UDC 347.219.5 Правоведение. 2023. Т. 67, № 1

Trusts in mixed jurisdictions*

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For citation: Lupoi, Maurizio. 2023. Trusts in mixed jurisdictions. *Pravovedenie* 67 (1): 21–55. https://doi.org/10.21638/spbu25.2023.102

Closed legal systems are gone in modern world, "mixed" legal systems have become the norm. That has made so-called "transplants" easier but, contrary to a widely held view, legal institutions cannot be transplanted. English trust rules even less, for they are not a coherent set of rules. The British attempted to legislate on trusts for their colonies, for instance for Ceylon (the present-day Sri Lanka), and were thus obliged to be coherent. That made it necessary to introduce new legal concepts with unforeseeable consequences. A wave of legislation followed the adoption of the convention "On The Law Applicable To Trusts And On Their Recognition" by the 15th session of the Hague Conference on private international law (1985); it gave birth to the "international model" of trusts that quickly became the favourite setting of the rich and ultra-rich. Jersey in the Channel Islands was the leading jurisdiction, many others followed but it was not until the establishment of the International Finance Centres in the Gulf and later in Kazakhstan where "the laws of England and Wales" are taken as a source of law and local courts are staffed by former English judges or in any event by lawyers brought up in the common law that a proper transplant of the English trust took place. A totally different legal setting witnessed attempts to create imitations that had to run against well-established civil law conceptual attitudes that did not allow the existence of more than one patrimony per person or the segregation of assets within one person's patrimony. In 2022 France decreed that each businessman is automatically the owner of two patrimonies; that open the way to a radical re-thinking of civil law notions. Québec and Louisiana are taken as examples of civil law legislation on trusts but Québec has followed its own idea that the assets that form the object of a *fiducie* belong to nobody, while Louisiana's Trust Code is a deft admixture of civil law and common law elements based on the civilian notion of "fiduciary". Luxembourg, France and other civil law countries are then examined: the focus then is on South Africa and Scotland, two countries which have a common past in a shared period of the European *ius commune* and a common present in being both orphaned from a cultural lineage that provided answers to current matters by drawing on Roman law. Now they both solve the problem of the patrimony by holding that a trustee has more than one patrimony, his own and then one for each trust of which he is the trustee.

Keywords: trusts, civil law, common law, mixed jurisdictions, financial centres, transplants.

Introduction

The immense scholarship devoted to trusts in the last two decades has yielded little agreement on any issue while a seemingly unstoppable surge of legislation has brought the most outlandish legal systems to the fore as trust proponents. The final, provisional, outcome of this upheaval has been that trusts in their pure form, the English trust, have progressively lost their place of pre-eminence in learned discussions and are seriously risking to be rated as a common law quirk.

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* I thank George Gretton for commenting on the first draft of this article and for providing valuable suggestions.

"Back to basics", one might venture to offer, but "basics" elude the English trust, one of the less conceptualised legal institutions in the world, whose approach is at odds with civilian systems, highly and at times overly conceptualised. Proper communication between the two has never easy and it has been suggested that it would be more productive to look at trusts "outside-in", that is, by common lawyers equipped with the eyes of non-common lawyers[1]. Many modern comparative law discussions on trusts belie the quest for such improbable equilibrium.

This essay is no exception. It has attempted to identify the reasons that have prompted several legal systems to cope with situations in respect of which trusts are the answer in the common law and the legislative means by which those systems expected or expect comparable results to come about. In the end, many reasons and many means have come to light and that is by itself evidence of the complexity of the issues and of the additional research that is yet to be carried out in this field.

1. "Mixed jurisdictions"?

The adequacy of the expression "mixed jurisdiction" may be challenged with reference to both the noun and the adjective that make it up.

The use of "jurisdiction" to identify a country or a region is redolent of the common-law approach. Civil lawyers, from René David's "Les grands systèmes de droit contemporains" on (1964), use "systems" and most comparative lawyers group systems into "families", as David did. It is not a mere matter of words, for "system" points at an ordered set of rules, while "jurisdiction" avails itself of a figure of speech, a metonymy, to point at the products of the exercise of jurisdiction, namely the case-law of a given territory.

And then, the adjective: "mixed": what would the components be of the mixture that would characterize mixed systems? And, even more problematic, what would the components be of the mixture that would characterize a mixed case-law?[2]

This matter may be phrased differently: when is a system or a jurisdiction not mixed? One may think of religious systems or jurisdictions, such as the Roman pontiffs whose body of rules, according to Livy, was "repositum in penetralibus Pontificum" until Cn. Flavius made it known in 304 BC[3]; or to modern constitutions that place the precepts of a given religion at the apex of the sources of law as in the Basic Law of Saudi Arabia: "The Kingdom of Saudi Arabia is an Arab Islamic State, having full sovereignty; its religion is Islam and its constitution is the Book of God Almighty and the Sunna of his Apostle (God's prayers and peace be upon Him); its language is Arabic and capital Riyadh"[4]. Those are extreme examples that deny the existence of mixtures or, rather, the very possibility of mixtures over what is perceived as a self-contained set of principles, rules, and objectives. A closed set, impervious to influences that should contradict its basic tenets.

That may be so and it would refer to an ever-decreasing number of instances. The openness of a legal system has become a mark of modernity that has had the greatest impact on codified systems, where the existence of codes by itself has until a few decades ago operated as a barrier to the entrance of rules from without, and on systems with strong religious and philosophical connotations as in 19th century Japan or based on all-encom-

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[1] *Smith L.* Trust and Patrimony // Trusts and Patrimonies / ed. by R. Valsan. Edinburgh: Edinburgh University Press, 2015. P. 42–61.

[2] See the notion of "interaction" in: *Zimmermann R., Visser D.* Southern Cross. Civil Law and Common Law in Southern Africa. Oxford: Clarendon Press, 1996. P. 141–164.

[3] The enormous body of literature on the Roman Pontiffs has been well examined and criticized: *Johnson M.* The Pontifical Law and the Civil Law. Towards an understanding of the *Ius Pontificium* // Athaeneum. 2015. Vol. 103, no. 1. P. 140–156.

[4] Translation from: The Basic Law of Saudi Arabia // Arab Law Quarterly. 1993. No. 8. P. 258.

passing political theories as in 20th century Communist countries and post-Imperial China. Uncodified systems are less prone to legal nationalism but that has not always been true, if only one recalls the English common lawyers' obstinate rejection of equity and their persistent refusal to openly accept rules coming from the civil law[5].

Closed legal systems are gone in modern world, where the introduction of new rules in order to cancel one's own peculiarities and place itself nearer to the prevailing trends has become a matter of necessity and at times of passive acquiescence not to be discriminated against, if not of pride to be like all others. The governance of financial markets and the evolving rules on digital platforms provide excellent examples of this and show that it is far more efficient for less developed countries to take ready-made solutions from more advanced countries than to try to devise their own. No choices are available, for there are no competing models and uniformity comes about naturally and willingly.

It is not only a matter of rules. Public entities are set up in one country in imitation of those that already exist elsewhere to serve purposes that until then had not been considered of any relevance in the imitating country, foreign words become dominant even when the local language would be perfectly equipped to designate the new phenomena and the new legal concepts that come with the new rules. Most importantly, the new rules carry values with them, that at times are at odds with those prevailing in the societal structure where they now find their place. Institutions until now held at bay as alien and inspired by alien values become domestic institutions.

Contrary to a widely held view, legal institutions cannot be transplanted[6]. Words, sentences, entire statutes may be taken from a legal system and then copied or translated into a different language so as to begin a new life in another legal system; or else a specific statute may be drafted in order to mirror a non-codified institution of a foreign legal system that the draftsmen intend to import into their own; or a statute may be enacted by a colonial power for its subjects in order to extend to them the benefit of one of its institutions. In all those instances and in many other that foster the same finalities the ensuing legal consequences resemble those that are typical of loanwords, whose graphics is identical to the original but whose pronunciation is so tied to the phonetics of the receiving language as to make them, once spoken, foreign to the ear of the speakers of the original language.

Legal history shows several other scenarios: migrations of peoples that set down in lands where they succeed in keeping their customs, as the Franks in Gallia, but in the end have to come to terms with the laws of the conquered population and give birth to a mixture of principles and rules; or a conscious decision to put by centuries of culture and a refined philosophical and administrative background in order to plunge into modernity as Japan did from 1857 and China after the demise of the last emperor;[7] or the coexistence of two peoples, each determined to keep its ground and its legal system, as in South Africa, Scotland and Québec, where coexistence has been possible thanks to the influences exerted by each of the two systems over the other and to the ensuing mixture[8].

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[5] That is still a controversial scholarly issue. For an instance of an open recognition in the 18th century that a civil law rule was being applied by the common law courts see: *Lupoi M., Graziadei M.* Una ricerca sulla collocazione storica di *Saunders* v *Vautier* nel diritto inglese // Trusts e attività fiduciarie. 2023. No. 1 (in print).

[6] A state-of-the-art treatment of the theory of transplants is in: *Graziadei M.* Comparative Law, Transplants, and Receptions / The Oxford Handbook of Comparative Law / ed. by M. Reimann, R. Zimmermann. Oxford: Oxford University Press, 2019. P. 443–473.

[7] Among others see: *Luney P. R. Jr.* Tradition and Foreign Influence: Systems of Law in China and Japan // Law and Contemporary Problems. 1989. Vol. 52, no. 2. P. 129–150.

[8] A. Braun has argued this point for Scotland and England: *Braun A.* The Value of Communication Practices for Comparative Law: Exploring the Relationship Between Scotland and England // Current Legal Problems. 2019. Vol. 72, no. 1. P. 315–345.

"Transplant" is currently used loosely to refer to various phenomena that derive from different causes and produce different effects as we shall see in the following pages[9]; by necessary connotations, mixed systems too are a complex phenomenon, the causes of which are many and very varied, just as varied are its dynamics; it would take much more than the brief observations set out above to fragment its complexity and attempt a general comparative law theory. All that matters for the purposes of this essay is that the common character of modern legal systems of being open systems, therefore prone to accept the insemination of foreign institutions, principles, rules and above all values, entails that the concept "mixed system" or if you will "mixed jurisdiction" cannot serve as a selective criterion.

Rather than by "systems" or "jurisdictions" I found quite interesting to proceed by problems.

2. "Transplanting" a coherent set of rules

English trust law has never been rationalised. Until quite recently beneficiaries were mentioned in the opening sections of trust manuals as an indispensable feature of trusts in general (in many manuals they still are) and yet everybody knew that charitable trusts were, of course, devoid of beneficiaries and had been so for centuries. Also, the settlor making a gift has been a regular feature of trust manuals and yet everybody knew that no gifts occur in commercial or financial trusts. Nowhere has this been more evident than at The Hague when common lawyers (probably wishing to humour civil lawyers) centred the definition of "trust" in article 2 of the Trust Convention on the transfer of control over assets, thereby omitting not only the transfer of legal title from settlor to trustee but also the "declaration of trust". The declaration of trust, also termed "self-declared trust", is an ordinary and quite common way to give rise to trusts. Therefore, the characteristics of a trust in article 2 of the Trust Convention "do not incorporate anything like all the features of the English trust"[10].

The lack of rationalisation goes hand in hand with the structural incoherence of trust law — of English private law in general, I hasten to add. Coherence is properly a rhetorical argument because it supports legal propositions by showing that they are consistent with other propositions, no matter what their effect on the state of society or on the interests of the parties to a litigation would be. Legal systems where coherence prevails without exception exist only in theory but legal systems where coherence ranges among the rhetorical arguments do exist and, speaking in very general terms, encompass most non-common law systems.

English trust law as English private law generally is shy of coherence and therein lies its strength. A perfectly coherent system (should it ever exist) is doomed to draw new rules from pre-existing principles only, thus giving the place of pre-eminence to (formal) logic at the expense of expediency. A basically incoherent system, on the other hand, is apt to give birth to new rules on the basis of a down-to-earth approach, thus giving the place of pre-eminence to expedience. It does not take much to show that incoherence is at the root of trust law. It is a recognised technique of English legal argumentation — whether by a lawyer arguing a case or by a judge giving the reasons for his decision — to rest a legal statement on a definition — a concept — or on a general principle laid down by a judge on a previous occasion: a sentence uttered by a judge that passes from mouth to mouth and is then carved into trust law textbooks. When the *dictum* of a judge becomes a legal

[9] *Braun A.* The Value of Communication Practices for Comparative Law: Exploring the Relationship Between Scotland and England. P. 315–320. — Has given good reasons to use "circulation" rather than "transplants".

[10] *Harris J.* The Hague Trust Convention. Portland Oregon: Hart Publishing, 2002. P. 111–116.

definition or concept or sustains a general principle because it has been so taken by other judges and by the legal profession incoherence creeps in naturally because that *dictum*, as whatever *dictum*, is not and cannot be part of any general systematic theory of trust law that could gain acceptance at the same time as that *dictum*. Any judge's *dictum* is but a fragment of an unspoken legal theory, the judge's own, therefore the judges' *dicta* are fragments of as many unspoken legal theories, at times spanned over centuries, and coherence among them all is well-nigh impossible[11].

To sum it up, whatever statute a clever mind could conceive would not be apt to convey English trust law to a non-common law legal system. In spite of this, attempts have been made and I shall now consider one of them.

3. When a statute is not enough

In trust matters Britain achieved as a colonial power what had proven to be impossible at home: to codify the law of trusts. Excellent statutory enactments are the Indian Trusts Act 1882 and the Ceylon Trusts Ordinance of 1917[12]. Both enactments, that are still in force, define "trust" as "an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner", where the use of the word "confidence" may be an attempt to go back to the roots of trusts and to call into play a concept — "confidentia" — familiar to the Roman-Dutch law that, until the arrival of the British in Ceylon, was the law of the land together with customary law[13].

Section 2 of the Ceylon Ordinance deals with a matter that has worried most lawmakers along the centuries: what will be fate of a statute once it has come into force and has therefore become subject to judicial interpretation. Justinian claimed that the Emperor was to dictate the rules whenever a fact should occur that was not provided for by existing legislation ("negotia, quae adhuc legum laqueis non sunt innodata")[14] and the French revolutionaries provided likewise whenever a matter of interpretation of the law should arise (all judges "s'adresseront au corps législatif toutes les fois qu'ils croiront nécessaire d'interpreter une loi")[15]. The Ceylon Ordinance selected a different solution in its section 2: all matters for which no specific provision is made "shall be determined by the principles of equity for the time being in force in the High Court of Justice in England". That was a bold provision[16] whose inherent frailness lay in charging local judges with a task that to be performed satisfactorily would require a strong and continuing link with England. Had the colonial period lasted longer[17], such a state of things might perhaps have occurred just as it occurred in Hong Kong whose magistracy in trust matters continues the English tradition without a break also thanks to a strong inflow of English non-permanent judges[18]. Short

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[11] In this section I have borrowed from: *Lupoi M.* Trusts and their comparative understanding // Trusts & Trustees. 2021. Vol. 27, no. 4. P. 286–294.

[12] Ordinance. No. 9, cap. 96.

[13] On "trust and confidence" see: *Lupoi M.* Trust and Confidence // Law Quarterly Review. 2009. Vol. 125. P. 253–287.

[14] Constitutio "Tanta" (year 533).

[15] Law 24th August 1790, tit. 2, art. 12.

[16] A faint similarity may be detected with a section of the law enacted upon the granting of independence to Cyprus in 1960 (Courts of Justice Law (14/60), sect. 29): all courts shall apply the principles of Common Law and Equity.

[17] Ceylon was a British colony until 1948.

[18] Hong Kong ceased to be a British colony in 1997. Detailed CVs of appellate judges and former judges are in the Court's website: https://www.hkcfa.hk/en/about/who/judges/introduction/index.html (accessed: 08.05.2022).

of that continuing link (and the abolition by Sri Lanka[19] of the right to appeal to the Privy Council in 1971 did not help)[20], it is hard to see how section 2 can be applied effectively. In addition, areas of conflict between English and Roman-Dutch law quickly emerged, as was to be expected[21].

A second notable character of the Ceylon Trusts Ordinance is that it provided legislative definitions of matters that in English trust law were (and still are) far from being finally settled, for instance constructive trusts, that are dealt with in sections 82–97[22]. Instead of a definition of "the" constructive trust there is a list of specific instances prefaced by "An obligation in the nature of a trust (hereinafter referred to as a "constructive trust") is created in the following cases"[23]. That was certainly wise but it ran against the equitable foundation of constructive and resulting trusts, namely an unconscionable conduct or an injustice to be prevented or remedied. In other words, an open line of English law precedents subject to include types of cases never before taken into consideration (witness the Quistclose trust, among others) cannot be transposed into a definition within a statute for a non-common law country unless vague language is employed contrary to the style required for such a piece of legislation. It has indeed been noted that Sri Lankan judges have taken a "circumscribed approach" towards constructive trusts and have interpreted the relevant sections of the Ordinance strictly[24].

A third aspect of interest lies in the terminology. "Settlor" was discarded: "the person who reposes or declares the confidence is called the 'author of the trust';"[25] it is a definition that sits well with the definition of "trust" given above and with the provision according to which a trust is "created" by a declaration made by its author and by a transfer of the trust property to the trustee "(unless the trust is declared by will or the author of the trust is himself to be the trustee)"[26]. There is, however, a peculiar rule that affects the creation of a trust: its author must declare "the purpose of the trust"[27]. That is no mean deviation from English law, not only because in the English law of trusts the mention of a purpose is related only to trusts for purposes but also because it runs against the basic English law assumption that what a party intends to achieve through a legal act is a matter that concerns only that party and nobody else (barring illicit purposes, of course).

There is a recurring theme whenever legislation in trust matters for a non-common law country is envisaged: any piece of legislation must afford a suitable basis on which judges as well as professionals (let alone the general public) may assess the legal consequences of a given act or event; that requires to cover the whole area of trust law even where English precedents are missing or not conclusive. More than that: it requires to offer

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[19] The name of the state was changed from Ceylon to Sri Lanka in 1972 (Ceylon was a name given to the island by the British).

[20] *Marshall H. H.* Ceylon and the Judicial Committee of the Privy Council // The International and Comparative Law Quarterly. 1973. Vol. 22, no. 1. P. 155–157. — Four ex-Chief Justices of Ceylon had been member of the Privy Council commencing with Sir Alexander Johnston in 1833.

[21] *Cooray L. J. M.* The Interaction Between English Law and Roman-Dutch Law in the Law of Trusts in Ceylon // The Comparative and International Law Journal of Southern Africa. 1971. Vol. 4, no. 1. P. 1–25.

[22] Those provisions are taken from sections 80–95 of the Indian Trusts Act 1882.

[23] Section 82. The Ordinance classifies as constructive trusts cases that are usually classified as resulting trusts, see section 84: "Where property is transferred to one person for a consideration paid or provided by another person…", but it is well known the uncertainties exist in English law over the boundary between constructive and resulting trusts.

[24] *Liew Y. K.* Constructive Trusts in Sri Lanka: A Model for an Expansive Approach // Australian Journal of Asian Law. 2020. Vol. 20, no. 2. P. 302–303.

[25] Section 3 (b), identical to the corresponding provision of the Indian Trusts Act, 1882.

[26] Section 6.

[27] Trust Ordinance, section 6 (b); Indian Trusts Act 1882, section 6 (b).

a coherent treatment of a legal institution that, as we have just seen, is governed by basically incoherent rules in its land of origin. If, in order to so, an element is required for the valid creation of a trust, such as the declaration of the purpose served by a trust, that is not among those taken into account by the original institution the whole conceptual structure is affected and unforeseeable consequences may ensue.

4. The international model

Pending the final text of the convention "On the Law Applicable to Trusts and on Their Recognition" by the 15th session of the Hague Conference on private international law (1985)[28], Jersey' statute on trust law (1984) was the first attempt to cover most if not all aspects of trust law by legislation in modern times[29]. Shortly afterwards several countries enacted statutes on trusts either using Jersey's as a blueprint or devising more or less original texts. A "Rush to trusts" thus began and in the following ten-odd years at least thirty new statutes on trusts came to light in as many countries, almost all of which belonged to the area of the common law[30].

This unusual turn of events was fostered by the anxieties of rich people who felt that the laws of their countries did not provide satisfactory legal arrangements to protect their wealth and to allow them to dispose of it confidentially and without restrictions.

The English trust was not the answer because there was no comprehensive statute on trust law in England and that put off advisers accustomed to practise in codified systems of law. Moreover, many rules of English trust law were hard to understand (the rule against perpetuities was one of them) while others ran against what appeared to be simple logic (for instance, the invalidity of non-charitable purpose trusts). The new wave of trust statutes did in fact attempt to amend those and other shortcomings of English trust law, such as the personal and unlimited liability of trustees, and at the same time provided rules to cover fact-situations in respect of which English law was silent, for instance the weight to be given (or, rather, not to be given) to foreign laws that did not embody the notion of "trust".

The settlors of trusts subject to those new statutes would in most instances be foreigners and quite a few of them would hail from countries where there was no testamentary freedom as this concept is understood in common law countries (barring certain states of the USA) or who, being indebted, may look at trusts as a convenient mechanism to place their assets in a safe haven. The new legislation would regularly protect settlors in those instances by basically denying the application of those foreign laws that may put the offshore trusts at risk and refusing to recognize foreign judgments that would have the same effect. First Cayman Islands and then Bahamas, Cook Islands, Bermuda, Turks and Caicos, Anguilla, Barbados, Belize and Guernsey and Jersey, to mention but a few, enacted specific legislation.

The substance of the rules on this is that no foreign law has any say on the validity of a trust or on the validity of any disposition of property to be held in trust and that no relevance is given to the fact that a foreign law prohibits or does not recognise the concept of a trust or that the settlor was indebted at the time of the disposition of property; and so on, in order to build a protective barrier around the offshore trust.

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[28] The convention is in force in Australia, most provinces of Canada, Cyprus, Hong Kong, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Panama, San Marino, Switzerland, United Kingdom (with British overseas territories, Guernsey, Isle of Man, Jersey). France and United States signed the convention but did not ratify it.

[29] Trusts (Jersey) Law 1984. Article 1 (2) cautions that "this Law cannot be construed as a codification".

[30] Malta and Mauritius did not.

The similarity of solutions among those new statutes made it convenient to place them all within a model, labelled "the international model" in contrast to "the English model"[31]. The two models jointly may be referred to as the "common law trust".

The international model quickly became the favourite setting of the rich and ultra-rich; for at least twenty years all kinds of arrangements and assets having the most varied origin were easily swallowed by trusts established under one or the other of the laws belonging to the international model; a good number of those trusts were meant to avoid or subvert foreign laws in several areas[32].

Small countries that until then had meagre economies combined trust legislation with new legislation on company, insurance, banking, investment and financial matters into what came to be known as the "offshore centres". Law firms were set up or extended their operations into other countries, trust companies were established, new professions emerged: the "trust industry" was born.

5. The international model and the offshore centres

The commissioners appointed by Queen Victoria in 1859 found that there were no trusts in Jersey other than a few instances of trusts for religious purposes; "trusts of realty, in favour of private individuals, and unconnected with public objects are, to the present day, absolutely unknown"[33].

The commissioners doubted "whether the trusts can be enforced against the trustees and whether those trusts will prevail against and supersede the ordinary liabilities and incidents of property in Jersey", including the claims of a trustee's private creditors. The commissioners opined that "legislation is imperatively required to settle those important questions" but expressly disclaimed "any intention to suggest the general introduction of trust", that could scarcely be introduced without a "fundamental alteration of their whole system of property, which is remarkable for its simplicity"[34].

As it happened, no legislation was enacted for over one century and when it was (in 1984) it concerned precisely those matters that according to the commissioners were not to be considered, lest the "simplicity" of Jersey property law be disturbed, that is, private trusts. The 1984 statute was Jersey's contribution to the international model (see above, n. 4) but had been conceived in haste and that explains why it has been amended seven times since[35]. Clearly based on the English model, it progressively worked out peculiar solutions such as the indefinite duration of trusts and more than once openly refused English rules up to the point of devoting its sixth amendment to avoid that a Supreme Court decision could induce effects into the Island's law[36].

Neither "equity" nor "equitable" are words to be found in Jersey's statute on trusts. That is not by chance, because Jersey lawyers have a tendency to mark their independence from English law and to stress the enduring relevance of Norman customary law;

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[31] I proposed this terminology in: *Lupoi M.* Trusts. A Comparative Study. Cambridge: Cambridge University Press, 2000. P. 201 ff.

[32] For an analysis of the subversive function of trusts generally see: *Bennett M., Hofri-Winogradow A.* The Use of Trusts to Subvert the Law: An Analysis and Critique // Oxford Journal of Legal Studies. Vol. 41, no. 3. 2021. P. 692–718.

[33] Report of the Commissioners appointed to inquire into the Civil, Municipal, and Ecclesiastical Laws of the Island of Jersey 1860, xxv.

[34] Report 1860, xxv–xxvi.

[35] A consolidated version was officially published in 2021.

[36] The reference is to the 2003 Supreme Court cases *Pitt* v *Holt* and *Futter* v *Futter* [2003] UKSC 26.

Jersey courts, however, regularly derive equitable principles from England as if they were courts of equity (which they are not), probably also because of the dominance of the English presence among Jersey part-time judges and in the Court of Appeal[37]. One of the many instances of this is the "well established" equitable jurisdiction of the Court in respect of voluntary dispositions and the Court's power to set them aside where the donor was under a mistake[38].

Guernsey statute on trusts followed closely on Jersey's (1989) and the two have then shared some innovations, such as the width of the powers that a settlor may retain or grant[39]. Guernsey and Jersey also share the same judges at the appellate level and in addition the Bailiff of each island serves on the Court of Appeal of the other.

Guernsey would appear to have remained closer to its Norman heritage: French legal terms are frequent in Guernsey legal practice, its statutes were drafted in French until the 1950s and lawyers cannot be admitted to practice before the Royal Court unless they have followed a course on French and customary Norman law at the University of Caen.

Trust law principles found their way into the Channel Islands not because the Islanders had taken to forming trusts but because it was felt that a trust legislation would attract business from abroad. That was what actually happened and Jersey and Guernsey became a legal laboratory. They attracted lawyers as well as financiers, the judicial workload of their courts increased enormously, businesses of every denomination sprung up, legal issues that would never have reached islands known only for cattle-growing and fishing piled up and called for up-to-date answers. The several strands of Jersey and of Guernsey law — Norman customary law, French pre-code writers such as Pothier, Roman law called into play by those writers, English law — conjure up complex solutions that require historical and comparative law approaches. An interesting instance of this is the debate on unjust enrichment, where the quite divergent points of view between civil law and common law call for a solution that sides with one or the other or that provides an independent position[40].

6. The "head-on" approach

At the opposite end of the spectrum of legal techniques is reception in its proper sense, that is, by physically importing a foreign law. There are instances of this in trust matters.

At one extreme is the Italian statute enacted on 22nd June 2016, no. 112, devoted to provisions in favour of seriously handicapped persons. It is an unprecedented piece of legislation, for it decrees that who wishes to benefit a gravely handicapped person may do so through a trust created and administered under a foreign law. The Italian statute does not interfere with the foreign laws, it only lays down certain requirements that enable such trusts to obtain vast tax advantages.

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[37] *Hanson T. V. R.* Comparative Law in Action: The Jersey Law of Contract // Stellenbosch Law Review. 2005. Vol. 16, no. 2. P. 202–203. — Until fairly recently, most judges were silks practising at the Bar of England and Wales and one or two were leading Scottish silks. In recent times, one or two of the judges have usually been recently retired judges of the English High Court or Court of Appeal.

[38] See, most recently: *CitiTrust (Jersey) Limited* [2022] JRC214, para. 20.

[39] Article 9 A of Jersey law, sect. 15 of Guernsey's.

[40] *Fairgrieve D., Purkis K.* The law of unjust enrichment in the Channel Islands: recognising the civil law strand // Jersey and Guernsey Law Review. 2019. Vol. 21, no. 1. P. 7–34; Cf. P. Buckle with reference to Guernsey, Jersey and English cases: *Buckle P.* The development of unjust enrichment in the Channel Islands // Jersey and Guernsey Law Review. 2019. Vol. 21, no. 1. P. 136–178.

At the other extreme is the creation of a physical area within a given state and the granting of a sort of extra-territorial status to it. That may be achieved through legislation that basically extends the principles applied for the creation of duty-free areas to a wider set of purposes: trade, insurance and reinsurance, financial investments, banking services, and so on.

At least three such areas have been created in the Persian Gulf: the Dubai International Finance Centre from 2004, the Qatar Financial Centre from 2005 and the Abu Dhabi Global Market from 2013[41]. Each of them has faced two issues: the applicable law and the court that administers that law.

As to the law be applied in those Centres, the local law with its dominant religious elements or civil law connotations via Egypt both in civil and commercial matters[42] has been regularly ruled out. Among the consequences of this is that businesses may be owned 100 % by foreigners, zero corporate taxes or income taxes for a guaranteed period of time, elimination of red tape and bureaucracy and no foreign exchange controls. Hence an impressive legislative activity, usually entrusted to foreign law firms, mainly British, that encompasses all that a modern economy requires. Statutes are usually enacted in English only. An individual or a firm active in one of those Centres is sheltered from Sharia law and in general from any law otherwise in force in that state and can rely on the legislation specifically enacted for the Centre and on "the laws of England and Wales", that are referred to as a source of law. It has been said that "here a common law jurisdiction is found within a civil law/Islamic law mixed legal system"[43] or that a "common law enclave" has been established"[44] or that there is now "a common law island in a civil law ocean"[45]. Possibly no other example in history can be found of such a totalizing reception, that concerns not only the rules of a foreign law but also their application and indeed their automatic modification if modified abroad; moreover, that type of reception physically transports, as it were, also the general concepts and assumptions of the foreign legal system, such as the different property law ontologies[46].

Islamic law in the Gulf has kept its dominance in several areas, including family and inheritance matters but also lending and financial transactions, in spite of its inadequacy to meet modern societal conditions[47] but the parallel systems of the Centres do not contradict Islam because the two sets of rules never meet.

As to the application of the laws in force in the Centres, all Centres include a system of courts staffed by foreign judges with a particular upbringing, namely, in the English common law[48], though not necessarily of British nationality[49]. Relevant literature openly

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[41] Abu Dhabi and Dubai are part of the United Arab Emirates, Qatar is a self-standing independent state.

[42] Is has been estimated that in Qatar 80 % of the (non-criminal) cases are decided under the civil law and 20 % under Islamic law: Botchway, 2017, 75.

[43] *Horigan D. P.* The New Adventures of the Common Law // Pace International Law Review Online Companion. 2009. Vol. 1, no. 5. P. 11.

[44] See: *Botchway F. N.* Trans-Systemic Models of Dispute Resolution and Economic Development: The Case of Qatar // Asian Business Lawyer. 2017. Vol. 19, no. 11. P. 71–92 (with reference to the Qatar Financial Centre).

[45] *Bodnar A., Kenney M.* Jurisdiction and the Dubai courts: Self-Immolation of Order out of Potential Chaos // Business Law International. 2018. Vol. 19, no. 2. P. 125. — Relating a sentence by the President of the Dubai International Finance Centre Court.

[46] On which see: *Graziadei M.* Comparative Law, Transplants, and Receptions.

[47] Cf.: *Ercanbrack J.* The Transformation of Islamic Law in Global Financial Markets. Cambridge: Cambridge University Press, 2015.

[48] For instance, the first President of the Qatar Financial Centre Court has been Lord Woolf, former Chief Justice of England.

[49] An important case against a Swiss bank was decided in 2012 by the Dubai International Financial Centre Court by a panel composed of one judge from Singapore, three from England, one from Australia,

refers to those courts as "common law" courts[50]; they are devoted to the resolution of commercial and civil disputes involving entities registered with the relevant Centre or doing business there. Conflicts with ordinary courts are of course possible and have been addressed by *ad hoc* legislative enactments[51]. The recent experience of the *Akhmedova* case, litigated in London and in many other jurisdictions, including Dubai, has showed a remarkable level of cooperation between the International Financial Centre court and ordinary courts[52].

In addition, the Centres aim to offer state-of-the-art arbitration facilities and each of them has enacted an Arbitration Act[53].

The courts of the Persian Gulf Centres as well as their arbitration chambers have been a success, for they have provided quick and effective services to end-users that have chosen to operate in the Centres for a number of reasons, among which is an established court composed of largely international, highly experienced judges, with use of the English language, and operational transnational laws and principles that are no different from London and New York: hence the new expression "legal services tourism"[54]. The lack of a bilateral treaty between the United Arab Emirates and the United Kingdom or the United States and other countries led the Dubai Centre Courts to conclude a Memorandum of Guidance with the Commercial Court of England and Wales in 2013 and subsequently with the District Court for the Southern District of New York, the Federal Court of Australia and the Supreme Court of Singapore, setting out common and reciprocal enforcement guidelines[55]. In addition, any party concerned with the enforcement of its Dubai Centre's judgment may apply to "convert" its judgment into an arbitral award, thus taking advantage of the 1956 New York Convention[56].

Kazakhstan is a newcomer to the group of international centres with its Astana International Financial Centre, effective from 2018, that intends to emulate the most successful Centres abroad but, first of all, has to dispel the tarnished image of its judiciary[57]. It was perhaps for that reason that the English connection was made stronger here than in the other Centres[58], as can be seen by the all-English composition of the Centres's judges[59]

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one from Malaysia and two from the United Arab Emirates (*Rafed Al Khorafi and Others* v *Bank Sarasin-Alpen (ME) Ltd and Bank Sarasin & Co Ltd.*)

[50] All that is said in the text applies to Abu Dhabi's Global Market as well. Se: *Le Gal J.-F., Raynaud I.* The Success of the DIFC Courts: When Common Law Makes Its Way into Civil Law Region // International Business Law Journal. 2017. Vol. 4. P. 300.

[51] For Dubai see: *Bodnar A., Kenney M.* Jurisdiction and the Dubai courts…

[52] Ibid. P. 136–137.

[53] For Dubai see: *Almutawa A. M., Maniruzzaman A. F. M.* The UAE's Pilgrimage to International Arbitration Stardom — A Critical Appraisal of Dubai as Centre of Dispute Resolution Aspiring to Be Middle East Business Hub // Journal of World Investment & Trade. 2014. Vol. 15, no. 1–2. P. 193–244. A detailed comparison between Dubai and Qatar courts of the respective Centres is made by: *Sharar Z. Al A., Al Khulaifi M.* The Courts in Qatar Financial Centre and Dubai International Financial centre: Comparative Analysis // Hong Kong Law Journal. 2016. Vol. 46, no. 2. P. 529–556 (where the enforcement of judgments and arbitral awards is also discussed). — On that see also: *Bodnar A., Kenney M.* Jurisdiction and the Dubai courts…

[54] *Bantekas I.* The rise of transnational commercial courts: the Astana international financial centre court // Pace International Law Review. 2020. Vol. 33, no. 1. P. 4.

[55] *Le Gal J.-F., Raynaud I.* The Success of the DIFC Courts. P. 297–298.

[56] Ibid. P. 298.

[57] *Bantekas I.* The rise of transnational commercial courts…

[58] This paper is obviously not concerned with international financial centres in general; the information provided on them has the only purpose to set the ground for what shall be said on trusts in mixed systems. Therefore many financial centres of great importance, such as Singapore, are not even mentioned.

[59] Cf.: *Horace Y., Huang F. Bekmurzayeva Z., Janaidar D.* Institutional Development and the Astana International Finance Center in Kazakhstan // Washington University Global Studies Law Review. 2020. Vol. 19, no. 1. P. 63. — The Chief Justice is now Lord Mance, formerly a judge of the UK Supreme Court.

and the specific mention of English equity among the sources of law (a "daring incorporation" which is however subject to many qualifications)[60].

Statutory enactments on trusts exist in all the Centres mentioned above. The rules laid down are often quite similar to each other, as was to be expected, and at times show a clear common derivation from the legislation of offshore trust jurisdictions, such as Jersey, Channel Islands.

Equity was listed among the sources of Astana's Trust Regulations of 2019; that is one the recurring themes of this type of legislation. Its full wording "The common law of Trusts and principles of equity applicable in England and Wales supplement these Regulations, except to the extent modified by these Regulations or any other AIFC Act or by the Court"[61] is almost identical to Dubai's "The common law of trusts and principles of equity supplement this Law, except to the extent modified by this Law or any other DIFC law or by the Court"[62] and to Qatar's "The common law of Trusts and principles of equity applicable in England and Wales supplement these Regulations, except to the extent modified by these Regulations or any other Regulations"[63].

The insulation rules of the international model in respect of the creditors and the heirs of the settlor (above n. 4) were absorbed into Qatar's, Dubai's and Kazakhstan's legislation[64], but Qatar stands out because of a proviso that prefaces the relevant articles: "Unless the Settlor has acted in bad faith". That is quite a reasonable condition but also one the substantially decreases the protective effect of the rules.

At times the draftsmen of the Centre's legislation copied from each other, exactly as it had happened in the international model. Witness the rules on duration: "A Trust may continue indefinitely or terminate in accordance with these Regulations or in accordance with the Terms of the Trust"[65]; "A trust may continue indefinitely or terminate in accordance with this Law or with the terms of the trust"[66]; and "A Trust may continue indefinitely or terminate in accordance with these Regulations or with the terms of the Trust"[67].

It is interesting to identify where this legislation departed from the common solutions embodied in the statutes of the offshore countries before the constitution of the Centres. One instance of an original solution concerns the law of mistake, where Dubai's law goes to extreme lengths in order to protect whoever makes a mistake when exercising a power on behalf of a settlor and the settlor himself if "the mistake is of so serious a character as to render it just for the Court to make a declaration under this Article"; but also a fiduciary or a trustee to whom Dubai's law extends the principles formerly applied in English law under the so-called *Hasting-Bass* doctrine[68]. Qatar's approach is quite limited[69], probably because no account was taken of the English Supreme Court decision in *Pitt* v *Holt*[70].

Departure from English trust law in order to provide clearer rules or to supplement or abolish precedents the effects of which had become inappropriate over time was one of the basic reasons that prompted the coming into being of the international model. The Centre's legislation has followed the same line; an instance of this is Dubai's treatment of

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[60] *Zambrana-Tevar N.* The Court of the Astana International Financial Center in the Wake of Its Predecessors // Erasmus Law Review. 2019. Vol. 12, no. 1. P. 128. — See also later in this section.

[61] AIFC Trust Regulations 2019, sect. 7 (1).

[62] DIFC, Trust Law No. 4 of 2018, art. 10 (1).

[63] QFC, Trust Regulations No. 12 of 2007, art. 8 (1).

[64] AIFC Trust Regulations 2019, sect. 11; DIFC, Trust Law No. 4 of 2018, art. 14–15; QFC, Trust Regulations No. 12 of 2007, art. 12.

[65] QFC, Trust Regulations No. 12 of 2007, art. 18 (1).

[66] DIFC, Trust Law No. 4 of 2018, art. 36 (1).

[67] AIFC Trust Regulations 2019, sect. 33 (1).

[68] DIFC, Trust Law No. 4 of 2018, art. 23–29.

[69] QFC, Trust Regulations No. 12 of 2007, art. 23 (6) and 74.

[70] [2013] UKSC 26.

limitation of actions against trustees, improving on the English Statute of Limitation that the English Law Commission rated as "unfair, complex, uncertain and outdated"[71].

A peculiarity of Qatar's Regulations is that a very long article (28 commas) sets out the "Specific powers of trustees"; that is a superseded technique that characterized trust deeds many decades ago, it is not clear why it was revived.

The cursory examination carried so far has probably been sufficient to provide the reader with a fair idea of the legislation of the three Financial Centres concerning trusts, and to warrant a few concluding remarks[72].

The contrast with the Indian Trust Act and with the Ceylon Ordinance lies first of all in the language. The draftsmen of the Centre's statutes were common lawyers addressing common lawyers; they could write that a trustee "holds" assets as in "declaration by the owner of Property that the owner holds identifiable Property as Trustee"[73] or as in "the Trustee holds or has vested in it Property for the benefit of a Beneficiary or for a purpose"[74] without having to worry that "to hold" in that sense in no other than the verb "tenere" in its Middle Ages and feudal connotation (hence "tenant") that is meaningless to a present-day civil lawyer. Or "fraud" could be used in its equitable meaning without a need to provide a clarification, ignoring the fact that a civil lawyer has no inkling of what it means[75].

The second point of contrast concerns the legal setting. The courts of the Centres are a piece of Westminster in disguise and English is their language just as their statutes are in English and their proceedings mirror the Rules of Civil Procedure. A quick reading of a few precedents of the Centres' courts confirms that the judges, quite often former English judges as mentioned above, simply go on doing what they have been used to doing as if the distance from Westminster did not matter. It does not matter, indeed; we are facing a revival of an old institution that was very active in the late Middle Ages, when the merchants coming from far away established their warehouses and went about their trade claiming to be subject to the laws of their mother countries and having their own officials, often called "consuls", to administer them by concession of the local rulers[76]. The laws applied by the consuls were the laws of their mother country (usually customs rather than statutes) but quite often they had to resort to the *lex mercatoria*.

Similarities between the Medieval and the current situations are striking because the Centres' courts are not provincially minded and the tendency, both on procedure and on substantive law, is towards rules that modern merchants can be at ease with. Some academic research on that would not come amiss.

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[71] Law Commission, *Limitation of actions* (Law Com No. 270), 2001, § 2.1; *Swadling W. J.* Limitation / Breach of Trust / ed. by P. Birks, A. Pretto. London: Hart Publishing, 2002. P. 344 (speaks of "a mess").

[72] *Russell D.* Trusts and foundations move onshore in the Gulf // Trusts & Trustees. 2021. Vol. 27, no. 4. P. 311–320. — Provides an updated outlook and deals with the Islamic *waqf* as well. On *waqf* see also: *Yahaya N.* British Colonial Law and the establishment of family *waqfs* by Arabs in the Straits Settlement 1860–1941 / The Worlds of the Trust / ed. by L. Smith, Cambridge: Cambridge University Press, 2013. P. 167–202.

[73] QFC, Trust Regulations No. 12 of 2007, art. 16 (3) (c).

[74] QFC, Trust Regulations No. 12 of 2007, art. 17 (1) (D).

[75] DIFC, Trust Law No. 4 of 2018, art. 77 (4) (a).

[76] An outstanding example of this is Galata, the Genoese quartier of Constantinople, modern day Istanbul. On the establishment of Florentine merchants in Buda as an instance of the phenomenon referred to in the text see: *Prajda K.* Justice in the Florentine Trading Community of Late Medieval Buda // Mélanges de l'École française de Rome — Moyen Âge. 2015. Vol. 127, no. 2; another instance is the Scottish "staple" at Campvere in Holland: *Macmillan H.* Scots Law as a Subject of Comparative Study // Law Quarterly Review. 1932. Vol. 48, no. 4. P. 479.

7. Fragmentation of patrimonies

On a larger scale the need emerged to fragment the unitary notion of patrimony, which is at the base of most civil law systems after the doctrine expounded by Aubry and Rau in France in the first half of 19th century[77]: every person owns a patrimony and only one, every patrimony has an owner[78]. French law itself has been at the forefront of the fragmentation movement. It introduced in 2011 the notion of the individual businessman with a limited liability ("Entrepreneur Individuel à Responsabilité Limité")[79] and has recently modified its commercial code by creating a distinction between the business patrimony and the personal patrimony of an entrepreneur. Each businessman active in France is automatically the owner of two patrimonies and as a consequence his business creditors may attach only his business patrimony: "l'entrepreneur individuel n'est tenu de remplir son engagement à l'égard de ses créanciers dont les droits sont nés à l'occasion de son exercice professionnel que sur son seul patrimoine professionnel"[80].

That is a major breakthrough in the very structure of the civil law relationships and in the combinations between property-based and obligation-based rules that is at the root of trust law[81]. It did not come out of the blue, not so much because French law had legislated on *fiducie* since 2007 (see later) but because since 1985 French law has made it compulsory for lawyers to deposit their clients' money into the Caisse Autonome des Règlements Pécuniaires des Avocats. That ensures that the clients' money is kept separate from the lawyers' own money. It is the best you can do short of trust-like rules that allow for the existence of more than one patrimony per person or for segregation of assets within one person's patrimony.

There is indeed a movement afoot in civil law countries towards the latter solution. For instance, Italy has recently made it compulsory for notaries to deposit any amount paid by their clients to them into specially designated bank accounts that are completed insulated from a notary's patrimony, not being available to a notary's creditors nor to a notary's heirs[82]. The money deposited in those accounts may be, for instance, the purchase price to be paid over to the seller at the appropriate time or, more generally, to be kept by the notary for as long as necessary, thereafter applying them to make one or more payments or to hand them back to the party who had deposited them with the notary or to a third party. Segregated bank accounts of real estate agents and notaries are now allowed also in Belgium under article 3.37 of the new third book of the civil code (in force since September 2021)[83].

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[77] See recently: *Kasirer N.* Transplanting Part of France's Legal Heritage: Aubry and Rau on the *Patrimoine* / Trusts and Patrimonies / ed. by R. Valsan. Edinburgh: Edinburgh University Press, 2015. P. 163–198. With specific reference to trust: *Matthews P.* Square Peg, Round Hole? Patrimony and the Common Law Trust / Trusts and Patrimonies / ed. by R. Valsan. Edinburgh: Edinburgh University Press, 2015. P. 62–84.

[78] Those principles have recently been reaffirmed by the Belgian Civil Code, art. 3.35 "Le patrimoine d'une personne est l'universalité de droit comprenant l'ensemble de ses biens et obligations, présents et à venir. Toute personne physique ou morale a un et, sauf si la loi en dispose autrement, un seul patrimoine" and 3.36: "A moins que la loi ou le contrat n'en dispose autrement, le créancier peut exercer son droit de recours sur tous les biens de son débiteur".

[79] Law No. 2010–2658 of 15th June 2010.

[80] Article L. 526–522 enacted by Law No. 2022–2172 of 14th February 2022.

[81] *Gretton G. L.* Up there in the Begriffshimmel? / The Worlds of the Trust / ed. by L. Smith. Cambridge: Cambridge University Press, 2013. P. 524–545. — Who speaks of the "gravitational pull" of the law of obligations.

[82] Law of 4 August 2017, No. 124.

[83] "Comptes tiers. Les créances sur les sommes, titres et valeurs au porteur placés au profit d'un tiers sur les comptes visés aux articles 446quater, 446quinquies, 522/1 et 522/2 du Code Judiciaire, à l'article 21/2 de la loi du 11 février 2013 organisant la profession d'agent immobilier et aux articles 34 et 34bis de la loi de du 25 ventôse an XI contenant organisation du notariat sont séparés du patrimoine du titulaire du compte. Ces créances échappent au concours entre les créanciers du titulaire du compte et

Segregation, the other face of fragmentation, is the key to understanding what functions may be pursued by trusts and, at the same time, compels non-common law systems to frame a type of ownership that runs against their customary approach: a trustee owns the trust property but cannot make use of it for his own benefit, nor is that property available to his creditors, and so forth; moreover, trust property cannot be freely disposed of by a trustee, for it is subject to the rules laid down in the legal instrument that created that trust. Segregation isolates assets and makes it natural to refer to trusts as if they were legal persons or entities. This tendency is stronger among non-common lawyers and is the linguistic equivalent of the legal notion that trust assets are owned by the trust itself as if the trust were a corporate entity. Trusts as entities is what non-common lawyers are ready to absorb (see, most recently, the trust law of United Arab Emirates)[84] and a tendency towards entities is detectable also in common law writers and even in some statutes of common law countries, for instance on the taxation of the income of a trust[85]; moreover, Statutory Entity Trusts are now regulated in some states of the USA following NCCUSL model law (2009); hence the alternative way to structure legal arrangements as entities, seen as competitive with the common law trust.

8. At the other end of the spectrum

"Mixed legal systems" is quite an unsatisfactory category for the reasons set out at the beginning of this paper. Québec is currently listed among them as embodying a civil law basic nature and being subject to strong common law influences. In view of that, a few words may be properly devoted to showing that the Québec's private law has little to share with "civil law" as these words are commonly understood.

When the French crown took over Canada from private interests and established a Sovereign Council in 1663, no French private law existed and, as is well known, the population of present-day France lived under territorial legal systems either of a customary nature or deriving from Roman law. A very limited uniformity was brought about by the Ordonnances of Louis XIV that dealt only with certain subject-matters and left the basic situation untouched.

Among the customs observed in specific territorial areas was the *Coutume de Paris*, widely respected as being among the more complete and with fewer archaic tracts[86]. French settlers in Canada would have been subject to their customs of origin had the king not ruled in 1664 that the *Coutume de Paris* was to be applied in the whole of Canada. That *coutume* and the Ordonnance on Civil Procedure of 1667 became the common law of Canada[87].

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toutes les opérations afférentes à ces créances peuvent être opposées à la masse pour autant qu'elles aient un lien avec l'affectation de ces sommes, titres et valeurs au porteur. Ces sommes, titres et valeurs au porteur sont également exclus de la liquidation du régime matrimonial et de la succession du titulaire du compte. Si l'avoir du compte est insuffisant pour payer les tiers visés à l'alinéa 1er, il est réparti entre ceux-ci en proportion de leurs prétentions. Si le titulaire du compte peut lui-même faire valoir des droits à l'égard de l'avoir en compte, il ne lui est octroyé que le solde qui subsiste après que tous les droits des tiers ont été exercés".

[84] Federal Decree Law no. 19 of 2020 Concerning Trust (Trust Law): *Russell D.* Trusts and foundations move onshore in the Gulf.

[85] See, for instance, Form SA900 in the United Kingdom and Form 1401 in the United States; examples outside the tax area are in: *Smith L.* Trust and Patrimony. P. 55–56.

[86] Local customs, almost all put into writing from the late 15th to the early 17th century, were 360. The *Coutume de Paris* was put into writing in 1580.

[87] *Dickinson J. A.* New France: Law, Courts, and the Coutume de Paris, 1608–1760 // Manitoba Law Journal. 1995.Vol. 23, no. 2. P. 38. — Writing in 1904, Hoyles makes this point forcefully: *Hoyles N. W.* Civil code of the province of Quebec // The Canadian Law Times. 1904. Vol. 23, no. 3. P. 78.

After Canada passed into British hands (Treaty of Paris, 1763), George III decreed that English law would be applicable in Canada but, as a consequence of strong protests by the French settlers, the earlier law was reintroduced by the Quebec Act 1774[88]. The French civil code of 1804 had no effect on Québec, where the previous law remained in force and gradually lost strength in the face of the dominating common law. No cultural help could come from France where the *Coutume de Paris* had been confined to texts of antiquarian interest only.

This cursory inroad into Québec's legal history has been necessary to detach Québec from mainstream civil law. The *Coutume de Paris* was not a civilian codification and the French civil code did not cross the Ocean to North America. That is particularly telling if one considers how many countries, also of the American continent, enacted new civil codes immediately or shortly after the enactment of the French civil code. When Québec (at the time described as Lower Canada) decided to join the codified legal systems it was clearly stated that it would only be a matter of putting down the existing law[89]. The civil code of 1866 was more a rearrangement of previous laws and an improvement on them then a revolutionary codification as in France: "Il est vrai de dire que notre Code s'inspire plus de l'ancien droit coutumier français que ne le fait le Code Napoléon. La législation révolutionnaire française n'a pas eu d'écho chez-nous. Nous avons conservé plus ou moins fidèlement les institutions juridiques et les conceptions familiales et sociales de l'ancien régime"[90].

However, among those institutions were the "fidéicommis pur" and the "simples fiducies", as Merlin termed them[91], a direct-line inheritance from Roman law sources as interpreted by the doctors of the *ius commune*, especially by Baldus who had referred to testamentary appointments coupled with a charge in favour of third parties ('heres fiduciarius') and had defined the heir or legatee so charged as "nudus minister"[92]. Two otherwise unexplainable provisions of the civil code of 1866 ("légataires fiduciaries", "simple ministre") find thus a proper setting and a legitimate ascendancy[93].

Those provisions were so remote from any ostensible link with trusts that it was generally held (and still is) that the "fiducie" was absent from the code and that it was added to it in 1879 (articles 981a to 981n) without much preliminary study to make it similar to

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[88] *Dickinson J. A.* New France… P. 39–44; *Macneill C. M.* Expanding the Exploration of Civil Law in New France, beyond Quebec to Acadie: 1608–1867 // Beijing Law Review. 2021. Vol. 12, no. 4. P. 1248–1249.

[89] *Mignault P. B.* Le code civil de la Province de Quebec et son interpretation // University of Toronto Law Journal. 1935. Vol. 1, no. 1. P. 107–108. — "Le Code civil ne consacre donc pas un droit nouveau". Mignault was a leading commentator of the civil code of Lower Canada.

[90] Ibid. P. 109.

[91] *Merlin Ph. A.* Répertoire universel et raisonné de jurisprudence, 3.ème éd., Paris: Bertin et Daniel, 1807–1809, sv. Fiduciaire (Heritier).

[92] The *ius commune* legacy has been thoroughly investigated by: *Graziadei M.:* 1) The Development of fiducia in Italian and French Law from the 14th century to the End of the Ancien Regime / Itinera fiduciae: Trust and Treuhand in Historical Perspective / ed. by R. Helmholz, R. Zimmermann. Berlin: Duncker & Humblot, 1998. P. 327–359; 2) La fiducia nella tarda età moderna. Le "confidenze" tra vincolo di coscienza e disciplina politica dei soggetti e dei beni / La fiducia secondo i linguaggi del potere / ed. by P. Prodi. Bologna: Il Mulino, 2008. P. 235–254; *Treggiari F.* Minister ultimae voluntatis. Esegesi e sistema nella formazione del testamento fiduciario. Vol. 1. Napoli: Edizioni Scientifiche Italiane, 2002; *Lupoi M.* I trust nel diritto civile (Trattato di diritto civile diretto da Rodolfo Sacco). Torino: Utet, 2004.

[93] I thank Michele Graziadei for having brought articles 869 and 964 of the Code civil du Bas Canada to my attention. Here are their key sentences. Article 869: "Un testateur peut établir des légataires seulement fiduciaires ou simples ministres pour des fins de bienfaisance ou autres fins permises et dans les limites voulues par les lois"; article 964: "Le légataire qui est chargé comme simple ministre d'administrer les biens et de les employer ou restituer pour les fins du testament, bien que dans les termes sa qualité paraisse réellement être celle de propriétaire grevé et non simplement d'exécuteur et administrateur, ne conserve pas les biens dans le cas de caducité de la disposition ultérieure ou de l'impossibilité de les appliquer aux fins voulues".

the English trust[94] if, as the Privy Council would later remark, the declaration of trust was forgotten[95]. There was no question to resuscitate a pre-code French fiduciary relationship of which all remembrance had apparently gone lost and, as to the 1879 innovation, the Supreme Court of Canada clearly stated in a case of 1933: "Ce n'est pas le *fideicommissum* du droit romain, non plus que la fiducie du droit français, dont Laurent (vol. 14, p. 444) disait que l'usage s'est perdu"[96].

That in my submission explains why Québec adopted the entity solution in the current civil code of 1994 (articles 1260 to 1298) under the heading "fiducie", where a definition of the *fiducie* or trust is not provided[97]: "A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer"[98].

The transfer of assets is not from the settlor to the trustee but from one patrimony, the settlor's, to another, of which nothing more is said. The key provision is in fact in article 1261 of Québec civil code: the assets that form the object of a *fiducie* belong to nobody, they no longer belong to the settlor, not yet to the beneficiary and in the meanwhile not to the fiduciary[99]. A trust is a *patrimoine d'affectation* that aims to achieve a functional equivalence with the common law trust[100]. There is much to be said for this solution, which stems from a basic misunderstanding of the trust and places Québec's *fiducie* in a place of its own. Differences from the trust in its traditional English meaning are legion[101], among them is the protection of beneficiaries against unauthorised acts of disposition by the "fiduciaire"[102]: it takes a great deal of legal ingenuity to suggest that the mechanism of "subrogation réelle" should operate so that the property acquired by the *fiduciaire* in exchange for the trust property would fall into the trust patrimony[103]. Canadian scholars are well aware of the unfavourable reception of Québec's *fiducie* by civil lawyers in

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[94] *Mignault P. B.* La fiducie dans la Province de Québec / La fiducie en droit moderne, Rapports Préparatoires a la Semaine Internationale de Droit. 1937. Vol. 5. P. 35–56.

[95] *O'Meara* v *Bennett* [1922] 1 AC 80.

[96] *Curran* v *Davis* [1933] SCR 293: "Ce n'est pas le *fideicommissum* du droit romain, non plus que la fiducie du droit français, dont Laurent (vol. 14, p. 444) disait que l'usage s'est perdu. Ce n'est ni la donation, ni le mandat, ni le dépôt du code civil. Il participe de chacun de ces contrats auxquels il emprunte sans doute quelques-uns de leurs éléments; mais il ne les contient en entier ni les uns, ni les autres, et il se sépare de chacun d'eux sur plus d'un point essentiel. Sir Mortimer Davis n'a pas voulu faire une donation, ni constituer un mandat ou un dépôt. Il a entendu créer un "trust" ou une fiducie telle qu'elle est prévue dans le statut de Québec 42–43 Vict., qui est maintenant incorporé au code civil dans les articles 981a et suivants. Il s'agit donc d'un contrat particulier, avec ses stipulations et son caractère essentiellement différents des contrats antérieurement connus au code".

[97] *Claxton J. B.* The Corporate Trust Deed under Quebec Law: Article 2692 of the Civil Code of Quebec // McGill Law Journal. 1997. Vol. 42, no. 4. P. 839–841.

[98] Civil code, article 1260: "La fiducie résulte d'un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer". See generally: *Waters D., Smith L., Gillen M.* Water's Law of Trusts in Canada. 5th ed. Canada: Carswell, 2021. P. 1507 ff.

[99] "Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d'entre eux n'a de droit réel".

[100] See generally: *Claxton J. B.* Studies on the Québec Law of Trust. Toronto: Thomson Carswell, 2005.

[101] *Crépeau P. A.* Civil Code Revision in Quebec // Louisiana Law Review. 1973–1974. Vol. 34, no. 5. P. 921–952. — Had forecasted quite a different outcome and a link with the treatment of trusts in Louisiana.

[102] Cf.: *Lee J.* The Nature of the Beneficiary's Interest in English, Japanese and Quebec Trusts // European Review of Private Law. 2021. No. 4. P. 611–632. — With reference also to Japanese law.

[103] *Smith L.* Unauthorized Dispositions of Trust Property: Tracing in Quebec Law // McGill Law Journal. 2013. Vol. 58, no. 4. P. 795–810.

Europe[104] and at the same time have to admit that "The *fiducie* is not yet seen to be truly part of Quebec's general law"[105].

An approach transparently tied to the Québec "fiducie" was recently selected by the Czech civil code of 2012 (effective since 2014) in setting out the rules of the fiduciary fund ("svěřenský fond") that, as in Québec, is not owned by the founder nor by the administrator of the fund and is not owned by an entity: the fiduciary fund is indeed an entity, that comes into being by contract or by will, but has no legal personality[106]. It can serve a private or a public purpose. It must have a name and be entered into a public register[107]; its assets are listed under the name of the administrator of the fund followed by the words "s věřenský správce"[108]. At the same time, Czech law lists foundations ("*fundace*") with legal personality among the instruments available for the administration of family property and it would appear that they are enjoying a greater success than the fiduciary funds[109].

Most provisions of the Czech civil code on the fiduciary fund are taken literally or almost literally from the civil code of Québec. Among the differences are the provisions on the powers that the settlor may hold to control the performance of the trustee and those on the lack of beneficiaries at the end of the trust period: the fund goes to the heirs at law of the founder in Québec, to the State in the Czech Republic[110].

9. A conceptual civil law approach

The legal literature of Québec often refers to Louisiana as a sort of sister country in trust matters and lists both countries among the mixed jurisdictions. It is not generally known outside the United States and Canada that in the 17th century Louisiana was a geographical entity under the French crown that went from the Gulf of Mexico to the Great Lakes and French Canada, thereby including Québec. When Québec was ceded to Britain in 1763, as mentioned above, also Louisiana territories east of Mississippi were ceded; what remained of Louisiana went to Spain that imported its laws in 1769[111] but returned to France in 1800. It was then that President Jefferson purchased Louisiana from Napoléon (1803). Part of Louisiana became a state of the US in 1812.

Louisiana has always enjoyed a civil law culture, be it French or Spanish, it never had an influx of British immigrants (as Québec had after the end of the War of Independence in 1783) and was never compelled to accept foreign laws (as Québec for English criminal law, judicial system and public law); indeed, the endurance of the *Coutume de Paris* in Québec that has led to the so-called "mixed jurisdiction" was a British concession (Que-

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[104] *Cantin Cumyn M.* Réflexions autour de la diversité des modes de réception ou d'adaptation du *trust* dans les pays de droit civil // McGill Law Journal. 2013. Vol. 58, no. 4. P. 811–826.

[105] *Cantin Cumyn M.* Reflections regarding the diversity of ways in which the trust has been received or adapted in civil law countries / Re-imagining the Trust. Trusts in Civil Law / ed. by L. Smith. Cambridge: Cambridge University Press, 2012. P. 6.

[106] Articles 1448–1474. — See: *Grasis J.* Trust Regulation in the Czech Republic: the Model Law for Introduction of the Trust Instrument in the Republic of Latvia? // EIRP Proceeding. 2016. No. 11. P. 46–54; *Popovici A.* Trust in Quebec and Czech Law: Autonomous Patrimonies // European Review of Private Law. 2016. Vol. 24, no. 6. P. 929–950; *Panico P.* Il trust nella Repubblica Ceca // Trusts e attività fiduciarie. 2022. No. 1. P. 245–253.

[107] Střeleček T. An introduction to the trust funds' registration in the Czech Republic // Trusts & Trustees. 2017. Vol. 23, no. 7. P. 763–769.

[108] Article 1456.

[109] *Ronovská K., Lavichý P.* New Czech Foundation and Trust (like) Law: initial experience and reactions // Trusts & Trustees. 2016. Vol. 22, no. 6. P. 641–646.

[110] Québec civil code, article 1297; Czech civil code, article 1472.

[111] *Palmer V. V.* The Louisiana civilian experience: critiques of codification in a mixed jurisdiction. Durham: Carolina Academic Press, 2005. P. 51–99.

bec Act 1774[112]). When the French civil code was being discussed in Paris Louisiana was a French possession (Québec was not) and was ready to absorb in its Digest of 1808 some of the revolutionary watchwords, such as the abolition of *fideicommissa* and the definition of ownership in article 544 of the civil code[113].

Indeed, academic essays by Louisiana trust scholars law attest to a closeness with the civil law (French, Spanish, Roman)[114] that has no equivalent in Québec and a progressive nearing of the legislative solutions to the structure of the common law trust[115]; as the main promoter of the 1964 Trust Code put it, its aim was "to strive for clarity and certainty in operation by defining precisely the uses of the word "trust" within a civil law framework"[116]. The 1964 Trust Code was enacted in spite of a widespread opposition in academic circles[117] and it was the provisional end to a long-lasting process that had had its major achievements in the 1920 Trust Law and in the 1938 Trust Estates Act and that still left room for improvement, as subsequent amendments would have shown.

The key problems were identified from the outset, but some of them had no real substance, for their root was the ignorance or rather the lack of comparative outlook of the English trust. Foremost among these was, and to a certain extent still is, the "split-ownership" or "dual ownership" concept, a misnomer if ever there was one of an equitable notion — "equitable ownership" — that is admittedly impossible to render by way of literal translation but that has found acceptance by civil lawyers once that its historical foundation has emerged as well as its conceptual setting in the domain of obligations rather than in the domain of ownership[118].

The prohibition of substitutions and *fideicommissa* (that in any event is not absolute in the French civil code) was overcome with some difficulty[119], while the fundamental question of classifying the trustee as the owner of the trust property was solved without any reservation: "A trustee is a person to whom title to the trust property is transferred to be administered by him as a fiduciary"[120]. Doubts were expressed on the meaning of this norm: does it extend to defining the trustee as "owner"? The answer was obviously in the affirmative, also in view of another provision: "A trust, as the term is used in this Code, is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another"[121].

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[112] As mentioned in the previous section of this paper.

[113] *Lorio K. V.* Louisiana Trusts: The Experience of a Civil Law Jurisdiction with the Trust // Louisiana Law Review. 1982. Vol. 42, no. 5. P. 1721, 1727.

[114] By way of example see recently: *Carter E. R.* Fiduciary Litigation in Louisiana: Mandataries, Succession Representatives, and Trustees // Louisiana Law Review. 2020. Vol. 80, no. 3. P. 666–673, 680–682.

[115] *Martin E. F.* Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code // Louisiana Law Review. 1990. Vol. 50, no. 3. P. 508–511.

[116] *Oppenheim L.* A New Trust Code For Louisiana: Some Basic Policy Considerations // Louisiana Law Review. 1963. Vol. 23, no. 4. P. 621.

[117] Related by: *Oppenheim L.* New Trust Code for Louisiana-Act 338 of 1964 // Tulane Law Review. 1964–1965. Vol. 39, no. 2. P. 187–226.

[118] *Oppenheim L.* A New Trust Code For Louisiana: Some Basic Policy Considerations. P. 622–623; *Martin E. F.* Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code. P. 502; *Clarry D.* Fiduciary Ownership and Trusts in a Comparative Perspective // International and Comparative Law Quarterly. 2014. Vol. 63, no. 4. P. 927–931 ("misleading and mistaken"); *Puder M. G., Rudokvas A. D.* How Trust-Like is Russia's Fiduciary Management? Answers From Louisiana // Louisiana Law Review. 2019. Vol. 79, no. 4. P. 1075–1077.

[119] *Oppenheim L.* New Trust Code for Louisiana-Act 338 of 1964. P. 192–197; *Lorio K. V.* Louisiana Trusts... P. 1726–1730; *Martin E. F.* Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code. P. 514–516.

[120] § 1781.

[121] § 1721. The debate at the time of the drafting of the Trust Code is related by: *Scalise R. J.* Some Fundamentals of Trusts: Ownership or Equity in Louisiana // Tulane Law Review. 2017. Vol. 92. № 1. P. 81–85. —

The language of the Louisiana Trust Code is crystal-clear and might be rated as a model for civil law legislative enactments[122]. It takes advantage of ordinary trust language but with a civilian penchant for definitions as in "A settlor is a person who creates a trust. A person who subsequently transfers property to the trustee of an existing trust is not a settlor"[123].

At the root of the Louisiana Trust Code is a deft admixture of civil law and common law elements that is not found in any other so-called "mixed jurisdictions" because none of those (be it South Africa or Scotland or Québec or whatever) has gone (or has had to go) to the same lengths. At least a few matters must be mentioned here to show some of the issues that a civil law system has to consider before legislating on trusts, unless one selects the opposite way that leads to a new or revived civilian institution such as the French *fiducie*.

Trusts, family trusts in particular, tend to pledge the future in order to implement the will of the settlor and to do so they must delegate certain settlor's powers to the trustee that the settlor would be unable to exercise because he would no longer be alive. That runs against several civil law assumptions, including the prohibition to delegate the expression of one's last will, so that a trust legislation to be reconciled with the civil law must curtail quite a few common law features. Beneficiaries, to begin with, must be ascertained or ascertainable when the trust is created[124], and in connection with that duration must be limited. In fact, Louisiana trusts are a far cry from American "dynastic" trusts, for their duration is tied to the life of the income beneficiary or to a certain period of time after the death of the settlor[125].

Louisiana achieved a remarkable innovation when the Trust Estates Act of 1938 allowed to place the *légitime* in trust; the Trust Code, as subsequently amended in 1974, improved on that and set out a series of rules that allow Louisiana to enjoy the best of the two worlds[126]; the liability of trustees, for instance, is conveniently compared with the liability of fiduciaries generally under civil law principles[127].

10. Civil law alternatives

Several civil law countries reacted to the international trust model and to the worldwide success of trusts as a legal institution by appealing to traditional principles (indeed, mostly based on Roman law) and exploiting the potential of contract law.

Luxembourg was the first to act. The law that made the Hague convention enforceable in Luxembourg also provided for a new discipline of the *contrat fiduciaire*[128], a type of contract that requires that the fiduciary be a bank or a financial institution or an insurance

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The author holds that "there appears to be ample reason to doubt the currently prevailing wisdom that the trustee is the owner of the trust property" (at 95). Scalise propounds the theory that "both the trustee and the beneficiary maintain real rights in a Louisiana trust".

[122] Some are never satisfied: *McAuley M.* Reflections regarding the diversity of ways in which the trust has been received or adapted in civil law countries / Re-imagining the Trust. Trusts in Civil Law / ed. by L. Smith. Cambridge: Cambridge University Press, 2012. P. 163–178.

[123] § 1761.

[124] *Martin E. F.* Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code. P. 512–513.

[125] § 1831. The provisions of this section are somewhat complex, there is no reason to set them out in detail. See: *Oppenheim L.* New Trust Code for Louisiana-Act 338 of 1964. P. 202–204.

[126] § 1841, 1844. For details see: *Oppenheim L.* New Trust Code for Louisiana-Act 338 of 1964. P. 204–205; *Lorio K. V.* Louisiana Trusts… P. 1735–1739.

[127] *Carter E. R.* Fiduciary Litigation in Louisiana… P. 721–723, 726–737.

[128] Regulation of 19th July 1983 on the "contrat fiduciaire" with banks was then abrogated.

company[129]: the fiduciary becomes the owner of the assets that the principal transfers to it and is to deal with them as an agent would[130]. The conceptual limits of the civilian theory on "patrimonies" (see above n. 7) were thus overcome: the assets that a fiduciary owns belong to a patrimony of its own and each *contrat fiduciaire* causes a distinct patrimony to come into existence: "Le patrimoine fiduciaire est distinct du patrimoine personnel du fiduciaire, comme de tout autre patrimoine fiduciaire. Les biens qui le composent ... ne font pas partie du patrimoine personnel du fiduciaire..."[131]

The setting of the *contrat fiduciaire* in the field of agency produces a quite remarkable distinction between trusts and the *contrat fiduciaire*: the settlor is in reality a principal who can instruct his agent. The *contrat fiduciaire* is in fact a mandate coupled with the segregation of the assets; it is "half a trust", one might say[132].

Shortly after the enactment of Luxembourg's statute, France's long child-bearing came to an end and in 2007 the "fiducie" was introduced in articles 2011–2031 of its civil code[133]. As in Luxembourg there is a distinct patrimony for each *fiducie*, so that segregation is an unescapable consequence[134]. As in Luxembourg the fiduciary must be a qualified financial entity[135], but, in an afterthought, lawyers were added among the fiduciaries. As in Luxembourg, the *fiducie* is a "contrat" but that has been doubted and the notion of "propriété fiduciaire" has been proposed[136]. That is only one of the several conceptual problems that this legislation has put to French jurists.

Fiducie was put on the statute book in spite of misgivings of various nature, foremost among them the vague setting of the "patrimoine fiduciaire" mentioned in article 2025 in opposition, one would think, to the "patrimoine propre" of the "fiduciary" (art. 2011) from which the assets included in the "patrimoine fiduciaire" must be "séparés". Those misgivings left a clear trace in many provisions: only physical persons could create a *fiducie* in

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[129] Law 27 July 2003, art. 4: "Le présent titre ne s'applique qu'aux contrats fiduciaires dans lesquels le fiduciaire est un établissement de crédit, une entreprise d'investissement, une société d'investissement à capital variable ou fixe, une société de titrisation, une société de gestion de fonds commun de placement ou de fonds de titrisation, un fonds de pension, une entreprise d'assurance ou de réassurance ou un organisme national ou international à caractère public opérant dans le secteur financier".

[130] Article 7 (1): "Les règles du mandat, à l'exclusion de celles reposant sur la représentation, sont applicables aux relations entre le fiduciant et le fiduciaire dans la mesure où il n'y est pas dérogé par le présent titre ou par la volonté des parties".

[131] Article 6.

[132] In order to express such measurement one should first define "the trust" for comparative law purposes; a few such definitions exist but no debate has ensued among their respective authors. See: *Lepaulle P.* Civil law substitutes for trusts // Yale Law Journal. 1927. Vol. 36, no. 8. P. 1126–1147; *Waters D.* The Institution of the Trust in Civil and Common Law / Recueil des cours. Vol. 252. Dordrecht: Academy of International Law Waters 1995. P. 427–435; *Lupoi M.,* Trusts. A Comparative Study. Cambridge: Cambridge University Press. 2000. P. 271; *Honoré T.* In Fitting Trusts into Civil Law Jurisdiction // Legal Research Paper Series. University of Oxford. 2008. No. 27. P. 3–4; *Braun A.* The state of the art of comparative research in the area of trusts / Comparative Property Law: Global Perspectives / ed. by M. Graziadei, L. Smith. Cheltenham: Edward ElgarBraun. 2017. P. 131–138.

[133] Later amended more than once on specific issues.

[134] Article 2025 of the French civil code: "le patrimoine fiduciaire ne peut être saisi que par les titulaires de créances nées de la conservation ou de la gestion de ce patrimoine".

[135] Article 2015: "Seuls peuvent avoir la qualité de fiduciaires les établissements de crédit mentionnés au I de l'article L. 511-1 du code monétaire et financier, les institutions et services énumérés à l'article L. 518-1 du même code, les entreprises d'investissement mentionnées à l'article L. 531-4 du même code, les sociétés de gestion de portefeuille ainsi que les entreprises d'assurance régies par l'article L. 310-1 du code des assurances".

[136] *Emerich Y.* Les fondements conceptuels de la fiducie française face au trust de la common law: entre droit des contrats et doit des biens // Revue Internationale de Droit Comparé. 2009. Vol. 61, no. 1. P. 49–71. — "une modalité de la propriété civiliste, inspirée de la common law".

the original wording of the law[137]; the fiduciary becomes the owner of the assets transferred to it[138] but the *fiducie* cannot serve to implement a donative purpose of the settlor towards the beneficiary, a liberal *fiducie* is a nullity[139]; all *fiducies* must be registered in a national register; settlors can only be residents of a member state of the European Community or of a state which has concluded a tax treaty with France for the avoidance of double taxation with a clause providing for administrative assistance; a *fiducie* established by a physical person ends when the settlor dies[140].

There is a peculiarity in the rules relating to *fiducie* that substantially undermines the functionality of the institution: third parties that have contracted with the fiduciary may sue the settlor should the assets of the *fiducie* be insufficient to satisfy their claims, unless the contract of *fiducie* has made the fiduciary liable to perform personally the obligations he has contracted: "En cas d'insuffisance du patrimoine fiduciaire, le patrimoine du constituant constitue le gage commun de ces créanciers, sauf stipulation contraire du contrat de fiducie mettant tout ou partie du passif à la charge du fiduciaire"[141].

Less than a "half-trust", if one may say so[142].

Romania followed the French solution in its new civil code of 2011[143]. It chose to limit the possibility to be a fiduciary[144] and, while abolishing the prohibition of *fideicommissa* of French origin[145], allowed fiduciary arrangements only if not aimed at achieving a liberality in favour of the beneficiary. As in France, the lawmaker did not employ in full the language of fiduciary arrangements (while attention was paid to pursuing the purpose of financial collaterals[146]) and labelled the two parties "constituitori" ("constituant" in the French civil code) and "fiduciari". The traditional concept of "one person — one patrimony" is apparently still dominant in Romania; therefore, the assets transferred to the fiduciary are owned by the fiduciary and are segregated within his own patrimony[147]. Limited to a maximum duration of 33 years, Romanian fiduciary arrangements must be registered in a Central Register of Fiduciary Arrangements (that too is due to French influence) and apparently are being slowly resorted to in commercial transactions[148].

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[137] *Barrière F.* The French fiducie, or the chaotic awakening of a sleeping beauty / Re-imagining the Trust. Trusts in Civil Law / ed. by L. Smith. Cambridge: Cambridge University Press. 2012. P. 241–246.

[138] This has been the subject of debate: Ibid. P. 234–238.

[139] Civil code, article 2013.

[140] Civil code, article 2029.

[141] Civil code, article 2025, para. 2; see: *Barrière F.* The French fiducie, or the chaotic awakening of a sleeping beauty. P. 250–256.

[142] F. Barrière in 2004 had envisaged quite a different outcome and had published a very well researched monography where he outlined the *fiducie* as "un outil aussi flexible et polyvalent que le trust". See: *Barrière F.* La reception du trust au travers de la fiducie. LexisNexis, Litec. 2004.

[143] Articles 773–791.

[144] Credit institutions, investment management companies, investment companies, insurance and reinsurance companies, public notaries, or attorneys at law.

[145] *Murphy A., Duță C.* The Fideicommissary Substitution and the Fiducia: Québécois Echoes in the Civil Code of Romania // Trusts & Trustees. 2021. Vol. 27, no. 4. P. 295–301.

[146] *Lefter C., Duagi G.* The fiduciary guarantee in the Romanian and European legal context // Juridical Tribune. 2016. Vol. 6, no. 2. P. 108–112.

[147] Some writers, however, tend to give little weight to the notion of "transfer" and consider the assets still owned by the transferor, at least as a nude owner. See: *Măgureanu F. A. Fiducia* in the new Romanian civil code // Contemporary Readings in Law and Social Justice. 2014. Vol. 6, no. 1. P. 301–307; *Tuleaşcă L.* The concept of the trust in Romanian Law // Romanian Economics and Business Review. 2011. Vol. 6. P. 150–160.

[148] *Moreanu D.* Fiducia — art. 773.791 din Codul civil — un deceniu de aplicare practică! // Romanian Review of Private Law / Revista Romana de Drept Privat, 2021, No. 3–4. P. 433–449;. *Lefter C., Duagi G.* The fiduciary guarantee in the Romanian and European legal context.

Quite different is the structure of fiduciary arrangements that emerges from the new Hungarian civil code (2013, effective since 2014) supplemented by an Act on Trustees[149]. Hungary too aimed at translating the traditional common law trust into civilian terms[150] and according to civilian principles but keeping in mind the English model, as can be seen by the inclusion of the unilateral declaration of trust among the acts creating a trust[151], by the express consideration of testamentary trusts, by the absence of limitation on who can be a trustee[152], by the allowance of discretionary trusts and by the unlimited liability of the trustee with his own property towards third parties if their claims cannot be satisfied from the trust property, and the third parties were not and could not have been aware that the commitments of the trustee exceeded the limits of the trust property[153]. It is to be noted that the code draws a distinction between professional and *ad hoc* trustees.

The Hungarian legislation has two pivotal issues: the powers of the settlor and the rights of the beneficiaries. The settlor, seen as "the dominant party in the trust relationship"[154], enjoys wide powers, including the power to remove the trustee and appoint a new trustee, change the beneficiaries, monitor the performance of the trustee, appoint a sort of protector to exercise the settlor's powers after the death of the settlor; in short, quite an involvement in the life of the trust barring giving direct instruction to the trustee[155]. The beneficiary has a contractual right to distribution towards the trustee, although he is not a party to the trust instrument; moreover, he is entitled to see the accounts of the trust and supervise them.

Among the differences from the English model, in addition to the fact that the Hungarian civil code classifies fiduciary arrangements as contracts, are the duration of the trust (maximum 50 years) and the power of the settlor to terminate the trust in advance: this would appear to be a prerogative that the settlor cannot waive[156]. In addition, the protection of the settlor's creditors is strongly reduced because in addition to the ordinary requirements of the *actio pauliana* a creditor cannot succeed unless it proves that the settlor acted in bad faith[157].

In addition, since 2019 Hungarian law allows wealthy individuals to establish Trust Funds, basically foundations devoted to the management and investment of assets as independent legal entities[158]. A minimum value of assets is required (HUF 600 million)[159], the duration may be unlimited and financial benefits may be paid out to the founder as well as to beneficiaries. The management is entrusted to a board of at least 5 persons, subject to the control of an auditor committee of at least 3 persons and in certain instances also of an asset controller. A Trust Fund may be created to pursue a purpose of public interest, in which case the concept of beneficiary obviously changes and is referred to the category of persons that the Trust Fund is meant to take care of.

The most remarkable attempts to recreate the common law trust in a civilian setting are the 1926 Liechtenstein statute and the 2010 San Marino statute.

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[149] Act XV of 2014.

[150] The Hungarian wording for "trust" is "bizalmi vagyonkezelési szerződés".

[151] Article 6: 329(1).

[152] There are licensed trustees (the licence is granted by the National Bank of Hungary) and unlicensed ones.

[153] *Sándor I.* The New Hungarian Fiduciary Asset Management Contract (Trust) From Comparative Aspect // US-China Law Review. 2015. Vol. 12. P. 612.

[154] *Ulmann K.* The Hungarian trust // Trust Quarterly Review. 2018. Vol. 22.

[155] *Sándor I.* The New Hungarian Fiduciary Asset Management Contract… P. 605–606, 610.

[156] The Hungarian trust *inter vivos* derives from a contract. I do not see that as a major departure from the common law model.

[157] Article 6:120 (1).

[158] Act XIII of 2019.

[159] Roughly equivalent to euro 1.85 million.

Liechtenstein regulated the *Treuhänderschaft* in articles 897–932 of its Personen- und Gesellschaftsrecht in 1926 and two years later the *Treuunternehmen*. The object of that legislation was to provide a legal device inspired by the English trust in order to be competitive in the financial markets[160]. The rules on *Treuhänderschaft* are characterized by considerable conceptual consistency, starting from its very neat definition of the trustee (not of the trust — a sound decision) as someone to whom another person transfers assets ("zuwendet") with the obligation to deal with them in his own name as their full owner for the benefit of other parties and with effect towards anybody[161].

The Liechtenstein rules translate very correctly many common law notions into civilian language; for instance, they provide for the right to follow trust property and codify a fact-pattern for the constructive trust (art. 898) but a recent decision of Liechtenstein's Supreme Court on the legal protection of trust beneficiaries has shown that similarity of written norms does not necessarily bring about a similarity of rules in practice, thus confirming the basic deficiency of the theory of transplants[162].

All trusts whose duration exceeds 12 months must be recorded in a public register.

The San Marino statute[163] deals with all aspects of trusts for beneficiaries and of trust for purposes following closely on English law but absorbing some of the solutions of the international model (for instance, the protector) and setting out new rules that take care of the civil law culture of San Marino and of Italy[164], for instance the "Book of events", that preserves all documents and a summary description of all relevant events that occur during the life of a trust, the option given to settlors to discard the rule in *Saunders* v *Vautier* and the duty of trustees to make themselves known as such unless the trust instrument provides otherwise. All trusts must be recorded in a public register. In addition, a specialised court was set up to administer the trust statute[165].

Neither Liechtenstein nor San Marino experienced any difficulty in drafting, enacting and applying their statutes on trusts. Perhaps some more attention should be devoted to their legislation.

11. The creeping in of trusts

Trusts may creep into a legal system that knows nothing of them and that has no intention to accept them among its institutions. That is what happened in South Africa and to a certain extent in Scotland. South Africa and Scotland are often mentioned in

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[160] *Biedermann K.* Die Treuhänderschaft des liechtensteinischen Rechts, dargestellt an ihrem Vorbild, dem Trust des Common Law unter Berücksichtigung des Gesetzes betreffend das Treuunternehmen. Bern: Stämpfli, 1981; *Moosmann K.* Der angelsächsische Trust und die Liechtensteinische Treuhänderschaft unter besonderer Berücksichtigung des wirtschaftlich Begünstigten. Zürich: Schulthess Polygraphischer Verlag, 1999; *Schurr F. A.* A Comparative Introduction to the Trust in the Principality of Liechtenstein / Trusts in the Principality of Liechtenstein and Similar Jurisdictions / ed. by F. A. Schurr. Zürich, St. Gallen: Dike Verlag, 2014. — As it happened, the Liechtenstein *Treuhänderschaft* remained substantially dormant for several decades because the *Anstalt* and the *Stiftung* were favoured by the foreign clientèle.

[161] Article 897. "Treuhänder (Trustee oder Salmann) im Sinne dieses Gesetzes ist diejenige Einzelperson, Firma oder Verbandsperson, welcher ein anderer (der Treugeber) bewegliches oder unbewegliches Vermögen oder ein Recht (als Treugut), welcher Art auch immer, mit der Verpflichtung zuwendet, dieses als Treugut im eigenen Namen als selbständiger Rechtsträger zu Gunsten eines oder mehrerer Dritter (Begünstigter) mit Wirkung gegen jedermann zu verwalten oder zu verwenden".

[162] Supreme Court 3rd March 2017; see: *Auer S., Marxer D.* The Breach of Trust doctrine under Liechtenstein Trust Law and its impact on the preservation and enforcement of beneficiaries' rights // Trusts & Trustees. 2021. Vol. 27, No. 1–2. P. 61–68.

[163] Law 1st March 2010, no. 42. The present writer was the lead draftsman of this statute.

[164] San Marino is an independent republic inside geographical Italy.

[165] The present writer was the first president of the court, whose other members were Antonio Gambaro, Michele Graziadei, David Hayton, Sonia Martin Santisteban, Paul Matthews.

one breath when speaking of trust matters and I shall follow suit, although for a reason not usually mentioned by legal writers, namely, that South Africa and Scotland have a common past in a shared period of the European *ius commune* and a common present in being both orphaned from a cultural lineage that provided answers to current matters by drawing on Roman law.

Scottish law students did flock to Dutch universities in the 17th and 18th centuries, thirsty for the civilian teaching, the *ius commune*, they would find there[166]. Between 1600 and 1800 some 1600 Scottish students attended courses at Leyden alone. Viscount Stair composed the second edition of his Institutes at Leyden from 1682 to 1689, Lord President Forbes studied at Leyden and Lord President Dundas at Utrecht[167].

Taking the relay from France, the original destination of Scottish law students, Leyden, Utrecht and the other civilian centres of learning in Holland provided Scottish students also with professional training, witness the Advocates library, founded in Edinburgh in 1692, that contained at its foundation 1500 books of which the overwhelming majority were Continental treaties[168]. Scottish advocates made good use of those books as an inquiry into the authorities cited to Stair as a judge has shown[169].

Scotland from the second half of the 17th century had its own legal institutional writings and would thus enjoy direct and original applications of *ius commune* and canon law doctrines, as, for instance, the characterisation of the Court of Session as exercising a "nobile officium"[170].

All this began to change after the French revolution and the two decades of wars between Britain and France. Scotland was cut off from the Continent and therefore also from cultural contacts with the Low Countries; when it was possible to resume them the Dutch had their own (Napoleonic) code and Roman-Dutch law has thus been superseded: Scotland, being isolated, was forced into contact with English law "on unequal terms"[171]. Roman law kept its place in the panoply of legal sources but the lively influx provided by the European schools of civil law had gone and English influence asserted itself, also thanks to the role played by the House of Lord as the court of last resort for Scotland as for England[172]. In the end, English influence did not extend beyond limited areas, also thanks to the lack of doctrinal elaboration and of a coherent set of rules (as pointed out above, section 2)[173]; at the same time, Scottish law has dealt with cases that

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[166] See the presidential address at the International Congress of Comparative Law (the Hague, August 2, 1932): *Macmillan H.* Scots Law as a Subject of Comparative Study // Law Quarterly Review. 1932. Vol. 48, no. P. 478: "Debarred from England by secular hostility, the Scottish student who was ambitious of acquiring an adequate equipment for the practice of the law naturally resorted to the Continent for his instruction. While some went in search of learning to France, some to Germany, and some to Italy, the great law schools of Utrecht, Leyden, Groningen, and Franeker especially attracted the young Scottish legal aspirant of those days. Not only was Holland the nearest neighbour of Scotland across the sea, but there were to be found the most erudite and elegant interpreters of the law of Rome on which Dutch law and Scots law are both alike based".

[167] *Macmillan H.* Op. cit. P. 480; *Fisher M. G.* Scotland and the Roman Law // Tulane Law Review. 1947–1948. Vol. 22, no. 1. P. 18–19.

[168] *Smith T. B.* Scots Law and Roman-Dutch Law // Acta Juridica. 1959. Vol. 36. P. 43.

[169] Ibid. P. 39.

[170] The Court of Session was established on the strength of a bull by Pope Paul VII in 1532. The miserable state of the law at that time is well described by: *Mackay A. J. G.* A Sketch of the History of Scots Law // The Journal of Jurisprudence. 1882. Vol. 26, no. 303. P. 113–129.

[171] *Smith T. B.* Scots Law and Roman-Dutch Law. P. 43.

[172] *Fisher M. G.* Scotland and the Roman Law. P. 20; *Smith T. B.* 1) Scots Law and Roman-Dutch Law. P. 44; 2) English Influences on the Law of Scotland // American Journal of Comparative Law. 1954. Vol. 3, no. 4. P. 524–525.

[173] *Smith T. B.* English Influences on the Law of Scotland; Gretton in his article Constructive Trusts: I // Edinburgh Law Review. Vol. 1, no. 3. P. 281–316. — lists a remarkable series of differences between Eng-

in England would call the uncertain doctrine of constructive trusts into play by availing itself of well-established civil law remedies, such as unjustified enrichment[174].

Roman-Dutch law in the Cape did not have a juristic doctrine of its own, it was but a passive receptacle of theories propounded by Dutch and other European scholars[175], mainly because the Dutch had not established any organized form of government to rule over the settlements they had set up from 1652 in a limited area around and east of the Cape of Good Hope under the Dutch West Indies Company, regularly at war with neighbouring tribes. It would not be even appropriate to speak of "South Africa" with reference to the early times because no such political entity came into existence until after the Boer wars[176].

"Trusts" and "trustees" belonged to the equipment of the British settlers in the Cape of Good Hope (as the civil code belonged to the equipment of the Napoleonic armies). Therefore, trusts crept up naturally in the Cape after 1815 and somewhat later in Natal (annexed in 1843) both in matters of public interest and in matters private[177]; however, the population of Dutch descent did not abandon its traditions and went on using donations or wills coupled with a *modus*[178] and maintained the institution of the *bewind*, a contractual relationship that entrusts the management of assets to a fiduciary without transferring their ownership[179]; hence a dual system that persists to this day not only in trust matters but in private law generally.

Trusts did creep into Scots law in a different way, that is, by offering a terminology and a legal framing from south of the Border to a legal phenomenon that was indigenous in nature[180] and that could have found a wholly civilian solution had active civilian links persisted into the 19th century. The oral declaration made by the fiduciary upon receiving the property was an evidence of its civilian origin: it mirrored the *stipulatio* that in Roman law was added to the *mancipatio* when the latter had a fiduciary character ("mancipatio fidi fiduciae causa"), for instance as a guarantee for a debt of the transferor[181]. A declaration with the name of the beneficiary of the trust in blank was at times executed and as early as 1696 a statute was enacted "that for hereafter no bonds assignations dispositions or other deeds be subscrived blank in the person or persons name in whose favors they are con-

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lish and Scottish laws of trusts and in: *Gretton G. L.* Constructive Trusts: II // Edinburgh Law Review. Vol. 1, no. 4. P. 409 adds "That the historical quirks of one system should be taken as a model for another is as irrational as the notion that because Beethoven was deaf, aspiring young composers should puncture their eardrums".

[174] *Evans-Jones R.* Causes of Action and Remedies in Unjustified Enrichment: Satchwell v. McIntosh // Edinburgh Law Review. 2007. Vol. 11, no. 1. P. 105–109. — Case between former cohabitants.

[175] On Roman-Dutch law see the essays collected in: *Feenstra R., Zimmermann R.* Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert. Berlin: Duncker & Humblot. 1992.

[176] Republic of South Africa was the name given by Dutch settlers to Transvaal and Orange, where they emigrated not be under British rule in the Cape.

[177] South Africa's Supreme Court of Appeal held in 1915 that terminology rather than legal rules had been imported: *Clarry D.* Fiduciary Ownership and Trusts in a Comparative Perspective. P. 911.

[178] *Cameron E., De Waal M., Solomon P.* Honoré's South African Law of Trusts. 6th edition, Cape Town: Juta & Co. 2018, P. 26, 57–60. — *Modus* was considered a valid alternative to trusts in certain instances by: *Lepaulle P.* Civil law substitutes for trusts. P. 1136–1137.

[179] South African legislation treats *bewind* and trust on the same footing.

[180] Gretton G. L provides ample proof of this. See: *Gretton G. L.* Scotland: the evolution of the trust in a semi-civilian system / Itinera fiduciae: Trust and Treuhand in Historical Perspective / ed. by R. Helmholz, R. Zimmermann. Berlin: Duncker & Humblot, 1998. P. 513–515.

[181] *Dunand J.-Ph*. Le transfert fiduciaire; «donner pour reprendre». Mancipio dare ut remancipetur. Analyse historique et comparatiste de la fiducie-gestion. Bâle; Genève; Munich: Helbing & Lichtenhahn, 2000. P. 77–88. Such stipulations have been found and published. See: *Costabile F.* L'auctio della fiducia e del pignus nelle tabelle dell'agro Murecine. Soveria Mannelli: Rubbettino, 1992; *Camodeca G.* Tabulae Pompeianae Sulpiciorum. Edizione critica dell'archivio puteolano dei Sulpicii. Roma: Edizioni Quasar, 1999.

ceived and that the forsaid person or persones be either insert before or at the Subscriveing or at least in presence of the same witnesses who were witnesses to the Subscribing befor the delivery[182].

It is interesting to compare the attitudes of the two legal systems in the face of the earliest trusts that came to their attention. Initially "*fideicommissum*" appealed to both as the appropriate legal framework for testamentary trusts[183] and a combination of *depositum* and *mandatum* was identified in Scotland to render *inter vivos* trusts[184], while South African courts around the middle of the 20th century selected as the appropriate peg for *inter vivos* trusts the contract in favour of third parties or *stipulatio alteri*[185].

All those conceptual attempts were doomed to show their limits when compared with the English trust because, not surprisingly, no traditional civil institution could be perfectly superimposed to it. The legal developments that followed reached some common results based on the common civilian heritage of Scotland and South Africa. Two instances of this are the requirement of writing[186] and the publicity of the existence of a trust[187], that are both directly in contrast with the English rules.

We saw in the previous pages how the notion of "patrimony" reacts when assets of any kind are "placed in trust":

1. either the trustee becomes their owner; if so, the assets:

1a. are within the trustee's only patrimony, or

1b. are within another patrimony owned by the trustee

or

2. the trustee does not become their owner and only enjoys certain powers over them; if so, the assets:

2a. either belong to a patrimony of their own, or

2b. are still within the patrimony of their original owner.

1a are the classical Roman law *fiducia* and *fideicommissum*, the English trust and possibly the French *fiducie*;

1b is the view taken in Scotland and South Africa and also the Liechtenstein and San Marino solution

2a is the Québec *fiducie*

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[182] Blank Bonds and Trusts Act 1696: "Our Soveraign Lord considering that the Subscriveing of Bonds Assignations and Dispositions and other deeds blank in the name of the person in whose favors they are granted as also that the intrusting of persons without any declaration or backbond of Trust in writing from the persons intrusted are occasions of fraud as also of many pleas and contentious …". See: *Wilson W. A., Duncan A. G. M.* Trusts, Trustees and Executors 2nd edition. Edinburgh: W. Green, 1995. P. 4–12.

[183] *Hahlo H. R.* The Trust in South African Law // Inter-American Law Review. 1960. Vol. 2, no. 2. P. 230–237; *Cameron E., De Waal M., Solomon P.* Honoré's South African Law of Trusts. P. 65–67; *De Waal M. J.* The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared // South African Law Journal. 2000. Vol. 117, no. 3. P. 555–556.

[184] *Gretton G. L.* Scotland: the evolution of the trust in a semi-civilian system / Itinera fiduciae: Trust and Treuhand in Historical Perspective / ed. by R. Helmholz, R. Zimmermann. Berlin: Duncker & Humblot. 1998. P. 511–516; *Gretton G. L.* Trusts without Equity / International and Comparative Law Quarterly. 2000. Vol. 49, no. 3. P. 603; *Stępkowski A.* L'institution du trust dans le système mixte du droit privé écossais (transl. A. Szklanna). Varsovie: Liber, 2005. P. 23–24.

[185] *De Waal M. J.* The Core Elements of the Trust… P. 556; *Wilson W. A., Duncan A. G. M.* Op. cit. P. 15–18. — See: *Lepaulle P.* Civil law substitutes for trusts. P. 1137–1138.

[186] In Scotland since the Blank Bond and Trusts Act of 1696 (see today the Requirements of Writing (Scotland) Act 1995 (Wilson and Duncan 1995, 37–40); in South Africa section 2 of the Trust Property Control Act 1988 refers to a "trust instrument"; see, however: *Cameron E., De Waal M., Solomon P.* Honoré's South African Law of Trusts. P. 148–158.

[187] The rules of the land registers in Scotland may show the trustee as the legal owner as a trustee and usually do so, but this is not a strict requirement of law. In South Africa registration was the main aim of the Trust Property and Control Act 1988.

2b is the Dutch *bewind*.

It should come as no surprise that the English trust and the Roman *fiducia* are in the same category (1a). Equity created a difference between the two[188] that cannot be replicated in the modern civil law where the *ius commune* references have gone astray[189]. That is why Scotland and South Africa chose category 1b: a trustee has more than one patrimony, his own and then one for each trust of which he is the trustee[190]. Creditors must satisfy themselves with the patrimony to which their claims are related, not with the other patrimonies referred to the same owner.

It is not for the present writer to discuss points of law on which foreign scholars are agreed but it is perhaps apposite to mention that the wording of the South African statute of 1988: "Trust property shall not form part of the personal estate of the trustee" is no conclusive evidence of the patrimonial theory;[191] it would sit equally well in Québec. Not even the mention of article 2 of the Hague convention on trusts is conclusive: "the assets are not a part of the trustee's own estate" appears only in the English version; the French version simply has "les biens du trust ne font pas partie du patrimoine du trustee", probably thinking of the "patrimoine d'affectation".

The trustee as a disinterested owner evokes civilian notions such as the testamentary executor which characterize the trustee as an office-holder or the manager of a *bewind*, who belongs to the genus of guardians and tutors[192]; "office" is a term found in the Hague convention and in some statutes of the international model[193]: it has been suggested that it could be "a convenient bridge between common law trusts and the civil law"[194].

Both Scotland and South Africa would seem to have eventually rejected the analogies between *fideicommissum* and trusts and not to have drawn any inspiration from the Roman *heres fiduciarius*[195]. The Roman law texts, and in particular the passage from Iavolenus in D. 36.1.48 (46), were well-known[196] but the *ius commune* elaboration of them was not. As mentioned above, there had not been an active civil law doctrine in the Netherlands after the codification and Scotland's interest in the *ius commune* had sharply declined at about the same time, subsequently shown by that Scots law students towards Germa-

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[188] *Honoré T.* In Fitting Trusts into Civil Law Jurisdiction. P. 10.

[189] *Merlin Ph. A.* Répertoire universel et raisonné de jurisprudence.

[190] *Reid K. G. C.* National Report for Scotland / Principles of European Trust Law / ed. by D. J. Hayton, S. C. J. J. Kortmann, H. L. E. Verhagen. Deventer: Kluwer Law International, 1999. P. 68–70; *Gretton G. L.* Trusts without Equity. P. 608–617. — Enounced this theory for Scotland with admirable clarity, see also: *Reid K. G. C.* Patrimony not Equity: The Trust in Scotland / Trusts and Patrimonies / ed. by R. Valsan. Edinburgh: Edinburgh University Press. 2015. P. 110–126. — For South Africa see: *Cameron E., De Waal M., Solomon P.* Honoré's South African Law of Trusts. P. 337–340.

[191] *De Waal M. J.* The Core Elements of the Trust… 559–565. — Takes a different position.

[192] *Zimmermann R.* Heres fiduciarius? Rise and Fall of the Testamentary Executor / Itinera fiduciae: Trust and Treuhand in Historical Perspective / ed. by R. Helmholz, R. Zimmermann, Berlin: Duncker & Humblot. 1998. P. 275–288. — The earliest Scottish statute on trust matters (1617) concerned the executors of wills, see: *Smith T. B.* Studies Critical and Comparative. Edinburgh: W. Green & Son. 1962. P. 201–207. — And more generally: *Anton A. E.* Medieval Scottish Executors and the Courts Spiritual // Juridical Review. 1955. Vol. 67, no. 2. P. 129–154. — For South Africa see: *Cameron E., De Waal M., Solomon P.* Honoré's South African Law of Trusts. P. 69–71.

[193] Hague convention, article 8 (a): "the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee"; "the offices of executor, administrator, trustee, receiver" (Hong Kong, Trustee Ordinance, as amended 2013, sect. 81.1.a); Belize, Trusts Act 1992 (2000 rev.), sect. 16 (1); "any trustee for the time being in office" (British Virgin Islands, Trustee Ordinance, sect. 101.3); see also Jersey, Trusts (Jersey) Law 1984, art. 14 (1) with reference to enforcers.

[194] *Honoré T.* In Fitting Trusts into Civil Law Jurisdiction. P. 6–7.

[195] On which see: *Bertoldi F.* L'*heres fiduciarius* in una prospettiva storico-comparatistica // Studi Urbinati. 2015. Vol. 66. P. 157–235.

[196] Iavolenus' passage is cited by: *Cameron E., De Waal M., Solomon P.* Honoré's South African Law of Trusts. P. 73.

ny[197] did not lead them "to grasp, seize upon, absorb, what was happening in 19th century German scholarship and seek to apply it at home"[198].

As a consequence, the fusion between property and obligation that supported the *fideicommissum confidentiale*, a *ius commune* innovation that was absorbed by equity judges in England and promptly dressed with English robes[199], eluded them.

Conclusions

Many more (non-common law) legal systems have come to grips with trusts than those rapidly reviewed in this paper, at the close of which one wonders why some civil law systems have introduced legal relationships in their statute books that, once dissected into their component rules, yield the same rules that a dissection of the common law trust would yield while others are still labouring amid internal controversies and external criticism.

The first and immediate answer may be "conceptualism", a typical illness of the civil law, but a second answer comes to the mind of comparative lawyers who, as such, have no homeland to defend: "ignorance" or, in an afterthought, "indolent ignorance". Doctoral dissertations and scholarly research work on trusts have now become somewhat common but they were almost non-existent until twenty years ago and academic research has gone so far as to discuss the possibility of a transnational fiduciary law[200]. One can be more precise than that and measure the academic involvement in Québec or Louisiana or France when legislation was being envisaged there and the current academic involvement in Scotland and South Africa. Not to speak of English academics whose interest in a dialogue with non-common lawyers in trust matters is barely above zero[201].

Comparatists should honour their calling and inspire a debate well beyond a *compte-rendu*, as this essay basically is, and set as its object a fragmentation of the conceptual issues into dollops, thus allowing the functional themes to find their most apt solutions unhindered by unnecessary conceptual constraints.

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[197] *Rodger A.* Scottish Advocates in the Nineteenth Century: The German Connection // Law Quarterly Review. 1994. Vol. 110, no. 4. P. 563–591; *Reid K. G. C.* Scottish Law Students in Germany in the 19th Century and Their Influence on Legal Culture in Scotland / Iurium Itinera / ed. by N. Jansen, S. Meier. Tübingen: Mohr Siebeckhas. 2022. P. 195–220. — Ascertained that the period of stay in Germany was only one or two semesters.

[198] *Gretton G. L.* Scots Private Law. Structure, Property and the Pandectist Deficit // *Iurium Itinera* / ed. by N. Jansen, S. Meier. Tübingen: Mohr Siebeck. 2022. P. 53.

[199] *Lupoi M.* Trust and Confidence // Law Quarterly Review. 2009. Vol. 125, no. 4. P. 253–287.

[200] *Kuntz T.* Transnational Fiduciary Law: Spaces and Elements // UC Irvine Journal of International, Transnational, and Comparative Law. 2020. № 5. P. 47–84.

[201] I showed elsewhere that they were so little interested during the Hague conference on trusts that they forgot to include the "declaration of trust" in the definition of "trust" in article 2.

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Received: August 13, 2022
Accepted: November 21, 2022

Трасты в смешанных юрисдикциях

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Для цитирования: *Lupoi M.* Trusts in mixed jurisdictions // Правоведение. 2023. Т. 67, № 1. С. 21–55. https://doi.org/10.21638/spbu25.2023.102

Закрытые правовые системы в современном мире ушли в прошлое, а «смешанные» правовые системы стали нормой. Это облегчило так называемые трансплантаты, но, вопреки широко распространенному мнению, правовые институты не могут быть трансплантированы. Совсем непригодно к трансплантации нормирование английского траста, поскольку оно не представляет собой систематизированный корпус норм. Британцы пытались издавать законы о трастах для своих колоний, например для Цейлона (современная Шри-Ланка), и поэтому были вынуждены прибегнуть к систематизации права трастов. Это привело к необходимости введения новых правовых концепций с непредсказуемыми последствиями. Волна законодательных актов на эту тему последовала за принятием Конвенции «О праве, применимом к трастам, и об их признании» на 15-й сессии Гаагской конференции по международному частному праву (1985). Она породила «международную модель» трастов, быстро ставшую излюбленным пристанищем богачей и сверхбогачей. В этом смысле остров Джерси на Нормандских островах стал ведущей юрисдикцией, а за ним последовали многие другие. Однако лишь после создания Международных финансовых центров в Персидском заливе, а затем и в Казахстане, где «законы Англии и Уэльса» принимаются в качестве источника права, а местные суды укомплектованы бывшими английскими судьями или по крайней мере юристами, сформировавшимися в традиции «общего права», стало возможным утверждать, что произошла надлежащая трансплантация английского траста. Совершенно иной правовой контекст в иных уголках мира стал свидетелем попыток создания имитаций траста, которым предстояло вступить

в противоречие с устоявшимися концептуальными установками континентального права, не допускающими принадлежности лицу более чем одного имущественного комплекса или обособления активов внутри имущества одного лица. Так, Франция в 2022 г. постановила, что каждый бизнесмен автоматически признается собственником двух обособленных имущественных комплексов, что открывает путь к радикальному переосмыслению базовых понятий гражданского права. Квебек и Луизиана обычно рассматриваются в качестве примеров «континентального» законодательства о трастах, однако Квебек придерживается своей собственной идеи о том, что активы, являющиеся объектом фидуции, никому не принадлежат, в то время как Трастовый кодекс Луизианы представляет собой искусную смесь «континентального» права и элементов «общего права», основанную на знакомом цивилистической традиции понятии «фидуциар». Затем в статье рассматриваются Люксембург, Франция и другие страны «континентального» права. Далее фокус внимания смещается в сторону Южной Африки и Шотландии — двух стран, разделявших общее прошлое в виде общеевропейского *ius commune* и имеющих общее настоящее в том смысле, что они обе относятся к той культурной линии, которой свойственно давать ответы на актуальные вопросы, опираясь на римское право. Теперь обе они решают проблему обособленности переданного в доверительную собственность имущества, утверждая, что у трасти имеется в собственности более одного обособленного имущественного комплекса, а именно его собственное имущество, а также столько остальных обособленных имуществ, для скольких трастов он назначен трасти.

Ключевые слова: трасты, континентальное право, общее право, смешанные юрисдикции, финансовые центры, трансплантаты.

Статья поступила в редакцию 13 августа 2022 г.
Рекомендована к печати 21 ноября 2022 г.

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