ATTEMPTS AT ADOPTION OF THE ANGLO-SAXON TRUST[1]

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In the new Hungarian Civil Code, the fiduciary property management contract was introduced, which has no antecedents in the Hungarian law. In connection with the new type of contract, the question may arise, as to how an Anglo-Saxon legal instrument can be part of a Roman law based legal system. The subject of the present study might also be interesting, since at the end of the 20th century and the beginning of the 21st century very similar legal institutions to the trust became a part of several mixed and civil law systems.

It is very important, during the examination of the adoption of the trust, in which different legal constructions affected its emergence, to examine whether there are any specific elements of this legal instrument which stem from other legal systems. The different views that have emerged in the jurisprudence, and the solutions from the legal practice and legislature shall be examined with regard to the adoption of the trust, or constructions similar to the trust after the examination of the previous scope of the question above.

1. Development of the trust

The trust came into existence regarding the specifics of the Anglo-Saxon property law system and the legal practice of the Medieval *use*.[2] The determinative characteristic of the legal relationship was that the owners entrusted ownership of their real property to their trustee (feoffee). A

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2 "If we were asked what is the greatest and most distinctive achievement performed by Englishmen on the field of jurisprudence I cannot think that we should have any better answer to give that his, namely the development from century to century of the Trust idea." F. W. Maitland, *Selected Essays* (1936 Cambridge) 129.

trust is a confidence reposed either expressly or impliedly in a person (called the trustee) for the benefit of another (called the cestui que trust, or beneficiary). This legal construction was very beneficial from different aspects, targeted the evasion of feudal burdens, the evasion of testamentary dispositions, and secured the property of that squire who went on the Crusades, or secured the assets for the Franciscan monks for their operation next to their vow of poverty.[3]

Regarding use, the feoffe became owner under the common law while the beneficiary has only the right to claim the fulfilment of the undertakings of the trustee which cannot be enforced by the common law courts. Next, to the common law the equity gave a possibility for the trustee to fulfil his obligations. The Chancellor, the holder of the king's conscience, gave a protection to the damaged beneficiary bearing in mind the aspects of equity (*conscience*) and natural fairness (*natural justice*), so that on the basis of equity, and from the use, the beneficiary's rights were acknowledged.

To curb the anti-feudal institution of the use, in 1535, Henry VIII – with the active collaboration of Cromwell[4] – passed the Statute of Uses through the English parliament Henry VIII upheld the applicability of the use as trust in the English legal system.[5] The application of the trust expands to almost all parts of life. Majo the Australian judge determines that *„the trust does not have an exact and accepted definition."* This approach is widely known in the jurisprudence. The trust became a concurrency of the legal person, but in its different forms (*constructive*, *implied*, *charitable trust* etc.) the unjust enrichment, the quasi contract known in the civil

[3] Sir Edward Coke in Chudleigh's case (1954) 1 Co Rep 113b at 121b. G. Moffat, *Trusts Law. Text and Materials* (2005 Cambridge) 36. Similarly: "English jurists centuries ago suggested that the parents of the trust were fraud and fear and that the court of conscience was its nurse." Attorney-General v. Sands, Hardres 488, 491 (1669); A. M. Hess – G. G. Bogert – G. T. Bogert, *The Law of Trusts and Trustees. A Treatise Covering the Law Relating to Trusts and Allied Subjects Affecting Trust Creation and Administration with Forms* (2007 Eagan, Vol. I.) 19; A. W. Scott – W. F. Fratcher, *Scott on Trust. The Law of Trusts* (1987 Boston, Vol. I.) 7.

[4] Sir J. Baker, *The Oxford History of the Laws of England. Vol. VI. 1483–1558* (2003 Oxford, Vol. VI) 672.

[5] „[…] the gladsome light of jurisprudence has shone but dimly over trusts." J. Neil 'Trusts in England after the Statute of Uses: A View from the 16th Century' in: R. HEIMHOLZ – R. ZIMMERMANN (ed.), *Itinera Fiduciae. Trust and Treuhand in Historical Perspective* (1998 Berlin) 173.

law legal systems, to fulfil the function of foundation and other legal instruments.[6]

Neil Jones uses the witty comparison of the trust to a chameleon.[7] The trust has been compared to the sticky fingers of a child, which leave a mark everywhere.[8] Literature also contains very simple and comprehensive definitions, where, for example, the trust is defined as "an arrangement recognised by law under which one person holds property for the benefit of another".[9] Or: "A *trust* may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another."[10] In the definition of Lord Coke, a trust is "[a] confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, […]

6 "There are at least as many reasons for creating a trust as there are people in the world." A. Hudson: *Understanding Equity & Trusts* (2013 London) 29. See further A. H. Oosterhoff – R. Chambers – M. McInnes – L. Smith: *Oosterhoff on Trusts. Text, Commentary and Materials* (2004 Toronto) 23sk; R. M. Belle Antoine: *Trusts and Related Tax Issues in Offshore Financial Law* (2005 New York) 14sk. „The trust is the guardian angel of the Anglo-Saxon, accompanying him everywhere, impassively, from the cradle to the grave." D. Hayton 'Developing the Law of Trusts for the Twenty-first Century' (1990) 106 *The Law Quarterly Review* 104. This saying was probably taken over by Hayton from Pierre Lepaulle because LEPAULLE writes the followings: „Le trust est l'ange gardien de l'Anglo-Saxon, il l'accompagne partout, impassible, depuis son berceau jusqu'à sa tombe; […] il soutiendra sa vieillesse jusqu'à son dernier jour, puis il veillera au pied de son tombeau et étendra encore sur ses petit-enfants l'ombre légère de ses ailes". P. Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscal et en droit international* (1932 Paris) 114. Furthermore „It is sometimes said that the trust institution is as indispensable in the English legal life as afternoon tea is in the everyday life of the English people." M. Bogdan: *Comparative Law* (1994 Tano) 113.

7 Jones: *op. cit.* 176.

8 "The law of trusts is notoriously difficult to define because, like a child with sticky fingers, it leaves its imprint on a number of different areas ranging from wills and estates to divorce proceedings and pension schemes. What must be remembered, however, is that the law of trusts is primarily oriented toward the protection of beneficiaries, who are entitled to have the trust property administered in their best interest." Nolan v. Kerry (Canada) Inc., (2009) S.C.J. No. 39, 2009 SCC 39 at para. 186 (S.C.C.); M. E. Hoffstein 'Trust' in: *Halsbury's Laws of Canada: Transportation: Trust* (2011 Ontario) 499.

9 J. G. Riddal: *The Law of Trusts* (2002 London) 1.

10 Hess – Bogert – Bogert: *op. cit*. Vol. 1. 1skk.

for which *cestui que trust* has no remedy but by subpoena in Chancery."[11] A distinction is made, however, between legal institutions, where a party entrusts something to another (law of entrusting), and the law of trust.[12] In defining the trust, legal dictionaries principally focus on the legal relationship between the three persons who are parties to the trust.

2. Trust and similar legal instruments

In the jurisprudence, many approaches consider the existence of a trust only to be the result of the English jurisprudence. Other opinions consider different legal constructions which influence its existence as well. For instance, the Roman law also shows similar legal institutions to that of the trust, and there is no doubt that the ambiguity of the *ius civile* and the *ius praetorium* is very similar to the common law and equity coexistence known in the English legislation. Furthermore, the coexistence of the *dominium ex iure Quiritium* and the ownership of the praetor are remarkable in the rights of property.

2.1. Similar legal institutions in the Roman law

The word *fiducia* means trust, and defines a legal instrument known as early as the time of the Twelve Tables.[13] Fiduciary transfer of title was a known practice in Roman law, in the form of the *fiducia cum creditore* established by way of a *mancipatio*, where pledged property served as security for a loan between a creditor and a debtor, and was based on the *fiducia cum amico*, where the conveyance served the management of an

[11] E. Coke – C. Butler – F. Hargrave, *The First Part of the Institutes of the Laws of England (Commentary upon Littleton)* (1823 London, Vol. I.) 272b; K. Biedermann *Die Treuhänderschaft des liechtensteinischen Rechts, dargestellt an ihrem Vorbild, dem Trust des Common Law: Unter Berücksichtigung des Gesetzes betreffend das Treuunternehmen* (1981 Bern) 25skk.

[12] M. J. de Waal, 'Trust Law' in: J. M. SMITS (ed.), *Elgar Encyclopedia of Comparative Law* (2006 Cheltenham) 755.

[13] The fiducia probably existed at the time of the Twelve Tables, but it was granted legal protection only from the 2nd century BC. B. Noordraven, *Die Fiducia im römischen Recht* (1999 Amsterdam) 1.

asset.[14] The parties initially created a stipulation establishing the obligation, which was followed by the transfer of the property's ownership.[15] It is likely that the *fiducia cum amico*, introduced later, originally functioned also as a pledge, in which the property was transferred not to the creditor relating to the principal obligation, but rather to a third person, as pledgee, elected jointly by the parties.[16] It was also used for conveying gifts in the case of death.[17] Under a solemn, ceremonial transaction (*mancipatio*, possibly *in iure cessio*), the debtor transferred ownership of the pledged property to the creditor, and the parties agreed that the creditor would transfer back ownership of the pledged property to the debtor upon fulfilment of the principal obligation.[18] Thus, the transfer of property was bound to the restriction of ownership rights in a separate agreement, in the so-called *pactum fiduciae*. The fiducia contained two legal provisions: a right in rem, the transfer of ownership, according to which the fiduciary acquired ownership under civil law *(dominium ex iure Quiritium)*, and a right in personam, the separate agreement between the parties, which only had an internal effect. The in personam relationship consists of three elements: firstly, the agreement between the parties relating to the transfer of property; secondly, the defined obligations of the fiduciary; and thirdly, the definition of other special conditions and rules.[19]

Under the rules of civil procedure, no appropriate legal action existed to enforce the fiducia. The fiduciary acquired ownership under civil law, and thus the transferor could not exercise *legis actio sacramento* against him. According to late classic terminology, the binding agreement constituted

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[14] Gai. Inst. 2, 60. Visky argues that since the Twelve Tables does not mention the fiducia, it probably did not exist at the time. But he, too, agrees that it would not take long for it to appear. K. Visky, *Fiduciárius ügyletek* (1944 Miskolc) 7.

[15] Visky: *op. cit.* 7.

[16] Visky: *op. cit.* 8skk.

[17] Pap. D. 39, 6, 42; D. Johnston, 'Trusts and Trust-like Devices in Roman Law' in: R. HEIMHOLZ – R. ZIMMERMANN (ed.): op. cit. 52.

[18] A. Földi – G. Hamza, *A római jog története és institúciói* (2013 Budapest) 442. Initially, the use of the forfeiture clause, the *lex commissoria*, was permitted. Constantine I, however, abolished the clause, and it was substituted with the right of sale *(ius vendendi*, *ius distrahendi*, *impetratio domini)*. See T. G. Watkin, *An Historical Introduction to Modern Civil Law* (1999 Siydney) 268.

[19] Noordraven: *op. cit.* 125.

a *nudum pactum*, i.e. it was judicially unenforceable. Initially, the praetor granted *in factum actio* to enforce the fulfilment of the obligation. The enforceability of the *pactum fiduciae* was guaranteed only by the objective requirement of *bona fides*. Later, the praetor granted in personam action *(actio fiduciae)* for compliance with the *pactum fiduciae,*[20] which was also included in the Edictum perpetuum.[21] The fiducia did not explicitly serve property management purposes, but rather filled a transitional function.[22]

The development of the fiducia is linked to the long periods of absence of the *pater familias* (commerce, service in the legion etc.), wherein he transferred all of his property and powers over his family to a trustee, to be restored to him upon his return. Later this was applied not only to all property, but to individual assets as well. The fiducia also served other purposes. It was used for the freeing of a slave *(fiducia manumissionis causa)*, the emancipation and adoption of family children, and for *coemptio fiduciae causa*, *tutela fiduciaria* and *mortis causa donatio.* [23] The antecedent of the fiducia was the *testamentum per aes et libram*, as fiducia in case of death.[24]

The fiducia played in important role in the early 2nd century BC, during the Punic Wars. The smallholders would often continue military service and be absent from their farms for longer periods of time, and their families would often run into substantial debt. Sicilian cereal products flooded Rome and the local farmers were unable to compete with their prices. To avoid the sale of their land, the smallholders borrowed loans, and transferred ownership of the land, as security, to the creditor in the form of

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[20] The *actio fiduciae* as *actio in ius concepta* is known to have existed since the 1st century BC. Visky: *op. cit.* 12.

[21] O. Lenel, *Das edictum perpetuum: Ein Versuch zu seiner Wiederherstellung* (1907 Michigan) 291 (§ 107). Noordraven: *op. cit.* 139.

[22] This was equivalent to the so-called bare trust for conveyance, which did not allow for property management, but only for the transfer of property to third parties and of ownership. Johnston: *Trusts (op. cit.)* 52.

[23] Noordraven: *op. cit.* 42skk. In his decree issued between 177 and 180, Marcus Aurelius, for example, prescribed that if someone sells a slave for that slave to be freed after a given period, the slave will become free even if not freed by the buyer. See P. Oertmann, *Die Fiducia im römischen Privatrecht: Eine rechtsgeschichtliche Untersuchung* (1890 Berlin) 152skk.

[24] Noordraven: *op. cit.* 2skk.

a fiducia. The *actio fiduciae* was established as an action taken to reclaim the land transferred as security.[25]

On the basis of the fiducia, the debtor did hold a right in rem to the property. The fiducia, however, had already went into decline in the classical period; other forms of the pledge replaced the *fiducia cum creditore*, while the gratuitous *commodatum* and the *deposit* replaced the *fiducia cum amico*. The fiducia basically ceased to exist in the post-classical age; Justinian's codification does not even mention it.[26] Since Barthold Georg Niebuhr discovered the Institutes of Gaius only in 1816, in the chapter library of Verona, it probably had no direct effect on medieval English law.[27]

The development of the medieval fiducia dates back to the 14th century. It essentially rested on the foundations of Roman law, but showed major differences with the Roman fiducia.[28] As we know, the original texts of the *fiducia cum creditore* and *fiducia cum amico* were removed from the Corpus Iuris Civilis through the interpolation. The memory of the fiducia, however, did not pass after Justinian's codification, and it comprised part of the *ius commune*.[29] This may be attributable to the fact that in terms of form, the *fideicommissum* surviving in Justinian's codification was also a fiduciary transaction.[30]

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25 The development of the *actio fiduciae* is linked to the formal rules of procedure, probably to the time of the jurist Q. Mucius Scaevola (140-82 BC). Noordraven: *op. cit*. 8.

26 The Justinian interpolation weeded out the *fiducia cum amico* from the sources, leaving only sporadic traces. Johnston: *op. cit*. 46; Watkin: *op. cit.* 268. The interpolated Digesta sources are covered in detail in Noordraven: *op. cit.* 17skk; Oertmann: *op. cit.* 21skk.

27 Johnston: *Trusts (op. cit.)* 53.

28 M. Graziadei, 'Recognition of common law trusts in civil law jurisdictions under the Hague Trusts Convention with particular regard to the Italian experience' in L. SMITH, *Re-imagining the Trusts: Trusts in Civil Law* (2012 Cambridge) 331.

29 See C. Th. 5, 1, 3; 15, 14, 9; Boetius: Ad Ciceronis topica, 4, 10, 41; "Fiduciam accipit cuicumque res aliqua mancipatur, ut eam mancipanti remancipet; velut si quis tempus dubium timens amico potentiori fundum mancipet, ut ei, cum tempus quod suspectum est praeterierit, reddat. Haec mancipatio fiduciaria nominabatur, id circo quod restituendi fides interponitur." Graziadei: *op. cit.* 332.

30 Visky: *op. cit.* 13skk.

The origin of the *fideicommissum* can be traced to *ius civile*, where the Roman citizen *(cives)* was not permitted to designate a foreigner *(peregrinus, exiles)* as heir in his testament, and the application of *institutio heredis* or *legatum* was not possible, either.[31] To get around this obstacle, the Roman citizen formally designated another Roman citizen as their heir, on condition the heir is not allowed to keep the inheritance, but rather must transfer it to a *peregrinus*, or third person.[32]

Thus, under the entailment, the testator conferred rights on, commissioned *(committere)* an intermediary person – usually the heir – to act with honesty *(fides)* and pass the property to a third person.[33] Originally, the fiduciary had no legal obligation to pass on the entailed property. Although the entailment was bound to a superior moral obligation, it was not judicially enforceable.[34] The entailment was principally laid down in the testament, giving indication to the public of the provisions motivating the *fideicommissary* to execute the testament.

The *fideicommissum* established under the rule of Emperor Augustus was open to enforcement and litigation.[35] Initially the consul acted to this end, and then the *praetor fideicommissarius* was appointed to verify the execution of the *fideicommissum*.[36] The designation of unascertainable persons and posthumous children *(incertae personae*, *postumi)* as beneficiaries was permitted.[37]

The legal structure of the *fideicommissum* was tripartite. It involved the settlor, as testator, the trustee (heir), as fiduciary, and the beneficiary. Since the divisibility of ownership was unknown in Roman law, the fiduciary was the legally recognised, beneficial owner. In Roman law, the application of

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31 This was the so-called "deathbed *commendatio*". F. Schultz, *Classical Roman Law* (1951 Oxford) 312; Johnston: *Trusts (op. cit.)* 46.

32 H. R. Hahlo, 'The Trust in South Africa' (1961) 78 South African Law Journal 196.

33 Gai. Inst. 1, 248.

34 Johnston: *Trusts (op. cit.)* 42.

35 Iust. Inst. 2, 23, 1–12.

36 Iust. Inst. 2.23.1; Johnston: *Trusts (op. cit.)* 46.

37 W. W. Buckland – A. D. McNair, *Roman Law and Common Law. A Comparison in Outline* (1965 Cambridge) 173.

the *fideicommissum* in areas other than the law of succession is unknown. The indirect object of the *fideicommissum* could be money, real property, or personal property; the only restriction was that it should be inherited property. It follows then, that the *fideicommissum* was not appropriate for transactions of a commercial nature. It was similarly not used for the management of property for the benefit of a minor, or a mentally disabled person. Rather, the institutions of *tutela* and *cura* served such purpose.[38]

As another important rule of the *fideicommissum*, it could only be established for a very short period: the duration of the distribution and transfer of property to the person receiving it as entailment.[39] However, in many cases conditional conveyance was possible, or after a given period of time, it could also be bound to the death of the fiduciary *(cum morieris)*.[40] It was also possible to designate additional beneficiaries. Under such an arrangement, the first beneficiary could use the land during his lifetime, but he was not permitted to dispose of the land upon his death; he was obliged to use it in accordance with the will of the testator establishing the entailment.[41] As an important rule, the beneficiaries were required to be identified persons. Justinian restricted this right to the extent that the property could be bound by up to four generations.[42]

Roman law does not contain any rules on the specific obligations of the fiduciary relating to the management and preservation of property. Since Roman law did not recognise the category *dominus fiduciarius*, Johnston holds the view that the status of the fiduciary was equivalent to the owner. It follows that the beneficiary was not an owner, thus he was not entitled to take *rei vindicatio* action. His claim for the entailment, however, was not purely of in personam nature. The *fideicommissary* was entitled to a *missio in rem*, granted to him by the magistrate against the owner

38 Johnston: *Trusts (op. cit.)* 47skk.

39 I.e. this, too, was equivalent to the institution of the bare trust for conveyance. Johnston: *Trusts (op. cit.)* 48.

40 Gai. Inst. 2, 250. Pap. D. 35, 1, 102; Iav. D. 36, 1, 56; Johnston: *op. cit.* 48.

41 Scaev. D. p. 32, p. 38: "pater filium heredem praedia elienare seu pignori ponere prohibuerat sed conservari liberis ex iustis nutiis et ceteris cognatis fideicommiserat […]." Johnston: *Trusts (op. cit.)* 49.

42 Nov. 159 (AD 555).

and third persons, with the exception of action taken in good faith and against bona fide purchasers for value.[43] If the fiduciary became insolvent, the fideicommissary was ranked before other creditors with the right to assert claims against him. Justinian judged the *missio in rem* to be a *tenebrosissimus error*, and prohibited it; it was substituted by the *actio in rem.*[44] As a result, the fideicommissary acquired ownership upon the death of the testator, and was entitled to in rem action with respect to the entailed property. Under the rule of Emperor Justinian, the beneficiary *(fideicommissarius)* held a claim in rem. The *fideicommissum* was used to circumvent the rules of succession, to expand their strict limitations.[45]

In the case of the *fideicommissum*, there is certainly a case of divided ownership between the fideicommissary and the third person, but it merely constitutes a deferred division, which closely approximates the case of the passive trustee.[46] There are significant substantive differences between the *fideicommissum* and the trust. With respect to the differences between the *fideicommissum* and the trust, we should also be aware that the concept existing before Justinian was mainly known in Western Europe, while the legislation of the Corpus Iuris Civilis was known only in the Byzantine Empire.[47] A further important distinction is that the *fideicommissum* did not perform the management of property, but rather only in its transfer. Moreover, the institution of the *fideicommissum* is explicitly regulated under the law of succession; it could be established only by way of testament, while the trust would often involve a legal act inter vivos. In the case of the *fideicommissum*, if the property could not be distributed to the beneficiary, the fideicommissary could keep it, as he too commonly received part of the inheritance under another title. In the case of the use and the trust, two varying claims of ownership arose, which marks a major difference to the arrangement of the *fideicommissum*.[48]

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43 Pauli sententiae 4, 1, 15; Johnston: *Trusts (op. cit.)* 51.

44 C. 6, 43, 1 (AD 529); C. 6, 43, 3, 2 (AD 531); Johnston: *Trusts (op. cit.)* 51.

45 D. Johnston, *The Roman Law of Trusts* (1988 Oxford) 42; Johnston: *Trusts. (op. cit.)* 46. Book II, chapters XXIII and XXIV of the *Iustinianus Institutiones* regulate in detail the *fideicommissum.*

46 Buckland – McNair: *op. cit.* 84.

47 P. Vinogradoff, *Roman Law in Medieval Europe* (1929 Oxford) 17.

48 G. P. Verbit, *The Origins of The Trust* (2002 USA) 81skk.

The restriction to four generations, known from Justinian law, was generally applied in the Middle Ages as well. The institution of the entail developed in Spain, presumably as a result of Arab influence.[49]

2.2. The salmann

The Lex Salica of the 5th century had already regulated the legal instrument of the salmann. Holmes notes that the use originates from the institution of the *Salmann, Treuhand* in Germanic law, wherein someone transferred property to another person for a specific purpose, with an obligation of the transferee to fulfil such purpose.[50] Many researchers trace the Anglo-Saxon institution of the trust to, *inter alia*, the medieval Lombard salmann.[51]

The Roman *fideicommissum* was not known in early Germanic law, but a similar institution, the *affatomie*, fulfilled a similar function. Testamentary inheritance was not permitted in early Germanic law; it was initially substituted with adoption, then with the affatomie. Under the affatomie regulated by the Lex Salica, the future testator transferred his property to the salmann during his lifetime *(traditio cartae)*, instructing him, as appropriate, to pass it on to third persons upon his death. Thereafter the salmann returned possession of the property to the testator, so he could use it during his lifetime.[52]

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[49] K. Luig, 'Philipp Knipschildt und das Familienfideikommiß im Zeitalter des Usus modernus' in Heimholz – Zimmermann (ed.): *op. cit.* 368.

[50] O. W. Holmes, 'Early English Equity' in: S. J. FITZJAMES et al., *Essays in Anglo-American Legal History* (1907 Boston, Vol. II. 705sk); Jr. Szladits, *Az angol jogi trust-intézmény* (1939 Budapest) 6; T. F. T. Plucknett: *A Concise History of the Common Law* (1956 London) 575. This view remains authoritative in American literature: "The generally accepted view is that uses were modelled after the *treuhand* or *salman* developed under Germanic Law." Hess – Bogert – Bogert: *op. cit.* Vol. 1. 18.

[51] A. Nussbaum, 'Sociological and Comparative Aspects of the Trusts' (1938) 38 *Columbia Law Review* 408. Holmes specifically refers to this. W. S. Holdsworth, *A History of English Law* (1956 London, Vol. IV.) 410; J. B. Ames, 'The Origin of Uses and Trusts' (1908) 21 *Harvard Law Review* 263.

[52] This arrangement is very similar to the Roman *testamentum per aes et libram*, marking a parallel between the roles of the *familiae emptor* and the salmann. Hahlo: *op. cit.* 198.

In chapter 46 of the Lex Salica (c. 46, acfatmire), adoption (affatomie) is divided into three stages. The adopter convened the meeting *(mallus)*, where the adopter gave a stick *(festuca)* to a third person *(salmann)* (threw it into his lap). Simultaneously with the handover of the stick, the adopter expresses his wishes and handed over his property, or a part thereof, to the salmann. In the second stage, the salmann moved into the house of the adopter, that is, the property is transferred *(sessio triduana)*. He was required to stay in the house of the adopter for at least three days and receive at least three guests. The meeting certified such transfer of the property. In the closing stage, within twelve months, the salmann gave the stick to the heir at a meeting, in the presence of the king. As a result of the above procedure, the testator had transferred his property to the adoptee.[53]

The salmann was frequently employed in case of longer travels and for financial reasons. In Bavaria and Franconia, real property owners frequently transferred land to the salmann, which was chiefly attributable to the securing of title and a quasi-registration of titles. The employment of the salmann may also have been for political reasons.[54]

Schultze contests the notion that the salmann was bound by strict legal obligation to transfer the property to a third person.[55] Rather, Schultze qualified this arrangement to be conditional ownership *(resolutiv bedingtes Eigentum)*.[56] He maintains that the limited rights in rem of the trustee are key elements of the Lombard Treuhand.[57] In Schultze's explanation of the difference between the Lombard Treuhand and the Roman fiducia, the fiduciary acquires unlimited ownership in the case of the fiducia, which is restricted only in personam by the *pactum fidiciae*, (i.e. the restriction

[53] Verbit: *op. cit.* 97skk.

[54] Verbit: *op. cit.* 103.

[55] A. Schultze, *Die langobardische Treuhand und ihre Umbildung zur Testamentsvollstreckung* (1985 Breslau, 1895) 1sk.

[56] Visky defines the legal status of the salmann similarly. Visky: *op. cit.* 15. Maitland points to this as the difference between the salmann and the trust. F. W. Maitland, *State, Trust and Corporation* (ed. by D. Runciman – M. Ryan) (2003 Cambridge) 80.

[57] The trustee *(Treuhänder)* is a person exercising independent rights on condition that he does not exercise these for his own benefit ("jemanden, der Rechte als Eigenrechte empfangen hat mit der Bestimmung, sie nicht im eigenen Interesse zu gebrauchen"). Schultze: *op. cit.* 1skk.

has no in rem effect). In the case of the salmann, however, the earlier owner holds a right in rem in relation to the transferred property, which is also enforceable against third parties.[58] According to HOLDSWORTH, the salmann was a trusted hand *(manus fidelis, getreue Hand)*, presumably owing duties to the trust vested in him *(Vertrauen, fiducia)*, which he fulfilled accordingly.[59] SCHULTZE, however, argues that the transaction involving the transfer of ownership resulted *ab ovo* in conditional ownership in the case of the salmann, the acquisition of ownership bound to a condition precedent.[60] HOLMES, therefore, traces the origin of the institution of the use to the instrument of the salmann.[61] AMES points out that the beneficiary was not granted a right to action against the salmann if he failed to fulfil his obligation, that is, this arrangement varies from that of the use.[62] The salmann served as an interposition of faith, to whom the testator transferred his property, instructing him to pass the property to designated persons upon his death. Some argue that the salmann acted as a testamentary executor.[63]

BARTON admits that the use and the salmann do reveal many similarities, but instances of the salmann are very rare in medieval England.[64] There is no evidence that the salmann held any rights to property or ownership.[65] There are more similarities with respect to the testamentary executor,

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58 VISKY: *op. cit.* 16.

59 HOLDSWORTH: *op. cit.* Vol. IV. 411[3].

60 See H. BÖSCH, *Die liechtensteinische Treuhänderschaft zwischen trust und Treuhand. Eine rechtsdogmatische und -vergleichende Untersuchung aufgrund der Weisungs-Bestimmungen des Art. 918 liecht. PGR* (1995 Mauren) 272.

61 HOLDSWORTH: *op. cit.* 411. There are many similarities between the trust and the Treuhand. A. FÖLDI (ed.), *Összehasonlító jogtörténet* (2012 Budapest) 420.

62 J. B. AMES, 'The Origin of Uses and Trusts' (1908) 21 *Harvard Law Review* 265.

63 Medieval English law, however, did not permit testamentary disposal of a title to land. F. POLLOCK – F. W. MAITLAND, *The History of English Law. Before the Time of Edward I.* (1923 Cambridge, Vol. II.) 230.

64 "The points of resemblance between these two institutions are certainly striking enough, but the difficulty with this theory is that the conveyance of land to a *salman* does not seem to have been at all a usual form of disposition in the England of the early Middle Ages." J. L. BARTON: 'The Medieval Use' (1965) 81 *The Law Quarterly Review* 562.

65 "There is no evidence that they took any proprietary interest. The 1,354 documents in Birch's *Cartularium Saxonicum* provide one example of a transaction which might

yet the role of the executor gained prominence only when the church in England was granted general powers in testamentary affairs. The feoffor could not transfer the property to infants, as he did not possess *intellectus recipiendi et retinendi*, thus the transfer was made to a tutor or curator. The status of the tutor or curator, however, was not equivalent to that of the owner.[66]

Oliver Wendell Holmes holds the view that the uses of the feoffe fully corresponds to the institution of the salmann known in early Germanic law. English law does not rest on the foundations of Roman law, but rather shows signs of Frankish influence.[67] The institution of testamentary arrangement was not known in Germanic law, and the Franks introduced adoption for this purpose.

The term *salmann* appeared around 1108, and means a quasi-independent agent. The word salmann is not found in Anglo-Saxon law, thus general connections between Frankish and English law need to be examined to identify the points of connection.[68] Literature does not contain concrete explication of the influence of Germaniclaw, wich includes Frankish law on English law. The salmann, as the antecedent to the trust, is known to have fulfilled a function similar to that of the testamentary executor regulated in English law.[69] So far it has not been possible to evidence forms of interaction with the salmann and the Treuhand. The two legal arrangements, however, show significant similarities; the modern-day differences resulting from the trust's link to property law and the

be construed as a conveyance to a *salman* who is to manage the property in the owner's absence." Barton: *op cit.* 562.

66 "Seisin is therefore delivered to a *tutor* or *curator*, who will hold on the infant's behalf. The *tutor* or *curator* resembles a trustee at first sight, but his position is much closer to that of the guardian in socage, or even of the bailiff. The freehold is not in him, but in the infant, and he must answer for his administration in an action of account (Bracton calls *it an actio negotiorum gestorum*), which would never lie against a feoffe." Barton: *op. cit.* 563.

67 Holmes: *op. cit.* 162.

68 For details see Verbit: *op. cit.* 104skk.

69 Verbit admits that "this seems a persuasive argument, and has in fact become the prevailing view, it in no way leads to the conclusion that the Salman is the predecessor of the trustee as opposed to the executor." Verbit: *op. cit.* 113.

Treuhand's contractual instrument only surface in the contemporary development phase of law.[70]

2.3. The wakf

Verbit argues that Maitland was mistaken in claiming that the trust is an institution that does not exist in foreign law, because the Islamic *wakf* reveals major similarities to foreign laws, and does so 500 years before the emergence of the English trust.[71]

The institution of the *wakf* has very distinct roots in Islamic law, functioning as a combination of the trust, the family entail and the charitable foundation.[72] The Arab word "wakf" literally means the stoppage, immobilisation of something.[73] In Islam, the wakf signifies the care of Allah, with which he encourages the rich to offer some of their wealth to others.[74] The wakf is the most distinctive institution of Islamic private law, which cannot be traced to pre-Islamic customs in Arabia.[75] The settlor (wāqif) transfers ownership to God, and designates a trustee (mutawwalī, mutawilli), who manages the property for the benefit of the beneficiary (al-mawqūf alayh). In the Ottoman Empire, 3/4 of urban properties were disposed of under this arrangement.[76] The wakf is essentially a legal instrument (wakf khayri) similar to the charitable trust, but the type of wakf used for private purposes (wakf ahli) is usually distinguished in literature.[77] Verbit emphasises that ultimately, a charitable purpose must

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70 C. H. van Rhee, 'Trusts, trust-like Concepts and Ius Commune' in: J. M. MILO – J. M. SMITS (ED.)*: Trusts in Mixed Legal Systems* (2001 Nijmegen) 90.

71 Verbit: *op. cit.* 286.

72 Verbit: *op. cit.* 114.

73 J. Jany, *Klasszikus iszlám jog. Egy jogi kultúra természetrajza* (2006 Budapest) 398sk; A. Salamon – A. F. Munif, *Saría, Allah törvénye. Az iszlám jog különös világa* (2003 Budapest). The transliteration is from Arabic resulted in different versions, such as vakf or waqf.

74 Salamon – Munif: *op. cit.* 90.

75 Jany: *op. cit.* 399.

76 Plucknett: *op. cit.* 575.

77 Gy. Eörsi, *Összehasonlító polgári jog. Jogtípusok, jogcsoportok és a jogfejlődés útjai* (1975 Budapest) 418. Salamon – Munif: *op. cit.* 91. R. Charles describes the wakf, which was known as *habou* in the northern part of Africa, as "a gift of income

always exist in the case of the wakf.[78] The wakf was a combination of public and private law.

In Islamic law, the testator could only dispose of 1/3 of his property; the remaining 2/3 was inherited under the rules of intestate succession. The inter vivos conveyance of gifts by way of the wakf emerged in response to such rules.[79] A limitation did not apply to the wakf.

Verbit cites and discusses numerous sources that show a similarity to the trust, because this arrangement also involved conveyance from A to B for the benefit of C. Jany points out the strong resemblance of the wakf to the trust, but notes the particular rules that render the wakf a different legal institution.[80] The trustee *(mutawilli)* was appointed by the settlor. Any Muslim who was suitable and available for this position could be a trustee, but he mainly came from the settlor's family.[81] If there was a suitable person for this position in the family, the appointment of a third person was not permitted. If the settlor did not appoint a trustee by his death, such powers were conferred on the testamentary executor, or else on the cadi.[82] The mutawilli was authorised to designate the beneficiaries, particularly if they were poor. The mutawilli could also exercise discretionary power with respect to the distribution of property.

It is a matter of dispute whether the declaration of the settlor is sufficient for the wakf to take effect, or whether validity is also bound to the transfer of property.[83] The property provided (mawqūf) must be durable and

or fruit provided for the benefit of the beneficiary, to fulfil a gracious or generally useful purpose". R. Charles: *Le droit musulman* (1965 Paris) 80skk. H. P. Glenn, 'The Historical Origins of the Trust' in: A. M. RABELLO (ed.), *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (1997 Jerusalem) 754. See further Jany: *op. cit.* 400; A. Hofri-Winogradow, 'Express trusts in Israel/Palestine' in SMITH (ed.): *Re-imagining (op. cit.)* 85.

78 At the least the proceeds from the transferred property had to be spent on charitable causes. Verbit: *op. cit.* 127.

79 Verbit: *op. cit.* 124.

80 Jany: *op. cit.* 398.

81 Verbit: *op. cit.* 133. Jany: *op. cit.* 401.

82 Verbit: *op. cit.* 133. Hofri-Winogradow: *op. cit.* 86.

83 Jany: *op. cit.* 401.

generate profit. There is similarly no consensus as to whether the trustee also acquires ownership of the transferred property.[84]

For the duration of the wakf, the property could not be alienated or sold, only rented out for up to one year.[85] With the permission of the settlor, however, the property could be exchanged or modified. The mutawilli could encumber the trust property only with the permission of the cadi, unless the settlor gave his prior explicit consent. The interpretation of the wakf also comprised part of the regular duty of the cadi.[86] JANY summarises the activity of the mutawilli in six areas: The mutawilli has the right to build, preserve or rent out the property, to plant, collect and distribute income from the property, and to carry out the legal representation of the property.[87]

The wakf shows pronounced similarities to the trust, but there is no conclusive answer as to how it could have become known in England. With respect to points of connection, we know that Henry II maintained continuous contact with scholars who pursued activities in Arab speaking regions.[88] Adelard of Bath is known to be the first scholar of Arab subjects; he studied in Sicily and completed many translations. Daniel of Morley, Robert of Ketton and Henry of Blois also conveyed many Islamic doctrines to England.[89] To this day, however, there is no concrete evidence of the influence of the wakf, or even of Islam, on the development of the trust during the reign of Henry II.

There is the possibility that the institution of the wakf became known in England through the Templars. It is possible, even likely that the Templars were aware of the wakf, although related written documents have not

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84 For particular views on this question, see JANY: *op. cit.* 403.

85 A longer rental would have given the impression that the lessee is the owner. VERBIT: *op. cit.* 135.

86 VERBIT: *op. cit.* 137.

87 JANY: *op. cit.* 404.

88 In 1168, Henry II was seriously considering conversion to the Muslim faith in case the pope did not remove Thomas Becket from the diocese of Canterbury. Henry II, namely, had shown interest in Arab philosophy since childhood. VERBIT: *op. cit.* 150.

89 VERBIT: *op. cit.* 152skk.

been found. The ribats and the active international banking activity of the Templars, involving many Muslim customers, may also have played a role.[90] The soldiers of the Crusades, and their encounter with Middle Eastern culture and law, is not proof of their knowledge or adoption of the institution of the wakf. In the 14th century, landlords also began to resort to the device of the use, initially perhaps before their service in the Crusades.[91]

3. Adoption of the trust under the civil law systems

On the basis of the examination in the previous chapter, it can be presumed that the trust came into existence independently and irrespectively of the other similar ancient and Medieval legal institutions in England.[92] In the field of the private law, the separation of the common law and equity, the dual court system, the trustee's restricted property rights, and the beneficiary's rights exercised against the third parties are very different from the property concepts of the civil legal system.[93] These circumstances are seen as obstacles which caused the adaption of the trust under the civil law systems to be impossible.[94] However, the function of the trust in the economy indicated the civil law legislatures and lawyers made a similar legal construction.

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90 Verbit: *op. cit.* 222skk, 284skk.

91 Plucknett: *op. cit.* 576; Biancala believes this is the true antecedent to the use. J. Biancalana: *Medieval Use*s, in: Heimholz – Zimmermann (ed.): op. cit. 114.

92 Maitland wrote these lines on the trust to John Chipman Gray on 15 November 1903. In C. H. S. Fifoot (ed.), *The Letters of Frederic William Maitland* (1965) no. 366. Cited by: R. Helmholz – R. Zimmermann 'Views of Trust and Treuhand: An Introduction' in: Heimholz – Zimmermann (ed.): op. cit. 34.

93 „We may imagine an English lawyer who was unfamiliar with the outlines of foreign law taking up the new Civil Code of Germany. 'This', he would say, 'seems a very admirable piece of work, worthy in every way of the high reputation of German jurists. But surely it is not a complete statement of German private law. Surely there is a large gap in it. I have looked for the Trust, but I cannot find it; and to omit the Trust is, I should have thought, almost as basis to omit Contract'. And then he would look at his book-shelves and would see stout volumes entitled 'Law of Trusts', and he would open his 'Reports' and would see trust everywhere, and he would remember how he was a trustee and how almost every man that he knew was a trustee". Maitland: *State (op. cit.)* 76.

94 „[…] is peculiar to English law; there is nothing comparable in other legal systems". A. H. Oosterhoff, *Cases and Materials on the Law of Trusts* (1987 Toronto) 3.

3.1. Sceptical views of the adoption of the trust

In terms of assessing the trust, Zweigert and Kötz accept Maitland's opinion that it is "… the most distinctive achievement of English lawyers".[95] Keeton believes it is "… the most characteristic product of the English legal genius",[96] while Buckland and McNair define it as "… the most original creation of English law".[97]

It is often difficult to determine the ways in which the Anglo-Saxon legal institution of the trust can be applied and recognised by the Continental legal systems.[98] "The adaptation of the principles, methods and practices of the English trust to the civil law is doubtless one of the most interesting events in the history of law," writes Alfaro.[99] According to Vera Bolgár, in the area of property law, the trust represents the sharpest difference between common law and civil law.[100] There is consensus among researchers of the topic that the trust has no equivalent in private law

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95 K. Zweigert – H. Kötz, *Introduction to Comparative Law* (1987 Oxford, 1987) 275.

96 In: Glenn: *op. cit.* 750.

97 Buckland – McNair: *op. cit.* 176.

98 "The valuable simplicity of the civil law system would be considerably diminished by the adoption of the trust concept, and this is particularly true if we remember that a nation can borrow a foreign legal concept, but cannot borrow a tradition of centuries. Without such a tradition the flexibility and 'evasiveness' of trust would be more dangerous than in the countries of its origin." Nussbaum: *op. cit.* 420.

99 R. J. Alfaro, 'The Trust and the Civil Law with Special Reference to Panama' (1951) 33:3–4 *Journal of Comparative Legislation and International Law* 25.

100 "In the field of property, the trust furnishes a striking antinomy between the common law and the civil law." V. Bolgár, 'Why No Trusts in the Civil Law?' (1953) 2 *The American Journal of Comparative Law* 204. She also points out that regulations are more appropriate for people in states where mandatory legal norms are only minimally present. "For the present, experience points to the fact that people appear well satisfied to live and to work in regulated communities where the rules are not pressed upon them by arbitrary autocrats but are felt to be the outcome of a social process. Above all, in these communities they are free to travel and to move, and because their freedom is not delimited by political borders they can choose the conditions under which they want to work and to live." V. Bolgár, 'The Magic of Freedom' in: K. H. NADELMANN – A. T. von MEHREN – J. N. HAZARD (ed.), *XXth Century Comparative and Conflicts Law. Legal Essays in Honour of Hessel E. Yntema* (1961 Leyden) 462.

systems based on Roman law.[101] According to Sir Moris Amos, the trust is "a cuckoo in the nest of the Civil Law".[102] The idea of introducing the trust was not aligned with European policies of the 1930s.[103] With the introduction of limited liability companies, the Continental European legal systems provided a framework for business activities that were implemented through trusts in Anglo-Saxon countries.[104] The jurists of legal systems resting on the foundations of Roman law remained sceptical of this legal institution. Otto von Gierke said this to Maitland: "I don't understand your trust".[105] Professor Meiers of the University of Leyden directed an outburst against the trust.[106] Some argue that the adoption of the trust is not possible due to differences in the concepts of ownership, which render the understanding of this institution difficult for Continental

101 "One of the most shocking things to the lawyer with a common law training who comes in contact with the civil law is the failure of the latter to provide clear-cut, well-defined legal institution or technique suitable to achieve the purposes which are accomplished in the common law through the trust. The writer says 'clear-cut' institution or technique because […] the civil law does provide institutions and schemes through which substantially the same social ends may be accomplished." L. S. S. Vilella, 'The Problems of Trust Legislation in Civil Law Jurisdictions: The Law of Trusts in Puerto Rico' (1945) 19 *Tulane Law Review* 374.

102 M. Amos, 'The Common Law and the Civil Law in the British Commonwealth of Nations' (1937) 50 *Harvard Law Review* 1264.

103 "The trend on the continent is rather towards socialism, be it of the bolshevik or the fascist or the democratic type. Ridding the owner of his legal and social responsibilities by interposing a trustee as a shield is certainly not what is at present desired by European countries." Nussbaum: *op. cit.* 420.

104 Nussbaum: *op. cit.* 421.

105 F. W. Maitland, *Equity*: *A Course of Lectures* (2011 Cambridge) 23. Professor Battifol had a similar experience: "An American asked me once: 'How can you live without Trust?' The fact that we do live without Trusts, and it is clear that we are faced with one of the most remarkable of the divergences existing between the Anglo-Saxon systems and, I believe I am right in saying, all the Continental legal systems." H. Battifol, 'The Trust Problem as Seen by a French Lawyer' (1951) 33 *Journal of Comparative Legislation and International Law* 18.

106 Meiers writes the following on English property law, including the trust: "piles up outmoded conceptions which have become useless, and foolish fictions at which nobody will be more marvelling than the English themselves once they have them abolished". Meiers, *De Trustee in het Burgerlijk Recht*, *Weekblad voor Privatrecht: Notaris-Ambt and Registratie* (1927) 413; Nussbaum: *op. cit.* 429.

European jurists.[107] Others argue that the adoption of the trust is prevented by the rigidity of Continental private law systems.[108]

According to some opinions, legal institutions similar to the trust are also found in legal systems based on Roman law.[109] Others contend that the main obstacle to the adoption of the trust is that similar legal instruments of existing civil law institutions fulfil the function of the trust, therefore its introduction is essentially unnecessary.[110] Still others argue that civil law has no legal instrument that corresponds to the Anglo-Saxon trust.[111]

Banakas lists three essential factors that prevent the adoption of the institution of the trust – bearing the above defined basic characteristics – by civil law systems. The main factor is the *numerus clausus* of property rights.[112] Equity not only divides ownership, but converts it as well. Over

[107] "As soon as it is understood how limited the Romanist concept of ownership really is, then one can understand the trust. The trustee is an owner whose prerogatives are determined and may be limited by the instrument constituting the trust and by the rules of Equity developed by the Court of Chancery. […] The division of the owner's prerogatives, as it occurs in the trust, is not possible in Romanist law in which only specific, and very limited, fragmentations of ownership are admitted – and the disintegration, so to speak, or dismemberment of ownership along the lines of the trust is not one of those authorised by law." R. David – J. E. C. Brierley, *Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law* (1985 London) 351.

[108] "The reason is that they lack the ductility which characterizes the Anglo-American trust that may be employed to fulfil all the ends achieved by these techniques and others for which the civil law provides no technique at all." Vilella: *op. cit.* 381.

[109] "Staunch civilians claim that the trust (or at least one form of trust) has always existed in their system, which had roots in Roman law, was perpetuated through old customary law, and maintained in modern codifications." Y. Caron, 'The Trust in Quebec' (1980) *25 McGill Law Journal* 421.

[110] K. W. Ryan, *An Introduction to the Civil Law* (1962 Brisbane) 220.

[111] "In the present state of research, no single foreign source of the trust has been conclusively identified." Glenn: *op. cit.* 755.

[112] Banakas claims that the *numerus clausus* is a major obstacle. S. Banakas, 'Understanding Trusts: A Comparative View of Property Rights in Europe' (2006) 1 *InDret Revista Para el analisis de derecho* 6. Lupoi argues that the adoption of the trust in Italian law is unnecessary, as it can be applied through the recognition of foreign trusts, based on the Hague Convention. Luxembourg applies a similar approach, while in Switzerland, there is a more open treatment of the trust. Banakas: *op. cit.* 6. Hefti holds the view that the trust could be adopted through the extension of property rights.

the years, the ownership of the trustee diminished to a basic right of management and representation, which is not only less than ownership, but also a different right.[113]

Secondly, the publicity of property rights[114], and thirdly, the unity of ownership are both obstacles. The latter is particularly problematic, because the civil law systems follow the "one legal title to one thing" principle, and do not permit the limitation of ownership by time, either.[115] The introduction of the trust, as a right in rem, in civil law systems would completely transform the existing category of ownership.[116]

Bolgár argues that the main obstacle to the adoption of the trust is the indivisibility of ownership, on the one hand, and the *numerus clausus* of property rights in civil law, on the other.[117] In legal systems resting on the traditions of Roman law, a certain degree of duality of ownership may be observed in the case of the *dos* and the *peculium castrense*.[118] In Roman law, the *mancipatio familiae, fiducia, fideicommissum* and the *legatum per damnationem* were similar institutions.[119] The efforts of the glossarists led to the distinction between the *dominium directum* and *dominium utile*, which is similar to the difference between legal and equitable ownership. Bolgár believes that Grotius applied such distinction to define the same property as possibly owned simultaneously by two or more persons on the basis of identical or different rights.[120]

P. Hefti, 'Trusts and Their Treatment in the Civil Law' (1956) 5 *The American Journal of Comparative Law* 562.

113 Hefti: *op. cit.* 563. See also A. Gambaro, 'Trust in Continental Europe' in: A. M. RABELLO (ed.): op. cit. 788.

114 Banakas notes this to be a major obstacle, as it is not possible to establish an oral or secret trust, and the beneficiary is unable to take action against third parties purchasing for a value. Banakas: *op. cit.* 6.

115 Banakas: *op. cit.* 7.

116 Y. Emerich, '*The Civil Law Trust: A Modality of Ownership or an Interlude in Ownership?*' in: SMITH (ed.), *The Worlds of the Trust* (2013 New York) 40.

117 Bolgár: *Why (op. cit.)* 204. See S. van Erp, 'A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of a Future European Property Law' (2003) 7:2 *EJCL* 5sk, http://www.ejcl.org/72/art72-2.html.

118 Bolgár: *Why (op. cit.)* 206.

119 Bolgár: *(op. cit.)* 207.

120 Bolgár: *Why (op. cit.)* 207.

Banakas maintains that the adoption of the trust in civil law systems is ruled out for the reasons listed above.[121] The general prohibition of the *pactum commissorium* in civil law may be an additional reason.[122] Gambaro puts forth a similar view[123]. At the same time, there seems to be a "trust rush" in civil law systems, aimed at the adoption of the trust.[124] Another additional trend is visible, where the large gap between areas of law relating to *in rem* and *in personam* rights is narrowing.[125] The concept of ownership in Anglo-Saxon and civil systems of law varies significantly. In civil law systems, the entities do not own things (physical approach), but hold rights, which are over and tied to things (metaphysical approach).[126] Common law adopted the Janus-faced concept of an owner holding full legal title toward the outside, but holding only limited rights within his internal relationships. This is not possible in systems of civil law. This is also closely correlated with the fact that the right of the beneficiary does not compete with the right of the trustee, but rather is derived from it.[127]

Pascal, for example, explicitly rejects the adoption of the trust, because "… it simply does not fit into the symmetry of our legal system any more than an armature for an electronic motor would fit into a steam engine."[128]

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121 "In the light of the above, it is clear that the introduction of an unadultered version of the Anglo-American Trust in Civil law jurisdictions is impossible without a major overhaul of the dogmatic structure of their Property laws. Only watered-down variations may be possible, as shown not only by the example of the Netherlands in Europe, but also, jurisdictions of mixed Civil/Common law traditions, Mexico and developed countries in Asia. The Anglo-American Trust is the product not only of the unique historical evolution of Anglo-American law, but, also, the cultural and social ethos in the Anglo-American world that historically asserted the independence of private individual will against tight State control of social and personal affairs, to an extent far greater than in Civil law countries". Banakas: *op. cit.* 8.

122 A. Gambaro: *op. cit.* 791.

123 Gambaro: *op. cit.* 777skk.

124 Glenn: *op. cit.* 778.

125 T. Sárközy, *A szocializmus, a rendszerváltás és az újkapitalizmus gazdasági civiljoga 1945–2005* (2007 Budapest) 314.

126 P. Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property' in: SMITH (ed.), *The Worlds (op. cit.)* 315.

127 Matthews: *op. cit.* 317.

128 R. A. Pascal, '*Some ABC's about Trusts and Us'* (1952-53) 13 Louisiana Law Review 555; J. Chalmers, 'Ownership of Trust Property in Scotland and Louisiana'

Pascal argues that the trust is unnecessary in civil law systems, as the contract perfectly fulfils this function.

The arguments against the adoption of the trust are often made with reference to the "dark side of trust," referring to the circumvention of strict laws, taxes and other obligations.[129]

3.2. Views favouring the possibility of adopting the trust

In the legal literature of the early 19th century, several jurists of private law explored possible ways of applying the institution of the trust in civil law systems.[130] They assigned relevance to this question because they attributed to the trust a role in the acceleration of economic development in the Anglo-Saxon countries.[131] Along with companies, this legal institution, with origins in English feudal law, became one of the main engines of liberal-capitalist economies as well as in the United States.[132]

According to the approach of Francois Geny, two issues need to be addressed when adopting an institution of a foreign legal system. Firstly, there is "le donné", i.e. whether the given society is capable and willing to adopt the foreign institution, and secondly, there is "le construit", i.e. the method by which the foreign legal institution can be adapted to the legal

in: V. V. PALMER – E. C. REID*, Mixed Jurisdiction Compared: Private Law in Louisiana and Scotland* (2009 Edinburgh) 137.

129 H. L. E. Verhagen, 'Trusts in the Civil Law: Making Use of the Experience of 'Mixed' Jurisdictions' in: MILO – SMITS (ed.): op. cit. 99.

130 P. Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscal et en droit international* (1932 Paris); R. Franceschelli, *Il trust nel diritto inglese* (1935 Milano); C. Grasetti, 'Trust Anglo-sassone, proprietà e negozio fiduciario' (1936) *Rivista del diritto commerciale* 345. The Deutscher Juristentag put this question on its agenda in 1932, based on two legal expert opinions prepared by Alfred Friedmann and Haemmerle two years before. Verhandlungen des 36ten Deutschen Juristentages, 1930, 805 – 1140. See also W. Siebert, *Das rechtsgeschäftliche Treuhandverhältnis* (1933); F. Weiser, *Trusts on the Continent of Europe,* (1936 London); Meyers: *op. cit.* 413.

131 Nussbaum: *op. cit.* 408.

132 Nussbaum: *op. cit.* 413.

system of the given country, and whether there are any moral, political, economic or any other non-legal obstacles.[133]

John Minor Wisdom defines three different ways for adopting the trust into legal systems resting on the foundations of Roman law.[134] The first option is the drawing up of a similar legal institution through the extension of the existing institutions of civil law, or the revision of Roman law institutions. The second option is the integration of the rules of the Anglo-American trust in a civil law environment. The third option is the open adoption of the Anglo-American trust, together with its rules derived from common law and equity. The feasibility of the first option essentially relies upon the rules of the fiducia.[135] The application of the rules of the *fideicommissum* is possible only through reform, as it may only be established in the event of death.[136] There are also efforts aimed at the implementation of the second method.[137] The third method may be hindered by the lack of English language proficiency among jurists and an Anglo-American mode of legal thought.[138] Thus, the application of this method – called "capitulation" by Wisdom – only has a chance in a few countries, such as Scotland, South Africa and the state of Louisiana.[139] This essentially raises a practical question, which also has implications in international private law.

Alfaro points out that the differences between the legal systems of Roman origin and the Anglo-Saxon system are not as large as they may appear.

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133 Verhagen: *op. cit.* 93.

134 J. M. Wisdom, *A Trust Code for the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act* (1938) 13 *Tulane Law Review* 76sk; Vilella: *op. cit.* 381.

135 "The gist of the *fiducia* is that *A* transfers property to *B,* the fiduciary, who thereby becomes unrestricted owner and as such can do anything he likes with the property. At the same time, *B* undertakes *vis-à-vis* the transferor to use his full-fledged ownership in a certain way only. This is the '*pactum fiduciae'*." Weiser: *op. cit.* 23.

136 Vilella: *op. cit.* 383.

137 "Any civil law concept which might be used to explain the nature of the trust is pregnant with its own peculiar legal connotations and is likely to be followed by legal consequences which may or may not conform with the already well-developed principles of the Anglo-American trust." Vilella: *op. cit.* 385.

138 Vilella: *op. cit.* 386.

139 Vilella: *op. cit.* 386.

For example, the legal structure established in Panama, Mexico and Puerto Rico with the name *fideicomiso* corresponds to the Anglo-Saxon trust.[140]

In his thesis[141] written in 1919, and in a bill drafted by him, ALFARO drew up regulation corresponding to the English trust. The bill was enacted in 1925. ALFARO holds the view that the legal scheme in Panama is essentially perfectly suitable for the fulfilment of the purposes defined for the Anglo-Saxon trust.[142] LEPAULLE argues that the twin institution of the trust in civil law systems is the fiducia. WISDOM firmly criticises this view, as in the case of the fiducia, a right in rem does not arise for the person assuming the position of the beneficiary.[143]

HAYTON raises the question as to whether the trust resembles an untamed, rowdy wild horse that is let loose in civil law systems from the grasp of creditors, spouses, heirs, tax authorities and policemen who combat money laundering.[144] HAYTON believes it is possible to introduce the trust in systems of civil law.[145] HAYTON maintains that the best solution would be for legislation to grant independent protection for separated assets, because this would render other schemes unnecessary, and also improve cost effectiveness.[146]

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140 ALFARO: *The Trust (op. cit.)* 25skk.

141 ALFARO, *El Fidecomiso, estudio sobre la necesidad y conveniencia de introducir a la legislacin de los pueblos latinos unda institucion civil nueva, analoga al trust del derecho inglés* (1919 Panama).

142 "In Panama we have also begun to create trusts which have proved entirely successful. Indeed, our experience is that anything that can be done by trust in the Anglo-Saxon countries is feasible in civil law countries by application of the provisions of the Panama Trust Law." ALFARO: *The Trust (op. cit.)* 30.

143 WISDOM: *op. cit.* 79skk.

144 D. HAYTON, 'English Trusts and Their Commercial Counterparts in Continental Europe' in: D. HAYTON (ed.), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (2002 The Hague) 24.

145 HAYTON: *op. cit.* 25.

146 "Legislation creating such immunity for all segregated accounts would simplify and cheapen many commercial arrangements while facilitating more commercial transactions. Such general legislation would also seem to circumvent the need in may cases for special artificial legislation that treats the owner of pooled investments as a temporary owner (or trustee) for the benefit of the real co-owners (of beneficiaries)." HAYTON: *op. cit.* 42.

Continental European legal systems recognise neither the dual legal system (common law – equity), nor the divisibility of ownership under Anglo-Saxon law.[147] There are, however, areas of law where rights are divided in civil law systems, such as copyright, constituting a dualism of the author's rights *in personam* and *in rem*.[148]

The *numerus clausus* of property rights also poses an obstacle to the adoption of the trust, as the parties lack free manoeuvring room to establish new rights to immaterial things beyond what is permitted by law.[149] Bolgár argues that neither the principle of publicity, nor the *numerus clausus* of property rights should be an obstacle to the adoption of the trust in civil law systems.[150] Other authors share this view, because Anglo-Saxon law also regulates the *numerus clausus* of property rights, albeit in different cases.[151] The examples in Scotland and South Africa prove that the *numerus clausus* of property rights is not an obstacle to the

147 "… the civil law developed important taboos that would be violated by trust law rules of the form that evolved in England." H. Hansmann – U. Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis* (1998) 73 *New York University Law Review* 442.

148 Hansmann – Mattei: *op. cit.* 442.

149 "Although this theory was largely the product of the folklore and ideology of the French revolution and lacked a well articulated general rationable, it enjoyed tremendous success and continues to have strong influence on the civil law." Hansmann – Mattei: *op. cit.* 4442.

150 "The publicity of the official registers could serve to protect the beneficiary under a trust, as is indeed the case in Quebec and in Scotland. The *numerus clausus* rule, on the other hand, which has no apparent practical value, might well be left to the museum of *Begriffsjurisprudenz*. The same result might be reached by granting parties the same autonomy in the creation of real rights as in the creation of obligations. As this seems unlikely in the view of the departure from the classic concepts of liberalism with regard to individual freedom in contracting and the accentuation of legal positivism, legislature enlargement of the list of real rights to include trusts with *in rem* effects is indicated. Or, as has been suggested for Germany, the famous Article 137 of the BGB might be elaborated to provide for the Treuhänder rights of administration with *in rem* effects, subject to the *Vollrecht* of the settlor." Bolgár: *Why (op. cit.)* 214.

151 A. Fusaro, 'The Numerus Clausus of Property Rights' in: E. COOKE (ed.), *Modern Studies in Property Law* (2000 Oxford, Vol. 1. Property) 314. See also Ryan: *op. cit.* 221.

adoption of the trust.[152] In relation to the drafting of the legal background to the separation of property, the function of the trust may be fulfilled by a legal institution if the beneficiary only holds a right *in personam* against the trustee.[153]

Nolan argues that the parties are not permitted to freely assume rights *in rem* under Anglo-Saxon law, either, thus this should not be an obstacle to the adoption of the trust. In his view, the adoption of the trust in systems of civil law only requires the recognition of the right of the beneficiary, where this is an exclusive *in rem* (negative) right, by which he can prohibit, or at least limit all other beneficiaries from using and collecting profits from the trust property. The beneficiary should also hold the right to take action against a given group of third parties if the trust property is not used or transferred appropriately.[154]

At the present time, a growing number of authors hold the view that the adoption of the trust is possible in systems of civil law, if not in a form that is completely identical to the Anglo-Saxon legal scheme, but with the same function.[155] The mixed legal systems show different solutions. In Scotland and South Africa, four key components were necessary with respect to adoption a trustee in a fiduciary position: separation of the trustee's own property and the property he manages, a genuine *in rem* right is conferred on the beneficiary in case of the alienation of the trust property, and creation of a position for the trustee.[156] Maurizio Lupoi has a same approach complemented by such as the settlor does not have rights regarding the asset management.

The adoption of the ownership in accordance with the English approach is not essential for the introduction of the trust in civil law systems. In Mexico, Panama and Liechtenstein, for example, the entire legal environment was not changed for the application of the trust. The Scottish version of the trust is the result of natural development. Originally, the English

[152] Verhagen: *op. cit.* 103.
[153] Verhagen: *op. cit.* 103.
[154] R. C. Nolan, 'Equitable Property' (2006) 122 *The Law Quarterly Review* 262.
[155] Waal: *op. cit.* 756.
[156] Waal: *op. cit.* 757.

version of the trust was introduced in South Africa, but local legal practice substantially transformed it to enable adaptation to the institutions of civil law *(fideicommissum, stipulatio alteri)*. In other states, such as Louisiana and the province of Québec, the trust was introduced by legislative means.

Fratcher's definition draws a sharp line between the trust and trust-like legal institutions by approaching divided ownership as a conceptual component,[157] while Tony Honoré considers that in the case of introduction of the legal institution with similar function to the trust the priciples of property rights do not have to be modified.[158] Honoré does not consider it essential for the trustee to be the owner of the trust property in relation to the introduction, adoption of the trust.[159] He maintains it is sufficient for the trustee to keep the property under his supervision and management, and his legal title to the property is not essential. The trust may be owned by the trustee, beneficiary, a business association, or it may even have no owner. Honoré believes that adoption of separate legislation on equity is similarly not essential for the introduction of the trust.[160]

Gretton notes that although Honoré and Lupoi provide a detailed list of the essentials of the trust and of its concept, they do not list elements without which there is no trust.

I think that the distinction between common law and equity played a crucial role in the development of the trust, but the lack thereof does not substantially affect the viability of the adoption of the trust. With respect to the legal handling of the trustee's position as an office, in legal systems with uncodified laws, case law qualifies the trustee by analogy to the custodian or guardian, while systems with codified laws must enact separate laws on this.[161] In the case of the trustee, the separation of property is possible if the trustee is the owner of his own property, and of the trust

[157] See G. Gretton, 'Up there in the Begriffshimmel?' in: SMITH (ed.): *The Worlds (op. cit.)* 544.

[158] T. Honoré, 'Obstacles to the Reception of Trust Law? The Examples of South Africa and Scotland' in: RABELLO (ed.): op. cit. 807.

[159] T. Honoré: *Trusts: The Inessentials,* 5sk, http://users.ox.ac.uk/~alls0079/Burn.pdf.

[160] Honoré: *Trusts (op. cit.)* 5skk.

[161] This is the case, for example, in Liechtenstein, Québec, Ethiopia, Puerto Rico, Israel. Honoré: *Obstacles (op. cit.)* 808.

property, but in a different capacity.[162] The separation of property is not a novel device in civil law systems, either, but rather it is one of the most important principles in company law. Honoré argues that with respect to the equivalent of the Anglo-Saxon trust in civil law, it may be appropriate to apply the model of guardianship, grantingownership to the beneficiary, and limiting the right of the trustee to the management of the property.[163]

4. Attempts to the trust adoption, different constructions

The institution of the trust was adopted in the national laws of different countries in different periods and legal systems. The institution of the trust was introduced relatively quickly in countries with civil law and with mixed legal systems, such as the province of Québec, Liechtenstein, Japan, Panama, Puerto Rico, Mexico, Venezuela, Louisiana and Sri Lanka.[164] Alfaro reviewed regulations in ten countries, and from these set up three groups.[165] In the province of Québec, Scotland and South Africa, a broad interpretation of the trust was applied in order to integrate it with civil law institutions, particularly with regards to the agency and deposit. The rules of the Anglo-Saxon trust were introduced together with special laws in Louisiana, China, Japan and Liechtenstein. The new institution of fiduciary ownership was integrated with rules of civil law, by application of the rules of the *fideicommissum* in Panama, Mexico and Puerto Rico. Alfaro notes that there is a trend in some Latin American countries to adopt the instrument of the trust. In Argentina and Brazil, the use of intermediaries is regulated among rules relating to public lending *(leyes de debentures)*. In Colombia, Chile, Ecuador, Peru, Bolivia, El Salvador and Costa Rica, banking regulations permit banks to act as asset managers

[162] Honoré has an interesting observation: "But in England the separation is not total. The trust beneficiaries and other trust creditors can satisfy themselves from the trustee's personal assets. They are not confined to the trust assets, as they would be if there were a complete separation. In other words, the trustee does not enjoy limited liability against the trust beneficiaries and trust creditors. Neither, then, do the trustee's personal creditors." Honoré: *Obstacles (op. cit.)* 811.

[163] The Dutch *bewind*, for example, is a such a legal scheme. Honoré: *Obstacles (op. cit.)* 813.

[164] L. A. Sheridan, *Keaton and Sheridan's The Law of Trust,* (1993 Little London) 37.

[165] Alfaro: *The Trust (op. cit.)*. 30.

(comisiones de confianza), but in these cases, the settlor has the right to recover the property from them.[166]

Moreover, it is a very common opinion that there is a risk during the integration of the trust into the civil law legal systems that sui generis legal institution shall influence the other legal institutions.[167]

The adoption of the Anglo-Saxon trust in countries with Anglo-Saxon legal systems evolved in parallel with the development of English law. As a result, trust regulation has a more or less common core and legal practice based on similar case law in North America, Australia, New Zealand, Hong Kong, India, Malta, Cyprus, for example. In countries with civil law systems, the strengthening role of the trust in the economy prompted demand for the introduction of this legal instrument, or of regulation similar in function. Regulation of the trust became an inevitability in civil law countries that were under dominant English economic and political influence. The trust was thus adopted in countries with civil law or with mixed legal systems, in unique regulatory environments, such as Louisiana, Québec, South Africa and in some Central and South American countries (Panama, Mexico, Chile etc.). In contrast, European legal systems resting on the traditions of Roman law essentially created their own alternatives of the trust, or completely dismissed the institution of the trust (Germany, Austria, Switzerland etc.) in favour of establishing the practice of the fiduciary transfer of title without a legal background, and with private foundations. Others, by recognising the economic benefits of the trust, developed similar institutions, such as those advanced by Liechtenstein in the early 20th century. General economic demand for the trust, or rather, for the regulation of institutions fulfilling its function in part or in whole is, however, very solid. In Asia, the People's Republic of China, South Korea and Taiwan, following in the footsteps of Japan, also established the legal framework of property management in the second half of the 20th century. Legislation in European civil law countries is following this trend in the 21st century with legislators in France, Luxembourg, Russia, San Marino, the Czech Republic, Romania, Lithuania and Hungary also having drafted

166 Alfaro: *The Trust (op. cit.)*. 30.

167 A. H. Oosterhoff – R. Chambers – M. McInnes – L. Smith: *Oosterhoff on Trusts: Text, Commentary and Materials* (2004 Toronto) 42.

legislative backgrounds for property management. International model regulations and the Hague Convention contribute to this process. Italy may be added to this list of countries through the internal regulation of the trust, although this may not even be necessary due to the unique solution already applied in Italy.

The accelerating international trend underlying the spread and adoption of the trust in the second half of the 20th century and in the early 21st century is, however, misleading. The instruments applied in civil law systems – similar to the trust – implement the functions of the trust to a certain extent, but this is not equivalent to the adoption of the concept of dual ownership under Anglo-Saxon law. The dogmatic foundations of ownership derived from Roman law determine the private law of civil law countries to such an extent, that the different schemes of property management are not identical to the institution of the English trust. The biggest breakthrough among the different forms of regulation is the legislative regulation of the in rem (or quasi in rem) right of the beneficiary vis-á-vis third parties, which transforms the purely in personam right to the trust property into a right of an in rem nature. When taking this into account as well, we may conclude that today, two concepts of the trust are implemented: firstly, the trust in a broader sense, corresponding to the sum of different legal instruments that fulfil the functions of property management, and secondly, the trust in a narrow sense, i.e. the Anglo-Saxon trust, which is defined by equitable dual ownership.

In the following, I wish to provide an overview of the different legal solutions developed for and applied to the structure, and main functions of the legal relationship of the trust.

Dual ownership defined by legal and equitable title under English law is regarded as the core element of the trust. This model is applied in the private law systems of countries with Anglo-Saxon legal foundations, such as, *inter alia*, the United States (except for Louisiana), Canada (except for the province of Québec), Australia and New Zealand. In terms of ownership, instruments similar to the trust may be divided into different groups, based on the given applicable regulation.

4.1. The settlor remains the owner

In Liechtenstein, the legal relationship of property management is similar to the German instrument (Treugeber – Treuhänder, Salmann – Begünstigter). Pursuant to PGR Art. 897, the settlor turns the trust property over ("zuwendet") to the trustee, that is, it is not essential to transfer ownership; it is sufficient to allow the trustee to dispose of the trust property in accordance with the contract *(als selbständiger Rechtsträger)*.

Legislation relating to property management was drawn up in the 1920s in Liechtenstein[168] for the principal purpose of establishing a favourable legal background for foreign capital.[169] The institution of the family foundation fulfils a similar property management function.[170] The method in Liechtenstein is a combination of the German Treuhand and the English trust; it is mainly regulated under the rules of agency, but with a limitation of the settlor's right of instruction.[171] There is also debate in literature as to whether Anglo-Saxon regulation was simply adopted, or Liechtenstein implemented a combination of German Treuhand traditions and the rules of the English trust.[172]

Israeli regulation (Trust Law of 1979) does not require the settlor to transfer ownership of the trust property to the trustee, and the beneficiary does not hold a right in rem to the trust property. I have to note that, in the practice of Liechtenstein and Israel it is quite common to transfer the assets to be managed to the ownership of the trustee.

The first part of the Russian civil code entered into force on 1 January 1995.[173] Pursuant to Art. 209(4), allows that legal title may be transferred

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168 J. Garrigues, 'The Law of Trusts' (1953) 2 *American Journal of Comparative Law* 31.

169 Liechtensteinisches Landesgesetzblatt (1928) n. 6.

170 B. B. Güggi, *The Family Foundation under Liechtenstein Law* (1997 Vaduz) 4sk.

171 Garrigues: *op. Cit.* 31.

172 K. Moosmann, *Der angelsächsische Trust und die Liechtensteinische Treuhänderschaft unter besonderer Berücksichtigung des wirtschaftlich Begünstigten. Eine rechtsvergleichende Studie mit Erkenntnissen für das Schweizer Treuhandrecht* (1999 Zürich) 160sk; H. Bösch: *op. cit.* 246skk.

173 Sobranie zakonodatel'stva RF 1994 No. 32 item 3301.

to someone else for the purpose of property management (doveritel'noe upravlenie).[174] The second part of the Russian civil code entered into force on 1 March 1996. Chapter 53 regulates property management (doveritel'noe upravlenie).[175] Pursuant to Art. 1012 of the Russian civil code, under the agreement between the parties, one party (settlor) transfers the property to the other party (trustee) for a fixed period, and the other party undertakes to manage the property for the benefit of the settlor or a beneficiary designated by him. The transfer of property does not extend to the transfer of legal title to the property.[176] Thus, under the new regulation, the settlor retains legal title to the trust property, while the trustee only acquires the right to manage the property. The trustee carries out his duties for remuneration, but is not entitled to profits from the trust property. The position of trustee may only be filled by a businessman (predprinimatel') or commercial company. Natural persons may manage property only in the case of trusts established by law (e.g. guardianship, custodianship). Property management includes assets and securities; the management of cash does not fall within this scope. The trustee is required to indicate his legal status, e.g. with the abbreviation "D U", on contracts relating to the trust property. The property management contract has a maximum duration of five years.

Louisiana – resting on the legal traditions of France – was unable to resist the adoption of the Anglo-Saxon legal institution in some form. This is chiefly attributable to economic reasons, because in other states of the United States, the wealthier members of society invested their property in trusts.[177] The Trust Estates Act of 1920 only contained one introductory part and eight sections and the law maximised the duration of the trust at

[174] The earlier term "trust owner" was replaced with "trust manager" (doveritel'nyi upravliaiushchii), which is associated with agency, representation. E. Reid, 'The Law of Trusts in Russia' (1998) 24 *Review of Central and East European Law* 48.

[175] Sobranie zakonodatel'stva RF 1996 No. 5 item 410.

[176] Z. E. Benevolenskaya, 'Trust Management as a Legal Form of Managing State Property in Russia' (2010) 35 *Review of Central and East European Law* 68skk. Hamza draws a parallel between this arrangement and regulation in Louisiana. G. Hamza, *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján* (2002 Budapest) 237.

[177] E. Nabors, 'The Shortcomings of Louisiana Trust Estates Act and Some of the Problems of Drafting Trust Instruments Thereunder' (1939) 13 *Tulane Law Review*

ten years from the death of the settlor, or in the case of a minor, from the minor's legal age.[178] The constitution of 1921 set out a separate provision prohibiting the legislature from introducing the institutions of pupillary substitution, the *fideicommissum* and the trust, with the exception of trusts whose duration is in compliance with the rules of the act of 1920. The politically motivated law of 1935 repealed the Trust Estates Act. Thereafter the Louisiana Bankers' Association submitted a petition to the governor,[179] which resulted in the adoption of the Louisiana Estates Act of 1938.[180]

The regulation of Louisiana was essentially drafted by the Trust Division's Legislation Drafting Committee of the Louisiana Bankers' Association, based on three American models and one English model.[181] The law only recognises the express trust. The act of 1882 continued to regulate trusts established for educational, charitable and religious purposes.[182] In Louisiana, pursuant to the Louisiana Trust Code 1964 Art. 9:1731, the trustee holds a power of administrative disposition.[183] Under Art. 9:1781, the settlor is still deemed to be the true owner, irrespective whether the trustee acquired legal title.[184]

170; F. F. Stone, 'Trusts in Louisiana' (1952) 1 *The International and Comparative Law* Quarterly 368.

178 E. F. Martin, 'Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code' (1990) 50:3 *Louisiana Law Review* 508.

179 "[…] new and enlightened trust law which will encourage Louisiana wealth to stay at home and grant to Louisiana citizens within the limits of our Constitution the rights now enjoyed by the citizens of every other state." In: Stone: *op. cit.* 371.

180 Louisiana Act 81 of 1938. (Trust Estates Law of 1938). See Hess – Bogert – Bogert: *op. cit.* Vol. 1. 21skk. Wisdom: *op. cit.* 87skk.

181 American sources: American Law Institute's Restatement of the Law of Trusts, Uniform Trusts Act, Uniform Principal and Income Act and the Model Spendthrift Trust Statute drawn up by Griswold of Harvard. Stone: *op. cit.* 372.

182 La. Acts 1882, No. 124., amended by La. Acts 1918. No. 72.

183 "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." Art. 9:1731. Louisiana Trust Code 1964.

184 "A trustee is a person to whom title to the trust property is transferred to be administered by him as a fiduciary." Art. 9:1781. Louisiana Trust Code 1964.

The Reynolds v. Reynolds case is an excellent example, illustrating the difference of opinion relating to the qualification of the beneficiary's rights.[185] In the relatively straightforward case, practically all possible interpretations were judged to be legitimate. Contrary judgements were handed down in the procedures of first and second instance, and the judges of the Louisiana Supreme Court were also divided over the case. From one point of view, upon establishment of the trust, the trustee became owner by acquiring title to the property, hence the beneficiary did not hold a right in rem to the property. From another point of view, the trustee acquired a title only for the purpose of managing the property, that is, he carries out a fiduciary function in the legal relationship, and the beneficiary is the ultimate owner. Still, from another point of view, the trustee may have acquired a title, but the beneficiary holds a separate right to the property. The majority of the acting council eventually came to the conclusion that the beneficiary holds some form of right to the trust property, however it is not a title, but rather a right extending to the profits of the trust property.[186] It follows that the benefits paid from the trust constitute the joint matrimonial property. This judgement essentially outlined an interpretation of the beneficiary's right as being a form of rights in others' ownership, which, however, breaches the principle of the numerus clausus of property rights.[187]

The judgement handed down in 2005 in the Bridges v. Autozone Properties, Inc. case, however, was of normative relevance. The Louisiana Supreme Court dispelled any doubts and declared that the legal title of the trustee is equivalent to undivided ownership within the meaning of civil law, and the beneficiary holds no legal title to the trust property during the effect of the trust.[188] It clearly follows from the judgement that the beneficiary only

185 388 So. 2d 1135 (La. 1980).

186 For a detailed analysis of the case, see D. W. Gruning, *Reception of the Trust in Louisiana: The Case of Reynolds v. Reynolds* (1982) 57 *Tulane Law Review* 101skk.

187 Gruning: *op. cit.* 115.

188 "Under Louisiana law, title to the trust property vests in the trustee alone, and a beneficiary has not title to or ownership interest in trust property, but only a civilian 'personal right' vis-à-vis the trustee, to claim whatever interest in the trust relationship the settlor has chosen to bestow." Bridges v. Autozone Properties, Inc., 900 So.2s at 796–797; E. E. Chase, *Trusts*. *Louisiana Civil Law Treatise* (2009 Danvers, Vol. XI.) 4.

holds rights in personam arising from a third party beneficiary contract *(stipulation pour autrui)*. On the other hand, the legal title of the trustee is undivided, but duties defined by the settlor in the deed of trust are attached to it. Thus, the trustee has the duty of managing the property he owns as a prudent investor for the benefit of the beneficiary. Legal practice in Louisiana did not adopt the divisibility of ownership based on the principle of the "bundle of sticks" under common law, and divided ownership was not considered essential for the application of the concept of the trust.[189]

The institution of the trust has also been introduced in some Asian countries,[190] such as Japan[191], South Korea[192], Taiwan[193] and China.[194] In all four countries, the rules of the trust essentially served as expansion of available financing structures, and the four countries show substantial similarities in respect of legislation.[195] The duality of ownership and the separation of property are essential elements of the trust. Without these, the trust would only amount to a contractual arrangement equivalent to an agency or mandate.[196] Regulations in Japan, South Korea and Taiwan clearly set out the obligation of the settlor to transfer the trust property to the trustee for a specific purpose.[197] Chinese regulation is different. It does not prescribe a transfer (zhuanyang); instead, it applies the "entrustment" (weituo) to the trustee, which is also a viable instrument in the case of a mandate or agency contract.[198] Ho points out that problems surface in the

189 Chase: *op. cit.* 33skk.

190 L. Ho, 'The Reception of Trust in Asia: Emerging Asian Principles of Trust?' (2004) *Singapore Journal of Legal Studies* 287.

191 The Trust Act, 1922, Law No. 512 of 1922, entered into force on 1 January 1923.

192 The Trust Law, 1961, entered into force in December 1962.

193 The Trust Law, 1996, Presidential Decree No. 8500017250, entered into force in January 1996.

194 Trust Law, 2001, Order No. 50 of the President of the People's Republic of China.

195 Ho: *op. cit.* 287.

196 Ho: *op. cit.* 291.

197 Taiwanese regulation relies heavily on earlier legislation in Japan and South Korea. Ho: *op. cit.* 294.

198 "… the settlor […] entrusts (weituo) the rights in his property to he trustee and the trustee manages or disposes of such property in his own name in accordance with the wishes of the settlor for the benefit of the beneficiary or for a specified objective." Ho: *op. cit.* 294.

process of interpreting whether the trustee becomes legal owner of the trust property under Chinese regulation.[199]

Under the regulations of all four countries, the trustee has the obligation to manage the trust property for the benefit of persons designated as beneficiaries. The relevant laws in neither of the Asian countries grant rights to either the settlor or the beneficiary against third parties. Regulation in Japan, South Korea and Taiwan provides for nullity if the trust property has been registered, and any share of the trust property is alienated

Similarly, the Georgian and Malta legislations are more like agency contracts than trusts. These types of legislations, which „cautiously" approach the structure of property rights of Anglo-Saxon models, do not actually solve it and do not adopt it. On the other hand, they do ensure the possibility that only the parties to the legal relationship can decide upon the ownership of the asset under management.

4.2. The trustee is the owner

The institution of the trust in Scottish law did not develop in tandem with English laws. There is consensus in literature that in Scottish law, the trust evolved independently of the development of English law.[200] While the recognition of the third party beneficiary contract was a very lengthy

[199] Ho: *op. cit.* 296.

[200] T. B. Smith, *Studies Critical and Comparative* (1962 Edinburgh) 207. With respect to a Scottish case in 1868, the English judge Lord Westbury said that "the doctrine of trusts has the same origin and rests on the same principles both in Scots and English law, and it is desirable that it should be developed to the same extent in both systems." Fleeming v Howden (1868) 6 M. (H.L.) 113, at 121. This view, however, is attributable more to the complacency of judges in the House of Lords, as it was easier for them to apply English law, than to identify derogations in Scottish law. G. L. Gretton, 'Scotland: The Evolution of the Trust in a Semi-Civilian System' in: HEIMHOLZ – ZIMMERMANN (ed.): op. cit. 512sk. This is supported by the observation of Lord Normand in 1955: "The history of the origin and development of the law of trusts in Scotland is not at all the same as the history of the origin and development of the law of trusts in England." Camille & Henry Dreyfus Foundation v. I.R.C (1956) A.C. 39, at 47.

process in English law,[201] and it deemed this arrangement feasible only by application of the trust, Scottish law applied the third party beneficiary contract *(pactum in favorem tertii)*. Although the institution of the trust in Scottish law evolved independently of English law, the development of English legal practice significantly influenced Scottish regulation. This impact, however, only materialised in the middle of the 19th century.[202] In his work entitled *Jus Feudale*, Craig discusses the trust, and compares it to the rules of the *fideicommissum* under the title "Fideicommissariae Conditiones".[203] Notwithstanding the similarities between the trust and the *fideicommissum*, it is not possible to conclude that the trust in Scottish law developed from this institution.[204] Stair argues that the trust was an undeveloped institution, revealing many uncertainties, positioned between the mandate and the deposit in terms of function.[205] Vera Bolgár shares this opinion.[206] In the opinion of Gretton, the fact that the term "trust" was known in 17th century Scotland does not mean that the trust was used as a legal instrument.[207] According to Gretton, the right of the beneficiary to the trust property is not a right in rem, but a right in personam, which, for some reason, appears to be a right in rem, and it is somewhere between the two.[208] The trust functioned as a special deposit to the extent that the trustee acquired legal title, and the beneficiary only held

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201 The Contracts (Rights of Third Parties) Act 1999 rendered the service arising from third party beneficiary contracts as actionable for third parties.

202 Gretton: *Scotland (op. cit.)* 511.

203 W. A. Wilson – A. G. M. Duncan: *Trusts, Trustees and Executors* (1995 Edinburgh) 3.

204 D. M. Walker, *Principles of Scottish Private Law* (1989 Oxford, Vol. IV.) 3.

205 D. M. Walker (ed.), *James, Viscount of Stair: The Institutions of the Law of Scotland* (1981 Edinburgh) 226skk; D. M. Walker, *A Legal History of Scotland* (1996–2004 Edinburgh, Vol. IV.) 822; Wilson – Duncan: *op. cit.* 13.

206 Bolgár argues that "[the] trust is construed as a combination of two contracts, deposit and mandate." Bolgár: *Why (op. cit.)* 209.

207 Gretton: *Scotland (op. cit.)*. 509.

208 "The right of beneficiaries do not behave like ordinary personal rights, but at the same time they do not behave like real rights either. Functionally, they are something in-between. But if the law is to aspire to coherence, matters cannot be left thus. Conceptual analysis is needed." G. L. Gretton, 'Trusts and Patrimony' in: H. L. MACQUEEN (ed.): *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996 Edinburgh) 184. "The right of a trust beneficiary is, in our law, not a real right which in some ways is like a personal right, but a personal right which in some ways is like a real right […] It is this quality that takes the trust wholly out

creditor's rights *(jus crediti)*.[209] Case law reflected this view.[210] According to the view which has been gaining dominance since1890, however, the trust does not qualify as a contractual relationship. Lord KINCAIRNEY noted that the trustee may have discretionary power, which is not granted in a contractual relationship.[211] MCLAREN emphasised that the trust is a quasi-contract, which is distinguishable from the mandate because the duties of the trustee vary from those of the mandatary, although they are similar.[212] Lord DUNEDIN also emphasised that the trust is not a combination of the mandate and the deposit, as the breach of trust is not deemed to be a breach of contract.[213] Following this train of thought, Lord KINNEAR emphasised that a fiduciary relationship is established between the parties, which is not deemed to be a contract.[214] WALKER argues that the trust is a tripartite, *sui generis* relationship, in which the obligations of the parties are independent of grounds for other obligations.[215] The decision of the House of Lords passed in 1976 changed the direction of the theoretical debate to the extent that the trust could also be established by unilateral representation.[216] WALTERS holds the view that the trust is a *sui generis* legal relationship, which is not entirely related to either the law of obligations, or to equitable ownership applied in English law.[217]

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of the law of obligations." G. L. GRETTON, 'Constructive Trusts and Insolvency' in: MILO – SMITS (ED.): op. cit. 287.

209 SMITH: *Studies (op. cit.)*. 207.

210 In the Cunighman v. Montgomerie [(1879) 6 R 1333, at p. 1337] case, Lord President INGLIS stated the following: "Scientifically considered, the position of Trustees under such a deed is this, that they are depositaries of the trust-estate and mandataries for its administration. This is a combination of two well-known contracts in the civil law, and the character and quality of these contracts is perfectly well fixed both in the civil law and in modern jurisprudence." WILSON – DUNCAN: *op. cit.* 14.

211 Carruthers v. Carruthers' Tr. (1895) 22 R. 775, at p. 778. WILSON – DUNCAN: *op. cit.* 14.

212 WILSON – DUNCAN: *op. cit.* 14.

213 Allen v. McCrombie's Trs. (1909 S.C. 710, at p. 716.). WILSON – DUNCAN: *op. cit.* 14.

214 WILSON – DUNCAN: *op. cit.* 14.

215 WALKER: *Principles (op. cit.)* Vol. IV. 3.

216 Allan's Trustees v. Lord Advocate 1971 S.C. (H.L.) 45, 53. HONORÉ: *Obstacles (op. cit.)*. 806.

217 D. B. WALTERS, 'Analogues of the Trust and of Its Constituents in French Law, Approached from the Standpoint of Scots and English Law' in: W. A. WILSON (ed.),

In Germany, Austria and Switzerland, the instrument of fiduciary property management, the Treuhand, is almost completely identical. Two legal acts are executed between the Treugeber (Fiduziant) and the Treuhänder: one with in rem effect and another with in personam effect. The Treugeber transfers the trust property to the Treuhänder, whereby the Treuhänder becomes owner (beneficiary of rights and claims), that is, he exercises all rights (Vollrecht) attached to the property vis-á-vis third parties. In addition, a contractual relationship is established between the Treugeber and the Treuhänder *(pactum fiduciae)*. The contract sets out the rights the Treuhänder may not exercise and the proprietary rights he is obliged to exercise in relation to his absolute ownership. Obviously, this second legal relationship remains on the level of in personam rights, that is, it has no effect vis-á-vis third parties. A beneficiary (Begünstigter) may be designated in the in personam legal act, for the benefit of whom the Treuhänder is obliged to manage the property. Under an alternative legal arrangement, the Treuhänder does not acquire ownership or absolute rights to the trust property, i.e. he only holds rights of representation. This arrangement, however, is simply regulated by the rules of agency.

To resolve this problem, Ferdinand Regelsberger drew up the doctrine of the fiduciary transaction established on Jhering's results,[218] which is based on the disparity between the purpose and the means.[219] The Germanic legal concept existed alongside the theory that rested on the foundations of Roman law, but was not applied in practice. As opposed to the contractual arrangement, the theory rooted in Germanic law granted in rem rights with respect to the entrusted property, that is, the settlor *(Treugeber)* could take action against anyone if the trustee *(Treuhänder)* sold the trust property in breach of the contract. Alfred Schultze distinguishes the fiducia and the Germanic legal scheme, as the fiducia has only in personam effect, while the Lombard Treuhand has also in rem effect. In the case of the fiducia, namely, the fiduciary acquires full ownership, but only a limited

Trusts and Trust-Like Devices (1981 London, United Kingdom Comparative Law Series Vol. 5.) 121.

[218] R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung I–III* (1858–66. Leipzig, Vol. III.) 290.

[219] F. Regelsberger, *Zwei Beiträge zur lehre von der Cession,* AcP 63. Bd. – Neue Folge 13. Bd. 173. H. Coing, *Europäisches Privatrecht II. 19. Jahrhundert: Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern* (1989 München, Vol. II.) 425.

right in rem in relation to the Lombard Treuhand. It follows that the two legal arrangements and modern fiduciary transactions are sub-types of the same category.[220] In the definition of Helmut Coing, it involves the transfer of property rights to someone else, based on loyalty *(Treue)* or trust *(Vertrauen)*, where the person acquiring the property manages the property legally, and before third parties, as his own and with such legal status, but he has the duty to exercise the rights arising from his legal status for the benefit of other persons, or for an objective purpose.[221]

There is no generally accepted definition of the Treuhand in German literature. In terms of its chief function, the owner of the property *(Treuhänder)* exercises ownership not for his own benefit.[222] The Treuhand evolved from two transactions: the property management agreement *(Treuhandabrede*, *pactum fiduciae)* and the transaction serving disposition of the property, commonly the transfer of ownership *(Verfügungsgeschäft)*. It should be noted that neither the BGB, nor the ABGB of Austria regulate the contract on the establishment of the Treuhand as an independent type of contract.[223]

As a major disadvantage of the German scheme compared to the trust, in the event of the unlawful alienation of the trust property, it does not allow the Treugeber or the beneficiary to enforce the restitution of the trust property against third party purchasers. In practice, other legal institutions are used to remedy this deficiency (prohibition of alienation and encumbrance,

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220 There are major differences in German literature in the approach to the Treuhand. S. Hofer, 'Treuhandtheorien in der deutschen Rechtswissenschaft des 19. Jahrhunderts' in: HEIMHOLZ – ZIMMERMANN (ed): op. cit. 397skk. For German research of the Treuhand, see J. Rückert, 'Kontinuität und Diskontinuität in der Treuhandforschung' in: HEIMHOLZ – ZIMMERMANN (ed.): op. cit. 417skk.

221 H. Coing, *Die Treuhand kraft privaten Rechtsgeschäfts* (1973 München) 1; K. O. Scherner, 'Formen der Treuhand im alten deutschen Recht' in: HEIMHOLZ – ZIMMERMANN (ed.): op. cit. 237.

222 R. C. Behnes, *Der Trust in Chinesischen Recht: Eine Darstellung des chinesischen Trustgesetzes von 2001 vor dem Hintergrund des englischen Trustrechts und des Rechts der finanziarischen Treuhand in Deutschland,* (2009 Berlin) 38; V. Thurnher, *Grundfragen des Treuhandswesens* (1994 Wien) 15.

223 Thurnher: *op. cit.* 21.

repurchase right, unjust enrichment), but the effectiveness and in rem nature of these is questionable.

In Swiss law, pursuant to OR Art. 35. Abs. 1, it is possible to declare a *mandatum post mortem*, that is, in the case of an agency contract otherwise bound to a person, the legal relationship of property management is maintained after the death of the Treugeber. It should be noted that trusts established abroad were not recognised in Switzerland for a long time. In the Harrison case, for example, the federal court deconstructed the trust to legal relationships regulated under Swiss law (agency, deposit etc.). Switzerland may soon recognise trusts established abroad after the country's ratification and implementation of the Hague Convention. This category includes Hungarian regulation as well, which is mainly based on German legal practice, and the trustee is deemed to be the legal owner. The Hungarian Civil Code, however, allows the settlor and trustee to enforce claims against third parties, which is similar to the rules of the trust.

Considering that the rules of agency are applied to the fiduciary transfer in case law, pursuant to Art. 404 OR, the settlor has the right to terminate the contract at any time;[224] such right may not be excluded, limited or waived.[225] The death, loss of the capacity to act or bankruptcy of the settlor or trustee also entails the termination of the contract, unless agreed otherwise between the parties. Swiss regulation is unique in permitting the trustee to act after the death of the principal *(mandatum post mortem)* under Art. 35 Abs. 1 OR.[226] Upon death of the trustee, the trust property is passed on to the heir of the trustee as inheritance. In case law, however, the share of the exiting trustee is added to the shares of the other trustees, if more than one trustee is engaged.[227]

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[224] Art. 404 Abs. 1. OR: "Der Auftrag kann von jedem Teile jederzeit widerrufen oder gekündigt werden."

[225] This rule is explicitly criticised in M. Eichner, *Die Rechtsstellung von Treugebern und Begünstigten aus Trust und Treuhand. Unter besonderer Berücksichtigung des Haager Trust Übereinkommens und des Aussonderungsanspruchs* (2007 Basel) 137skk; Thurnher: *op. cit.* 139skk.

[226] M. Seiler, *Trust und Treuhand im schweizerischen Recht unter besonderer Berücksichtigung der Rechtsstellung des Trustees* (2004 Zürich) 63.

[227] P. P. Supino, *Rechtsgestaltung mit Trust aus Schweizer Sicht* (1994 St. Gallen) 87.

Since the trustee holds full legal title, obviously the trust property will not constitute separate property. He is only obliged under contract to manage the property separately, but such an obligation does not apply to the relationship with third parties.[228] Where there is more than one trustee, rules of joint ownership and simple (civil law) company law are applicable to them.

Overall, the Swiss, the German and the Austrian fiduciary property management arrangements significantly vary from the institution of the trust. While the trust is the result of one legal act, the fiducia requires two legal acts. The English trust essentially establishes a right in rem, while the Swiss, the Geman and the Austrian fiducia are based only on the *pactum fiduciae* between the settlor and the trustee.[229] A major drawback of the Swiss arrangement is the lacking of separation of the trustee's own property *(Sondervermögen*, *patrimoine séparé)*, and the application of the rules of the agency contract, as these rules allow the termination of the contract by either party, at any time.[230]

In France, the act on the regulation of the *fiducie* was adopted in 2007; its rules are set out in sections 2011-2030 of the Code civil. French regulation requires the transfer of ownership of the trust property to the trustee on condition that the trustee manages the property separately.[231] The managed property must be registered. The duration of property management is maximised at 99 years, but it may be extended. Romanian regulation in

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228 Eichner: *op. cit.* 94skk.

229 Seiler: *op. cit.* 64skk.

230 L. Thévenoz, *Trust en Suisse: Adhésion à la Convention de la Haye sur les trusts et codificaton de la fiducie: Trust in Switzerland: Ratification of The Hague Convention on Trusts and Codification of Fiduciary Transfers* (2001 Zurich) 307sk; C. Weingart, *Anerkennung von Trusts und trustrechtlichen Entscheidungen in internationalen Verhältnis – unter besonderer Berücksichtigung schweizerischen Erb- und Familienrechts* (2010 Zürich) 32skk.

231 Pursuant to section 2011 of the Code civil, "La fiducie est l'opération par laquelle un ou plusieurs constituants transfèrent des biens, des droits ou des sûretés, ou un ensemble de biens, de droits ou de sûretés, présents ou futurs, à un ou plusieurs fiduciaires qui, les tenant séparés de leur patrimoine propre, agissent dans un but déterminé au profit d'un ou plusieurs bénéficiaires."

the civil code, for example, is essentially based on the French regulatory model.

Under Luxembourgian law, the fiducie may only be applied within a narrow scope, in the financial sector. The position of the trustee may only be filled by a financial service provider, who is obviously subject to the laws governing the financial sector.

The introduction of a national version of the trust in Panama in 1925 was a defining event. The legal instrument adopted in Panama was called *el nuevo fidecomiso*; the legal relationship was established under the rules of entailment. With regard to the legal status of the parties, the trustee (fiduciario) acquired ownership, but he had the duty to exercise such right in the framework of an irrevocable agency. It follows that neither the settlor, nor the beneficiaries held a right in rem to the trust property. Puerto Rico, Mexico, Chile and Venezuela adopted Panamanian legislation with some amendments.

4.3. The beneficiary is the owner

The institution of the trust has not been introduced in the Netherlands, although initiatives were taken to this end in the drafting process of the new Dutch civil code. The *bewind (bewindhebber)* is a unique institution of Roman-Dutch law. In the case of the Dutch bewind, under the provisions laid down by the settlor, the beneficiary *(bewindgoederen)* acquires ownership of the property, but the trustee *(bewindgoederen)* has the right and obligation to manage the property. This legal instrument creates a legal structure similar to the institution of guardianship and custodianship.

4.4. South Africa – intermediate solution

The uniformity of ownership is recognised in South African law, but the establishment of rights in others' ownership is allowed. The trust was adopted in South African legal practice under English influence; a response was required in case law. The Estate Kemp v. McDonald's Trustee case is a landmark in relation to the qualification of the testamentary trust. By applying the rules of the *fideicommissum*, the court determined that

although the trustee is the legal owner, the beneficiary is deemed to be the beneficial owner. In more recent legal practice, the trust is qualified as a *sui generis* legal institution. The rules of the *stipulatio alteri* and *donatarius gravatus* are applied to the inter vivos trust. Legislation only sets out rules of a technical nature. Under the Trust Moneys Protection Act (1934) and the Trust Property Control Act (1988), the Master of the High Court – holding independent powers - manages the registration of trusts.

4.5. Québec – right without entity, appropriated property

The rules of the trust were introduced in 1994 in sections 981a–981n of the civil code of Québec. These rules do not draw a distinction between equitable and legal ownership.

Under the ruling in the Curran v. Davis case, the beneficiary is only a creditor, and not beneficial owner. In the course of recodification carried out in 1970, professional debate focused on the selection of a legal instrument from among four alternatives. Under the first approach, the trustee is the owner, but it failed to adequately express the actual legal situation. Under the second approach, the beneficiary is the owner, but this was not recognised in case law on the basis of the Curran v. Davis case. Under the third approach, the settlor is the owner, but this would entail conditional ownership, and was therefore abandoned. Eventually a fourth version was approved, wherein the "trust" is the owner. Although the trust is not an independent legal entity, the trust property is an independent entity as appropriated property (*patrimoine affecté*, independent patrimony).[232] The civil code of the Czech Republic (No. 89/2012.) in force as of 1 January 2014 also regulates property management in the same way as the civil code of Québec.

[232] The trust is regulated in the Civil Code of Quebec Title Six (Certain Patrimonies by Appropriation), in force as of 1 January 1994. Art. 1261. is clear in its definition: "The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right."

4.6. The purpose trust

According to the Anglo-Saxon regulatory model, owing to its historical origin, the settlement of the trust for purposes without a specific beneficiary, for public benefit is widespread, while the trust settled for a private purpose is allowed only in exceptional cases, within a narrow scope. In contrast, under Special Purpose Trusts ("STAR"), introduced in 1997 in the Cayman Islands, it is possible to settle a trust without the designation of a specific beneficiary, with only the definition of a given purpose by the settlor. Under this arrangement, the enforcer plays a central role. He has the right to instruct the trustee in relation to the trust property. Within this structure, the trustee is the legal owner, but without an independent right of disposition, hence the enforcer of the trust exercises the right of disposition over the trust property.

The spread of the New-Fangled trust has become an international trend. It essentially serves to protect property against creditors. Based on disposition of ownership so established, neither the creditors of the settlor, nor those of the trustee, may lay claim to the trust property. Since there is no specific beneficiary in the case of such a trust, obviously the creditors of the beneficiary are unable to lay claim to the trust property. Under this arrangement, the trust has an indefinite duration, which further strengthens protection of the trust property. This brilliant legal instrument essentially renders the trust property as completely inaccessible. In terms of overall function, this structure corresponds to the legal status of property without entity in Québec, and almost entirely transforms the dogmatic traditions of civil law.

It should be noted, however, that the foundation is the main established form in Continental European legal systems for property settled for public benefit. In the case of private purpose property, the private foundation (e.g. Austria, Belgium) fulfils a similar function. It follows that there is no demand to substitute the foundation – which is fulfilling the role of the trust – with expanded rules of property management schemes within the scope of such application.

It should, however, be taken into account that the level of property protection provided by the foundation against creditors is not as strong as in the case of the private purpose trust, as the property of the foundation serves as collateral for the foundation's creditors, and the foundation established for private purposes can only be applied within a narrow scope under the new Hungarian Civil Code. It follows that the private purpose management of property could fulfil a legitimate function alongside the reformed and modernised rules relating to the foundation in the new Hungarian Civil Code.

4.7. Unique aspects of Italian legal practise

There are efforts to draft legislation on the trust in Italy. By Italy's ratification and enactment of the Hague Convention in 1989 and 1992, respectively, the trust has nevertheless become common practice in a singular manner.

In legal practice, this means that trusts settled in Italy, by Italian persons, on Italian property, but under foreign laws, are valid, as these must also be recognised in Italy under the Hague Convention.[233]

The Italian courts examined four relevant issues in relation to the recognition of trusts created abroad. Under the laws of Italy (Art. 240 Codice civile), ownership is indivisible, but its laws regulate the category of property for purposes (patrimoni destinati ad uno specifico affare) (e.g. investment and pension funds, company limited by shares etc.), therefore the trust does not violate the Italian concept of ownership. The numerus clausus of property rights is not breached, as the trust does not create new rights in rem, because the trustee is the owner. The institution of the trust does not obstruct the application of the rules of succession, as the claim for the legitime may be construed in accordance with these. Only rules pertaining to the registration of real property caused difficulty for some time with respect to the title of the ownership transfer, but in the course of time, this became accepted practice.

[233] Hague Convention, Art. 6

In a sense, Italian legal practice expresses the modern role of the praetor *(peregrinus)* in ancient Rome. The creation of an institution unknown in internal Italian law by stipulation of foreign law offers an ingenious solution for the management of problems related to the adaptation of the trust. This example also proves that the ratification of the Hague Convention alone is sufficient to enable the practical application of the trust through elegant avoidance of difficulties underlying the introduction of the Anglo-Saxon concept of dual ownership, and by exploiting all benefits offered by the trust.

4.8. The new Hungarian Civil Code

Overall we may establish that the trust is not a relic of feudal property laws. Rather, in the modern economy, it offers an adequate legal instrument for the fulfilment of many important economic and private objectives. The biggest problem facing Continental European legal systems in attempts to apply this legal institution is that Continental Nations essentially treat ownership as a uniform category, and neither the trustee, nor the beneficiary are simultaneously deemed to hold rights in rem. As a further impediment to the interpretation of the legal institution of the trust within the context of the dogma of Continental European private law, due to the *numerus clausus* of property rights in Continental European legal systems, the establishment of a legal basis for the simultaneous recourse of both the trustee and the beneficiary to absolute *in rem protection* in connection with trust property is possible only through statutory provisions. Rules of the contract, particularly those of agency, do not essentially offer viable options due to the relative structure of their legal relationship.

The business association and the foundation fulfil functions in Hungarian law that are different from those of the trust. The owners of a business association can dispose of the company's property and receive its profits only by indirect means. The separate entity of the business association functions as a "buffer", which, upon the "diversion" of the trust property, allows the enforcement of claims against third parties for the restitution of the company's property only by indirect means, which is a major disadvantage compared to the trust. The reformed rules concerning the foundation in the Hungarian Civil Code are almost revolutionary in that

private foundations may be established exclusively for private purposes. Thus, lacking regulation of the private purpose trust within the scope of rules relating to the fiduciary property management contract has been significantly compensated. The private foundation, however, cannot altogether fulfil the function of the private purpose trust under the rules of the New-Fangled trust due to its scope of application, on the one hand, and the formalities of the foundation, on the other.

The regulation set out in the new Hungarian Civil Code closely approximates the rules of the Anglo-Saxon institution of the trust, and – in light of the international trends – it is fortunate that this type of contract has a place in Hungarian private law. Considering the legitimacy of fiduciary property management in the economy, we hope that the first step in legislation will live up to expectations. The demarcation line between in rem and in personam legal relationships, derived from classic Roman private law dogma, seems so solid in Hungarian law, like a sheet of ice dividing the waterflow of the river from the air. Under the contractual arrangement of fiduciary property management, the (implied or actual in rem) right of the settlor and beneficiary enforceable against third parties is considered to be a tiny hole in the ice, which nevertheless projects the future breakthrough of the ice of dogma in Hungarian private law, through byways for the time being. Although an independent (limited) right in rem was not introduced in the new Hungarian Civil Code in relation to the fiduciary property management contract like in Lithuania, the rules applicable to this contract implicitly contain in rem rules.

In the case of Hungarian regulation, an interesting parallel may be drawn with the development of the trust in Scottish and South African law. The distinction between legal and equitable ownership is not drawn in either Scottish or South African law. English equity significantly influenced the development of Scottish trust regulation. The adoption of certain rules of equity in Scottish law was much criticised, which was directly attributable to the adoption of English models for the interpretation of some of the trust rules. The rules of the English trust penetrated the rules of the Scottish trust on a subsidiary and ad hoc basis; these are regularly considered in case law. Equity does not contain any rational elements that allow it to be defined within a systematic framework; it produced rules in

relation to certain legal relationships on an ad hoc basis. Equity plays a supporting role in English law, filling the gaps left by common law. For this reason, it cannot be fully or generally adopted in civil law systems. South African law took an entirely different path. The trust is construed and filled with substance through the arsenal of civil law dogma. In terms of legal practice, the main question to be raised concerns the specific rules that will govern the interpretation of the fiduciary property management contract. I personally think that certain internationalised Anglo-Saxon principles and particular rules could potentially carry out a supportive function in the application of Hungarian law.

As with all new legal institutions, the principal question is application in practice. Which path will the court take in concrete disputes: Will it consider the Anglo-Saxon rules, or analogously apply the institutions of Hungarian private law? In the first case, Hungarian private law will continue its progress along the possibly unavoidable path of globalisation, and adapt to the international trends. In this case, property management may be defined as a modern concept, which is, importantly, recognised and understood by foreign investors. In the second case, laws drafted in relation to property management will remain on the level of Hungarian curiosities that are less transparent in practice for foreigners.

The regulation of fiduciary property management in the Hungarian Civil Code represents a response to substantial economic demand; its legitimacy is therefore clearly justified. The extent to which the specific rules can be applied in practice significantly depends on the implementing regulations and legal practice. The first and most important step, however, has been taken. Hungarian legislation has chosen a path, and a larger step is anticipated along the way – accession to the Hague Convention. Under the regulation of the Hungarian Civil Code, there are no longer any dogmatic obstacles to this in private law, and Italian experience suggests that the ratification of the Convention would allow us to create any kind of trust we wish to have. In other words, we could further widen the gap within the closed system of dogma in private law that rests on the civil foundations of 19th century pandectistics.

5. Final remarks

The establishment of the trust is attributed to the specialities of English property rights, but while previous similar constructions are known, their direct effects are not proven. On the other hand the similarities of the fiducia, the fideicommissum, the Salmann and the wakf suggest the possibility that this form of the property management can be established not only next to the duality of common law and equity.

The adoption of the trust into the civil law and mixed legal system did not affect the adaption of all rules of Anglo-Saxon trust. During the introduction of the legal constructions of property management, the legislatures approached its scope of questions from functional aspect. They chose to establish legal institutions which did not affect the traditional legal institutions and the legal environment of private law. The introduced legal conceptions are trust-like constructions, and they can be considered to be trusts with the definitive features of trust. The separation of asset, the trustee's function being considered a position – rather than a contractual party –, ensuring of rights for the beneficiary regarding the assent under management and the conclusion of rights for the beneficiary against the third person in the case of free transaction of property or its acquisition with bad faith, are the legal institutions which show that they are able to fulfil the functions of trust.

The previous rules introduced above were established into the new Hungarian Civil Code regarding the trust contract. The tendency which includes the principles of English legislation and known from the Scottish and South-African practise may give rise to the question regarding the function of the trust contract in practise.