TRUST AND PRIVATE INTERNATIONAL LAW. CRITICAL ANALYSIS

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SUMMARY

I. General aspects.

I. Introduction.

1. *Trust*. General concept and basic characteristics.

A) Approach to the concept of *trust*.

1. Common law trust can be defined, roughly and very generally, as the "legal relationship created *inter vivos* (*trust deed*) or *mortis causa* (*will*) by a person, the *settlor*, by placing property or assets under the control of another person (*trustee*), in the interest of a beneficiary (*beneficiary* or *cestuis que trust*) or for a specific purpose". The famous *Black's Law Dictionary* defines a *trust* as "*[a] legal institution created by a settlor for the benefit of designated beneficiaries under state law and the valid trust instrument. The trustee has the fiduciary responsibility to manage the assets and income of the trust property for the economic benefit of all beneficiaries*"[1].

2. With regard to the concept of *trust* referred to in the previous paragraph, some important preliminary information should be underlined.

Firstly, there is no official or legal definition of *trust* in the countries whose legal systems admit and regulate it[2] . Common law, as C. GONZÁLEZ BEILFUSS rightly points out, follows an inductive procedure that starts from the singular and particular: from concrete cases it extracts more generic hypothetical rules. It does not start from a prior and aprioristic configuration of legal concepts and institutions provided by the incorrectly named "Science of Law", as is the case in continental law, where a classic deductive method, typically Aristotelian, is followed. Definitions are not as important for legal scholars in common law countries as they are for legal experts in continental countries, because legal experts in common law countries do not need general concepts and institutions from which to deduce concrete solutions[3].

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[1] Black's Law Dictionary: "*[a] legal entity created by a grantor for the benefit of designated beneficiaries under the laws of the state and the valid trust instrument. The trustee has a fiduciary responsibility to manage the trust's corpus assets and income for the economic benefit of all of the beneficiaries*". Text at: https://issuu.com/sanantoniobar/docs/sal-sepoct-mmc-digital/s/11055744#:~:text=Trusts%20were%20developed%20by%20courts,court%20decisions%20based%20on%20fairness.

[2] D. HAYTON, "*Trusts* in Private International Law", *Recueil des Cours de l'Académie de Droit international de La Haye*, 2013, vol. 366, pp. 9-98, esp. p. 17: "*It is universally acknowledged that, due to the inductive development of the trust, there is no true or conclusive definition of a trust that can enable one to determine whether or not certain legal relationships in particular circumstances give rise to a trust rather than some other legal concept. Instead, one can only look at certain core characteristics that reflect the rules that distinguish trusts from other legal concepts*". Also D.W.M. WATERS, "The institution of the *trust* in civil and common law", *Recueil des Cours de l'Académie de Droit international de La Haye*, 1995, vol. 252, pp. 115-452, esp. pp. 123-125, with a delightful description of the dialogue between English and Continental jurists on the concept of *trust* and on the functions it performs and its possible equivalents in *Civil Law*. An accurate summary of this lack of a legal concept of "*trust*" can be found in M. VIRGÓS SORIANO, *El Trust y el Derecho español*, Cuadernos Civitas, Madrid, 2006, pp. 13-16. A truly exhaustive and fascinating collection of definitions of the *trust* can be found in J.C. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, pp. 40-45.

[3] C. GONZÁLEZ BEILFUSS, *El trust, la institución anglo-americana y el Derecho internacional privado español*, Bosch, Barcelona, 1997, pp. 10-12.

Secondly, Article 2 *in primis* of the Hague Convention of 1 July 1985 on the law applicable to *trusts* and the recognition of trusts contains a sentence indicating "what is meant by trust" ("*the term "trust" refers to* ...."). However, several remarks should be noted in relation to this expression. First of all, it is not really a "definition" of *trust*, but rather a "description" of it, as F. MOSCONI / C. CAMPIGLIO point out[4].

Secondly, this expression of what a *trust* is, applies only "*for the purposes of this Convention*" (Art. 2 *in primis* Convention)[5]. Consequently, this definition cannot be extended without further ado to all *trusts* admitted in all the legislations of the world. Moreover, the Convention itself admits that it uses a very broad concept of *trust*, an almost artificial concept, so that the Convention can thus be applicable to "*trusts as developed by the courts of equity in common law countries and adopted by other countries with certain modifications*" as "*a specific legal institution*".

Thirdly, there is no universal "*trust law*" and it is therefore logical that there is no universal legal definition of what a *trust* is. Each state has its own *trust* law and the concept of trust and its functions vary considerably from country to country.

B) The *trust*, an Anglo-Saxon institution.

3. The *trust* is a legal institution specific to the law of Anglo-Saxon countries, such as the United States, the United Kingdom, Australia, Ireland and many others around the world. The *trust* was born in England in the 12th century. The expansion of the British Empire all over the world was the cause, -*felix culpa*, according to English jurists-, of the spread of the *trust* to a multitude of countries.

4. In contrast, the *trust* is a legal institution that does not exist in *Civil Law* countries, such as, for example, in continental European countries. It does not exist in Spanish law. For continental jurists, the *trust* is a mystery wrapped in an enigma and hidden in a riddle. The phrase attributed to the great German jurist OTTO VON GIERKE in a letter sent to the exceptional British jurist FREDERIC WILLIAM MAITLAND, the true modern father of English legal history, is famous: "*I cannot understand anything about your English trust*".

5. It is true that some *civil law* countries, such as Liechtenstein, Japan, Luxembourg or Mexico, have legal forms similar to *trusts*. These legal forms have recently been created for two purposes. Firstly, to encourage investment from Anglo-Saxon countries, as is explained by a large body of doctrine[6]. Secondly, to provide firm and solid legal

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[4] F. MOSCONI / C. CAMPIGLIO, *Diritto internazionale privato e processuale. Vol. 2: Statuto personale e diritti reali*, 6th edition, Utet giuridica, Wolters Kluwer Italia, Milano, Milano, 2023, pp. 368-371, esp. p. 369.

[5] Art. 2 *in primis* of the Hague Convention of 1 July 1985 on the law applicable to *trusts* and their recognition: "*For the purposes of this Convention, the term "trust" means a legal relationship created - inter vivos or mortis causa - by a person, the settlor, by the placement of property under the control of a trustee in the interest of a beneficiary or for a specific purpose*".

[6] S. CÁMARA LAPUENTE, "Breve compendio geo-conceptual sobre *trusts*", in M. GARRIDO MELERO / S. NASARRE AZNAR (Coords.), AA, "Los patrimonios fiduciarios y el *trust* : III Congreso de derecho civil catalán" Editores: Marcial Pons, Ediciones Jurídicas y Sociales, Marcial Pons, 2006, pp. 25-52; C. BAUER, *Trust* und Anstalt als Rechtsformen liechtensteinischen Rechts, Frankfurt am Main, 1995; H. BÖSCH, *Die liechtensteinische Treuhänderschaft zwischen trust und Treuhand: eine rechtsdogmatische und -vergleichende Untersuchung aufgrund der Weisungsbestimmung des Art.918 liecht. PGR*, Mauren, 1995; D.A. DREYER, *Le trust en droit suisse*, Genève, 1981; P.-M. GUTZWILLER, "Der *Trust* in der schweizerischen Rechtspraxis", *ASDI*, 1985, pp.

protection for the beneficiary, since with the structure of the simple Roman-style trust business, the beneficiary is at the mercy of the trustee's good deeds -or not, which is what usually happens-. In a pure trust business, if the trustee, who is the sole and true owner of the assets, decides to keep them or simply disposes of them, the hapless beneficiary has only a personal action against him for breach of the trust contract that both parties agreed upon, which is a weak protection. The *trust* protects the beneficiary in a much more decisive and effective way, since it offers him a wide and effective set of actions to ensure that the assets in *trust* continue to be held in *trust.* In any case, as C. GONZÁLEZ BEILFUSS points out, these *trust-like* forms do not really correspond to the scheme and structure of the Anglo-Saxon *trust*, since they are built on the legal framework of a reinforced trust business, as can be seen in the legislation of Quebec and France, among others[7].

6. It should also be noted that *trusts* arouse mixed feelings among *civil law* jurists. Some have a visceral loathing for it as a legal institution that can be, and often is, used for sophisticated tax evasion, to avoid the debtor's liability, to render certain assets immune from enforcement, and even to engage in creditor fraud. Other continental jurists, on the other hand, love it with boundless passion for its functional flexibility or out of pure legal snobbery and/or a systemic legal xenophilia that sometimes borders on the pathological[8]. Against these two groups of jurists, there are experts in private international law, whose interest in the *trust* lies in getting assets that are legally in a *trust* situation to cross the border without having to change their legal *status*. The continuity of the *trust* in space is what motivates the reflections of private international law specialists. This avoids legal limping situations, strengthens cross-border legal security in space, secures the rights of individuals on the international stage, provides efficient legal solutions and guarantees the free international movement of wealth, goods and services as well as people. Overcoming pure territorialism and mere legal legalism is also the aim of private international law when dealing with the sensitive subject of the Anglo-Saxon *trust.*

C) Structure, participants and creation of the *trust*.

7. It should be stressed that most *trusts* involve three persons in three very different legal positions: the *settlor* or *grantor*, -the person who unilaterally creates a *trust*; the *trustee*, -who is the person to whom the assets are transferred and who manages them in the interests of the beneficiaries according to the instructions given by the *settlor*; and the beneficiaries, -the persons who receive the income from the assets in the *trust* and who, when the trust ends, will be the new owners of those assets. However, the

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53-56; U. SIEVERS, *Die Abwicklung von Treuhandunternehmen*, Diss. Hamburg, 1995; J.-P. BERAUDO, "*Trust*", Répertoire de droit international, Dalloz, Paris, 1998; J.-P. Beraudo, *Les trusts anglo-saxons et le droit français*, LGDJ, Coll. Droit des affaires, 1992; C. GONZALEZ BEILFUSS, *El trust, la institución anglo-americana y el DIPr. español*, Bosch, Barcelona, 1997, p. 8, indicates that the *trust* is "*a hidden phenomenon for the external observer*".

[7] C. GONZÁLEZ BEILFUSS, *El trust, la institución anglo-americana y el Derecho internacional privado español*, Bosch, Barcelona, 1997, p. 10.

[8] The debate can be followed, perfectly explained, in J.C. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, pp. 80-88.

trust does not always involve three different persons. Indeed, the *settlor* may appoint himself as *trustee* or *beneficiary*, and there may be several *trustees* or several *beneficiaries*.

The *trustee* must administer and manage, in good faith and with the utmost diligence, the assets transferred to him by the *settlor* and must perform these functions in full compliance with the instructions given by the *settlor* when the *trust* was created.

The *trust* is not a legal person and lacks, in any case, legal personality. Consequently, it cannot be sued as such, as it has no legal personality. The Ordinanza Corte di Cassazione, Italy, 20 January 2022 n. 1826 [claims against a *trust*] is very interesting and correct in this respect[9].

8. As regards the way in which a *trust* is created, it can be created in several ways. A voluntary *trust* exists when the *settlor*, by means of a document or a specific act, creates a *trust*. A statutory *trust* exists when the courts, in cases provided for by the law, create a *trust* (*constructive trust*) or when the law creates a *trust* directly, *ope legis* (*resulting trust*). It can even be created orally. On the other hand, the *trust* cannot last indefinitely. It is also true that the *trust* persists and continues after the death, resignation or abandonment of the *trustee*[10].

2. The origin of the *trust*. Crusades, *Common Law* and *Equity Law*.

9. In all legal systems there have been and still are legal figures of trust, by virtue of which one person grants to another, in whom he fully trusts, the power to dispose of certain assets for the benefit of others. In fact, the English word "*trust*" means "confidence". *Trust* derives from the Germanic word *"trost*", which means "firm". And this word, in turn, is inherited from an Indo-European root ("*-deru*"). The root means "solid", "firm" and "true". From this root also come the English words "*tree*", which evokes the idea of firmness, strength and robustness, as well as the word *"true*", which means true, and "*truth*", which means "*truth*". The Indo-European root "*-deru*", which is the basis of the English word "*trust*", also gave rise to the Greek word "*δένδρον*", meaning tree, and to the Latin word "*durus*", meaning *"hard*".

10. In Roman Law, the *ficucia cum amico* and the *fiducia cum creditore* functioned according to this scheme of trust. So much so that some authors place the remote origin of the *trust* in Roman law itself[11]. Others indicate that the *trust* is a borrowing from Salic-Germanic law (*treunhand*) and finally there are those who underline that the *trust*, how curious, has its origin in the Islamic *waff*, which the English crusaders could have transferred from the Holy Land to England after their experience in the Third Crusade[12].

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[9] Ordinanza Corte di Cassazione, Italy, 20 January 2022 n. 1826 [*Rivista di Diritto internazionale privato e processuale*, 2022-IV, pp. 1013-1017].

[10] S. CÁMARA LAPUENTE, "El *trust* y la fiducia: posibilidades para una armonización europea", *Derecho privado europeo,* Madrid, Colex, 2003, pp. 1099-1172, esp. p. 1134.

[11] J. GARRIGUES DÍAZ-CAÑABATE, *Negocios fiduciarios en el Derecho Mercantil*, Cuadernos Civitas, Thomson Reuters, Madrid, 1979, reprint 2026, pp. 45-46.

[12] Magnificently explained by JC. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, pp. 20-24.

11. Without prejudice, therefore, to the notable historical precedents of the *trust*, it did not exist as such in Roman law, as W.W. BUCKLAND has already shown. BUCKLAND[13] . The real origin of this institution seems to be found, explains J.-P. BÉRAUDO, in medieval times and more precisely in the 12th century, *i.e.* at the time of the Crusades, the famous expeditions carried out by numerous European warriors in the Holy Land, but it is an English legal creation and not a borrowing from Muslim law[14].

12. When an English noble knight went to the Crusades, -specially the third Crusade, captained by the king Richard the lionheart-, he left his lands and goods in the hands of a friend, of course also of noble status, so that this person could manage these goods for the benefit of the knight's wife and children, who logically stayed in England while the knight went to the Holy Places. The crusader knight feared that other nobles - perverse and well-connected to the Crown - might appropriate his lands and fiefs. He also feared that his family would be left without a livelihood. Finally, he also wished to continue to fulfil his duties as a feudal lord even if he was not present in England. This operation of passing on property to a noble friend, D.W.M. WATERS argues, was done for two reasons[15].

Firstly, the crusader knight was normally a nobleman holding a fief and as such, he was entitled to a series of rights and obligations linked to the management of the fief. No one other than a nobleman could assume such rights and obligations. If the English knight left for the Crusades, his legal position had to be assumed by another nobleman, and not by anyone else.

Secondly, the nobleman could not leave his fief and property to his wife and/or children, because the wife did not have the legal capacity to hold a fief and the children did not have such capacity either. The intervention of a third party, another nobleman, was therefore necessary.

13. This operation was perfectly possible in English law because English law has a very peculiar conception of the right of ownership of immovable property, which requires at this point a very brief and even fleeting historical note.

In the early 8th century, northern France was ravaged by Viking raids from Denmark that even reached Paris as early as the 9th century. The Viking king Rollon, also known as Rollon the Wayfarer, Roderick the Rich, or Gange Rolf, who had fled from Norway, where he was originally from, settled in northern France with Danish troops. He occupied a region that became known as "Normandy" or "*Northmanorum*" - the lands of the Northmen - following a pact with King Charles III of France, the Treaty of Saint-Clair-sur-Epte in 911. Rollon was named the first Duke of Normandy under the name of Robert I. Rollon's descendant was William II, Duke of Normandy, later known as William I of England. Well, it turned out that his cousin, King Edward I the Confessor of England, had died without issue. The Earl of Wessex, Harold II, an Anglo-Saxon, was appointed successor and King of England, but the situation was very unstable and weak. He had to

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[13] W.W. BUCKLAND, *Equity in Roman Law,* London, University of London Press, 1911, pp. 14-15.

[14] J.-P. BERAUDO, "*Trust*", *Répertoire de droit international*, Dalloz, Paris, September 2012, pp. 1-9; J.-P. BÉRAUDO, *Les trusts anglo-saxons et le droit français*, LGDJ, Coll. Droit des affaires, 1992; J.-P. BERAUDO, "La Convention de La Haye du 1er juillet 1985 relative a la loi applicable au *trust* et a sa reconnaissance", *TCFDIP*, 1985-1986, pp. 21-41.

[15] D.W.M. WATERS, "The institution of the *trust* in civil and common law", *Recueil des Cours de l'Académie de Droit international de La Haye*, 1995, vol. 252, pp. 115-452, esp. pp. 169-171.

face another Harold, Harold III, King of Norway, who with his son Olaf landed in England ready to seize the coveted English throne. At the Battle of Stamford Bridge (25 September 1066), Harold II defeated the Norwegians. Following this, Harold II faced his other enemy, William the Conqueror, and was defeated at the Battle of Hastings (14 October 1066), where he died. William, victorious, conquered England and the Normans from the North of France, Normandy, seized power in England. Well, for these Norman kings, the land belongs to the Crown. It is *terra regis*. The King has the real *absolute ownership*. In this sense, these Crown lands are *allodial title*, that is, property totally independent of any other superior subject.

However, Norman invaders were not numerous in England. Therefore, in order to maintain peace and order, the new king had to cede the use of his land, under different legal forms, to the nobles and lords of England. Thus, the same land was used in different ways by different people. The persons who own the land are the *land owners* and have, according to English law, rights over things (*estates*) which are, in a way, similar to the royal rights regulated in continental law, although the land is not theirs, but that of the Crown, to which they pay certain taxes for their *property*. English *ownership* is not to be translated as "property" in the Roman sense of the term, but as "lawful possession in one's own name under the law" of the property in question. The King grants the nobles so-called "*estates*" or "interests", which are certain rights over the King's lands. The King charged certain royalties when the *estates* were passed on by inheritance. The King could also deprive the nobles of *estates* in serious cases because, after all, the land belongs to the Crown.

14. In short, the crusader knight transferred his *estate* over the fief, over his lands and over his goods, to another nobleman. This other nobleman (*feoffee to uses*) therefore had the title of owner of the estate (*feoffment to uses*). This other nobleman, presumed to be a friend of the first, was the true, sole and full owner of the *estate*, explains C. STEENS[16]. Now well, he was the owner of such goods and rights but he had to exercise his rights as owner "for the *use*" or "for the benefit" of other people, normally the wife and children of the crusader knight and with the obligation to return the goods after a certain period of time, says G. BALE[17] . The wife and children were usually, as indicated above, the "beneficiaries" of this legal transaction. The English word "*use*" is a noun and should be translated as "*profit*", not as "*right to use*" or "*right to use*". In its medieval origin, what is now known as "*trust*" was simply called "*use*". It should be stressed that there is documentary evidence of the existence of "*use*" in England before the Norman invasion of the country, notes J.C. MUÑIZ PÉREZ[18] . The English word "*use*" is not derived from the Latin "*usus*", but from the expression "*ad opus*", which means "to take advantage of".

15. When the crusader knight died, usually on the battlefield and in a foreign country, or when, more rarely, the crusader knight returned from the Holy Places, it turned out

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[16] C. STEENS, "The History Of The *Trust*", at https://southpacgroup.com/the-history-of-the-trust/: "*At this time, English common law inferred that property was an indivisible entity, and whoever owned the legal title owned all the rights and privileges of such a title*".

[17] G. BALE, "*Trust*" at https://www.thecanadianencyclopedia.ca/en/article/trust, February 2012.

[18] J.C. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, p. 25.

that the noble "friend" who had remained in England, intended to keep the lands and goods of the deceased crusader knight, and moreover, as the true "owner". Certainly, the nobleman who owned the fief and property had a *legal title* to these assets. The wife and children of the crusader knight - or the knight himself, if he survived and returned to England - were frustrated in their attempts to receive the fruits of the property ("*use*") and also in their attempts to recover them. In view of the situation, which they considered unfair, the beneficiaries went to court and claimed their rights as beneficiaries, and this is where the problem began and, in reality, the *trust* was born.

16. Following the conquest of England by the Normans after the decisive battle of Hastings (1066), these new kings from France compiled the law that had applied in England up to that time, the law of the Anglo-Saxons, with the invaluable help of legal experts such as LANFRANC, an Italian jurist who was archbishop of Canterbury[19] . It must also be said that, in the mid-12th century, a Bolognese jurist named VACARIUS taught Roman and canon law at Oxford with great success. His book *Liber Pauperum* collected texts from the *Digest* and the *Codex* and certain glosses. The Normans also instituted certain ecclesiastical tribunals which applied, logically, canon law. This is important because it shows that Roman and canon law were studied and applied in England.

At that time, courts existed in England under each feudal lord and applied the law of the feudal lord in the jurisdiction of the feudal lord. However, the Norman kings, beginning with King Henry (1100-1135) and especially with Henry II, grandson of the former (1154-1189), instituted royal courts. These King's courts, at first, operated only in the royal court and within a perimeter of four and a half kilometres from the point where the King was located at the time. Later, the King's courts began to dispense justice on the network of roads and waterways on the pretext that they led to the King's court. Finally, kings extended their jurisdiction to the whole of their realm by the legal fiction that the king was present throughout the whole of his realm. This was the birth of the English *Common Law*, a law common to the whole kingdom and which was distinct from the law applied in each fief by each feudal lord. The local courts of the fledgling towns, the merchants' courts, usually established in fairs, ports and markets, the courts of the Church and also the courts of the feudal lord, continued to operate in their respective places. Superimposed on this network of particular courts was thus a network of royal courts which applied a single law throughout the realm, the *Common Law*. They were not superior courts to these particular courts, but parallel courts, so that individuals could turn to the particular, local or feudal Justice, to the municipal Justice in the cities, to the ecclesiastical courts or to the royal Justice.

17. The *Common Law* applied by the King's courts was very successful, because individuals thought that Royal Justice was more neutral than private Justice and because it was a much more effective Justice, as the King could enforce what was decided in his courts in a very convincing way.

18. The *Common Law* was a very rigid body of law that operated by means of so-called "*writs*". The *writ* was an order written in Latin on parchment by officials of the King of England and signed by the King, ordering an official of the King to redress an

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[19] T. HERZOG, *A Brief History of European Law. Los últimos 2500 años*, (translated by Miguel Ángel Coll Rodríguez), Madrid, Alianza Editorial, 2019, pp. 131-64.

injustice or to have justice done in a certain sense. The *writ* indicated that, at least in principle, the actor had the right to have justice done. The *writ* soon became a necessary order to initiate litigation. The number of *writs* was small at first but grew over time. The number of petitions for the issuance of *writs* increased steadily. This caused the King's officials to grant *writs* only in cases similar to the previous ones in which *writs* had been granted. Because of this repetition of *writs* and also because the feudal lords forced King Henry II in 1258 to stop issuing new *writs* in order to limit the expansion of the royal jurisdiction, the list of *writs* was closed. As a consequence, the King's judicial system became very rigid, as the subject who requested any action from the King's Justice but did not have a *writ* to that effect, did not obtain permission to initiate the process. The *writs* contained everything that could be requested from the King's Bench, and outside them the *Common Law* did not protect the subject's petition.

19. In relation to the *trust*, then called "*use*" as mentioned above, there was no specific "*writ*" for the beneficiaries to assert their legal position against the owner of the fief and of the assets. The latter was the owner of the property under the *Common Law*, since he had the *legal title* (*legal ownership*). In other words, the *common law* left the beneficiaries of *use* without any legal protection.

20. Faced with this situation, the beneficiaries, some of whom were English crusader knights returning from the Holy Places, were not protected by the *Common Law.* They therefore turned directly to the King's Justice. The King delegated to the *Lord Chancellor* and the *Chancery courts* to settle the case. These courts, made up of ecclesiastics of the Roman Church, were designed to enable the King to do justice in an upright and thorough manner, i.e. to safeguard the conscience of the sovereign and to save his soul. Since the legal situation of the beneficiaries at *Common Law* did not seem just and not attending to them could weigh heavily on the King's conscience, the King's officials and courts created another body of law to provide a just solution to the problem: the *Equity Law*[20].

21. *Equity Law* was composed of a set of rules and principles whose mission was to correct the defects and injustices caused, in specific cases, by the rigidity of a *Common Law* based on a closed number of *writs*. *Equity Law* was and is inspired by Canon Law, Roman Law and general principles of Justice and natural philosophy, as M. CHECA MARTÍNEZ recalls very well. Hence its name, clearly Aristotelian: equity or Justice for the specific case[21].

Equity law allowed justice to be obtained in the concrete case by the adoption of specific *remedies*, always in exceptional cases, and did not have a closed list of rights and actions that could be exercised.

Equity Law was thus a very flexible legal system implemented by the *Lord Chancellor*. It was designed to safeguard the King's conscience and to do justice in specific cases

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[20] T. HERZOG, *A brief history of European law. Los últimos 2500 años*, (translated by Miguel Ángel Coll Rodríguez), Madrid, Alianza Editorial, 2019, pp. 153-158. The fundamental maxims of *Equity* are brilliantly set out in J.C. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, pp. 27-33.

[21] M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, pp. 1-3.

where the *Common Law* did not provide that just and righteous solution. *Equity Law* was not, however, an arbitrary or praetorian law: it was based, as noted above, on Roman and canon law criteria.

22. It should also be stressed that *Equity Law* is not a body of law contrary to *Common Law*. In fact, *Equity follows the Law*, which means that *Equity Law* is only an equitable interpretation of the law. *Equity Law* serves the ends of justice by serving the law, the *Common Law*[22]. *Equity* does not correct the *Common Law*, it is not the enemy of the *Common Law.* It is a supplement to the Common Law that helps its correct interpretation and application by means of criteria of justice. In fact, *Equity Law* follows the reasoning of the *Common Law*: *Equity respects every word of law*. *Equity Law* fills the legal and axiological gaps in the *Common Law* in the same way as the *Common Law* would have done if the Common Law had asked itself the question.

23. In the 15th century, the *Lord Chancellor*, who was in charge of administering this *Equity Law*, admitted an action brought by the "beneficiary of the *trust*" or "*cestui que trust*" against the *trustee*, the evil noble "friend", to make him fulfil his duties towards the "beneficiary". Such an action was recognised "in equity", i.e. by *Equity Law*. That is why it is often rightly asserted that the *trust* was born under *equity law*. The beneficiary now has "*equitable ownership*".

24. *Equity law* is a body of law distinct from *common law*. It was applied from the 14th century until the late 19th century exclusively by the *Court of Chancery*, a "court of equity". In 1873 *the Court of Chancery* disappeared by virtue of the *Supreme Court of Judicature Act 1873*, but *Equity Law* now applied by *Common Law* courts remained, and so did the *trust*.

25. The *use*, a direct precedent of the *trust*, was not only applied to do justice to the beneficiaries of the property of the crusader knights. It was also used to avoid the payment of taxes and feudal duties, as H.L. MUNSINGER explains[23]. Since the transfer of property by will was forbidden, landowners started to create "*uses*". Similarly, in order to avoid paying inheritance taxes, "*uses*" were created[24]. The *use* (economic benefit) was attributed to the son. Moreover, certain corporations and religious orders with a vow *of* poverty (*oath of poverty*) could not, precisely for this reason, own land. However, such a vow of poverty did not prevent them from receiving fruits and benefits from the land. In order to receive such fruits and rents, religious orders and other ecclesiastical corporations also created "*uses*"[25] . On the other hand, many lands were owned by the Church, and as the Church is eternal, it does not die and never pays inheritance or transfer taxes. Faced with this situation, in the 13th century, the *Statutes of Mortmain*, formed by two laws of 1279 (*Statutum de Viris Religiosis*) and 1290 (*Quia Emptores*),

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[22] M. LUPOI, *Trusts*, 2nd ed. in full review, Giuffrè Editore, Milano, 2001, p. 41.

[23] H.L. MUNSINGER, "History of Trusts", https://issuu.com/sanantoniobar/docs/sal-sepoct-mmc-digital/s/11055744#:~:text=Trusts%20were%20developed%20by%20courts,court%20decisions%20based%20on%20fairness, September - October 2020.

[24] G. BALE, "*Trust*" at https://www.thecanadianencyclopedia.ca/en/article/trust, February 2012.

[25] H.L. MUNSINGER, "History of Trusts", https://issuu.com/sanantoniobar/docs/sal-sepoct-mmc-digital/s/11055744#:~:text=Trusts%20were%20developed%20by%20courts,court%20decisions%20based%20on%20fairness, September - October 2020.

passed during the reign of Edward I of England, preserved the revenues of the Kingdom by preventing the Church from owning land in England. In response to this, the Church used the *uses*, so that a person (*feoffee*) owned the land, while the Church received the fruits and rents of the land, being the beneficiary or holder of the *use*[26].

The purpose of using *use*, and later *trust,* to avoid paying taxes and to defraud has always been present in trust institutions, fiducia and *trust*, as a highly suspicious element. J. GARRIGUES DÍAZ-CAÑABATE writes: "*let us not forget that the Romans used the trust to ensure that the inheritance or legacy reached people who could not legally be heirs or legatees and that the English say that the fathers of fraud and fear were fraud and fear*"[27].

Against this situation, King Henry VIII, in 1535, had Parliament enact the "*Statute of Uses*" with the aim of abolishing these "*uses*" and to bring back the taxes evaded by such *uses*. However, this attempt failed, as the English courts held that the Act prevented only those *uses* relating to real property where the *trustee* had no positive duties and furthermore, that the Act did not affect *uses* relating to other types of property. *Uses* which were not abolished by the *Statute of Uses* became known as *trusts* and are the basis of modern *trust* law[28].

26. In the end, the *trust* survived all attempts at extermination. Today, the *trust* is a vigorous and powerful autonomous branch of common law in the Anglo-Saxon countries. It is a field of law of extraordinary importance and vigour, and extremely complex. As R. ALFARO explains, "*el trust, por su ductilidad característica y por prestarse para llevar a cabo diversas transacciones por medio de un solo acto o instrumento, es institución sin par en cuando a eficacia y utilidad: reemplaza con ventaja a los contratos de mandato, de usufructo, de constitución de renta vitalicia, de enfiteusis, de depósito, de comodato, de prenda, de hipoteca, de anticresis y de venta con pacto de retroventa …. de igual modo el trust sustituye con insuperable ventaja al albaceazgo, a la tutela testamentaria, a la curatela de pródigos, menores e incapaces, y a la constitución de fundaciones de interés público*"[29].

27. Today, the *trust* is present in the everyday life of citizens in common law countries, from their childhood to their old age. Therefore, with J.-P. BÉRAUDO, it can be said that, strange as it may seem to the eyes of a continental jurist, the *trust* constitutes the "*cornerstone of a great legal civilisation*"[30].

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[26] J.C. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, pp. 24-27.

[27] J. GARRIGUES DÍAZ-CAÑABATE, *Negocios fiduciarios en el Derecho Mercantil*, Cuadernos Civitas, Thomson Reuters, Madrid, 1979, reprint 2026, pp. 50-51: "*no olvidemos que los romanos utilizaban el fideicomiso para hacer llegar la herencia o el legado a personas que legalmente no podían ser herederas o legatarias y que los ingleses dicen que los padres del fueron fraud and fear*".

[28] H.L. MUNSINGER, "History of Trusts", https://issuu.com/sanantoniobar/docs/sal-sepoct-mmc-digital/s/11055744#:~:text=Trusts%20were%20developed%20by%20courts,court%20decisions%20based%20on%20fairness, September - October 2020; SHEPPARD LAW FIRM, "A History of Trusts", 9 December 2016, at https://www.sbshlaw.com/a-history-of-trusts/.

[29] R. ALFARO, *apud* J. GARRIGUES DÍAZ-CAÑABATE, *Negocios fiduciarios en el Derecho Mercantil*, Cuadernos Civitas, Thomson Reuters, Madrid, 1979, reimpresión 2026, pp. 90-91.

[30] J.-P. BERAUDO, "*Trust*", *Répertoire de droit international*, Dalloz, Paris, September 2012, pp. 1-9.

3. The purposes of the *trust*.

28. The voluntary *trust* can pursue very different purposes. It is a multifunctional instrument, as M. CHECA MARTÍNEZ[31] describes very well. It can be used for almost anything one might want to do in this world[32] . From this perspective, several types of *trust* can be distinguished, according to M. VIRGÓS SORIANO[33].

Firstly, there is the succession *trust*. In this, the *settlor* creates a *trust* so that, after his or her death, a person manages an estate in favour of certain persons who may or may not have inheritance rights, normally the widow/widower or the minor children.

Secondly, *intervivos trusts* are now widely used. A *trust* is created for the management of securities or capital (*business trust*), pension funds (*pension trust*), to operate as a guarantee fund (*debenture trust*), to represent a company (*voting trust*), for the creation and administration of very complex estates, such as *time-sharing* real estate estates operating worldwide, or to obtain tax benefits, since through the *charitable trust*, the *trust*, created for charitable or non-profit purposes, receives a very generous tax treatment. A *marriage settlement trust* can also be created by the spouses or their parents for a *trustee* to administer the marital assets for the benefit of the spouses. Similarly, the *trust* can be extremely useful in the project finance contract. In this case, a *trustee* is named in the loan whose repayment is guaranteed by the success of such a project, so that the *trustee* is the assignee of credits of the company owning the project and of its managers, as J. JACQUET / P. DELEBECQUE / S. CORNELOUP have explained[34].

29. Trusts are used to obtain tax advantages, to streamline the administration of complex estates and also to avoid the expropriation of assets carried out by certain totalitarian political regimes.

It is significant that in Spain, during the years of the Second Spanish Republic, there was, as is well known, a systematic persecution of the Catholic Church and a continuous plundering of its property. In order to avoid such confiscations and acts of violence against property, certain religious institutions, orders and congregations, points out J. GARRIGUES DÍAZ-CAÑABATE, carried out certain legal operations with the appearance of legality which sheltered them from sectarian threats, robbery, plundering and looting. One of these techniques, which was very frequent, consisted of selling their Houses, Colleges and other real estate to third parties, with the promise that these properties would be returned to the Church after the years of persecution and plunder[35]. In this way, these real estate properties were registered in the Spanish Property Registers, under the protection and under the name of third parties, religious or secular. Once this persecution was over, after the Spanish Civil War of 1936-1939, it turned out that many of the purchasers of these properties had died or disappeared, and some of their heirs

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[31] M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, pp. 6-8.

[32] J.C. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, pp. 53-59.

[33] M. VIRGÓS SORIANO, *El Trust y el Derecho español*, Cuadernos Civitas, Madrid, 2006, pp. 25-28.

[34] J. JACQUET / P. DELEBECQUE / S. CORNELOUP, *Droit du commerce international*, 2nd ed., Dalloz, Paris, 2010, p. 504.

[35] J. GARRIGUES DÍAZ-CAÑABATE, *Negocios fiduciarios en el Derecho Mercantil*, Cuadernos Civitas, Thomson Reuters, Madrid, 1979, reprint 2026, pp. 25-31.

refused to return the property to the Church. Franco's government reacted to this unfair situation. The Law of 11 July 1941 establishing the procedure for the inscription in the Property Registers of the properties of the Church, Orders and Religious Congregations, which are registered in the name of deceased or disappeared intermediaries, established a procedure for the return of these properties to the Catholic Church[36] . The Law of 1 January 1942 extended the above procedure to claims concerning movable property and securities of the Church, Orders and Religious Congregations[37]. These operations did not constitute *trust* cases, but the purpose of protecting property, which is also pursued by any *trust*, was well present in them.

4. The errors of the continental doctrine in the understanding of the *trust*.

30. Up to this point everything seems reasonably clear, especially if the person explaining what a *trust* is is a common law lawyer who uses exclusively common law legal categories, notions and terms. However, everything changes when it is continental lawyers who try to understand and clarify what a *trust* is and what its purpose is.

In this sense, it is necessary to act with the utmost prudence and always keep in mind the famous saying of RAMÓN DE CAMPOAMOR, according to whom, "*en este mundo traidor, nada es verdad ni mentira, todo es según el color del cristal con que se mira*". Through the lenses of a Spanish jurist - who uses his own legal concepts of "acción real", "acción reivindicatoria", "derechos reales", "propiedad", "propiedad", "contrato bilateral", "causa del contrato"-, it turns out that nothing makes sense in English law. Indeed, the (Spanish) concepts of ownership, real action, rights in rem, cause of contract and so many others cannot be found in that legal system. Therefore, when it is said, for example, "the *trustee* can transfer the ownership of the assets in a *trust* situation", in reality the statement is not accurate in its entirety, because in English law it is not possible to transfer what does not exist in that legal system. Continental jurists manage to reach a general or essential understanding of the *trust*, but, to tell the truth, they cannot understand it exactly, because they try to explain it with the legal concepts, techniques and mechanisms of *Civil Law*. MARTIN HEIDEGGER used to say that "*my philosophy can only be adequately formulated in German*". So it is with *trust*: its full understanding can only be achieved by means of legal concepts, legal language, heuristic tools and the historical peculiarity of Anglo-Saxon law. It is a real epistemological-legal problem: Spanish law lacks the conceptual rigour and the appropriate legal language to study, explain and understand the Anglo-Saxon *trust.* We have to live with this.

31. The majority of *civil law* doctrine, when describing and understanding the *trust*, has forged various "legal dogmas" about this institution. These are ideas which are taken for granted today, which are accepted without any additional proof and which have been formed, accumulated and appraised over hundreds of years.

These so-called "dogmas" constitute profound legal errors. Such errors are the result of viewing the *trust* through the lens of the conceptual apparatus and the hermeneutical and heuristic tools of continental law. It is surprising, however, that such alleged dogmas have been spread for dozens of years throughout continental Europe and the world and

[36] BOE No. 256 of 25 July 1941.
[37] BOE No. 11 of 11 January 1942.

that only certain authors, isolated and solitary voices, have questioned their veracity with a very restrained, cautious and timid prudence.

These allegedly mistaken *trust* dogmas - *trust* ideas that are accepted as valid by the vast majority of doctrine and jurisprudence in *Civil Law* countries around the world - are as follows.

A) There is no divided ownership of *trust* property between *trustee* and beneficiary.

32. In a *trust* there is said to be "divided ownership" between two subjects. On the one hand, the *trustee* is said to be the owner of the assets in *trust*, but he only has "formal ownership" of those assets. This individual appears in legal transactions as the owner vis-à-vis third parties, but his right of ownership is not absolute, since it is limited by the obligations that, as *trustee*, weigh on him. On the other hand, it is said, the beneficiaries are also "owners". They have, it is said, *an equitable ownership*, i.e. an ownership of the assets given in *trust*, recognised by *Equity Law*.

33. It is easy to combat this misconception by a considered analysis of *trustee* and beneficiary rights in English law.

34. First of all, it is necessary to start from a basic idea and that is that, in English law, there is no concept of "property" as it is understood in continental law and in Spanish law[38] . Holders of property are holders of *estates*, which is a range of rights and interests that a subject has over the property. In truth, the only one who is the "owner", in the Roman sense of the term, is the Crown of the United Kingdom. On the basis of this conceptual assumption, it must be stated that, in reality, in English law, the beneficiary has only the so-called "beneficial ownership of the property or right". This concept has nothing to do with the beneficiary's "ownership" of the property. In fact, the beneficiary only has a "beneficial ownership of the property given in *trust*". Therefore, the English expression "*beneficial ownership*" accurately expresses the correct legal position of the beneficiary. He has the "beneficial ownership", or as S. CÁMARA LAPUENTE writes, he has the "economic advantage" or the "benefits of ownership" of the *trust* property, but he does not have any dominion or ownership over the *trust* property[39]. He does not have a "real right" over the assets in *trust*, in the Spanish sense of that legal concept. He does not have a direct and immediate power over the assets that can be opposed *erga omnes*. The beneficiary is the sole owner of the economic benefit of the property given in *trust* in a construction similar to the *jus ad rem* (*Beruf auf dingliches Recht*) created in the 13th century by the ingenious mind of SINIBALDUS FLISKUS, a Ligurian-born canonist who would later brilliantly accede to the papal throne under the name of Pope Innocent IV.

35. Secondly, and as a consequence of the above, the beneficiary is not the "owner" of the assets integrated in the *trust*, in the Spanish sense of the term "owner" (Art. 33 CE 1978 and Art. 348 CC). First, because the beneficiary does not have "direct power"

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[38] M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, pp. 8-10.

[39] S. CÁMARA LAPUENTE, "El *trust* y la fiducia: posibilidades para una armonización europea", *Derecho privado europeo,* Madrid, Colex, 2003, pp. 1099-1172, esp. pp. 1101-1112.

over the assets in question, since such power corresponds to the *trustee.* Second, because the beneficiary is not the holder of the right to enjoy and dispose of the things in *trust*, since the holder of such right is the *trustee.* Third, because the beneficiary has no action against the holder and possessor of the things given in *trust* to claim them. Indeed, the beneficiary does not have a title to the goods in *trust*, so he cannot claim the delivery or restitution of the possession of such goods

36. Thirdly, the assets belong to the *trustee*, the person to whom the *settlor* has transferred the ownership of the assets. The *trustee* acquires full ownership of the assets in *trust* according to the rules of the *Common Law*: this is *legal ownership*.

37. Fourthly, the beneficiary does not have any real right over the *trust* assets. As M. LUPOI explains, the *trustee*'s ownership of the *trust* property is not limited by any real right of the beneficiary. The latter has no direct and immediate power over the things given in *trust* that he can exercise against all. He has certain legal prerogatives vis-à-vis the *trustee* which serve to ensure that the *trust* property is administered in accordance with the law and the instructions given by the *settlor* and to receive the economic benefit of the *trust* property. On other occasions, and under certain conditions, the beneficiary has the right of action to have the assets recognised by any person as being in *trust* and, consequently, they may not be transferred to third parties or seized by third parties or be affected by the insolvency of the *trustee* or be included in the trustee's estate[40]. In short, and in the words of the trustee, the trust assets may be transferred to the trustee's estate in order to obtain the economic benefit of the trustee's estate. In short, and in the words of T. BALLARINO / A. BONOMI, the beneficiary is the holder of a credit right that is close to real rights because, in certain cases, he can take action against subjects with whom he has no legal relationship and, above all, because it restricts the *trustee*'s freedom to dispose of the assets. However, although it is close to a right in rem, the beneficiary's rights are personal and credit rights[41].

38. This first major continental error on the *trust* is the result of certain inaccuracies in translation and is also due to a misunderstanding of English law, which is verified by the use of continental legal categories in the study of English law.

Thus, the expression "*ownership*" should not be translated as "property" in the Spanish sense of the term. In reality, "*ownership*" means, in this case, "ownership of certain prerogatives over property".

In addition to the above, there is a mistake regarding the object of the beneficiary's ownership: the beneficiary has ownership not of the property given in *trust*, but of the economic benefit generated by this property. S. CÁMARA LAPUENTE correctly states that the beneficiary holds a legal position protected as "*a second type of property which corrects the first type of property in the event of abuses by rules of equity, an equitable ownership*"[42]. This profound error often occurs not only because of an inappropriate literal translation of the English legal terms but also because "*in reality there is no concept of property in English law comparable to the all-encompassing concept of civil*

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[40] M. LUPOI, *Trusts*, 2nd ed. in full review, Giuffrè Editore, Milano, 2001, pp. 344-348.

[41] T. BALLARINO / A. BONOMI, *Diritto internazionale privato*, 3rd ed., Cedam, 1999, p. 575.

[42] S. CÁMARA LAPUENTE, "El *trust* y la fiducia: posibilidades para una armonización europea", *Derecho privado europeo,* Madrid, Colex, 2003, pp. 1099-1172, esp. p. 1112.

law"[43].

39. Consequently, there is no divided ownership of the *trust* property. They are the full property of the *trustee*, in the Spanish sense of that legal term.

B) The *trustee* is not merely a *trustee* of the trust property.

40. It is also argued that the *trustee* is no more than a trustee or administrator of the *trust* assets or, at most, a person with limited powers and rights. At most, the *trustee* is considered to a "formal owner", a person who appears as an owner vis-à-vis third parties but who, in reality, does not have all the legal powers of an owner in the continental law sense.

This statement is simply false and arises because certain authors believe that the real ownership of the assets belongs to the beneficiary and that, consequently, the *trustee* is a figure similar to an administrator, executor, trustee's agent or agent of a principal. However, as indicated above, the *trustee* has *legal ownership* over the *trust* assets. He is the owner, in the Spanish sense of the term, of the *trust* assets, which have been validly transferred to him by the *settlor*. In accordance with the rules governing the *trust*, the *trustee* can manage such assets and validly transfer them to third parties, who acquire them directly from the *dominus*, who is the *trustee*.

C) The *trustee* is not the holder of two separate estates.

41. Some continental doctrine insists that, in reality, the *trustee* is the holder of two separate estates. Firstly, he has his own private assets, his own property. Secondly, the *trustee* would also be the owner of the assets given in *trust*, which form a "separate estate" from the previous one. The vision projected by this idea is that the *trustee* is the holder of two different estates at the same time, and that the assets are divided into two separate estates whose assets should not and cannot be interchanged or confused.

42. The above idea is wrong. In English law, the *trustee* is the full owner of all property, i.e. his own property and the property conveyed to him in *trust*. He is the owner of all his property, including *trust* property. He is not the owner of two separate estates.

Firstly, if the *trustee* confuses the assets of the *trust* with his own, the beneficiary has an action, called "*following*", which serves to request the identification of the assets, especially movable assets, given in *trust* and to specify their location. The beneficiary also has an action - called "*tracing*" - , to determine the monetary value of the *trust*

[43] S. CÁMARA LAPUENTE, "Breve compendio geo-conceptual sobre trusts", in *Los patrimonios fiduciarios y el trust: III Congreso de derecho civil catalán* (coord.: S. NASARRE AZNAR / M. GARRIDO MELERO, 2006, pp. 25-52. S. CÁMARA LAPUENTE, "El *trust* y la fiducia: posibilidades para una armonización europea", *Derecho privado europeo,* Madrid, Colex, 2003, pp. 1099-1172, esp. p. 1112; ID., "*Trust* a la francesa: Las doce preguntas de siempre y un reto desesperado a partir de la proposición de ley de 8 de febrero de 2005 que instituye la *fiducie*", *Indret*, 2005, n.2 (*online* version); ID., "Elementos para una regulación internacional del *trust*", in A.-L. CALVO CARAVACA / S. AREAL LUDEÑA (Directors), *Cuestiones actuales del Derecho mercantil internacional*, Editorial Colex, Madrid, 2005, pp. 241-275.

assets in the event that these assets have been disposed of or have been confused with the assets of the *trustee* and to request that these assets continue to be held in *trust*.

Secondly, if the assets given in *trust* are disposed of to third parties by the *trustee* "*in breach of trust*", i.e. against the rules governing the *trust*, the beneficiary has an action to request that such assets or their value in money be identified and to request that such assets remain in *trust* by means of the aforementioned *following* and *tracing*. Naturally, if such action is not exercised, the assets are considered to be validly transferred by the *trustee*, the legitimate and sole owner of the assets, to third parties. And there is no acquisition *a non domino*, because the *dominus* is the *trustee*.

Thirdly, in the event of the *trustee*'s insolvency, the assets owned by the trustee and held in *trust* may have been included in the insolvency estate, since they are the property of the *trustee*. However, the beneficiary has a privileged claim on the assets in *trust*. Indeed, if the *tracing* has been successfully completed, the beneficiary has the right to claim that the assets given in *trust* are not included in the *trustee*'s passive estate against which the voracious creditors of the trustee will present their claims. Naturally, if the beneficiary does not exercise such an action, the assets in *trust* are included in the insolvency estate of the *trustee* because they are assets belonging to the *trustee*.

Fourthly, in the case of the *trustee*'s succession, if the trustee disposes of the *trust* property by will, the beneficiary has an action to request that the *trust* property not be included in the *trustee*'s estate.

II. International jurisdiction and *trust*. Brussels I-bis Regulation.

1. The three forums for determining jurisdiction in litigation against the founder, *trustee* or beneficiary of a *trust*.

43. The determination of the competent courts in disputes arising from the so-called internal relationships arising from a *trust* is a matter to be decided, in cases with foreign elements, by the rules contained in the Brussels I-bis Regulation[44] . The Brussels I-bis Regulation contains several rules in this respect, which only apply if the legal relationship arising from the *trust* is covered by Art. 1 Brussels I-bis[45]. Therefore, the Brussels I-bis Regulation does not apply to the relationship between *trustee* and beneficiary in the case of matrimonial property or inheritance property in a *trust* situation.

44. It is important to distinguish between internal and external *trust* relationships. P. SCHLOSSER explains that the legal actions deriving from the trust and based on the trust are called "trust actions". SCHLOSSER explains that legal actions deriving from and based on the *trust* are called "*trust actions*": legal actions brought by the beneficiary against the *trustee* for neglecting his duties as a trustee, litigation between several *trustees*

[44] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJEU L 351, 20 December 2012), known as the Brussels I-bis Regulation.

[45] P. SCHLOSSER, "Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the Protocol on its Interpretation by the Court of Justice (90/C 189/10) (signed in Luxembourg on 9 October 1978), *OJ* C 189, 28 July 1990, p. 184-256, marginal number 112.

arising from the exercise of their functions and the delimitation of their spheres of action and also actions brought by the beneficiary against the *trustee* and/or third parties for the identification, location and determination of the value of the *trust* assets (*following* and *tracing*) as well as actions brought by the beneficiary for the return of the trust assets, which have been transferred to third parties, to their *trust* status[46].

So-called "external *trust* relationships" are those between the *trustee* and a third party to whom the *trustee* appears as the owner of the trust property. For example, if a third party claims possession of a *trust* property from the *trustee*, such a relationship is external to the *trust*. If a *trustee* sells a *trust* property to a third party and the third party pays but the *trustee* does not deliver the promised property, the dispute arises out of a relationship external to the *trust*.

The external relations of the *trust* are subject to the general rules of jurisdiction of the Brussels I-bis Regulation: Art. 4 and Arts. 7-8 Brussels I-bis in general. On the other hand, the internal relations of the *trust* have a specific forum in Art. 7.6 Brussels I-bis. This provision is not intended to establish a *forum legis*, so that it is possible that the courts of a Member State whose law does not govern the *trust* have jurisdiction *under* Art. 7.6 Brussels I-bis[47]. It can even happen, as P. MANKOWSKI points out, that the courts of a state whose law does not regulate or contemplate the *trust* as a legal institution, e.g. the Spanish courts, have jurisdiction[48]. With H. GAUDEMET-TALLON / M.E. ANCEL, it should be recalled that Art. 7.1 Brussels I-bis, -a special rule of jurisdiction for international contracts-, does not apply to disputes arising from a *trust*[49]. Art. 7.6 Brussels I-bis does not apply to relations between other parties to the *trust*, such as the protector of the *trust*, for example. Nor does it apply to implicit *trusts*.

The following courts may have jurisdiction to hear internal disputes arising out of a *trust*.

45. Firstly, the courts chosen by the parties have jurisdiction. Indeed, Art. 25 Brussels I-bis admits the choice of the competent court by the parties in connection with a *trust*. Furthermore, Art. 25 para. 4 Brussels I-bis indicates that the *trust* instrument may specify "the court or courts" of a Member State which shall have exclusive jurisdiction for this purpose. Such bodies shall have exclusive jurisdiction to hear an action against

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[46] P. SCHLOSSER, "Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the Protocol on its Interpretation by the Court of Justice (90/C 189/10) (signed in Luxembourg on 9 October 1978), *OJ* C 189, 28 July 1990, pp. 184-256; J.L. IRIARTE ÁNGEL, J.L. IRIARTE ÁNGEL, "Art. 5.6 del Convenio de Bruselas", en A.-L. CALVO CARAVACA (Dir.), *Comentario al Convenio de Bruselas relativo a la competencia judicial y el reconocimiento de resoluciones judiciales en materia civil y mercantil*, Ed.Un. Carlos III y BOE, Madrid, 1994, pp. 148-157.

[47] Another view, very much in favour of *forum legis*, can be found in P. SCHLOSSER, "Report on the first accession convention to the Brussels Convention of 27 September 1969", OJEC C 189, 28 July 1990, pp. 184-256.

[48] P. MANKOWSKI, "Article 7.5 Brussels I bis Regulation", in U. MAGNUS / P. MANKOWSKI (ed.), *Brussels Ibis Regulation -Commentary, European Commentaries on Private International Law*, volume 1, Verlag Dr.Otto Schmidt, 2016, pp. 361-366. In the same sense in P. MANKOWSKI, "Article 1 Rome II Regulation", in U. MAGNUS/P. MANKOWSKI (EDS.), *Rome II Regulation: Commentary. European commentaries on private international law*, Köln, O. Schmidt, Sellier European Law Publishers, 2019, pp. 111-113.

[49] H. GAUDEMET-TALLON / M.E. ANCEL, *Compétence et exécution des jugements en Europe: matières civile et commerciale: règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)*, 7th ed., Issy-les-Moulineaux, LGDJ-Lextenso éd., Paris, 2024, p. 418.

the founder, the *trustee* or the beneficiary of a *trust* if it concerns relations between these persons or their rights or obligations under the *trust*. The choice of court has limits: it must respect the provisions of the Brussels I-bis Regulation in relation to insurance, consumer contracts and employment contracts, as well as the exclusive competences of Art. 24 IR I-bis (ECJ 17 May 1994, C-294/92, *Webb*; judgment of the Tribunale di Sciacca, Italy, 20 September 2016 [*trust* on assets located in Italy]; Ordinanza Corte di Cassazione, Italy, 18 March 2019, n. 7621)[50]. Art. 24.1 Brussels I-bis, which contains certain grounds of exclusive jurisdiction in relation to rights in rem over immovable property, applies to actions to declare ownership, to grant possession, to rectify the land register, but not to actions deriving from the internal relations of the *trust*, which will always be "personal actions" within the meaning of Art. 24.1 Brussels I-bis *a contrario sensu*, and are therefore excluded from that provision, as indicated below. The competent court can also be tacitly chosen by the parties (Art. 26 Brussels I-bis).

46. Secondly, in the absence of submission by the parties, the courts of the Member State of the domicile of the *trust* have jurisdiction. In the absence of a choice of court, Art. 7.6 Brussels I-bis states that the courts of the Member State in whose territory the *trust* is domiciled have jurisdiction to hear disputes "*brought against the founder, trustee or beneficiary of a trust created either by operation of law or in writing or by an oral agreement confirmed in writing*". The concept of trust is the Anglo-Saxon concept of trust, so the rule does not apply to litigation arising out of a fiducia, explain H. GAUDEMET-TALLON / M.E. ANCEL[51].

This forum leads to the court closest to the centre of gravity of the dispute: the court of the place where the *trust* is domiciled. In this way, the expectations of the beneficiaries are protected against a possible surreptitious change of domicile of the *trustee*. Indeed, if a *trust* is domiciled in Ireland and the *trustee* moves his domicile from Dublin to Malaga, the beneficiaries will always be able to sue the *trustee* in the courts where the *trust* is domiciled and will not have to travel to Spain to bring their claim.

The wording of this forum in the Brussels I-bis Regulation, i.e. the "domicile of the *trust*", is surprising, it is true, because the *trust* has no legal personality and therefore, strictly speaking, no "domicile" or "seat" because, from a legal point of view, it is not a "person" and only persons, natural and legal, have a domicile. It is true that *trusts* have a "centre of local interest" or "*situs of the trust*" or "*seat of the trust*", writes P. SCHLOSSER[52] . *At common law*, the domicile of the *trust* is the place with which the *trust* has its "closest links". Art. 63.3 Brussels I-bis specifies that, in order to determine whether a *trust* is domiciled in the Member State whose courts are seised of the case,

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[50] ECJ 17 May 1994, C-294/92, *George Lawrence Webb v. Lawrence Desmond Webb*, *[*1994*] ECR* 1717-1740 [ECLI:EU:C:1994:193]; judgment Tribunale di Sciacca, Italy, 20 September 2016 [*Rivista di diritto internazionale privato e processuale*, 2018, pp. 771-773]; Ordinanza Corte di Cassazione, Italy, 18 March 2019, n. 7621 [*Rivista di diritto internazionale privato e processuale*, 2020, pp. 114-126].

[51] H. GAUDEMET-TALLON / M.E. ANCEL, *Compétence et exécution des jugements en Europe: matières civile et commerciale: règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)*, 7th ed., Issy-les-Moulineaux, LGDJ-Lextenso éd., 2024, pp. 416-419.

[52] P. SCHLOSSER, "Report on the first accession convention to the Brussels Convention of 27 September 1969", OJEC C 189, 28 July 1990, pp. 184-256. Also in P.F. SCHLOSSER, *EuGVÜ. Europäisches Gerichtsstands- und Vollstreckungsübereinkommen mit Luganer Übereinkommen und den Haager Übereinkommen über Zustellung und Beweisaufnahme*, München, 1996 and P.F. SCHLOSSER/B. HESS, *EU-Zivilprozessrecht: EuGVVO, EuVTVO, EuMahnVO, EuBagVO, HZÜ, EuZVO, HBÜ, EuBVO, EuKtPVO. Kommentar*, 4th ed., München, Beck, 2015.

the court shall apply the rules of its private international law. In the event that it is questioned whether the *trust* is domiciled in Spain, in the absence of Spanish rules indicating where the domicile of a *trust* is determined, it can be considered that, if the *trust* in question is particularly linked to Spain, then it is domiciled in Spain, as has been pointed out by abundant and solvent doctrine[53]. This solution is the one followed in Great Britain: the domicile of the *trust* is determined in the country with which it has the closest links. Indeed, Art. 45.3 of the Jurisdiction and Judgments Act 1982 (United Kingdom) indicates that "*A trust is domiciled in a part of the United Kingdom if and only if the system of law of that part is the system with which the trust has its closest and most real connection*".

Art. 7.6 Brussels I-bis grants international jurisdiction, in general, to the courts of the Member State where the *trust* is domiciled and the law of that State will specify the specific territorially competent court.

47. Thirdly, the courts of the Member State of the defendant's domicile have jurisdiction. This forum can be used as an alternative to the previous one, i.e. the forum of the domicile of the *trust* (Art. 4 Brussels I-bis). The defendant can be the *trustee* or it can be the beneficiaries or a third party in possession of *trust* assets.

48. On the other hand, as underlined above, the *trust* is not a legal person. It is not a subject of rights and obligations. It lacks legal personality. Consequently, the *trust*, in itself considered, cannot be a "defendant" or occupy the procedural position of a "defendant" in civil proceedings, as it has no procedural legal personality (Ordinanza Corte di Cassazione, Italy, 20 January 2022 n. 1826 [claims against a *trust*])[54].

2. Art. 24 Brussels I-bis (exclusive jurisdiction) is not applicable to trust. The Webb case.

49. It is very common for the assets in *trust* to be immovable property. It is also common that the actions brought by the *trustee* and the beneficiaries relate to this real estate. The question therefore arises as to whether such actions are covered by Art. 24 Brussels I-bis. This famous provision states that "*the courts of the Member State in which the immovable property is situated shall have exclusive jurisdiction, irrespective of the domicile of the parties .... in matters relating to rights in rem in immovable property and*

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[53] P. SCHLOSSER, "Report on the First Accession Convention to the Brussels Convention of 27 September 1969", OJEC C 189, 28 July 1990, pp. 184-256; P. KAYE, *Civil Jurisdiction and Enforcement of Foreign Judgments. The Application in England and Wales of the Brussels Convention of 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters under the Civil Jurisdiction and Judgments Act 1982*, Abingdon, Proffesional Books, 1987, pp. 613-620; G.A.L. DROZ / H. Gaudemet-Tallon, *Civil Jurisdiction and Enforcement of Foreign Judgments*. GAUDEMET-TALLON, "La transformation de la Convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'execution des décisions en matière civile et commerciale", *RCDIP*, 2001, pp. 601-652; H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe. Règlement n.44/2001, Conventions de Bruxelles et de Lugano*, LGDJ, 3rd ed., Paris, 2002, pp. 192-194; P. GOTHOT / D. HOLLEAUX, *La convention de Bruxelles du 27 septembre 1968 (Compétence judiciaire et effets des jugements dans la CEE)*, Paris, Jupiter, 1986, (Spanish version: Ed.La Ley), 1986, pp. 63-65.

[54] Ordinanza Corte di Cassazione, Italy, 20 January 2022 n. 1826 [*Rivista di Diritto internazionale privato e processuale*, 2022-IV, pp. 1013-1017].

tenancies of immovable property. If that were the case, only the courts of the Member State where the immovable property is situated would be able to hear disputes in which such actions are brought on immovable property. In other words, the question is whether these actions are to be classified as actions in rem relating to immovable property or as purely personal actions relating to immovable property.

50. Actions deriving from a real estate *trust* are personal and not real actions, even if they relate to immovable property. This has been indicated in case law (ECJ 17 May 1994, C-294/92, *Webb*; Corte di cassazione, Italy, 30 September 2016 [*trust*: the action to declare the nullity of a *deed trust* creating a *trust* is a personal and not a real action, so that art. 24.1 RB I-bis is not applicable])[55].

51. In the famous *Webb* case (ECJ 17 May 1994, C-294/92, *Webb*), the ECJ indicated that Art. 24.1 R.B. I-bis attributes exclusive jurisdiction in matters of rights in rem in immovable property to the courts of the Contracting State where the immovable property is situated[56]. In order to be able to apply this provision, the action must be based on a right in rem and not - except for the exception provided for in the case of leases of immovable property - on a personal right. The action brought in this case sought recognition that Mr Webb junior owned the flat for the exclusive benefit of his father and that, as such, he had a duty to execute the documents necessary to transfer ownership to him. The father does not seek to be declared the holder of a direct and enforceable prerogative over the property. He does not seek to have the property conveyed to him, nor does he claim to be the owner of the property. Mr. Webb Sr. only invokes certain personal rights against his son. Therefore, his action is not an action in rem (Art. 24.1 Brussels I-bis), but a personal action. The exclusive jurisdiction of the courts of the state in which the real estate is situated in matters of real property rights is justified by the fact that disputes concerning real property rights give rise to claims that frequently involve checks, investigations and expert evidence to be carried out there. In this case, the nature of the real estate and the location of the property held in fiduciary capacity have no bearing on the configuration of the main dispute. Therefore, an action seeking a declaration that a person holds real estate as a *trustee* and an order

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[55] ECJ 17 May 1994, C-294/92, *George Lawrence Webb v. Lawrence Desmond Webb*, *[*1994*] ECR* 1717-1740 [ECLI:EU:C:1994:193]; Judgment Corte di Cassazione, sezioni unite, Italy, 30 September 2016, n. 19471 [https://renatodisa.com/corte-di-cassazione-sezioni-unite-civili-sentenza-30-settembre-2016-n-19471/]: '*I motivi -che possono essere congiuntamente esaminati, attesane la intrinseca connessione- sono manifestamente infondati, volta che essi si pongono in patente contrasto con principi piu' volte affermati da questa Corte regolatrice (in particolare, nella pronuncia di queste sezioni unite n. 27495 of 2013), which, in the context of the consonant orientation of the European judiciary (namely, Corte di giustizia C-294/92 del 17 maggio 1994), ha escluso l'applicabilita' del criterio del forum rei sitae nei casi di azioni volte adcertare la qualita' di detentore a titolo di trustee di un bene in relazione al quale si chieda il compimento degli atti necessari al riconoscimento della legai ownership sul bene stesso in capo a chi se ne dichiari effettivo proprietario ... L'irrilevanza, quoad iurisdctionis, dell'oggetto sostanziale della pretesa (invocato invece da parte del ricorrente al folio (OMISSIS) dell'odierno atto di impugnazione quale criterio funzionale alla declaratoria della competenza del giudice britannico) si coniuga specularmente con la rilevanza del petitum sostanziale della prima e, in part qua, della seconda domanda, che esula tout cort da qualsivoglia questione proprietaria, poiche', diversamente opinando, in pressoche' tutte le azioni volte alla declaratoria di una invalidita' negoziale e' dato rinvenire un petitum mediato volto al riconoscimento di un diritto dominicale*".

[56] ECJ 17 May 1994, C-294/92, *George Lawrence Webb v. Lawrence Desmond Webb*, *[*1994*] ECR* 1717-1740 [ECLI:EU:C:1994:193].

to execute the documents necessary for the plaintiff to acquire *legal ownership* is not an action in rem within the meaning of Art. 24.1 Brussels I-bis.

III. Law applicable to *trust*.

1. General aspects: applicable law and recognition of the *trust*.

52. In litigation arising out of a *trust* with foreign elements, several preliminary difficulties arise which must be resolved before the law applicable to the merits of the case can be determined.

53. First of all, it should be made clear that when an action is brought before the courts in respect of a *trust*, it is assumed that the *trust* already exists. Therefore, the *trustee* brings an action as such or the beneficiary brings an action to protect his rights as such. No action is brought to create a *trust*: the *trust* is created by the will of the *settlor,* by the decision of the judge or by operation of law. No one goes to a judge to create a *trust*. A *trust* is not an adoption, for example, which only exists if a judge creates it when the parties so request. Therefore, when the *trustee* or the beneficiary takes legal action, the *trust* itself must first be "recognised" or, much better expressed, "in existence" in the State whose courts hear the case. This is important because it leads to the assertion that the recognition of the *trust* is a question which must be identified with another question, which is the law applicable to the trust. In other words, there are not two issues, but only one. The law governing the *trust* governs its existence, so that, if a *trust* exists as such, it must be recognised in the State before whose courts the parties are acting.

54. This question of symbiosis and identification between "applicable law" and "recognition" has already arisen in private international law in relation to legal persons. Indeed, in order for a foreign capital company, i.e. incorporated under a foreign law, to be considered as an existing company in Spain and before the Spanish authorities, its legal existence in Spain must be "recognised" even though it has been created under the law of another State. Well, as A.-L. CALVO CARAVACA has demonstrated with his usual legal expertise in the field of legal matters. CALVO CARAVACA in the field of international company law, the so-called "problem of *trust* recognition" is in itself without object. It is not a different question to the determination of the law applicable to the *trust*[57]. Therefore, the existence of a *trust* created in London will be recognised in Spain, for example, if the law applicable to the *trust* considers it to have been validly created. In other words, it can be stated that, once the law applicable to the *trust* has been

[57] A.-L. CALVO CARAVACA, "Artículo 9.11 Cc.", in AA.VVV, *Comentarios al Código Civil y a las Compilaciones forales*, edited by M. ALBALADEJO AND S. DÍAZ ALABART, tomo I, vol.II, 2ª ed., Ed. Revista de Derecho privado / Edersa, Madrid, 1995, pp. 479-525, esp. p. 508-514: A.-L. CALVO CARAVACA, "*el problema del reconocimiento de las sociedades extranjeras carece en sí mismo de objeto y no es, en rigor, un problema distinto al de la determinación del estatuto personal de dichas sociedades*" y "*el reconocimiento ..consiste en la aceptación por un tercer Estado de la personalidad jurídica otorgada a un ente, creado por uno o varios Estados, fuera de éstos*"*… conceptualmente, el reconocimiento es un posterius a la constitución de la sociedad al amparo de un Derecho extranjero y un prius a la aplicación a ésta, en un Estado distinto al suyo, del Derecho de Extranjería*".

established, the trust must be accepted as existing in Spain under the terms established by its governing law. Therefore, the Hague Convention of 1 July 1985 on the law applicable to the *trust* and its recognition refers to both notions at the same time: the law regulating the *trust* and its consequent recognition, as such a *trust*, in the States party to the said international convention[58] . This unitary method followed by the Hague Convention allows the *trust* to be inserted into the legal order of the country of destination of the trust, even if this is a *Civil Law* system: the unknown legal institution - the *trust* - is immersed in the legal order of the State of destination as an existing and valid institution[59]. In short, the use of the term "recognition" is in fact improper, since it means in reality that the *trust* is considered existing and valid in the State of destination if it has been validly constituted in other States[60]. In other words, it can be said that the *trust* is recognised as existing and valid in the State of destination if it has been correctly constituted in the State of origin in accordance with the law designated by the conflict rule of the State of destination, as illustrated by T. BALLARINO / A. BONOMI[61]. The nuance is important, because it is a genuine conflict recognition operated through the conflict rules of the State of destination, unlike the so-called "method of recognition of legal situations", as explained by A.-L. CALVO CARAVACA has explained with his usual mastery[62]. In this method, the valid existence of a legal situation created in another State under the law designated by the conflict rule of the State of origin is recognised in the State of destination, which is quite different, as can be seen in the accurate exposition of M.-L. NIBOYET / G. DE GEOUFFRE DE LA PRADELLE[63].

55. Secondly, the legal subject-matter of the plaintiff's action must be correctly defined. This is the only way to determine which conflict rule applies to the merits of the case. Thus, for example, if the action brought before the Spanish courts can be qualified as an action in rem on immovable property, then it must be qualified as an action in "rights in rem". Art. 10.1 CC and the law of the country where the immovable property is situated will then apply. The classification to determine the applicable

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[58] The preamble to the Convention states that "*trust ... is a specific legal institution*". *See* Hague Convention of 1 July 1985 on the Law Applicable to *Trusts* and the Recognition of Trusts. Text in Spanish (unofficial) at https://www.hcch.net/es/instruments/conventions/full-text/?cid=59). Text (official) in English and French in *Conférence de La Haye de droit international privé. Recueil des conventions (1951-1988)*, pp. 314-325. *Vid*. S. CÁMARA LAPUENTE, "Breve compendio geo-conceptual sobre *trusts*", in M. GARRIDO MELERO / S. NASARRE AZNAR (Coords.), AA, "Los patrimonios fiduciarios y el *trust*: III Congreso de derecho civil catalán" Editores Marcial Pons, Ediciones Jurídicas y Sociales, Marcial Pons, 2006, pp. 25-52, esp. p. 37: "*Aunque este convenio constituye una norma uniforme de conflicto para conseguir la eficacia de los trusts en ordenamientos jurídicos donde no están regulados, también recoge una definición de su objeto y establece ciertos efectos mínimos que producirán las instituciones que caigan bajo su ámbito*"..

[59] C. GONZÁLEZ BEILFUSS, *El trust, la institución anglo-americana y el Derecho internacional privado español*, Bosch, Barcelona, 1997, p. 11.

[60] M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, pp. 98-99.

[61] T. BALLARINO / A. BONOMI, *Diritto internazionale privato*, 3rd ed., Cedam, 1999, p. 574: "*l'istituto de trust viene introdotto nella nostra legislazione civile: il fenomeno che si verifica per effetto della Convezione è un riconoscimiento automatico degli effetti del trust creato secondo le leggi di un paes che conosce tale istituto*".

[62] *Vid*. this distinction in A.-L. CALVO CARAVACA, "Mutual recognition as a method in European private international law", in AA.VV., Gedächtnisschrift für Peter Mankowski: [A Commemorative Volume for Peter Mankowski], (Christian Von bar (dir.), Oliver L. Knöfel (dir.), Ulrich Magnus (dir.), Heinz-Peter Mansel (dir.), Arkadiusz Wudarski (dir.), 2024, pp. 101-115.

[63] M.-L. NIBOYET / G. DE GEOUFFRE DE LA PRADELLE, *Droit international privé*, 6th ed., Paris, Lextenso éditions, LGDJ, 2017, p. 195.

conflict rule must always be made according to Spanish law, i.e., according to the law of the forum (Art. 12.1 Spanish Civil Code). That is to say: the action brought must be examined and then the Spanish legal category in which the action falls must be determined: action in the area of contractual obligations, non-contractual obligations, rights in rem, etc.

2. Law applicable to the *trust* under European private international law.

56. There are no specific rules in European private international law to determine the law applicable to the Anglo-Saxon *trust.* In general, all European private international law regulations exclude *trusts* from their scope of application.

Firstly, Art. 1.2.h) of Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) excludes from the scope of application of this regulation "*h) the creation of trusts, the relations between the founders, administrators and beneficiaries*"[64].

Secondly, Article 1(2)(e) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II") excludes from this Regulation "*(e) non-contractual obligations arising out of the relationship between the founders, trustees and beneficiaries of a trust created voluntarily*"[65].

Thirdly, Article 1(2)(j) of Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession states that "*(j) the creation, administration and dissolution of trusts* is excluded from the scope of the Regulation in question"[66].

57. The exclusion of the *trust* from the European legal instruments of private international law is due to the fact that the European legislator always thought that the ideal was for the Member States to ratify and incorporate into their legal system the above-mentioned Hague Convention of 1 July 1985 on the law applicable to *trusts* and their recognition. However, this has not been the case. Only some Member States of the Union have done so. Others, such as Spain, have not wanted to know anything about the Convention. This diplomatic refusal can be explained simply: Spain, like other Member States, did not want to incorporate this convention into its legal system so as not to have to accept trusts created in *common law* countries in Spain and not to have to admit that certain immovable property located in Spain is in the status of a *trust*. The aforementioned convention does not oblige any state to incorporate *trusts* into its legal system, but it does encourage *trusts* validly created in another country to be considered as existing and valid in countries that do not regulate *trusts*.

As a result, European private international law has no conflict rules that determine the law applicable to the *trust*, so that the Member States do not have a uniform European conflict rule for this purpose. Each Member State must therefore apply its own

[64] OJ EU L 177 of 4 July 2008.
[65] OJ EU L 199 of 31 July 2007.
[66] OJ EU L 201 of 27 July 2012.

national conflict rules determining the law applicable to the *trust*.

58. Most of the obligations generated by a *trust* are incumbent on the *trustee* and are, from the point of view of European private international law, "contractual obligations". Indeed, the *trust* is a commitment freely entered into by one party, the *trustee*, vis-à-vis another, the beneficiary. It also implies a free commitment by the *settlor*, who decides to hand over his assets to the trustee[67].

The *trustee* voluntarily agrees to manage the *trust* for the benefit of the beneficiaries. However, as indicated above, Art. 1.2.h) Rome I excludes the *trust* from the Rome I Regulation. Non-contractual actions that may arise from a *trust* are also not governed by the Rome II Regulation and succession actions that may arise from a *trust* are not governed by the European Succession Regulation. The result is clear. European private international law has no conflict rules to determine the law applicable to the creation and existence of the *trust*, nor the law applicable to the relations between the parties involved in the *trust*. Everything is left to the national private international law of each Member State.

3. Law applicable to *trusts* under Spanish private international law.

A) General aspects.

a) Trust, a legal institution unknown in Spanish law.

59. There are no specific rules in Spanish or European private international law to

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[67] C-433/19, *Ellmes Property Services Limited v. SP*, [ECLI:EU:C:2020:900], 37; ECJ 22 March 1983, 34/82, *Peters v. Zuid Nederlandse Aannemers Vereniging*, *[*1983] *ECR* 987-1012. ECLI:EU:C:1983:87]; ECJ 17 June 1992, C-26/91, *Jakob Handte v. Mecano-Chimoques*, *[*1992] *ECR* 3967-3996. ECLI:EU:C:1992:268], FD 15; Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS*) *[*2002*] ECR* I-07357 [ECLI:EU:C:2002:499], FD 23-27; Case C-265/02 *Frahuil SA v. Assitalia SpA [*2004*] ECR* I-1543. ECLI:EU:C:2004:77], FD 24; Case C-77/04 *Groupement d'intérêt économique (GIE) Réunion européenne and Others v. Zurich España, Société pyrénéenne transit d'automobiles (Soptrans) [*2005*] ECR* I-4522. [ECLI:EU:C:2005:327], 17; ECJ 17 October 2013, C-519/12, *OTP Bank Nyilvánosan Működő Részvénytársaság vs. Hochtief Solution AG*, [ECLI:EU:C:2013:674], 23; CJEU 10 September 2015, C-47/14, *Holterman Ferho Exploitatie BV, Ferho Bewehrungsstahl GmbH, Ferho Vechta GmbH, Ferho Frankfurt GmbH vs. Friedrich Leopold Freiherr Spies von Büllesheim*, [ECLI:EU:C:2015:574], FD 52; ECJ 15 November 2012, C-456/11, *Gothaer Allgemeine Versicherung AG, ERGO Versicherung AG, Versicherungskammer Bayern-Versicherungsanstalt des öffentlichen Rechts, Nürnberger Allgemeine Versicherungs-AG, Krones AG v. Samskip GmbH*. [ECLI:EU:C:2012:719], 44; ECJ 21 April 2016, C-572/14, *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH vs. Amazon* [ECLI:EU:C:2016:286], FD 35; CJEU 15 June 2017, C-249/16, *Saale Kareda vs. Stefan Benkö*, [ECLI:EU:C:2017:472], 28; ECJ 7 March 2018, C-274/16, C-447/16 and C-448/16, *Air Nostrum* [ECLI:EU:C:2018:160], FD 60; ECJ 8 May 2019, C-25/18, *Brian Andrew Kerr vs. Pavlo Postnov, Natalia Postnova*, [ECLI:EU:C:2019:376], FD 24; CJEU 5 December 2019, C-421/18, *Ordre des Avocats du barreau de Dînant v. JN* [ECLI:EU:C:2019:1053], FD 26; ECJ Order 19 November 2019, C-200/19, *INA-Industrija nafte d.d. and others v. Ljubljanska banka d.d.*, [ECLI:EU:C:2019:985], FD 30; ECJ 20 January 2005, C-27/02, *Petra Engler v. Janus Versand GmbH*, *[*2005] *ECR* I-499 [ECLI:EU:C:2005:33] 51; ECJ 14 March 2013, C-419/11, *Česká spořitelna, a.s. v. Gerald Feichter* [ECLI:EU:C:2013:165], 47; CJEU 4 October 2018, C-337/17, *Feniks sp. z o.o. v. Azteca Products & Services, S.L.*, [ECLI:EU:C:2018:805], 39; ECJ Order 13 February 2020, C-606/19, *flightright GmbH v. Iberia*, [ECLI:EU:C:2020:101], 33; ECJ 26 March 2020, C-215/18, *Libuše Králová v. Primera Air Scandinavia A/S*, [ECLI:EU:C:2020:235], 38 and 52.

determine the law applicable to the existence, creation and validity of the *trust*, as well as to the legal relationships between its subjects. Spain is not a party to the Hague Convention of 1 July 1985 on the law applicable to *trusts* and their recognition. This international convention is in force for fourteen countries, some of which are *Common Law* countries, -Canada, Australia, Cyprus, Malta, United Kingdom of Great Britain and Northern Ireland-, although it is also in force for certain *Civil Law* States, such as Monaco, Liechtenstein, Luxembourg, the Netherlands, Panama, Italy, San Marino, Switzerland and the Netherlands.

In order to resolve the question of the law applicable to the *trust* in Spanish private international law, several aspects must be borne in mind, which have been well highlighted by authoritative Spanish legal academic literature[68].

60. The *trust* is an unknown legal institution in Spanish law and this must be understood on "three levels".

On a first level, -conflict level-, the *trust* is not regulated as such in Spanish private international law. Private international law does not have a conflict rule that indicates which law is applicable to the *trust* in cases with foreign elements.

On a second level, -material level-, the *trust* is not regulated in substantive Spanish Civil Law. It does not exist as a legal institution in Spanish law.

On a third level - the functional level - the *trust* performs legal functions that are also unknown in Spanish law. These are functions that are not performed by the typical legal institutions of Spanish law, such as the contract, the legal person or the right in rem.

Consequently, the *trust* is a truly "unknown institution" in Spanish law. This has given rise to a heated doctrinal controversy on how to determine the law applicable to the *trust* in cases where a Spanish court has to resolve a dispute related to a *trust* . The specialised legal doctrine has formulated several theses in this respect.

b) Characterisation to determine the conflict rule applicable to the *trust*.

61. As indicated above, the legal operator must analyse the action brought before the Spanish courts and then specify the Spanish legal category into which the action falls: action in the field of contractual obligations, non-contractual obligations, rights in rem, etc. The legal categories to be used are the categories of Spanish law, as is indicated in Article 12.1 CC: the classification to determine the applicable conflict rule is made in accordance with Spanish law.

62. In reality, all foreign legal institutions are, to a certain extent, "unknown" to Spanish law, since their legal regulation in a foreign law is different from that offered by Spanish law. Faced with this obvious situation, three general positions can be adopted.

The first indicates that any foreign legal institution that is not identifiable with a Spanish legal institution cannot be qualified under Spanish law. Consequently, the action will be denied and the claim will be dismissed.

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[68] M.A. ASÍN CABRERA, "La Ley aplicable al *trust* en el sistema de Derecho internacional privado español", *RGD*, 1990, pp. 2089-2120; M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998; C. GONZÁLEZ BEILFUSS, *El trust, la institución anglo-americana y el DIPr. español*, Bosch, Barcelona, 1997; M. VIRGÓS SORIANO, *El Trust y el Derecho español*, Cuadernos Civitas, Madrid, 2006.

The second accepts that the Spanish legal categories used by the Spanish conflict rules must be 'stretched' to encompass foreign legal institutions that perform a similar function to the Spanish legal categories. A marriage governed by Indian law is regulated differently from a marriage governed by Spanish law, but essentially performs a similar function. This Indian marriage can therefore be functionally qualified as a Spanish "marriage" and will therefore be regulated by the Spanish conflict rule which determines the law applicable to the marriage. After all, conflict of laws rules are designed to apprehend foreign legal realities that will never be the same as Spanish ones. In this way, private international law can perform its regulatory function. Admittedly, this approach is somewhat pretentious, as it is claimed that every foreign legal institution will always find an applicable Spanish conflict rule. In other words, it can be said that, for this thesis, the Spanish legal categories used by the Spanish conflict rules cover every international private situation, they are exhaustive or all-encompassing, in the expression of E. VITTA[69]. This is the method of functional qualification or the analogical method.

The third thesis argues that there is a real gap in the Spanish system of private international law. This obliges judges to fill this legal vacuum by creating a global conflict rule that covers the foreign legal institution unknown in Spanish law.

B) The three theses on the law applicable to the *trust*.

a) First thesis. Non-existence of the *trust* in Spain.

63. A first thesis holds that, in countries such as Spain, whose law does not recognise the *trust* as a legal institution, the trust must be considered non-existent. It has no legal effect and is not considered valid or existing. This is the opinion of F.K. VON SAVIGNY and H. LEWALD[70]. The thesis is based on the following argument: the existence and validity of a *trust* cannot be admitted in Spain because, as an institution unknown in Spanish law, this would violate the "master axes" of Spanish law, forcing Spanish law to admit a legal institution that the Spanish legislator does not want to exist in Spanish law. The famous judgement of the Tribunale di Oristano, Italy, 15 March 1965, *Piercy vs. E.t.f.a.s.* is partly along these lines[71]. The court considered that the *trust* constituted under a foreign law was "transparent", which is the same as saying "non-existent" in Italy: the beneficiary is the heir and the *trustee* is a mere executor or fiduciary administrator of the inheritance.

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[69] H. BATIFFOL / P. LAGARDE, *Droit international privé* I, 8th ed., LGDJ, Paris, 1993, pp. 480-490; C. GONZÁLEZ BEILFUSS, *El trust, la institución anglo-americana y el Derecho internacional privado español*, Bosch, Barcelona, 1997, pp. 70-72; P. MAYER / V. HEUZE, *Droit international privé*, 11th ed, Issy-les-Moulineaux, LGDJ, 2014, p. 121: "*un tel système [lacunaire] doit être écarté*". E. VITTA, *Diritto internazionale privato*, Volume I, UTET, Torino, 1973, pp. 319-321.

[70] H. LEWALD, "Règles générales du conflit de lois. Contribution à la technique du droit international privé", *Recueil des Cours de l'Académie de Droit international de La Haye*, 1939, vol. 69, pp. 1-147; F.C. VON SAVIGNY, *Sistema de Derecho romano actual*, translated from the German by M. Ch. Guenoux and translated into Spanish by Jacinto Messía and Manuel Poley, Madrid, 1879, vol.VIII, facsimile edition by Ed. Comares, Granada, 2005 (the original German edition is from 1849), pp. 199-200. Also explained in detail by J. GARDE CASTILLO, *La "institución desconocida" en Derecho internacional privado*, Valladolid, Escuela de formación profesional Onésimo Redondo de la Delegación Sindical, Valladolid, 1947, p. 14.

[71] Judgment Tribunale di Oristano, Italy, 15 March 1965, *Piercy v. E.t.f.a.s*, [*Il Foro italiano*, 1956, p. 1021].

64. This is the thesis followed by the Spanish Directorate General for Taxation, which considers that, from the perspective of Spanish law, the *trust* does not exist. It is as simple as that. The Directorate General does not ask itself about the law applicable to the *trust*: since this institution does not exist in Spanish law, it does not exist in any country in the world and the law applicable to the *trust* is an irrelevant question. For the Directorate General of Taxes, the transfer of assets is direct from the *settlor* to the beneficiary and occurs at the moment the assets reach the beneficiary. The *trust* is like a ghost because it does not exist and the *trustee* is also a ghost, because it does not exist either (resolutions of the Directorate General for Taxation of 22 February 2011 and 2 August 2021)[72]. The consequences of this position are clear: (a) The *trust*, even if it has been validly created in another country, does not exist in Spain for the purposes of Spanish tax laws: "*for tax purposes, in the absence of recognition of the figure of the trust, in principle, it is considered not to be constituted, so that the legal relations regulated by it have no effect ... in this respect, in the absence of recognition of the figure of the trust, it seems reasonable to consider that, in principle, the trust is not considered to be constituted and the legal relations regulated by it have no effect (....).) the trust is a legal institution that has not been recognised in Spain, which is why the treatment of* trusts *in our tax system must be based on the fact that such a figure is not recognised by the Spanish legal system and that, therefore, for the purposes of that legal system, the relations between the contributors of assets and rights and their recipients or beneficiaries through the trust are considered to be carried out directly between them, as if the* trust *did not exist (tax transparency of the trust*)"; (b) The abovementioned Directorate General considers that the transfer of assets from the *grantor* to the beneficiary is a gift and is taxed as such. While the asset is in the hands of the *trustee*, the Directorate General considers that "*... the income generated by the trust in question must be understood to be obtained directly by the trust's constituent subject*"[73]. The fiscal transparency of the *trust* has been elevated by the Spanish tax authorities to the category of "*authentic hermeneutic principle*", emphasises J.C. MUÑIZ PÉREZ[74].

65. This thesis of the non-existence of the *trust* leads directly to the concealment of the *trust*. As C. GONZÁLEZ BEILFUSS rightly points out, fearing that the *trust* is not understood by Spanish officials and that its existence is completely ignored, those interested in creating a *trust* on assets located in Spain opt to create shell companies, to use intermediaries, to resort to trust contracts such as agency and mandate or to use voluntary representation[75].

66. There are several reasons why this thesis should be rejected. Firstly, the thesis

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[72] J.C. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, pp. 158-168.

[73] Resolution of the Directorate General for Taxation of 2 August 2021, text at https://www.iberley.es/resoluciones/resolucion-vinculante-dgt-v2216-21-02-08-2021-1536783.

[74] J.C. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, pp. 162-164.

[75] C. GONZÁLEZ BEILFUSS, *El trust, la institución anglo-americana y el DIPr. español*, Bosch, Barcelona, 1997, p. 9. Also, in the same sense, D.W.M. WATERS, "The institution of the *trust* in civil and common law", *Recueil des Cours de l'Académie de Droit international de La Haye*, 1995, vol. 252, pp. 115-452, esp. pp. 419-421, as well as E. GAILLARD & D.T. TRAUTMAN, "*Trust* in *Non-Trust* Countries: Conflict Of Laws And The Hague Convention on *Trust*", *AJCL*, 1987, n.2, pp. 307-340.

encourages legal limping situations: according to it, a *trust* is valid in the country where it has been created, but it will never be valid or considered as existing in Spain. Secondly, the thesis ignores the fact that the *trust* exists, because the *trust*, whatever is said, does exist in the country where it was created. Thirdly, this thesis does not answer the question as to which law is applicable to the *trust*. It consciously ignores the fact that the trust is an international private situation that must be governed by a specific state law. Fourthly, there is no norm, rule or principle of private international law which indicates that an institution unknown in Spanish law is, for that reason alone, contrary to Spanish international public policy and should therefore be considered non-existent in Spain. On the contrary, on numerous occasions, Spanish case law has considered that the mere fact that a legal institution of foreign law does not exist in Spanish law does not necessarily activate Spanish international public policy. Thus, a "separation of bodies" under Colombian law (SAP Burgos 30 July 2007 [divorce between Colombian citizens]), the kafala typical of Moroccan law (STS CA 9 December 2011 [*kafala* constituted in Morocco]) and the Moroccan *haddana* and *nafaqa* (SAP Pontevedra 29 July 2016 [Moroccan haddana and divorce between Moroccan spouses]) have been admitted as existing in Spain[76]. Fifthly, finally, the thesis sustained by the Directorate General of Taxes can only have some projection, and with profound doubts, for mere tax purposes, but not for civil purposes, a level in which this first thesis must be rejected.

b) Second thesis. The nationalisation of the *trust*: qualification by function or "transposition".

67. According to this second thesis, in order to know whether the *trust* exists in Spain and to determine the law applicable to the rights and legal positions of the *trust*, the conflict rule must be applied which, in Spanish private international law, indicates the law applicable to the Spanish legal institution which performs a "similar function" to that performed by the *trust* in Anglo-Saxon law. This is a thesis whose basis, development and practical impact was already very well explained years ago by H. BATIFFOL / P. LAGARDE[77].

In essence, it is a question of transforming the *trust* into a national legal institution, of "nationalising the *trust*", of seeking and finding a Spanish legal institution equivalent, in its function, to the *trust*. For this purpose, it is necessary to open a "phase of exploration" of the function of the *trust* in the foreign law under which this institution has been created and, subsequently, to complete it with a "phase of equivalence" with an institution which, in Spanish law (*lex fori*), performs a similar function[78].

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[76] SAP Burgos 30 July 2007 [CENDOJ 09059370022007100245]; SAP Pontevedra 29 July 2016 [CENDOJ 36038370012016100396]; STS CA 9 December 2011 [*kafala* constituted in Morocco] [ECLI:ES:TS:2011:8175].

[77] H. BATIFFOL / P. LAGARDE, *Droit international privé* I, 8th ed., LGDJ, Paris, 1993, pp. 480-490. In a similar sense, J.A. CARRILLO SALCEDO, "Art. 12.1. CC", in AA.VV., *Comentarios al Código Civil y a las Compilaciones forales*, t.I, Edersa, Jaén, 1978, pp. 428-433; ID., "Art. 12.1 CC", in AA.VV, *Comentarios a las reformas del Código Civil (El nuevo Título Preliminar y la ley de 2 de mayo de 1975)*, vol.I, Madrid, Tecnos, 1977, pp. 584-592.

[78] H. BATIFFOL / P. LAGARDE, *Droit international privé* I, 8th ed, LGDJ, Paris, 1993, pp. 480-490, esp. p. 481. 481: "*le juge français doit analyser les modalités de constitution ete la destination du trust dans la loi étrangère ainsi que le but poursuivi par le constituant avant de classer le trust dans l'une des catégories*

The question why, according to this thesis, the *trust* should be "nationalised" is answered in a simple way. The experts who hold this view are convinced that, since in their opinion the *trust* generates real rights for *trustee* and beneficiaries at the same time and over the same assets, the law of the country where the assets are located must be applied (Art. 10.1 CC) and if the *trust* as a real right does not exist in this law, then a similar real right must be sought and found in the law of the country where the *trust* is to be enforced. Since it is not possible to introduce foreign rights in rem into national law - since the law applicable to them is the law of the country where the assets are located - the *trust* has to be "translated" or "transformed" into a national right in rem, into a legal institution of the country where the assets are located[79].

68. There are two variants of this thesis. The first consists of searching in Spanish law, which is very often the law of the country where the assets affected by the *trust* are located, for a single Spanish legal institution that is equivalent, in its function, to the *trust*. The second one breaks the *trust* down into different legal relationships and searches for a Spanish legal institution that is equivalent to each of these legal relationships which, when added together, result in the *trust*.

(i) First variant: an equivalent Spanish institution.

69. With regard to the first variant of this thesis, the following remarks can be made.

Firstly, it is not possible to detect a Spanish legal institution that performs functions equivalent to those performed by the *trust*, because such a "functionally equivalent" institution simply does not exist. As J. GARRIGUES DÍAZ-CAÑABATE pointed out, it is not possible to import the Anglo-Saxon *trust* into Spain and find a perfect equivalent in Spanish law, nor even a functional equivalent, a legal institution that, in Spanish law, performs the same functions that the *trust* performs in the law of the *Common Law* countries[80]. This approach of equating the foreign *trust* with another Spanish legal institution is clearly a reductive approach, according to D. BUREAU / H. MUIR WATT[81] . Indeed, the *trust* serves at the same time to satisfy different purposes, so that to reduce it to a contractual, matrimonial, real or other institution, is nothing but to functionally reduce the *trust*[82].

Secondly, by starting from an erroneous premise, this thesis leads to unsolvable problems and wrong solutions. The courts that have followed this thesis "struggle" to

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du droit international privé du for" and with an acerbic criticism of the judgment Cour d'Appel Paris, France, 10 January 1970, *Courtois v. Consorts de Ganay*, *Revue critique de droit international privé*, 1971, p. 518-531, note by G. G. H. Batiffol / P. Lagarde, *Droit international privé I,* 8th ed. 518-531, note by G.A.L. DROZ, which did not activate the two phases of this theory.

[79] This perspective can be seen in T. VIGNAL, *Droit international privé*, 5th ed., Paris, Sirey, 2021, p. 237.

[80] J. GARRIGUES DÍAZ-CAÑABATE, *Negocios fiduciarios en el Derecho Mercantil*, Cuadernos Civitas, Thomson Reuters, Madrid, 1979, reprint 2026, pp. 94-95: "*La institución del trust tropieza con en el Derecho continental con una serie de obstáculos infranqueables en el continente europeo, cuya lectura yo quisiera aconsejar a quienes en su ingenua xenofilia creen que las instituciones jurídicas de un país extranjero pueden ser importadas como si se tratara de un tractor o de un frigorífico*".

[81] D. BUREAU / H. MUIR WATT, *Droit international privé*, Tome 2 - *Partie spéciale*, 5th ed., Paris, puf, 2021, pp. 89-99, esp. p. 94.

[82] D. BUREAU / H. MUIR WATT, *Droit international privé*, Tome 1 - *Partie générale*, 5th ed., Paris, PUF, 2021, pp. 384-385 and 487-490.

find a specific legal institution regulated in their law that performs a function similar to that of a *trust* in common law. The result is nonsensical, absurd and even ridiculous: as J.-P. BÉRAUDO WRITES, the *trust* has been equated with a contract in general (Cour d'Appel Paris, France, 10 January 1970, *Epoux Courtois et autres vs. consorts de Ganay*), -which was the proposal of the great jurist A.F. SCHNITZER-, with a trustee substitution, with a mandate, with a representation, with a fiducia with transfer of ownership, with a donation (Swiss Federal Court 29 January 1970, *Harrison vs. Crédit Suisse*), etc.[83]. It is therefore far from clear what this institution of the forum, which is equivalent to the *trust*, should be, with the result that legal certainty is seriously undermined and the legal predictability of individuals is profoundly damaged. As M.-L. NIBOYET / G. DE GEOUFFRE DE LA PRADELLE, the irreducible originality of the trust precludes any comparison with a legal institution of the law of the forum in *civil law* countries[84].

Thus, it can be stated that the *trust* is not a contract[85]. The act creating the *trust* is unilateral and does not require the acceptance of any other person[86]. The *trust* is valid even if the initially appointed *trustee* does not accept his appointment as trustee.

Similarly, the *trust* cannot be classified as a "fiduciary business" typical of continental Europe and already known in Roman law (*fiducia - fideicommissum*). It corresponds neither to the "pure fiduciary business" or "original" nor to the so-called "corrected fiducia", as is pointed out by authoritative doctrine (J. GARRIGUES DÍAZ-CAÑABATE, E. CASTELLANOS RUIZ, S. CÁMARA LAPUENTE)[87]. The trust is a bilateral contract. The *trust* is a

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[83] A.F. SCHNITZER, "Le *trust* et la fondation dans les conflits de lois", *RCDIP*, 1965, pp. 432-498; B. BERAUDO, "La Convention de La Haye du 1er juillet 1985 relative a la loi applicable au *trust* et a sa reconnaissance", *TCFDIP*, 1985-1986, pp. 21-41; J.P. BERAUDO, *Les trusts anglo-saxons et le droit français*, LGDJ, Coll. Droit des affaires, 1992. Judgment Cour d'Appel Paris, France, 10 January 1970, *Courtois v. Consorts de Ganay*, *Revue critique de droit international privé*, 1971, pp. 518-531, note by G.A.L. DROZ; Judgment Swiss Federal Court 29 January 1970, *Harrison v. Crédit Suisse*, RO 96-II- 79 and *Journal de droit international*, 1976, pp. 695-700, with note by P. LALIVE. G. WITTUHN, *Das Internationale Privatrecht Des Trust*, Peter Lang, Frankfurt am Main, 1987, pp. 27-64 and 163, points out that the contractual qualification of the *trust* prevails in German doctrine and case law. Attempts to redefine the trust as a mandate contract are well described in G. VAN HECKE, "Principes et méthodes de conflit de lois", *Recueil des Cours de l'Académie de Droit international de La Haye*, 1969, vol. 126, pp. 399-569, esp. pp. 505-508 and in P. BERNARDI, *Il trust nel diritto internazionale privato*, Pubblicazioni della Università di Pavia: Studi nelle scienze giuridiche e sociali, Tipografia del Libro, Pavia, 1957.

[84] M.-L. NIBOYET / G. DE GEOUFFRE DE LA PRADELLE, *Droit international privé*, 6th ed., Paris, Lextenso éditions, LGDJ, 2017, p. 213.

[85] RAMANDEEP KAUR CHHINA, "An introduction to trusts", 1 July 2021, https://www.openownership.org/en/publications/an-introduction-to-trusts/what-are-trusts/. Also, very well explained, J.C. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, pp. 145-148.

[86] S. CÁMARA LAPUENTE, "El *trust* y la fiducia: posibilidades para una armonización europea", *Derecho privado europeo,* Madrid, Colex, 2003, pp. 1099-1172, esp. p. 1134. 1134: "*el trust no nace, contra lo que una extendida concepción civilista entiende de un contrato entre el settlor y el trustee … no sólo es posible que no exista constituyente, o que se cree por testamento, sino que en los trusts credos inter vivos existen dos actos en su configuración: por una parte, el acto jurídico unilateral que crea propiamente el trust y, por otra parte, la transferencia de los bienes al trustee, que ni siquiera tiene que producirse en el mismo momento. El trust, por tanto, no es un contrato*". Also with an explanation of its unilateral origin, M. LUPOI, *Trusts*, 2nd ed. in full review, Giuffrè Editore, Milano, 2001, pp. 161.

[87] J. GARRIGUES DÍAZ-CAÑABATE, "Law of trusts", *AJCL*, 1953, pp. 25-35; E. CASTELLANOS RUIZ, "Sucesión hereditaria", in A.L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ (eds.), *Derecho internacional privado*, vol, 2004, pp. 417-427; S. CÁMARA LAPUENTE, "El *trust* y la fiducia: posibilidades para una armonización europea", *Derecho privado europeo,* Madrid, Colex, 2003, pp. 1099-1172.

unilateral legal transaction[88]. Thus, in a fiducia, the assets transferred to the trustee fully belong to the latter and are fully integrated into his assets. The trustee can neither claim them nor separate them in the event, for example, of transfer to third parties, in the event of the trustee's insolvency or in the event of attachments against such assets by the trustee's creditors. The trustor can only claim damages from the trustee according to the famous "theory of double effect" maintained for years by the Spanish Supreme Court (STS 28 January 1946; STS 18 February 1965; STS 7 January 1944; STS 10 March 1944)[89] . In a *trust*, the beneficiary does have such actions: he can request that the assets not be included in the passive mass of the *trustee* and he can claim that the assets continue in *trust* in the event of alienation to third parties and he can request that they not be seized by third parties. Therefore, the *trust* cannot be qualified as a *fiducia*. On the other hand, today the Spanish Supreme Court follows the theory of fiduciary property (STS 19 May 1982 and STS 2 June 1982)[90]. According to this view, the assets are not transferred to the trustee, but remain as assets owned by the trustor. In the event that such assets are acquired by third parties in bad faith or simply free of charge, the trustee can claim them[91] . However, the beneficiary cannot claim the *trust* property. He can only claim that such assets remain in *trust*. On the other hand, as mentioned above, the trust is created by a contract and not by a unilateral act, like the *trust*. The fiducia terminates with the death of the trustee, whereas the *trust* does not terminate with the death of the *trustee*. The fiducia lacks a structure of supervision by specialised courts as the *trust* does[92] . On the other hand, the rights and obligations of the subjects participating in the *trust* are perfectly foreseen and regulated by law. They are not based on the *settlor*'s trust in the *trustee*. In continental trusts, the rights of the settlor are based on the trust he has in the trustee, not on the law, according to J. GARRIGUES DÍAZ-CAÑABATE[93]. In short, as the SAP Jaén 25 March 2010 states, "*el tan referido trust anglosajón no se puede equiparar a la fiducia, pues se trata de una relación jurídica mucho más compleja en la que se enmarcan, según la doctrina, relaciones atinentes al*

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[88] M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, p. 29.

[89] STS 28 January 1946 (*JC* 1946, 25); STS 18 February 1965 (*RJA* 1965, 882); STS 7 January 1944 *(RJA* 1944, 109); STS 10 March 1944 (*JC* 1944, 12).

[90] STS 19 May 1982 [ECLI:ES:TS:1982:82]; STS 2 June 1982 [ECLI:ES:TS:1982:74].

[91] S. CÁMARA LAPUENTE, "El *trust* y la fiducia: posibilidades para una armonización europea", *Derecho privado europeo,* Madrid, Colex, 2003, pp. 1099-1172, esp. p. 1151: "*en la fiducia no se produce la transmisión de la propiedad al fiduciario, que retiene el fiduciante. … la jurisprudencia dota a esa titularidad fiduciario de una limitada eficacia real con diversas consecuencias … los terceros de buen fe a título oneroso no saldrán perjudicados por la apariencia creada, mientras que los terceros de mala fe y los que reciban a título gratuito bienes del fiduciario los perderán ante la reivindicación del fiduciante*".

[92] S. CÁMARA LAPUENTE, "Breve compendio geo-conceptual sobre *trusts*", in M. GARRIDO MELERO / S. NASARRE AZNAR (Coords.), AA.VVV., "Los patrimonios fiduciarios y el *trust*: III Congreso de derecho civil catalán" Editores: Marcial Pons, Ediciones Jurídicas y Sociales, Marcial Pons, 2006, pp. 25-52.

[93] J. GARRIGUES DÍAZ-CAÑABATE, *Negocios fiduciarios en el Derecho Mercantil*, Cuadernos Civitas, Thomson Reuters, Madrid, 1979, reprint 2026, pp. 98-99: "*Por eso, el trust anglosajón no es verdadero negocio fiduciario dado que los derechos y obligaciones del transmitente (settlor), del accipiens (trustee) y del beneficiario (cestui que trust) están regulados por la ley. El trust es una relación fiduciaria porque se funda en la confianza pero no es un negocio fiduciario en el sentido técnico …. No hay negocio fiduciario allí donde allí donde el abuso de la ajena confianza está previsto y sancionado por la ley. Al convertirse el antiguo "use" en "trust" y al quedar éste reglamentado por las normas del Statute Law, el trust ha dejado de ser un negocio fiduciario. Cuando nuestra confianza no descansa en la buena fe del otro sino en la tutela de la ley, la fiducia deja de ser fiducia en sentido técnico. La llamada "fiducia legal" encierra una contradicción en sus propios términos*".

mandato, albaceazgo, depósito, tutela, etc."[94] . The *trust* is not a *fiducia*[95].

In the same way, the *trust* is not comparable to and does not fulfil the same function as the *Treuhand* or *Salmannus* that exists in the law of certain Germanic countries, an institution that has a contractual origin. The *trust* is, likewise, different in its structure and function from the *Wafk* of Muslim law, which is merely a development adapted to Islamic culture of the ancient Roman fiducia[96].

The *trust* is also not a legal person[97]. It does not have the structure of a foundation or similar. In order to be valid and exist, the *trust* does not have to be entered in any special register, which is the case for legal persons, especially foundations.

(ii) Second variant: several equivalent Spanish institutions.

70. With regard to the second variant of this thesis, certain legal experts have tried to "break down" the *trust* into different typical legal relationships in Spanish law, so that the law applicable to each of these legal relationships will have to be determined by means of the conflict rules existing in Spanish law, as can be seen in the careful proposal by M. VIRGOS SORIANO[98]. The result, as far as *trusts* with specific and concrete beneficiaries are concerned, is as follows.

First. The relationship between *settlor* and *trustee*, the so-called "valuta relationship", must be qualified as a contractual relationship. Therefore, they are subject to the law indicated by Art. 10.5 CC: the law chosen by the parties, and failing that, the law of the common nationality, of the common habitual residence and finally the law of the place of conclusion of the contract.

Secondly. The relations between *trustee* and beneficiaries are, it is said, also of a contractual nature and, consequently, must be subject to the same law that governs the valuta relationship and which is determined in accordance with art. 10.5 CC.

Third. The relations between *settlor* and beneficiary must be classified as donations, as the spirit of liberality is undeniable, although they are built, it is said, on an indirect donation. Therefore, they must be regulated by the law to which Art. 10.7 CC leads, which is the national law of the donor. For *trusts* with undetermined beneficiaries, such as a *charity trust*, the application, by analogy, of the law governing foundations, which is the law chosen by the *settlor* to create the *trust*, has been suggested.

71. However, this thesis, in its second variant, must also be rejected for the following reasons, which are well pointed out by P. MAYER, E. VITTA and D. BUREAU / H. MUIR WATT[99].

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[94] SAP Jaén 25 March 2010 [ECLI:ES:APJ:2010:168].

[95] M. VIRGÓS SORIANO, *El Trust y el Derecho español*, Cuadernos Civitas, Madrid, 2006, p. 51.

[96] ANN VAN WYNEN THOMAS, "Note on the Origin of Uses and *Trusts* - WAQFS", *Southwestern Law Journal*, 1949, pp. 162-166; https://www.zicotrust.com.my/history-of-trusts/.

[97] S. CÁMARA LAPUENTE, "El *trust* y la fiducia: posibilidades para una armonización europea", *Derecho privado europeo,* Madrid, Colex, 2003, pp. 1099-1172, esp. p. 1113. *See* also RAMANDEEP KAUR CHHINA, "An introduction to trusts", 1 July 2021, https://www.openownership.org/en/publications/an-introduction-to-trusts/what-are-trusts/.

[98] M. VIRGÓS SORIANO, *El Trust y el Derecho español*, Cuadernos Civitas, Madrid, 2006, pp. 99-107.

[99] P. MAYER, *Droit international privé*, 1994, Paris, Montchrestien, 5th ed., pp. 118-121; E. VITTA, *Corso di Diritto internazionale privato e processuale*, Torino, UTET, 3rd ed., 1989, p. 157; D. BUREAU / H. MUIR WATT, *Droit international privé*, Tome 2 - *Partie spéciale*, 5th ed, Paris, PUF, 2021, p. 98: "*l'insertion du trust dans l'ordre du for pourrait s'envisager tout d'abord au moyen de la technique de la substitution ..... cependant,*

First of all, these descriptions of the various legal relationships forming the *trust* as 'contracts' under Spanish law or as 'donations' under Spanish law are very forced. Indeed, certain legal relationships deriving from the *trust* cannot be classified according to the categories of Spanish law: they are neither contracts, nor donations, nor legal persons. For example, the legal relationship between *settlor* and *trustee* is not a contract: in fact, the *trust* exists as soon as the *settlor* creates it, even if the *trustee* refuses to be appointed as such. On the other hand, the *settlor* is not bound to the *trustee* or the beneficiary. On the other hand, the legal relations between *trustee* and beneficiary do not arise from a contract. The beneficiary may not even know who the *trustee* is. Finally, the relations between *settlor* and beneficiary constitute a modal and indirect gift.

Secondly, by breaking up the *trust* into several legal relationships governed by laws that may be totally different, the internal coherence of the *trust* is destroyed, as M. CHECA MARTÍNEZ and S. ÁLVAREZ GONZÁLEZ[100].

Thirdly, it should be remembered that in the private international law of the *common law* countries that regulate the institution, the law applicable to the *trust* is always one. The *trust* is not broken down into several legal relationships, each of which is governed by its own law.

72. In short, this second thesis - the nationalisation of the *trust* - *in* its two variants, has demonstrated in history its total inadequacy with reality and its contradiction with the principles of legal certainty and foreseeability of solutions. It is therefore very surprising that this thesis has been upheld by a great deal of Italian, Swiss, French and German case law since the 19th century and that even today it still finds staunch defenders who are determined to nationalise the *trust* and translate it into continental legal forms in order to "qualify" it and thus find the correct conflict rule(s) to determine the law applicable to it in cases with foreign elements. Indeed, this thesis of the "transposition" or "nationalisation" of the *trust* alters its nature and function and, consequently, denaturalises it, as the doctrine has written[101]. In Spain, the *trust* is no longer a *trust*. It is something else: an institution or a heterogeneous set of institutions that are not a *trust*. The qualification operation to determine the applicable conflict rule is therefore distorted.

73. It is also surprising, in contrast to the previous paradox, that this same issue has not given rise to any problems in company law. In this field, a capital company legally incorporated in State A must be able to operate in Spain using the company's original type of company in the Member State of origin. This solution avoids the same capital

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les mêmes liaisons systématiques qui avaient conduit à l'échec de la qualification du trust, conduisent assez naturallement à fermer également cette voie.... But none of these attempts is entirely convincing, because the structure of succession administration in French law is such that none of them is able to safeguard the autonomy of the assets placed in trust".

[100] S. ÁLVAREZ GONZÁLEZ, "Comentario al art. 12.1", *Comentarios al Código civil y Compilaciones forales* (dirs. M. ALBALADEJO / S. DÍAZ ALABART), t. 1, vol. II, 1995, pp. 842-880; M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, pp. 106-109.

[101] M.A. ASÍN CABRERA, "La Ley aplicable al *trust* en el sistema de Derecho internacional privado español", *Revista General de Derecho*, 1990, pp. 2089-2120; H. MOTULSKI, "L'office du juge et la loi étrangère", *Mélanges offerts à J.Maury*, vol.I, Paris, Dalloz/Sirey, 1960, pp. 342-373. Also A.F. SCHNITZER, "Le *trust* et la fondation dans les conflits de lois", *RCDIP*, 1965, pp. 432-498 and M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, pp. 106-107.

company having to assume "different types of company" in each State in which it operates. This second thesis has been expressly supported by the CJEU: the capital company is recognised in the Member State of destination as it was created in the Member State of origin, with the company type of the Member State of origin, as explained by V. MAGNIER and S. LEIBLE / J. HOFFMANN[102] . This has also been the case law of the CJEU (see ECJ, 9 March 1999, *Centros*, No. 26 *in* fine; ECJ, 5 November 2002, *Überseering*, No. 93, 95, 57, 58, 59 and 81)[103]. This thesis has also been implicitly supported by Art. 96.1 of Royal Decree-Law 5/2023, of 28 June 2023 [structural modifications of commercial companies], which indicates that the capital company registered in another Member State of origin, without being dissolved or liquidated and retaining its legal personality, "*becomes a Spanish capital company*", transferring at least its registered office to Spain[104]. Example: a company of the *Private Company Limited by Shares* type set up in Dublin will be considered a company of that type throughout the European Union, in Spain, Germany, Portugal, etc., and must be able to act as such a company in those States, even if in those countries there is no such company type with the specifications laid down by Irish law. Downgrading or converting the company or transposing it into the company types of each Member State means hindering, distorting and distorting the freedom of establishment of companies. The same applies to *trusts*: if the *trust* is obliged to be converted into a legal institution under Spanish law, it is distorted and the continuity of the rights of the participants in the *trust* is not guaranteed.

74. In conclusion, as M.A. ASÍN CABRERA rightly pointed out, the "transposition" thesis leads to very unsatisfactory results. It will never be possible to find one or more Spanish legal institutions equivalent to the *trust*[105] . The thesis denaturalises the *trust*: its nature is consciously ignored and it is treated as what it is not, stresses H. MOTULSKY[106]. This thesis destroys the internal coherence of the *trust*, which is only a *trust* if its regulatory law is specified once the *trust* is qualified as a *trust* and not as a national legal institution or a group of them, as M. CHECA MARTÍNEZ and S. ÁLVAREZ GONZÁLEZ have shown[107].

c) Third thesis. Thesis of the "specific global conflict rule".

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[102] V. MAGNIER, "La société européenne en question", *Revue critique de droit international privé*, 2004, pp. 555-587; V. MAGNIER, "Mobilité des sociétés et liberté d'établissement: le point de vue communautaire: article", *Cahiers de droit de l'entreprise*, no. 2, 2006, pp. 28-34; S. LEIBLE / J. HOFFMANN, "Wie INSPIRIERT IST IST IST einem Wirtschaftsrecht? HOFFMANN, "Wie inspiriert ist 'Inspire Art'?", *EZfW*, 2003, pp. 677-683; S. LEIBLE / J. HOFFMANN, "Überseering und das (vermeintliche) Ende der Sitztheorie", RIW, 2002, pp. 925 ff.

[103] ECJ 9 March 1999, C-212/97, *Centros* [ECLI:EU:C:1999:126]; ECJ 30 September 2003, C-167/01, *Inspire Art* [ECLI:EU:C:2003:51]; ECJ 5 November 2002, C-208/00, *Überseering* [ECLI:EU:C:2002:632];CJEU 12 July 2012, C-378/10, *VALE Építési Kft.* [ECLI:EU:C:2012:440]; ECJ 25 October 2017, C-106/16, *Polbud* [ECLI:EU:C:2017:804].

[104] BOE no. 154 of 29 June 2023.

[105] M.A. ASÍN CABRERA, "La Ley aplicable al *trust* en el sistema de Derecho internacional privado español", *Revista General de Derecho*, 1990, pp. 2089-2120.

[106] H. MOTULSKY, "De l'impossibilité juridique de constituer un *trust* anglo-saxon sons l'empire de la loi française", *Ecrits. Études et notes de droit international privé*, Paris, Dalloz, 1978, pp. 5-21.

[107] S. ÁLVAREZ GONZÁLEZ, "Comentario al art. 12.1", *Comentarios al Código civil y Compilaciones forales* (dirs. M. ALBALADEJO / S. DÍAZ ALABART), t. 1, vol. II, 1995, pp. 842-880, esp. p. 867; M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, pp. 105-106.

75. A third position is that there is a real legal gap in the Spanish private international law system: there is no conflict rule to determine the law applicable to *trusts*, because this is an extreme case, according to E. VITTA, which cannot be qualified or identified with one or more Spanish legal institutions[108].

Given that the Spanish court must rule on the merits of the case (Art. 1.7 CC), given that there may be legal loopholes but no legal loopholes in Spanish law, and given the obvious legal loophole that exists in relation to the *trust* in the Spanish system of private international law and the lack of written conflict rules applicable to the case, case law must and can fill this gap. The courts will create a conflict rule which will fix the law applicable to the *trust*, as indicated by P. MAYER / V. HEUZÉ and E. VITTA[109].

Spanish case law should have filled this gap by means of specific proposals, i.e. by means of a conflict rule created on the basis of general principles of Spanish private international law, as E. VITTA proposes with complete solvency[110]. However, Spanish case law has been extraordinarily difficult, clumsy and vague in *trust* cases, especially in inheritance *trust* cases (STS 30 April 2008 [inheritance *trust* instituted by Arizona deceased]; SAP Jaén 25 March 2010 [will granted before an Illinois notary by a Spanish deceased])[111]. This case law has not provided any useful element for the design of a specific conflict rule indicating the law governing *trusts* in Spanish private international law.

76. This third thesis holds that, in view of the stubborn, obstinate, constant and stubborn legal lacuna of the Spanish system of private international law, the courts must formulate, on the basis of the general principles of private international law, a "specific conflict rule" that determines the law applicable to these "internal relations" of the *trust*. This thesis has been defended by numerous specialists in private international law[112]. The thesis is based on two premises.

The first premise indicates that the *trust* is a unique legal phenomenon, a "*unitary institute*", as M. VIRGÓS SORIANO writes[113]. Therefore, the law applicable to it must be a single law, which will govern all the legal relations between the subjects affected by the *trust.* This approach is the one followed by the Hague Convention of 1 July 1985 on the law applicable to the *trust* and its recognition in Art. 11 ("*[a] trust created in accordance*

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[108] E. VITTA, *Diritto internazionale privato*, Volume I, UTET, Torino, 1973, pp. 319-321.

[109] P. MAYER / V. HEUZE, *Droit international privé*, 11ª ed., Issy-les-Moulineaux, LGDJ, 2014, p. 121: "*ici aparaît l'utilitè de laisser à la jurisprudence la liberté de créer les règles nécessaires; en presence d'une institution inconuee, qui n'entre dans aucune des catégories du droit du for, le juge élaborera la règle de conflit qui lui paraître le mieux en harmonie avec le reste du système*". E. VITTA, *Diritto internazionale privato*, volumen I, UTET, Torino, 1973, pp. 319-321.

[110] E. VITTA, *Diritto internazionale privato*, Volume I, UTET, Torino, 1973, pp. 319-321.

[111] STS 30 April 2008 [ECLI:ES:TS:2008:1632]; SAP Jaén 25 March 2010 [ECLI:ES:APJ:2010:168].

[112] *Vid*. J. GARDE CASTILLO, *La "institución desconocida" en Derecho internacional privado*, Instituto Editorial Reus, Madrid, 1947; M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, esp. pp. 63-82; M.A. ASÍN CABRERA, "La Ley aplicable al *trust* en el sistema de Derecho internacional privado español", *Revista General de Derecho*, 1990, pp. 2089-2120; P. CZERMAK, *Der Express Trust im internationalen Privatrecht*, Frankfurt, Peter Lang, 1986; H. MOTULSKY, "De l'impossibilité juridique de constituer un *trust* anglo-saxon sons l'empire de la loi française", *Ecrits. Études et notes de droit international privé*, Paris, Dalloz, 1978, pp. 5-21; A.F. SCHNITZER, "Le *trust* et la fondation dans les conflits de lois", *Revue critique de droit international privé*, 1965, pp. 432-498; M.J.D. BREDIN, "L'évolution du *trust* dans la jurisprudence française", *TCFDIP*, 1973-1975, Paris, 1977, pp. 137-160.

[113] M. VIRGÓS SORIANO, *El Trust y el Derecho español*, Cuadernos Civitas, Madrid, 2006, p. 94.

with the law specified by the preceding Chapter shall be recognised as a trust"), recall F. MOSCONI / C. CAMPIGLIO[114]. As a matter of fact, C. GONZÁLEZ BEILFUSS points out that this is a new method, as the traditional approach over the last hundred years has been to look for a legal institution or several more or less equivalent ones in the law of the forum in order to be able to qualify the *trust* and identify it with a legal category known in the country of *Civil Law*[115]. This new approach was already followed by the famous judgment of the TGI Bayonne, France, of 28 April 1975, in which the court considered that the *trust* should be recognised in France as such a *trust*, in which the *trustee* was the true owner of the inherited assets although his prerogatives were "*limited by the charter of constitution of the trust and by the rules of equity*"[116]. It is therefore a question of importing the *trust* as such, says S. GODECHOT-PATRIS[117]. This avoids falling into this reductive or deforming re-qualification of the *trust* by means of a legal category known in the law of the forum, as D. BUREAU / H. MUIR WATT[118].

The second premise is that, in formulating the conflict rules indicating which law is applicable to the *trust*, the general principle of private international law known as the "principle of proximity" or "closest connection" should be taken into account. The *trust* should be subject to the law of the country with which it is most closely connected, the law whose application to the case is the most foreseeable for the parties involved. Thus, the most appropriate conflict solutions are as follows.

77. Firstly, the *trust* must be governed by the law of its source, by the law of the country that generates and gives rise to the *trust*. In the case of voluntary *trusts*, this leads to the application of the law chosen by the *settlor*. The *trust* will thus be subject to the law designated by the *settlor*. This solution can be supported by several arguments: (a) The criterion of the autonomy of the conflicting will is a general principle of European and Spanish private international law which is widely extended in the property sector; (b) If the *settlor* can materially regulate the *trust* as he wishes, it seems logical that he can also choose the law applicable to it. This argument was used by the SC before 1974 when Spanish private international law lacked a conflict rule indicating the law applicable to international contracts. The SC noted that the parties could choose the law applicable to international contracts because they can also regulate their contracts freely (STS 19 December 1930 (*Metropolitan Opera vs. Burró Fleta*)[119]; (c) This solution has advantages, since the *trust* may be subject to a State law that regulates the institution. It is enough for the *settlor* to choose a material law that contemplates and

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[114] F. MOSCONI / C. CAMPIGLIO, *Diritto internazionale privato e processuale. Vol. 2: Statuto personale e diritti reali*, 6th edition, Utet giuridica, Wolters Kluwer Italia, Milano, Milano, 2023, p. 369.

[115] C. GONZÁLEZ BEILFUSS, *El trust, la institución anglo-americana y el Derecho internacional privado español*, Bosch, Barcelona, 1997, p. 11.

[116] Judgment TGI Bayonne, France, 28 April 1975, *Revue critique de droit international privé*, 1976, p. 331 and note by NECKER, very well analysed by M.-L. NIBOYET / G. DE GEOUFFRE DE LA PRADELLE, *Droit international privé*, 6th ed., Paris, Lextenso éditions, LGDJ, 2017, pp. 212-214.

[117] S. GODECHOT-PATRIS, "Retour sur la notion d'équivalence au service de la coordination des systèmes", *Revue critique de droit international privé*, 2010, pp. 271-312; S. GODECHOT-PATRIS, *L'articulation du trust et du droit des successions*, Paris, LDGJ, 2004, pp. 13-14.

[118] D. BUREAU / H. MUIR WATT, *Droit international privé*, Tome 2 - *Partie spéciale*, 5th ed., Paris, PUF, 2021, p. 95.

[119] STS 19 December 1930, *Metropolitan Opera vs. Burró Fleta*, *Jurisprudencia Civil*, vol. 197, p. 677, magnificently explained by M. VIRGÓS SORIANO, "Obligaciones contractuales", in J.D. GONZÁLEZ CAMPOS, *Derecho internacional privado*, parte especial, vol. II, Oviedo, 1984, pp. 295-376, esp. pp. 303-308.

regulates the *trust*; (d) In a similar way to what happens with legal persons, this connection operates as a kind of "*incorporation theory*": the *trust* exists if it conforms to the law chosen by the *settlor* and, if this is so, it must be considered to exist in other countries as well: it is the "personal statute of the *trust*", it is its "Law of origin".

There must be a limit to this point of connection: the "fictitious internationalisation" of a "purely domestic *trust*" must be avoided. Thus, the *trust* will be governed by the law chosen by the *settlor*, but if the objective elements of the *trust* are all linked to a particular country, the courts of a state may reject this choice of law, so that the law of the only country with which the *trust* is connected will always and exclusively be applicable. Therefore, in such a case, if the law of the country objectively connected to the *trust* disregards such an institution, the *trust* will not exist as such a *trust*, nor will it be valid or produce any effect as such a *trust*. In other words, it can be said that a *trust* created in an artificially international manner by the *settlor* may not produce legal effects as such a *trust* (Tribunale di Monza judgment, Italy, 13 May 2015 [*trust* with fraudulent purposes])[120]. In short, one may say that the *trust* cannot be governed by a foreign law merely because the *settlor* has chosen a foreign law as the law applicable to the *trust*, nor merely because a foreign country has been chosen as the place of administration of the *trust*, nor merely because the habitual residence of the *trustee* is in another country (judgment of the Tribunale di Udine, Italy, 28 February 2015 [artificially internationalised *trust*])[121]. This limitation is included in Article 13 of the Hague Convention of 1 July 1985 on the law applicable to *trusts* and their recognition, with a very particular scope. The rule specifies: "*[n]o State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved*". This legal provision does not in fact prohibit the choice of the law of another country as the law governing a trust that does not have foreign elements, but simply allows a State not to grant validity to such a choice. The Italian courts have therefore opted for the opposite approach: an Italian can set up a trust on assets all located in Italy, because this is not prohibited by the aforementioned Art. 13 of the Convention. The argument of equality between settlors of the *trust* has been used: if an Englishman can create a *trust* on assets located in Italy, it would be unfair, and even unconstitutional, if an Italian could not do so (Judgment of the Bologna Court, Italy, 1 October 2003[122]. Therefore, as F. MOSCONI / C. CAMPIGLIO have explained, the Hague Convention's main objective is to ensure that a trust created in Anglo-Saxon countries is recognised in Civil Law countries, but, in fact, it has opened the way to the so-called "internal *trust*", i.e. to the creation of *trusts* also by citizens of Civil Law countries and/or relating to assets located in such countries[123].

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[120] Judgment Tribunale di Monza, Italy, 13 May 2015 [*Rivista di diritto internazionale privato e processuale*, 2016, pp. 1109-1112].

[121] Judgment Tribunale di Udine, Italy, 28 February 2015 [*Rivista di diritto internazionale privato e processuale*, 2016, p. 536].

[122] Judgement by Tribunale di Bologna, Italy, 1 October 2003 (text and comments on https://www.notaio-busani.it/it-IT/La-sentenza-del-Tribunale-di-Bologna.aspx): "*Sarebbe paradossale che l'ordinamento italiano volesse pervenire al riconoscimento in Italia di trust istituiti da stranieri con legge straniera aventi ad oggetto beni siti in Italia e, al contrario, intendesse disconoscere trust aventi le medesime caratteristiche costituiti dai propri cittadini*".

[123] F. MOSCONI / C. CAMPIGLIO, *Diritto internazionale privato e processuale. Vol. 2: Statuto personale e diritti*

78. Secondly, in the absence of a choice of law by the *settlor*, the *trust* must be governed by the law of the country with which the *trust* has the "closest links", as indicated in Spanish doctrine by M. CHECA MARTÍNEZ[124] . The reasoning to determine the law applicable to the *trust* must be done on a "case by case" basis. The circumstances of the specific case are relevant. Various elements must be taken into account, such as the place where the assets of the *trust* are located, the place where the *trustee* carries out his activities, the place of administration of the *trust* designated by the *settlor* and the place or places where the objectives of the *trust* are to be fulfilled. This point of connection is appropriate. The parties involved can reasonably foresee which state law will govern the *trust*, as this connecting point is inspired by the "proximity principle" or "centre of gravity of the legal relationship". On the other hand, the "spatial continuity" of the validity of a *trust* that has been validly created under a foreign law that regulates and admits it is guaranteed. This system of specifying the law applicable to the *trust* in the absence of the law designated by the *settlor* is followed, with certain variations, by the courts of the United Kingdom and the United States of America, explains G. WITTUHN, although these courts often separate the administration of the *trust* from the *trust*, which is subject to a different law, usually the law of the country where the things in the *trust* situation are located[125].

79. The State law applicable to the "internal relations" of the *trust*, as specified in this third thesis, regulates: (i) The validity of the *trust*, its modification and termination; (ii) The interpretation of the *trust*; (iii) The effects of the *trust*; (iv) The administration of the *trust*; (v) The "legal status of the *trustee*": appointment, resignation, revocation, capacity, transfer of functions, rights and obligations of the *trustee*, powers of the *trustee*, restrictions on the trustee's capacity to act, the relationship between *trustee* and beneficiaries, and the *trustee*'s obligation to account for his management.

4. Law applicable to actions arising out of the *trust*.

A) Application of the *Trust Act*.

80. There are three types of legal actions which are connected with the *trust* and which must be distinguished for the purposes of their legal qualification and the determination of the law applicable to them.

81. Firstly, there are *trust actions*. These are the actions admitted by law and which derive directly from the situation in *trust* in which certain assets are found. This group of actions includes *following*, *tracing* and all actions that the beneficiary can exercise against the *trustee* and/or third parties are "*trust actions*". Also included are all actions that the *trustee* can exercise in his capacity as trustee and those that the *settlor* can exercise as settlor of the *trust*. Under these *trust actions* a court is asked to supervise or

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reali, 6th ed., Utet giuridica, Wolters Kluwer Italia, Milano, Milano, 2023, p. 370.

[124] M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, pp. 124-126.

[125] G. WITTUHN, *Das Internationale Privatrecht Des Trust*, Peter Lang. Frankfurt am Main, 1987, pp. 27-64 and 73-75.

intervene in relation to a *trust*, the *trustees* or the beneficiaries. For example, an action brought by one *trustee* against another *trustee* whom he accuses of failing to properly exercise his functions as trustee is a *trust action*. Consequently, all the actions listed above that can be brought against the *trustee* or third parties derive from the existence of a *trust* and are, by this, *trust actions*. All these actions are personal and not real actions and, therefore, must be subject to the law governing the *trust* and not to the law of the country where the assets in *trust* are located. Art. 10.1 CC is inapplicable to them.

82. Secondly, within the *trust actions*, there is a specific class of actions that can be brought against the *trustee*, the beneficiary and the *settlor*. Normally, these are actions that are brought between these subjects, one against the other. They are called actions arising out of the "internal relations of the *trust*". They are the actions which give rise to the disputes covered by Art. 7.6 Brussels I-bis. They are also subject to the law governing the *trust*.

83. Thirdly, mention should also be made of legal actions arising from what are known as "external *trust* relationships". As indicated above, the external relationships of the *trust* are those between the *trustee* and a third party against whom the *trustee* appears as the owner of the trust property. For example, if a third party claims physical delivery of a *trust* property from the *trustee*, such an action arises from a relationship external to the *trust*. If a *trustee* sells a *trust* property to a third party and the third party does not pay, the dispute arises out of a relationship external to the *trust*. These relationships external to the *trust* are governed by the law applicable to the act in question: the law governing contracts, non-contractual tortious acts, rights in rem in property, etc.

B) *Following* and *tracing*.

84. *Following* and *tracing* are not, strictly speaking, procedural actions. There is no plaintiff and defendant when *following* and/or *tracing* are activated. Rather, they are technical procedures that must be activated before any real procedural actions can be brought.

85. *Following* and *tracing* are "legal exercises to locate assets" which are in *trust* and over which the beneficiaries claim to have "*equitable ownership*". In the event that the *trust* property in question or its corresponding substitute or value has been located, it can then be decided what is the best action the beneficiary can take to have his or her rights as beneficiary restored.

86. *Following* is the procedure or procedural technique that consists in following an asset in *trust* when it passes from one person to another. The *trust* property may in fact have been transferred by the *trustee* to a third party and the latter may have transferred it to another third party, and the latter's child may have inherited it. The *following follows* all the transfers of the property in trust and, if successful, makes it possible to locate the property, to find out who has it now and where it is.

The idea behind *following* is that a *trust* asset remains a *trust* asset even if the *trustee*, contrary to the *trust* rules, transfers it to a third party and the third party to another and

so on. The beneficiary can always assert his rights as beneficiary over such assets. In one of the most famous trust cases (*Foskett v McKeown*, 2001), LORD MILLETT states that *following* is "*the process of following the same asset as it moves from hand to hand*"[126].

The *following* is activated to find out who is, at the present time, the holder of the property in *trust* and where the property is located. It does not pursue anything else. Obviously, *following* is not a vindicatory action and does not aim to recover the thing for the beneficiary or for anyone else. It is normally used in relation to movable property held in *trust*.

87. *Tracing* is the procedural, economic and accounting procedure or technique of identifying a new asset to replace the old asset that was in *trust*. Thus, for example, if a house in *trust* is sold and the proceeds are used to purchase a luxury car, the value of the house can *be traced* back to the car. *Tracing* is thus the "*tracing* of the *trust* property".

Tracing is a very important technique. In terms of civil dogmatics, as has already been stated, *tracing* is not a procedural action, but an evidentiary technique whose purpose is to individualise the object of the claim.

As is evident, *tracing* is not a vindicatory action. It is not a real action[127]. It does not seek to declare that the ownership of *trust* property belongs to the beneficiary. The very verb "*to trace*" means "to *find something or someone that has been lost*", "to *locate*" or "to *ascertain*". It has nothing to do with "recover" or "claim". In no case does *tracing* seek to bring things given in *trust* back into the possession of the beneficiary or to proclaim that such things are the property of the beneficiary.

In cases where the dishonest and defaulting *trustee* turns out to be insolvent or has disappeared from the face of the earth, *tracing* makes it possible to ascertain the pecuniary value of an asset that was in *trust*. Thus, if a *trust* property has been transformed into something else, then the value of the *trust* property that is now inside the new thing can be claimed by the beneficiaries. If a car in *trust* whose value was 80,000 dollars is sold and with this money and another 100,000 dollars that belonged to the *trustee*, the trustee acquires Google Corp. shares, the *tracing* allows, if successful, to claim that a total of 80,000 euros worth of Google Corp. shares remain in the *trust* in favour of the beneficiary. Thus, the economic benefit of such shares for such a value belongs to the beneficiary. The specific rules of *tracing* are extremely casuistic[128].

88. Upon successful completion of *following* and *tracing*, if any, the beneficiary can exercise various actions recognised by *Equity Law* as *Equity acts in personam*. This means that the court can issue an order (*injunction*) for another person, the *trustee* or a third party, to carry out an activity, such as paying an amount, delivering an asset or observing a certain conduct. In the case of disobedience to this order, the subject is in *contempt* of *court*, which is a criminal offence.

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[126] *Foskett v McKeown* [2000] UKHL 29.

[127] M. CHECA MARTÍNEZ, *El 'trust' angloamericano en el Derecho español*, Madrid, McGraw Hill, 1998, p. 12.

[128] S. CÁMARA LAPUENTE, "El *trust* y la fiducia: posibilidades para una armonización europea", *Derecho privado europeo,* Madrid, Colex, 2003, pp. 1099-1172: *"tracing, developed by case law rules of great casuistic detail*", serves to "*trace or follow the assets unduly transferred or appropriated by the trustee and recover the economic benefit they procured*".

C) Actions against the dishonest *trustee*.

89. When the *trustee* breaches his principal duties as *trustee*, the law of the States that admit and regulate *trusts*, on the classic English law model, grants certain *remedies* that can be exercised by the beneficiary. These *remedies* are varied, since they correspond to the different nature of the breach that may have occurred. If a *trustee* has breached an obligation under the *trust*, the beneficiary can bring various legal actions.

90. Firstly, he can claim *specific performance*, which is generally the case where the beneficiary simply wishes to oblige a *trustee* to follow the terms of the *trust*, or to avoid an anticipated breach of the trust rules. Thus, in the famous *Webb* case (ECJ 17 May 1994, C-294/92, *Webb*), the action sought recognition that Mr. Webb junior (*trustee*) owned a flat in France for the sole benefit of his father (beneficiary) and that, as a result, he had a duty to execute the necessary documents to transfer the property to him on termination of the *trust*[129]. Mr. Webb senior was only pursuing the *trustee*'s performance of his duties as trustee and in accordance with the *trust* rules. In short, Mr. Webb senior only wanted Mr. Webb junior to be declared to own the real estate in France as *trustee* and to be ordered to execute the documents necessary for him to acquire *legal ownership*.

In short, the beneficiary can request the judge to order the *trustee* to fulfil his obligations as trustee, to administer the assets given in *trust* in accordance with the law, to follow the instructions given by the *settlor* and to carry out the necessary acts so that the beneficiary can receive the economic benefit of the assets given in *trust*.

91. Secondly, a breach by the *trustee* of his general duty of care in the management of the *trust* entitles the trustee to financial compensation in favour of the beneficiary. If the beneficiary has suffered damages attributable to the *trustee*, such damages must be compensated.

92. Thirdly, in case of monetary losses or losses in the value of the *trust* assets, the beneficiaries can claim compensation from the *trustee*. This action is often used in cases where the *trustee* makes a disastrous economic investment without regard to the basic elements of prudent investment. The beneficiaries are entitled to have the loss of value of the *trust* replaced by the *trustee*.

93. Fourthly, the beneficiary has the right to apply for so-called "*restitution*", which happens when the *trustee* has obtained "unauthorised profits" in his favour through the *trust* property. This *restitution* has nothing to do with "returning the *trust* property" or giving anything back to anyone. *Restitution* is the amount of money to be paid by the *trustee* for having been unjustly enriched. Its rationale is precisely to prevent unjust enrichment. It is not a matter of compensating for damages, but of ensuring that the *trustee* does not retain and make his own the benefits he has wrongfully obtained from the *trust* assets. In such cases, the *trustee*'s financial liability is mainly governed by the rules of unjust enrichment: a person who has been unjustly enriched at the expense of

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[129] ECJ 17 May 1994, C-294/92, *George Lawrence Webb v. Lawrence Desmond Webb*, *[*1994*] ECR* 1717-1740 [ECLI:EU:C:1994:193].

another is obliged to *make restitution*, in this case in favour of the beneficiary.

94. Fifthly, the *trustee*'s breach of his obligation to avoid conflicts between the interests of the *trust* and his own interests allows the beneficiary to bring an action against the *trustee* for the return of the stolen or distracted assets to their previous *trust* status. This action resembles, *mutatis mutandis*, a rescissory action. Note that Art. 11.d) of the Hague Convention of 1 July 1985 on the law applicable to *trusts* and their recognition indicates that: "*... the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets*". To translate this expression as "reivindicar", as can be seen in some unofficial Spanish translations circulating in certain legal circles, does not seem correct. Thus, "reintegrate" or "return" are expressions that are more in line with the official text of the convention. Indeed, it is a question of returning the goods to their previous situation of *trust*, not of physically recovering them or handing them over to the beneficiary, since, in fact, the beneficiary does not possess such goods, so they cannot be returned to his possession either. If the legal text had meant to say "*claim*" directly, it would have used the verb "*claim*" or "*reclaim*". Therefore, this action of *recovery* should not be subject to the law of the country where the property is located (Art. 10.1 Spanish Civil Code) because it is not a real action, since it is not aimed at re-establishing the beneficiary in possession of the thing, but a personal action, which aims exclusively at maintaining the things in a situation of *trust* even if these things remain in the hands of the new possessor through *a constructive trust*[130]. Such a *recovery* action must be regulated by the law governing the internal relations of the *trust*.

95. Sixthly, in the event that the assets in *trust* have been commingled with other assets of the *trustee*, the beneficiary has an action to request that the assets in *trust* remain in trust and are not confused with the *trustee*'s own assets.

In this regard, firstly, in the event of insolvency or bankruptcy of the *trustee*, the beneficiary can request that the assets in *trust* be removed from the insolvency estate so that the *trustee*'s creditors do not enforce their claims against those assets.

Secondly, the beneficiary can also take action to prevent the assets held in *trust* from being affected by an attachment directed against the *trustee* or against a third party.

Thirdly, the beneficiary can also request that the assets in trust are not included in the *trustee*'s estate[131].

96. The court order issued as a consequence of any of the above actions may impose an obligation or order a course of conduct on the *trustee*. This court order is not, in any case, a consequence of a vindicatory action, but consists merely of a particular *remedy* aimed at doing Justice in *Equity Law* in favour of the beneficiary.

These actions aim to return and restore to the beneficiary's enjoyment of the economic benefit provided by the assets in *trust*. These actions aim at "reverting the assets to the *trust*"[132]. In no case do *tracing* and its corresponding *remedies* consist of a declaration of

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[130] D. BUREAU / H. MUIR WATT, *Droit international privé*, Tome 2 - *Partie spéciale*, 5th ed., Paris, PUF, 2021, p. 975.

[131] M. LUPOI, *Trusts,* 2nd ed. in full review, Giuffrè Editore, Milano, 2001, pp. 344-348.

[132] J.C. MUÑIZ PÉREZ, *El trust, herramienta de elusión fiscal internacional, crisis y competitividad fiscal*, Aranzadi, Pamplona, 2002, pp. 51-52.

ownership of the *trust* assets in favour of the beneficiary. *Tracing* and these actions do not seek the physical return of the property to the beneficiary or to the original *trustee*

D) Actions against third parties.

97. Firstly, if the *trust* property has been given to a third party in breach of the *trust* rules, the beneficiary can claim that the trust property be returned to its previous *trust* status. This rule, *recovery*, does not apply if the acquirer was a bona fide third party acquirer for valuable consideration, whose legal position is protected against such a claim (*innocent volunteers*), so that they may be obliged to return the assets to the *trust*, but they can claim the money they spent on their acquisition. This action prevents the assets from being removed from their legal status as a *trust*.

In fact, once the *tracing* is over, this action follows "*the peculiar system of obtaining the judicial constitution of a 'constructive trust', in such a way that the person who acquired the assets must be considered as a new trustee who will act on them for the benefit of the beneficiary*", explains S. CÁMARA LAPUENTE[133]. Therefore, the things in *trust* may not be returned to the *trustee* nor, in any case, to the beneficiary. However, the *trust* pursues these assets, which remain in *trust* but in the hands of the third party, who is now considered the new *trustee* and who, therefore, must manage them with full respect for the beneficiary's right to their economic benefit.

As indicated above, this action is similar, *mutatis mutandis*, to a rescissory action (Art. 11.d) of the Hague Convention of 1 July 1985 on the law applicable to *trusts* and their recognition). *Recovery* is not a real action. Therefore, it is not subject to the law of the country where the property is located (Art. 10.1 CC). Its sole purpose is to maintain the things in *trust* status even if such things are now in the hands of a third party, who will be the new *trustee* of a *constructive trust*. The law governing this action of recovery directed against a third party is the law governing the internal relations of the *trust*. This third party may assert his title to the *trust* property under the law of the country where the property was located at the time of acquisition, if he allegedly acquired a right in rem (Art. 10.1 CC). The said law will decide which title should prevail: the *trust* or the title invoked by the third party acquirer.

This *recovery* action against the third party is not a claim action. The beneficiary is not the holder of any right in rem over the goods, but only of the economic benefit they generate. The beneficiary does not have any immediate power over the assets that can be enforced *erga omnes*. The assets are the property of the *trustee*.

98. Secondly, if things in trust have been lost or disposed of to bona fide third parties, as a general rule, any recipient of property subject to *trust* who knows or should have known that such property has been transferred to him in breach of the *trust* rules can be sued by the beneficiary in order to force him to return the value of the property, even if such third party has transformed such property into other assets.

99. Thirdly, the beneficiary can claim back the value of the *trust* property from persons who have never held or owned it, but who have contributed to the breach of

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[133] S. CÁMARA LAPUENTE, "El *trust* y la fiducia: posibilidades para una armonización europea", *Derecho privado europeo,* Madrid, Colex, 2003, pp. 1099-1172 en p. 1133-1134.

the *trust* rules and have done so dishonestly and knowingly. This rule is particularly important in relation to banks and other professionals who may have been involved in the improper transfer of *trust* property or its improper administration and management.

Lawyers, banks or other intermediaries, professional or otherwise, who operate as mere "conduits" of *trust* property, i.e. who receive remuneration for passing or transmitting such property or money to another person, are not, in principle, "responsible recipients" of *trust* property. However, in the case of persons who have had knowledge that such assets were passed on in violation of the *trust* rules and who have assisted the violators of the *trust* rules in various ways (*dishonest assistance*). In general, any recipient of the property who has acted in bad faith is considered to have been unjustly enriched and must therefore return the *trust property* to the *trust* situation.

100. Fourthly, of course, in addition to having the assets returned to the *trust* situation in the hands of the new *trustee*, if any, the beneficiary has a claim for damages against the *trustee* and the third party acquirer in bad faith (*liability for receipt*) who has taken possession of the *trust* assets.

5. Law applicable to the transfer of the *settlor*'s property to the *trustee*.

101. Legal scholar C. GONZÁLEZ BEILFUSS rightly points out that the creation of the *trust* is a legal transaction and that another very different legal transaction, a different legal transaction, is the transfer of assets to the *trustee*[134]. This perspective is also adopted by the Hague Convention of 1 July 1985 on the law applicable to *trusts* and their recognition, Article 4 of which states that "*[t]he Convention shall not apply to preliminary questions concerning the validity of wills or other legal acts by virtue of which property is transferred to the trustee*". Accordingly, J. FAWCETT / J. M. CARRUTHERS point out, the law applicable to the *deed* by virtue of which property is transferred to the *trustee* is determined by the conflict of laws rules applicable to the legal act of creation of the *trust*[135]. For example, if the trust is created by a will, the validity of the will is governed by the law applicable to the succession, as determined in accordance with Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession[136]. In the case of a *trust* created by a unilateral act of the *settlor*, the *trust* is governed by State law as laid down in Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[137]. It is true that the act of transferring the assets to the

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[134] C. GONZÁLEZ BEILFUSS, *El trust, la institución anglo-americana y el Derecho internacional privado español*, Bosch, Barcelona, 1997, pp. 110-111.

[135] J. FAWCETT / J. M. CARRUTHERS, *Cheshire, North & Fawcett Private International law*, 14th edition, Oxford University Press, 2008, pp. 1311-1315. Also F. MOSCONI / C. CAMPIGLIO, *Diritto internazionale privato e processuale. Vol. 2: Statuto personale e diritti reali*, 6th edition, Utet giuridica, Wolters Kluwer Italia, Milano, Milano, 2023, p. 369.

[136] OJEU L 201 of 27 July 2012. In this sense, F. MOSCONI / C. CAMPIGLIO, *Diritto internazionale privato e processuale. Vol. 2: Statuto personale e diritti reali*, 6th ed., Utet giuridica, Wolters Kluwer Italia, Milano, Milano, 2023, P. 369.

[137] OJEU L 177 of 4 July 2008.

trustee is not a contract but a unilateral act. However, this unilateral act gives rise to contractual obligations in the European sense of the term: it is a commitment freely entered into by one party, the *settlor,* vis-à-vis another, the *trustee*, and which consists of voluntarily handing over assets to the trustee *in trust*. The law applicable to such an act is determined in accordance with the Rome I Regulation.

102. On the other hand, the question of whether the ownership of the *trust* property has been transferred to the *trustee* is governed by Art. 10.1 CC: the law of the country where the *trust* property is located at the time of the transfer (*lex situs*) must be applied[138]. In other words, it can be stated that, in order to prove whether the property of the assets given by the settlor to the *trustee as* trust property is now the property of the *trustee*, it is necessary to consult the law of the country where the trust property is located. In other words, it can be stated that, in order to establish whether the ownership of the assets given by the *settlor* to the *trustee* as *trust* property are now the property of the *trustee*, it is necessary to consult the law of the country where the assets were located at the time of the creation of the *trust*[139]. The issue was already raised in the famous case decided by the Chancery Division, *In re Pearse's settlement, Pearse v. Pearse*, 24 November 1908[140]. The instrument creating the trust was perfectly valid under its governing Law, but the Law of the place where the matrimonial property was held, Jersey, did not permit land to be conveyed by a *settlor* to a *trustee*.

6. Second step issues: the trust and Art. 609 CC.

103. The question of whether the ownership of the assets subject to the *trust* has been transferred to the *trustee* is governed, if such assets are located in Spain, by Spanish law. Specifically, Art. 609 CC (Spanish Civil Code). The precept states: "*ownership and other rights over property are acquired and transmitted by law, by donation, by testate and intestate succession, and as a consequence of certain contracts by means of tradition*....". In this legal scenario, the aforementioned precept requires two extremes to be verified. First, the legal transaction between *settlor* and *trustee* must be capable of transferring ownership. The suitability of that legal transaction to transfer ownership is a matter to be regulated by the law of the State that governs that transaction (*deed*), a law that is determined in accordance with the rules of the aforementioned Rome I Regulation. However, the fact that the law applicable to the *deed* considers that such a transaction has the potential to transfer ownership is not sufficient for the property to be considered to have been correctly transferred. Secondly, in fact, it is also necessary for the transfer of the thing from the transferor to the acquirer to take place, as this is required by Art. 609 CC[141].

104. It is now the right time to explore whether the *trust* can be considered as a

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[138] P. MAYER / V. HEUZE, *Droit international privé*, 11th ed., Issy-les-Moulineaux, LGDJ, 2014, pp. 475-476, with very relevant nuances in favour of the Lex situs in the case where the law governing the legal act of transfer of the property and/or the *lex situs* ignore the distinction between rights in rem and personal rights.

[139] M. VIRGÓS SORIANO, *El Trust y el Derecho español*, Cuadernos Civitas, Madrid, 2006, p. 108.

[140] [1907 P. 2647.]. Full text at https://www.uniset.ca/other/cs2/19091Ch304.htm.

[141] G.M. UBERTAZZI, *Studi sui diritti reali nell'ordine internazionale*, Giuffrè, Milano, 1949, pp. 50-52.

"contract" which, together with the tradition of the thing, entails the acquisition of the property located in Spain in the context of Art. 609 CC. The broad meaning of the expression "*by donation ..... and as a consequence of certain contracts by means of tradition*", makes it possible to affirm that any valid contract or legal act which, according to the law governing it, entails the transfer of ownership, is susceptible of being a "contract" or a legal act similar to "donation" for the purposes of Art. 609 CC. Consequently, the *trust* must be considered a "contract" or a "donation" aimed at transferring the ownership of the assets to which it refers. If the said *trust* has been validly constituted in accordance with the Law that regulates it, then, accompanied by the *traditio* of the assets located in Spain, -as this is required by Art. 609 CC-, it will entail the transfer of the ownership of such assets in favour of the *trustee*. The *trustee* is the owner of the assets located in Spain and can transfer ownership of them to third party acquirers.

7. Application of the material *trust* law.

105. Once the State law applicable to the *trust* has been specified, it is possible to distinguish, with B. OPPETIT, several hypotheses[142].

First. If the law governing the *trust* is the law of a country that contemplates and regulates the *trust* (*lex validitatis*), then, according to G. WITTUHN, no serious problems arise[143]. Thus, for example, if the *trust* is governed by English law, the *trust* will be perfectly regulated by that legal system, since, in English law, the *trust* is a "typical" legal institution and English law regulates all the vicissitudes of the *trust* that one can imagine, of which there are many.

Secondly. In the event that the law applicable to the *trust* is a legal system of a State which does not regulate or contemplate the *trust*, such as, for example, Spanish law, extremely serious legal problems arise. In this case, one could try to redirect the *trust* to a set of "atypical obligatory businesses", as proposed by M. VIRGÓS SORIANO[144]. However, this is a very difficult, not to say impossible undertaking: the internal relations derived from a *trust* must be governed by a state law that contemplates the institution of the *trust*. If this is not the case, i.e. if, according to the Spanish conflict rules, the law governing the internal relations of the *trust* is the law of a state which does not regulate or contemplate the *trust*, as is the case of Spanish law, then there is no *trust.* Other authors, such as F.J. GARCIMARTÍN ALFÉREZ, who start from the idea that the *trust* generates "real rights" for the beneficiary, cling to the possibility of creating atypical real rights in Spanish law, a controversial option which has never been well clarified in legislation or case law. A (presumably) real right of the beneficiary should be created, an atypical real right under Spanish law[145].

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[142] B. OPPETIT, "Le *trust* dans le droit du commerce international", *Revue critique de droit international privé*, 1973, pp. 1-21.

[143] G. WITTUHN, *Das internationale Privatrecht des Trust*, Peter Lang. Frankfurt am Main, 1987, pp. 27-64.

[144] M. VIRGÓS SORIANO, *El Trust y el Derecho español*, Cuadernos Civitas, Madrid, 2006, pp. 38-39, who, in any case, admits that "*cualquier adaptación o transposición a sus categorías [categorías del Derecho español] implicará divergencias importantes en cuanto a sus efectos, comparados con los propios del trust*".

[145] F.J. GARCIMARTÍN ALFÉREZ, *Derecho internacional privado*, Cizur Menor, Civitas Thomson Reuters, Madrid, 6th edition, 2021, p. 432.

It can therefore be concluded that, if the law applicable to the *trust* is the law of a State which does not provide for such a trust, the *trust* must be considered non-existent. This is the approach taken in Article 5 of the Hague Convention of 1 July 1985 on the law applicable to the *trust* and its recognition: "*the Convention shall not apply to the extent that the law determined in accordance with Chapter II does not recognise the institution of the trust or the type of trust in question*". If the Convention does not apply, the *trust* does not have the necessary legal platform of private international law to be recognised in another state. This argument is reinforced in the *dictum* of Art. 6.2 of the Convention, which indicates that a *trust* cannot exist if the settlor of the trust has chosen, as the law applicable to it, the law of a country in which the legal institution of the trust does not exist: "*[w]here in the law chosen pursuant to the preceding paragraph the institution of the trust is not known (...), such choice shall have no effect*....". In fact, recalls E. VITTA, and without the need to go through the application of the aforementioned convention, certain case law, albeit with some confusion and a certain lack of systematicness, had already considered that a *trust* does not exist if it is governed by the law of a country where the *trust* does not exist as such. This can be read in the famous judgement of the Tribunale di Oristano, Italy, 15 March 1965, *Piercy vs. E.t.f.a.s.*[146].

106. The fact that a *trust*, validly created under the law of a State, is considered not to exist in the Spanish legal system if it is governed by the law of a country that does not contemplate or regulate it should not cause alarm, for two reasons.

Firstly, because it is difficult to envisage a *settlor* creating a *trust* under a state law that does not regulate *trusts*.

Secondly, because the non-existence of the *trust* in Spain, for example, avoids the penetration into the Spanish legal system of an institution that serves a purpose not intended by the Spanish legislator. The Spanish legislator did not wish to incorporate the *trust* into its legal system, nor did it wish to create any other legal figure that performs an equivalent function.

107. Spanish law governs the rights in rem over property situated in Spain and also determines the rights that can access the Spanish Registers (art. 10.1 CC). Spanish substantive law prevents the access of the *trust*, as such, to the Spanish Land Registry, because it is not a "real right" under Spanish law. It is not included in the catalogue of rights in rem created by the Spanish legislator and, furthermore, the *trust* does not confer on the beneficiary an immediate and *erga omnes* power over a real property. The *trustee* can register the ownership of the *trust* property in his sole name in the Spanish Land Registry. However, the *trustee* must limit himself to managing the assets forming part of the *trust* in favour of the beneficiaries.

IV. Spanish case law and the *trust*.

108. Only four pronouncements of Spanish civil case law on the *trust* deserve to be cited, and always taken *cum grano salis*, as most of them do not go into the substance of the question of the law applicable to the *trust*.

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[146] Judgment of the Tribunale di Oristano, Italy, 15 March 1965, *Piercy v. E.t.f.a.s*, [*Il Foro italiano*, 1956, p. 1021]. *Vid*. E. VITTA, *Diritto internazionale privato*, Volume III, UTET, Torino, 1973, p. 34, note [88].

Firstly, the SAP Girona 17 October 2002 [*trust* constituted in the USA]. In this judgement, the Provincial Court dismissed the claim on the grounds that the plaintiffs' status as *trustees* had not been proven in accordance with the presumably foreign law applicable to the existence and validity of the *trust.* Therefore, in this ruling, the court does not enter into the question of which law should govern a *trust* whose existence is asserted in Spain[147].

Secondly, the STS 30 April 2008 [*trust* created by an Arizona settlor] indicated that both the existence of the *trust* created by an Arizona settlor and the succession *mortis causa* of said settlor were matters subject to Arizona law. In other words, it classified both the creation of the *trust* and the possibility of leaving property, by will, to that *trust* (right) as "matters of succession" (wrong). It therefore applied the national law of the deceased (Art. 9.8 CC), the law of Arizona. However, as the content of this legal system was not proven on the stand, the SC considered that the *trust* did not exist and decided

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[147] SAP Girona 17 October 2002 [trust set up in the USA] [ECLI:ES:APGI:2002:2005]: "*No se trata, como señalan los apelantes, de un problema que afecte a la legitimación activa "ad causam", es decir, a la relación del demandante con lo que constituye el objeto del proceso, que le permite pedir, con razón o sin ella, lo que pretende. El problema que aquí se plantea es anterior: se trata de saber quién demanda y la imprecisión sobre esta cuestión no es un problema de fondo que conlleve la desestimación de la demanda, sino un evidente defecto en el modo de proponerla….. Se afirma que la calidad con la que actúan los demandantes quedó plenamente perfilada en la demanda. Se dice que lo hicieron como "trustees" y en interés y beneficio del "trust". Que reclamaban la propiedad de un inmueble que les pertenece en tanto que propietarios "fiduciarios", facultad que se deriva de la naturaleza misma de esta institución. Simplemente cabría reiterar lo ya dicho acerca de la prueba de la naturaleza y contenido de tal institución y la imposibilidad de integrar las confusiones, y aún aparentes contradicciones, acerca de esta cuestión contenidas en la demanda. Por lo demás, esta Sala comparte íntegramente los argumentos desgranados en el fundamento jurídico tercero de la sentencia de instancia y que llevan a la Sra. Juez que la redactó a apreciar el defecto legal en el modo de proponer la demanda. Su carácter exhaustivo y su claridad permiten que se den por reproducidos en esta sentencia en orden a evitar reiteraciones argumentales del todo superfluas. No obstante, la Sala quiere hacer hincapié que las alegaciones de los demandantes en la comparecencia, lejos de aportar luz al respecto, no hicieron sino traer mayor confusión. En ella el Sr. Letrado de los demandantes indicó escuetamente que sus defendidos actuaban en nombre del "trust", para añadir, en referencia a la excepción de falta de litisconsorcio pasivo necesario, que la presencia en el pleito de las hijas del difunto Sr. Héctor no era necesaria puesto que, junto con los demandantes, eran propietarias de la finca litigiosa. Independientemente de que en el fondo del asunto puedan tener razón, cosa que no corresponde analizar en este momento, lo cierto es que tal afirmación exigiría una completa prueba de la naturaleza y contenido de la institución del "trust", que permitiera clarificar e integrar la demanda respecto a si los demandantes actúan como supuestos propietarios del inmueble como resultado del eventual contenido de las relaciones jurídicas inherente a todo "trust", como representantes del "trust" o como condóminos, o en cualquier otro carácter. Los esfuerzos dialécticos realizados en el escrito de interposición del recurso pretenden, sin conseguirlo, reparar la confusión que ha perdurado durante toda la primera instancia, y que se proyecta esta segunda. Además parten del supuesto erróneo de que se ha logrado la acreditación del contenido jurídico de un "trust", cosa que, como ya se ha repetido, no ocurre. Distinto es que, como se argumentará a continuación, esta falta de precisión, una vez celebrada la comparecencia no puede imputarse única y exclusivamente a los demandantes, sino que dada la trascendencia de saber quien demanda y en qué concepto lo hace, trasciende a la intervención y a las funciones del propio juzgador (distinto de la Sra.Juez que redactó la sentencia ahora apelada) en dicho acto, de manera que, si en la comparecencia y ante las aclaraciones del Sr. Letrado de los demandantes, seguían existiendo dudas, como así ha ocurrido, debió interesar las aclaraciones y precisiones necesarias y, en último extremo, acordar el sobreseimiento del proceso conforme a lo establecido en el artículo 693, regla cuarta de la LEC. Lo que no se puede admitir es que esa falta de claridad subsista y a pesar de ello el proceso siga adelante hasta sentencia, con la consiguiente frustraciónd el mismo al concluir con una absolución en la instancia que deja sin resolver el fondo del asunto, abocando a las partes al inicio de un nuevo litigio…..* ".

the fate of the inheritance assets in accordance with Spanish law: saved by the bell[148].

Thirdly, the SAP Jaén 25 March 2010 [will granted before an Illinois notary by a Spanish decedent] considered that, given that Spanish law governed the succession of a Spanish decedent, the existence of the *trust* established by said decedent should also be governed by Spanish law. Serious error. Applying Spanish law to the issue, it concluded that the beneficiaries of the *trust* were the heirs of her estate. The error is manifest, as (i) the beneficiaries of the *trust* are not "heirs" of the decedent in cases of *trust mortis causa* and (ii) the court ignored that the assets left in *trust* become the property of the trustee[149].

Fourthly, it is worth citing the ATS 28 February 2018 [*trust* created under English law whose existence is not proven to prejudice the rights of the deceased's beneficiaries][150]. This is an order of inadmissibility of the appeal in cassation that arises from the fact that the judgement of the Provincial Court under appeal considers "*que no ha quedado acreditado que el trust, acto dispositivo inter vivos otorgado por el posteriormente causante, perjudique la legítima de los hijos de aquel*". As this is a question of pure proof of a fact, an appeal in cassation is not admissible, as this appeal deals with purely legal questions.

V. Conclusions.

109. First. The *trust* was born as a legal institution for the protection of family wealth. Today, however, the *trust* is undergoing a process of corporatisation, commercialisation and wealth management. This means that most of the *trust* management is carried out by legal persons, law firms specialised in *trusts*, who try to obtain the highest profitability from the assets given in *trust* and to protect these assets. The *trust* is seen as an autonomous set of assets destined to produce profits. The family pigment disappears from today's *trust*, which is increasingly seen as a distinct entity managed by professionals.

110. Secondly. The *trust* was originally, is now and will continue to be in the future, an essential legal tool that allows individuals to react against the expropriatory excesses of certain governments, against tax abuses and against the control of people's lives that is often exercised by the legal system, not only in totalitarian countries, but all over the world. It is a way of protecting wealth from the abuse of power by public authorities.

111. Third. The *trust* offers an operational scheme that protects the beneficiary in a very special way. From this point of view, it is superior to the trust business. Moreover, the *trust* is more flexible than the fiduciary business: the *trust* is a structure that can be used for everything: managing the matrimonial property regime, inheritance, channelling investments, deferred transfer of assets and many other things, some of them really sophisticated.

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[148] STS 30 April 2008 [ECLI:ES:TS:2008:1632].

[149] SAP Jaén 25 March 2010 [ECLI:ES:APJ:2010:168].

[150] ATS 28 February 2018 [*trust* created under English law, the existence of which is not shown to prejudice the rights of the deceased's beneficiaries] [ECLI:ES:TS:2018:1731A].

112. Fourth. In a *trust* there is no divided ownership: the owner, the only person who has real rights over the things in *trust*, is the *trustee*. The beneficiary has a wide range of actions, personal and non-real, to protect his right to the economic benefit of the things held in *trust*. The beneficiary is not the owner of anything, but is the owner of the economic return produced by the things in *trust*. The assets in *trust* are the property of the *trustee*. The trustee must not confuse them with his own assets, but if he does, the beneficiary can react and request that such assets are immune from insolvency proceedings of the *trustee*, that they are excluded from the succession property of the *trustee*, that no liens are placed on them and that they remain in *trust*, if applicable, now in the hands of a new *trustee* (*constructive trust*) if they are disposed of by the original *trustee* against the instructions of the *trust*.

113. Fifth. Private international law has techniques, mechanisms and rules that are perfectly equipped to guarantee the continuity, in one country, of the *trust* validly created in another country. That is its mission, to act as an airport *finger* between the first country and the second country so that the *trust* can circulate through this channel. Despite the legal stinginess of the European legislator and the Spanish legislator, since neither of them offers any private international law solution to the *trust,* the Spanish courts, on the platform of Art. 1.6 CC, can and should fill this persistent and lacerating legal gap in European and Spanish private international law and create a rule that allows the law applicable to the *trust* to be established.

114. Sixth**.** In this sense, the *trust* must be governed by the law of the country under which it has been created. In the absence of this choice of law by the *settlor*, the Spanish courts must determine which country has the closest links with the *trust*, the country where the centre of gravity is located. The law of that country must govern the *trust*. Thus, if the *trust* has been created in accordance with that law, it must be considered to exist and be valid, under the terms of that law, in other countries as well.

115. Seven. The so-called analogical method, which divides the *trust* into different legal relationships to which a specific conflict rule of the forum and a specific substantive law are applicable, must be abandoned. This method leads to an excessive stretching of the conflict rules of the forum. It forces the conflict of law rules so much that it disfigures them and attributes to them a regulatory function for the *trust* that they do not actually have.

116. Eighth. The so-called analogical method, which divides the *trust* into different legal relationships to which a specific conflict rule of the forum and a specific substantive law are applicable, must be abandoned. This method leads to an excessive stretching of the conflict rules of the forum. It so strains the conflict-of-law rules that it disfigures them and attributes to them a regulatory function for the *trust* that they do not actually have.

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