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SOME ALTERNATIVES TO TRUSTS

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Introduction

Broadly speaking, continental institutions performing trust-like functions can be divided into two groups: those where the existence of the institution, once set up, is entirely separate and distinct from the founder, and those where the founder or settlor continues to play a significant, even critical, role. In the first category we have the modern equivalents of the Roman law *fideicommissum*, such as the *substitution fidéicommissaire*, and the foundation. In the second category there are the fiduciary contract and the establishment. But, as different legal systems - and the societies which they serve - have developed in different ways, so these institutions possess varying characteristics, depending on where they come from. Thus a foundation under French law, for instance, is very different from a foundation under Liechtenstein law. I shall therefore outline the basic characteristics of each of the four kinds of institution I have mentioned, and then describe some examples from different jurisdictions. Lastly, I will just mention a comparable institution from a quite different legal tradition.

First Group

Fideicommissum

The Roman law *fideicommissum* was an institution under which initially the fiduciary would be charged to keep the property during his own life and pass it (or some portion of it) to the beneficiary on his own death. This effective life interest was incentive enough to the fiduciary to accept the legacy. Later on, testators sometimes charged fiduciaries to give the whole property to the beneficiary and

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keep nothing for themselves.[2] Not surprisingly, fiduciaries saw no point in accepting such legacies, and refused them, so they wholly failed. As a result, in the late Roman law the fiduciary had to be given at least one quarter of the property for himself,[3] and the fundamental notion that fiduciary and beneficiary had entirely separate interests, which each beneficially owned, was passed on into the modern civil law systems. Thus, for example, the beneficiary's interest under a *fideicommissum*, once vested, was indefeasible, and could not be defeated by a sale by the fiduciary to a bona fide purchaser without notice.[4] It is also worth noting that, unlike a trust (which originally was *inter vivos* only) a *fideicommissum* could only arise on death, never through a transaction *inter vivos*.[5] This was because it was originally an extension of testamentary power, i.e., in being able to give property on death to persons who could not legally be instituted as heirs.[6] There was less need for such an extension in the case of *inter vivos* gifts, because the power of donation *inter vivos* could be exercised amongst a wider class anyway.[7]

There is some debate as to whether the *fideicommissum* was the ancestor of the trust in England.[8] What is certain is that it found its way into modern European legal systems where Roman law principles were received. In some systems, such as the Roman-Dutch, in Holland, South Africa and Ceylon, it developed an *inter vivos* form as well as a testamentary form, and was used for marriage contracts.[9] But primarily it was an institution designed to deal with succession to property on death. As such, it was regarded with suspicion in most European legal systems, for it was generally not competent for a person to dispose of his property on death so as completely to disinherit his heirs.

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2 Buckland, *A Textbook of Roman Law*, 3rd ed 1963, at 355; Thomas, *Textbook of Roman Law*, 1976, at 512.

3 Buckland at 356; Thomas at 513.

4 *Abdul Hamid v De Saram* [1946] AC 208 at 217.

5 Johnstone, *The Roman Law of Trusts,* 1988 at 15.

6 Buckland at 353; Thomas at 511.

7 Thomas at 192.

8 See, e.g., Holdsworth, *A History of English Law,* vol 4, 410.

9 Frere-Smith, *Manual of South African Trust Law,* 1953, at 25-27; Lee, *Introduction to Roman Dutch Law*, 5th ed 1953, at 375.

Many legal systems placed restrictions on the *fideicommissum*. Justinian himself had forbidden *fideicommissa* beyond the fourth generation,[10] but *substitutions fidéicommissaires* were still being created *inter vivos* of immoveables under Norman customary law in the sixteenth century.[11] French efforts to deal with the problem of large amounts of property becoming in practice inalienable[12] did not succeed until the Revolution, when nearly all *substitutions* were abolished.[13]

Even so, there are still today limited circumstances in which a *substitution fidéicommissaire* can be created.[14] Similarly, in Italy a *sostituzione fedecommissaria* can still be created today in exceptional cases.[15] In Jersey (a legal system based on Norman customary law), they were prohibited for testamentary cases, both by customary law[16] and by statute,[17] but have never been forbidden for *inter vivos* gifts.[18] They were abolished in Ceylon only as late as 1972,[19] and still survive in Quebec, South Africa, Switzerland[20] and Liechtenstein.[21] But in practice, even where they still exist, they are of little significance (except perhaps in South Africa).

Much more important is the foundation, which most civil legal systems recognise.[22] It involves a fund of assets dedicated by its founder to a particular purpose, which acquires a separate legal personality upon creation or recognition. Usually it is supervised by a public authority, and the founder or settlor has no

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10 Buckland, 364; Thomas, 514.

11 Terrien, *Commentaires du Droict Civil,* 2nd ed 1578, 193-4.

12 e.g., the *Ordonnance* of Charles IX in 1560 (see Terrien at 195).

13 De Wulf, *The Trust and Corresponding Institutions in Civil Law,* 1965, 130-135.

14 See Arts 897-899 of the *Code Civil.*

15 *Codice Civile*, Art 692.

16 *Re Testament Fradin* (1753) 2 CR 103 (movables).

17 *Loi (1851) sur les testaments d'immeubles*, Art 6 (immoveables).

18 Matthews and Sowden, *The Jersey Law of Trusts*, 3rd ed 1994, paras 2.32-2.33.

19 Abolition of Fideicommissa and Entails Act, No 20 of 1972.

20 *Code Civil*, Arts 488-492.

21 PGR Arts 829-833.

22 Even the new Russian Civil Code provides for it: Arts 118-119.

function or power within the foundation unless this has been expressly reserved or stipulated for. Some legal systems allow for a foundation to be created for family purposes, others only for charitable or other public, non-profit purposes. We shall consider a few examples.

The Liechtenstein Stiftung

This can be either for a pure purpose or for a family purpose. Unless the *Stiftung* is dependent on another one, it will have separate legal personality. The structure rather resembles a company, with by-laws and a board of governors or Council. In the absence of specific provision to the contrary, it will be irrevocable and the founder will have no function or role to play. In the past, the beneficial interests of the family members were always fixed by the terms of the by-laws, but it is possible to draft them so as to confer discretion on the board.

In analytical terms there is a world of difference between a trust and a Liechtenstein *Stiftung*, separate legal personality and ownership of property being outstanding examples of that difference. But in operational terms there is not much to choose between them. Each covers much the same ground functionally. An important consideration, in deciding which to use, will be which legal systems the structure will have most contact with. Civil law systems will usually find it easier to understand a *Stiftung* than a trust. For common law systems the converse is true. There is, for example, no clear authority in English law as to whether a Liechtenstein *Stiftung* is to be treated for UK tax purposes as a trust in the strict sense, a "settlement" (as defined), or a company - or all of these.

A *Stiftung* is created by depositing the constitutive document at the Public Register office in Vaduz. It needs to be *entered* in the Public Register if it concerns a charitable (other than ecclesiastical) purpose, if the beneficiaries are not specifically defined, or if it intends to engage in commercial activities. Otherwise secrecy is maintained. The deed of formation will contain the statutes (or articles) of the *Stiftung*, and appoint the first members of the Council. Beneficiaries will be designated or described by by-laws to be issued, though these days with a discretionary *Stiftung* there may also be a letter of wishes.

The Dutch stichting

Stichtingen - foundations - play an important role in Dutch society. There are the charitable *stichtingen*, such as those which promote cultural or fund medical research, there are those that run hospitals, schools or other institutions, those that run organisations or community projects, and there are ecclesiastical foundations. But a *stichting* is not restricted to activities of a public character. It can carry on commercial, or quasi-commercial activities, as with pension and insurance funds. It can be set up for purely personal benefit. In essence, the *stichting* provides a

legal framework for almost any kind of activity. Forming a *stichting* is a comparatively simple way to acquire legal personality and legal capacity without all the limitations inherent in Dutch corporate law.

The major relevant legislation is the *Wet op Stichtingen* (Foundations Act) of 1956, but this does not interfere with the establishment or functioning of *stichtingen*. A *stichting* is created *inter vivos* by notarial act or on death by will. Unless exempted from the registration provisions of the 1956 Act, it should be registered with the Public Central Register maintained by the Department of Justice. This Register is open to the public. But non-registration does not affect the validity or effectiveness of the *stichting*. The Act confers powers of supervision and of taking corrective action on the District Courts.

From an international estate planning point of view, one of the major advantages of using a *stichting* is that it is a legal institution well known to and understood by the Dutch legal system and the legal systems of the Dutch offshore territories, such as the Dutch Antilles.

The French fondation

The word *fondation* has more than one meaning to French lawyers. Strictly speaking it should refer only to a private non-profit organisation without members, recognised by the State, beneficial to the community and formed in accordance with the relevant legislation. But it is also used for associations of persons which, although non-profit making and of public benefit, are not officially recognised as *fondations* by the State, and even for some (unscrupulous) profit-making bodies. The word *fondation* can also be used itself to refer to a gift to an existing *fondation* or other non-profit body. In this sense it is not a separate legal entity, but merely a fund belonging to another body which must be used in the way stipulated. It is a *patrimoine affectée*.

To form a *fondation* in the strict sense is not common in France. Indeed a body, the *Fondation de France*, was set up some years ago specifically to assist and encourage in the creation of *fondations*. To be validly created, the statutes of a *fondation* must be accepted, and the body recognised as a non-profit organisation of public benefit, by the *Conseil d'Etat*. The initial gift to the capital of the *fondation* must be at least 1 million francs. Upon acceptable recognition a *décret* is issued by the *Conseil d'Etat,* and the *fondation* acquires legal personality distinct from its founder or directors. *Fondations* are subject to considerable administrative supervision by the State, which indeed may seek their liquidation if their position or their statutes are abused. Some of the administrative burden was reduced by a law of 1990, but it still remains significant. The minimum period of existence for a *fondation* is five years.

In its secondary sense, *fondation* refers to non-profit associations having members who nominate and supervise the board of directors. These can either be officially recognised as of public benefit, in which case their statutes must conform with certain official models, or not, in which case the creators and members are free to frame their statutes as they wish. The former, official, status confers certain additional privileges, such as the ability to accept gifts and legacies.

It will be seen that there is no scope, officially at least, to use the French *fondation* as an estate planning device in the manner of the Liechtenstein *Stiftung* or Dutch *stichting*. It is concerned with matters of public, rather than private, benefit.

Second Group

We now move on to the second category of continental trust-like institution, i.e., that where the founder or settlor continues to play a significant role. There are two main manifestations of this, the fiduciary contract and the establishment.

Fiduciary contract

As to the fiduciary contract, the critical point to note is that it is indeed a *contract*. The trust is not a contract - at least, not as conventionally understood in common law jurisdictions. But the fiduciary contract is just that, a contract which involves both settlor and fiduciary. In Roman law, it was called *fiducia cum amico*, which survived into Roman-Dutch law in Holland until as recently as 1st January 1992, when it was unaccountably abolished.[23] It still exists in Belgium. However, it appears not to have survived into modern French law at all, unlike the *fideicommissum*.

Treuhand

The *Treuhander* is the fiduciary agent who manages or looks after property which, vis-à-vis third parties, he appears to own, but which, vis-à-vis his principal, the *Treugeber*, belongs to that principal. This is regarded by Swiss law as part of the law of agency, and hence dealt with as part of the law of obligations.[24] It is also known to German law, though less well developed. In so far as this can be regarded as a trust-like device, it resembles a bare trust, or nomineeship, where the "settlor" is also the sole beneficiary. If the *Treuhander* is to hold the assets for the benefits of third parties, those third parties have no rights in the property.

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23 *Civil Code*, Book 3, Art 84, para 3.

24 *Code des Obligations*, Arts 394-406. Thus it is always revocable in Swiss law.

Fiducie

In 1983 the Luxembourg law re-introduced the concept of the *fiducie*.[25] This is a fiduciary contract under which the settlor, or *fiduciant*, agrees to transfer ownership to a trustee, the *fiduciaire*, to be held subject to the terms of the contract. But (and this is the innovation) the assets so transferred are not to form part of the *fiduciaire'* property in case of insolvency, and are not subject to seizure by the *fiduciaire'* creditors. The *fiduciaire* is expressed *not* to have power to represent the *fiduciant*, but (rather curiously) their relationship is otherwise subject to the rules of agency.

The main uses of the Luxembourg *fiducie* are commercial rather than familial: fiduciary asset management, fiduciary loans, fiduciary security, and so on. This is hardly surprising, given the simplicity of the *fiducie* compared with the trust: it is much more suitable for two-party relationships *fiduciant/fiduciaire*) or for simple three-party relationships (*fiduciant/fiduciaire*/beneficiary) than for multi-party relationships (settlor/trustee/beneficiaries/protector). But it is reinforced by the fact that, under the 1983 law, only a Luxembourg bank can be a *fiduciaire*. So the types of use to which they are put tend to be related to banking business in general, and Luxembourg banking business in particular. The fact that *banks* are the *fiduciaires* brings with it an important consequence: bank confidentiality means that the bank which holds assets as a *fiduciaire* is not allowed to reveal the existence of the *fiducie* to third parties.

There are no specific formalities involved in the creation of a *fiducie*. For example, there is no need to appear before a notary, unless of course the nature of the property being transferred requires this. Indeed, the 1983 law does not even require writing, though an oral *fiducie* would be very rare. There is no limit of time for which a *fiducie* can last, and it can be either revocable or irrevocable. There is also no requirement that any third party beneficiaries should be either ascertained or in existence at the time the *fiducie* is created.

But as a civil law concept, the *fiducie* will be subject to all the usual civil law limitations: the requirements of *ordre public* (public policy), the *réserves héréditaires* of civil law succession rules, the *action paulienne* to set aside gifts in fraud of creditors, and so on.

The proposed French fiducie

Ever since the Hague Convention of 1985, there has been pressure in France for the introduction into French domestic law of a trust-like institution. The main reasons for this were that:

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[25] *Règlement grand-ducal du 19 juillet 1983.*

(i) once France ratified the Convention it would have to recognise foreign legal institutions with no direct equivalent in France, causing difficulty at the fiscal and administrative levels;

(ii) following on from this, if there was no comparable *French* institution, French-based settlors might use trusts even more than they do already, secure in the knowledge that they would be recognised in France; this might be economically particularly significant in the case of commercial or business trusts.

But rather than simply attempt to import the trust, with its Anglo-Saxon conceptual basis, it was thought preferable to legislate for a wholly different institution, consistent with French civil law principles. (There may also have been the idea that a new institution might be able to compete with the trust at an international level. French lawyers are very proud of their law, and do not take kindly to the thought that other legal systems may have something to offer the international community which they do not.) In the event, that choice was to re-invent the old Roman law idea of the fiduciary contract, the *fiducia cum amico*, or, in French, the *fiducie*.

An *avant-projet* of the new law was produced for discussion in 1990. The French fiscal authorities took over a year to comment on it, and it was not until the end of February 1992 that a *projet de loi* was laid before the *Conseil des Ministres*. It was then hoped that time would be found in the legislative programme during 1992-93. But this did not happen, and the combination of (a) *cohabitation* between a left-wing President and a right-wing government and (b) the approaching Presidential election made it less likely to happen in succeeding years. Presumably now the new President has been installed such matters will be pushed forward anew.

In that spirit it is worth mentioning a few of the features of the *projet de loi*. First, it is notable that there is considerable provision to prevent the *fiducie* being used:

(i) to avoid tax;

(ii) to prejudice the rights of heirs;

(ii) to prejudice the rights of creditors;

(iv) to carry out transactions only permitted to banks;

(v) to avoid certain rules of company law.

By contrast, there is relatively little effort put into setting out basic rules of the operation of a *fiducie* in practice, and consequently huge scope for argument in the future. As a result, the *projet* has a rather lopsided aspect to an Anglo-Saxon lawyer. He will find in it things which it would not have occurred to him to look for, yet will not find many things which he does indeed seek.

For example, the provisions relating to

(i) prohibition on appointment as *fiduciaire*;

(ii) the duties of a *fiduciaire*;

(iii) the powers of a *fiduciaire*;

(iv) the appointment of a new *fiduciaire*;

(v) the termination of a *fiducie* and its consequences;

are all alarmingly short and vague by English standards. Yet by contrast there are detailed provisions, for example, on the obligation of the *fiduciaire* to account to his beneficiaries, and in particular on the *form* that these accounts must take. One cannot help thinking that these provisions have been driven more by the requirements of the French fiscal authorities, than by the draftsman's tender feelings towards beneficiaries.

Some basic rules *are* clear, however. The *fiducie* is first and foremost a contract, which can only be created in writing and, if gratuitous, before a notary. A *fiducie* can only be express, and never implied, and cannot last longer than 99 years. (On the other hand, and unlike a *fondation*, a *fiducie* has no minimum period of existence.) It is expressly provided that a settlor can be a beneficiary, as also (but in limited circumstances) can a *fiduciaire*.

Many professional advisers seeing all this may well shrug their shoulders and pass by. "We do not need to know this - if it is so user-unfriendly, we will use another institution, like the trust." Unfortunately, even if the *fiducie* is not used, those dealing with French clients or French property still need to know these rules. The *projet* makes clear that the terms of the law will apply to any assets or rights which form part of a *fiducie or a similar institution* (as provided for in the Hague Convention), subject only to certain rules of territoriality. This means that French assets held in a Jersey trust, for instance, in principle would be subject to the tax (and other) rules applicable to a *fiducie* making similar provision under French law. The consequences - especially fiscal - of this approach may be disastrous. Certainly it will not do anything to make France a more attractive source of investment.

The nominee

"Nominee" means different things to different people. Generally speaking, a nominee is - or appears to be - the owner of property for the absolute benefit of a single other person, and acts in accordance with the directions of that other person. A genuine nomineeship in this sense is simply one kind of trust, namely a "bare" trust for a beneficial owner absolutely entitled, where (usually) the trustee has agreed to act on the beneficiary's instructions. In general, a trustee need not do what his beneficiary tells him; he has an independent discretion, and can do what he thinks right,[26] leaving it to the beneficiary to put an end to the trust under the rule in *Saunders v Vautier*[27] if he does not like it. But a trustee can agree to take property on terms requiring him to follow the beneficiary's instructions - indeed, requiring the beneficiary to *give* instructions. This in essence is nomineeship, a contractual version of the bare trust. The nominee is automatically entitled to be indemnified against liabilities to third parties by the beneficiary.[28]

A genuine nomineeship must be distinguished from a sham, where a nominee is put forward as a "front". The nominee is not intended to be the legal owner of the property concerned, but merely lends his name to mask that of the real owner. In this case the "nominee" is really a kind of agent with an undisclosed principal.

The establishment

A more sophisticated arrangement of the second kind is the establishment, *établissement* in French, *Anstalt* in German. This is like a fiduciary contract or *fiducie* in the sense that the settlor/founder continues to play an important role in what happens, and may also be a beneficiary - perhaps *the* beneficiary. But the structure much more resembles a company than a trust, and unlike a trust - or a *fiducie* - it has separate legal personality. Although the establishment is known to more than one legal system, perhaps the best known example is the Liechtenstein *Anstalt*.

The Liechtenstein *Personen- und Gesellschaftrecht* of 1925 ("PGR") provides for the *Anstalt* in Arts 540-546. Three different kinds of *Anstalt* are envisaged:

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26 *Re Brockbank* [1948] Ch 206.

27 (1841) Cr & Ph 240.

28 *Hardoon v Bellilos* [1901] AC 118.

(i) the one-man *Anstalt*;

(ii) the trust-like *Anstalt*;

(iii) the company-like *Anstalt*.

The first is like a one-man company. The founder is the only beneficiary and controls everything that the *Anstalt* does. The second is where the founder gives control to a board of directors and the beneficiaries are other people. The third is where two or more founders create a structure to benefit themselves, retaining control in their hands. Of course, it is possible to design and form an *Anstalt* which falls between these different types. For example, the founder might remain the principal beneficiary during his life, and retain control of the *Anstalt* activities as well, but on his death cede control to a board of directors and appoint third party beneficiaries. Or he might appoint third party beneficiaries straightaway, but retain control.

Just as there is a wide variety in the ways in which an *Anstalt* may be designed, so too there are many *purposes* for which one may be set up. It is not restricted in its scope, but may be created to serve

(i) business functions;

(ii) family functions;

(iii) abstract purpose functions; or

(iv) some mixture of these.

The great advantage with an *Anstalt*, namely its flexibility, is also its great danger. Just as the trust has found difficulty in being accepted and understood in civil law jurisdictions, because its novelty and flexibility mean that in functional terms it stands for many different institutions in other legal systems, so the *Anstalt* has not been easily accepted in other jurisdictions, especially the common law systems. Is it to be treated as a trust, as a company, or as something else (and, if so, what)? Curiously, this difficulty has spread to other civil law systems too. Until about 15-20 years ago, the *Anstalt* was the most popular Liechtenstein private client structure. Nowadays it seems to be the *Stiftung* (foundation), which after all at least has clear equivalents in most other civil law legal systems.

Islamic law

Waqf

Finally, I should just mention that another great legal system, that of Islam, has an institution with some characteristics similar to the trust, namely *waqf*. Under this institution, a donor dedicates property to certain objects, so that the capital is inalienable, and the income or other product is used for the benefit of the specified objects. These latter must be pleasing to Allah, and may include charitable objects, or the benefit of the settlor's or another's children, or a mixture. If (or when) the private objects fail, charitable objects are pursued and, in effect, the *waqf* is perpetuitous from the outset.[29]

The administration of the *waqf* is placed in the hands of a *mutawali*, or manager, but he has no ownership of the assets. Indeed, there is a debate between various Islamic schools of thought as to whether *anyone* has ownership of the property of a *waqf*, or whether it is a separate legal person once established.[30]

Conclusion

The trust is without doubt the "offshore" structure *par excellence*. But it is too easy - and fallacious - to assume that other legal systems have nothing to offer in the same line. It is true that the continental offerings - with the possible exception of the Liechtenstein *Anstalt* - do not have the same flexibility, but most settlors/founders have a sufficient idea at the outset of what they wish to do. What is important is that a given legal system will be happiest in dealing with what it knows. From a commercial, and certainly from a tax, point of view, a settlor/founder is more likely to get clear, unambiguous legal advice if he employs a structure known to the system with which it will come most into contact. It is hoped that this short article will have given a little idea of what those alternative structures are.

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29 Though see *Abdul Fata v Russomoy Dhur Chowdhury* (1894) LR 22 IA 76, PC.

30 See generally Pearl, *A Textbook on Muslim Personal Law*, 2nd ed 1987, 9.2; and on the system of *waqf* in Mauritius, see the Waqf Act (1941).