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Fiducia and Trust

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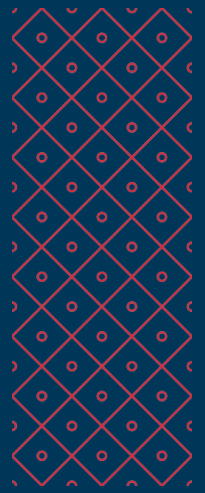

Chapter 1

The Common Law Trust

The Common Law Trust

- a typical legal technique in **systems based on the Anglo-American legal tradition**
- USA, Australia, New Zealand, Canada (except Quebec), India, etc. (Commonwealth)
- most often regarded as an achievement of **a specific English legal development**
- the traditional Common law trust is based on **the concept of duality of ownership**
- the trust has developed "from below" due to needs / to the order of **practice**
- the Common law trust as a historical product of the system of **Equity**

The Common Law Trust

- Equity is a means by which a system of law balances out the need for certainty in rule-making with the need to achieve fair results in individual circumstances

- equity **mitigates the rigour of the common law** so that the letter of the law is not applied in so strict a way that it may cause injustice in individual cases

- English equity does this by examining **the conscience of the individual defendant**

- a part of English private law which seeks either to prevent any benefit accruing to a defendant as a result of some unconscionable conduct or to compensate any loss suffered by a claimant which results from some unconscionable conduct

The Common Law Trust

- origins of the English trust are often associated with **the medieval crusades**:

  - English feudal lords went off to fight in wars and were away from home for long periods of time; as large landowners they needed someone to manage their land; so they entrusted their land to a trustworthy person for this purpose; the trustee needed to have the rights of an owner to be able to dispose of the land; however, according to Equity, the ultimate owner was the one for whose benefit the land was managed

- =) the trust as a means of resolving **a situation in which two different persons exercise different ownership claims to the same property**, i.e. a claim arising from common law and a claim arising from Equity

The Common Law Trust

- "*The trust is a legal device developed in England whereby ownership of property is split between a person known as a trustee, who has the rights and powers of an owner, and a beneficiary, for whose exclusive benefit the trustee is bound to use those rights and powers.*" (Fratcher, W. F. International Encyclopedia of Comparative Law. Vol. VI, Chap 11, 1973)

- "*A fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it or by operation of law.*" (Ryan, K. W. The Reception of the Trust in the Civil Law. Thesis (Ph.D.). University of Cambridge. November 1959, p. 2)

The Common Law Trust

- *"A trust is an equitable obligation, binding a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation."* (Hayton, D., Matthews, P., and Mitchell, Ch. Underhill and Hayton: Law of Trusts and Trustees. 17th edition. London: LexisNexis Butterwoths, 2006, p. 2)

The Common Law Trust

- the trust is both the most important part of **equity** and the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence

- the trust concept is **one of the fundamental techniques with which English lawyers analyse the world** = a peculiarly English way of thinking

- the trust **enables more than one person to have rights in the same property simultaneously** – permits a division in the ownership of the trust property between a trustee and a beneficiary so that the trustee is compelled to act entirely in the best interests of the beneficiary in relation to the management of property held on trust

The Common Law Trust

- the essence of a trust is the imposition of **an equitable obligation** on a person who is the legal owner of property (a trustee) which requires that person to act in good conscience when dealing with that property in favour of any person (the beneficiary) who has **a beneficial interest** recognised by equity in the property

- four significant **elements** to the trust:

  1) it is equitable
  2) it provides the beneficiary with rights in property
  3) it imposes obligations on the trustee
  4) those obligations are fiduciary in nature

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The Common Law Trust

1) a **relationship** between a person who has control over property (the trustee) and other persons for whose benefit he is obliged to deal with the property (the beneficiaries or cestuis que trust)

2) it is not merely a personal relationship, but the one **with respect to property**

3) the relationship is **fiduciary**

4) the source of the obligation may be either **a juristic act or an act of the law**

5) the obligation is one which was enforced **in courts of equity** as opposed to courts of common law

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The Common Law Trust

- the notion of **the duality of legal title and beneficial ownership**
- **a separation** of the control and management function in the trustees and the enjoyment of the trust property in the beneficiaries
- the trustees are **the legal owners** of the trust property
- the beneficiaries posses the rights of enjoyment =) could be seen as **the real owners**

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The Common Law Trust

- trusts are **enforced by equity** and therefore the beneficiary is said to have an equitable interest in the trust property, whereas the trustee will be treated by the common law as holding the legal title in the trust property, thus **enabling the trustee to deal with the trust property** so as to achieve the objectives of the trust

- **a trustee is the officer under a trust** who is obliged to carry out the terms of the trust and who owes strict fiduciary duties of the utmost good faith to the beneficiaries

- trustees are subject to **fiduciary obligations**, as a corollary to their power to administer and dispose of the trust property =) they may not use their position to their own advantage or to the detriment of the beneficiary

The Common Law Trust

- there is some uncertainty as to **the nature of the interest enjoyed by the beneficiary**:
  - the beneficiary have more than a personal right (a right to the profits generated from the trust property) against the trustee = in some situations the beneficiary **appear to have proprietary or "real" right** over the trust property
  - **the right to follow the trust property** and any unauthorised profit deriving from it, held by the trustee or a third person (other than a *bona fide* purchaser for a value)
  - the principle set forth in ***Saunders v. Vautier*** : the beneficiaries may require that the trustee transfer legal title to the trust property to them in certain circumstances

The Common Law Trust

- ways of creating a trust:
  - **a) express trusts** – trusts created intentionally (by gift, contract of succession) = the settlor is the person who has the intention of creating trust
  - b) trusts imposed by law:
    - **i. resulting trusts** – imposed by the judge on the basis of the presumed intention of the parties or in response to defective consent
    - **ii. constructive trusts –** used among other things to ensure the performance of obligations and to avoid unfair situations

- **various forms of trusts** =)

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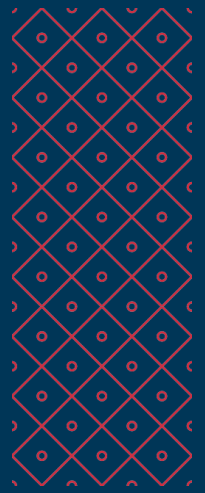
The Common Law Trust

1. by virtue of having been established expressly by the settlor who was the absolute owner of property before the creation of the trust **(an express trust)**
2. by virtue of some action of the settlor which the court interprets to have been sufficient to create a trust but which the settlor himself did not know was a trust **(an implied trust)**
3. by operation of law either to resolve some dispute as to ownership of property where the creation of an express trust has failed **(an automatic resulting trust)** or to recognise the proprietary rights of one who has contributed to the purchase price of property **(a purchase price resulting trust)**
4. by operation of law to prevent the legal owner of property from seeking unconscionably to deny the rights of those who have equitable interests in that property **(a constructive trust)**



Chapter 2

The Reception of the Trust in the Civil Law

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The Reception of the Trust in the Civil Law

- the trust continues to provoke **contrasting reactions in countries that do not belong to the Anglo-American tradition**

- on the one hand, the receipt of the trust has been **expressly excluded in some codifications**, the prevailing opinion being that it is inseparable from the division of the title into two rights

- on the other hand, particular historical or geographical circumstances have **led several civil law systems to adopt or adapt the institution of English law**, either directly through legislation, or indirectly through contractual practices which the courts have often viewed favorably

The Reception of the Trust in the Civil Law

- in several countries that do not have an official position on the issue, there is strong pressure to add a trust-like mechanism to domestic law

- **The Hague Convention on the Law Applicable to Trusts and on their Recognition** (from 1 of July 1985) is symptomatic in this regard:

  - an approach aimed at giving effect to the trust, according to its own characteristics, in the jurisdictions of countries which do not know the institution, has justified new initiatives in favour of the reception of the trust in national law

The Reception of the Trust in the Civil Law

- the significant evolution of **traditional express trust practices** in common law countries is linked to the greater favor that trusts enjoy today among civil law practitioners

- while it was long a technique primarily associated with the transfer of family wealth, the express trust has, in the 20th century, taken on **an increasingly important role in the structure of commercial relationships**

- the numerous restrictions relating to transfers by gifts and successions =) the functions of the trust may be **more limited in the civilian legal traditions of continental Europe** = mainly the commercial uses of trusts that are of potential interest

- civilian trusts can also be **used outside the business context**, such as the creation of trusts for the benefit of vulnerable persons or dependants who cannot administer their own assets themselves

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The Reception of the Trust in the Civil Law

- the question arises as to **the necessity of defining trusts by reference to fragmentation of title** (with legal title being attributed to the trustee and beneficial title to the beneficiary)

- moreover, the claim that trusts have their origins in the common law of England has been contested by many scholars who instead **trace it back to Roman law**

- it has been argued that the trust comes from the Roman law ***fideicommissum*** – the fideicommissum was in many respects similar to the *use*, often described as the precursor to the common law trust

- but it is uncertain whether these similarities are sufficient to establish that trusts came from the Roman law

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The Reception of the Trust in the Civil Law

- Roman law recognised both **the *fiducia cum creditore*** (security trust) and **the *fiducia cum amico*** (management trust); but the mechanism disappeared from the civil law world

- the internationalisation of the law and the practical relevance of trusts have **made it more popular in many legal traditions** – several civil law jurisdictions have recently introduced their own trust instruments

- civil law countries can be grouped into **three categories according to different models** from which the civil law institution equivalent to the trust is conceived

The Reception of the Trust in the Civil Law

1. the first model – seemingly the simplest solution, proposes **to reproduce the trust as it exists in English law** : it is followed by several civil law systems that are or have been part of a larger political entity belonging to the English law family (e.g. Republic of South Africa, Louisiana, Jersey, Scotland; Japan and Mexico can also be included)

- the adoption of the English trust does not, however, imply the creation of an Equity jurisdiction, nor the acceptance of dual title with respect to the trust assets

- only the trustee holds the title; the beneficiary appears to have only a personal right

- the countries in this group generally allow the commercial application of the express trust

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The Reception of the Trust in the Civil Law

2. the second model – a group of civil law countries which opted for **a solution primarily inspired by the Roman law fiduciary pact (or *fiducia*)**

- continental European countries generally adhered to this model

- some jurisdictions identified **fiduciary alienation as the functional equivalent of the institution described by the Hague Trust Convention**, in the absence of legislation on trusts (Germany, Spain, Italy, the Netherlands and Switzerland); it also inspired the legislature, in Luxembourg, France and Belgium

- in **a fiduciary alienation**, the assets are transferred to the trustee, who alone acquires title to the transferred object – the acquirer is obligated to use the acquired asset only as prescribed by the transferor and to return it at the time stipulated in the contract

The Reception of the Trust in the Civil Law

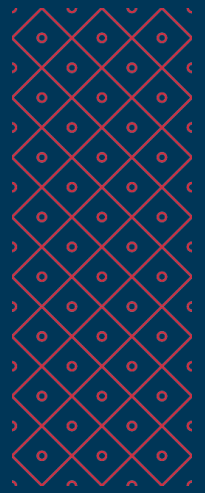
3. the third model – **a distinctly different path represented by the Quebec trust**

- before the revision of the Code civil (1994) the Quebec trust could be placed in the first group of civil law jurisdictions, especially since the courts had inferred from previous legislation that the trustee's legal relationship with the trust assets should be classified as a *sui generis* ownership right

- the 1994 Civil Code replaces this conception with a new analysis, primarily inspired by doctrine =) the trust (fiducie) constitutes **a depersonalized patrimony by appropriation**

- the trust (fiducie) is not recognized as a legal person

- the Quebec model of ownerless property in trust was followed by **the Czech legislator**



Chapter 3

The Quebec Trust (Fiducie)

The Quebec Trust (Fiducie)

- the original model for the Quebec trust is the English law model – Quebec is in a similar situation as Louisiana or South Africa

- **it did not follow the approach generally favoured in continental Europe** to transform the Roman Law *fiducia* into an institution comparable to the trust of the Anglo-American tradition

- the first trust appeared **when British settlors started to establish themselves in Canada** in the XIXth Century – the practice of the testamentary trust was the carried out in the absence of legislation

- **the first legislation was enacted in 1879** (An Act respecting Trusts, L.Q. 1879, c. 29)

The Quebec Trust (Fiducie)

- in 1888 the trust legislation was included in **the Civil Code of Lower Canada** (1866):

  - it provoked a number of issues related to its operation, the question arose of the nature of the beneficiaries´ interest, and the crucial problem was to determine where the title to the property in trust rested

  - the title was held by the trustee, as **a *sui generis* property right** (Royal Trust Co. V. Tucker, 1982) =) questions related to the nature of the fiduciary ownership in the hands of the trustee

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The Quebec Trust (Fiducie)

- articles 1260–1298 of the Civil Code of Quebec (CCQ) – in force since 1994
- the idea of the trust that would allow, in Quebec, the accomplishment of **many of the goals that are achieved by the trust of the Common law tradition**
- without replicating the conceptual framework of the Common law trust
- **the word "*trust*" in English**, in Quebec, has a juridical connotation different from what it signifies in the Common law tradition, although it serves the same purpose
- **the word "*fiducie*" in French**, in Quebec, has a connotation different from what it signifies in continental French law

The Quebec Trust (Fiducie)

- it derives many of its characteristics from the common law trust
- but it has **many unique features** relating particularly to the legal nature of the trust and, to a certain extent, to the rules for amending the governing trust documents
- the civilian concept of "**patrimony by appropriation**"
- the trust property is appropriated or affected to **a purpose authorized by law**
- **none of the parties concerned have any real right** in the trust property (CCQ 1261)

The Quebec Trust (Fiducie)

- the Quebec trust **does not rely on an adaptation of the notion of dual titles** (legal and equitable “ownership“ known to the Common law); or its partial derivative, the idea of *sui generis fiduciairy ownership*; or even upon the “personalization“ of the trust

- although it generally follows the civil law tradition, identified as the “obligation model trust“, it is **influenced by the rest of the Canadian provinces** that have received the common law trust from England

- it does not follow the pure contractual model =) the **Book of Property** in the CCQ

- **a unique property concept generally characterized as unowned dedicated property**

The Quebec Trust : Lepaulle´s Theory

- the Quebec solution is based on work of Pierre Lepaulle (a French comparative lawyer)
- a definition which **rejects any idea of relationship** between trustee and cestui que trust, and of the distinction between legal and equitable interests
- only two elements in the trust: **an autonomous patrimony and a free destination**
- **a trustee is not essential to the existence or validity of a trust**
- **a beneficiary (an individual or legal person) is likewise not essential**
- a trust may be constituted not only for the benefit of a determinate person, but **also for a purpose**

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The Quebec Trust: Lepaulle´s Theory

- the property settled in trust **does not form part of the patrimony of the settlor, the trustee or the cestui que trust** – it must constitute an autonomous patrimony!
- this autonomous property is subjected to **a determinable and lawful destination**
- **the obligations of the trustee** exist only towards the trust itself
- **the rights of the cestui que trust** exist only against the trust itself
- the Lepaulle´s theory **attacks the classical theory of the patrimony**
  - Aubry and Rau: the patrimony should be regarded as an emanation of the personality of its holder, and the expression of the legal power with which a person was invested

The Concept of Patrimony by Appropriation

- the idea was developed by two **German authors – Brinz and Becker** and has been adopted by many other authors, including French jurist Pierre Lepaulle

- a challenge to the classical idea of **patrimony as a reflection of one´s legal personality** =) principles of unicity, unfragmentability and inalienability

- patrimony by appropriation: a depersonalised version of patrimony that is not connected to one´s legal personality, but creates **a form of detached, impersonal patrimony**

- Lepaulle: described the trust as a legal device that consists of a patrimony existing **independently of any person holding it** and whose unicity derives from its appropriation to whatever purpose, subject to mandatory provisions of law

The Concept of Patrimony by Appropriation

- **regarded as the closest conceptual equivalent to the common law trust** which is characterized by the fact that the trust property is not part of the personal patrimony of the trustee, who holds the property in a type of box separated from his own assets

- the problem with the Lepaulle´s theory – **common law trusts are not equivalent to patrimonies** because the assets in them are without corresponding debts

- by adopting this conception of patrimony the Quebec legislature **have cut ties with ownership in relation to trusts** – the patrimony is disconnected from relevant real rights =) none of the parties involved in the trust is the owner of the trust property

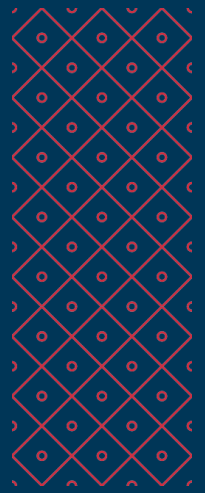
- necessary to analyse trusts **in terms of powers and administration of another´s property** rather than in terms of subjective rights of ownership

The Concept of Patrimony by Appropriation

- in Quebec the trust is **no longer a matter of rights held but of powers exercised**

- it is the body of rules applicable to **the administration of another's property** that governs the trustee's conduct and that allows the prerogatives that he exercises in relation to the property to be explained in terms of legal powers

- the concept of depersonalised patrimony by appropriation =) many **theoretical difficulties** – the question arises in particular as to who this other (owner of property) is and as to the person from whom the trust property is acquired



Chapter 4

The Czech Trust

The Czech Trust

- it follows the Quebec model - **an autonomous patrimony ("ownerless" property)**
- a legal technique that **appeared to be the most appropriate solution** for adapting the idea of trust into Czech law
- **the reception of the Quebec trust** was explained by the fact that Quebec law has retained the striking character of a civilian jurisdiction and that the Quebec legislator managed to introduce a functional equivalent of the traditional Common law trust
- introduced in 2012 by adopting **the Czech Civil Code No 89/2012 Coll.** (CzCC)

The Czech Trust

- nor the Czech trust is (supposed to be) a legal person
- **it has not a legal personality and it is not a subject of law**
- CzCC =) only 2 categories of legal subjects: a natural person and a moral person
- accordingly, the institution of the Czech trust is both systematically (in the structure of CzCC) and conceptually (an autonomous property) **separated from legal persons**
- Articles 1448–1474 CzCC **(Part Three – Absolute Property Rights)**

The Czech Trust

- the Czech trust is regarded as **a legal arrangement** (Art. 2 of the Act No. 37/2021 Coll.)
- Art. 1448 CzCC **confirms the adoption of patrimony by appropriation** into Czech law
- the problem is wording of Art. 17 CzCC (“only persons may have rights and duties may only be imposed upon persons“)
- In 2016, a so called technical amendment to the Civil Code introduced **an obligatory registration of trusts in the Czech republic** – a response to the requirement of the EU legislation to ensure transparency of ownership structures
- in Quebec trusts generally are not subject to any registration

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List of Sources – Civil Code, Case Law

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