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From Civil Law Jurisdictions' Point of View

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From Civil Law Jurisdictions' Point of View

The purpose of this paper is to provide a consistent and comprehensive theory of civil law jurisdictions on trusts in a manner designed for lawyers having expertise in common law jurisdictions. Upon doing this, it investigates civil law countries traditional aversion against trusts and trusts' alleged incompatibility with e.g. the principle of indivisibility of ownership and the numerus clausus of in rem rights. In addition, the paper tries to explain some fundamental aspects of civil law systems for common law lawyers in order to understand e.g. why civil law systems classify the beneficiary's right to the trust assets as an in personam right

FOREWORD

The essence of a thing or a notion can be often explained in different ways. The explanations may differ from each other fundamentally, even if they provide equally good and acceptable reasons why the given thing or notion is what it is and behaves as it behaves. One may found an excellent example in mathematics: equations. The left and the right side of an equation always refer to the same thing (because they are equals), but they both describe different aspects of the same reality and shed light on different characteristics of the given mathematical expression. For example, if one takes a look at the following equation: 'a * (b+c) = ab + ac' its left side suggest that the underlying mathematical operation is a multiplication, while the right suggests that it is a summation. These two seems to be in contradiction to each other, but nobody questions their correctness. They simply approach the underlying notion from a different angle.

Sometimes the world of law operates similar to that of mathematics. Take for instance the notion of contract. Both common law and civil law jurisdictions have contracts in their own legal systems, and nobody questions that common law contracts serve almost the same functions as their civil law counterparts.[1] This is indeed unquestionable, even in spite of the fact that the law of contract has gone through very different development in common law and civil law jurisdictions and their fundamental governing principles are slightly different today.[2] Even the very notion of contract is different in the two great systems: common law depicts it as a process of bargaining, as a result of which the contract takes shape and the parties' promises are getting outlined. In contrary, civil law systems consider contract as a point in time when the intention of the parties meet and the deal is made. This latter approach focuses on the final agreement of the parties, while common law concentrates on the way of contract formation. The difference is not at all negligible and still, common law and civil law lawyers understand each other when they talk about contracts.

1. Attitude towards Trusts in Civil Law Countries

a) In General

The situation of trusts is different from that of contracts. Trusts are, at least today, unusual notions to lawyers practicing in civil law countries. Some civil law jurisdictions do recognize certain legal instruments resembling to trusts, but they are limited both in functionality and

[1] Naturally, there are always differences in the respective regulations and therefore the laws relating to contract are very different in common law and civil law jurisdictions. Nevertheless, this does not prejudice the statement that down their root they serve the same purposes and provide similar solutions for the same needs.

[2] For example civil law systems do not recognize the principle of consideration and they empower contracts with binding force even if they are donations or otherwise gratuitous in nature.

flexibility.[3] In general, a civil law lawyer usually cannot consult with its own law for directions to the interpretation of the law of trusts or more importantly, whether the notion of trusts complies with the principles of its own legal system. This puzzlement can be easily pointed out in many court judgments delivered in civil law jurisdictions when courts were forced to face with the validity of common law trusts in the fifties and sixties. An Italian court for example, in the case of *Piercy v ETFAS*,[4] refused to uphold the validity of a trust in Italy, because it believed that the notion of trust so fundamentally contradicted the principles of Italian law (the two cited principles were the indivisibility of ownership and the *numerus clausus* of *in rem* rights) that the court's conflict of laws rules forbid its enforceability. At the end, the court recognized the beneficiaries interests, but by virtue of the long established doctrine of *favor testamenti* and not on the basis of a trust-relationship.[5] In a later case, called the *Gordon Forbes*[6] case, which also concerned an Italian property, another Italian court resorted to a different approach and declared that *mortis causa* trusts can be compatible with Italian law, if they satisfy the requirements set out for an Italian legal instrument, the so-called *pactum fiducie*. The court in this case circumvented the traditional civil law resistance against trusts and used the *pactum fiducie* as a shortcut to uphold the validity of a foreign trust. The Supreme Court of Switzerland followed a similar reasoning, but it moved one step forward with its decision in *Harrison v Crédit Suisse*[7] and declared that trusts are *"amalgams, which can be looked as a mixture of several contract types and which do not collide with any fundamental principles of Swiss law."*[8] Like Switzerland, the practice of some civil law countries had begun to recognize the existence of trust relationships established under foreign laws, but the scholars' dominant approach remained at the stage of complete denial. This was and is so powerful that civil law countries are still very reluctant to enact trusts or trust-like instruments in their laws.

b) Resistance of Legislations – "The French Example"

A good example to civil laws' resistance against the enactment of trusts can be found in France. This country signed the 1985 Hague Convention on Trusts and its court system has been recognizing the validity of foreign trusts since the seventies, which made it one of the leaders among civil law countries in this particular field.[9] Despite of this, when it came to the possible enactment of the "French trust", the so-called *fiducie*, practitioners, scholars and officials became anxious and one had to wait up until 2007 when, after three withdrawn drafts and fifteen unsuccessful years,[10] the legislation adopted finally the act on the amendment of the Code Civil and introduced the *fiducie*. The skepticism however did not end at this point. Even the provisions of the new *fiducie* are highly – and sometimes unreasonably – restrictive compared to common law trusts. For example, a *fiducie* must be established by means of written contract,[11] which must be registered with the national registry (*register national des fiducies*)[12] having the purpose of preventing the setup of anonymous trusts and providing assistance to authorities upon identifying the beneficiaries or the settlor. If the legal

[3] Among others the Swiss and German *Treuhand* or the French *fiducie* are good examples (see below), as well as the so-called *bewind* of Dutch and South-African law. This latter is an instrument that grants legal title to the beneficiary and stipulates that the trustee is not more than a mere manager of the assets. (de Waal 2000, 447.)
[4] (1986) Riv.Foro Ital. 813. The judgement was delivered on 15 March 1956.
[5] (Paton and Grosso 1994, 656-657.)
[6] Giur.Ital. 754.
[7] ATF 96 II 79.
[8] (Barthold 1999, 55.)
[9] (Saïac and Gutman 2010, 15.)
[10] (Saïac and Gutman 2010)
[11] (Newman 2007, 76.804.)
[12] See Article 2019 and 2020 of the Code Civil.

requirements are not met or the *fiducie* is not registered, it is considered as void. To the top of these restrictions comes another by stipulating that not everybody is entitled to become a fiduciary under French law. This office is limited only to banks and insurance companies.[13] Lastly, one more limitation on *fiducie* is worth to be mentioned, namely that French law expressly forbids the use of *fiducies* in gratuitous transactions.[14]

The underlying motive of these and the other not quoted restrictions usually stem from the traditional aversion of civil law countries from trusts. French authorities look at trusts as instruments dedicated to tax avoidance and malicious wealth protection even against the power of the state. In reality, they do not have the sufficient knowledge on the mechanism and the operation of trusts and unfortunately their own lawyers support these false arguments. But why are lawyers of civil law countries so much against trusts and why are they the ones who ring alarm bells when the debate comes to trusts? For the explanation of this strange behavior, one needs to investigate the development of civil law jurisdictions from a historical angle.

2. Historical Background

The first shocking surprise for common law lawyers is that trusts are not at all as unique "products" of common law as it was considered during centuries. Once, the famous English scholar Frederick William Maitland wrote:

> *"If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely the development from century to century of the trust idea."*[15]

Maitland was undoubtedly right that without the English jurisprudence there would be no trusts or only much undeveloped ones, but he would be surprised supposedly that a much older legal system, namely the Roman law had recognized and developed legal instruments using very similar concepts than trusts long before the English. One of them was the *peculium castrense* which allowed the paterfamilias' son to have a separate *patrimonium* within the property of the paterfamilias.[16] In practice, the paterfamilias still had, in today's sense, legal title to the assets, but his son was regarded very much like a beneficiary today. Certainly, Roman law did not operate with notion of common law or equity, but the concept of separating the function of a trustee and a beneficiary worked in the background.

In addition, it must also be mentioned that the frequently quoted argument of civil law lawyers is also false, namely that civil law based systems never allowed the division of ownership. In fact, the ancestor of all civil law systems, the above-mentioned Roman law not only allowed it, but deliberately developed it throughout the ages. Under this law, two separate types of ownership existed parallel to each other. One was the *dominium ex iure Quiritium*, while the other was the *bonitar* ownership.[17] The discussion of these notions goes beyond the scope of this paper, but it must be noted that these two different kinds of ownerships could survive and operate under the Roman law without any difficulties. The principle of indivisibility of ownership, which raises the most skepticism against trusts in the civil law world, was unknown at that time. This latter notion is actually product of the Napoleonic era and the ideological background of the French revolution. During the feudalism, the ultimate owner of the land was the king, while the nobles, based on their ranks and privileges, enjoyed different entitlements to real properties. These entitlements were

[13] See Article 2015 of the Code Civil.
[14] See Article 2013 of the Code Civil.
[15] (D. Hayton 1989, 2.)
[16] (Bessenyő 2003)
[17] (Bessenyő 2003, 343-345.)

sometimes as strong as ownership and, to make things more confusing, some nobles were allowed to grant certain further ownership-like rights on their lands to their 'clients'. This made ownership relations impenetrable in the feudalism. In order to remedy the situation, Napoleon introduced a consistent notion of ownership and declared that this ownership was not divisible.[18] It is not hard to see, that the sole purpose of the indivisibility of ownership principle was to help eradicating the feudalist structures of the 18th-19th century French society.[19] The success of the principle was immense. It made clear and transparent ownership structures and was also very easy to use. It is not surprising therefore that the indivisibility of ownership rose quickly among the ranks of French law's core principles and due to its expansion by Napoleon's soldiers, it widespread all over Europe and became part of the civil law systems core elements.

Nowadays, the principle of indivisibility of ownership is so respected and is so part of civil law lawyers' way of thinking that the standard common law division of ownership into legal and equitable title[20] accompanied by some other fundamental principles of trusts law are so strange for civil law lawyers that they declared the absolute incompatibility of trusts with the very fundaments of civil law systems.[21] In order to be objective and not to prejudice civil law practitioners, it must also be mentioned that common law lawyers on the other hand could not familiarize themselves with the strict hierarchy of civil law and the inflexibility of its fundamental concepts such as ownership. This full misunderstanding of each other began to melt only with the preparation of the Hague Convention on Trusts.[22] These negotiations were the first milestones on the road to open the gates towards each other, however, the beginnings cannot be considered easy at all. One good example is that some negotiators from civil law countries believed strongly that the United States' anti-trust law was in fact part of the law of trusts and therefore trusts were dangerous instruments pointing towards unhealthy monopolies. It had to be explained to them that the use of trusts to achieve monopolies was the consequence of the rule prohibiting companies in the United States to acquire other companies' shares.[23] Another good example is that the dominant view at the beginning of the negotiations was that trusts belonged exclusively to common law countries and they had nothing to do with civil law countries. One can imagine the negotiators' surprise and the shock when they discovered that Lichtenstein, which is undoubtedly a civil law country, had an established and working trust regulation that derived its origins from the English trusts law. From that point, no one could claim that trusts belonged exclusively to common law jurisdictions, because there was at least one civil law country where the adoption of trusts meant no problem at all.[24]

Nowadays things are changing rapidly. As the economic relations and transactions are globalizing, trusts are achieving new roles even in their homelands such as England and the United States[25] and at the same time they are sneaking increasingly into civil law systems, too. Their flexibility and user-friendliness provide useful tools to lawyers all around the world. In spite of this, the resistance of civil law scholars still survives, because they claim

[18] (Bolgár 1992, 210.)

[19] (Bolgár 1992, 210.)

[20] Another common misbelief concerning trusts is that there are no trusts without equity. Some jurisdictions showing both common law and civil law characteristics do have trusts in spite of the fact that they do not recognize the traditional common law – equity separation. These systems are the so-called 'mixed systems' such as Scotland, South-Africa, Québec or Louisiana. See also (Gretton 2000).

[21] (Bolgár 1992) and (Lupoi, Trusts: A Comparative Study 2000, 267.)

[22] The exact title of the convention is the following: *Convention on the Law Applicable to Trusts and on Their Recognition*.

[23] (Dyer 1999, 1002.)

[24] (Lupoi, Trusts: A Comparative Study 2000, 328.)

[25] See also (Schwarcz n.d.), (Langbein 1997) and (Rounds and Dehio 2007).

that trusts seriously interfere with the fundaments of civil law. This argument, as the present writing tries to prove it, is false down to its core elements. Civil law systems do have everything at their disposal to fit trusts into the system. Even common law trusts, as they exist in the United States or England, can be explained with the concepts and notions that civil law systems already recognize. The only thing one should do before beginning to analyze common law trusts from a civil law perspective is to forget about the notions and principles common law practitioners keep saying and trying to force upon their civil law colleagues. The system of common law and the underlying legal theory is different in almost every aspect from that of civil law systems. This must be kept in mind along with the fact that upon investigating the trust-question one has to compare the core differences of common law and civil law systems. The remaining part of this paper focuses on providing assistance and guideline to common law lawyers in order to navigate more safely on the tricky seas of civil law systems. It does so, because in order to cooperate successfully, mutual understanding is required. There is though a great responsibility on a common law practitioner as he always has to be careful what to say to a civil law colleague. Civil law is a precise and vulnerable instrument which is highly and carefully engineered. Everything has its own place and if something does not fit into the picture the system throws out the whole instrument. But, if a common law practitioner chooses his words wisely, both parties learn that trusts can be more easily fitted into civil law than it seems.

3. Trusts' Place Within Civil Law Jurisdictions

a) Law of Obligations

The first and most important thing a common law lawyer should know about civil law is that, as already mentioned, everything has its own place in civil law. This is not only because civil law systems operate by using codified civil codes, but some of the given legal instrument's core characteristics are determined on the basis of their location in the civil code. This works the same in common law systems as well. Trusts are, for example, belong to equity and this very fact explains many of their characteristics, for instance the range of available remedies in the case of a breach of trust.[26]

Within civil law systems the main areas of law are law of persons, property law, law of obligations and law of succession.[27] Trusts, as they can be established both *inter vivos* and *mortis causa*, belong (in legal systems such as Scotland and South-Africa) or would belong to the law of obligations, because the very heart of the trust, the relationship between the trustee and the beneficiary reflects the characteristics of a legal relationship fitting only into the law of obligations. From this statement one thing needs to be explained, namely, what 'law of obligations' really stands for and why it is absent from common law systems.

In order to grasp the essence of the law of obligations, civil law scholars compare it usually with property law. The latter sets out the static part of wealth distribution, more precisely, it defines the notion of ownership and some other fundamental rights, while the law of obligations represents the dynamic aspects of these rights as it explains how properties could be exchanged or encumbered, etc. In other words, the law of obligations is what swings the static proprietary law into motion and it is the one that marks the starting point of this motion and the whole process itself.[28] As this function, the "motion", is usually between identifiable persons, the law of obligations operates *in personam* in most cases. Lastly, it must be noted that common law systems, although not recognizing the notion itself, do have their laws of obligations as well. Actually, the most significant parts of civil law laws of obligations are the

[26] (Webb and Akkough 2008)

[27] Usually the order of this enumeration is the same followed in the civil code itself. The present Hungarian Civil Code *(Act IV of 1959)* for example follows this order.

[28] (Lábady 2000, 152.)

law of contracts and the law of torts, which form integral part of common law jurisdictions as well. The difference between the two systems is that common law jurisdictions do not create a higher notion under, which they subsume these areas of law.

b) In Rem or In Personam?

From a common law perspective one thing seems to raise confusion around trusts: as mentioned above, from a civil law point of view the law of trusts can be placed within the law of obligations. The question is why? Why do not trusts belong to proprietary law instead? According to the common law doctrine, the title to a trust property is divided between the trustee (holder of the legal title) and the beneficiary (holder of the equitable title) and the latter has a proprietary right (an *in rem* right) to the trust assets. The reason lies indeed again in the terminology, namely in the difference between the civil law and the common law concept of proprietary rights. Civil law proprietary rights always have *erga omnes* scope (in other words: they bind everybody around the world against the holder of the right).[29] The most fundamental proprietary right in civil law systems is ownership. If one owns a thing, this means that everybody must respect the ownership and nobody is entitled to violate this right. These *erga omnes* proprietary rights are considered certainly as *in rem* rights in common law jurisdictions as well, but civil law jurisdictions make one step further and declare that any other rights, with a few exceptions, not of *erga omnes* scope must not be considered as proprietary rights and such rights have nothing to do with the rules of proprietary law. In the case of the beneficiary's *in rem* right this means that this right cannot be classified as proprietary right in civil law systems. The reason, in reality, is that the beneficiary's right to the trust assets' is so much limited, that it extends only to the trustee (to claim the beneficiary's share due under the terms of the trust) and to persons to whom the trustee gratuitously alienated trust assets or who had notice about the trustee's breach of trust. From civil law systems' point of view this restriction is so severe that it prevents the beneficiary's right to be classified as a proprietary right.

If not a proprietary right, the beneficiary's right to the trust assets can be characterized under civil law theory only as a right established under the rules of the laws of obligations. As already mentioned, scholars usually describe the law of obligations as the dynamic element of civil law (contrary to property law which is the static one) by virtue of the fact that the law of obligations includes almost every means throughout which rights and obligations can be transferred from one person to another. It was also mentioned that from a common law perspective the two most important areas of the law of obligations are contracts and torts, but this list is not exhaustive. Sometimes for instance, rights and obligations can be transferred to another person by means of unilateral declarations, which, if all other requirements are met, form part of the law of obligations as well.[30] This is indeed exactly how trusts operate: the settlor unilaterally transfers the trust assets to a trustee who then holds them on trust for the designated beneficiaries (or purposes). It is nevertheless false that in civil law jurisdictions no rights and obligations can stem from unilateral declarations. Even the Hungarian Civil Code (without recognizing trusts) provides for this possibility. Trusts can be therefore fitted into the frame of the law of obligations, if another requirement is met, namely that the legal relationship between the trustee and the beneficiary has *in personam* nature according to civil law terminology. It was discussed above that under civil law, if a right cannot be classified as *in rem*, it is indeed *in personam*. Accordingly, a right can be usually classified as *in personam*, if it binds one or sometimes more persons directly involved in a transaction. Common law lawyers are usually not aware of it, but there are some exceptions. Sometimes an *in personam* right extends beyond the founding legal relationship (usually a contract) and

[29] (Gretton 2000, 605.)
[30] (Lábady 2000, 272.)

affects third parties who otherwise would have nothing to do with it. Under Hungarian law a good example is when a debtor concludes a contract (usually a gratuitous transfer or a sale and purchase contract) with the aim of depriving a creditor's coverage. In such case, the law, in order to protect its interests against the debtor, extends the creditor's *in personam* right beyond the frame of the original loan agreement (to which the donee or the sale and purchase contract's another party is not a party) and entitles it to declare that the other contract between the debtor and the third party is ineffective against the creditor. [31] In the end, the creditor may lawfully recover the wrongfully alienated assets from third parties having notice on the underlying purpose or acquiring the assets by means of gratuitous transfers. This rule obviously operates very similar to the *bona fidei* purchaser rule. The moral for common law lawyers is that civil law *in personam* rights are sometimes durable and in some cases extend beyond their origins. Naturally, it also follows from the above reasoning that the beneficiary's *in rem* right to trust assets can be clearly classified as *in personam* right in civil law systems.

c) Trusts and Contracts

Another question coming forward with trusts as part of the law of obligations is why are civil law systems' trust-like concepts, such as *fiducies*, *Treuhands*, etc. contract-driven instruments? The answer lays in the role that the law of contract plays in civil law jurisdictions. This field of law is more extensive and flexible in civil law jurisdictions than in common law ones. The consequence is that on one hand side, the law of contract has greater weight than other fields of law and on the other side, it has influence on a wide range of legal relationships. Contracts are the fundaments of private law and in fact, trusts do not fall far from their concept.[32] Except for some non-negligible differences, trusts are similar to contracts concluded with the purpose of benefitting a third party. In common law jurisdictions, where the doctrine of privity is stronger and provides for stricter rules, such contracts cannot compete with trusts. In civil law systems, however, the doctrine of privity is more relaxed and it leaves bigger space for contracts benefiting third parties. This is why legislators, upon considering the possibility to enact trust-like devices, usually find it more comfortable to place them in the law of contract's system. In reality, the legal profession's opposition against trusts can be easier lowered by enacting a new type of contract than creating a whole new instrument, which has no connection with the highly developed contract-system. It is worth to mention also that historical development of contracts in civil law countries was so influential that they determined the way on which trust-like devices evolved. Despite of the popularity that contracts gained in civil law jurisdictions and the obvious similarities between trusts and contracts, classic trusts cannot be depicted as contracts, even under civil law jurisdictions. Contracts require at least two parties and more importantly, consent.[33] If trusts were contracts between the settlor and the trustee (for the benefit of a third party, the beneficiary), they would be effectively created only at that point when the trustee accepts its office. This is obviously not the case, as the settlor's transfer of the property or his unilateral declaration is sufficient.[34] What is the solution then? As already mentioned, civil law jurisdictions provide for unilateral declarations within the frame of the law of obligations. The draft of the new Hungarian Civil Code had chosen exactly this road and classified the to-be-introduced trusts as unilateral declarations instead of contracts.[35] This

[31] See Section 203 paragraph 1 of the Hungarian Civil Code *(Act IV of 1959)*.

[32] (Lupoi, The Civil Law Trust 1999, 11.)

[33] This statement is under both common law and civil law systems. Irrespective whether one focuses on the bargaining element of contracts or the consent itself, the principle is the same: there is no contract without consent.

[34] (Marylebone 1984, 357-363) and (Rounds and Rounds 2010, 2-5.-2-7.)

[35] It must be mentioned also that this regulation, despite the fact that it not classified trusts as contracts, required the trustee's acceptance for the valid creation of a trust. See Section 5:483 paragraph 2 a) and b) of the adopted

classification explains some fundamental aspects of trusts. Besides the already mentioned problem with the point of creation, the unilateral declaration doctrine provides also answer to the question why trustees could be nominated or removed during the lifetime of a trust and more importantly, why successors of a trustee do not inherit their office.

d) Numerus Clausus of In Rem Rights

As the place for trusts in civil law systems is found in the area of the law of obligations, one other important argument of the resisting civil law scholars can be eliminated without difficulty. It is usually argued that trusts violate one of civil law's well-established principles, namely the *numerus clausus* of proprietary rights. This means two things in most civil law systems. Firstly, that nobody is allowed to establish proprietary rights not regulated by the law (in other words the parties are not free to create new types of proprietary rights) and the parties are not free to deviate from the provisions relating to the chosen proprietary right either (in other words they are not allowed to deviate from the rules defining the chosen proprietary right).[36] Secondly, proprietary rights need to be registered in a public and authentic registry in order to become effective.[37] As described earlier, the foundation of the trust-relationship (the legal relationship between the trustee and the beneficiary) can be (and should be) classified as an *in personam* relationship. The consequence of this interpretation is that trusts no longer belong to the scope of the *numerus clausus* principle and therefore they cannot violate it either. Concerning the registration requirement, it must also be noted that no legal principle requires the registration of *in personam* rights in any public registry. Most countries (typically the ones with a certain some civil law traditions) however require a certain degree of registration. For example, in Liechtenstein the law provides for two methods of registration, from which the settlor can choose freely the more suitable one for his purposes. The first option is to register the name, the date of foundation and termination, and the trustees' names and addresses into a public registry. In this case, the public will know about the existence of the trust. On the other hand, the settlor might resolve to remain in anonymity. In order to reach this, it has to deposit the trust's deed of foundation at the same authority keeping the above registry. The trust then acquires invisibility to the public as it will not be registered into any public register.[38]

e) Indivisibility of Ownership

At this point, we have reached the most important objection that civil law scholars and lawyers rise usually against trusts, namely the indivisibility of ownership. Although this principle, as it was seen, does not belong to one of the oldest principles of civil law systems, it rose undoubtedly so high among the ranks of civil law principles that it became one of its fundaments. If a legal instrument crosses it, it automatically becomes incompatible with the civil law system itself. At first sight, trusts indeed violate this principle as in a common law sense, where the notion of ownership did not acquire such a precisely designed meaning as in civil law systems, the ownership over the trust assets are divided between the legal owner (trustee) and the beneficial owner (beneficiary). This is, at least from a civil law standpoint, against everything what a lawyer learns at law school. There is however another interpretation or one could say, a left side of the equation. As described earlier, the equitable owner's title to trust assets can be explained with civil law terminology as an *in personam* right, which, by definition, has nothing to do with the civil law ownership, which is a 'real' *in rem* right. As a

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new Hungarian Civil Code *(Act CXX of 2009)*. Although the legislation enacted this Civil Code, it was repealed before its entry into force.

[36] (Banakas 2006, 323)

[37] (Bolgár 1992, 214.)

[38] (Kaiser Ritter Partner Services Anstalt 2008, 7.)

consequence, there is no division of ownership in the case of trusts, because the beneficial owner is not an owner in the eyes of civil law systems. The civil law notion of ownership encourages actually this reasoning by defining ownership as an *erga omnes* proprietary right that can be divided into three parts: *usus*, *fructus* and *abusus*. *Usus* entitles the owner to use, *fructus* to manage and invest, while *abusus* to dispose of the property. These key elements of ownership are always vested in the trustee, the legal owner of the trust assets, and not in the beneficiary, despite the fact that the trustee is obliged to exercise them in favor of the latter. From a civil law standpoint the real and exclusive owner therefore is the trustee, while the equitable owner, the beneficiary is a mere holder of a right, which is established by virtue of the law of obligations. This approach is compatible fully with the principles of civil law systems.

f) Doctrine of Separated Patrimonia

So far, it can be seen that civil law systems are able to explain most of the trusts characteristics. There is however one vital aspect, which is not covered so far. It is the fact that the trustee's creditors are not permitted to reach the trust assets in spite of the trustee's legal title to them. This is hard to be explained, because in civil law jurisdictions, one's estate serves usually coverage for all of its debts. Although the situation is not hopeless, one must look once more into the past for solution. Roman law recognized a notion that allowed law to separate the elements of one's property and attach them to different purposes (or for the benefit of different persons). This is the already mentioned *peculium.* Under Roman law, only the head of the family, the *paterfamilias* had capacity to own a property, but in certain cases the law enabled some of his assets to form a different *patrimonium*, which served the benefit of another person (such as his son or slave). This *peculium*, as an *universitas rerum*,[39] belonged *ipso iure* to the property of the *paterfamilias*, while was *ipso facto* under the disposal of such person who actually benefited from it. In fact, this concept survived the Roman ages and up until the Napoleonic era, jurisdictions based on Roman law allowed the separation of legal and beneficial title.[40] After this time, the indivisibility of ownership principle exiled the concept of separate *patrimonia*, although scholars never forgot about it. A good example is that its theory is still taught at law schools and is still part of the law schools' curriculum.

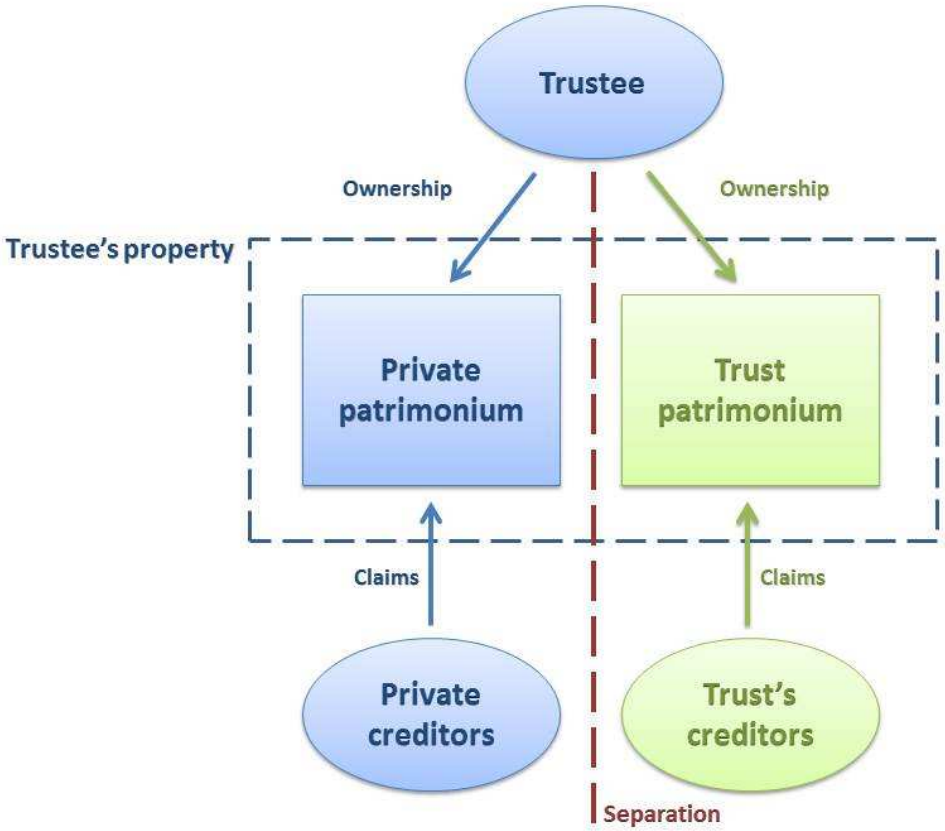
Back to trusts, the notion of separated *patrimonia* explains clearly how a trustee's estate looks like. First, a trustee has its own, private *patrimonium*, which is the same as everybody has. Besides this however, it has another and separated *patrimonium* (or more *patrimonia* in the case of more trusts), to which the trust assets belong just like the obligations that the trustee assumed in such capacity. The separated *patrimonia* are sealed from each other as if a computer firewall would have separated them. They are accessible only to their own respective creditors and are restricted from the other *patrimonia*'s creditors.[41] An example might help the understanding: assume a trustee is under liquidation. In such case, the doctrine of separated *patrimonia* prescribes that the trust assets serve as coverage only to the trust's own creditors, while the trustee private creditors (who dealt with the trustee not in his capacity as trustee) are entitled to seek satisfaction only from the trustee's private estate. The trustee's private creditors are therefore not entitled to raise claims against the trust property

[39] It means: "collection of things."

[40] None of the civil law countries has developed such a system as than the English division of common law and equity. As a result, there was no possibility to divide the title to properties into legal and equitable ones, as no equity existed in these legal systems at all.

[41] There is also a hierarchy of creditors' within the *patrimonia* as well. In case of a trust *patrimonium* for example, the standard (unsecured) creditors' claims enjoy priority over the beneficiary's *in personam* right to the trust assets and naturally, in all *patrimonia*, the secured creditors' claims will prevail over that of the unsecured creditors. (Gretton 2000, 613.)

even if the trustee's personal wealth proves to be insufficient. In this respect a trust is nothing else than an estate among the trustee's other estates. This also explains why trust assets do not form part of the trustee's estate upon its death and why heirs are not allowed to inherit them.



1. figure- separation of patrimonia

From a civil law standpoint the circle is complete. A trust, on the basis of the above, can be explained as a separated *patrimonium* within the trustee's property, which is entirely independent from the trustee's own assets and which serves exclusively the interests of the beneficiaries. The theory is simple, but the practice raises some difficulties. As mentioned, the concept of separated *patrimonia* is not a living doctrine in most civil law countries. Many jurisdictions, in their fear that this doctrine could provide basis for malicious asset protection or even encourage transactions aiming to deprive creditors' coverage, simply refuse to allow trusts or trust-like concepts and even in the countries, where some achievements have been reached, the establishment of this doctrine is not complete. Good examples are Germany and Switzerland. In both countries the courts designed and developed the *Treuhand*, which is a trust-like device, which derives its origins from the law of contracts.[42] The settlor of a *Treuhand* (the *Treuhandgeber*) appoints a quasi-trustee (the *Treuhänder*) to use and and/or manage certain assets for the benefit of a third party or a designated purpose. The *Treuhänder* acquires ownership on the assets, but upon the termination of the *Treuhand*-relationship, the *Treuhänder* is usually obliged to hand over these assets to the *Treuhandgeber*. The problem with this legal instrument is that neither the Swiss nor the German judicial practice has introduced the doctrine of separated *patrimonia* in its entirety so far. In both countries the courts are sliding towards this point of view, but so far they have achieved some partial results only. In Germany for example, the courts declared that the *Treuhänder* is only a formal owner

[42] (Thévenoz 2001, 305.)

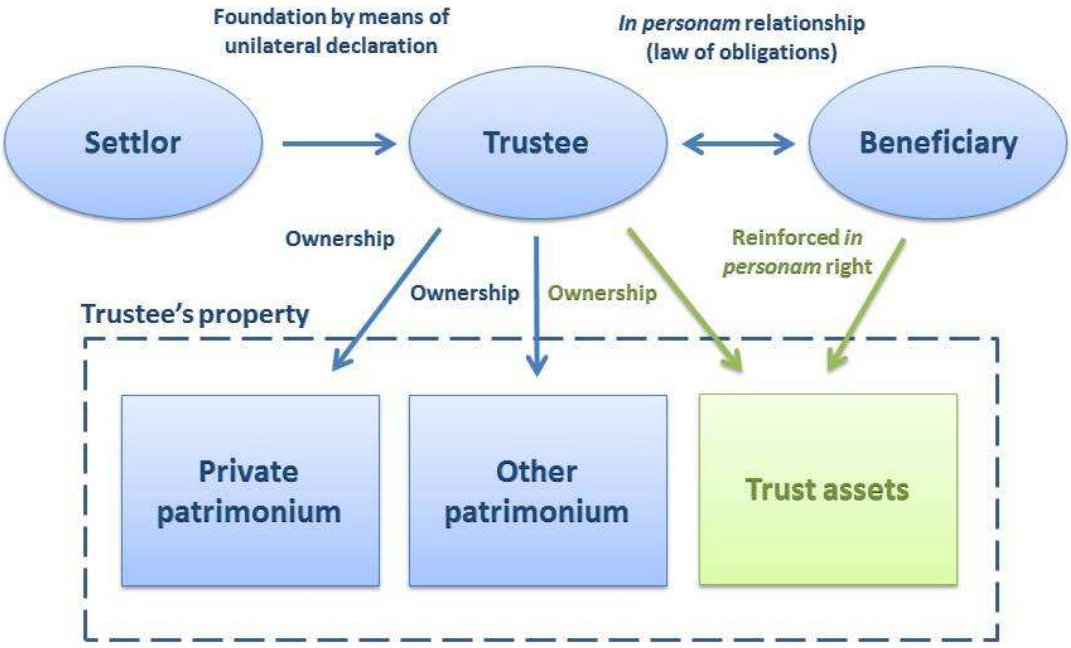
of the *Treuhand*-assets, but in Switzerland the courts are so far refusing to recognize this.[43] Instead, the Swiss judicial practice remains inconsistent as the following example demonstrates. As mentioned, the *Treuhänder* acquires ownership on the assets the *Treuhandgeber* transfers to it. In case of the latter's insolvency however, the destiny of the assets depend on what the *Treuhänder* has made with them. Except for real estates, if the *Treuhänder* acquires new assets in exchange for the originally transferred assets (or on their value), the courts offer protection to them and in such case they provide coverage only for the *Treuhandgeber*. In contrary, the originally transferred assets provide always coverage for all creditors and the *Treuhandgeber* does not have any privileges among the other creditors at all.[44] The recognition of separated *patrimonia* is therefore partially adopted only. German law has difficulties with this doctrine as well. In their case the problem comes from the opposite direction. As mentioned earlier, German courts consider the *Treuhänder* only as a formal owner of the *Treuhand*-assets. As a consequence, they are willing to give the protection to the transferred assets the Swiss courts refuse to provide. But as soon as the *Treuhänder* buys something in exchange for these assets, the newly purchased ones will not belong to the *Treuhand*-assets. In addition, the German judicial practice has not developed the *bona fidei* purchaser rule, therefore there is no protection, if the *Treuhänder* alienates *Treuhand*-assets wrongfully. On top of this, the *Treuhandgeber* is not entitled to recover *Treuhand*-assets, if the *Treuhänder* mix them with its own properties wrongfully.[45]

As it can be seen, both German and Swiss courts made efforts in order to introduce the doctrine of separate *patrimonia* in their jurisdictions. There are some achievements, but in the future more is needed. It must be taken into account that as in all civil law countries, the armory of judicial law-making is limited. Although the *Treuhand* is a good example, the courts are now about to reach their limits that the interpretation of statutes and some other tools made available to them. The next step should be that of the legislation, but this is necessarily a hard task. The situation is however not hopeless, as trusts are becoming more popular around the world than ever.

4. Civil Law Concept on Trusts

As it was seen in the short overview of Swiss and German judicial practice, the doctrine of separated *patrimonia* is a hard nut to crack for civil law jurisdictions. In theory, however, it explains sufficiently and precisely the operation of trusts and allows the setting up of their explanation with civil law terminology. This is the following: the trustee is the legal and rightful owner (in a civil law sense) of the trust assets, but under the rules of the laws of obligations it is forced to manage them for the benefit of the beneficiaries (or the designated purpose). The other party to this legal relationship is the beneficiary, who, again under the rules of the laws of obligations, has entitlement to the trust assets. In the case of a breach of trust, the beneficiary is allowed to seek remedy against the breaching trustee and, still under the rules of the law of obligations, the beneficiary is empowered to turn against the acquirers of trust assets who gained trust assets gratuitously or had notice on the breach. This concept is indeed in accordance with the common law interpretation of trusts as it is only a different approach to, and terminology for the same notion.

[43] (Hayton, Kortmann and Verhagen 1999., 93.)
[44] (Thévenoz 2001, 307.)
[45] (Hayton, Kortmann and Verhagen 1999., 94-95.)



2. figure - civil law concept of trusts

CONCLUSION

As this paper intended to prove, trusts are compatible with the strict structure of civil law legal systems. In fact, many of the mixed jurisdictions, such as Scotland, Louisiana or South-Africa have their own trust concept and they prove trusts to be working in civil law environment as well. The difficulties, from the author's point of view, derive mostly from the superficial knowledge common and civil law practitioners and scholars have about each other's legal system and fundamental legal principles. As the preparations of the Hague Convention on Trusts indicate, mutual understanding and cooperation is required to set aside the obstacles and fill the huge gap between the minds of common law and civil law lawyers. Everybody should learn from the trust-example that neither common law nor civil law is better or worse than the other, sometimes they are just simply two sides of the same equation. There is much to learn from each other…

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