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Trust Funds In Common Law And Civil Law Systems: A Comparative Analysis

Carly Howard

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TRUST FUNDS IN COMMON LAW AND CIVIL LAW SYSTEMS: A COMPARATIVE ANALYSIS

*Carly Howard**

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1. Introduction

Perhaps the most flexible and useful estate planning instrument of all time is the trust. According to Professor Scott, a dominant figure in 20th Century trust law,¹ “[t]he purposes for which trusts can be created are as unlimited as the imagination of lawyers.”² Indeed, trusts have provided the means for attorneys to assist their clients in a range of different circumstances and in many creative ways. The trust is a creation of common law, and despite the utility and flexibility of the trust, it has only recently started gaining acceptance in civil law countries. Other jurisdictions have trust-like methods of transferring wealth, but trusts as they are known in common law have been shunned.³ While disagreement concerning the theoretical concepts of the trust and its practical applications continues, one thing is certain: the trust is in demand.

Due to globalization and the impact of international investing upon legal and financial systems, the trust and similar instruments have become enormously popular. Although the realm of trusts was fairly clear-cut only 30 years ago, there has been a “massification”⁴ of the trust throughout the world. Countries without traditional trust devices have been forced to adapt their laws to accommodate the growing use of trusts across the globe. Even original trust law jurisdictions have made frequent and drastic changes to trust law in response to its growing popularity.

This paper focuses on theories which validate and invalidate private trusts, as opposed to public or charitable trusts, and emphasizes the world’s attempts to harmonize differences in attitudes toward trusts. Topics include: 1) definitions and formalities of trusts; 2) purposes and elements of a trust; 3) histories of the common law trust and its civil law counterparts; 4) general principles of enforcement and recognition of

¹ ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES (2003).

² 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, INTRODUCTION TO THE LAW OF TRUSTS 2 (4th ed. 1991) (1987).

³ E.g., GARETH MILLER, INTERNATIONAL ASPECTS OF SUCCESSION 236 (2000).

⁴ Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don’t Have to Think of England Anymore*, 62 ALBLR 543, 545 (1998). Massification is Dobris’ term for the increased popularity of trusts. *Id.*

trusts, particularly in light of the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985. Although an understanding of the global state of trusts can be found by comparing the laws of particular countries, this paper surveys the general theories behind trust mechanisms and their application.

1.1. Definitions

1.1.1. Definition of a Trust

According to Black's Law Dictionary, a trust is "[t]he right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)."⁵ This brief and widely accepted definition serves to identify trusts as we know them in American law and in other common law systems.⁶ However, as explained below, there are conflicting theories in private international law concerning the definition and requirements of a trust.

1.1.2. Definition of an International Trust and Offshore Trust

Although it is commonly used, "International trust" is an expression that has no settled definition in private international law.⁷ Typically, the term references a trust that has either a legal connection with two or more countries⁸ or holds property in two or more countries.⁹ These countries characteristically have different legal systems.¹⁰ There are also linguistic differences in the use of the term "trust" as a general

⁵ BLACK'S LAW DICTIONARY 1546 (8th ed. 1999).

⁶ David Hayton describes the word "trust" as an accordion word that can have a very narrow meaning or can be expanded to have a very wide meaning. He stresses the necessity of clearly defining trust characteristics. David Hayton, *Principles of European Trust Law*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 19, 21 (David Hayton ed., 1999).

⁷ John Glasson, *The Phenomenon of the International Trust*, Editor's Introduction to THE INTERNATIONAL TRUST 1 (John Glasson ed., Jordan Publishing Limited 2002).

⁸ *Id.*

⁹ See MILLER, *supra* note 3, at 1-2.

¹⁰ *Id.*

concept or instrument. The linguistic differences arise particularly between common law and civil law systems.¹¹

The phrase "offshore trust" describes an international trust in a jurisdiction whose trust services are promoted abroad and where trust legislation is used as a marketing aid.¹² About 30 jurisdictions were termed "offshore" in 2002.¹³ Such trusts are becoming increasingly popular as international investors make greater use of trust instruments. Evidencing the global need for harmonization of trust treatment, the offshore trust industry has been criticized for its poor administration of trusts.

1.2. Purposes for International Trusts

Today's international trusts serve a myriad of purposes, including the popular uses of disposition of property upon death and tax avoidance. International trusts are also useful for preserving assets, for protecting property in the event of unforeseen circumstances, for investing in an anonymous way, and for having capital invested and managed by a person or institution of financial responsibility.¹⁴ Trusts

¹¹ See generally MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 5-8 (Simon Dix trans., 2000). Legal texts written in the English language ordinarily use the plural form "trusts", while texts in French and other languages use the singular form "trust". This may seem a small matter, but the use of a singular or plural form can cause difficulties in comprehension and translation, especially for scholars and theorists, due to the functional and structural variations in the forms. According to Lupoi, the use of English and French are particularly important in the international field because these are the languages chosen for translation and publication of the Hague Convention of 1 July 1985. In fact, the full titles of the Hague Convention are, in English, Hague Convention on the Law Applicable to Trusts and on their Recognition. In French, *Convention relative à loi applicable au trust et à sa reconnaissance*. Lupoi contends that the determination of whether to use the singular or plural form is a matter of no small significance. *Id.* Furthermore, when defining terms, legal lexicographers define only singular forms of words, not plurals, unless there is a compelling reason to do otherwise. This technicality may also further disparities in notions concerning trusts. See Bryan A. Garner, *Legal Lexicography*, 6 GREEN BAG 151, 155 (2003).

¹² Glasson, *supra* note 7, at 1-2.

¹³ *Id.*

¹⁴ E.g., ROBERT C. LAWRENCE, III, INTERNATIONAL TAX AND ESTATE PLANNING 578 (1989). See also Edward C. Halbach, Jr., *The Uses and Purposes of Trusts in the United States*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 123, 133-142 (David Hayton ed., 1999). Professor Halbach divides trust

provide what has been coined “asset protection” because they are used to assist clients in securing interests against creditors, family members, government, and more. Attorneys and their clients continually construct creative trusts for countless purposes.

2. Formalities of Common Law Trusts

2.1 Establishment of Trusts

A common law trust can be established either while living or upon death. The former is labeled an *inter vivos* trust, while the latter is labeled a testamentary trust.¹⁵ In order to establish an *inter vivos* trust, a settlor must transfer property to a trustee or declare himself a trustee. In order to establish a testamentary trust, a settlor simply gives assets to a trustee to be held in trust according to instructions laid out in the settlor’s will.

As noted in section 1.1.1, there are three persons crucial to the establishment of a trust: the settlor, the trustee, and the beneficiary. A settlor may be a trustee or beneficiary himself, but there must always be an equitable duty owed by the trustee to another. In America, a trust is typically required to have three additional elements: an intention to create a trust, the property transferred, and a valid trust purpose.¹⁶

2.2 Types of Trusts

There are 4 primary types of trusts: express, resulting, constructive, and statutory.¹⁷ Express trusts, as they are known in English law, which are also called voluntary trusts by international

purposes into the broad categories of property management; probate avoidance; limited, concurrent, and successive enjoyment; and tax-saving purposes. *Id.* For a list of 26 examples for which the trust can be put to use, see WILLIAM F. FRATCHER, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, VOL. 6, 3-5.

¹⁵ E.g., MILLER, *supra* note 3, at 236; ANDERSEN, *supra* note 1, at 81.

¹⁶ E.g., ANDERSEN, *supra* note 1, at 83. It should be noted that there are lengthy and complex laws concerning probate administration and personal representative capacities in both England and America, the details of which differ vastly but are not crucial to the comparative analysis of this paper.

¹⁷ E.g., Frans Sonneveldt, *The Trust – An Introduction*, in THE TRUST: BRIDGE OR ABYSS BETWEEN COMMON AND CIVIL LAW JURISDICTIONS? 1, 8-10 (Frans Sonneveldt & Harrie L. van Mens eds., 1992); LUPOI, *supra* note 11, at 14-15; CLARK, *infra* note 24, at 412-14.

scholars, are purposely established by a settlor.¹⁸ Constructive or resulting trusts are devices imposed by courts of law where there is no clear indication that the settlor intended to create a trust. Constructive trusts are often used to prevent unjust enrichment, especially in cases of fraud or wrongdoing, and resulting trusts usually arise by operation of law where an express trust fails.¹⁹ Statutory trusts arise when mandated by statute. Trusts are also categorized into private trusts, which are for the use of individual beneficiaries, and public trusts, which are for public or charitable purposes. As explained in section 1, the information provided in this paper refers only to private trusts, unless otherwise indicated.

3. History of Common Law and Civil Law Systems

3.1. History of Common Law Trusts

As early as 1927, trusts were described by common law legal scholars as being "like those extraordinary drugs curing at the same time toothache, sprained ankles, and baldness."²⁰ Long before the turn of the twentieth century, trusts were being used by attorneys in Anglo-Saxon countries to solve problems involving family disputes, business complications, religious differences, and charitable issues.²¹ After studying the history of the trust and how it became widely accepted so early in common law history, one can understand why the trust has seeped into civil law.

3.1.1 History of Trusts in England

The common law concept of division of ownership, or splitting of rights in property, developed in medieval England with the life estate and the fee simple estate. The life estate is held only for the duration of a specific person's life. The fee simple estate is an absolute right of ownership. During feudal times, the King granted his primary loyal nobles certain rights to land. In exchange for these rights, the nobles had certain obligations, and they owed the Crown certain profits.²² To

¹⁸ See, e.g., LUPOLI, *supra* note 11, at 14.

¹⁹ See, e.g., CLARK, *infra* note 24, at 413-14.

²⁰ Lepaulle, *infra* note 73, at 1126.

²¹ *Id.*

²² David Hayton, *English Trusts and Their Commercial Counterparts in Continental Europe*, in EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR

protect a life estate or fee simple, a tenant was required to bring action in person in England's court of law. This caused problems for knights as they left England to join the Holy Crusades. Before leaving, knights would transfer their property rights to another "to the use of" the knight and his family until his return or to a designated son upon the knight's death.²³ These temporary rights became known as a "use" instrument.²⁴

Some scholars attribute the wide recognition of the use during this era to the Franciscan friars who came to England in the thirteenth century. Friars were unable to own property under an oath of poverty. However, benefactors could transfer property to suitable persons for the use of the friars to live and work on, essentially bypassing religious restrictions while retaining ownership of the property.²⁵

By the fourteenth century, before it was possible to make a will, the use became a tool for landowners to convey property to friends, daughters, and younger sons upon death.²⁶ Where a daughter would typically have absolutely no rights to property, the use provided a means to avoid the disadvantages of primogeniture.²⁷ The use was also a popular method of avoiding feudal taxes payable upon death, marriage, and coming of age²⁸ until such avoidance was countered by law.²⁹ When a landowner transferred property interests to a group of trustees, he avoided paying taxes because the trustees were not collectively subject to taxes on personal, life-altering events, such as death and marriage.³⁰ The property would still be managed by the legal owners for the advantage of

RING-FENCED FUNDS 23, 25-27 (David Hayton ed., 2000) [hereinafter *English Trusts*].

²³ *Id.*

²⁴ The term "use" is a corruption of the Latin word "opus", meaning benefit. JESSE DUKEMINIER & STANLEY M. JOHANSEN, *WILLS, TRUSTS, & ESTATES* 553 (6th ed. 2000). For a rich history of the use and common law conveyances, see ELIAS CLARK, ET. AL., *CASES AND MATERIALS ON GRATUITOUS TRANSFERS, WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS, AND ESTATE AND GIFT TAXATION* (3rd ed. 1985).

²⁵ See Sonneveldt, *supra* note 17, at 3; DUKEMINIER & JOHANSEN, *supra* note 24, at 553-54; *English Trusts*, *supra* note 22, at 26.

²⁶ Sonneveldt, *supra* note 17, at 3; DUKEMINIER & JOHANSEN, *supra* note 24, at 554. See also *English Trusts*, *supra* note 22, at 26.

²⁷ See *English Trusts*, *supra* note 22, at 31.

²⁸ A.J. Hawkins, *The Trust in English Law*, in *TRUSTS AND TRUST-LIKE DEVICES* 3, 6 (W.A. Wilson ed., 1981).

²⁹ *English Trusts*, *supra* note 22, at 31.

³⁰ Hawkins, *supra* note 28, at 6.

beneficiaries named by the settlor. However, such use arrangements were not recognized under English common law, and beneficiaries could not make claims in the common law courts.

The trust device developed out of the separate court systems of law and equity in England.³¹ By the end of the thirteenth century, common law in England had developed into a rigid system, not suited to fit new types of cases such as those dealing with use arrangements.³² Citizens began to make petitions to the king through the Chancellor who judged cases on an ad hoc basis and granted specific remedies to citizens who were entitled to a remedy but could not obtain a remedy in the king's courts. The Chancellor's decisions were not binding precedent, nor did the judgments apply to parties other than those directly involved in the petition. Nevertheless, over time, a new system of law developed which was called "equity" and was separate, though related, to the traditional common law system.

In accepting trust obligations, the Chancellor deemed that a trustee's moral conscience was involved, and it was this obligation of conscience that he enforced.³³ As a general rule of equity, a trustee was required to administer his trust gratuitously, despite any inconveniences he may have experienced during administration.³⁴ Equitable rights were originally enforced against a trustee by means of imprisonment for failure to comply with orders of the Chancellor.³⁵ Thus, orders in equity were issued *in personam* against the trustee but not *in rem* against the trust property itself.³⁶ Eventually, equitable remedies were expanded to allow beneficiaries' actions seeking to recover property wrongfully managed by a trustee, and beneficiaries' rights became partly *in personam* with regards to the trustees and partly *in rem* with regards to the trust property to be recovered.³⁷

As courts of equity made progress in establishing their own methods of regulating trusts, transfers made to avoid rights of feudal lords were outlawed by the king.³⁸ Furthermore, the implementation of

³¹ DUKEMINIER & JOHANSEN, *supra* note 24, at 554.

³² Sonneveldt, *supra* note 17, at 2. See also Hawkins, *supra* note 28, at 6-7.

³³ Hawkins, *supra* note 28, at 6.

³⁴ See CHRISTIAN DE WULF, THE TRUST AND CORRESPONDING INSTITUTIONS IN THE CIVIL LAW 29-31 (1965).

³⁵ Hawkins, *supra* note 28, at 6.

³⁶ *Id.*; see also Sonneveldt, *supra* note 17, at 6.

³⁷ Hawkins, *supra* note 28, at 7.

³⁸ *English Trusts*, *supra* note 22 at 32.

the use device to avoid feudal incidents was blocked by the Statute of Uses in 1535. This statute virtually destroyed the right to devise land in England. The Statute of Wills was passed in 1540, which allowed land to be devised by will, followed by the Statute of Explanation of Wills in 1542.³⁹ Both statutes served to transform the use into the trust.⁴⁰

3.1.2 History of Trusts in America

The well-established English trust became the foundation of the American trust upon the colonization of America and foundation of American law.⁴¹ The trust gained popularity in America after World War II when it became an accepted method of securing family wealth.⁴² In America, the laws of the individual States are different, and trust aspects differ from state to state.⁴³ Although the American judicial system does not have separate courts of law and equity, the theory underlying adoption and enforcement of trusts in American common law states is the same as that in England.⁴⁴

³⁹ *Id.*; see also DUKEMINIER & JOHANSEN, *supra* note 24, at 554.

⁴⁰ For a continued history of the English trust to present day, see Sir William Goodhart, *Trust Law for the Twenty-first Century*, in TRENDS IN CONTEMPORARY LAW 257 (A.J. Oakley ed., 1996).

⁴¹ *E.g.*, Edward Halbach, *The Uses and Purposes of Trusts in the United States*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 123, 124 (David Hayton ed., 1999); William F. Fratcher, *Trusts in the United States of America*, in TRUSTS AND TRUST-LIKE DEVICES 45 (W.A. Wilson ed., 1981) [hereinafter Fratcher]. Professor Fratcher excludes the State of Louisiana from his analysis because it is a civil law state and includes the District of Columbia, a common law district. He further notes that in the common law states, English statutes and judicial decisions are not binding, although the pronouncements of superior English courts are "treated with respect." *Id.*

⁴² ANDERSEN, *supra* note 1, at 81.

⁴³ For a discussion of individual states and resulting tax consequences, see Bert R. Leemreis, *The Taxation of Trusts, Beneficiaries and Grantors in the United States of America*, in THE TRUST: BRIDGE OR ABYSS BETWEEN COMMON AND CIVIL LAW JURISDICTIONS? 33 (Frans Sonneveldt & Harrie L. van Mens eds., 1992).

⁴⁴ Fratcher, *supra* note 41, at 45-46.

3.2. History of Civil Law Trust-Like Devices

3.2.1 History of the Civil Law System

Just as today's common law legal systems are derived from English law, today's civil law systems reflect Roman law. Roman law developed in two main periods.⁴⁵ The first was during the time of the Roman Empire with the compilation of the *Corpus Juris Civilis* by the Byzantine Emperor Justinian from 527 A.D. to 565 A.D. The second period was in the eleventh century with the spread of Justinian's works throughout Europe, eventually influencing the codification of the Napoleonic Code in 1804 A.D.⁴⁶

As early as the third century B.C., during the Roman Republic, a group of scholars specializing in law, called the *Jurisconsults*, became the first lawyers. What we know as Roman law evolved from the *Jurisconsults'* opinions on legal topics.⁴⁷ The most notable legal development from this period occurred around 450 B.C. with the enactment of the Twelve Tables, which show clear distinctions between religious law and secular law, a novel concept for that time.⁴⁸ The Twelve Tables focused, in a legal sense, on equity. Furthermore, the Twelve Tables were an attempt by the patricians, the high society of Rome, to placate the plebeians, or lower class citizens of Rome, by settling legal disputes between the two orders of society, thus bridging the gap between the classes.⁴⁹

Roman law experienced its fullest development during the Classical period from approximately 117 A.D. to 235 A.D., although

⁴⁵ E.g., J.A.C. Thomas, *Roman Law*, in AN INTRODUCTION TO LEGAL SYSTEMS 1 (J. Duncan M. Derrett ed., 1968).

⁴⁶ For a detailed history of Roman law, including numerous quotations from historians and experts in the field of civil law and comparative law, see WILLIAM HOWE, *STUDIES IN THE CIVIL LAW, AND ITS RELATIONS TO THE LAW OF ENGLAND AND AMERICA* 7-25 (Cambridge, Univ. Press 1894) (1896). For a detailed description of the legal and political systems of Rome, including a translation of the full Twelve Tables of the Roman Republic, see WILLIAM HOWE, *STUDIES IN THE CIVIL LAW, AND ITS RELATIONS TO THE LAW OF ENGLAND AND AMERICA* 45-72 (Cambridge, Univ. Press 1905) (1896).

⁴⁷ MARY ANN GLENDON, ET. AL., *COMPARATIVE LEGAL TRADITIONS, TEXT, MATERIALS, AND CASES* 40-41 (1985)

⁴⁸ See Thomas, *supra* note 45, at 3.

⁴⁹ *Id.* For further explanation of the social hierarchy in Rome regarding the plebeians and patricians, see Charles J. Reid, Jr., *The Spirit of the Learned Laws*, 1 WASH. U. GLOBAL STUD. L. REV. 507, 510 (2002) (book review).

many written sources were lost by the time of Roman law resurgence in the eleventh century.⁵⁰ Despite these unfortunate losses, a massive compilation of Roman law did survive due to the work of the Byzantine Emperor Justinian. In the sixth century B.C., Justinian began to compile the *Corpus Juris Civilis* collection of law and other works. The collection contained four parts: the Digest, the Code, the Institutes, and the Novels.⁵¹ The Digest has been the most influential portion in so far as the development of civilian law is concerned, particularly due to its emphasis on torts, contracts, personal status, unjust enrichment, and remedies.⁵²

As the Roman Empire gradually collapsed, marked by the ruin of Rome in 410 A.D., the science of jurisprudence declined as well. However, Roman law itself did not lose its validity, particularly among subject peoples of non-Germanic origins.⁵³ The legal system throughout the former Roman Empire was reduced to territorial decrees based on Roman law, Germanic customary laws that survived from the Middle Ages, and the canon law of the Church.⁵⁴

A revival of Roman private law occurred in the eleventh century, as northern Italian jurists rediscovered the *Corpus Juris Civilis*. The University of Bologna became the foremost center of legal learning in Europe, its scholars being the forerunners of the Digest's interpretation

⁵⁰ GLENDON, *supra* note 47, at 41.

⁵¹ *Id.*; see also Henry Mather, *The Medieval Revival of Roman Law: Implications for Contemporary Legal Education*, 41 CATH. LAW. 323, 327 (2002).

⁵² GLENDON, *supra* note 47, at 41. Glendon further describes the portions of the *Corpus Juris Civilis*. The Digest was a treatise of the most valuable legal works from all previous Roman periods, according to Justinian's jurists. The majority of books relied upon by the jurists in compiling the Digest were since lost, so the Digest became the principle source of Roman law. The Code was systematic Roman legislation, and the Digest and the Code together represented an authoritative restatement of Roman law. The Institutes were an introductory text for legal students, and the Novels were imperial legislation enacted after the Code and the Digest were concluded. *Id.*

⁵³ KONRAD ZWEIGERT & HEIN KOTZ, *INTRODUCTION TO COMPARATIVE LAW I*, 77 (2nd ed. 1987).

⁵⁴ See GLENDON, *supra* note 47, at 43-44. For a discussion on the existence of the "vulgar laws" of native provinces during Roman rule, see Eberhard F. Bruck, *West Roman Vulgar Law: The Law of Property*, 66 HARV. L. REV. 378 (1952).

and study.⁵⁵ By the twelfth century, the renaissance of Roman law studies had reached France and its universities.⁵⁶

Early scholars were known as Glossators because of their annotations (glosses) on the Digest, but the Glossators were ultimately replaced by the thirteenth century Commentators (Post-Glossators) who applied Roman law interpretations to ideals of the times.⁵⁷ As Roman civil law, along with the theories and publications of the Glossators and Commentators, spread through Europe, it became known as the *jus commune* of Europe.⁵⁸ By the seventeenth and eighteenth centuries, individual legal systems were formed through codification of laws, with the *jus commune* becoming the backbone of many European legal systems.

At any stage, the law of property in Roman law gave absolute control to the owner, which enabled him to issue lesser rights, such as rights of way and estates for life, but the rights were always associated with the property and not with the owner.⁵⁹ Furthermore, Roman law imposed rigid requirements for transfer of ownership in property, including attendance of the actual parties to the transaction, witness by several persons, and the presence of someone holding a pair of scales.⁶⁰ These requirements were altered throughout the ages, although basic Roman notions of ownership remained.

3.2.2 The French Civil Code

Napoleon's French civil code is of particular interest because of its overwhelming influence on the civil codes of other countries. According to Voltaire, a traveler in revolutionary France before the implementation of Napoleon's civil code changed laws as often as he changed horses.⁶¹ Although France became a unified nation under central rule after the Revolution of 1789, there was no unified legal system until Napoleon came to power in 1799 and soon after implemented his *Code civil des français*, also called the "Code

⁵⁵ GLENDON, *supra* note 47, at 44. Some of the first women law professors were nuns who taught at the University of Bologna during this period. *Id.* See also Mather, *supra* note 51, at 330.

⁵⁶ ZWEIGERT, *supra* note 53, at 77.

⁵⁷ GLENDON, *supra* note 47, at 44-45.

⁵⁸ *Id.*; see also Mather, *supra* note 51, at 335.

⁵⁹ See Thomas, *supra* note 45, at 13.

⁶⁰ *Id.* at 17-18.

⁶¹ See GLENDON, *supra* note 47, at 49.

Napoleon.”⁶² The French Civil Code of 1804 was drafted by four jurists handpicked by Napoleon.⁶³ Although the Code resembled Justinian’s code in substance, it was not simply a restatement of law as the *Corpus Juris Civilis* had been.⁶⁴

Three ideological pillars are contained in The French Civil Code of 1804: private property, freedom of contract, and the patriarchal family.⁶⁵ The Code made the most drastic departure from Justinian’s code and feudal and territorial systems of the past in the area of property law, in an attempt to dissemble the estates of certain French aristocracy. The French Civil Code defined ownership as the “right to enjoy and dispose of things in the most absolute manner,” a notion which contradicts the feudal system of estates and explains the unwillingness of the French legal system to accept estates in land, contrary to common law.⁶⁶

Napoleon’s Code was written in systematic, clear, and concise provisions so that every citizen could read it, understand it, and therefore follow it. Its rules were general and flexible, rather than detailed and full of jargon. The format of the French Civil Code of 1804, both in style and substance, laid the groundwork for many other codes that followed. Napoleon is quoted as saying that his civil code would live forever,⁶⁷ and although the French Civil Code itself has changed considerably over the years, the influence of Napoleon’s Code persists.

⁶² *Id.*

⁶³ ZWIEGERT, *supra* note 53, at 82-86. Zweigert and Kotz provide a comprehensive history of Napoleon’s involvement with and influence on the French Civil Code, as well as the political factors that influenced his decisions.

⁶⁴ GLENDON, *supra* note 47, at 49.

⁶⁵ *Id.*

⁶⁶ FRENCH CODE CIVIL art. 544 (Fr.) (J. Crabb. trans. 1977), *quoted in* JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING 642-43 (1982).

⁶⁷ GLENDON, *supra* note 47, at 50. Napoleon took an extraordinary personal interest in the development of the code. In exile on St. Helena, Napoleon expressed his belief that his code would be his most memorable accomplishment. He is quoted as saying, “One Waterloo wipes out their memory, but my civil code will live forever.” *See id.*

4. Trust Concepts and the Civil Law

4.1 Introduction of Trusts to Civilian Systems

The common law trust made its way into civilian countries in the nineteenth century via the globalization of commerce and investment.⁶⁸ Traditional Roman law did not have a trust instrument or similar technique for achieving the collective goals of the common law trust, although comparable devices existed (and still exist) serving as sufficient substitutes to accomplish individual trust-like goals.⁶⁹ The essential difficulty concerning trusts in civil law systems is that the trust relies on split ownership of property. There is a division between legal and equitable ownership, and trust assets are separate from a trustee's personal wealth. Until recent years, scholars have asserted that this concept is unknown in conventional civil law⁷⁰ or that, at best, civil jurisdictions made feeble attempts to avoid the conflict of split ownership by using trusts without recognizing the trustee as owner of the property.⁷¹

Modern scholars argue that the trust, under other names, existed in Roman law and currently exist in civil law.⁷² One of the original split property devices in Roman law was the mandate, although that device was a poor trust substitute and did not achieve trust-like results. On the other hand, two Roman instruments called the *fiducia* and the *fideicommissum* illustrate clear trust principles and have found their way into modern civilian systems.⁷³ The civil law power of attorney also provides a means of achieving trust-oriented goals. To date, the trust

⁶⁸ Donovan Waters, *The Future of the Trust From a Worldwide Perspective*, in THE INTERNATIONAL TRUST 597, 618 (John Glasson ed., 2002) [hereinafter *Worldwide Perspective*].

⁶⁹ See SCHOENBLUM, *supra* note 66, at 642.

⁷⁰ See, e.g., JONATHAN HARRIS, THE HAGUE TRUSTS CONVENTION SCOPE, APPLICATION, AND PRELIMINARY ISSUES 81-83 (2002). But see SCHOENBLUM, *supra* note 66, at 642-44; LUPOI, *supra* note 11, at 195-97, 169-73, 368-77.

⁷¹ See Leonard Oppenheim, *The Drafting of a Trust Code in a Civil Law Jurisdiction*, in TRUSTS AND TRUST-LIKE DEVICES 137, 138 (W.A. Wilson ed., 1981).

⁷² Some scholars point out that even the Muslim legal system recognizes the *wakf*, a device attributed to the Koran, whereby property is held for the interests of one's family or for religious purposes. See generally SCHOENBLUM, *supra* note 66, at 671-77. See *Worldwide Perspective*, *supra* note 68, at 619.

⁷³ Pierre Lepaulle, *Civil Law Substitutes for Trusts*, 36 YALE L.J. 1126 (1927). Lepaulle's article is an authoritative paper which gives details of the traditional forms of the mandate, *fiducia*, and *fideicommissum*.

instrument in some form has been accepted in over 20 non-common law legal systems, including civil law jurisdictions and mixed jurisdictions, such as Argentina, Colombia, Panama, Peru, and Ecuador in Latin America; Malta, a civil law jurisdiction; Mauritius, which uses the Napoleonic Code and English law; and Guernsey and Jersey, which show influences from Norman law, European common law, and French law prior to codification.⁷⁴

4.2 The Roman Mandate

A Roman mandate agreement is more or less an agency-principal relationship where one party takes on responsibilities for another.⁷⁵ In order to have any trust-like qualities at all, a mandate must be coupled with a contract assigning benefits to a third party. Otherwise, the beneficiary will have no enforceable rights against the agent, and the mandate would always be revoked upon death of the principal.⁷⁶ This arrangement was not an effective trust substitute because of many negative aspects, including the liability of the principal for the agent's acts and various negative tax consequences, and thus.⁷⁷

4.3 The Roman *Fiducia*

The *fiducia* originally concerned the transfer of property to a creditor or manager by a formal act of sale, yet with an agreement that the creditor would reconvey the property upon payment of a debt.⁷⁸ The creditor held legal title but derived no personal gain from the property

⁷⁴ LUPOI, *supra* note 11, at 201, 213-14, 215-18, 269-70, 273-76, 285-86. Lupoi discusses trusts in the systems of Anguilla, Antigua and Barbuda, The Bahamas, Barbados, Belize, Bermuda, The British Virgin Islands, The Cayman Islands, Cyprus, Cook Islands, Gibraltar, Guernsey, Hong Kong, The Isle of Man, Jersey, Malta, Mauritius, Nauru, Nevis, Niue, Saint Vincent, Seychelles, Turks and Caicos, Vanuatu, and Western Samoa at 205-22. Lupoi further discusses the systems of Argentina, Colombia, Ecuador, Ethiopia, the Philippines, Japan, Israel, Lichtenstein, Louisiana, Luxembourg, Mauritius, Mexico, Panama, Peru, Quebec, Russia, the Seychelles, St Lucia, Venezuela, Scotland, and South Africa at 273-301. For a more in-depth study of individual laws of countries, see MAURIZIO LUPOI, *TRUST LAWS OF THE WORLD* (1996).

⁷⁵ Lepaule, *supra* note 73, at 1139; SCHOENBLUM, *supra* note 66, at 651. See also Note, *Common Law Trusts in Civil Law Courts*, 67 HARV. L. REV. 1030, 1031 (1954).

⁷⁶ Lepaule, *supra* note 73, at 1139.

⁷⁷ See SCHOENBLUM, *supra* note 66, at 651.

⁷⁸ *Worldwide Perspective*, *supra* note 68, at 619.

although he was responsible for managing the property for someone else. This Roman method of conveyance was replaced with other devices by the time of Justinian and was subsequently forgotten. Fortunately, the *fiducia* was rediscovered in the early twentieth century and is currently used in certain civilian nations as a means of transferring property to one who has legal title and must manage the property but derives no personal advantage from the transfer.⁷⁹ A *fiducia* exists where there is a moral certainty that the grantor's intent will be carried out; there is an inherent element of "entrusting".⁸⁰

The primary difference between the common law trust and the *fiducia* is that a trust beneficiary has a legal right to property in the trust, while a *fiducia* beneficiary is, in essence, no more than a mere creditor. The manager of the *fiducia* property held complete legal and equitable title in the property. Another discrepancy is that a trust may be revocable if established properly as a revocable trust, while a *fiducia* may not be revoked. Still, many civil law countries, including France, Germany, and Switzerland offer a contemporary variation of the *fiducia* as a trust substitute.⁸¹

4.4 The Roman *Fideicommissum*

The Roman *fideicommissum* was a Byzantine concept laid out in Justinian's *Corpus Juris Civilis*. It allowed settlors to establish successive interests, much like a dynasty trust. Thus, in his attempt to break-up the estates of powerful French families, Napoleon abolished the *fideicommissum* with his code, and many other civilian countries subsequently followed suit.⁸² In recent times, however, the *fideicommissum* and variations of it have been revived as trust substitutes in some legal systems, including Quebec and South Africa.⁸³

The division of ownership in a *fideicommissum* is conditional because a gift is made to a party who may use the property to his benefit

⁷⁹ See SCHOENBLUM, *supra* note 66, at 645-50. Schoenblum credits the twentieth century rediscovery of the *fiducia* to Dr. Pierre Lepaulle. *Id.* at 649. See generally Lepaulle, *supra* note 73, at 1127, 1138-39.

⁸⁰ LUPOI, *supra* note 11, at 369. For an in-depth, theoretical, and practical explanation of *fiducia*, see LUPOI, *supra* note 11, at 368-77.

⁸¹ SCHOENBLUM, *supra* note 66, at 650; Lepaulle, *supra* note 73, at 1138.

⁸² See *Worldwide Perspective*, *supra* note 68, at 619; See *Common Law Trusts in Civil Law Courts*, *supra* note 75, at 1033.

⁸³ See *Worldwide perspective*, *supra* note 68 at 619; see also LUPOI, *supra* note 11, at 297-301, 376.

but may not dispose of it.⁸⁴ Essentially, the fiduciary in this relationship fulfills the same purpose as a trustee and has the same moral obligations.⁸⁵ Although the *fideicommissum* has been a consistent source of trust litigation in civilian systems, some countries (see section 4.1) have modified the device in an attempt to arrive at a modern civil law form of the trust.⁸⁶

One of the main benefits of the traditional *fideicommissum* is that it permits the naming of unborn beneficiaries.⁸⁷ However, drawbacks exist, including the fact that inter vivos transfers of property are rarely allowed and beneficiaries may be restricted to certain family members in some jurisdictions.⁸⁸ Even modern interpretations of the *fideicommissum* are riddled with limits, obligations, and restrictions.

4.5 Power of Attorney

The most common trust substitute in civil law systems is the general power of attorney. Power of attorney is the right given by one person to another to do something for him, agreements for such powers are called powers of attorney. Unlike an American power of attorney which denotes a limited agency relationship and is primarily invoked for estate planning purposes in the case of incapacity,⁸⁹ a civil law power of attorney is extremely broad and covers all of the principal's affairs.⁹⁰ Thus, assignment of such powers can be an effective way to accomplish all the tasks of a trust, but the limitations and fiduciary duties assigned to

⁸⁴ Lepaulle, *supra* note 73, at 1142-43; SCHOENBLUM, *supra* note 66, at 656. See generally *Common Law Trusts in Civil Law Courts*, *supra* note 75, at 1033-35; Kathryn Venturatos Lorio, *Louisiana Trusts: The Experience of a Civil Law Jurisdiction With the Trust*, 42 LA. L. REV. 1721, 1723-25 (1982).

⁸⁵ See LUPOI, *supra* note 11, at 196.

⁸⁶ SCHOENBLUM, *supra* note 66, at 656.

⁸⁷ *Id.* at 656-57.

⁸⁸ *Id.* at 657.

⁸⁹ See generally CLARK, *supra* note 24, at 309-314.

⁹⁰ See SCHOENBLUM, *supra* note 66, at 658-59. Schoenblum discusses civil law powers of attorney as they relate to the civil codes of France and Germany. *Id.* at 658-60. Furthermore, he describes several trust substitute devices found in foreign legal systems, including the *Stiftung* (foundation) and the *Anstalt* (establishment) in Germany, Lichtenstein, and Switzerland and the *Wakf* in Islamic nations. *Id.* at 660-77. For a practical approach to estate planning for international trusts, see Donovan Waters, *Convergence and Divergence: Civil Law and Common Law*, in *EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS* 59 (David Hayton ed., 2000).

trust-like instruments are not present. In many cases, overbroad discretion is given to the recipient of the power. Most countries have adapted their civil codes to limit powers of attorney and protect the interests of the principal, especially where estate planning is concerned.

5. Enforcement and Recognition

5.1 Operation of Trusts

A crucial distinction must be made between the establishment of a trust and the operation of a trust, particularly in private international law. Establishment of a trust refers to the creation of a trust and the validity of the instrument itself (see section 2), while operation of a trust involves the maintenance and administration of a valid trust's provisions. Because of these differences, the trust has been compared to a rocket and rocket launcher.⁹¹ The distinction between establishment and operation is crucial because a trust can be perfectly valid in a certain legal system, while the provisions and instructions of that trust cannot be carried out due to conflicts of law, including legal restraints, inefficiencies, or unwillingness of courts to follow the directions of the trust instrument.⁹²

In cases involving international trusts, three issues generally arise. The first concerns the trust situs and whether a country's courts have jurisdiction to hear a case, the second is the choice of law to be applied by the court hearing the case, and the third is what recognition or enforcement will be given to the court's decision.⁹³ Jurisdiction and choice of law concern establishment, or building of the rocket, while the recognition and enforcement concern operation of trusts, or ignition and flight of the rocket.

⁹¹ Jonathan Harris, *Launching the Rocket – Capacity and the Creation of Inter Vivos International Trusts*, in *THE INTERNATIONAL TRUST* 89, at 89. (John Glasson ed., 2002) [hereinafter *Launching the Rocket*]. But see HARRIS, *supra* note 70, at 4-5. The rocket launcher analysis has been criticized as being flawed in that the two different legal negotia of creation and transfer are embraced within the "launch pad". *Id.*

⁹² See generally MILLER, *supra* note 3, at 236-238. Miller continues his analysis of the distinction between establishment and operation of trusts by applying these distinctions to modern English law.

⁹³ E.g., MILLER, *supra* note 3, at 1-2.

5.2 Conflicts of Law

Conflict of laws is the branch of law that deals with the effect of foreign law on the forum state.⁹⁴ A court typically decides cases in which the operative facts upon which judgment will be based occurred within the jurisdictional limits of the court.⁹⁵ However, in cases involving international trusts, some of the operative facts may have taken place in another jurisdiction. The forum court must decide what effect foreign law is given.

5.3 Situs, Jurisdiction, and Choice of Law

As explained in section 5.2, even though a trust itself is situated in one location, the applicable law governing the property may be in a different location. Choosing a situs is crucial to effective establishment of a trust because of tax liability and authority of courts to exercise jurisdiction.⁹⁶ Jurisdiction is most often a problem when the grantor seeks to establish a common law trust but is domiciled in a country that does not recognize trusts. If the grantor chooses to establish a common law trust in another country and attach property in his domicile, the other country's courts may not exercise jurisdiction over it.⁹⁷ In order to avoid this situation, a trust should be established in and governed by the laws of one selected jurisdiction.⁹⁸

Choosing the best situs for a trust is an arduous task because related factors are dynamic and constantly changing.⁹⁹ The most important factors in establishment of a trust are always the location of the property to be transferred to the trust and the location of the trustee or a co-trustee. If both the property and the trustee are in the same jurisdiction, courts will generally accept jurisdiction over the trust.¹⁰⁰

⁹⁴ M. HENNER, A COMPENDIUM OF STATE STATUTES AND INTERNATIONAL TREATIES IN TRUST AND ESTATE LAW at 15 (1985).

⁹⁵ *Id.*

⁹⁶ See generally William H. Newton, III, *Selecting a Situs For a Foreign Trust: The Key Factor; How and When to Change It*, 59 J. TAX'N 220 (1983). Newton's article is an excellent practical guide to selecting a situs, including the implications of relevant treaties, termination, change of situs, and decanting.

⁹⁷ E.g., LAWRENCE, *supra* note 14, at 583-84.

⁹⁸ *Id.*; see also HARRIS, *supra* note 70, at 35-36. Harris provides a thorough explanation of situs and the Hague Convention's approach to situs. *Id.* at 34-39. See generally *Common Law Trusts in Civil Law Courts*, *supra* note 75, at 1034-42.

⁹⁹ Newton, *supra* note 96, at 220.

¹⁰⁰ LAWRENCE, *supra* note 14, at 584.

This does not necessarily mean that the situs should be the place of the trustee's residence, since there may be consequences concerning beneficiaries' rights to *in personam* actions against the trustee under the trustee's country's laws.¹⁰¹ Other factors to consider are tax burdens and the rights of the beneficiary to bring suit to recover trust property in the foreign country or to recover a trustee's property in the beneficiary's country of domicile.

5.4 Enforcement or Recognition?

Although these two concepts are often considered together, enforcement and recognition have separate meanings and applications. In international trust law, recognition is the formal admission or confirmation by a nation or its courts that a trust exists and is valid. Enforcement, which necessarily requires recognition, refers to a judgment that has been awarded on behalf of a creditor for which the creditor will attempt to secure assets.¹⁰² In some cases, recognition alone is required in order to secure assets.¹⁰³

5.5 *In personam* and *In Rem* Distinctions

As previously mentioned, the common law makes a distinction between rights *in personam* and *in rem* with regard to trusts.¹⁰⁴ Where enforcement and recognition are concerned, this distinction may not translate well from a common law system to a civilian system. Under traditional civil law, *in personam* actions are not inherently difficult because parties can contract whatever obligations they choose, as long as those obligations do not frustrate public policy.¹⁰⁵ Rights in property are a different matter. Rights in property located in a civilian country must be recognized by that country in order for the rights to be exercised.¹⁰⁶

6. The Hague Convention

Due to the frequency of interactions between trust and non-trust systems and resulting difficulties, the Hague Convention on the Law

¹⁰¹ HARRIS, *supra* note 70, at 38.

¹⁰² Jonathan Harris, *Jurisdiction and the Enforcement of Foreign Judgements in Transnational Trusts Litigation*, in THE INTERNATIONAL TRUST 9, at 58 (John Glasson ed., 2002)..

¹⁰³ *Id.*

¹⁰⁴ See Lorio, *supra* note 84 at 1722.

¹⁰⁵ Lepaulle, *supra* note 73, at 1126.

¹⁰⁶ *Id.*

Applicable to Trusts and on their Recognition 1985 (hereinafter Convention) was held to harmonize and assist with the translation of trust forms from one legal system to another.¹⁰⁷ In 1982, a special commission on the subject was established comprised of about 20 countries.¹⁰⁸ The preliminary reports and discussions which took place at the working sessions centered on the conflict between common law and civil law countries.¹⁰⁹

After about three years of work, the special commission presented a draft of the Convention. This draft was accepted and then ratified individually by some nations. By 1999, Australia, Canada, Great Britain, Italy, and the Netherlands had ratified the Convention.¹¹⁰ Since 1999, Hong Kong and Malta have ratified the Convention. Cyprus, France, Luxembourg, and America have signed but not ratified.¹¹¹ Other countries have considered the Convention and accepted modified versions of its rules when forming their own conventions or trust enforcement and recognition laws.

6.1 Purpose of the Convention

According to Article 1 of the Convention, the aim of the Convention is to specify the law applicable to trusts and their recognition. The purpose is simply to establish common principles of conflicts of law concerning trusts, but the Convention does not attempt to introduce trusts into civil law legal systems.¹¹² Thus, the Convention gives lawyers and judges in civil law countries an indication of what truly constitutes a trust.¹¹³

6.2 Application of the Convention

The first drafts of the Convention applied only to common law trusts, but the language of the final draft was changed so that analogous civil law devices are included.¹¹⁴ The Convention only applies to trusts

¹⁰⁷ See Hein Kotz, *The Hague Convention on the Law Applicable to Trusts and Their Recognition*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 37, at 37-39 (David Hayton ed., 1999).

¹⁰⁸ For an in-depth history of the Convention, see LUPOI, *supra* note 11, at 86-89.

¹⁰⁹ *Id.* at 327-28.

¹¹⁰ Kotz, *supra* note 107 at 39.

¹¹¹ LUPOI, *supra* note 11 at 88-89.

¹¹² Sonneveldt, *supra* note 17, at 15.

¹¹³ LUPOI, *supra* note 11, at 330.

¹¹⁴ *Id.* at 331.

or similar devices created voluntarily and evidenced in writing, and all matters relating to wills and succession are excluded from the Convention.¹¹⁵ Consequently, it has been said that the Convention does not apply to a trust until the rocket has been launched (see section 5.1).¹¹⁶ The Convention also states in Article 6 that a trust is governed by the law chosen by a settlor, but this choice may be express or implied and may be interpreted by courts in light of the circumstances. Although there is room for judicial interpretation, the Convention's harmonization of choice of law rules has been beneficial to settlors where jurisdictional issues are concerned, and it has reduced incentives to forum shop.¹¹⁷

Even in countries that have ratified the Convention, no protection is given to those fighting a claim of heirship.¹¹⁸ In matters including succession rights, protection of minors, effects of marriage, and protection of creditors, Article 15 permits contracting states to apply their own laws or those of other states against the trust.¹¹⁹ Given the nature of civilian nations to enforce rights of heirs, it is unlikely that those countries will not apply their own laws against a trust which denies rights of succession to heirs, especially minors.

For matters to which the Convention applies, there is no territorial limit, even with regard to non-contracting nations.¹²⁰ This means that a trust established in a non-contracting state should be recognized and enforced by a contracting state under the terms of the Convention. During drafting, it was suggested that the Convention apply only to contracting nations, but ultimately the drafters decided that such inclusion would defeat the purpose and aim of the Convention.¹²¹

6.3 Criticism of the Convention

The Convention has been criticized for many reasons, although countries that have ratified the Convention are already seeing improvements in interpretation of foreign trusts.¹²² Some critics claim that the Convention fails to adequately address issues such as the

¹¹⁵ See HARRIS, *supra* note 70, at 5.

¹¹⁶ Sonneveldt, *supra* note 17, at 15-16.

¹¹⁷ HARRIS, *supra* note 70, at 85.

¹¹⁸ Anthony Duckworth, *Forced Heirship and the Trust*, in THE INTERNATIONAL TRUST 151, at 211 (John Glasson ed., 2002).

¹¹⁹ *Id.* at 211-12.

¹²⁰ HARRIS, *supra* note 70, at 93-94.

¹²¹ *Id.*

¹²² See generally HARRIS, *supra* note 70, at 90-94.

capacity of a settlor to transfer assets to a trustee and other problems relating to the self-appointment of a settlor as trustee. A few countries have expressly rejected the rules of the Convention or a large portion of its rules. Most offshore jurisdictions, including the Cayman Islands and the Isle of Man, do not follow the Convention because they view the Convention as not providing sufficient asset protection for settlors against creditors.¹²³

An additional problem is the small percentage of countries that have ratified the Convention, although this is not surprising, given the passive nature of the Convention.¹²⁴ Because the Convention does not attempt to unify domestic laws regarding trusts, large gaps in enforcement and recognition still exist, but most scholars agree that the Convention did accomplish its goals. In any event, the Convention has undoubtedly assisted in globalizing the trust concept and unifying trust treatment.

7. Conclusion

The law of trusts is not static but is continually changing, growing, and expanding across the globe. It will continue to intrigue scholars, challenge attorneys, and concern clients of numerous countries, as it has for many years. As A.W. Scott eloquently stated, “[t]he evolution of the trust has been a great adventure in the field of jurisprudence. It has not ended. As long as the owner of property can dispose of it in accordance with his legitimate wishes, the great adventure will go on. The law of trusts is living law.”¹²⁵

¹²³ See HARRIS, *supra* note 70, at 66, 75.

¹²⁴ See generally *Launching the Rocket*, *supra* note 91, at 90-91.

¹²⁵ 5 A.W. SCOTT, *Epilogue* to THE LAW OF TRUSTS 645 (1987).