How Civil law Systems Absorb Trusts

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Part 1 - INTRODUCTION

The subject of this article needs careful explanation on the conceptual approach at the start. We could analyse the subject of absorption of trusts in any legal system, which does not cater for them, but the subject is infinitely more challenging if we consider how this happens when the legal system is a Civil law system or a mixed legal system. It is easy to appreciate that with the antagonistic baggage historically accumulated towards trusts in the Civil law world, analysing absorption into purely civil law systems, throws up evidence of resistance and suspicion. The mixed legal systems, on the other hand, provide extensive material worth observing as there is more openness to the institute and a tried and tested model for absorption of common law on a wider front. Absorption in these systems has happened very often over a period of 250 years, reflecting the expansion of the British Empire until its sunset in the post World War II era.[2]

It is assumed that a mixed legal system is originally a Roman-Civil law system which then absorbs aspects of English common law as part of its structure. The reason for this is historical in that trusts, called *fiducia*, arise in early Roman law as a mode of transfer but then disappear in classical Roman law[3], only to re-emerge in English law in the late Middle Ages. As English

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[2] Professor Joseph M. Ganado, "*Malta: A Microcosm of International Influences*" in Studies in Legal Systems: Mixed and Mixing, (1996) Kluwer Law International, and "*British Public Law and the Civil Law in Malta*" in Current Legal Problems, Vol III, (1950), Stevens & Sons Ltd, pgs 195-212;

[3] See David Johnston, "*The Roman Law of Trusts*", (1988) Clarendon Press, Oxford. Conceptually the trust is a derivation of the Roman law on *fiducia* and so there necessarily are some similarities in the Common law and the Roman law on the basic elements of this institute. The institute of *fiducia* developed throughout the history of Roman law and received different approaches at different eras. In Roman law, *fiducia* was an agreement "appended to a conveyance of property, involving a direction or trust as to what was to be done with it." *Fiducia* was, even at that time considered to be a separate agreement to a main contract and need not be in writing. Interestingly, it is debated whether it was a contract as it never featured in the list of nominate contracts. Some authors considered it to have been a *pactum*. "The reason for its non-appearance in the lists [of contracts] may be its parasitic character; it could occur only as an appendage to a conveyance." See W.W. Buckland, *A Textbook of Roman Law*, Cambridge University Press, 2nd Edition - pg. 431. In Roman law *fiducia* features in many different applications, two main ones being the *fiducia cum creditore*, which eventually leads to security law of pledges and hypothecs, and *fiducia cum amico* which pre-dated the contracts of deposit, loan and mandate, all of which were later classified as *bonae fidei* contracts, giving rise to a higher level of care. Today, these are contracts where fiduciary obligations can feature very strongly. There were also *fideicommessa*, which were testamentary dispositions whereby a person leaves property to another under obligation to transfer it to a third person;

law is the later version it is natural that it fills the vacuum which started to be felt in the older system.
The process goes beyond mere influence by one system of law on the other in the development of a rule or set of rules within a national legal system. Absorption of parts of one system into another means that potential policy clashes need to be rationalized, not in a specific context but generally. It is well known that there are major policy differences between the two world legal systems, especially on aspects of trusts, which are sharp and specific enough to articulate easily.

Of interest to this analysis are cases where the incorporation of the trust into the legal system of a country has had impacts on various other parts of the legal system which bear a certain amount of generalized relevance and which have been addressed legislatively or judicially.

We need to see how the absorbing legal system addresses these impacts. In some future review we can go into very specific detail and judge whether the way they have done this is positive or negative and from what perspective. In this contribution the review is necessarily high level.

1.1 EXCLUSIONS

As the Civil law world is enormous, we need to exclude some exercises in absorption which are of lesser interest because the absorption is clearly segregated from the main legal system. I have found three approaches to this issue which we can exclude so as to be able to focus on the richer fields of enquiry where absorption is more substantial.

I. Countries where trusts have been introduced only for non-residents, non-citizens or non-domiciliaries, only for property outside the relevant country, and with an exemption from the rules of domestic fiscal law, which therefore basically introduce trusts as an "offshore" product, and stop it entering the domestic system, do not provide material of sufficient interest to this analysis as they stop short of having to deal with local impacts of a property law nature such as ownership, succession, security and the like. This model used to exist in Malta[4] and Mauritius[5] but is slowly disappearing with the onslaught on offshore centres and tax haven models.

II. Some countries have introduced trusts in a manner which meets the test of absorption but do so in a very limited context such as in relation to the grant of security interests. While they do indeed address some domestic aspects and apply the rules even domestically, the impact of the introduction of trusts in that limited context would not be wide enough to affect basic principles of law on ownership, succession, contracts, remedies for fraud and dishonesty and the like. On this basis I have therefore excluded France, Luxembourg and many South American countries[6] as well as Asian civil law systems like Japan[7]. Again there are naturally

[4] This refers to a law enacted in 1988 which has subsequently been radically revised to eliminate all "offshore" elements;
[5] This refers to a law enacted in 1992 which has been displaced by another law in 2001 which provided a single integrated legislation to regulate all trusts in Mauritius. See www.step.org/jr-mauritius;
[6] Laws are changing rapidly and it may be the case that the situation has changed from time to time and this naturally bears more detailed analysis. Reference may be made to Gothard/Shah "The World Trust Survey" 2010, Oxford University Press;
[7] See L. Ho, R. Lee *Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis*, Cambridge University Press, 2013;

some interesting aspects to discuss even in these models as they expose the conceptual thinking underlying the absorption.
III. There are then civil law systems which have ratified The Hague Convention on the Recognition of Trusts[8] and have done nothing or little else within the domestic system. This has resulted in the use of trusts within the domestic system governed by the trusts law of other countries, but has not brought about much change in legal rules *per se*. It has necessarily affected attitudes, and positively so, particularly in the Courts, and has brought about massive internal academic and sometimes judicial analysis, but it tends to provoke reactions to avoid unexpected impacts, such as on taxation[9].

This approach actually results in trusts entering into the system in a very broad and deep manner as it caters for every imaginable system and feature of trusts as designed in another legal system of the world. It also necessarily brings about the legal impacts set out in the Hague Convention, which are very far reaching, but these ride on the compromises reached by the Convention parties and not their own legislative policy considerations. Of course, the ratification of the Convention by a country is a policy decision in itself, one to accept previously absent legal concepts, such as segregated patrimonies.

It may result in the same situation as total incorporation as the Courts start implementing concepts which do not exist in the domestic legal system to bring about the required outcomes. In some cases this has inspired much legislative innovation without referring to trusts at all[10], but effectively adopting the same mechanisms to general areas when in the past they may have existed in very limited contexts or not at all.

Unfortunately this situation, although extremely interesting, is again not specific enough for us to gauge how a civilian system proceeds to adjust its rules when absorbing trusts. On this basis I have excluded Italy and Switzerland.

1.2 THE RESULTING FOCUS OF THIS ARTICLE

This then leaves the following legal systems on which to consider some detailed legal issues where concepts of a traditionally civilian nature are reviewed to address trusts. This therefore allows us to consider the following legal systems: Quebec, Louisiana, Scotland, South Africa, Malta and Hungary, though there may be others which may include the Czech Republic, Mauritius and San Marino.

1.3 CLASSIFICATION

The above discussion invites us to set five typologies for critical analysis of a country's incorporation of trusts which, in a word, allows us to determine the level of substantive incorporation through the standard. The classes of civilian legal systems absorbing trusts are therefore suggested to be the following:

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[8] The Hague Convention on the Law Applicable to Trusts and on their Recognition, 1985;
[9] This is currently happening in France (See www.step.org/jr-France) and Italy where fiscal authorities tend to perceive this institute as a means for fiscal evasion and sometimes impose penal effects on their use;
[10] The Italian case stands out here with changes to company law introducing "*patrimoni destinati*" for financing purposes for example;

- Offshore
- Recognition

- Segmental – for example only for banks

- Partial – for example only for security structures or disability solutions

- Total

We can find shades of more than one approach in particular legal systems and we can even find overlap or sequential phases with two or more approaches in the same legal system. Evidently, it is the **total** absorption or incorporation which interests us most, for it develops analysis and thinking for planned outcomes which are intended to be beneficial. The incorporating legal system takes the policy position that total incorporation is a good thing, better than offshore, recognition, segmental or partial. It evidently shows that the civil law system analysed the benefits which could accrue to it by incorporating the common law approach to this legal institute[11]. There is focus on which positive benefits arise, and of course this could be very subjective.

It is evident that it could be an indication of the perceived value of the institute within the legal system and a wish to enhance the depth and breadth of the institute - in this case of a context of intermediated relationships relating to property - which may exist in a legal system. It could indicate a wholesale introduction of an institute which did not exist in the system at all or to a very limited extent. In reverse, it may indicate a deficiency in the absorbing legal system as much as it may show a quality of the absorbed legal institute, but this will allow for much qualitative discussion of which elements are identified as weak and in need of enhancement and which elements are enhanced by absorption.

Trusts is a subject (or a part of a subject) which is fundamental and wide ranging in a legal system. We see a lot of discussion on whether it pertains to the law of property and creates rights *in rem*, is part of the law of succession or is part of the law of contract or more generally

[11] I have used the term "institute" to imply a particular state of affairs within the legal system. See Max Ganado "*Trusts and Other Fiduciary Relationships*" in D.Zanchi, *Il Trustee Nella Gestione dei Patrimoni*, (2009), G. Giappicchelli Editore, Torino at page 795 from which I quote: "The imposition or assumption of fiduciary obligations has sometimes produced legal institutes of a distinct nature, beyond the mere contract. What starts off as a mere contract such as a transfer of property to the fiduciary, then becomes a self-standing institute with its own rules. These emerge from and go beyond the discipline of mere contracts and produce new property rights, new remedies and new rules of law. This is the case of the *mandate prestanome* and *community of acquests* although to a limited extent. This is more so in the case of *trusts* and we are now seeing the emergence of another identifiable institute in civilian legal systems called the *fiducie*. In these cases we see that the fiduciary becomes the owner of the relevant property which then results in defined features and effects of these institutes which are **atypical**. When a legal system develops a complex set of rules relating to a particular fiduciary relationship, beyond the contracts of mandate and deposit, it tends to elevate those rules to a named institute, mostly for identification, for purposes of applying **the atypical rules**. This enables the legal system, for instance, to go beyond the discipline of pure contract without creating confusion in the interpretation of basic legal norms. It enables the system, for example, to deal with a "different" type of ownership. Trusts do this on several important aspects, particularly when regulating the status of a beneficiary and his interests relating to the property held under trust, the method and effects of transfer of trusts among trustees when one trustee succeeds another and the concept of ownership of assets by a trustee.

obligations. To me this is only indicative of how basic and wide ranging the subject is and how it is a subject which really spans the whole of the legal system.
Trying to box it in one part of the system or another contradicts its nature as a "parasitic institution"[12] which does not exist in its own right but necessarily attaches to another right, power or obligation, of whatever nature or class, within the legal system and changes it to suit the fiduciary agenda of protecting the beneficiary whose economic interests are owned, held or controlled by another person. Allowing it to operate only in limited contexts may defeat its natural function. This is what happens in the segmented and partial approaches but not in the recognition or total approach, as in the latter approaches the incorporation is across the board and challenges every aspect of the system to meet the standard set for trusts, wherever it can have some influence.

This is not to say that this challenge is not addressed in a manner consistent with the excellent civilian methodology of classification and rationalization in everything it does, in an attempt to keep disciplined thinking across the whole system.

1.4 STAGE OF THE DISCUSSION

This subject, of trusts and civil law, has been the subject of a lot of debate and discussion, many articles and books have been written about it but it seems we are still at a very rudimentary level of qualitative discussion. The legal world has been caught in a rather limited debate for at least a century, where the element of conflict and contradiction has dominated the debate about trusts and civil law systems[13]. There was a veritable resistance movement in most civil law countries and some of that still blocks constructive and innovative thinking.

Too many civil and common law lawyers - in an older generation - have been wasting their time with finding reasons why trusts are incompatible with civil law resulting in an equal amount of civil and common law lawyers - in a more recent generation - then wasting their time with trying to show that there is no such incompatibility. This issue has distracted the participants in the discussion too much and for too long. Now there is a growing number of contributions which have left that mind set behind and are looking forward to better angles for analysis.

This article seeks to continue this trend in a qualitative manner[14].

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[12] Lee "*Principles of Roman Law*", Sweet & Maxwell, 4th Edition;
[13] How many times have we heard reference being made to the article written by Pierre Lepaulle "*Trusts and the Civil Law*" in the Journal of Comparative Legislation and International Law (1933)?;
[14] I am very biased in this discussion. In teaching materials I prepared for the Law Course at the University of Malta in 2005, and which have not been amended since, I state: "Research and discussion has therefore revealed that trusts are not necessarily incompatible with Civil law. There are points of divergence in institutes but the divergence shows diversity not incompatibility. Any areas of perceived incompatibility are not elements of trusts law or equity but of trusts practice. There is nothing in trusts law which cannot sit comfortably in Maltese law if it is addressed as a self-contained institute, rather than trying to squeeze or re-interpret it to fit into one of the existing institutes already in the Code. It may also be decided not to adopt an element or two of trust *practice* for Malta's own philosophical reasons but that will not stop the trust institute from being merged within the Maltese system in the most extensive and consistent manner. The overlap between trusts law and other areas of law is not a problem either. Indeed it is to be expected for two reasons: first, trusts share the same nature as other existing fiduciary situations in our law and so can operate as an alternative in existing areas and secondly, because trusts, as all fiduciary obligations, are by their nature usually appendages to another legal relationship which is already regulated by Malta's legal system. There will necessarily

PART 2 – IDENTIFYING THE KEY ISSUES

Cleary there are many issues in this discussion and it is impossible to deal with all issues in a contribution such as this. A few are fundamental and identifiable from the existing literature, sometimes laterally, as they emerge as the conflict points in antagonistic discussion. As the most ambiguous and controversial issues, it is natural to expect that they are dealt with in an incorporation project.

Enough evidence has been established to show that there is no one issue on which both the legal systems do not have evidence of elements of the other, if not total espousal in some specific contexts. So, rather than showing that exceptions exist in the civil law systems to permit concepts often classified as common law, I will assume that just as these elements exist in one part of the system or in a context they can easily exist and be applied, in a totally consistent manner, in another context, even if this happens to be trusts.

2.1 THE UNDERLYING REASON OR METHOD FOR TOTAL INCORPORATION

We find total incorporation models in Quebec, Louisiana, Scotland, South Africa, Malta and possibly Hungary[15]. Looking at these countries we see different routes to total incorporation or reasons why it has happened though many bear similarity.

2.1.1 Colonisation

Apart from Hungary, all civil law systems which have incorporated trusts totally were British colonies. In most cases, trusts came in as a result of the overlay of English law which the British encouraged to serve their commercial and property needs. Malta, although an ex-colony, is an exception as trusts came in decades after the British left Malta.

South Africa[16] has seen trusts merge into its system as a result of the operation of the common law of the governing authority (England) which dominated over the country which already had a sophisticated and widely applied civil law system based on Roman law. This led to the assumption that trusts were part of the system and had to be accommodated, as indeed they were, by the legal profession and the courts. Of course debates emerged on the underlying conceptual basis for trusts.

Louisiana[17] had something similar in that the common law of the United States (inspired by English Common law) applied to a civil law system which then enacted laws to deal with the institute of trusts so as to create predictable outcomes. In the case of Quebec, we had broadly the same elements for many years, some provisions in the Civil Code on testamentary

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be this overlap and this is totally natural to an institute of this type which has its own particular identity. It must not be confused with other institutes but treated on its own merits.

[15] Possibly also Czech Republic, Mauritius and San Marino;

[16] *Ibid*, p. 297;

[17] L. Smith, *Re-imagining the Trust: Trusts in Civil Law*, Cambridge University Press, 2012, p. 123;

substitutions and a totally structured approach in the revision of the Civil Code, which then led to a completely new approach to trusts.

Malta was a colony where trusts were not introduced in any relevant manner until 1989 when the offshore model was adopted. At about the same time trusts were permitted to be formally used in mortgages taken over ships registered in Malta. This was then enhanced by the recognition model in 1993, similar to Italy. The offshore model was then eliminated and substituted by the total incorporation model in 2004 with recognition features, as in England and Wales, due to the ratification of the Hague Convention naturally remaining in place. In Malta, we find a specific statute, similar to the one in Jersey[18] which covers many legal aspects, but adjusted in the incorporation process to dovetail with the Civil Code and other statutes.

So much has been happening in the field of trusts in the Malta system that it now provides a very good subject for analysis. It has experienced at least three of the five typologies above mentioned and ended up with total incorporation after a legislative project spanning several years, with general changes to many parts of the legal system specifically designed to accommodate trusts and the underlying concepts.

Hungary passed through a similar exercise through a legislative project spanning 20 years and amending the law to deal with trusts.

2.1.2 English common law

The English common law was not necessarily imposed lock stock and barrel and the legal systems of these countries were allowed the liberty of choice. In Scotland, South Africa, Malta and Hungary it is the classical English law approach to trusts, with each varying on the extent of how it follows the original model especially on detail. In Louisiana, it is the US approach which in turn broadly follows the English.

2.1.3 Equity?

In all systems, the absence of a parallel source of regulation called "equity" is evident and it is interesting seeing why this happened and what effects this has. In some cases where English law is uncertain, the civilian temptation to introduce certainty, reflected even in the Jersey model followed by Malta, leads to a set of developments which are again interesting to review.

In Quebec a new approach was taken and the concept of a patrimony by appropriation was designed to meet the same functional effects, without equity and without calling them trusts. We see writings about Scotland having trusts but not equity and the same applies to South Africa. Hungary too avoided the issue and has not suggested the introduction of equity.

This topic can be discussed from various angles; however the favourable view is that this is better left to academics as it should be of little practical importance as the civil law systems

[18] M.Lupoi, *La legge di Jersey sul trust: Jersey nel modello internazionale dei trust* in *Trusts e attività fiduciarie*, nr.8, 2007, p. 5;

already provide all the legal remedies, such as specific performance, and the assumptions, such as equality, in their laws which equity sought to provide given the gap in English law.

Equity gave rise to many rules which are now anyway in the law, and therefore, the rules are no longer dependant on unwritten precepts.

PART 3 – THEMES

Having established some features of the methodology of incorporation in total incorporation countries, let us now discuss some selected issues of fundamental importance.

3.1. Is a Trust a Contract?

The issue here is an important one because it tends to widen or to restrict the concept and its manner of operation within the legal system. While it is clear that transfers of property by way of settlement are in most cases contracts between the settlor and the trustee, it is equally recognised that there is no contract with the beneficiary in constructive trusts which result from behaviour or in judicial trusts. Likewise, there is no contract in testamentary trusts or unilateral declarations of trust.

So the reply with reference to the traditional theory of trusts is that there are elements of contract but there are other elements which are not. An incorporating country has the choice to absorb this flexibility – or ambiguity as some may feel - or to exclude it by making a trust a nominate contract with its own special legal effects to address the atypical outcomes such as the beneficiary rights.

In Maltese law, trusts are defined as a species of fiduciary obligation[19] and fiduciary obligations can arise from contract, quasi contract, office, trusts or behaviour. So rather than trying to take a view on whether trusts are contracts or not, we simply look at them as another source of obligations and that resolves the issue: they are not necessarily contracts but may be so.

In Quebec, trusts are not treated as contracts[20] and in Louisiana a trust is a relationship which results from the transfer of title to property[21] implying that it is not a contract.

Some countries like San Marino preferred to build on a contract of *affidamento fiduciario* which focuses on the contract aspect of the transfer as well, but then appears to continue with contract terminology in the system. A proposed Italian law takes a similar approach requiring a written contract[22].

The main argument in favour of the open ended approach is that you want the concept of *fiducia* to apply when it is needed in the particular context in which it arises. To create a

[19] Max Ganado, "*Fiduciary Obligations Under Maltese Law*" in *Trusts e Attivita' Fiduciarie* 4-2013, pgs. 353 et seq;
[20] Mtre Guy Fortin, "*How the Province of Quebec Absorbs the Concept of the Trust – Part 1*", Trusts and Trustees, December 1998/January 1999 pgs 22-26;
[21] Louisiana Civil Code;
[22] Max Ganado, "*A Comparative Analysis between the Proposed Italian Provisions on Fiducia and Maltese Law*" (unpublished);

doorstep requirement for the obligation to exist and be enforceable means that, absent the written contract, you do not have an enforceable obligation, which, it is suggested, is a very dangerous position at law to be in when the protection is needed.
The context is always the *holding*[23] of property by one person for another.

The fiduciary obligation is that "parasite" which attaches to the transfer of ownership[24] of a thing. It never arises on its own and depends on the intent of the parties which can only be surmised from the facts and the discussion surrounding the transfer of the thing. Requiring that there must be a contract to create it means that, if there is no specific contract about it, it cannot be implied from the facts. This, in my view, is a weakness and limits the original Roman Law concept, which has been applied by the Courts in many civil law contracts as part of the *ius comune.* It could be argued that the Courts will in any case apply the *ius comune;* however, as indicated above, the tendency in civil law is that when the Code regulates an arrangement as a nominate contract, it leads to the death of the underlying *ius comune* concepts[25]. So there is a real risk that the restricted fiduciary contract will apply going forward. The flexible tool used by the Courts to find that there exists a fiduciary obligation or a trust in a particular context will no longer be considered possible. Given that this power is based on a need to dispense justice when there is no express legal remedy to achieve the just result, this may be serious loss to the legal system.

3.2. Ownership

The one legal issue on which there seems to be major division and debate is ownership. We all know the common arguments that in civil law it is selfish and exclusive, unconditional, absolute and perpetual while in trusts we see an ownership for another person which is subject to many obligations and limitations *vis a vis* the beneficiary. In this argument there is an agenda not to merge ideas but to contrast them. Civilians see this as impossible, aided by the evidently casual use of the terms "two ownerships" or "beneficial ownership" which meet the demands of mutual understanding of the situation in the common law world.

A legal system accepting a notion of an owner of property being entitled to things on a temporary basis or for a purpose should have no problem with the concept of fiduciary ownership and frankly I do not see this as an issue civilian lawyers should continue to argue with. Surely two notions of ownership with each being well defined and regulated is so much better than just one! Having one which is selfish and one which is altruistic and meets administrative demands and liability risks is surely something which can enrich the legal system and not confuse it. Let's assume that is the case, and then we can start thinking on what we need to do to address the new challenges, otherwise we pretend the issue does not

[23] 'Holding' has to be interpreted in the widest possible sense of detention, possession or ownership, directly or indirectly, when there exists a power of disposition;
[24] In Roman law this is how it was treated, as an appendage to a transfer of ownership, but as concepts of things, ownership and possession become more refined, then one needs to apply the same thinking to any transfer even of possession where the power to deal with the asset is implied;
[25] This happened for example when *pignus* was introduced. It killed the *fiducia cum creditore* and this is documented by a very interesting observation on the Justinian Code or related papers where the feminine latin terms applicable to *fiducia* where left in the document notwithstanding the fact that *fiducia* had been cancelled and substituted by *pignus*, which is a masculine term. Everything written about *fiducia* was made applicable to *pignus* in that simple manner, but *fiducia* then disappeared from the texts. It is now coming back into the Codes through "fiducia" (Italian Code) and "Fiducie" (French Code) but in a more limited conceptual format;

exist and do not think of the real problems which arise from the real factual situation - a person owning, holding or controlling the property he has in hand for another person or for a purpose.
This reality arises in all legal systems and only the approach is different so it would be better to have both solutions to an issue rather than one. In reality, both legal systems resolve this same issue by recourse to fiduciary obligations, the English developing trusts and the civilians preserving ownership with an overlay of contract, quasi contract or other legal solutions. Both work and both have the same problems of apparent wealth when they are undisclosed. Both can lead to fraud and cheating and both need remedies. Is it not better if we focus on the effectiveness of the remedies we need for the context and how best to achieve them?

Whether we have fiduciary ownership - which is the apparent ownership for the world and restricted functions in the internal relationship - or ownership and a series of fiduciary contracts and relationships - to achieve the same end, it really makes little difference in practice and the argument then ends up being civilian theorizing against common law practicality. In today's world, some legal systems are espousing practicality and it is up to this generation of disciplined civilian lawyers to find the best way to reach practical solutions to issues within their legal system.

It is clear in nearly all systems that a trustee is seen as an absolute owner of the property. This is the normal type of ownership. There is no issue about that. The problem is how this is then internally limited.

What we certainly need to eliminate is the confusion in the ownership of the trustee and the rights of the beneficiary which some call 'beneficial ownership'. That is clearly not ownership although the rights of a beneficiary may be very strong and have a proprietary nature in that they refer to specific property and give specific rights to receive the same.

In Maltese law we have accepted the concept of fiduciary ownership. The way this is perceived is that when the owner is a fiduciary, the fiduciary obligations contaminate the ownership and change it from selfish to altruistic. Quebec on the other hand avoided this completely by not seeing an owner in a trustee but only an administrator[26] with powers of administration which are effective. So the patrimony has no owner but functionally it works for the trustee in the same way.

3.3. Segregated patrimonies

A notion intimately connected to the ownership debate is that on the creation of a second or third segregated patrimony intended to ensure that the beneficiaries of the trust relationship are well protected.

The difficult question of the nature of the beneficial interest is addressed in some detail in these systems and whether it is a form of ownership, of an *in rem* right, gives rise to a patrimonial right, or gives rise to a proprietary remedy ensuring restitution of the thing, is something all the above systems grapple with.

[26] L. Smith, *The World of the Trust*, Cambridge University Press, 2013, p. 350;

The outcome is the same as would arise from a right of direct ownership of a thing which is held or owned by the beneficiary - which is indeed the general approach of the civil law systems whether an intermediary holds or controls assets belonging to a principal, whether under the law of agency or a contract of deposit or mandate, and irrespective of whether the asset is registered in the name of the holder or not, making the intermediary appear to be the owner to the world, as a result of possession or registration, when he is not so.

Most systems expressly state the outcome in the law as does the Hague Convention. Maltese law has specific provisions in this regard, both in the trusts law and in the Civil Code on the wider concept of fiduciary obligations.

In fact, Article 3(2) of the Trusts and Trustees Act[27] establishes that:

> *The trust property shall constitute a separate fund owned by the trustee, distinct and separate from the personal property of the trustee and from other property held by the trustee under any other trust.*

The segregation of assets is also mirrored in:

> *Trustees shall keep trust property distinct and separate from their own property as well as from any other property held by them under any other trust or title, and separately identifiable therefrom:*
> *Provided that trustees may, if expressly permitted by the terms of the trust, or in any case where the trust property consists of fungible things, place and keep trust property in a common pool of identical assets or in a clients' or common account.*[28]

Also, Article 1124B (2) of the Civil Code[29] establishes that:

> *When a person holds property subject to fiduciary obligations, such property is not subject to the claims or rights of action of his personal creditors, nor of his spouse or heirs at law.*

In Quebec, the trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.[30]

Segregation of assets also exists in Scotland where the trust assets are distinct from the trustee's personal patrimony. The trustee's personal creditors, therefore, do not have any rights over the trust property as this does not belong to the trustee in his personal capacity.[31]
In Louisiana, the trustee is under the obligation to keep his property separate from the property of the trust.[32]

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[27] Cap. 331, Laws of Malta;
[28] Art. 21(5), Trusts and Trustees Act, Cap. 331, Laws of Malta;
[29] Cap. 16, Laws of Malta;
[30] Art. 1261, Civil Code of Quebec;
[31] L. Smith, *Scottish Trusts in the Common Law*, (2013), 17.3, Edinburgh Law Review; Reference should also be made to the Dual Patrimony Theory in the Scottish Law Commission Discussion Paper 133, 2.16 – 2.27;

When you have segregated patrimonies in the ownership of the same person, whether you accept a concept of fiduciary ownership or not becomes academic as the duties relating to the segregated patrimony are always so cumbersome and the rights of the beneficiary are always so strong, that whatever you say, this is clearly a different type of ownership to civil law ownership.

3.4. Fiduciary obligations

Under all systems it is clear that trusts create fiduciary obligations towards the beneficiaries or the purpose. They all accept that ownership is modified to reflect this reality. What exactly these fiduciary obligations are is an issue which is addressed differently in each system.

On one extreme we have no statutory law at all and there is full reliance on the definition of fiduciary obligations in English case law and writings. In Scotland fiduciary obligations are addressed through case law rather than through statutes. Therefore, for example, in the case of **Aitken v Hunter (1871) 9M 756**, the Court stated:

> *It appears to me that from first to last the rule of the law of Scotland has been that anyone holding a fiduciary character, whether that of guardian or trustee, cannot lawfully became auctor in rem suam.*[33]

On the other hand, in Malta there is a specific title in the Civil Code which regulates fiduciary obligations[34] and the Louisiana Trust Code also expressly refers to fiduciaries.[35] Quebec has a specific title in its Civil Code regulating the administration of the property of others[36].

3.5 Tracing and substitution

Once we have an outcome which creates a fiduciary obligation over property the trustee owns, whether by contract or otherwise, the next question is what remedies does the beneficiary have in case of breach.

Here systems differ but the challenge is whether they allow the beneficiary to follow the property into the hands of a third party in bad faith or not (tracing), whether they make this easy or not (remedies) and whether they allow it even if the third party has in the meantime converted the property from one form to another (substitution of property).
Maltese law has addressed all issues by allowing fiduciary obligations to follow property by making an acquirer in bad faith from a fiduciary also a fiduciary of the beneficiary.

Article 1124A(3) of the Civil Code[37] establishes that:

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[32] RS 9:1721-Louisiana trust code, article 2094: *A trustee shall keep the trust property separate from his individual property, and, so far as reasonable, keep it separate from other property not subject to the trust, and see that the property is designated as property of the trust, unless the trust instrument provides otherwise*.
[33] a person acting in his own interest;
[34] Part II, Title IV, Sub-title III, Part VII, Civil Code, Cap. 16, Laws of Malta;
[35] For example Article 1731 states: *A trust, as the term is used in this Code, is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another*; and Article 1781 states *A trustee is a person to whom title to the trust property is transferred to be administered by him as a fiduciary;*
[36] Articles 1299 to 1370 of the Civil Code of Québec. See also Mtre Guy Fortin, "*How the Province of Quebec Absorbs the Concept of the Trust – Part II*", Trusts and Trustees, February 1999, pgs. 20-25;

(3) Fiduciary obligations arise from behaviour when a person –

(a) without being entitled, appropriates or makes use of property or information belonging to another, whether for his benefit or otherwise; or

(b) being a third party, acts, being aware, or where he reasonably ought to be aware from the circumstances, of the breach of fiduciary obligations by a fiduciary, and receives or otherwise acquires property or makes other gains from or through the acts of the fiduciary.

The same rule is outlined in the special law on trusts[38] but the law of trusts is now only an example of how a fiduciary institute works and is not unique within the legal system.

Likewise Maltese law allows the beneficiary to claim rights and remedies on substitute property:

(5) In addition to any other remedy available under law, a person subject to a fiduciary obligation who acts in breach of such obligation shall be bound to return any property together with all other benefits derived by him, whether directly or indirectly, to the person to whom the duty is owed.

(6) The obligation to return property derived from a breach of a fiduciary duty shall apply also to all property into which the original property has been converted or for which it has been substituted.[39]

Maltese law is still somewhat ambiguous on remedies and the Courts are still grappling with cases of abuse using traditional civil law concepts, just as lawyers are still using remedies like the *actio pauliana* based on fraud rather than simply demanding restitution for breach of fiduciary obligations. It is now being suggested that the Civil Code cater for the *actio fiduciae* which should cut through a lot of complexity to obtain simple remedies to protect the rights of beneficiaries.

In Scotland, beneficiaries have a personal right againt the trustee. They may trace the trust property to the extent that the party who is holding such property is doing so as a constructive trustee. In this case, the beneficiaries do not have a real right over the property but rather a claim *in personam*[40]. No tracing is possible in South Africa[41], and the beneficiary has to sue a third party (when the trustee transfers the trust assets to a third party in bad faith) with the other creditors.

In the field of remedies most systems develop their own solutions and some may have them already in domestic law and others will need to develop them. Trusts require cut through

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[37] Cap. 16, Laws of Malta;
[38] Article 40A, Trusts and Trustees Act, Cap. 331, Laws of Malta;
[39] Sub-articles (5) and (6) of Article 1124A, Civil Code, Cap. 16, Laws of Malta;
[40] Stair Memorial Encyclopaedia Volume 24 (1) para 49: *the beneficiaries' right is not defeated by the alienation of trust property in breach of trust, as long as the person acquiring it either has not given full value for the property or has acquired it with actual or constructive knowledge of the trust*;
[41] Ibid, para 126;

remedies of substance and that surely is not a matter of compatibility or incompatibility and on this we therefore have no conceptual problems, only problems on how we perceive the Courts' role and how strong we want to make them in the face of abuse and dishonesty when dealing with the property of a third party.

3.6 Causa – donation or something else?

The issue here is whether the transaction between the settlor and the trustee is to be treated as a donation or gift or whether it is an onerous transaction of a different type.

The Maltese Civil Code makes it clear that rules relating to donations do not apply to the settlement or distribution of property under trusts except to the extent expressly stated by the provisions of the Code[42]. Transfers which are settlements of property under trusts to a trustee or a distribution or a reversion of property from a trustee pursuant to any trust are also not governed by the provisions regulating donations[43].

Conclusions

This article has hopefully set the stage for more focused analysis of some key issues in the incorporation of trusts. A beneficial outcome would be to sow the seeds for a discipline which can be shared among civilian lawyers to address commonly held views on the best way to deal with an issue in a manner consistent with the legal system they have. The end result would be to have the same effects of trusts in all systems and benefit from the powerful outcomes of this institute.

[42] 1740A, Civil Code, Cap. 16, Laws of Malta;
[43] 1740B, Civil Code, Cap. 16, Laws of Malta.