



Fiduciary Property Management and the Trust

Historical and Comparative Law Analysis



hvg

| | |
|--------------------|----|
| Abbreviations..... | 11 |
| Foreword..... | 13 |

I.
On the trust in general

| | |
|--|----|
| 1. Fiduciary property management – the trust | 18 |
| 2. Comparative law | 20 |
| 3. Structure of the work | 23 |
| 4. Terminology | 24 |
| 5. Main references relating to the trust | 26 |

II.
Development of the trust

| | |
|--|----|
| 1. Chief historical aspects of the English legal system..... | 29 |
| 2. The Court of Chancery and equity..... | 33 |
| 2.1. <i>Development and operation of the Court of Chancery</i> | 33 |
| 2.2. <i>Characteristics of the law of equity</i> | 37 |
| 3. Use..... | 42 |
| 3.1. <i>Main characteristics of English property law</i> | 43 |
| 3.2. <i>Origin of use</i> | 48 |
| 3.3. <i>The Statute of Uses</i> | 59 |
| 4. The trust..... | 62 |
| 4.1. <i>The use is replaced with the trust</i> | 62 |
| 4.2. <i>Early rules of the trust</i> | 64 |
| 4.3. <i>Evaluation of the trust in legal literature</i> | 67 |
| 5. Non-Anglo-Saxon elements of the trust..... | 70 |
| 5.1. <i>Influence of Roman law</i> | 72 |
| 5.2. <i>The salmann</i> | 86 |
| 5.3. <i>The wakf</i> | 89 |

III. Regulation of the English trust

| | |
|--|-----|
| 1. Definition of the trust..... | 95 |
| 1.1. <i>Definitions of the trust</i> | 96 |
| 1.2. <i>Descriptions of the trust</i> | 98 |
| 1.3. <i>A functional approach to the trust</i> | 102 |
| 1.4. <i>Distinction of the trust from certain Anglo-Saxon legal institutions</i> | 103 |
| 1.5. <i>Main terms of the trust</i> | 104 |
| 2. Forms of the trust..... | 105 |
| 3. English statutory laws relating to the trust..... | 112 |
| 4. Brief description of the rules of the trust..... | 115 |
| 4.1. <i>Creation of the trust</i> | 116 |
| 4.2. <i>Termination of the trust</i> | 121 |
| 4.3. <i>Legal status of the trustee</i> | 122 |
| 4.4. <i>Liability of the trustee</i> | 132 |
| 4.5. <i>Liability of third parties</i> | 136 |
| 4.6. <i>The beneficiary</i> | 139 |
| 5. Special forms of the trust..... | 156 |
| 5.1. <i>The charitable trust</i> | 160 |
| 5.2. <i>The family settlement</i> | 162 |
| 5.3. <i>Trust established for associations</i> | 163 |
| 5.4. <i>The business trust</i> | 163 |
| 5.5. <i>The investment trust</i> | 164 |
| 5.6. <i>The corporate trust, trust company</i> | 165 |
| 5.7. <i>The voting trust</i> | 166 |

IV. Problems underlying the adoption of the trust

| | |
|--|-----|
| 1. The medieval Continental European legal systems..... | 167 |
| 2. Views put forth in legal literature relating to the adoption of the trust..... | 173 |
| 2.1. <i>Sceptical views of the adoption of the trust</i> | 178 |
| 2.2. <i>Views favouring the possibility of adopting the trust in civil law</i> | 182 |
| 3. Legal instruments in civil law similar to the trust..... | 188 |
| 3.1. <i>The trust and the contract</i> | 189 |
| 3.2. <i>Protection of minors, persons with disabilities</i> | 190 |
| 3.3. <i>Gift, legate</i> | 191 |
| 3.4. <i>Third party beneficiary contract</i> | 191 |

| | |
|---|-----|
| 3.5. <i>The fiducia</i> | 192 |
| 3.6. <i>Agency, representation</i> | 193 |
| 3.7. <i>Usufruct</i> | 194 |
| 3.8. <i>The perpetual usufruct</i> | 195 |
| 3.9. <i>Annuity contract</i> | 195 |
| 3.10. <i>Dowry</i> | 195 |
| 3.11. <i>The entailment</i> | 196 |
| 3.12. <i>The testamentary executor</i> | 196 |
| 3.13. <i>Unjust enrichment</i> | 197 |
| 3.14. <i>The foundation</i> | 198 |
| 3.15. <i>Comparison of the business association and the trust from an economic perspective</i> | 199 |
| 4. <i>Structural components of the trust relationship, translated into relationships existing in Continental legal systems</i> | 213 |
| 4.1. <i>Analysis of legal relationships based on the three main contractual positions</i> | 213 |
| 4.2. <i>Legal relationship between persons in the three principal contractual positions and their creditors</i> | 214 |
| 4.3. <i>Legal relationship between the persons in the three principal contractual positions and creditors who assert claims for the trust property</i> | 216 |
| 4.4. <i>Legal relationship between persons in the three principal contractual positions and persons who purchase trust property for value or gratuitously</i> | 216 |

V.

The trust and similar structures in the laws of different countries

| | |
|---|-----|
| 1. <i>America</i> | 217 |
| A) <i>NORTH AMERICAN COUNTRIES</i> | 217 |
| 1.1. <i>The United States of America</i> | 217 |
| 1.2. <i>Louisiana</i> | 225 |
| 1.3. <i>Canada</i> | 230 |
| 1.4. <i>Québec</i> | 231 |
| B) <i>CENTRAL AND SOUTH AMERICA</i> | 238 |
| 1.5. <i>Panama</i> | 239 |
| 1.6. <i>Puerto Rico</i> | 239 |
| 1.7. <i>Some other Latin American countries</i> | 241 |

| | |
|---|-----|
| C) THE HYPERMODERN TRUST, I.E. THE PRIVATE PURPOSE TRUST | 242 |
| 1.8. <i>Cayman Islands</i> | 242 |
| 1.9. <i>British Virgin Islands</i> | 245 |
| 1.10. <i>The purpose trust and similar legal instruments in other countries</i> | 246 |
| 2. Australia | 249 |
| 2.1. <i>Australia</i> | 249 |
| 2.2. <i>New Zealand</i> | 249 |
| 2.3. <i>Some islands</i> | 250 |
| 3. Africa | 250 |
| 3.1. <i>Trust regulation in South Africa</i> | 250 |
| 3.2. <i>Aspects of the trust in the tribal laws of African countries</i> | 258 |
| 4. Asia | 262 |
| 4.1. <i>Israel</i> | 264 |
| 4.2. <i>Japan</i> | 266 |
| 4.3. <i>China</i> | 268 |
| 4.4. <i>Hong Kong</i> | 273 |
| 4.5. <i>Taiwan</i> | 274 |
| 4.6. <i>Singapore</i> | 275 |
| 4.7. <i>South Korea</i> | 276 |
| 4.8. <i>Malaysia</i> | 278 |
| 4.9. <i>Labuan</i> | 278 |
| 4.10. <i>Indonesia</i> | 279 |
| 4.11. <i>The Philippines</i> | 280 |
| 4.12. <i>Regulation of the trust in India</i> | 280 |
| 4.13. <i>Some remarks</i> | 284 |
| 5. Europe | 284 |
| A) PROPERTY MANAGEMENT MODELS BASED ON RULES OF THE ENGLISH TRUST | 284 |
| 5.1. <i>The Channel Islands</i> | 284 |
| 5.2. <i>Cyprus</i> | 288 |
| 5.3. <i>Malta</i> | 289 |
| 5.4. <i>Gibraltar</i> | 291 |
| B) PROPERTY MANAGEMENT BASED ON THE TREUHAND MODEL | 291 |
| 5.5. <i>Germany</i> | 291 |
| 5.6. <i>Austria</i> | 298 |
| 5.7. <i>Switzerland</i> | 299 |

| | |
|--|-----|
| 5.8. <i>Poland</i> | 306 |
| 5.9. <i>Spain</i> | 306 |
| 5.10. <i>Greece</i> | 307 |
| C) THE FRENCH FIDUCIE..... | 309 |
| 5.11. <i>France</i> | 309 |
| 5.12. <i>Luxembourg</i> | 315 |
| D) INDIVIDUAL PATHS OF TRUST REGULATION..... | 316 |
| 5.13. <i>Scotland</i> | 316 |
| 5.14. <i>Liechtenstein</i> | 328 |
| 5.15. <i>Italy, alternative to the trust in Italian legal practice</i> | 334 |
| 5.16. <i>San Marino</i> | 338 |
| 5.17. <i>Dutch regulation and the bewind</i> | 339 |
| E) CENTRAL AND EASTERN EUROPEAN TRUST LAWS, THE NEWCOMERS..... | 343 |
| 5.18. <i>Russia</i> | 343 |
| 5.19. <i>Georgia</i> | 345 |
| 5.20. <i>Lithuania</i> | 345 |
| 5.21. <i>Ukraine</i> | 346 |
| 5.22. <i>Romania</i> | 346 |
| 5.23. <i>Czech Republic</i> | 347 |

VI.

International efforts to unify law

| | |
|--|-----|
| 1. The Hague Convention..... | 349 |
| 2. The Principles of European Trust Law..... | 355 |
| 3. Efforts to unify law under the aegis of the European Union..... | 359 |

VII.

Fiduciary property management in the Hungarian legal system

| | |
|---|-----|
| 1. Property management instruments before the new Civil Code of Hungary. . | 363 |
| 2. Management of state-owned property and privatisation..... | 364 |
| 3. Property management instruments evolving in legal practice..... | 367 |
| 3.1. <i>Legal arrangement of ownership</i> | 368 |
| 3.2. <i>Legal arrangement of representation</i> | 370 |
| 4. Requirements applicable to fiduciary property management..... | 371 |
| 5. An ownership based approach to the trust based on the analysis of Gyula Eörsi. | 373 |
| 6. The property management contract under Act CXX of 2009..... | 375 |

| | |
|---|-----|
| 7. Regulation in the new Hungarian Civil Code | 378 |
| 7.1. <i>The fiduciary asset management contract</i> | 379 |
| 7.2. <i>Contractual status of the settlor</i> | 380 |
| 7.3. <i>Rights and obligations of the trustee</i> | 380 |
| 7.4. <i>Legal status of the trust property</i> | 384 |
| 7.5. <i>Legal status of the beneficiary</i> | 385 |
| 7.6. <i>Legal relationships between the parties</i> | 385 |
| 7.7. <i>Creditors</i> | 387 |
| 7.8. <i>Fiduciary property management versus trust</i> | 391 |
| 7.9. <i>Some comparative remarks to the Central and Eastern European trust laws</i> | 392 |

VIII.

Review of the different legal instruments of the trust (conclusions)

| | |
|--|-----|
| 1. Instruments of fiduciary property management | 408 |
| 1.1. <i>The settlor remains the owner</i> | 409 |
| 1.2. <i>The trustee is the owner</i> | 409 |
| 1.3. <i>The beneficiary is the owner</i> | 411 |
| 1.4. <i>South Africa – intermediate solution</i> | 411 |
| 1.5. <i>Québec – right without entity, appropriated property</i> | 411 |
| 2. The purpose trust | 412 |
| 3. Exercise of the right of disposition | 413 |
| 4. Unique aspects of Italian legal practice | 414 |
| 5. The new Hungarian Civil Code | 414 |
| Literature | 417 |
| List of cited legislation and other legal sources | 447 |
| Cited cases | 459 |
| Sources of Roman law | 465 |