*European Review of Private Law* **3:**477-498, 2000.



# Trusts in the Civil Law: Making Use of the Experience of 'Mixed' Jurisdictions

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**Abstract:** In this paper it is submitted that Dutch society would benefit from having something 'which resembles a common law trust. Trusts have a number of advantages, efficient insolvency protection being the most important one, while sufficient tools are available in Dutch law to remedy abuses of trust. The Dutch 'trust' should be a 'reinforced' *fiducia cum amico*: the trust assets are legally owned by the trustee but form a separate fund which is immune against claims by the personal creditors of the trustee. The trust laws of the mixed jurisdictions could serve as a precedent for developing a Dutch 'trust' and so could the Principles of European Trust Law (which themselves have benefited from the experience of the mixed jurisdictions).

**Résumé:** Le présent article soutient l'idée que la société néerlandaise pourrait tirer profit d'un *trust* semblable au *trust* de *common law*. Les *trusts* ont un certain nombre d'avantages, une protection efficace contre l'insolvabilité est la plus importante, tandis que le droit néerlandais possède suffisamment instruments pour remédier contre les abus du *trust*. Le *trust* néerlandais devrait être une *fiducia cum amico* 'renforcée': les biens du *trust* sont légalement détenus par le *trustee* mais constituent un fonds distinct qui est imperméable à toute action des créditeurs personnels du *trustee*. Les lois du *trust* des corps de règles juridiques mixtes pourraient servir de précédents pour développer un *trust* néerlandais, c'est le cas notamment des Principes Européens du droit du *trust* (qui ont eux-mêmes bénéficiés de l'expérience des systèmes juridiques mixtes).

**Zusammenfassung:** In dieser Arbeit wird vorgebracht, dass die niederländische Gesellschaft von einem dem Common-Law-Trust ähnlichem Rechtsinstitut profitieren würde. Trusts haben eine Anzahl von Vorteilen, wovon der effektive Schutz vor Insolvenzen der wichtigste ist. Hinzu kommt, dass im niederländischen Recht genügend Mittel vorhanden sind, um die Missstände des Trusts zu beheben. Das niederländische "Trust" wäre eine wiedereingeführte *fiducia cum amico*: die Vermögenswerte des Trusts stehen rechtlich dem Treuhänder zu, bilden aber einen separaten Fond, der gegenüber den Forderungen persönlicher Gläubiger des Treuhänders immun ist. Die Trustinstitute gemischter Rechtsordnungen können ebenso wie die Prinzipien des Europäischen Trustrechts (welche ihrerseits von den Erfahrungen gemischter Rechtsordnungen profitiert haben) als Modell für die Entwicklung eines niederländischen "Trusts" dienen.

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## 1. Introduction

In 1956, in a review of Uniken Venema's ground-breaking dissertation on trust and *bewind*[1], the Dutch comparative lawyer Kisch adopted a distinction made by the great French comparatist Francois Geny.[2] The distinction Geny makes is between *'le donné'* and *'le construit'*. *'Le donné'* concerns the question whether a society can and wishes to accept a certain legal institution. It may not be prepared to do so, because this legal institution would violate fundamental religious or moral principles. There can also be more down to earth reasons against reception, such as – particularly relevant for trusts – taxation. *'Le construit'* deals with the technical question of whether and how a foreign legal institution can be fitted into that society's legal system, once it appears that there are no moral, political, economic or other non-legal objections against that legal institution.[3]

In his review of Uniken Venema's dissertation Kisch established that in case of the trust *'le donné'* was already an accomplished fact. According to Kisch, within and outside legal circles there was a distinct desire to import the trust into the Netherlands. For this reason Kisch agreed with the emphasis placed by Uniken Venema on *'le construit'*: the technical introduction of the trust into Dutch domestic law.[4] We shall see that as far as *'le donné'* is concerned Kisch was perhaps a little too optimistic: not everyone in the Netherlands is convinced that trusts are a good thing. It is interesting to note that in his review Kisch stressed the importance of mixed jurisdictions and declared that he would have liked to have read more about them in Uniken Venema's book.[5]

In this paper, I will discuss both aspects of the reception of the trust: the advantages and disadvantages of the trust for society (*'le donné'*) as well as the technical feasibility of the reception of the trust (*'le construit'*). In doing so, I shall focus on the commercial uses of the trust. The main reason for this is that in economic terms

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[1] C.Æ. U. VENEMA, *Trustrecht en bewind*, Zwolle, 1954. *Bewind* under Dutch law is an instrument which can be compared to the trust. It is basically the administration of the assets of a person by another. A difference with the common law trust is that the administrator (*bewindvoerder*) does not own the assets placed under *bewind*. He 'merely'has exclusive powers to deal with them, the assets being owned by the beneficiary.

[2] Review in (1956) WPNR 4461, 408, also printed in H.U. JESSURUN D'OLIVEIRA (ed), *Uitgelezen opstellen, Een bloemlezing uit het werk van Prof.mr. I. Kisch*, Zwolle, 1981, 146.

[3] I realise that the distinction is debatable and that in many cases the (non-)desirability of reception wholly or partly depends on technical feasibility. Nevertheless, the distinction is useful for explaining the various aspects of reception of a foreign legal institution. It can therefore be used, as long as one realises that no absolute value should be attributed to it.

[4] *Uitgelezen opstellen 146*. In the second half of the 19th and the first half of the 20th century the common law trust had already attracted the attention of several academic writers. Cf C.J.H. JANSEN, *De negentiende-eeuwse wortels van het moderne zekerheidsrecht, inaugural lecture Nijmegen*, Deventer 1999, 25-31, with further references.

[5] Uitgelezen opstellen 151-152.

the commercial trust is 'vastly' more important than the personal trust.[6] It is the uses of the trust in the commercial and financial area that have been the focus of the research in which I participated at the Nijmegen Business and Law Research Centre (*Onderzoekcentrum Onderneming en Recht*).[7]

The 'mixed' jurisdictions I have focussed on are Scotland and South Africa. A comprehensive study of the benefits which the mixed jurisdictions could bring for civil law systems wishing to adopt the trust would need to include other jurisdictions as well, in particular Quebec and Louisiana. Moreover, it would also be interesting to look at civil law jurisdictions for which statutory instruments on trusts already exist or have been proposed (e.g. Liechtenstein, Luxembourg and France). Reviewing all these jurisdictions was impossible within the scope of this paper. This paper does no more than provide a rough sketch of how a Dutch 'trust' could look.

## 2. 'Le donné'

What are the benefits and disadvantages which the trust could bring for society, Dutch society in particular?

In a recent contribution, Professor Langbein thinks of the trust "as a competitor, locked in a sort of Darwinian struggle against other modes of business organisation and finance, in particular the corporation, but also the partnership and the various techniques of secured finance".[8] In this struggle for life the trust seems to have done pretty well. Langbein lists a number of factors contributing to the success of the trust.[9] It is submitted that most of these factors equally apply to the Dutch situation and therefore provide a strong indication that trusts would be beneficial to our society.

### *2.a. The US experience and The Netherlands*

What are the reasons for why the setting up of commercial trusts is often preferred to other legal devices? The experience in the United States provides us with the following such reasons.

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[6] J.A. LANGBEIN, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce,' in: D. Hayton (ed), *Modern International Developments in Trust Law*, The Hague, Boston, London, 1999, 183.

[7] Under the auspices of the Business and Law Research Centre the following two books on trusts have been published: D.J. Hayton *et al* (eds.), *Vertrouwd met de Trust, Trust and Trust-like Arrangements, Serie Onderneming en Recht, Volume 5*, 1996; D.J. Hayton, S.C.J.J. Kortmann, H.L.E. Verhagen (eds), *Principles of European Trust Law, Law of Business and Finance, Volume I*, 1999. The research for this paper was carried out within the TMR-Research Network "Common Principles of European Private Law", a joint research project of the universities of Barcelona, Berlin (Humboldt), Lyon, Münster, Nijmegen, Oxford and Torino, financially supported by the European Commission.

[8] J.A. LANGBEIN 183.

[9] J.A. LANGBEIN 183-189.

The first, and from a Dutch perspective most interesting, reason is *insolvency protection*: protection of the beneficiaries against the insolvency of the trustee.[10] It is true that under both common law and civil law similar results can be reached, by incorporating special purpose vehicles, by inserting limited recourse clauses in contracts with third parties, by creating security interests *etcetera*. However, particularly when one is dealing with a large number of beneficiaries or with highly volatile assets, for instance a constantly changing securities portfolio, this result may prove impossible to achieve in practice, or only at great cost. As Ugo Mattei, a supporter of the Law & Economics school, has observed, the trust is a most efficient tool by which to isolate assets managed for the benefit of others from the manager's insolvency.[11]

I shall discuss one example: that of *investment funds*. Investment institutions do usually involve both a changing portfolio of investments and a large number of beneficiaries. It is essential that the rights of these beneficiaries in respect of the investments are protected against the insolvency of the legal entities managing or safeguarding the investments. In the Netherlands investment *institutions* can have two different legal forms. They can be investment *companies*. In that case the investment institution is a separate juristic person, usually a *naamloze vennootschap* (public limited liability company) or *besloten vennootschap* (private limited liability company). This means that the investments are separated from the estates of both the manager and the custodian of the assets, since they are owned by a separate company. However, investment institutions can also be investment *funds*. The investment fund is not a separate juristic person. The question then arises how it can be achieved, as the Investment Institutions Supervision Act (*Wet toezicht beleggingsinstellingen*) prescribes[12] that the investments do not form part of the personal assets of either the manager or the custodian of the fund. It is submitted that an efficient way of organising this is the reception of the trust. In the Netherlands the custodian could be made the owner of the securities, with the securities forming a separate fund which is not available for recourse by personal creditors of the custodian.[13] Thus, the custodian can act for several investment funds, without the necessity of incorporating a separate juristic person for each fund. That the trust is an interesting alternative to the juristic person for setting up investment institutions is supported by the experiences of common law, mixed legal systems and even of some purely civilian jurisdictions. In England, investment trusts are used for setting up investment funds,[14] the same is true for Scotland[15] and, as can be read in Professor de Waal's paper, for South Africa. However, also in Germany investment institutions can be structured in this manner, by making use of the *fiduziarische Treuhand*.[16]

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[10] J.A. Langbein ? 183-185.
[11] U. Mattei, *Comparative Law and Economics*, Ann Arbor, 147-177.
[12] Art 5 of the *Wet toezicht beleggingsinstellingen.*
[13] S.C.J.J. Kortmann and H.L.E. Verhagen, *Principles of European Trust Law*, 202.
[14] See D.J. Hayton, *Vertrouwd met de Trust*, 42-44.
[15] See K. Reid, *Principles of European Trust Law*, 78.
[16] See H. Kötz, *Principles of European Trust Law*, 91-93.

A reason for choosing a trust rather than a corporation is *flexibility in design*.[17] As far as internal governance and the creation of beneficial interests are concerned the trust allows for far more flexible commercial arrangements than the corporation does. According to Langbein, the flexibility to eliminate obligatory corporate procedures, such as shareholders' meetings, has been one of the great attractions of the commercial trust.[18] Trusts also allow for the creation of different types of beneficial interests, which are not restricted by the traditional classes of corporate shares and which can be created and extinguished more easily than corporate shares.[19]

In the US this is considered very useful in connection with securitisation. Securitisation is the process whereby the revenue stream on a segregated pool of receivables owned by a bank or commercial enterprise (the 'Originator') is 'repackaged' into tradeable securities, hence the word 'securitisation'. Using trusts has enabled arrangers of securitisation transactions to create a large number of different tranches of interests for the investors in these securities (the Noteholders). As Langbein observes: 'Transaction planners designing asset securitisation trusts especially welcome the freedom to carve beneficial interests without regard to traditional classes of corporate shares. They have manipulated the trust form to create a dizzying array of so-called tranches, each embodied in its own class of trust security.'[20] Securitisation transactions are increasingly used by Dutch corporations. It has to be admitted, however, that at present it is difficult to perceive a real need for the trust in this area. The few securitisation transactions which have so far been entered into with Dutch 'Originators', with the exception of one (Hooge Huys Hypotheekfonds NV), all involved an SPV (the special purpose vehicle purchasing the 'securitised' receivables) funding itself by issuing debt rather than equity securities. In case of debt securities also a wide variety of interests can be created, for instance by making use of subordination, limited recourse and intercreditor agreements, resulting in many different tranches. Nevertheless, although also in the US debt securities can be (and are) issued by securitisation SPVs, trusts are still used too.[21] So, apparently the trust offers certain advantages for securitisations. One advantage of using a trust in a Dutch context would be that the cumbersome rules of Dutch law with respect to the assignment of receivables could be avoided. The assignment of receivables under Dutch law requires notification of the debtors of the receivables (art. 3:94 Civil Code). Where one is dealing with a large receivables portfolio this may cause practical difficulties or notification may be commercially unacceptable to the Originator. In a trust-based structure, the receivables portfolio could be isolated from the Originator's insolvency, by a declaration of trust made by the Originator in favour of the Noteholders.

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[17] J.A. Langbein 187-189.

[18] J.A. Langbein 188.

[19] J.A. Langbein 188-189.

[20] Langbein ? 187-188.

[21] On securitisation in The Netherlands see my contribution (together with F.G.B. Graaf and A.R.T. van Ijlzinga Veenstra) in T. Baums, E. Wymeersch (eds), *Asset-backed Securitization in Europe*, The Hague, Boston, London, 1996, 143.

One would expect, given the fact that trusts are used as a tool for setting up a business, that in common law (and mixed) jurisdictions certain statutory rules on corporations have been declared applicable to commercial trusts as well, in order to remedy evasions of mandatory rules of corporate law. Of course this may have happened in certain instances. However, what has also happened in the United States is that commercial trust innovations have been absorbed into corporate practice, rather than that the flexibility of the trust has been undermined by statute.[22]

A final advantage of the trust is considered to be the fiduciary duties of a trustee. By using trusts in a common law context one automatically invokes the 'distinctive protective regime' offered by trust fiduciary law to investors and other beneficiaries.[23] It is interesting to note that van Setten has recently argued that in elaborating the protection of investors from abuse by stockbrokers, Dutch law should draw its solutions from the results that have been achieved under the law on fiduciary relations of the common law systems.[24] However, we do not need the trust for this. Dutch contract law offers sufficient possibilities for realising this, as van Setten confirms.[25]

*2.b. The Dutch experience*

Also from our own experience conclusions can be drawn concerning the desirability of a Dutch trust. Despite the availability of other legal devices (e.g. juristic persons, security interests), the *fiducia cum amico* (*eigendom ten titel van beheer*) has found and still finds many commercial applications. So apparently there is a need for using 'ownership-based' management structures rather than juristic persons or other legal devices. [26]

This is clearly the case with investment institutions, which can be (as we have seen) investment companies (i.e. juristic persons) or unincorporated investment funds. The fact that in practice investment funds are used, despite a corporate alternative being available, clearly suggests that there is a practical need for an alternative to setting up a separate company. Other examples of commercial uses of the *fiducia cum amico* are 'certification' (*certificering*, the issue of units of value) of shares, receivables or real estate, the nominee account, the trustee in bond issues, the

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[22] J.A. LANGBEIN 189.

[23] J.A. LANGBEIN 185-186.

[24] L.D. VAN SETTEN, *De commissionair in effecten*, Deventer 1998.

[25] See in particular Chapter 4 of van Setten's book.

[26] Uniken Venema has made the following categorisation of the reasons for using *the fiducia cum amico*: (i) reasons relating to wishes of the 'settlor', (ii) reasons relating to the special qualities or capacity of the fiduciary, (iii) reasons relating to the nature of the assets and (iv) reasons relating to the wishes and interests of third persons. See C.Æ. UNIKEN VENEMA and S.E. EISMA, *Eigendom ten titel van beheer naar komend recht, Preadvies van de Vereeniging 'Handelsrecht'*, 1989, 29-42.

transfer of real estate for management purposes and the transfer of intellectual property rights to special corporations (Buma/Stemra).

When assets are managed by a fiduciary for the benefit of one or more beneficiaries it is usually considered important that the assets are isolated from the fiduciary's insolvency. This can sometimes be achieved by creating security interests over the assets in favour of the beneficiaries, but as we have seen this is not always so. Sometimes the law itself goes so far as to provide that security interests over assets managed by the fiduciary owner arise by operation of law. This is the case with 'certification' (c*ertificering*). Certification concerns a special application of *fiducia cum amico*. In case of certification of shares, the shares are transferred to a limited company or foundation (*stichting* (*stichting administratiekantoor*)). The 'administration office' subsequently issues certificates and administers the shares for the benefit of a group of certificate holders. In order to protect the certificate holders, the Dutch legislator has incorporated a special provision in the Civil Code. By virtue of Article 3:259 of the Civil Code, the personal claims of the certificate holders are in certain circumstances reinforced with a right of pledge created by operation of law. This security interest protects the certificate holders against non-payment of what is owed to them by the administration office. In this specific application of *fiducia cum amico* the beneficiaries (the certificate holders) therefore have more than a mere personal right against the fiduciary owner.

In one case the *Hoge Raad* (Supreme Court) has recognised a form of nominee account, with the 'credit balances' forming a separate fund, not being part of the insolvent estate of the account holder. In HR 3 February 1984 NJ 1984, 752 (Notary Slis-Stroom) the *Hoge Raad* decided – with respect to a bank account in the name of a notary to which a purchaser of real estate had transferred the purchase price – that in certain circumstances a bank account standing in the name of a notary is not affected by the notary's insolvency. The credit balance of the account is available for the beneficiary of the account only. In the words of the *Hoge Raad* this will be so in case of: "a separate (bank) account in the name of the notary under entry of his capacity of agent of the purchaser and seller concerned". Such accounts are referred to in literature as "capacity-accounts" (*kwaliteitsrekeningen*) or nominee accounts.[27]

Insolvency protection is also offered by article 7:420 of the Civil Code. Where the 'trustee' would enter into contracts in his own name with a third party, on behalf of the 'beneficiary', the contract would come into existence between trustee and third party.[28] However, where the trustee is declared insolvent, the beneficiary can bring about a transfer to himself of the trustee's rights vis-à-vis the third party. He

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[27] On nominee accounts in Dutch substantive law, see S.C.J.J. KORTMANN and H.L.E. VERHAGEN, *Principles of European Trust Law*, 198. The private international law aspects of nominee (money) accounts are reviewed in H.L.E. VERHAGEN, *Agency in Private International Law, The Hague Convention on the Law Applicable to Agency*, The Hague, Boston, London, 1995, 388.

[28] Art 3:66 Civil Code.

does so by means of a declaration to the trustee and third party.[29] Therefore, although the contractual rights against the third party are legally owned by the trustee, in the trustee's insolvency they will pass to the beneficiary and will thus remain unaffected by the insolvency. Uniken Venema has suggested that the new Dutch Civil Code should contain a similar provision for the *fiducia cum amico* generally, allowing the beneficiary to bring about the transfer of the property to himself.[30]

There are therefore several instances in which protection is offered to the 'economic' or 'beneficial' owner of certain property. Why should we, given the fact that apparently there is a practical need for the *fiducia cum amico*, not offer similar protection to the beneficiaries of the *fiducia cum amico* generally, by accepting that assets held for the benefit of others constitute a separate fund?

*2.c. The 'dark' side of trusts*

Now something about the dark side of trusts. As legal history demonstrates there is a common pattern: trusts or trust-like institutions have always been used to overcome the rigidity of the established law and to evade taxes and other duties. Or as Helmholz and Zimmermann put it in their introduction to *Itinera fiduciae*: 'trusts have made it possible to accomplish objectives that could not be achieved otherwise'.[31] This in itself is not a bad thing: overcoming obstacles created by rigid traditional rules and the reduction of one's tax liabilities in principle are perfectly honest enterprises. On the other hand, when the experience of jurisdictions which have trusts, either common law or mixed, would demonstrate that in a considerable number of cases trusts are used for discreditable purposes rather than for good ones, then of course we should not introduce the trust. The impression I have is that the experience is rather that abuses are rare, as Professor Reid's paper confirms.

In a recent contribution to a book on trust accounts Professor Zwalve suggests that because of the long history of the trust in the common law, lawyers from common law jurisdictions are well equipped for dealing with abusive trusts. It must, according to Zwalve, on the other hand seriously be doubted whether civil lawyers are equally well equipped.[32] It would seem that doubts of these sort have now come too late. The Netherlands has ratified the 1985 Hague Convention on the Law

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[29] Under Article 7:421 Civil Code the third party has a similar power, enabling him to exercise against the beneficiary the remedies the third party has against the trustee under the contract existing between trustee and third party. On Articles 7:420 and 421 Civil Code, see H.L.E. VERHAGEN, *Agency in Private International Law*, 43-50.

[30] See C.Æ. UNIKEN VENEMA and S.E. EISMA, *Eigendom ten titel van beheer*, 299.

[31] R. Helmholz, R. Zimmermann (eds), *Itinera Fiduciae, Trust and Treuhand in Historical Perspective*, Vergleichende Untersuchungen zur kontinentaleuropäischen und anglo-amerikanische Rechtsgeschichte, Band 19, Berlin, 1998, 42.

[32] W.J. ZWALVE, 'Geld op de plank,' in: E. Dirix, R.D. Vriesendorp (eds), *Inzake Kwaliteit, De kwaliteits- of derdenrekening naar Belgisch en Nederlands recht*, Deventer, 1998, 52-53.

Applicable to Trusts and on their Recognition.[33] The Trust Convention forces the Dutch courts to recognise trusts created under foreign law, despite the fact that trusts may enable parties to reduce taxation and to create preferential positions for certain creditors. If in an international context the parties are allowed to create trusts, should not the same possibility be open in purely domestic transactions? In any case, in international cases we already have to deal with trusts and we will have to think of how to prevent or mitigate the unacceptable consequences of the trust. And I do think we are capable of doing so, also when we would introduce trusts into our domestic law.

For instance, although I am not a tax lawyer, my impression is that the Dutch legislator, courts and tax authorities are well capable of remedying fiscal abuses of trusts. There have been a number of cases in the last few decades in which the Dutch Supreme Court has shown itself to be able to understand trusts and to deal with them effectively for taxation purposes.[34]

It is submitted that also Dutch private law and insolvency law is capable of dealing with the adverse consequences of trusts. For instance, the creation of trusts with the intention of prejudicing the creditors of the settlor can be avoided with the *actio Pauliana*. The lists of suspect transactions in art. 3:46 of the Civil Code and art. 43 of the Bankruptcy Act, to which the reversal of the burden of proof applies, could be supplemented with a new category: the creation of a trust.

We have seen in professor Reid's paper that one of the disadvantages of the Scottish trust is lack of publicity, creating the image of false wealth, although we have also seen that in practice trusts *are* registered. The statutory introduction of the trust in the Netherlands could contain a provision, stating that in respect of those trust assets for which the creation of a security interest would require publicity, the same requirement should be satisfied. In other words, a perfectly analogous treatment of security interests and trusts could accomplish that false wealth problems can only arise in similar circumstances as is presently the case. Thus the creation of a trust over immovable property would, like the creation of a mortgage,[35] require registration in the land register. Ordinary creditors of the trustee would be able to verify whether the real estate legally owned by their debtor would be available for recourse. Where the trust property would consist of movable assets or receivables no such verification would be possible. It is true that the fact that these assets, although legally owned by the trustee, are not available for recourse could come as a surprise to certain creditors. However, under present Dutch law the ordinary creditors could

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[33] Stb. 1995, 507.

[34] On taxation and trusts, see the contributions of Langereis, Magnin and IJzerman *to Vertrouwd met de Trust*. In a number of decisions, all rendered on the same day in similar cases, the Hoge Raad has recently ruled that the trust is to be treated as a special fund, a *doelvermogen*, for taxation purposes (gift tax). See HR 18 november 1998, no 31 756, 31 758 and 31 759, published in BNB 1999/35, BNB 1999/36 and BNB 1999/37.

[35] Art 3:260 Civil Code.

be faced with the same kind of surprise. Movables and receivables can also be pledged, without the need for registration in a public register, and thus without publicity limit the rights of recourse of the ordinary creditors. One could even contemplate that the creation of a trust over tangible movable property or over receivables would require either a notarial deed or the registration of a deed under private signature with the tax authority, as in the case of a non-possessory or non-disclosed pledge.[36] Of course the latter does not lead to publicity, but neither is this the case when pledging these types of assets. It would only have the advantage of fixing the date when the trust is created.

*2.d. Conclusion*

The experience of jurisdictions which have trusts demonstrates that trusts have a number of advantages: not only do they provide an efficient tool for achieving insolvency protection, they also provide flexibility in design and they impose fiduciary duties. From the Dutch perspective insolvency protection is by far the most important advantage. Also the Dutch experience demonstrates that there is a need for ownership-based management structures. To this it may be added that Dutch law is likely to have sufficient tools available to deal with the 'dark' side of trusts. It is therefore submitted that it would be beneficial to our society to have a trust or analogous institution in our domestic law (*'le donné'*).

## 3. 'Le construit'

Let us now turn to *'le construit'*, the technical introduction of the trust into a civil law system, Dutch law in particular, and discuss the useful role which the mixed jurisdictions could play here.

Some of the essential features of the trust are according to many civilians difficult to reconcile with the civil law. One of these features is that the trust assets form a separate fund, which may consist of a changing 'portfolio' of assets (e.g. a securities portfolio) and which is not available for recourse by the trustee's personal creditors.[37] Another of these features is the beneficiary's ability to recover *in rem* the trust assets or their traceable products from any third party to whom the trust assets have been wrongfully transferred (unless the third party is a *bona fide* purchaser).[38] A third characteristic of the trust is that it is created by means of a unilateral act by the settlor. There is no contractual relationship between settlor, trustee and beneficiary.[39]

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[36] Arts 3:237 and 3:239 Civil Code.
[37] Cf Arts I(1), I(3) and III of the Principles of European Trust Law (hereafter referred to as PETL).
[38] Cf Arts I(4) and VII PETL.
[39] Cf Commentary Principles of European Trust Law 31.

In the civil law systems there are not many legal institutions in which all these characteristics are united. Many civil law systems recognise the concept of fiduciary ownership (*fiducia cum amico*).[40] Property can be legally owned by one person for the benefit of other persons. The fiduciary undertakes to use his right of ownership in accordance with the terms agreed upon with the original owner, who transferred the property to him. Functionally this form of fiduciary ownership is closely related to the common law trust. Structurally, however, there are important differences. A crucial difference with the common law trust is that personal creditors of the fiduciary will be able to take recourse against the property. The 'beneficial interest' of the beneficiary is nothing more than a personal non-preferred remedy against the fiduciary. The beneficiary, moreover, has at most a personal claim in tort against *mala fide* transferees of assets wrongfully transferred by the fiduciary. Also, the underlying juridical basis of a civilian fiduciary relationship is usually a contract, not a unilateral act by the settlor.

In Dutch law, the *fiducia cum amico* has wholly developed outside statutory law. Under the regime of the previous (1838) Civil Code it was recognised for the first time in the *BUMA* case (HR 14 June 1929, NJ 1929, 1424). The 1992 new Civil Code does not contain general rules dealing with the *fiducia cum amico*. The question even arose whether the *fiducia* was valid at all. The infamous article 3:84 section 3 of the Civil Code provides, *inter alia*, that an agreement which lacks the intention of bringing the property within the patrimony of the transferee does not constitute a valid basis for transfer of ownership of that property. With an earlier draft of this provision Meijers intended to remove the *fiducia cum amico* from Dutch law. His draft for Book 3 of the Civil Code contained a section (title 3.7) allowing the parties to create a *bewind*, if an asset manager was to have exclusive powers in respect of the assets. However, the introduction of title 3.7 was postponed and now seems to have been abandoned. In the *Sogelease* case (HR 19 May 1995, NJ 1996, 119) the *Hoge Raad* ruled that the *fiducia cum amico* remains valid as long the manager acquires full and undivided ownership. The claims of the beneficiary to receive, for example, the proceeds of the managed assets can only be of a personal nature. Such claims therefore have no effect against third persons, unless the relevant claims happen to have been reinforced with existing proprietary rights (pledge or mortgage).

By many civilians the beneficiary's interest under a common law trust is actually conceived as a right *in rem*, which is unknown to the civil law of property and which therefore infringes upon the *numerus clausus* of property rights. It is also held that the fact that the civil law systems do not have anything like the division between common law and equity prevents the recognition of dual ownership. We have a unitary concept of ownership and there can be no legal ownership for the trustee and beneficial ownership for the beneficiary.

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[40] Cf the National Reports in Principles of European Trust Law.

On a general level, the Scots and the South African experience demonstrate that the traditional civilian objections against the recognition of the trust do not hold true. These jurisdictions demonstrate that it *is* possible to have trusts, albeit not common law trusts, within the framework of a property law with Roman origins and in a legal system which does not have the 'duality' of common law and equity.

That we do not need equity has been made very clear by Professor Reid in his paper: 'patrimony not equity'. I will only say a few words about the *numerus clausus* of real rights. Professor de Waal has explained in his paper that in South Africa the *numerus clausus* principle would not be an obstacle for the recognition of the common law trust, but rather the unitary concept of ownership. Because there is no closed system of real rights in South Africa a new kind of limited right *in rem* could have developed for beneficiaries of a trust.

Personally, I do not think that our closed system of property law, if it exists at all, would stand in the way of the reception of the trust. It is true that when we would take over the common law trust, the beneficial interest would much resemble a real right. It would have two important features of a real right: *droit de préference* (priority in insolvency) and – in certain respects – *droit de suite* (enforceability against third parties). However, neither of these features are exclusive to the rights *in rem* listed in our Civil Code. One *can* have priority without having a real right and there *are* personal rights which can be invoked against third persons. This is demonstrated by the existence of institutions such as the separate fund of a commercial partnership, the nominee account, the existence of privileged claims, the existence of *kwalitatieve rechten* and *verplichtingen*,[41] the rules on indirect agency (articles 7:420 and 7:421 Civil Code), the exclusive mandate (*privatieve lastgeving*) and, of course, the *bewind*. The existence of all these institutions has brought Kortmann to the conclusion that there is no *numerus clausus* of real rights in our Civil Code. Kortmann concludes that the present 'half-open' character of our property law entails that hybrid legal institutions such as the trust, having both obligational and proprietary characteristics, can be accommodated in our legal system.[42]

If in imitation of Scots and South African law, we would not accept the possibility of recovery *in rem* against transferees of the trust assets, then we would certainly not be dealing with a real right. The beneficiary would have a 'protected right in personam', based on separation of patrimony, offering protection against the insolvency of the trustee.

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[41] *Kwalitatieve rechten* and *kwalitatieve verplichtingen* are rights and obligations which are attached to a certain capacity (eg the capacity of owner of certain property). Cf articles 6:251 and 6:252 Civil Code.

[42] *Vertrouwd met de Trust*, 181. Cf P. L. Nève, *Uit de bonte berm van de juridische begrippenflora: ons 'gesloten' stelsel van beperkte rechten, 'Op recht, bundel opstellen aangeboden aan prof. mr. A.V.M. Struycken ter gelegenheid van zijn zilveren ambtsjubileum aan de Katholieke Universiteit Nijmegen*, 1996, 223; J.M. Smits, 'Van partijen en derden; over interpretaties van de numerus clausus van zakelijke rechten,' Groninger Opmerkingen en Mededelingen, Magazijn voor Leerstellige Rechtsvergelijking op Historische Grondslag, XIII 1996, 41-64.

It could be argued that the recognition of the trust would upset mandatory rules concerning creditors' rights of recourse. According to art. 3:276 of the Civil Code a creditor can have recourse against all assets owned by the debtor, unless provided otherwise by a contract (between the creditor and the debtor) or by statute. It could be argued that art. 3:276 of the Civil Code would prevent the recognition of a separate trust fund, since such recognition would entail that certain assets owned by the debtor are *not* available for all creditors. Moreover, according to art. 3:277 of the Civil Code all creditors have equal ranking, unless there are statutory preferences. In other words, it could be argued that the trust would violate the principle of *paritas creditorum*. However, in our National Report we have submitted that these provisions do not prevent the recognition of a separate trust fund. This is confirmed by the fact that certain forms of a separate fund have been developed by case law (the nominee account and the separate fund of a commercial partnership), which are not directly supported by a statutory basis.[43] However, we have also submitted that it would be recommendable to create a statutory basis for the separate trust fund, because this will greatly enhance legal certainty.[44]

Finally, it is submitted that art. 3:84 section 3 of the Civil Code does not prevent the recognition of a separate fund. In case of a transfer of trust assets to the trustee, all ownership rights would pass to the trustee. Within the estate of the trustee the trust assets would form a separate fund, not available for private creditors of the trustee. However, this does not derogate from the fact that according to the law of property a full transfer of ownership has taken place. In the case of a declaration of trust, art. 3:84 section 3 BW would not even be applicable, because no transfer takes place at all.[45]

### *3.a. The Principles of European Trust Law*

In 1996 the International Working Group on European Trust Law was created, which drafted the Principles of European Trust Law.[46] The Principles' main objective is to

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[43] Cf also H.L.E. Verhagen and N.E.D. Faber, 'A Trace of *Chase Manhattan* in the Netherlands (*Ontvanger v. Hamm*),' (1998) Restitution Law Review 165.

[44] See S.C.J.J. Kortmann and H.L.E. Verhagen, in: Principles of European Trust Law 209-210.

[45] See S.C.J.J. Kortmann and H.L.E. Verhagen, in: Principles of European Trust Law 209.

[46] The members of the International Working Group are: Peter Birks (All Souls College, University of Oxford, United Kingdom); Allégria Borrás (University of Barcelona, Spain); Rasmus Feldthusen (Research Fellow, University of Copenhagen, Denmark); Cristina González Beilfuss (University of Barcelona, Spain); David Hayton (Kings College, University of London, United Kingdom); Sebastian Kortmann (University of Nijmegen, The Netherlands); Hein Kötz (University of Hamburg (emeritus); Max-Planck Institute, Germany); Maurizio Lupoi (University of Genoa, Italy); Alfred von Overbeck (University of Fribourg (emeritus), Switzerland); Kenneth Reid (University of Edinburgh, Scotland); Philippe Rémy (University of Poitiers, France); Rick Verhagen (University of Nijmegen, The Netherlands); Donovan Waters (University of Victoria, British Columbia (emeritus)). The secretaries are: Rik Aertsen (University of Nijmegen, The Netherlands); Charissa Domingus (University of Nijmegen, The Netherlands); Dennis Faber (University of Nijmegen, The Netherlands).

provide guidelines for civil law member states of the European Union who wish to introduce a trust or analogous institution in their domestic laws.[47]

Article 1(1) of the Principles gives the following description of the trust:

'In a trust, a person called the "trustee" owns assets seggregated from his private patrimony and must deal with those assets (the "trust fund") for the benefit of another person called the "beneficiary" or for the furtherance of a purpose.'

It is no secret that the first draft of the Principles, which we used as the basis for our discussions in the International Working Group, was prepared by a common lawyer: David Hayton. It is openly admitted in the Introduction that the Principles are to a considerable extent based on the experience and the terminology of the law of trusts as it was developed in common law jurisdictions.[48]

The choice for taking the common law trust as a point of departure was deliberately made.

The Preamble to the Trust Convention states:

'Considering that the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution'.

We have seen today that this is not true: trusts are not unique to the common law. However, it is the common law trust that is most frequently used in international business and finance and the common law jurisdictions have indeed built up a wealth of experience on the uses of trusts in commercial and financial matters.

Nevertheless, the mixed jurisdictions, Scots law in particular, have exercised considerable influence on the final text of the Principles and the Commentary. Both texts were carefully screened by the Scottish delegate, Professor Reid. At meetings of the Working Group he often proved to be a bridge between common lawyers and civil lawyers. The end result is, I think, a set of principles of trust law that can be implemented in civil law jurisdictions. Significantly, it appears from the Scots National report that, with certain exceptions, the Principles may be taken as an accurate statement of the law of trusts in Scotland.[49] The other National Reports demonstrate that it is possible to introduce the 'European' trust in purely civilian systems, albeit that statutory changes may be necessary to fully accomplish this.

This is all that I want to say here about the Principles. In the remainder of this paper, dealing with more technical aspects of the introduction of the trust, I will occasionally refer to individual rules contained in the Principles.

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[47] The other objectives are stated in the Introduction. See 'Principles of European Trust Law' 3-12. One of the secondary aims of the Principles is to assist the courts of civilian Contracting States to the Hague Trust Convention in understanding trusts, when they are faced with a trust which has to be recognised under the Convention.

[48] Principles of European Trust Law, 3.

[49] Reid, Principles of European Trust Law, 82.

*3.b. 'Le construit': making use of the experience of the mixed jurisdictions*

At the meetings at which the Dutch National Report was prepared three approaches were discussed, in order to fit the 'European' trust into the system of Dutch law: the proprietary approach, personification and the so-called obligational approach.

*a. The 'proprietary' approach*

Under the proprietary approach the trust, or better: the beneficial interest, would be characterised as a proprietary encumbrance (*goederenrechtelijk verband*) with which the trust property is burdened.[50] From this proprietary encumbrance, the beneficiary's real right, obligations originate which are owed by the legal owner of these assets and his successors vis-à-vis the beneficiaries.[51] This is the path which South African law has *not* chosen to take, although it could have done so.[52].

For the same reason as indicated in Professor Reid's paper, I find the proprietary approach less attractive. The great English historian and lawyer Maitland observed:

"The idea of a trust-fund which is dressed up (invested) now as land and now as current coin, now as shares and now as debentures seems to me one of the most remarkable ideas developed by modern English jurisprudence".[53]

Our Scottish colleagues probably will not agree with the role which English jurisprudence has played here according to Maitland. However, the first part of Maitland's statement lucidly stresses the point that the beneficial interest is a right floating over a changing fund, rather than an interest in a specific asset. Particularly when the trust fund consists of different categories of property, for instance the present and future assets of a whole company, including real estate, inventory, stock, receivables and securities, the concept of a right *in rem* is less suitable. This would be different when we would recognise in our property law the concept of a 'universality of goods' (*algemeenheid van goederen*). In that event the beneficial interest could be a proprietary interest in a changing fund.

Meijers' draft for the new Civil Code did contain a provision for the universality of goods (art. 3.1.11.) This provision was later dropped. It must now be assumed that a universality of goods cannot be the object of a single right *in rem*. Belgian property law, on the other hand, does recognise the concept of a universality of goods. In his draft statute for a Belgian trust Matthias Storme employs this concept. Storme defines the *trustee's* interest in the trust property (the *bewindrecht*) as follows: '*Bewindrecht* is the right of a party, called *bewindvoerder*, to have in his name

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[50] S.C.J.J. Kortmann and H.L.E. Verhagen, Principles of European Trust Law, 207.

[51] That in Dutch law real rights can create obligations which are owed by the owner of the encumbered property to the holder of the right *in rem* can be demonstrated with reference to *emphytheusis* (*erfpacht;* 'long lease'). The terms and conditions agreed upon between the owner of the encumbered estate and the holder of the right of *emphytheusis* create obligations for the latter which, different from contractual obligations, automatically transfer to subsequent purchasers of the *emphytheusis*.

[52] See Professor de Waal's paper.

[53] F.W. Maitland, *Selected Essays*, Cambridge 1936, 134.

one or more goods or a universality of goods, called *bewindgoederen*, which are owned by one or more others, called title-holders, and to manage them in his own name and to dispose thereof, however, for the account of the title-holders and under the obligation to pass on the value of those goods to the title-holders.'[54] In Storme's proposal the beneficiary is the owner of the property, while the 'trustee' (*bewindvoerder*) has the power the dispose thereof.

*3.c. Personification*

The trust could also be introduced into domestic law by way of 'personification' of the trust.[55] This can be achieved by introducing the trust as a qualified form of the *stichting* (foundation). Under this approach the trust fund will be regarded as a juristic person, managed by the board of the *stichting*. In the constitutive documents of the *stichting* the settlor could appoint the beneficiaries of the trust. This approach would require amendments to the law regarding the *stichting* (title 2.6 of the Civil Code). Under current law the board of a *stichting* can only distribute assets of the *stichting* if such a distribution serves a charitable purpose (art. 2:285 section 3 Civil Code). In order for the *stichting* to be available for a wide range of commercial purposes, art. 2:285 section 3 of the Civil Code would have to allow distributions to the beneficiaries.

A disadvantage of the *stichting* is formality. Incorporation of a *stichting* can take some time and requires constitutive documents which will need to be executed before a Dutch notary. A trust can be created by means of a clause contained in a contract or other document (e.g. a deed of charge or mortgage, an intercreditor deed, a securities custody agreement) and the trust instrument can be executed anywhere.[56] From a practical point of view this can be a considerable advantage, which should not be underrated. Morever, a trustee can be a trustee of hundreds of trust funds, each involving large numbers of beneficiaries. This can be the case, for instance, when the trustee is an investement manager of securities. For each category of securities, or even for each client, there may be a separate trust fund. Another example: the same bank regularly acts as security trustee within the framework of syndicated loans or bond issues. Here the informality of the trust leads to far more practical results than the incorporation of a separate foundation by the same bank for each transaction.

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[54] M.E. STORME, 'Vertrouwen is goed, dual ownership is beter,' Rechtskundig Weekblad 1996-1997, 150.

See also M.E. STORME, 'Van trust gespeend? Trust en fiduciaire figuren in het Belgisch privaatrecht,' 35 Tijdschrift voor Privaatrecht 1998, 703.

[55] S.C.J.J. KORTMANN and H.L.E. VERHAGEN, Principles of European Trust Law, 207-208.

[56] Even when one would require registration in the land register this can usually also take place on the same day.

*3.d. The 'obligational' approach*

Although we agreed that under each of these two approaches it would technically be possible to introduce the trust into Dutch domestic law, in the end we favoured a third approach.[57] The underlying concept of this approach is a reinforced fiducia cum amico, where the assets concerned form a separate fund, not available for personal creditors of the fiduciary. This approach best reflects the concept of the trust that can be found in the Principles of European Trust law. Amending Dutch law in this manner would have the effect that the most important alternative to the trust available in Dutch law, the fiducia cum amico, would be brought much closer to the Anglo-American trust, the Scots trust, the South African trust and also to the German Treuhand. This reinforced fiducia would also have the characteristics of a 'trust' in the sense of Article 2 of the Hague Trust Convention, so that the Dutch 'trust' would have to be recognised in other ratifying states. Moreover, as Uniken Venema and Eisma have demonstrated, there is a need for ownership-based management structures as an alternative to incorporation. What we would like to accomplish is that more efficient insolvency protection is afforded to the persons for whose benefit the investments are managed.[58]

In our view, there are no insurmountable difficulties for realising this. Scots, South African and German law could serve as a precedent. In several instances current Dutch law already recognises the notion of a separate fund. The experiences we have with the commercial partnership and the nominee account demonstrate that a separate fund, as referred to above, can well be fitted into a legal system, such as that of the Netherlands, recognising an absolute and indivisible concept of ownership.[59]

## 4. Elaboration of the obligational approach

The main source of inspiration for the third approach, the obligational approach, was Scots law, as described by Professor Ken Reid in the Scots National Report.[60]

Under Scots law the beneficiary's preference is based not on a right *in rem*, his rights are of a personal nature, but on separation of patrimony. From this "separation of patrimony without separation of personality",[61] which can also be found in Article 1 of the Principles, many of the consequences of the Dutch "trust" can be derived, in the same manner as in Scots law. On this basis the following sketch of *a* Dutch trust can be drawn.

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[57] S.C.J.J. Kortmann and H.L.E. Verhagen, ?? Principles of European Trust Law, 205-207.

[58] See C.Æ. Uniken Venema and S.E. Eisma, *Eigendom ten titel van beheer*, 29-42.

[59] This matter is discussed more elaborately by N.E.D. Faber, S.C.J.J. Kortmann and H.L.E. Verhagen, *Vertrouwd met de Trust*.

[60] Principles of European Trust Law, 67-84.

[61] Reid, Principles of European Trust Law, 68.

As I have already indicated, the underlying concept of the Dutch trust is that of a reinforced *fiducia cum amico*. The trustee has the right of ownership in respect of both his private assets and the trust assets. Nevertheless, private assets and trust assets, although both owned by the trustee, form two separate funds, two separate and exclusive patrimonies. If the trustee sells an asset, the "replacement value" of the asset flows to the patrimony from which the asset originated: as Article III(1) of the Principles makes clear, the trust fund can be a changing portfolio.

In principle a creditor of one patrimony has no right of recourse against assets which form part of the other patrimony. The personal creditors of the trustee merely have a claim against the assets comprised in the "private fund" of the trustee, while trust creditors can only take recourse against the trust property comprised in the separate trust fund. The personal creditors cannot take action against the trust fund. If the trustee is declared insolvent, the trust property will not form part of the insolvent estate. On the other hand, when the trust fund is not able to meet 'its' debts, the trustee can be declared insolvent in his capacity as trustee. In that event his personal patrimony will not be involved in the insolvency. The beneficiary only has to share the proceeds of the assets of the trust fund with the creditors of the trust. A similar set of rules can be found in Article III(2) of the Principles. Sometimes crossovers may be possible. Personal creditors of the trustee cannot reach the trust property. However, we should at least seriously consider the Scots solution that creditors of the trust can take recourse against both the personal patrimony and the trust patrimony, unless the contract was made on the basis that the trust patrimony only was to be available.[62]

The separate fund only comes into existence when the trust assets are owned by the trustee. Therefore, in situations when the settlor is not the same person as the trustee, a transfer to the trustee is required in order to create a separate fund. When the settlor will be the trustee, a simple 'declaration of trust' will do.

Scots law has also supported our view that it is not essential for a viable trust to allow recovery *in rem* against third parties.[63] I have the same impression of commercial and financial practice. The consequences of the insolvency of one's counterparty are of prime importance to investors when they have to decide whether they will participate or not, not the consequences of wrongful dispositions by the fund manager. This is a risk which seems to be regarded as relatively small, and which is difficult to remedy anyhow, even with tracing rules. In Articles I(4) and VII of the Principles, recovery *in rem* is made optional and the same is true for the Trust Convention (Article 11).

In the National Report for the Netherlands we have called our approach the 'obligational' approach. The reason for this is that the relationship between the trustee and the beneficiary is obligational in character: it belongs to the law of obligations.[64]

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[62] See Reid, Principles of European Trust Law ,69.

[63] See Reid, Principles of European Trust Law, 72-73, 84.

[64] S.C.J.J. Kortmann, H.L.E Verhagen, Principles of European Trust Law, 205-207.

What is the source of the trust obligations? The source of obligation could be contract. The underlying basis of the trust could be a contract between settlor and trustee, if necessary wholly or partly for the benefit of a third party. The *stipulatio alteri* could be used, in order to create beneficial interests for persons other than the settlor. This is the way South African law has dealt with the beneficiaries' rights, in any case as far as their creation is concerned.[65] The same approach has been followed in Germany, as can be read from the German National Report. The *Treuhand* is accompanied by a contractual agreement with the *Treuhänder*, the *Treuhandvertrag*, and if there are to be beneficiaries other than the settlor, they derive their rights from a contract for the benefit of a third party.[66]

Scots law has taken a different path.[67] In his paper Professor Reid speaks of a 'detached' patrimony. In the case of trusts there is the element of duration: trusts can endure as long as corporations. Duration is difficult to achieve on the basis of contract. The settlor may die or cease to exist and trustees may be replaced. In these cases there is, according to Professor Reid, no contractual nexus between settlor and trustees, so that the source of the trust obligations cannot be contract. Furthermore, termination of trusteeship entails that by operation of law rights of ownership vested in the resigning trustee pass to the remaining trustee or to the new trustee. The trust can even survive without any persons at all, despite the fact that in that event the trust property seems to become *res nullius*. Trust obligations are regarded as forming a separate branch of the law of obligations, beside contract, tort and unjust enrichment[68]. In the Commentary to the Principles the same idea can be found. It is observed that in order to accomplish that 'the trust is a free-standing institution with a life of its own'.[69] Factors which could cause the termination of contracts, such as death or mental illness of the settlor or the trustee, or breach of contract by the trustee, should not be able to cause the termination of the trust.

Do we need all this in the Netherlands? I think it all depends on how far we would want to go. If we would simply provide in our Civil Code that in the case of *fiducia cum amico* (*eigendom ten titel van beheer*) the assets constitute a separate fund, that would already be a major step forward, in my view even by far the most important step. We could then attach some 'bells and whistles' to the *fiducia cum amico*, for instance by providing that where a new trustee is appointed the trust fund automatically passes to the new trustee, by way of 'universal title' (*verkrijging onder algemene titel*) and by limiting the grounds for termination of the contract with the trustee. Alternatively, we could follow the Scottish example and design a really detached trust fund, a quasi-juristic person, which can survive even without any persons at all.

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[65] The trust itself is no longer regarded as a contract: see the quotation from Honoré in Professor de Waal's paper.

[66] KÖTZ, Principles of European Trust Law 89.

[67] In earlier times attempts were made to explain the trust as being a contract for the benefit of a third party, combining elements of deposit and mandate. See REID, Principles of European Trust Law 71.

[68] See REID, Principles of European Trust Law 71.

[69] Principles of European Trust Law 31.

Thus we would have to accept that temporarily the trust assets could be 'ownerless'. One of the reasons why for Belgian law Matthias Storme is in favour of a proprietary approach, the trust assets are owned by the beneficiaries whilst the trustee (*bewindvoerder*) has a limited real right *(bewindrecht),* is that it is easier to accommodate a separate fund without a person managing the fund than a separate fund without owners.[70] Under Quebec law, on the other hand, the 'ownerless' fund is the rule rather than the exception.[71] The Quebec experience demonstrates that it is possible to accommodate an 'ownerless' fund in a civilian system.

We could add a new source of obligation to our existing ones: the declaration of trust. By means of a unilateral act the settlor can create trust obligations, that correspond with 'protected' personal rights and obligations which are automatically attached to one's capacity of trustee or beneficiary. In other words, the declaration of trust would be the source of *kwalitatieve rechten* and *verplichtingen*, together creating an enduring detached trust fund. Thus we would not need contract, *stipulatio alteri* and special provisions dealing with universal succession and termination.

What would be the preferred option I would like to leave in the middle in this paper. This is something we will have to sort out, when we finalise the draft for a Dutch statute on trusts.

Another question is whether we should have special rules on court supervision. In both Scots and South African law these rules are available. We could follow the approach of these mixed jurisdictions. Alternatively, we could rely on existing rules of civil procedure. In some circumstances the judge may award a restraining order against the trustee, preventing him from wrongfully transferring trust property. The court could also command a trustee in breach to execute certain acts (Article 3:296 Civil Code). Since no special provisions exist in relation to the replacement of a contractual party, statutory provisions might be desirable for some particular uses of the trust. One could contemplate provisions making regulations similar to those currently existing for the replacement of managing directors of companies.[72]

There is one unique feature of South African trust law which is of special interest to us. It is the co-existence of two forms of trust. There is the 'ownership-trust' with the trustee as the legal owner of the trust property and there is the *'bewind*-trust*'*, with the beneficiary as the legal owner, the trustee merely having exclusive powers to manage and dispose of the property. The South African experience may demonstrate that it is practically useful to have these alternatives available and that it would be a shame to allow the home-grown trust of the Roman-Dutch jurisdictions to wither away. As Uniken Venema already submitted, Dutch law should have two forms of trust:

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[70] M.E. STORME, 'Vertrouwen is goed, dual ownership is beter,' Rechtskundig Weekblad 1996-1997, 141.

[71] See Article 1261 of the 1994 Civil Code of Quebec, Canada. Cf. D.W.M. WATERS, *The Institution of the Trust in Civil and Common Law, Recueil des Cours*, Volume 252, Dordrecht, Boston, London, 1995, 396-407.

[72] See KORTMANN and VERHAGEN, Principles of European Trust Law 213-214.

the *bewind*-trust, where the trustee acts as the representative (agent) of the beneficaries, and the ownership-trust, where the trustee legally owns the trust property.[73]

## 5. The Hague Trust Convention

The ratification of the Trust Convention by Italy and the Netherlands constituted a landmark in the development of private international law. Not only has this convention now been ratified by a number of common law countries, but it has also entered into force in two civil law states (more civil law states – including Luxembourg and Switzerland, may follow). In Italy and the Netherlands, common law trusts must be recognised. Italian and Dutch legal theory and practice are now faced with the challenging, and not merely acadamic, question of how trusts can be fitted into jurisdictions whose property laws are based on Roman law and which do not recognise anything like a distinction between common law and equity.

Article 11, para. 1 states: "A trust created in accordance with the law specified by the preceding Chapter shall be recognized as a trust." The fundamental question is what the words 'shall be recognized as a trust' exactly entail. Broadly, two approaches are possible. The first approach would be that 'shall be recognized as a trust' means that the courts of the Contracting States should simply apply the law governing the trust to the fullest extent. When dealing with common law trusts, the Dutch courts should therefore give full effect to, for instance, English law, also in respect of assets located in the Netherlands. The second approach would depart from the point of view that this may not always be possible, given the fundamental differences that exist between common law and civil law. This approach would be that the results achieved in the common law, particularly the immunity of the trust fund for recourse by personal creditors, should where necessary be realised by making use of domestic concepts. For instance, in the Netherlands the courts have developed rules for the separate fund existing in case of a commercial partnership. In the legislative history of the act ratifying the Convention it is remarked that recourse can be had to those rules when a trust has to be fitted into the Dutch legal system.[74] Under this approach inspiration could also be drawn from the mixed jurisdictions. Rules developed in these jurisdictions for issues such as the beneficiary's priority in the trustee's insolvency, the replacement of trustees and the recovery of trust assets which have been wrongfully transferred to third persons could be extremely useful for the Dutch courts.

There is an other aspect of the Trust Convention that I would like to mention. Article 13 of the Convention allows the courts of the Contracting States to refuse to

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[73] In the same sense C.Æ. UNIKEN VENEMA and S.E. EISMA, Eigendom ten titel van beheer 299-316. See also W. SNIJDERS, 'Nog een duit in de zak van de trust,' in: S.C.J.J. KORTMANN *et al* (eds), *Onderneming en 5 Jaar nieuw Burgerlijk Recht*, Serie Onderneming en Recht, volume 7, Deventer, 1997, 99-105.

[74] See 'memorie van toelichting' accompanying the *Wet conflictenrecht trust, kamerstukken Tweede kamer* 1992-1993, 23 027, 9.

recognise a trust whose significant elements, except for the chosen law, the place of administration and the habitual residence of the trustee, are more closely connected with countries whose substantive laws do no recognise the concept of a trust or the category of trust involved. Professor Maurizio Lupoi has recently argued that, despite Article 13, the courts of the Contracting States should even in purely domestic cases recognise trusts created under the laws of a common law jurisdiction.[75] His main argument seems to be that Article 2 of the Convention, listing the characteristics of a trust for the purposes of the Convention, has introduced the 'shapeless' trust. This shapeless trust can be found in most civil law jurisdictions. For this reason there are not many jurisdictions which are to be characterised as jurisdictions whose domestic laws do not recognise the concept of a trust at all. Accordingly, the courts of the Contracting States should not be able to refuse, on the basis of Article 13, to recognise a purely domestic trust created under Anglo-American law. Indeed, such trusts have been set up in Italy and have according to Lupoi been recognised by Italian courts. Outside Italy, Lupoi's views do not seem to have found much acceptance. Most authors hold that the Hague Trust Convention assumes that an international relationship exists and that in purely domestic cases the choice of a foreign trust law can never set aside mandatory rules of domestic law.

If Lupoi's views would gain acceptance in the Netherlands, of which at present there is no indication, we would not really need a trust in Dutch domestic law. In a purely Dutch context, an English, or Scots or South African trust could be created, which the Dutch courts should recognise pursuant to Article 11 of the Trust Convention.

## 6. Conclusion

It is fascinating to see how often lawyers use metaphores expressed in biological terms when faced with the trust. We have seen that Langbein regards the trust as being involved in a 'Darwinian struggle'. At the Utrecht symposium George Gretton spoke of the trust as potentially being both a 'dangerous savage beast' and a 'pet'. Hayton even went so far as to compare the trust with an elephant: 'Like an elephant, a trust is difficult to describe but easy to recognise'.[76] Two Dutch legal historians have also used metaphores of this kind. Zwalve has said that one should only eat strange fruit when one is sure that its consumption is not life-threatening.[77] Nève, having a more exotic taste – has written that we should not despair over foreign flowers blossoming at our roadsides.[78] Both are right of course. The experience of the mixed jurisdictions has shown us that trusts are not life-threatening. On the contrary, it is my firm belief that, like our national flower the tulip, the trust will be a valuable import from overseas, which is able to flourish amidst our indigenous flora.

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[75] In P. Jackson, D.C. Wilde (eds), *The Reform of Property Law*, Ashgate, 1997, 222.
[76] HAYTON, Vertrouwd met de Trust 3. This point of view is not shared by everyone.
[77] Inzake Kwaliteit 52-53.
[78] Op Recht 232.