

Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?

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Introduction

Most of the differences between the U.S. and Latin American legal systems are rooted in dissimilar cultural and societal approaches. One important area is that of equity. In fact, whereas in Latin America equity plays a relegated subsidiary role, in the United States equity permeates legal institutions — both in the criminal and civil arenas — in almost all areas, including evidence, remedies, precautionary measures, trials, juries, sentencing, and trusts. In fact, trust law is one of the most important fields where key differences between Anglo-American common law and Latin American civil law take place because of the subdued role of equity in one and its vitality in the other.

Due to its flexibility, the trust is considered one of the most useful legal tools for promoting business in the United States. In Latin America, in contrast, the trust (*fideicomiso*) is used only in limited circumstances in the commercial and financial realms and has been described as a rigid and outdated institution.

As a consequence, any attempts at merely transplanting the Anglo-American idea of trusts into Latin America would be likely doomed to fail. This argument does not deny the prospects for transforming the Latin American *fideicomiso* into a modern and effective legal tool. In fact, the need to improve the Latin American *fideicomiso* was outlined in a study commissioned in 1921 by the U.S. Congress, which concluded that one of the reasons for the inefficiency of Latin American banking systems was “the lack of the trust.”¹

A redesign of the Latin American *fideicomiso* into a more Anglo-American-type of business trust would help boost investment promoting growth and development in the region. The search for the modernization of the Latin American trust needs to avoid the extremes of introducing cosmetic changes alone or upsetting the very foundations of Latin American civil law systems. Nor should this undertaking meet defeatism based on the enormous task of updating an outdated institution.

In this context, this article reviews the essential aspects of trusts in both legal systems, identifies their key differences, highlights the benefits brought about by Anglo-American business trusts, studies the aspects of the Latin American *fideicomiso* that challenge the expansion of trade and business and, finally, advances general criteria and examples for further study of legal reforms in the region that lean towards mimicking the multifarious tool that the Anglo-American trust represents.

Part I identifies the main elements of the Latin American *fideicomiso* and the Anglo-American *Inter Vivos* trust. This section acknowledges the contractual nature of the former and the more flexible nature of the latter. A review of the origin and definition of the Anglo-American *inter vivos* trust is included to understanding its benefits. In explaining the advantages of this trust, part I focuses on the divided concept of ownership, the notion of the entrusting, the segregation of assets principle, tracing, and tax treatment.

¹ Maurizio Lupoi, *Trusts. A Comparative Study*. (CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW, 2000), at 269.

Part II seeks the points of convergence and divergence between the Anglo-American trust and the Latin American *fideicomiso*. This section stresses that the trust lies at the heart of the Anglo-American legal system because it is based upon thoughts, processes, cultural approaches, priorities, and conceptions concerning the organization of societal and individual life distinctive to Anglo-American societies. Latin American legal systems, in contrast, rest on a significantly different mode of legal thought and analysis, characterized by the formality of civil law. Ten specific areas of comparison are incorporated, including the powers of grantors, courts, the publicity requirement for trusts, and their termination.

Part III deals with the quest for equivalence between both trust versions, explores the comparisons that have been attempted in the past, and arrives at the conclusion that it is not possible to find an absolute simile to the Anglo-American business trust in Latin America. Despite this assertion, the article recognizes the value of striving to discover points of convergence, exemplified by governmentally-created trusts. Furthermore, this section specifies particular kinds of business and commercial trusts in common law and matches them, as applicable, with their Latin American counterparts. This section proposes that, though meritorious, the Latin American experiences with business and commercial trusts are limited in reach and scope, and need to be deepened to foster business and investments in the region.

Part IV looks at what lies ahead in furthering trust development in the Latin American region. It analyzes the attempts developed hitherto, especially in the form of the Hague Convention on the Law Applicable to Trusts and on their Recognition. It sets forth several trust alternatives available in Anglo-American law that are unknown in Latin America. It further lies out basic criteria for the reformulation of the Latin American *fideicomiso*.

The conclusion confirms the need to reformulate the Latin American *fideicomiso* and updating it for the increasing challenges that globalization has created in the region.

PART I. GENERAL ASPECTS OF THE LATIN AMERICAN AND THE ANGLO-AMERICAN INTER VIVOS TRUST

1. The Latin American Fideicomiso

1.1. In General

The Latin American trust is called *fideicomiso*. The Roman law institutions of the *fiducia* and *fideicommissum* have been identified as the remote predecessor of the *fideicomiso*. *Fiducia*² was understood as an agreement under which the transferee must return the full ownership of the property to the transferor.³ The Napoleonic Civil Code – which is an offspring of the French Revolution and the inspiration to most Latin American civil codes –⁴ abolished the *fiducia*, but maintained the *fideicommissum*,⁵ which became ultimately the predecessor of the Latin American *fideicomiso*.

Among the most unmerciful characterizations the Latin American *fideicomiso* has received from the Anglo-American world are that it is “a fossil, inelastic, inflexible institution with no scope of action, utterly useless for the varied and complex civil relations of modern life.”⁶ It has also been said that Latin America possesses “complicated trusts laws that [make it] difficult to fashion transactions.”⁷

On the other way around, civil lawyers generally voice their view that the common law trust is but a “jumble of ideas,”⁸ and wonder “[h]ow can the civilian effectively design that equivalent if there is uncertainty where the common law trust idea is to be found on the spectrum?”⁹

² Carly Howard, *Trust Funds in Common Law and Civil Law Systems: A Comparative Analysis*, 13 U. Miami Int'l & Comp. L. Rev. 343 (2006), at 8 (“The *fiducia* originally concerned the transfer of property to a creditor or manager by a formal act of sale, yet with an agreement that the creditor would reconvey the property upon payment of a debt.” Also noting that, “the primary difference between the common law trust and the *fiducia* is that a trust beneficiary has a legal right to property in the trust, while a *fiducia* beneficiary is, in essence, no more than a mere creditor. The manager of the *fiducia* property held complete legal and equitable title in the property. Another discrepancy is that a trust may be revocable if established properly as a revocable trust, while a *fiducia* may not be revoked. Still, many civil law countries [...] offer a contemporary variation of the *fiducia* as a trust substitute.”).

³ Donovan Waters QC, *The Future of the Trust from a Worldwide Perspective*, in THE INTERNATIONAL TRUST, (John Glasson, ed., 2002), at 619.

⁴ See generally M.C. Mirow, The Power of Codification in Latin America: Simón Bolívar and the Code Napoleon, 8 Tul. J. Int'l & Comp. L. 83, 1-29 (2000). See also M.C. Mirow, Borrowing Private Law in Latin America: Andres Bello's Use of the Code Napoleon in Drafting the Chilean Civil Code, 61 La. L. Rev. 291, 1-38 (2001).

⁵ Waters, *supra* note 3, at 619.

⁶ See Albert S. Golbert & Yenny Nun, *Chapter V: Trusts and Future Interests*, in LATIN AMERICAN LAWS AND INSTITUTIONS, (1982), at 90.

⁷ Georgette Chapman Poindexter, et al., *En Ruta Hacia el Desarrollo: The Emerging Secondary Market in Latin America*, 34 GEO. WASH. INT'L L. REV. 257, 4 (2002), at 10.

⁸ Waters, *supra* note 3, at 639.

⁹ *Id.*

Therefore, so far it has broadly been held on both sides of the aisle that there is no possible equivalent between the Anglo-American trust and the *fideicomiso*.¹⁰ Even the relevance of finding a common ground has been hotly disputed.¹¹ Whereas in common law countries the trust “for hundreds of years [...] has played a vital role in organizing transactions of both a personal and a commercial character,” in civil law countries “the private trust does not exist as a general form.”¹²

This inauspicious environment provides the context for an in depth analysis of the Latin American *fideicomiso*.

1.2. The Quintessential Latin American *Inter Vivos* Trust is Always Contractual

It is broadly believed in Latin American civil law that a contractual form provides more certainty.¹³ This explains the preference for a contractual trust instead of the unilateral approach to trust creation found in common law.¹⁴ Panama¹⁵ – a country that introduced trusts long before most other Latin American countries¹⁶ – defined the *fideicomiso* in 1941 as “an irrevocable agency whereby determined property is transferred to a person called the *fiduciario*, for this person to dispose of them according to the instructions of the *fideicomitente*, for the benefit of a third party, called *fideicomisario*.”¹⁷ This definition lies out the main elements of the *fideicomiso* commonly found in most Latin American jurisdictions. For example, Peru’s banking law of 1993 defines *fideicomiso* as

¹⁰ Lupoi, *supra* note 1, at 195-6 (“[T]o speak of a trustee as one would of a (civilian) fiduciary is a serious error.”).

¹¹ Henry Hansmann, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U.L. REV. 434, 2 (1998), at 10 (“Contract law in the civil law countries is also generous in permitting enforcement of a contract by a third party beneficiary, with the consequence that in those jurisdictions, too, the importation of trust law doctrine would add nothing significant to the law in this regard.”).

¹² *Id.*, at 1.

¹³ Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, at 37 (“An enforceable contract represents the most common substitute for trust. Contract law can compensate for a lack of trust because parties do not need to rely as heavily on trust that another party will keep her promise if a court will enforce the promise either by awarding damages or requiring court-monitored specific performance. When commercial players have access to information and legal sanctions in case of breach, ‘commercial transactions can succeed even in the presence of some distrust.’”).

¹⁴ Paul Matthews, *The New Trust: Obligations without Rights*, in TRENDS IN CONTEMPORARY TRUST LAW, 30 (A. J. Oakley, ed., 1996), at 1 (“Had the right [the beneficiary’s] remained purely personal, it might have developed into a law of obligations rather like the civil law of contract, i.e. voluntarily assumed obligations...”).

¹⁵ This country enjoys the privilege of being called the home to a trust scholar who has been called “the father of the Latin American legislation on trust.” See Roberto Goldschmidt, *The Trust in the Countries of Latin America*, 3 Inter-Am. L. Rev. 29, 31 (1961) or 3 Rev. Jur. U.I. 29 (1961), quoted in Kathryn Venturatos Lorio, *Louisiana Trusts: The Experience of a Civil Law Jurisdiction With the Trust*, 42 LA. L. REV. 1721 (1982), at 3, n. 38.

¹⁶ See R. J. Alfaro, *The Trust and the Civil Law with Special Reference to Panama*, in 33 J. Comp. L. (1951) III 25, quoted in Lupoi, *supra* note 1, n. 12, at 269.

¹⁷ Law 17 of 1941, published in the *Gaceta Oficial* on March 6, 1941, art. 1. (translation by author). See also the Regulations of the Law issued by Executive Decree 16, published on October 18, 1984, amended by Executive Decree 53 published on December 31, 1985.

a legal relationship through which a person called *fideicomitente*, transfers property to another person, called *fiduciario*, for the formation of a fiduciary patrimony, subject to the fiduciary ownership of the *fiduciario* and subject to the achieving of a specific purpose or purposes for the benefit of a third person or of the *fideicomitente* himself, called *fideicomisarios*.¹⁸

Thus typical *inter vivos* Latin American *fideicomisos* work as follows: the grantor creates the trust, primarily for the benefit of the *fiduciario* and then for the *fideicomisario* or *fideicomisarios*. The *fiduciario* holds title, possession and use of the trust's assets on his own right, both legal and equitable. The rights of third parties, namely, the *fideicomisario(s)*, do not limit the *fiduciario*. This means that the only limitation affecting the *fiduciario* is that he has to transfer the trust corpus to other *fideicomisario(s)* upon the occurrence of a condition¹⁹ and then "return the property when the purpose is fulfilled [the condition met], either to the original transferor or to a third party nominated by him."²⁰ Statutorily, the condition is deemed failed if it does not occur within certain period of time from the creation of the *fideicomiso*.²¹ The grantor may appoint a plurality of *fiduciarios* or *fideicomisarios*.²² But while the first *fideicomiso* is pending, the *fideicomisario* does not have any rights over the trust corpus: she will only receive what is left according to the use or disposition the *fiduciario* has made in compliance with the grantor's instructions. In other words, if the grantor authorized the *fiduciario* to execute acts of disposition over the property, the *fiduciario* will get "that what is left at the time of the transfer, if any."²³

At first sight, both the Latin American *fiduciario* and *fideicomisario* could be considered as a certain type of beneficiaries in Anglo-American legal jargon, as they enjoy full ownership and possessory rights over the trust *corpus*. Their key difference lies in that the *fiduciario* is under the obligation to transfer the assets to the *fideicomisario* once a condition occurs. Unlike the Anglo-American trustee, the *fiduciario* does not hold the property for another, namely, the beneficiary. In that sense, and more clearly, neither the *fiduciario*, nor the *fideicomisario* – who takes what is left after the *fiduciario*'s rights expire – are beneficiaries in Anglo-American terms.

Another important distinguishing characteristic of the *fideicomiso* is that – as a reaction against the Old Regime – the Napoleonic Civil Code eliminated the possibility of constituting two or more successive *fideicomisos*. The purpose of this prohibition – which was incorporated by most Latin American civil codes in the nineteenth century – was to avoid the perpetuation of property ownership within the family in violation of

¹⁸ The Regulation of the Trust and Fiduciary Service Companies of 1999 was approved by Resolution SBS No. 1010-99 of November 11, 1999, issued by the Superintendence of Banks and Insurance Companies, and published in *El Peruano* on November 13, 1999, art. 2. (translation by author).

¹⁹ Cód. Civ. art. 773 (Chile 2005) ("Fiduciary ownership is that which is subject to the burden of passing to another person in the event that a condition occurs.") (translation by author).

²⁰ Venturatos, *supra* note 16, at 2.

²¹ See Cód. Civ. art. 739 (Chile 2006).

²² *Id.* art. 742.

²³ *Id.* art. 760.

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succession rules. Therefore, the grantor cannot create a *fideicomiso* forcing the *fiduciario* to transfer the corpus to a *fideicomisario* providing that the latter, in turn, transfers the corpus to a second *fideicomisario* – or back to the *fiduciario* when a condition occurs. A violation of this prohibition renders the transfer from the first to the second *fideicomisario* or back to the grantor void. In these hypotheses, trust assets remain the property of the noncompliant transferor.²⁴ The civil law *fiduciario* holds trust property “for his own benefit,”²⁵ and the *fideicomisario* (or *fideicomisarios*) have “no vested rights but merely an untransferable expectancy, a contingent interest.”²⁶ In definitive, the central concept of holding the trust assets for the benefit of another, as it happens with the beneficiary in the Anglo-American express *inter vivos* trust, is absent in the Latin American *fideicomiso*.²⁷

2. The Anglo-American *Inter Vivos* Trust

American families have used trusts as a device to achieve many different objectives: sometimes as a tool for the preservation of family assets, and chiefly for the protection of mentally and physically incompetent persons.²⁸ In the business realm, trusts have been commonly used to raise capital for commercial transactions, to channel investment for financial ventures, and for other related uses.²⁹

The broad recognition of trusts as a multifarious and flexible tool for the organization and distribution of wealth has run parallel to a profound distrust for this device in the eyes of some Anglo-American scholars. Some have expressed doubts that the trust could ever achieve a completely legitimate role in American legal culture.³⁰ Nevertheless, whatever the philosophical approach, experience shows that trusts are “one of the most flexible Anglo-American legal devices in that it can play a part in almost any sphere of life.”³¹

There is not a single or a unanimously accepted definition for the Anglo-American trust. Undoubtedly, the notion of trust finds its etymologic origin in the

²⁴ *Id.*, art. 739.

²⁵ Golbert, *supra* note 6, at 88.

²⁶ *Id.*.

²⁷ *Id.*

²⁸ See Paul Finn, *A Comment*, in *TRENDS IN CONTEMPORARY TRUST LAW*, 212 (A. J. Oakley, ed., 1996) (“In equity the predominant thrust has been to prevent the exploitation or manipulation of a person in a position of vulnerability.”).

²⁹ See Ignacio Arroyo, *Trust and the Civil Law*, 42 *LA. L. REV.* 1709, 3 (1982) (Citing among the multiple uses of the trust “the protection and care of incompetents, to the distribution of an inheritance or the preservation of a family estate, to the giving of security for the transfer of immovable property, or the issuing of bonds; to the structure of profit-sharing plans for workers, not to mention the many commercial and financial uses such as investment trusts, guaranteed trusts and life insurance, voting trusts, trusts for underwriting purposes, and, finally, the international trusteeship.”); see also Waters, *supra* note 3, at 606 (Other trust uses include “[I]nvestment, security provision, lending, and property title holding.”).

³⁰ *Id.*, at 3 (“[A]ccording to historical investigations, it can be proved today, without any risk of error, that the trust was born of an illegal purpose: the transfer of lands to bogus intermediaries, avoiding in that way the payment of taxes and the enforcement of the laws governing mortmain.”).

³¹ Frans Sonneveldt et al., *The Trust – An Introduction*, in *THE TRUST. BRIDGE OR ABYSS BETWEEN COMMON AND CIVIL LAW JURISDICTIONS?* 3 (Frans Sonneveldt et al. ed., 1992), at 7.

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concept of confidence,³² which most communities consider a fundamental element of societal life — and this idea deeply permeates the Anglo-American trust. Only a few experts have attempted to provide a unique stand-alone definition of trusts.³³

2.1. The Search for a Definition of the Anglo-American Trust

Much debate has taken place as to what lies at the core of the Anglo-American trust. Some commentators have stated that it is to be found in the “duty of confidence imposed upon a trustee in respect of particular property and positively enforceable in a Court of Equity by a person.”³⁴ For others, the core of the trust is found in the “beneficiaries’ rights to enforce the trust and make the trustees account for their conduct with the correlative duties of the trustees to the beneficiaries.”³⁵ The determination of the main elements of the trust provides the elements for a workable definition. Among the many in existence, one of the most traditional and accepted definitions³⁶ conceptualizes a trust as

an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.³⁷

This definition is valid only for *inter vivos* contractual trusts, which are but a small portion of the trusts available in today’s Anglo-American legal world. Among its shortcomings, it does not recognize that trusts may be created irrespective of and even against the settlor’s desires and that beneficiaries might not necessarily be “born” persons but also unborn fetuses³⁸ or even buildings or pets. Moreover, it overlooks the fact that trusts may also benefit causes, ideas, or movements — as in the case of trusts created for the promotion of literacy or religion. Thus arises the difficulty of finding a

³² Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 535 (1995), *quoted in* Leslie, *supra* note 13, at 8.

³³ Emmanuel Gaillard, et al., *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*, 35 AM. J. COMP. LAW 307 (1987). (“[T]rusts experts often have great aversion to giving a precise definition of the ‘trust.’”).

³⁴ For a review of the duty of loyalty, see John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?* 114 YALE L.J. 929 (2005).

³⁵ David Hayton, *The Irreducible Core Content of Trusteeship*, in TRENDS IN CONTEMPORARY TRUST LAW, 47, 148 (A. J. Oakley, ed., 1996) (“[i]t is the beneficiaries’ right to enforce the trust that is at the core of the trust.”) (David Hayton, ed., at 148).

³⁶ Sir Arthur Underhill’s, LAW OF TRUSTS AND TRUSTEES, 11th ed., at 3, *quoted in* Martyn Frost, *Overview of Trusts in England and Wales*, in TRUSTS IN PRIME JURISDICTIONS, 13 (Alon Kaplan, ed., 2000).

³⁷ *Id.* at 13. See also Lupoi, *supra* note 1, at 95 et seq. See also Underhill & Hayton, LAW OF TRUSTS AND TRUSTEES (Butterworths, 15th ed., 1995), *quoted in* Waters, *supra* note 3, at 604.

³⁸ Exceptionally in Latin America, Panama’s Law 17 of 1941 contains a groundbreaking provision allowing the naming of the unborn as beneficiary.

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comprehensive and broadly accepted definition of the Anglo-American trust, even among Anglo-American attorneys who are most familiar with this institution.³⁹

2.2. A Look at the Origin of the Trust to Understanding its Current Status

The trust is as much of an institution in English culture as is soccer and tea parties. In fact, the influence of the British trust was felt everywhere throughout the former British Empire.⁴⁰ The trust's origins can be traced back to the middle Ages and are intimately connected with the religious and historical events of that age. As early as the thirteen-century Catholic monks used trusts for the implementation of their vows of poverty.⁴¹ Trusts served in those cases as a basic means of property holding in the name of a titleholder—usually a community—for the benefit of another, in this case the monks, who were not allowed to own anything besides minimal personal items.⁴² Trusts also served as a means of landholding for Crusaders while they went on their missions.⁴³

During later times, trusts developed in England as a useful tool for devising real property and for the organization and distribution of familial wealth—both *inter vivos* and *causa mortis*—in accordance with the succession priorities of the age, which mainly were primogeniture laws.⁴⁴ With the growth of commerce and the rise of a wealthy merchant class in England, utilization of trusts greatly increased until late in the nineteenth century.⁴⁵ At the turn of the twentieth century, the use of trusts multiplied

³⁹ The trust has been extolled as the ‘most distinctive achievement of English lawyers.’” F.W. Maitland, *Equity also the Forms of Action at Common Law* 23 (A.H. Chaytor & W.J. Whittaker eds., 1984), quoted in Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91, 6 (2000), at 4.

⁴⁰ See Waters *supra* note 3, at 625 (“Wherever the British went, the trust went with them.”).

⁴¹ See Gaillard *supra* note 33, at 315 (“The history of the trust, from its very beginning was a device used by the Franciscan monks to enable them to observe the letter of their vows of poverty.”); see also Lupoi, *supra* note 1, at 185 “[A]s we know, the friars could not own anything, and, according to the strictest interpretation, could not own any right, on pain of violating their vow to poverty.”).

⁴² See Sonneveldt et al., *supra* note 31, at 3. (“It all began with the Franciscan friars who came to England in the second quarter of the thirteen century. They were bound by their oath of poverty not to possess any wealth. Still they needed land to live and work on. A solution was readily found. Lands were conveyed to the borough community *ad opus fratrum*, to the use of the friars.”)

⁴³ See Matthews, *supra* note 14. (“Trusts came into existence because lawyers were asked to create structures to serve particular purposes: holding land whilst the owner went off to the Crusades, devising land when there was no power of testation, avoiding feudal incidents of tenure.”).

⁴⁴ Henry Christensen et al., *Foreign Trusts and Alternative Vehicles*, American Law Institute – American Bar Association Continuing Legal Education, SK024 ALI-ABA 115, 1 (2004). (“At the beginning, then, the trusts were used for dividing estates in real estate, and facilitating the donor’s testamentary plans in the face of the laws of primogeniture and other restrictions imposed by the Crown on transfers of land, which constituted most of the wealth of medieval society. John Langbein suggests that well into the 19th Century, trusts by and large were still used in England as instrument of conveyancing and that only in the last 150 years do we find developing the widespread use of trusts to manage family fortunes consisting of assets other than land.”)

⁴⁵ See Waters *supra* note 3, at 600 (“[A]n unprecedented growth of mercantile wealth in the Victorian period and of a prosperous urban middle class had also occurred, and the successful merchants’ trusts reflected much of the rural landed families’ settlements.”). During this period, trusts were used “for the holding and disposition of individual wealth within the family, both real estate and securities, cash, jewelry and art, furniture and other assets of value.” *Id.* at 605.

exponentially in the corporate arena and came to include “trusts of corporate supplied assets to secure the company’s debenture holders, public subscription unit investment trusts [...] and the management of urban businesses by trustees following the death of the unincorporated successful entrepreneur.”⁴⁶ By the last quarter of the twentieth century, a massive body of case law on trusts already existed in England.⁴⁷

The debut of trusts in American law can be traced to the use of equity by English courts.⁴⁸ There is record of the use of trusts in the original American colonies. For example, in the seventeenth century, a trust was used to avoid unwanted professional liability consequences and, in another situation, to provide for the needs of a spouse and children.⁴⁹ Trusts became popular in the United States only after World War II.⁵⁰

In today’s American society, trusts have seen their uses expanded to almost every aspect of the economy, in both private and public realms. In the private sector, trusts “are used as estate planning devices to minimize estate taxes, as perpetuators of dynastic wealth, and as a way to preserve assets against the improvidence of a beneficiary and his creditors.”⁵¹ By far the most important role of trusts in the United States is witnessed in the field of capital markets.⁵² This widespread use is due primarily to the tax advantages that trusts provide for settlors and beneficiaries. The trust device also grants beneficiaries immunity against their creditors and the possibility of an alternative management by professional trustees.⁵³ In the public arena, on the other hand, trusts have found a unique

⁴⁶ *Id.*; see also George L. Gretton, *Trusts without Equity*, in *THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY*, Vol. 49, 378 (2000).

⁴⁷ Waters, *supra* note 3, at 600 (“Only in the late 1960s and the 1970s did a changed world of equity and trust begin to emerge, and only in part did this slow revival of interest in equity come to be reflected in the traditional case-law of trusts.”).

⁴⁸ Edward C. Halbach, *The Uses and Purposes of Trusts in the United States*, in *MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW*, 124 (David Hayton, ed., 1999) (“The origin of American trust law can be traced to practices involving what was called a ‘use’ in feudal England, and then to more modern law that evolved in the English courts of equity (or ‘chancery’).”).

⁴⁹ See Rosenberg, *supra* note 39, at 6. (“A physician in Maryland created a trust for his wife and children to avoid liability for potential damages in a lawsuit. In a less formal arrangement, a woman in Massachusetts entered into a verbal trust-like arrangement with her future husband to provide for her children and prevent her husband from controlling her property.”).

⁵⁰ Roger W. Andersen, *Understanding Trusts and Estates* (2003), at 81, *quoted in* Howard, *supra* note 2, n. 42.

⁵¹ Rosenberg, *supra* note 39, at 7.

⁵² *Id.*, at 7 (Currently, “[t]he largest growth of the trust—in America—has been in the area of commercial trusts [which] constitute a significant portion of personal and national wealth.”); see also Hansmann, *supra* note 11, at 2. (“[A]sset securitization trusts are now the issuers of a large fraction of all outstanding American debt securities—more than \$2 trillion worth.”). Such is the case mutual funds and pension funds, which currently hold “roughly forty percent of all United States equity securities and thirty percent of corporate and foreign bonds.”)

⁵³ Hansmann, *supra* note 11, at 18. (“Immunity from the creditors of the fund’s manager is also a critical reason for use of the trust form for mutual funds. If a fund’s manager were simply the agent of the fund’s investors, the fund’s portfolio would always be at risk of the fund manager’s insolvency—a risk that the investors would have great difficulty monitoring or controlling. For this reason, mutual funds that are not formed as trusts are typically formed as business corporations.” *Id.*, at 19 (“For this purpose, an essential feature of the trust is that it is ‘bankruptcy remote’.”).

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role, especially in the form of charitable trusts, which have been considered a “positive force in American culture.”⁵⁴

2.3. Essential Elements

The original Anglo-American trust took the form of the express, contractual *inter vivos* trust. Over the centuries, the many benefits provided by this legal institution gave way to other forms of trusts, some of which have retained little resemblance to the original trust form. Thus, it becomes necessary to provide an examination of the principal elements of the express *inter vivos* Anglo-American trust.

2.3.1. The Divided Concept of Ownership

Much debate has taken place as to what are the essential elements of a trust. In common law, the voluntary expression of the settlor’s will – essential in all contracts – is definitely not a fundamental element when it comes to the creation of a trust. In fact, for centuries and based on equitable principles, Anglo-American courts have imposed trusts upon individuals. Not even the trustee’s express acceptance is a requirement for the establishment of an Anglo-American trust. Thus, it can never be said that a contract lies at the essence of the Anglo-American trust.⁵⁵ Nevertheless, trusts are on many occasions born as contractual institutions, but in the case of a so-called “contractual” trust, the key elements required for its existence – the settlor or grantor, a trustee, and a beneficiary – do not always converge at the moment of the trust’s creation. Even if these elements are present, they do not always exist in singular numbers. Moreover, these three categories can and are often intertwined and mixed: namely, the same person can simultaneously be the settlor, the trustee, and the beneficiary of a trust. Alternatively, a person can simultaneously be both the trustee and the beneficiary of a trust. Trusts in which the beneficiary or beneficiaries are not specifically determined at the creation of a trust can still subsist and be valid.

2.3.2. The Trustee

In the view of many trust law scholars, the institution of the trustee lies at the center of the *inter vivos* Anglo-American trust.⁵⁶ Even when the settlor and the beneficiaries are not present, if there is a trustee, a trust may still exist. The rules generally applicable to common law trustees are: (a) a plurality of trustees is commonly permitted;⁵⁷ (b) there are some limitations on the performance of trust obligations by the trustee;⁵⁸ (c) there are not many restrictions concerning who can be a trustee, as both

⁵⁴ *Id.* at 7.

⁵⁵ *Common Law Trusts in Civil Law Courts*, 67 Harv. L. Rev. 1030 (1954), at 2 (“... at common law a trust need not be founded upon a contract.”).

⁵⁶ Lupoi, *supra* note 1, at 179 (“The trustee is the only essential person in a trust.”)

⁵⁷ Underhill, *supra* note 36, at 3. *Id.*, at 16 (“[T]here is in general no limit to the number of trustees for a trust.”).

⁵⁸ English law even allows for the appointment of a protector. A protector is defined as someone whose consent is necessary before the trustee can take any actions, or who has veto power over the trustee’s decisions, or who has the power to change the law governing the trust, or to even remove the trustee. David

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natural and juridical persons may act as such;⁵⁹ (d) the trustee's role is not generally delegable unless otherwise expressly provided in the trust instrument;⁶⁰ (e) strict liability is usually the rule when it comes to the trustee's statutory liability;⁶¹ (f) exoneration or indemnification clauses favoring trustees for negligent acts or omissions are generally considered valid "except in cases of the trustee's own fraud."⁶²

2.3.3. The entrusting

Together with the existence of a trustee, the most important element in a trust is the entrusting.⁶³ The entrusting consists of the vesting of a right or interest in the trustee and the total dispossession of the grantor, who becomes the former owner of the trust's assets.⁶⁴ This idea also is present in Latin America. For example, the Argentinean *fideicomiso* builds upon the idea of entrusting.⁶⁵ The same can be said of the Mexican trust version, which is defined as the entrusting of an asset to the trustee who holds it for the beneficiary's profit.⁶⁶

2.3.4. The segregation of assets principle

This rule prohibits the commingling of the trust's assets with the trustee's personal assets. The trustee has legal title and not equitable interests over the trust corpus, which resides in the beneficiary's. The trustee is forbidden from disposing of trust assets

Hayton, *Exploiting the Inherent Flexibility of Trusts*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW, 321 (David Hayton, ed., 1999).

⁵⁹ Some restrictions may apply based on residence or citizenship requirements, but these are isolated cases in the Anglo-American world. See Frost, *supra* note 36, at 16 (Noting that in England, for example, "[T]here is no bar to a non-resident acting as a trustee.").

⁶⁰ See Lupoi, *supra* note 1, at 228 ("The obligations must be discharged personally; the delegation of a trustee powers is generally not accepted.").

⁶¹ *Id.*, at 177 ("[T]he Statute of Limitations *never* operates in favour of a trustee when he has acted fraudulently or has appropriated a trust asset."). *Id.* at 178 (If there are two or more trustees, "their responsibility to the beneficiaries is joint and several," and their defenses are extremely scant).

⁶² Whether the settlor should be allowed to anticipatorily waive a trustee's negligence at the moment of the trust's creation is much debated, but there seems to be a consensus that a limitation should exist and that this limitation is the trustee's fraud or extreme carelessness. Frost, *supra* note 36, at 22. See also Hayton, *supra* note 35, at 59. (noting that, "[T]here seems no reason in principle why a settlor should not have freedom to exempt his trustees from liability from losses flowing from negligence, covering ordinary and gross negligence, but not extending to losses flowing from recklessness.").

⁶³ See Lupoi, *supra* note 1, at 197 ("[W]ithout entrusting there is no trust.").

⁶⁴ *Id.*, at 196.

⁶⁵ Jorge R. Hayzus, FIDEICOMISO, (Ed. Astrea, Argentina, 2004), at 44, quoting art. 1 of Law 24,441 ("[A] trust shall exist when a person [settlor] conveys the fiduciary ownership of particular assets to another [trustee] who commits to act as owner for the benefit of whomever is designated in the contract [beneficiary] and to transmit the property upon the expiration of a given term or the fulfillment of a condition, to the settlor, to the beneficiary or to the residual beneficiary.") (translation by Hayzus).

⁶⁶ Francisco Corrales, *The Real Property Trust in Mexico*, in NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE, 3 (2000), at 1 (According to Mexican law, "a trust is a mechanism through which the Maker transfers ownership over property or rights over to a Trustee, who pursuant to instructions from the Maker, administers the property for the Beneficiary until the fulfillment of a stated objective, by agreement or by law.").

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as though they were his personal property. The trustee has only legal and equitable ownership rights over his personal assets, not over the trust's assets

The primary purpose of the segregation or separation of assets principle is the protection of the trust corpus from third parties, especially creditors of both the trustee and the beneficiary. Trust assets remain isolated even after the trustee's death.⁶⁷

Similar rules occur in Latin America. For instance, the segregation of trust assets also is a principle of Uruguayan trust law.⁶⁸

2.3.5. Tracing

This is a direct consequence of the violation of the segregation principle. In fact, it operates when “the trustee has mixed trust assets with personal assets and it therefore becomes necessary to return to the appropriate condition of separation.”⁶⁹ The trustee breaches his duties when he transfers the assets to himself or to a third party who knows about the conflict of interest. Sometimes the third party or the trustee himself may have used the profits from the transfer to make investments or to purchase other assets or values. Tracing thus serves as a procedural equitable tool aimed at determining the whereabouts of the proceeds obtained by the transfer of property acquired in violation of the rights of third parties.⁷⁰ After the proceedings from the unlawful transfer have been identified, the beneficiary can go after and recover the money or values that the trustee has acquired from the commingling of his personal assets and the trust corpus.⁷¹

2.4. Characteristics and Benefits of the Trust

The flexibility in the administration of Anglo-American trusts is a key reason for their popularity in the Anglo-American world. Other features of the trust illustrate this point:

2.4.1. The trust is not a corporate entity

Trusts do not have a corporate structure or issue shares or other securities or distribute dividends. Occasionally, they may perform some of these functions depending on the type of trust and the jurisdiction involved, but that function does not transform the

⁶⁷ As a consequence, the assets do not become a part of the trustee's estate. *See* COD. CIV. art. 1261 (Quebec 2005). (“The fiduciary patrimony [...] constitutes an autonomous and distinctive patrimony of affectation.”) (translation by author), *quoted in* Lupoi, *supra* note 1, at 308. It would be extremely difficult for the pursuance of business and legal acts in general to imagine the existence of trusts without the segregation rule. In that hypothetical situation, the trustee “would need to insert explicit language in each of her contracts insulating her personal assets from creditors' claims—a costly burden that would presumably be impractical in many circumstances.” Hansmann, *supra* note 11, at 14.

⁶⁸ Law 17,703 of 2003, published in the *Diario Oficial* of Uruguay on November 4, 2003, art. 7, paragraph 3.

⁶⁹ Hansmann, *supra* note 11, at 60.

⁷⁰ *Id.*, at 59.

⁷¹ *Id.*, at 60.

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trust into a corporation. One of the very benefits stemming from their nature is that trusts can be “created and managed less formally and less expensively than companies.”⁷² Therefore, the fact that trusts are a separate legal entity does not transform them in a corporation.

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2.4.2. The trust is not an agency

Unlike an agency – where the agent acts on behalf of and under the directives of the principal, and all of the acts legitimately carried out by the agent are acts of the principal – in the trust, the trustee – who is in charge of administering the assets – is neither the agent of the trustor, the trust, or the beneficiary. Put simply, the trustee is “his own man.” The reason is that, once created, the grantor relinquishes all of his rights over the corpus and retains no rights, except the right to revoke the trust in revocable trusts, over the trust. Moreover, the grantor does not even have the power to terminate the trustee, and it is ultimately up to the courts to enforce the trust’s terms.⁷³

2.4.3. The powers of courts with respect to trusts

In general, Anglo-American courts have multiple powers with respect to trusts: they may vary their terms, appoint and remove trustees, change the trustees’ investment powers, generically interpret and enforce the trust’s terms, decide whether there has been a breach of the trust, and award damages.⁷⁴

2.4.4. Tax benefits

Trusts have long been used as devices for tax avoidance.⁷⁵ By transferring part of his assets to a trust, the grantor decreases the amount of his taxable income, generating a lower tax base. An extreme case of trust utilization is the “bare trust,” where “the trustee is not faced with a group of successive beneficiaries, or when the trustee is not called upon to carry out any activity other than maintaining ownership of the asset or performing merely administrative tasks.”⁷⁶ Bare trusts are usually created in a foreign jurisdiction and protected by double-taxation treaties.⁷⁷ In the words of an expert, these trusts become something “little more than a shell [...] that is, the instrument does not contain the whole of the trust.”⁷⁸ This flexibility is essential for tax purposes, so that trustees may transfer trusts’ assets to new trusts or sub-trusts or to other existing trusts,⁷⁹ by means of the so-called “pour over trust.”⁸⁰

⁷² David Hayton, *The Uses of Trusts in the Commercial Context*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW, 158 (David Hayton, ed., 1999), at 160.

⁷³ *Id.*, at 151.

⁷⁴ Frost, *supra* note 36, at 20.

⁷⁵ Miguel Checa, *EL TRUST ANGLOAMERICANO EN EL DERECHO ESPAÑOL*, 29 (McGraw Hill, 1998), at 156.

⁷⁶ *Id.* at 157.

⁷⁷ Waters, *supra* note 3, at 612.

⁷⁸ *Id.*, at 609.

⁷⁹ *Id.* at 612.

⁸⁰ Edward C. Halbach, *The Restatement Third of Trusts: A Look Ahead*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW, 215 (David Hayton, ed., 1999), at 211. (Pour over trusts “involve

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In this sense, the Anglo-American trust can be used for legitimate or unlawful purposes, such as tax evasion or fraud.⁸¹ As such, it behaves as a double-edged sword. This potential for good or evil fully permeates the regulation of Anglo-American trusts, especially when it comes to tax issues and the protection of third parties.

2.5. Modalities

Trusts generally adopt two variants that testify to their flexibility: discretionary and nondiscretionary or revocable and irrevocable.

2.5.1. Discretionary and Nondiscretionary Trusts

A discretionary trust allows the trustee to “decide which member or members of a class of beneficiaries should be entitled to the trust property.”⁸² The trustee’s power can extend to deciding when the trust corpus should be distributed to the beneficiary and the amount or proportion of the distributions, when there is a plurality of beneficiaries. When the trust instrument⁸³ empowers the trustee to make decisions related to the trust mainly concerning the distribution of trust income or capital, the beneficiaries generally may not challenge the trustee’s discretion. Some exceptions apply depending on the jurisdiction. One example is the case of the beneficiaries of a closed class who, pursuant to their equitable rights, may ask a court to declare an early termination of the trust in some circumstances. Another exception is the case of fraud by the trustee in the administration of the trust.⁸⁴

attempted dispositions by settlers to add other properties at the time of death to the assets already held in their *inter vivos* trusts. These additions are usually made by will.”).

⁸¹ See Gaillard *supra* note 33, at 315 (“[T]he trust, depending on its function and purpose in any particular case, can either be a marvelous instrument in the evolution of law or a dangerous means of evasion or even fraud.”).

⁸² J.G. Riddall, *The Law of Trusts*, 205 (London, 1987), *quoted in* Sonneveldt, *supra* note 31, at 11.

⁸³ The trust instrument “can be whatever the settlor and the trustee agree as worthwhile for producing the benefits intended by the settlor.” Hayton, *supra* note 72, at 158. Thus, it can take the form of a stand-alone document, or it may be a provision of a larger instrument, or it may consist of two or more writings. In general, the key elements to determine the validity of a trust are the finding of the true and explicit intent of the trustor to create a trust, and the compliance with the required local formalities for the execution of the trust instrument. No differences exist with the Latin American *inter vivos fideicomiso* in this aspect. More formalities might be required, but no difference in substance exists.

⁸⁴ Matthews, *supra* note 14, at 19.

In nondiscretionary trusts, on the other hand, provisions established by the settlor in the trust instrument bind the trustee. Unlike discretionary trusts, which are said to provide substantive rights to the beneficiaries, nondiscretionary trusts confer only “procedural equitable rights” to the beneficiaries.⁸⁵

2.5.2. Revocable and Irrevocable Trusts

The grantor can set the trust as either a revocable or irrevocable trust. Tax considerations are critical when making this decision. By means of irrevocable *inter vivos* trusts, the grantor designates assets that are transferred as gifts, “primarily for tax and asset protection advantages.”⁸⁶ Experience shows that irrevocable trusts give rise to many controversial tax issues, such as “the application of registration taxes, transfer taxes, mortgages taxes, property taxes and income taxes, calculations of capital gains and losses.”⁸⁷

Revocable *inter vivos* or “living” trusts, instead, are those “where the assets are managed by the settlor who is usually the beneficiary thus receiving income or principal during his lifetime, and are disposed of at the settlor’s death according to her disposition.”⁸⁸ Due to the inherent risk of tax evasion posited by revocable *inter vivos* trusts, there are many restrictions placed on them so they do not become “a means of circumventing the legal system.”⁸⁹ These trusts “are treated for all tax purposes as if the trust property still belongs to the settlor, and thus do not offer tax advantages to the settlor during her life or to her estate at death.”⁹⁰

PART II. COMPARISON BETWEEN THE ANGLO-AMERICAN AND THE LATIN AMERICAN *INTER VIVOS* TRUST

1. In General

The institution of the Anglo-American trust finds no exact and – according to some authors — not even a remote equivalent in civil law systems.⁹¹ Important attempts at finding such a match have existed. For example, as early as 1936, the Supreme Court of Switzerland, a civil law country, decided a case where a party sought recognition of a common law trust in that jurisdiction. The Court undertook a comparison of “trusts” with

⁸⁵ Lupoi, *supra* note 1, at 190-1.

⁸⁶ G. Warren Whitaker, *Revocable Trusts: Fact and Fiction*, in NEW YORK STATE BAR ASSOCIATION JOURNAL, vol. 77 number 6, 44 (2005).

⁸⁷ Ferdinando Albisinni et al., *Chapter 13: Italy*, in THE INTERNATIONAL TRUST, (John Glasson, ed., 2002), at 592.

⁸⁸ See Halbach, *supra* note 48, at 129.

⁸⁹ Whitaker, *supra* note 86, at 45.

⁹⁰ Halbach, *supra* note 48, at 139.

⁹¹ In spite of suggestions to the contrary the Argentinean *fideicomiso* can hardly be equated to the Anglo-American *inter vivos* trust. See Hayzus, *supra* note 65, at 29 (“The Republic of Argentina is currently characterized as a country that practices and recognized the *fideicomiso* (a trust-law country).”) (translation by author).

the civil law institutions of “contract, mandate, usufruct, *fiducie*, a donation *inter vivos* or a donation *mortis causa*.”⁹² The court evidenced its frustration at not finding an exact civil law equivalent and “denied the existence of a trust and ruled that the underlying legal concept should be explained as a ‘contract *sui generis*,’”⁹³ that is an institution of special, undefined nature.

On the other hand, civil law experts have regarded the Anglo-American trust as “functionally unnecessary in light of the many existing civilian mechanisms which may be used to accomplish the same ultimate results,”⁹⁴ and highlight that “the trust concept is hard to grasp,”⁹⁵ because “in civil jurisdictions there is no concept comparable to the trust.”⁹⁶ In effect, certain transfers to a beneficiary, which in the Anglo-American legal world constitute trusts, have been equated to the “Romano-Canonical *usus*.”⁹⁷ There is even dispute as to where the trust (or *fideicomiso*) originated. As previously stated, some civil law jurists have claimed paternity of civil law trusts or *fideicomisos* in Roman law, tracing its origins to the Roman *fideicommissum*, the Spanish *comisiones de confianza*, or the French *confiance* or *fiducie*.⁹⁸ The main argument used to justify their ancestry is that the French Civil Code of 1804 (Code Napoleon) – upon which Andrés Bello’s Civil Code took close inspiration⁹⁹ – defines *fiducie*, a term from which *fideicomiso* derives as “a contract between the ‘constituant’, i.e. the settlor, and the ‘fiduciaire’, i.e. the trustee.”¹⁰⁰ But this notion is utterly insufficient to fully equate the *fideicomiso* to the *fiducie*.

The idea of incorporating a civil law version of the Anglo-American trust has met reactions ranging from initial reluctance¹⁰¹ to outright opposition.¹⁰² It is broadly thought in civil law circles that a full recognition of the Anglo-American trust would mean nothing less than an overhaul of the domestic legal system, because the trust, “like property dispositions in general, does not exist in a vacuum but is closely tied to other legal relationships, such as marriage, and family law, contract, and succession.”¹⁰³

⁹² Harrie L. van Mens, *The Trust and Swiss Tax Law*, in THE TRUST. BRIDGE OR ABYSS BETWEEN COMMON AND CIVIL LAW JURISDICTIONS? 47-48 (Frans Sonneveldt et al. ed., 1992).

⁹³ Aktiebolaget vs. Banque des Règlements internationaux (1936), *quoted in* Van Mens, Id., at 47-48.

⁹⁴ Venturatos, *supra* note 16, at 2.

⁹⁵ Sonneveldt, *supra* note 31, at 1.

⁹⁶ *Id.* at 1.

⁹⁷ Lupoi, *supra* note 1, at 185.

⁹⁸ Christensen, *supra* note 44, at 10.

⁹⁹ *See supra* note 4.

¹⁰⁰ Ineke A. Koele, *France: A Law Proposal Including ‘La Fiducie.’*, in THE TRUST. BRIDGE OR ABYSS BETWEEN COMMON AND CIVIL LAW JURISDICTIONS? 68 (Frans Sonneveldt et al. ed., 1992).

¹⁰¹ Jairo Mayda, “Trusts” and “Living Law” in Europe, 103 U. PA. L. REV. 1041, 5 (1955), at 1 (“[W]e deem it dangerous to incorporate [...] in our law an exotic institution like the Anglo-American trust.” “We are not faced with a minor incongruity between civil and common law, but with a basic contrariety as to their legal approach.”).

¹⁰² *See* Waters, *supra* note 3, at 629 (“[S]ince civil law jurisdictions do not need a trust, and recognition of the common law trust in their conflict-of-law rules has no particular attraction for most civil law jurisdictions, there is no point in their modifying this analysis [...] the civilian may think, why not simply leave the civil law contract for the benefit of the promisee, or of a third party, as it is? Why rename it?”).

¹⁰³ Gaillard *supra* note 33, at 329.

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Thus, distrust between the two sides concerning the issue of trusts seems to be the current paradigm. A learned trust scholar stated that, “the simple answer is that common law scholars have not attempted a comparative study of the civil law institutions, while civil law scholars have not attempted a comparative study of trusts.”¹⁰⁴ In fact, early Latin American initiatives aimed at expanding the scope of *fideicomisos* were thwarted by the belief that a simple “translation” of the Anglo-American trust “was in the realm of impossibility,”¹⁰⁵ and that such “insertion into civil-law countries [...] would be impossible.”¹⁰⁶ In spite of this, it has been held that “the mere fact that trusts exist in civil law countries should prove the point that there is no basic incompatibility with civil law structures.”¹⁰⁷

Perhaps the only existing point of convergence between both versions of trusts is the underlying ethical idea of *fides*, the confidence or “trust” permeating them.¹⁰⁸

2. Specific Differences

An important difference between the express *inter vivos* common law trust and the Latin American *fideicomiso* is found in the context of the *fiduciary* and the *fideicomisarios*. It is interesting to note that the Chilean Civil Code, for example, regulates the *fideicomiso* or *propiedad fudiciaria* [fiduciary ownership] under a paragraph headed *Of the Limitations to Ownership*. This treatment reveals that, unlike common law countries, fiduciary ownership is not considered a separate ownership but a form of restriction on full absolute property rights.

2.1. Contractual Nature

Nevertheless, the central difference between the Latin American *inter vivos fideicomiso* and the Anglo-American trust resides in the exclusively contractual nature of the former.¹⁰⁹ Three consequences arise from this statement: first, it is not possible to equate the many Anglo-American versions of trusts to the Latin American *fideicomiso*, due to the exclusively contractual character of the latter; second, as non-contractual trusts are non-existent in the Latin American civil law world, foreign common law trusts generally are denied recognition as trusts in Latin America;¹¹⁰ third, any practical or academic attempts at finding an exact equivalent between the Anglo-American trust and the Latin American *fideicomiso* are doomed to fail.

¹⁰⁴ Maurizio Lupoi, *The Civil Law Trust*, 32 VAND. J. TRANSNAT'L L. 967, 7 (1999); see also ILN Newsletter - (2005), available at http://www.ag-internet.com/push_news_one_two/thecivillawtrust.htm (last visited June 1, 2005), at 6.

¹⁰⁵ Lupoi, *supra* note 1, at 267.

¹⁰⁶ *Id.*

¹⁰⁷ Lupoi, *supra* note 104, at 6.

¹⁰⁸ See Waters *supra* note 3, at 618 (“Trust means simply placing confidence in and reliance upon another.”).

¹⁰⁹ See Checa, *supra* note 75. (“The *trust* is created through a unilateral juridical act, it does not have a contractual nature at all.”) (translation by author).

¹¹⁰ “Devices like implied trusts and trusts created by will or by a decision of a judge are excluded.” Koele, *supra* note 100, at 68.

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The Argentinean *fideicomiso* is an example of the strictly contractual nature of Latin American trusts.¹¹¹ Several effects emerge from this distinction: (a) the *fiduciario* becomes the owner of the trust corpus,¹¹² a feature opposite to the Anglo-American trust; (b) the *fideicomiso* does not distinguish between “legal title” and “equitable/beneficial ownership,”¹¹³ which is a crucial element of the Anglo-American *inter vivos* trust; (c) fiduciary ownership is limited in time, that is, it has to pass to the *fideicomisario* within a certain period of time from the inception of the *fideicomiso*,¹¹⁴ contrasting the Anglo-American trust, which can be perpetual; (d) the *fiduciario*’s liability is limited to the value of the trust’s assets,¹¹⁵ which is hardly a matter of statutory law in the Anglo-American legal world where juries and courts, in general, enjoy broad freedom to award damages to plaintiffs beyond purely compensatory damages; and (e) the lack of *cy près* in the Argentinean *fideicomiso*, where the unworkability of the trust’s purpose terminates the trust and the corpus reverts to the grantor.¹¹⁶

In the case of Uruguay,¹¹⁷ for instance, the *inter vivos* trust –loyal to the Latin American tradition — also is defined as a contract.¹¹⁸

2.2. Lingering Powers of Grantors

Civil law systems regularly keep the trustor’s powers for the duration of the trust.¹¹⁹ These rights include making sure that the trustee is complying with his fiduciary duties, ultimately revoking the trust, or asking a court to terminate the trust.¹²⁰ The settlor’s unilateral power somehow conflicts with the alleged exclusive contractual nature of civil law trusts. In that sense, these lingering powers of the trustee are an exception to the contractual rule.

2.3. The Transfer

The Anglo-American distinction between legal ownership rights and equitable rights, key to understand the common law trust, is completely foreign to Latin American legal systems. The source of the Anglo-American distinction between equitable and legal ownership is rooted in the notion of equity, which is an area where important differences

¹¹¹ See Hayzus, *supra* note 65, at 133. (“The framework of the *fideicomiso* is typically contractual, about which there aren’t any doubts.”) (translation by author).

¹¹² *Id.* at 143. (“For the law, there is one owner alone and that is [...] the fiduciary [or trustee]”) (translation by author).

¹¹³ *Id.* at 30.

¹¹⁴ *Id.* at 62; see also p. 63. (Noting that thirty days is the term and that several exceptions apply including minors and incompetents).

¹¹⁵ *Id.* at 180.

¹¹⁶ *Id.* at 210.

¹¹⁷ See *supra* note 68.

¹¹⁸ *Id.*, art. 2, paragraph 2.

¹¹⁹ Lupoi, *supra* note 1, at 311.

¹²⁰ *Id.*

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between both legal systems exist.¹²¹ While the Anglo-American trustee holds legal ownership rights over the corpus and the beneficiary's equitable rights, the Latin American *fiduciario* holds both legal and equitable rights over the trust's assets.¹²² Instead, in the Anglo-American system, the trustee has legal ownership over the property and the beneficiary's equitable ownership. When the trust property is transferred to the beneficiary, a consolidation of the legal and equitable property of the trust takes place. This arrangement is foreign to Latin civil law, where both legal and equitable rights are consolidated in an absolute ownership right.

Practical consequences come up from this separation, with all of them established for the gain of beneficiaries. The most important is that the common law beneficiary or beneficiaries have a right "to prevent a misuse of the trust funds, and a right to enforce the performance of the trust."¹²³ The Latin American *fideicomisario*, in turn, may receive only what is left upon the termination of the *fideicomiso*.

Furthermore, the settlor may appoint himself as beneficiary, an alternative that does not exist in Latin American trust law.¹²⁴

2.3. The Publicity Requirement

In common law jurisdictions, trusts are not required to comply with any publicity formalities, and in many cases publicity is strictly prohibited. This rule is the case for shares owned by a person as a trustee, real estate held in trust, and bank accounts held in the name of the trust or the trustee.¹²⁵ The main rationale is to protect and promote "the free circulation of assets,"¹²⁶ avoiding the discouragement of potential business partners who discover that title to property held under somebody's name is actually owned by another.

On the contrary, trust assets transfers are subject to strict rules requiring registration in civil law countries. The mere act of creating a trust does not perfect it when it deals with property subject to registration requirements for any transference.¹²⁷ Generally, no such registration requirements exist in Anglo-American jurisdictions, where trust property can be registered in the name of the beneficiaries and still be subject to the trust. But this option is unavailable in civil law jurisdictions where, according to

¹²¹ Phanor J. Eder, *Equity*, in A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW, 66-85 (1950).

¹²² Matthews, *supra* note 14, at 27.

¹²³ *Id.*

¹²⁴ These rules have some exemptions. See the case of Panama's new Trust Law of 1984 defining *fideicomiso* as "a juridical act whereby a person called *fideicomitente* transfers property to another person called *fiduciario* for this to administer or dispose of them for the benefit of a *fideicomisario*, who may also be the *fideicomitente*." (Law 1 of January 5, 1984 published in the *Gaceta Oficial* on January 10, 1984, article 1). Furthermore, this Law expressly lifts the prohibition against the appointment of two or more *fiduciarios*. (*Id.*, art. 20).

¹²⁵ Lupoi, *supra* note 1, at 173.

¹²⁶ *Id.*

¹²⁷ Panama's Law 17 of 1941, arts. 20-2, states that for a *fideicomiso* constituted upon real estate to be enforceable against third parties, it must be registered in the property registry under the *fiduciario*'s name.

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registration and publicity requisites, property must be registered under the trustee's name or the fiduciary's. This situation applies, for example, to *fideicomisos* created over real estate where any transfer to the *fiduciario(s)* or *fideicomisario(s)* must be registered in their name in the appropriate property registry.¹²⁸

The lack of publicity requirements in common law jurisdictions has long puzzled civil law attorneys who believe the policy breeds fraud against innocent third parties. The common law world has responded to this objection noting that the multiplicity of remedies available have proven sufficient to avoid such risk, as case law has shown across the centuries.¹²⁹

2.5. The Divided Concepts of Estate and Interests Applicable to Land Trusts¹³⁰

The basic common law notions of estate and interests in land, which generate two separate sets of ownership rights – legal and equitable — coexist at the center of the Anglo-American trust.¹³¹ These notions do not find an equivalent in civil law systems, which generates several consequences:

(a) In common law, a land trust is not an independent legal entity; in civil law it is;

(b) In attention to their enjoyment – that is, to the rights bestowed on the trustee and the beneficiaries — common law estate trusts may confer legal and equitable rights; civil law *fideicomisos*, instead, only confer legal rights to the *fiduciario*;

(c) Different types of real or *in rem* rights are identifiable in civil law. The most important distinction is between absolute real rights (property or ownership) and limited real rights (lease, usufruct, *fideicomiso*, etcetera). This differentiation is not as rigorous in common law jurisdictions;

(d) As a legacy of feudal law there is a flexible concept of property ownership in common law that allows its division and fragmentation. In civil law, on the contrary, due to its Roman law roots, the concept of ownership is unitary, absolute, and indivisible. As a result, only the owner can fully exercise the rights of use, enjoyment, and administration over the property;

(e) In common law, an estate is an interest in land and, as such, is the object of ownership and possession. The word “interest” is used exclusively for an interest in land. In civil law, instead, the object of ownership and possession of land is the piece of land itself, the material thing;

¹²⁸ See CÓD. CIV. art. 747 (Chile 2006).

¹²⁹ Lupoi, *supra* note 1, at 173.

¹³⁰ Justin P. Thorens, *The Common Law Trust and the Civil Law Lawyer*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY*, 310 (David S. Clark, ed., 1990).

¹³¹ Lupoi, *supra* note 1, at 1 et seq.

(f) In common law estates can be classified based on their duration. Namely, estates can be: (i) finite or infinite; (ii) freehold and nonfreehold estates, according to their certain or uncertain duration (freehold estates include fee simple, which “is the complete estate that includes all others;”¹³² and estate for life, “limited to the duration of the life of its holder or to the life of a third person (called ‘*pur autre vie*’ estate)”¹³³). Unlike common law, it is not possible to think of a civil law trust without a present owner. In other words, all estates in a trust must be present and vested. A present interest can only exist as vested and, whether vested or contingent, future interests are nonexistent. Furthermore, under civil law: (i) absolute property ownership is always perpetual; thus, it is inaccurate –or rather flatly wrong– to speak of “finite” ownership in civil law systems; (ii) non-freehold estates in general are all types of leases and are regulated by the law of obligations, not by the law of property; (iii) the notion of civil law property is closer to that of fee simple absolute; and (iv) estates for life are nonexistent; and

(g) In reference to possession, it can be classified as present and future interests in common law estates. This fact signifies that several estates can exist simultaneously over the same land and only the possession and enjoyment of the property is differed. Therefore, “a trust can be constituted in favor of successive beneficiaries, and in particular in favor of beneficiaries who do not yet exist.”¹³⁴ In civil law, successive *fideicomisos* are outright prohibited.¹³⁵

2.6. Powers of Appointment

The trust instrument in common law may provide the involvement of a third party,¹³⁶ give instructions to the trustees, or require that a third party provide consent for the administration of the trust’s corpus.¹³⁷ This power of appointment does not exist in Latin American law.

The role of the civil law trustee is to dutifully implement the instructions established by the grantor in the trust instrument. The obligations of trustees are defined differently in the Anglo-American legal system.¹³⁸ In fact, in Anglo-American law, these

¹³² Thorens, *supra* note 130, at 311.

¹³³ *Id.*

¹³⁴ *Id.* at 314.

¹³⁵ See *supra* note 68, art. 9 (c).

¹³⁶ There are multiple potential sources for the appointment of the trustee: by a third party holding a power of appointment given by the grantor, a prior trustee, a court, or by the beneficiaries. Lupoi, *supra* note 1, at 167.

¹³⁷ *Id.* at 101. Over the centuries the Anglo-American trust was developed to allow the settlor to appoint herself as trustee. *Id.* at 163 (Noting that the classic example can be found in case “of a departure for the Crusades or on a dangerous journey, where instructions were given in the event he [*the settlor*] did not return, but provision was made to take back the property if the story ended happily.”)

¹³⁸ See Frost, *supra* note 36, at 17 (Concerning investment trusts, for instance, “[I]n England besides abiding by the instructions laid out in the trust instrument, there are additional statutory duties, *i.e.*, to act with care, impartially with respect to the beneficiaries and to keep them informed, to act jointly and unanimously with co-trustees, to invest and manage trust funds prudently.”).

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obligations command the trustee to act with due diligence, to the best of his skills and abilities, observe the utmost good faith, exercise the standard of care of a reasonable and prudent person, and avoid conflict of interests.¹³⁹ Two purely Anglo-American rules usually govern trustees' behavior: the rule against self-dealing and the rule of fair dealing.¹⁴⁰ Latin American trust laws, in contrast, generally do not spell out the trustee's obligations in such detail.

2.7. Tracing

There is not an exact equivalent to tracing in civil law. A close parallel could be drawn, nevertheless, with the *acción reivindicatoria* or replevying action, where the grantor would retain his condition as a substantial owner and the trustee would be nothing more than an apparent owner or agent. Similar to protections received by beneficiaries in tracing, these persons are protected by the *acción reivindicatoria* in civil law jurisdictions.¹⁴¹ For instance, Panama's trust law of 1984, which was strongly influenced by the American trust, contains a key difference between the Panamanian trust and the Anglo-American trust: unlike in the latter, in the former, the beneficiary only has personal actions against the trustee, not against third parties, such as creditors.¹⁴²

2.8. Intervention of Courts in Trusts

In cases of disputes about the appointment of a trustee, common law courts enjoy equitable powers to appoint and remove a trustee.¹⁴³ Latin American courts do not intervene in the appointment of trustees. Additionally, in common law, the grantor can create a trust explicitly by executing a trust instrument. But the settlor's will may also be inferred from his behavior, provided that other conditions are met. A fundamental condition is the "evidence of a deprivation of a right or entitlement for the benefit of a third party, or 'for the attainment of a purpose.'"¹⁴⁴ As Latin American courts do not have the power to "create" trusts absent an express manifestation of intention by the "grantor," these types of trusts are not present in Latin America.

¹³⁹ Lupoi, *supra* note 1, at 226.

¹⁴⁰ The former prohibits the trustee "from purchasing trust property from and for himself," whereas the latter "forbids the trustee from buying trust assets while taking advantage of his position, and without the full and informed consent of the beneficiary and full value paid to the beneficiary." See Hon. Mr. Justice B. H. McPherson, CBE, *Self-dealing Trustees*, in *TRENDS IN CONTEMPORARY TRUST LAW* 135 (A. J. Oakley, ed., 1996), at 135. The consequences of the violation of these two rules are twofold. First, "the interests of the beneficiary continue to subsist in, the trust property," regardless of the validity of the underlying transaction or conveyance. *Id.* at 144. Second, a "dishonest appropriation [by the trustee or his agents] is a criminal offence" and "without more, it can never effect a transfer of title to the trustee." *Id.* at 151.

¹⁴¹ Checa, *supra* note 75, at 23.

¹⁴² *Id.*, at 20 ("The regulations of Venezuela and Panama [...] are separated from [...] the model of the Anglo-American trust to the extent to which the beneficiary only has actions of a personal character against the *fideicomisario*." (translation by author).

¹⁴³ Lupoi, *supra* note 1, at 195-6.

¹⁴⁴ *Id.*, at 100.

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2.9. Remedies Available for the Breach of Trust Duties

Equitable remedies are available broadly to a beneficiary in cases of the trustee's noncompliance with trust obligations, in common law jurisdictions.¹⁴⁵ Included among these equitable remedies are: (a) actions compelling the trustee to perform his duties;¹⁴⁶ (b) injunctions enjoining the trustee from committing a breach of trust; (c) specific performance forcing the trustee to redress a breach of trust (i.e., seeking the restitution of trust property);¹⁴⁷ (d) the appointment of a temporary receiver;¹⁴⁸ and (e) the removal of the trustee and the appointment of a new trustee.¹⁴⁹

In Latin American civil law jurisdictions, by contrast, when an illegal transfer of trust property by the trustee occurs, only three actions usually are available: (a) an *acción revocatoria* aimed at annulling the transfer and restituting the trust's assets to the beneficiary or beneficiaries; (b) an action for compensation based on the trustee's unjust enrichment;¹⁵⁰ and (c) possibly an action for personal subrogation, comparable to the Anglo-American subrogation and novation, that is, the substitution of one person to another in an obligation.¹⁵¹

The civil law *acción revocatoria* is common to all cases where restitution is sought from third parties and does not only apply where the transfer has been effectuated in violation of a fiduciary duty.¹⁵²

2.10. Termination of Trusts

Like all legal institutions, trusts fail for many reasons. With the exception of some purpose trusts – charitable trusts being the most common form — the largest cause for the failure of a trust is the lack of a beneficiary.¹⁵³ Trusts also fall short when the trust's purpose contradicts public policy, such as when the trust attempts to “deceive the public administration of the country, discourage service in the armed forces or public office,

¹⁴⁵ See Finn, *supra* note 28, at 214 (“[c]ompensation can be awarded for breaches of fiduciary duty, of confidence, and of trustees’ and directors’ duties of care.”).

¹⁴⁶ Golbert, *supra* note 6, at 100.

¹⁴⁷ A. J. Oakley, *The Liberalising Nature of Remedies for Breach of Trust*, in TRENDS IN CONTEMPORARY TRUST LAW (A. J. Oakley, ed., 1996), at 220 (“The remedy afforded to the beneficiary by equity is compensation in the form of restitution of that which had been lost to the trust estate, not damages.”).

¹⁴⁸ Golbert, *supra* note 6, at 100.

¹⁴⁹ *Id.*

¹⁵⁰ See Checa, *supra* note 75, at 23 (In some civil law jurisdictions this is the only remedy available: “...in case of noncompliance with his personal obligations by the trustee [the trustor] can only obtain an indemnification for the damages arising from that noncompliance...” (translation by author).

¹⁵¹ See Golbert, *supra* note 6, at 103 (The civil law “real” subrogation, or subrogation of the *res*, instead, corresponds somewhat to our equitable conversion and following the trust *res* [...]. In Anglo-American law the term “subrogation” is used only in the sense of the personal subrogation of Latin law.”).

¹⁵² The general requirements of the *acción revocatoria* are: (i) damage to the creditor arising from the unlawful transfer; (ii) debt prior to the unlawful transfer; (iii) debtor's intent to defraud his creditors (intent is presumed in cases of insolvency); and (iv) debtor availed himself of accomplices in cases of a transfer for value; the knowledge of debtor's insolvency presumes complicity; a transfer not for value is revocable, even if the transferee was not aware of the debtor's insolvency. See Hayzus, *supra* note 65, at 126.

¹⁵³ Matthews, *supra* note 14, at 9.

restrain from marriage, or subvert morality or religion.”¹⁵⁴

Common law charitable trusts are subject to two special regimes when it comes to their termination. First, they are not restricted by the rule against perpetuities –¹⁵⁵ in other words, they can last perpetually. In Latin America, by contrast, trusts cannot last forever. A representative example is that of Mexico,¹⁵⁶ whose General Law of Credit Institutions and Banking Establishments of 1926¹⁵⁷ regulating *fideicomisos*, specifically bans transfers in perpetuity and limits the duration of *fideicomisos* to any life in being or in conception at the time of the grantor’s death.¹⁵⁸ Second, charitable trusts may “survive” when their purposes become unattainable through the application of the common law *cy près* doctrine,¹⁵⁹ which allows courts to “change or expand the purposes of a charitable trust” as close as possible to the grantor’s objectives. This doctrine is not used in Latin America,¹⁶⁰ which marks an enormous difference when it comes to trusts in both systems.

However, a particularity exists when it comes to the termination of trusts in Latin America. The Colombian Civil Code has a provision that also is applicable to trusts in cases of failure for unattainability of purpose, which states that, in default of an express provision, “the property shall belong to the Nation, subject to the obligation to use it for purposes analogous to those of the institution... [and that]... [t]he Congress shall prescribe such purposes.”¹⁶¹ Thus, the legislature, not the judiciary, is bestowed with the power to determine the fate of a failed *fideicomiso* in Colombia.

PART III: THE SEARCH FOR A LATIN AMERICAN EQUIVALENT OF THE ANGLO-AMERICAN BUSINESS TRUST¹⁶²

1. Possible comparisons with the Latin American *Fideicomiso*

¹⁵⁴ Frost, *supra* note 36, at 22.

¹⁵⁵ Matthews, *supra* note 14, at 10.

¹⁵⁶ Since 1905 Mexico has endeavored to produce its own versions of the Anglo-American trust. Lupoi, *supra* note 1, at 267.

¹⁵⁷ See Corrales, *supra* note 66, at 3.

¹⁵⁸ Hayton, *supra* note 35, at 98.

¹⁵⁹ See Mayda, *supra* note 101, at 5. (*Cy près*, a French-born doctrine meaning “as near as possible,” is based “on the absolute right of the lower courts to interpret testaments.”)

¹⁶⁰ Halbach, *supra* note 80, at 216.

¹⁶¹ Golbert, *supra* note 6, at 109.

¹⁶² There are other types of Anglo-American non-business or “social” trusts. Some trusts are created for the protection of certain persons, such as minors, mentally ill persons, persons subject to alimony or other family benefits, creditors of bankrupted persons, or persons whose assets are administered by third parties. Examples of statutory “social” trusts are: (i) Supplemental needs trusts: these trusts have been created by specific legislation in the United States with the purpose of allowing disabled persons to obtain health care services and other benefits thus enhancing their quality of life. These trusts also “create opportunities for independent living, innovative rehabilitation and therapy, employment, and other activities that give life meaning.” (See Rosenberg, *supra* note 39, at 3). Support trusts are the antecedent of supplemental needs trusts. (See Rosenberg, *supra* note 39, at 8); and (ii) Employee share ownership trusts: these trusts allow for the employee’s participation in the ownership of the company. In this case, the company issues shares that are transferred to a trust; the trust allocates the shares to the employees tax-free, provided that a specific period of time elapses from the transference. (Hayton, *supra* note 72, at 163).

Legal experts in different civil law jurisdictions have long tried to find a simile of the Anglo-American express *inter vivos* trust in the civil law world. As already mentioned, history shows efforts to find an institution akin to the Anglo-American trust in the Roman law *fideicommissum*, which still “exists in Roman law countries such as Italy and France and Spain, and in Latin American countries which trace their law to the law of Spain, such as Chile.”¹⁶³ Those efforts have included references to the notions of “agency, deposit, contracts for the benefit of third parties,”¹⁶⁴ and other civil law institutions. As the analysis below demonstrates, these proposals are inherently defective, because in the absence of an explicit *inter vivos* agreement, no *fideicomiso* may exist in Latin America.

1.1. Real estate donations

In Latin America, gifts of real estate generally must be achieved by means of a public deed executed before a notary public, accepted by the donee, and registered in a land registry. Otherwise, “a gift [of real estate] is not presumed except in cases expressly provided by the laws.”¹⁶⁵ Real estate donations performed by means of an Anglo-American trust require entrusting or the holding of a property in the hands of the trustee for another, namely, the beneficiary. In Latin America, by contrast, real estate donations are an outright gift from the donor to the donee, not subject to any conditions or encumbrances.

1.2. Usufruct

The usufruct has been defined as “a personal, contractual civil law right over land through which a property owner grants to another the use and enjoyment of the property.”¹⁶⁶ The beneficiary receives a personal right and the transferor retains his right to receive back his property upon the termination of the usufruct. Therefore, the usufruct “does not bind subsequent landowners and cannot last longer than the life of the beneficiary.”¹⁶⁷ The Anglo-American trust, on the contrary, terminates the grantor’s ownership and bestows permanent ownership rights on the beneficiary, upon whose death the assets become a part of his estate and are acquired by the beneficiary’s heirs, whether the succession is testate or intestate. Herein lies the dichotomy between the usufruct and the trust.

1.3. Commodatum or gratuitous bailment

The Commodatum or gratuitous bailment been defined as a “civil law contract through which a landowner lends land, or rights to resources on the land, to another person free of charge.”¹⁶⁸ An essential element of the *comodato* is that the transferor [or

¹⁶³ Christensen, *supra* note 44, at 10.

¹⁶⁴ Sonneveldt, *supra* note 31, at 1.

¹⁶⁵ Golbert, *supra* note 6, at 107.

¹⁶⁶ Byron Swift et al., *Private Lands Conservation in Latin America: The Need for Enhanced Legal Tools and Incentives*, 19 J. ENVTL. L. & LITIG. 85, 15 (2004).

¹⁶⁷ *Id.*, at 15.

¹⁶⁸ *Id.*

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comodante] recovers the property at the expiration of the term or the occurrence of the condition upon which she transferred the asset. Coupled with this difference, beneficiaries of *comodato* rights cannot transfer them to subsequent owners and at their death the rights are transmitted to their heirs.¹⁶⁹ These two significant differences make it impossible to equate the Latin American *comodato* and the Anglo-American trust.

1.4. Agency and deposit contracts

The Anglo-American trust is at odds with the agency agreement and the deposit contract in that in neither of the latter two instruments does the beneficiary ultimately acquire ownership rights over the assets involved in the transactions.¹⁷⁰

1.5. Use, habitation

Civil law jurisdictions recognize that two “real” or *in rem* rights may exist simultaneously for the same property with possessory rights.¹⁷¹ These institutions, which include the use and habitation right, “allow for the total or partial utilization or exploitation of property belonging to someone else and, in some cases, the appropriation or acquisition of its fruits or income [by somebody else].”¹⁷² The Anglo-American trust differs because these institutions allow the beneficiary to administer or control the property subject to the right of the full owner. In trusts, it is the trustee who administers the property and the beneficiary has no right to administer the trust property before the transference occurs.

1.6. Other institutions

Several European civil law institutions have been said to come close to the notion of the Anglo-American trust. Among them, the “*foundation, mandat, fiducie, Treuhand*, contract for the benefit of a third party, usufruct, naked ownership, fideicommissary substitution, appointment of an heir or legatee subject to a condition (“charge”), testamentary execution, the Dutch *bewind*, certification, and others.”¹⁷³ Nevertheless, by no means could these institutions be considered an equivalent to the common law trust, as *fides* – the sole element common to them all – is insufficient to explain the Anglo-American trust.

2. Government trusts: A Point of Convergence

Anglo-American regulatory compliance trusts are used to tackle problems that affect the public at large. Examples of these trusts are nuclear decommissioning trusts,

¹⁶⁹ *Id.*

¹⁷⁰ Hayzus, *supra* note 65, at 5.

¹⁷¹ Albisinni, *supra* note 87, at 568.

¹⁷² Arroyo, *supra* note 29, at 6.

¹⁷³ Thorens, *supra* note 130, at 314.

environmental remediation trusts, liquidation trusts, prepaid funeral trusts, foreign insurers' trusts, and law office trust accounts.¹⁷⁴

On the Latin American side, the use of government trusts has greatly expanded since the fourth quarter of the twentieth century. Colombia, for example, counts on a fiduciary system for the administration of a special account designed to promote security and the restoration of public order in the country.¹⁷⁵ Mexico presents many examples of public-interest trusts: (a) the Trust for the Establishment of the Historical Studies of the Mexican Workers' Movement Center created in 1973;¹⁷⁶ (b) the Trust for Commercial Development of 1980;¹⁷⁷ (c) the Rural Promotion Trust of 1981;¹⁷⁸ (d) the Trust to Grant Loans to the Concessionaires of the Freight Transportation Public Service in the Federal District of 1990;¹⁷⁹ (e) the National Trust Fund for Development of Tourism of 1992;¹⁸⁰ (f) the Mining Promotion Trust of 2001;¹⁸¹ (g) the Trust Fund for Quality Cinematographic Production of 2001;¹⁸² (h) the Trust Fund of Micro Financing for Rural Women of 2002;¹⁸³ and (i) the Trust Fund for the Strengthening of Saving and Lending Associations and Cooperatives and for the Support of their Members of 2004.¹⁸⁴

Other Latin American examples include Guatemala's National Trust for Peace, appropriated with government funds in 1991;¹⁸⁵ the Roads Trust for the improvement of

¹⁷⁴ John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW, 177 (David Hayton, ed., 1999), at 179-81.

¹⁷⁵ See Decree 1965 of 1989 published in the *Diario Oficial* of August 31, 1989, arts. 4-6, regulating Law 45 of 1923.

¹⁷⁶ Accord of May 30, 1973, issued by the Secretariat of Labor and Social Welfare, published in the *Diario Oficial* on June 28, 1973.

¹⁷⁷ Accord of May 17, 1980, issued by the Secretariat of Programming and Budget, published in the *Diario Oficial* on March 24, 1980.

¹⁷⁸ Accord of June 30, 1981, issued by the Secretariat of Programming and Budget, published in the *Diario Oficial* on July 2, 1981.

¹⁷⁹ Accord of 1984, issued by the Secretariat of Programming and Budget, published in the *Diario Oficial* on October 17, 1984, amended by Resolution of June 13, 1990, issued by the same Secretariat, published in the *Diario Oficial* on June 21, 1990.

¹⁸⁰ Federal Law of Tourism, published in the *Diario Oficial* on December 31, 1992, arts. 26-9.

¹⁸¹ The Mexican Non-metallic Minerals Trust Fund was created on November 1, 1974 with the purpose of providing support to *ejidos* [small land holdings], rural communities and small proprietors in mining activities. In 1990, the trust was renamed as Mining Promotion Trust, which currently depends of the Secretariat of Energy. See also the Accord issuing the Rules of Operation for the Discount of Credits of the Mining Promotion Trust, approved by Accord of March 14, 2001, published in the *Diario Oficial* on March 15, 2001.

¹⁸² See the Rules of Operation, management and evaluation indicators approved by the Secretariat of Public Education and published in the *Diario Oficial* on March 16, 2001.

¹⁸³ Pursuant to an Accord issued by the Secretariat of Economy on December 31, 1998, this trust was created by a contract executed on June 10, 1999. See also Accord of March 11, 2002 approving the Rules of Operation for the trust, published in the *Diario Oficial* on March 14, 2002.

¹⁸⁴ Law creating this trust was published in the *Diario Oficial* on January 28, 2004. See also Decree of June 23, 2004, published in the *Diario Oficial* on June 29, 2004, amending that Law.

¹⁸⁵ Governmental Accord 408-91 of 1991, published in the *Diario de Centro América* on August 2, 1991 created FONAPAZ. See also the Transportation Trust established by Decree 106-96, as amended by Decree No. 75-98, published in the *Diario de Centro América* on December 9, 1998.

the countries' highways of 2000,¹⁸⁶ and the Trust Fund for Banking Capitalization of 2002 created to provide financial support to the national banking system.¹⁸⁷

Honduras's Special Law on the Naturalization Chart of 1991¹⁸⁸ appointed the Central Bank of Honduras as a "fiduciary institution."¹⁸⁹ Trust funds consist of deposits made overseas in U.S. dollars by non-Hondurans seeking to become Honduran citizens. The trust's *fideicomisarios* are the beneficiaries of the Naturalization Chart.¹⁹⁰ Other government-established trust examples in Honduras are the Road Maintenance Trust Fund of 1993¹⁹¹ and the Social Funds Trust of 1995 that was established to finance social development programs.¹⁹²

Argentina's public interest trusts [*fideicomisos de derecho público*] are established by the state for the purposes of organizing and implementing projects that benefit the community at large.¹⁹³ Examples of this type of trusts are: (a) the Fiduciary Fund for Federal Electricity Transportation of 1999;¹⁹⁴ (b) the "National Development Fund for Micro, Small and Medium-size Businesses" of 2005, whereby the state—through the Ministry of Economy—is the trustor and the National Bank of Argentina, the trustee, to issue Certificates of Participation drawn over the trust corpus for the benefit of the aforementioned entities;¹⁹⁵ (c) the Trust Fund for Provincial Development of 2003, which assumed the debts of the provinces documented in the form of public titles, debentures, treasury bonds, or loans;¹⁹⁶ and (d) the Trust Fund for Household Gas Consumption Subsidies established in Law 25,565 of 2002.¹⁹⁷

By means of the Organic Law of the Ministry of Health of 1999, Costa Rica authorized the Ministry to execute trusts with the National Banking System for the

¹⁸⁶ The Roads Trust was created by Governmental Accord 736-98 of October 14, 1998, and amended by Governmental Accord 97-2000, published in the *Diario de Centro América* on March 15, 2000.

¹⁸⁷ Decree 74-2002, published in the *Diario de Centro América* on November 29, 2002, art. 2, directed the Guatemalan Government to create a Trust Fund for Banking Capitalization with seed money in the form of loan of up to \$150,000,000 provided by the World Bank. The Trust was created by public deed of December 23, 2003. See also the Regulations of the Trust's Technical Committee approved by Ministerial Accord No. 51-2004 published in the *Diario de Centro América* on October 4, 2004.

¹⁸⁸ Decree 26-90-E of December 14, 1990, regulated by the Internal Regulation of the Trust's Committee approved by Resolution 620-9/91 of the Central Bank, published in *La Gaceta* on October 23, 1991, art. 16.

¹⁸⁹ *Id.*, art. 3.

¹⁹⁰ *Id.*, art. 7.

¹⁹¹ See Decree 131-93, Law of the Roads Maintenance Fund, published in *La Gaceta* on December 2, 1993, art. 14.

¹⁹² Accord 000621 of 1995, issued by the Treasury and Public Credit Secretariat, published in *La Gaceta* on July 8, 1995, arts. 2-3.

¹⁹³ Lupoi, *supra* note 1, at 87.

¹⁹⁴ See Resolution No. 657 of December 3, 1999, issued by the former Secretary of Energy, dependent of the former Ministry of Economy, Works, and Public Services, modified by Decree No. 1135/2000 of the Secretary of Energy, dependent of the Ministry of Economy, published in the *Boletín Oficial* of December 5, 2000.

¹⁹⁵ See Law No. 25,300 of June 2, 2005, and Decree No. 1,633/2002 of the Ministry of Economy, published on the *Boletín Oficial* of September 4, 2003.

¹⁹⁶ See article 62 of Law 25,725, which approves the Expenditures Budget and the Resources for the National Administration for Fiscal-Year 2003, published in the *Boletín Oficial* of 27 January 2003.

¹⁹⁷ Law 25,565 was published in the *Boletín Oficial* of March 19, 2002.

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financing of its programs and activities.¹⁹⁸ Additionally, Law 8147 of 2001 created the Trust for the Agricultural Protection and Promotion of Small and Medium-size Producers.¹⁹⁹ The Regulation of Law 8147 specifies that the *fiduciario* [trustee] is the Bank of the State, which administers the trust; the *fideicomitente* [creator of the trust] is the state; the *fideicomisarios* [the beneficiaries] are the producers; and the financial institutions or other public or authorized private organizations –which provide loans to the beneficiaries – are the creditors.²⁰⁰

El Salvador also shows some degree of experience in the creation of government-funded public trusts. Consider the Trust for the Development of the Reciprocal Guarantees System of 2001, where the *fideicomitente* is the Government of El Salvador, the Multisectoral Bank of Investments is the *fiduciario*, and the *fideicomisarios* are the micro, small, and mid-size rural and urban businesses, Guarantees Companies, and the Government of El Salvador.²⁰¹ Another example is the Responsible Artisan Fishing Trust of 2003, established to strengthen the artisan fishing organization by encouraging investments for sustainable and orderly fishing.²⁰² Panama's Trust Development Fund of 2004 is yet another case of a government trust in the region.²⁰³ Finally, Brazil's Law 11,146 of 2005 authorized the executive branch to contribute to the maintenance of the Trust Fund created by the Inter-Governmental Group of Twenty-Four (G-4).²⁰⁴

3. The Case of the Anglo-American Business Trust

The grantor may create a trust with an economic or charitable purpose in mind: economic, when it provides financial benefit to another person or himself; charitable, when it benefits undetermined members of a class of which the trustor is not a member. There are various expressions of Anglo-American business trusts.

3.1. Purpose trusts

¹⁹⁸ For example, see the Organic Law of the Ministry of Health, modified by Law No. 7927 of October 12, 1999, art. 13. See also Decree 31,198-S of May 15, 2003, published in *La Gaceta* on June 12, 2003, which approves a trust contract executed between the Ministry of Health and the National Bank of Costa Rica.

¹⁹⁹ Law 8147 of October 24, 2001 was amended by Law 8390, published in *La Gaceta* on November 7, 2003, and by Law 8427 creating a trust for debt purchase and restructuring, published in *La Gaceta* on December 27, 2004. Interestingly, the trust is exempted from income tax (See Law 8147, art. 9, as modified by Law 8427).

²⁰⁰ See Decree 32,101-MAG (Ministry of Agriculture and Livestock), published in *La Gaceta* on January 12, 2005, containing the Regulation of Law 8147. See also Decree 32,677-MAG, published in *La Gaceta* on October 11, 2005, modifying Decree 32,101-MAG.

²⁰¹ See Legislative Decree 553 of 2001, published in the *Diario Oficial* of October 22, 2001, which contains the Law of Reciprocal Guarantees System for Micro, Small and Mid-size Rural and Urban Businesses. Chapter V creates the Trust.

²⁰² See Legislative Decree 1215 published in the *Diario Oficial* of May 9, 2003, authorizing the Ministry of Agriculture and Livestock for the creation of the "Fideicomiso PESCAR."

²⁰³ Law 20 of 1995 creates the Fiduciary Fund for Development, amended by Law 52 published in the *Gaceta Oficial* on October 21, 2004, and Law 57 published on December 22, 2004.

²⁰⁴ See Law 11,146 of July 26 2005, published in the *Diário Oficial* of July 27, 2005.

In these trusts, the grantor deliberately fails to designate a beneficiary. Originally, they were considered null in English law for want of a party entitled to enforce the trust's terms.²⁰⁵ Later case law upheld the validity of purpose trusts based on the idea that – save specific exceptions — the members of a benefited class could be identified.²⁰⁶

Charitable trusts are the most common type of purpose trusts. Their origin can be traced back to Medieval England, where property held by certain religious organizations was granted certain exemptions.²⁰⁷ Characteristics of charitable trusts are: (a) their objective is the promotion of a charitable purpose;²⁰⁸ (b) the intervention of the government – by means of state courts or attorneys general – in the enforcement of charitable trusts has long been a substantial element of these instruments;²⁰⁹ (c) the *cy-près* theory applies to charitable trusts, meaning that “when the purpose indicated by the settlor may not be attained, the court will identify the most similar purpose possible and modify the trust instrument accordingly;”²¹⁰ and (d) unlike other expressly created trusts, charitable trusts in the United States “may last in perpetuity.”²¹¹

Other non-charitable purpose trusts are: (a) trusts for the erection or maintenance of sepulchral monuments, graves, or tombs; (b) trusts for the saying of masses, to the extent that they are not charitable; (c) trusts for the maintenance of particular animals; (d) trusts for the benefit of unincorporated associations; and (e) a miscellaneous group of trusts, such as (i) the promotion of fox-hunting; (ii) the disposal of property of the testator for ‘best spiritual advantage’; and (iii) the provision of a maintenance fund for an historic building.²¹²

Charitable trusts also have been implemented in Latin America. In Argentina, for instance, munificence trusts [*fideicomisos de liberalidad*] allow the donor to donate

²⁰⁵ Matthews, *supra* note 14, at 4.

²⁰⁶ Matthews, *supra* note 14, at 4 (“The basic rule is that trusts created for abstract or impersonal purposes are void as there is no beneficiary to enforce the terms against the trustee, provided that the purpose is not charitable.”); *see also* Frost, *supra* note 36, at 26.

²⁰⁷ David Villar Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 2 (2000) (“Because of this, feudal lords were denied the usual benefits of property once religious corporations obtained land through charitable gifts [...] [T]o defeat these mortmain and forfeiture statutes, religious charities quickly found a loophole by which property was conveyed to individuals for use by a religious order.”).

²⁰⁸ There is extensive case law as to what the specific definition of a charitable purpose is, but courts generally have approached the issue on a case-by-case basis. *See* Rosenberg, *supra* note 39, at 3 (“Throughout its history, the trust has furthered social justice by providing for the needs of people who are subject to the harsh dictates of the law.”); *see also* Lupoi, *supra* note 1, at 127 (“In an opinion of Lord Macnaghten in a decision from 1891, four categories of purpose trusts were listed: relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community.”).

²⁰⁹ *See* Villar Patton, *supra* note 207, at 3 (Noting that Chancery courts in England enforced charitable trusts “as early as the 1400s”; *see also* holding of the U.S. Supreme Court in *Vidal v. Girard* 43 U.S. (2 How.) 127 (1844), *quoted in* Villar Patton, *id.*, at 11-12.

²¹⁰ Lupoi, *supra* note 1, at 130.

²¹¹ Halbach, *supra* note 48, at 131.

²¹² Matthews, *supra* note 14, at 5.

specific assets or values during his lifetime to the beneficiary.²¹³ Beneficence trusts [*fideicomisos de beneficencia*] are used to organize somebody’s contributions for public benefit works.²¹⁴ It is not clear whether the income generated from these contributions is tax-deductible,²¹⁵ but this characteristic may operate as a disincentive for the widespread use of munificence trusts use in Argentina.

3.2. Asset-protection or Protective trusts

These trusts allow for the settlor to shield his assets from any creditors’ claims by expressly prohibiting their transfer, either voluntarily or by statute.²¹⁶ The most common category of protective trusts is that of “spendthrift trusts,” which impede the beneficiary from transferring trusts interests and limit his ability to receive income from the trust.²¹⁷ The asset protection benefit is lost when the settlor acts fraudulently against his creditors²¹⁸ and, in some jurisdictions, when the creditor is “a *bona fide* purchaser of a legal security interest for value without notice of the trust.”²¹⁹

Asset-protection trusts are rarely available in Latin America. One exceptional case is that of Argentina’s Commerce Fund [*Fondo de comercio*] protecting family businesses by holding family assets as a unit separately and isolated from the reach of third parties.²²⁰

3.2.1. Offshore trusts

Also known as “international trusts, or foreign grantor trusts, or a foreign non-grantor trusts,”²²¹ they are defined as “trusts set in tax-haven countries or territories which provide tax benefits for grantors and beneficiaries.”²²² Foreign banks or other private trusts companies act as trustees.²²³ They own shares, controlling or non-controlling, in a company located onshore,²²⁴ causing this company to appear “on no-one’s balance sheet.”²²⁵ Offshore trusts are very popular among wealthy persons in the United States, who use them “to remove some of their assets from the U.S. litigation system, to permit the trust assets to be invested in foreign funds closed to U.S. citizens

²¹³ See Hayzus, *supra* note 65, at 88 (“They are gifts of particular goods that the fiduciary gives during his lifetime [...] through the periodic distribution of a sum of money or the conveyance of specific assets for the compliance of the stipulated condition (*e.i.* for having reached majority).”) (translation by author).

²¹⁴ *Id.*, at 89.

²¹⁵ *Id.*, at 90.

²¹⁶ Lupoi, *supra* note 1, at 133.

²¹⁷ Halbach, *supra* note 80, at 215.

²¹⁸ Matthews, *supra* note 14, at 19.

²¹⁹ Hayton, *supra* note 72, at 154.

²²⁰ Hayzus, *supra* note 65, at 70. There is a real transfer of resources to the *fideicomiso* in this case. *Id.*, at

71.

²²¹ Frost, *supra* note 36, at 128.

²²² *Id.*

²²³ *Id.*

²²⁴ Matthews, *supra* note 14, at 20.

²²⁵ *Id.*, at 22.

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and resident aliens and for tax and estate planning purposes.”²²⁶ Nowadays, “offshore trusts are the largest number of trusts created for the carrying out of business in the international arena.”²²⁷

3.2.2. Limited Partnership

Protective trusts have only one general partner and one limited partner who “can have a trust hold the ninety-nine percent partnership interest ... [and also have] an interest as a general partner, this making it even more difficult for a creditor someday to get.”²²⁸

Other alternatives for the isolation of trust assets from creditors are also available.²²⁹

Both offshore and other protective trusts have stirred debate in the United States in recent decades. Legal and ethical considerations have been argued against and in favor of these types of trusts, and this debate is far from over.²³⁰

²²⁶ J. Richard Duke, *Use of Trusts by US Citizens in International Tax Planning*, in TRUSTS IN PRIME JURISDICTIONS, 127 (Alon Kaplan, ed., 2000).

²²⁷ Frost, *supra* note 36, at 128.

²²⁸ See Barry Engel, opinion in *Symposium on The Rise of the International Trust*, 32 VAND. J. TRANSNAT'L L. 779, 3 (1999), at 3.

²²⁹ See Gideon Rothschild, opinion in *Symposium on The Rise of the International Trust*, 32 VAND. J. TRANSNAT'L L. 779, 18-9 (1999) (“We may set up a partnership, for example, where the client, who is the general partner of his partnership, transfers a million dollars into the entity. He would retain a one percent interest. A ninety-nine percent interest in that partnership then would be assigned immediately to his foreign trust, appointing a foreign trustee as the trustee of that trust. And in that fashion, divesting himself, for all intents and purposes, of ninety-nine percent of the equity in that partnership. Any representations to a lender in future financial statements would only reflect that he owns a one percent interest in that structure with his trust owning now a ninety-nine percent interest. He can be a discretionary beneficiary of that trust, if he wishes, assuming that the jurisdiction designated allows him to remain a beneficiary of that trust. His spouse, if he is married, and his children may also be discretionary beneficiaries of that trust, as well as charities and any other individuals he would like to favor, either during his lifetime or upon his death. And this trust would also serve the purpose of being his primary dispositive instrument for estate planning purposes. It would contain, just like his will, his credit shelter provisions, his marital trust provisions, and his generation-skipping trust provisions, and the trust would become, in effect, his will substitute.”).

²³⁰ Among those on the pro-offshore trusts, see Rothschild, *supra* note 229, at 3 (noting that, “there should be nothing wrong with an individual who wishes to protect his assets by using a trust.”); see also Rothschild, at 17 (“There’s nothing wrong either morally, ethically, or legally with structuring the trust at the correct moment in time when there are no foreseeable creditors on the horizon. This is no different than any other pre-bankruptcy planning that debtors’ attorneys very often recommend.”). See also Rothschild, at 21 (warning about the consequences of the widespread use of offshore trusts: “the real reason Alaska passed their legislation, and then Delaware copied them [was] because they saw the flight of money leaving this country for offshore places.”). On the opposite end, some scholars hold a gloomy view about the consequences of the “rife use of offshore trusts.” See, e.g., Eric Henzy, *supra* note 229 (stating that, “from a societal perspective, [...] these asset protection trusts are a bad thing” because they destroy the basic principle that “when you do something wrong, you have to pay for it.”). See also Mary Daly, *supra* note 229 (Noting that in light of the fraudulent purposes for which offshore trusts are usually utilized, “...for the most part, we’re hearing about ordinary people who have accumulated an unusual amount of wealth” [and

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3.3. Securitization trusts

In an asset securitization:

a business corporation forms a private trust and transfers to that trust title to some subset of the corporation's assets [...] [T]he trust in turn issues bonds that are backed by those assets and pays the proceeds of the bond sale to the corporation. Thus, the trust is used as an intermediary in a transaction in which a corporation, in effect, pledges some of its assets as security to back an issue of marketable bonds.²³¹

Securitization trusts are beneficial because they enable “a complex group of assets to be disposed of to a trustee to be available as security to investors,”²³² bringing about lower transactional costs and bankruptcy protection benefits for the trust assets.²³³

Several Latin American countries²³⁴ recently have passed laws dealing with securitization. In Guatemala, for example, according to the Law on Trust Operations by Insurance Companies of 1991,²³⁵ these companies may promote trust operations in any banking or financial institution through the issuance of guaranteed securities of life insurance policies with prior authorization from the Superintendence of Banks.²³⁶ Insurance companies act as *fideicomitentes* and perform transferences of funds to the trust on behalf of their insured clients.²³⁷ Trust funds originate in loans provided by insurance companies guaranteed by insurance policies, based on the securities being guaranteed by the respective life insurance policies.²³⁸

Argentina also possesses broad experience with credit securitization [*titulización de créditos*], a tool used to open access to capital markets for the promotion of house financing.²³⁹ Here the *fiduciante* [mortgagor/creditor] assigns its rights to an entity legally enabled to act as financial *fiduciario*. The assignment may occur at the moment when a loan is made in the same mortgage deed and it is registered directly under the fiduciary's

what is striking is that] “they're trying to isolate themselves in a very particular way from the rest of society.”)

²³¹ Hansmann, *supra* note 11, at 18.

²³² Hayton, *supra* note 72, at 165.

²³³ For example, in the case of the securitization of credit card receivables, the bank, “[called the originator or packager], buys the credit card receivables as before, but then transfers them in trust to a separate trustee... [and]... [S]hares in that trust are sold to various participating investors who [...] are not lenders to the bank but share owners in the trust.” See Langbein, *supra* note 174, at 177.

²³⁴ Chile, Colombia, Peru. See Claire A. Hill, *Latin American Securitization: The Case of the Disappearing Political Risk*, 38 VA. J. INT'L L. 293, 14 (1998).

²³⁵ Governmental Accord 637-91 of 1991, published in the *Diario de Centro América* on 2 October 1991, approves the Regulations for the Promotion and Development of Trust Operations by Insurance Companies.

²³⁶ *Id.*, art. 1.

²³⁷ *Id.*, art. 2.

²³⁸ *Id.*, art. 6.

²³⁹ Hayzys, *supra* note 65, at 117.

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name. Thus, the borrower may borrow against the *fideicomiso*,²⁴⁰ which may then issue Certificates of Participation in the fiduciary ownership,²⁴¹ and the certificates are titles to the debt generated. This method for obtaining secondary financing is called *titulización* and has been used in different areas of the Argentinean economy such as financial *fideicomisos* over the money owed in the purchase of flight tickets, domestic appliances, and credit card debts,²⁴² and for the special system established by Law 25,798, which created a trust for the implementation of the mortgage refinancing system.²⁴³

Brazil’s Law 9,514 of 1997 introduced the Real Estate Finance System. This Law regulates the securitization of real estate loans where the credits are expressly linked to the issuance of titles of credit. Securitization firms are empowered to issue certificates of real estate receivables, whereby the fiduciary agent is a financial institution expressly authorized to that effect.²⁴⁴

3.4. Land trusts

These trusts are “local, state, regional, and national nonprofit organizations that actively work to conserve land for the public benefit through a variety of means, including, most commonly, the acquisition of land and conservation easements by gift, purchase, or bargain purchase.”²⁴⁵ Through them, a private landowner “donates a conservation easement to a land trust for one or more of the conservation purposes enumerated in the statute generally will be entitled to a charitable income tax deduction equal to the value of the donated easement.”²⁴⁶

Business trusts [*fideicomisos de negocios*] are used extensively in Argentina for different purposes. Real estate trusts, for example, are roughly an equivalent to the U.S. real estate investment trust and are comprised of a collection of different stakeholders – the landowner, developers, planners, project coordinators, financiers, and the fiduciary – who stands at the center of the venture – for the planning, development, construction, and commercialization of housing.²⁴⁷ The fiduciary is charged with selling the units and holds fiduciary title to the land, the buildings built thereon, the materials used for the construction, and the funds used during the project.²⁴⁸ The “Gas Trust” approved by Law

²⁴⁰ Hayzus, *supra* note 65, at 118.

²⁴¹ *Id.*, at 46, quoting art. 21 of law 24,441 (“[T]he certificates of participation shall be issued by the trustee. The debt securities backed by trust assets may be issued by the trustee or by third parties, as the case may be. The certificates of participation and the debt securities can be in bearer form, or registered, whether endorsable or not, or in book-entry form...”) (translation by Hayzus).

²⁴² *Id.*, at 119-120.

²⁴³ See Law 25,798 published in the *Boletín Oficial* of November 7, 2003.

²⁴⁴ See Law 9,514 of November 20, 1997, published in the *Diário Oficial* of November 21, 1997.

²⁴⁵ Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 1-2 (2002).

²⁴⁶ *Id.*, at 1-2.

²⁴⁷ See Hayzus, *supra* note 65, at 109.

²⁴⁸ *Id.*, at 109-110.

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24,076, which created the Fiduciary Investment Fund for the transportation and distribution of gas, is another example of a business trust in Argentina.²⁴⁹

4. The Case of the Financial Trust

Financial trusts are a fundamental element for the organization of investment and the administration of wealth in the United States. Among the many benefits of using trusts for financial purposes are: bankruptcy and tax protection, the protective regime of fiduciary law, lower costs, and easier governance.²⁵⁰ Commenting on the parallel between trusts and corporations, an author has stated that even though they resemble “in supplying for the particular venture a highly adaptable, contract-like regime of rights, of fiduciary duties, and of internal governance, the trust offers investors an insolvency regime superior to that of corporate law, packaged in a way that facilitates pass-through taxation.”²⁵¹

Three specific types of financial trusts deserve particular attention: trusts for financial operations, mortgage trusts, and blind trusts.

4.1. Trusts for financial operations

Pension funds, also called “investment trusts,” are one of the best-known categories among Anglo-American trusts for financial operations. A pension fund is “a pool of assets that is accumulated as a reserve with which to pay the pensions of employees at a given firm, and that is both funded and managed by the corporation whose employees are covered by the fund.”²⁵² The trust corpus is formed by the pension funds.²⁵³

There are examples of this type of trust in Latin America. Argentina’s Financial Trusts [*fideicomisos financieros*]²⁵⁴ are composed of public certificates issued by the state and purchased in public offerings. Another expression of these trusts are funds built as trusts by retirement and pension fund administrators, which, in turn, are authorized to

²⁴⁹ The Fund issues fiduciary stocks and participation certificates to raise financing. See article 2 § b) of Law 24,076 of 1992 on the Regulation of the Transportation and Distribution of Natural Gas. See also Letter of Intent implementing the Fund published in the *Boletín Oficial* of November 29, 2004. See also article 12 of Law 26,028 of 1995, which created the Trust on the Transportation Infrastructure System.

²⁵⁰ See Langbein, *supra* note 174, at 169. (“[W]ell over 90 percent of the money held in trust in the US is in commercial trusts as opposed to personal trusts.”).

²⁵¹ *Id.*, at 194.

²⁵² *Id.*, at 17.

²⁵³ *Id.* Pension fund trustees contract with expert investment or insurance companies to manage the trust corpus.

²⁵⁴ For further analysis of the Argentinean financial trust, see also “*Algunos Lineamientos Generales del Fideicomiso de la Ley 24.441*,” [“Some General Guidelines of the Trust established in Law 24,441”] (translation by author), by Luis Moisset et al. (Available at <http://www.acader.unc.edu.ar/artalgunoslineamientosgeneralesdelfideicomiso.pdf> (last visited April 25, 2006)).

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invest in these types of trusts. Nevertheless, these investment tools are affected by heavy limitations in the amounts than can be invested.²⁵⁵

In Colombia, Decree 1730 of 1991, which contains the New Statute on the Financial System, authorizes the creation of fiduciary companies. These companies are specifically empowered to act as trustees for mortgage operation or bond issued by any domestic or foreign firm.²⁵⁶ Decree 1730 also establishes the “Investment Trust,” which is defined as “a fiduciary business undertaken by fiduciary companies with their clients, for the benefit of the latter or of third parties appointed by them, with the principal objective or the contemplation of the possibility of, investing or placing sums of money, according to the instructions provided by the client.”²⁵⁷ Fiduciary companies are entitled to the fee established in the fiduciary contract executed with the beneficiaries and may issue bonds on behalf of a pool of companies.²⁵⁸

The Stock Market Law passed by Ecuador in 1998²⁵⁹ amended the Commercial Code of 1857 introducing the *Fideicomiso Mercantil* [Commerce Trust]. According to this law, only banks, authorized financial companies, and investment fund management companies can act as fiduciaries.²⁶⁰

In Mexico’s case, the General Law of Credit Institutions and Banking Establishments of 1926²⁶¹ regulated *fideicomisos* with the peculiarity that all trusts were considered commercial acts.²⁶² Later in 1932, the country undertook a revision of its commercial code with the idea of a “dedicated fund,”²⁶³ and the General Law on Negotiable Instruments and Money Operations of 1932 was passed. This Law amended

²⁵⁵ See Law 24,241 article 74 § j), approved by Decree No. 1518/94, and modified by Decree No. 163/01. See also, Instruction No. 19/2001, issued by the Superintendence of Retirement and Pension Funds Administrators, published in the *Boletín Oficial* of August 7, 2001.

²⁵⁶ See Decree 1730 of April 7, 1991, published in the *Diario Oficial* of August 31, 1989, art. 2.1.3.1.1. §(c).

²⁵⁷ *Id.* (translation by author).

²⁵⁸ See Decree 1730 of April 7, 1991, published in the *Diario Oficial* of August 31, 1989, art. 2.1.3.1.1.19; Decree 1730, art. 2.4.11.1.1, expressly authorized the state-owned “Fiduciary Company La Previsora” (created by Decree 1547 of 1984) to operate as a fiduciary for the management of the National Fund of Calamities.

²⁵⁹ Stock Market Law, Law No. 107, was published in the *Registro Oficial* on July 23, 1998. See the General Regulation of the Stock Market Law contained in Decree 390 of December 8, 1998, was published in the *Registro Oficial* on December 14, 1998.

²⁶⁰ For example, Accord No. 20020057 issued by the Ministry of Tourism, published in the *Registro Oficial* on September 25, 2002, contains the General Regulations for the Operations of the Mix Fund of Touristic Promotion created in the Commerce Trust memorialized in the public deed executed by that Ministry on July 29, 2002. According to the General Regulations, “*La Fiduciaria*” [or “The Fiduciary,” the trustee in Anglo-American terminology] established in the public deed, administers the Fund. The funds collected in the Trust can only be used for the promotion of products, programs, projects or touristic services qualified as a priority by the Council of Touristic Promotion (article 63).

²⁶¹ See Corrales, *supra* note 66, at 3.

²⁶² *Id.*

²⁶³ See Waters, *supra* note 3, at 628 (This idea “was first coined by French advocate of the trust, Pierre Lepaulle, whose writings were instrumental in 1932 in Mexico adopting the idea in its code revision of that year.”).

the commercial code, introducing a new right into the legal system called *titularidad*.²⁶⁴ Currently, the *fideicomiso* is used broadly for financial operations and in some cases in real estate investments.²⁶⁵

Paraguay's Law 92 of 1996 on Fiduciary Businesses (*Negocios Fiduciarios*), establishes the procedure for the registration of securities issued through public offerings in the Stock Market.²⁶⁶

Peru's banking law of 1993 instituted the trust commission [*comisión de confianza*], defining it as a commercial act that only banking institutions may carry out.²⁶⁷ The trust issues Certificates of Participation, which are held under the name of the *fideicomisario*.²⁶⁸ The Regulation to this Law²⁶⁹ created three types of *fideicomisos*: (a) *Fideicomisos* in guarantee, where the assets are destined to guarantee the performance of an obligation, and where the *fideicomisario* is the creditor;²⁷⁰ (b) the Testamentary *Fideicomiso*;²⁷¹ and (c) the *Fideicomiso de Titulización*²⁷² — a type of financial trust.

The 2003 Trust Law of Uruguay²⁷³ regulates the financial trust, defined as “that where the beneficiaries are entitled to certificates of participation in the fiduciary ownership, of securities representative of debt guaranteed by the assets composing the trust, or of mixed securities granting credit rights and participatory rights over the remainder.”²⁷⁴ Only financial entities or administrators of investment funds may act as financial *fiduciaries*.²⁷⁵

Finally, in 1956 Venezuela sought to “introduce a notion of trust with no restrictions as to its range of applications.”²⁷⁶ The civil code *fideicomiso* continued to exist, but the 1956 law permitted banks, insurance companies, and financial companies only to perform as fiduciaries for certain banking, insurance, and other financial operations, respectively.²⁷⁷

These are certain modern versions of the *fideicomiso* that lean towards acquiring the main characteristics of the Anglo-American trust. They, nevertheless, fall short from

²⁶⁴ Lupoi, *supra* note 1, at 285 (“*Ley General de Títulos y Operaciones de Dinero*, of August 27, 1932 is a part of the Commercial Code.”).

²⁶⁵ Lupoi, *supra* note 1, at 285 (“*Ley General de Títulos y Operaciones de Dinero*, of August 27, 1932 is a part of the Commercial Code.”).

²⁶⁶ Law 92/96 on Fiduciary Businesses (*Negocios Fiduciarios*), is regulated by Resolution 854 published in the *Gaceta Oficial* on June 15, 2005.

²⁶⁷ See *supra* note 18.

²⁶⁸ *Id.*, art. 7.

²⁶⁹ See *supra* note 18.

²⁷⁰ *Id.*, arts. 15-6.

²⁷¹ *Id.*, arts. 17-8.

²⁷² *Id.*, arts. 19-21.

²⁷³ See *supra* note 70.

²⁷⁴ *Id.*, art. 25, paragraph 1.

²⁷⁵ *Id.*, art. 26, paragraph 1.

²⁷⁶ Lupoi, *supra* note 1, at 291.

²⁷⁷ *Id.*

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fully incorporating the proven benefits of the common law financial trust, mainly broad tax benefits and others already discussed.²⁷⁸

4.2. Mortgage trusts

These trusts are a useful mechanism for real estate financing. In them, the lender/seller sells the property (trust property) to the borrower/buyer. Title to the property is retained by the lender/seller who becomes the trustee for the duration of the trust, and the borrower/buyer becomes the beneficiary enjoying the use of the property. The trust terminates upon full payment of the debt by the borrower/buyer who becomes the full owner of the property. Without these trusts, it would be impossible to explain the expansion of the U.S. housing market after World War II.²⁷⁹

In Latin America, by contrast, the mortgage trust is a largely underused institution. Some instances are, however, worth mentioning. Argentina's collateral trusts [*fideicomisos de garantía*] usually operate in mortgage operations by the transference of the legal title for property from the debtor (borrower) to the lender (usually a bank or other financial institution).²⁸⁰ This mechanism allows the borrower to obtain financing and the lender to simultaneously secure a strong guarantee for the re-payment of the loan. Trusts have played a role in the Mexican real estate sector as well. In effect, due to the many restrictions imposed after the Mexican Revolution of 1910, investment in real estate trusts and the participation of foreign investors have been particularly controversial topics in that country. A Presidential Agreement of 1971 was the first government regulation allowing the participation of foreign investors in real estate trusts over Mexican lands. According to this regulation, only "duly certified Mexican financial institutions [are permitted] to acquire title to real property as trustee in the name of the beneficiary foreign investor."²⁸¹ Foreign beneficiaries only "acquired beneficiary rights to use and profit from the real property without constituting ownership rights."²⁸² Later on, mirroring the effect of world changes and in order to raise additional capital for infrastructure development, the Foreign Investment Law of 1993 broadened authorization for the use of real property trusts controlled by foreign investors in Mexico.²⁸³ Other restrictions to real estate trusts include the requirement that the trustee be a Mexican²⁸⁴ financial institution "duly authorized by the federal government."²⁸⁵

²⁷⁸ See Part I, pp. 15 et seq.

²⁷⁹ See generally Rothschild, *supra* note 229. See also *supra* note 50.

²⁸⁰ See Hayzus, *supra* note 65, at 113-4 ("...there is an improvement here over the classical collateral forms available (mortgage and pledge with registration) in that the debtor relinquishes part of his assets.") (translation by author).

²⁸¹ See Corrales, *supra* note 66, at 4.

²⁸² *Id.*

²⁸³ *Id.* at 5 ("After 1993, the lifting of prior restrictions allowed foreign investors to participate in real estate trusts for the acquisition of the "rights to the use and profits from real property located along the border and coastline of Mexico by means of the irrevocable trust [which] had to be commercial or industrial in nature and no ownership rights were acquired."). These trusts allow the trustee to issue securities called Ordinary Participation Certificates. Chapman Poindexter, *supra* note 7, at 5 ("Certificados de Participación Ordinaria.").

²⁸⁴ *Id.* at 3.

²⁸⁵ *Id.* at 2.

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4.3. Blind trusts

These trusts are designed to avoid conflicts of interest for persons holding government positions or otherwise dealing with the government in influential posts. In this kind of trust, “the manager-trustee is prohibited from communicating with the interested party regarding the investments made, and the interested party may not request any information directly from the trustee.”²⁸⁶ There are several Latin American experiences with this type of trust.²⁸⁷

PART IV: The Road Ahead: Looking Beyond the Current Paradigm

1. In general

As already stated, in today’s globalized world of business, finances, and exchanges, the Latin American region has long been familiar with Anglo-American trusts,²⁸⁸ and it is likely that attempts at deepening this familiarity will continue to take place “if only to capture back some of the lucrative international financial work which has gone to common law jurisdictions.”²⁸⁹ A commentator has noted that civil law scholars feel jealous “when they visit the universities, hospitals, and other general social institutions [in Great Britain and the United States] [and see them] prospering because of the [trust] mechanism.”²⁹⁰ Therefore, the need for an expansion of trusts as business and financial tools is more present than ever.

The discussion about the compatibility or equivalence – or the lack thereof – between the trust and the *fideicomiso* is not just for academicians, but is a practical matter in the international business world. The problem arises particularly in two situations: when a trust created in a common law country seeks recognition in a civil law jurisdiction²⁹¹ and when a trust created pursuant to a statute in a civil law jurisdiction searches to be recognized in another “jurisdiction [which] has adopted a form of trust by statute.”²⁹²

²⁸⁶ Albinini, *supra* note 87, at 591.

²⁸⁷ For a recent discussion on the blind trust [*fideicomiso ciego*] see the case of Chile: available at http://www.senado.cl/prontus_senado/antialone.html?page=http://www.senado.cl/prontus_senado/site/artic/20050602/pags/20050602182005.html (last visited Dec. 2006).

²⁸⁸ See Gaillard *supra* note 33, at 313 (“... the civil-law countries find themselves more and more frequently confronted with international situations involving trusts.”).

²⁸⁹ Matthews, *supra* note 14, at 22.

²⁹⁰ Mayda, *supra* note 101, at 7 (“One may be allowed to ask whether it is really the legal technique of trusts or rather the greater availability of money [...] which makes the difference.”).

²⁹¹ See generally Walter H. Diamond et al., INTERNATIONAL TRUST LAWS AND ANALYSIS (2001).

²⁹² Adair Dyer, *Topic V: The Recognition of Common Law Trusts and Their Adoptions in Civil Law Societies*, in Symposium International Recognition and Adaptation of Trusts: The Influence of the Hague Convention, 32 VAND. J. TRANSNAT’L L. 989, 3 (1999), at 10.

Globalization increasingly will require the need for mutual recognition of trusts created in both legal systems. The construction of a more modern or business-friendly version of the Latin American *fideicomiso* seems to be the starting point.²⁹³

Reality shows that most civil law countries have and continue to adopt “trust-like institutions.”²⁹⁴ Despite the apparent irreconcilable stands of common and civil law,²⁹⁵ there are academic examples of how an approach between the trust in both systems would occur. In fact, an author has modeled a process of “reception” of a foreign legal institution, which could help to develop a working hypothesis for the reception of Anglo-American trusts in Latin American countries.²⁹⁶

The “reception” in the proposed model would not happen overnight, but in stages. First, “the arrival of the foreign doctrine,”²⁹⁷ which is the trust doctrine in this exercise. Second, the reaction could range from rejection, acceptance, or acceptance followed by repentance.²⁹⁸ Thirdly, “assimilation with the underlying law,”²⁹⁹ coupled with subsequent positive experiences for the users of the initially foreign doctrine. The last stage is the reconstruction of the doctrine and its full reconciliation with domestic institutions and practices.³⁰⁰

This process of “reception” or incorporation would entail obstacles and potential misunderstandings. The change is a particularly daunting task when it comes to “the

²⁹³ Latin American courts do not enjoy the breath of equitable powers that Anglo-American courts do and, therefore, the quest for resulting and constructive trusts has to necessarily focus on statutory law. In this context, the obligation to restate the trust assets or the values or income generated thereof—which is germane to the resulting trust—is also present in several Latin American legal institutions. In effect, statutory law in Latin America generally provides that if the grantor gratuitously conveys property to the donee and the transfer fails due to the noncompliance with any of the legal formalities necessary to perfect the transfer, in this case, the third party who receives the trust property is under the obligation to restate it to the intended beneficiary. With respect to resulting trusts, the same effect may roughly be obtained through the Latin American doctrine of simulation. See COD. CIV. art. 989 (Argentina, 1917). (“Simulation is present when the juridical character of an act is concealed under the appearance of another act, or when the act contains clauses which are not sincere, or dates which are not true, or when rights are constituted or transferred thereby to interposed persons, other than those for whom they are really constituted or to whom they are transferred.”). These legal actions take the form of legal actions aimed at annulling the effects of the unlawful act. *Id.* art. 1078 (“Juridical acts are void when the parties have proceeded with simulation . . .”) (translation by author). What remains to be determined is whether Latin American courts could impose a resulting trust in the absence of statutory authority.

²⁹⁴ Hansmann, *supra* note 11, at 2.

²⁹⁵ Venturatos, *supra* note 16, at 1 (“Incorporating a common law concept into a jurisdiction of the civil law jurisdiction tradition presents many difficulties, not only in terminology, but in basic underlying legal concepts.”).

²⁹⁶ Kenneth G.C. Reid, *The Idea of Mixed Legal Systems, in First Worldwide Congress on Mixed Jurisdictions Salience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities*, 78 TUL. L. REV. 5, 9-10 (2003). (“The trust fits the model neatly enough.”).

²⁹⁷ *Id.* at 9-10.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

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adaptation of legal institutions that is necessary in order to recognize trusts created under foreign law.”³⁰¹

2. Potential Avenues for the Expansion of Business and Financial Trusts in Latin America

There are several alternatives of Anglo-American business trusts that do not exist in Latin America, which, if created, could serve as an important investment tool in the region. These options are listed below.

2.1. Flee clauses or “grasshopper” trusts: In these trusts, the trustees and the law governing the trust are substituted for other trustees and for the law of a new jurisdiction “when any of a broad range of specified events occur.”³⁰²

2.2. “Blackhole” trusts: These conveyance devices are meant to distribute income for a period of a hundred years to the beneficiaries, “upon the expiry of which the capital is to be distributed to the youngest then living descendant of [the grantor] born after 82 years have elapsed from creation of the trust.”³⁰³

2.3. Unit trusts: These are “a collective investment vehicle in which the value of units in the trust held for a unit-holder is directly related to the value of the assets held by the unit trustee.”³⁰⁴

2.4. Custodian trusts: A corporation custodian holds the securities for a broker, who holds them for a client. Custodian trusts are practical tools fostering a “speedy inexpensive dealing in stocks and shares.”³⁰⁵

2.5. Debenture trusts: In this complex class of trusts, “a trustee can hold on trust for the lenders the borrower’s covenant to repay, together with property charged to the trustee as a security for the loan.”³⁰⁶

2.6. Subordination trusts: Subordination “is a transaction whereby one creditor, the ‘subordinated’ or ‘junior’ creditor, agrees not to be paid by a debtor until another creditor, the ‘senior creditor,’ of the common debtor has been paid.”³⁰⁷

2.7. Retention trust funds: Used in the building industry, they provide the security to the employer that the “project is properly completed, while the management contractor and work contractors are protected in the event of the insolvency of the employer.”³⁰⁸

³⁰¹ Dyer, *supra* note 292, at 17.

³⁰² Hayton, *supra* note 58, at 323.

³⁰³ *Id.*, at 329.

³⁰⁴ Hayton, *supra* note 72, at 163.

³⁰⁵ *Id.*, at 163.

³⁰⁶ *Id.*, at 164.

³⁰⁷ *Id.*, at 165.

³⁰⁸ *Id.*, at 166.

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2.8. Trust proceeds clause: This trust operates as a guarantee for the wholesaler *vis-à-vis* the retailer.³⁰⁹

2.9. Client account trusts: These are used by professional services providers to isolate and protect their clients' property from third parties.³¹⁰

2.10. Voting trusts: In voting trusts, shareholders place shares into a trust and appoint a trustee. Shareholders instruct the trustee, who generally "enjoy[s] little or no discretion,"³¹¹ how to vote in these type of trusts.

2.11. Trust receipt: A trust receipt has been explained as follows:

[I]t may happen that a borrower needs to retain physical possession of the property on which he has been granted credit by a bank or wholesaler in order to be able to make advantageous sales of finished products or to be able to manufacture raw materials into salable property. A pledge therefore would be out of the question, and the bank may not feel that the customer is good for an unsecured loan. The creditor therefore allows the property to remain in the possession of the borrower but will require him to give a trust receipt evidencing he holds the property as 'trustee' for the bank, and that the proceeds of sale belong to the bank. In case of the borrower's bankruptcy the bank has a prior claim on the property; if the loan were unsecured, it would have to share with other creditors.³¹²

2.12. Other: Real estate investment trusts and oil and gas royalty trusts are expressions of business trusts broadly used in the Anglo-American world.³¹³

This long list of statutory trusts reflects the extensive expressions available for the Anglo-American trust. Needless to say, the Latin American *fideicomiso* presents an alarming shortage of possibilities *vis-a vis* the Anglo-American trust and, at the same time, suggests the breath of opportunities for modernization.

3. The Multilateral Approach

A crucial battle for the relation between the civil law *fideicomiso* and the Anglo-American trust took place at the conference leading to the adoption of the Hague Convention on the Law Applicable to Trusts and on their Recognition (Convention) to

³⁰⁹ See Waters *supra* note 3, at 607 ("[u]pon transfer of possession to the retailer the trustee holds title to goods, the proceeds clause gives the unpaid wholesaler an immediate absolute equitable interest in the proceeds upon authorized sale of the goods by the retailer. In this way the wholesaler retains his interest as against the floating charge of the retailer's lending bank, and against the retailer's bondholders. The property is never in the retailer.").

³¹⁰ Hayton, *supra* note 72, at 166.

³¹¹ Hansmann, *supra* note 11, at 17.

³¹² Golbert, *supra* note 6, at 74.

³¹³ Langbein, *supra* note 174, at 175-6.

which several Latin American countries are party to.³¹⁴ The Convention has been described by a leading international trust law scholar “as the first serious attempt in 600 years to bridge the gap of the “English” Channel [...] in the field of fiduciary law.”³¹⁵ The scholar was referring to the Convention’s efforts “to furnish judges and practitioners [in both civil and common law jurisdictions] with the elements that would allow them to understand this legal institution more clearly.”³¹⁶

The purpose of the conference was “not to introduce the trust into the civil law countries”³¹⁷ but to “validate the activities of common-law trustees in civilian systems.”³¹⁸ The results were mixed and, as a trust expert has pointed out, the conference was the stage for “few convergences and far many misunderstandings.”³¹⁹

3.1. A Compromised Definition of the trust

The conference’s purported goal was to find a definition valid for civil and common law systems. In fact, the Convention establishes that the term ‘trust’ refers to “the legal relationships created –*inter vivos* or on death– by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.”³²⁰ The same provision outlines the features of the trust: (a) the assets constitute a separate fund and are not a part of the trustee’s own estate; (b) title to the trust’s assets stands in the name of the trustee or in the name of another person on behalf of the trustee; and (c) the trustee has the power and the duty, under which he is held accountable, to manage, employ or dispose of the assets in accordance with the trust’s terms and the special duties imposed upon him by law.

Several problems arose immediately from this “shapeless” definition.³²¹ First, the term “trust” is not reserved in Anglo-American systems exclusively to expressly created trusts. Even though resulting and constructive trusts do not require a specific act by the trustor, these are still fully regarded as trusts. The Convention’s definition completely obliterates the possibility of equitable trusts being recognized outside the common law world. Second, the definition states that the assets are not a part of the trustee’s own estate. The Latin American *fideicomiso*, as already mentioned, establishes that if the trustee dies before the condition fails or a term expires for the transfer of the trust assets, these become a part of the trustee’s own estate. This feature shows a dichotomy with the Anglo-American trust, in that in the Latin American *fideicomiso*, the *fiduciario* is the full owner of the corpus and, as such, the corpus becomes a part of his estate at his death. This effect is unthinkable in common law. Thirdly, in Latin American civil systems, the trustee holds both legal and equitable title to the assets, not just legal title as seen in

³¹⁴ Latin American member states are: Argentina, Brazil, Chile, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela.

³¹⁵ Waters, *quoted in* Dyer, *supra* note 292, at 3.

³¹⁶ Dyer, *supra* note 292, at 15.

³¹⁷ *Id.* at 15.

³¹⁸ Lupoi, *supra* note 1, at 345.

³¹⁹ *Id.* at 327.

³²⁰ Convention, art. 2.

³²¹ As a consequence, a ‘shapeless trust’ “was ultimately recognized.” Lupoi, *supra* note 1, at 332.

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common law. The definition fails to endorse this essential element of Anglo-American trusts. Lastly, whereas in common law a trustee may be also a beneficiary, this scenario is generally unacceptable in civil law systems, where a person is either a trustee or a beneficiary, but not simultaneously. The definition contains a rather anodyne reference to this circumstance when it states that “the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.” But this statement of compromise does not alter the essential difference between the Anglo-American and the Latin American trust when it comes to the trustee’s powers. In sum, the rules contained in the definition only postpone legal debates instead of clarifying them at once.

It follows that the Convention’s definition of trusts is so flawed that the only valid explanation for its issuance is that it was conceived – in the words of a recognized international trust law expert — as “an image that caters to the need for judges and lawyers in non-trust countries to be able to identify trust-like devices operationally from their specific characteristics, rather than having to view them as a whole and try to fit them within a comprehensive definition.”³²²

3.2. The Limited Scope of the Convention’s application

The Convention states it applies exclusively to “trusts created voluntarily and evidenced in writing.”³²³ A commentator has noted that

this provision is intended to limit the scope of the application of the Convention to clear and unambiguous trust relationships and to release the judge in civil law countries from the difficult task of dealing with more complicated forms of common law trusts, in particular with constructive trusts and the trusts which are established by a court order.³²⁴

In the light of this provision, if an Anglo-American constructive trust seeks recognition in Latin America, a Latin American judge will probably not recognize it based on the principle that recognition is a matter of domestic legislation that cannot be trumped by international treaties. If, however, a foreign judge has established the trust, it is a matter of enforcing a foreign judgment. Therefore, the establishment of common law trusts in Latin America will always be a matter pertaining to their respective common law jurisdictions. But their effects in civil law jurisdictions will be left to Latin American judges to decide. The recognition of a trust – whatever its origin and the form it takes — is an issue within the exclusive jurisdiction of a civil law judge, who will recognize the trust as long as it conforms to civil law rules. The Convention addresses this dilemma but it does not provide a satisfactory and complete solution.

³²² Dyer, *supra* note 292, at 7.

³²³ Convention, art. 3.

³²⁴ Hein Kotz, *The Hague Convention on the Law Applicable to Trusts and Their Recognition*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW, 40 (David Hayton, ed., Kluwer The Hague, 1999). See also J Schoenblum, *The Hague Convention on Trusts: Much Ado About Very Little*, 3 J Int. Trust & Corp Plan 5 (1994).

3.3. The Challenge of Reaching Full Recognition of a Trust

When a foreign trust is recognized in one of the signatory jurisdictions, the Convention forces them to accord, as a minimum, to the following effects of recognition: (a) that the trust property constitutes a separate fund; (b) that the trustee may sue and be sued in his capacity as trustee; (c) that the trustee may appear or act in this capacity before a notary or any person acting in an official capacity; (d) that personal creditors of the trustee shall have no recourse against the trust's assets; (e) that the trust's assets shall not form part of the trustee's estate upon his insolvency or bankruptcy; (f) that the trust's assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death; and (g) that the trust's assets may be recovered when the trustee, in breach of trust, has mingled them with his own property or has alienated them.³²⁵

As reviewed earlier, effects (d), (e), (f), and (g) are by and large excluded in Latin American jurisdictions.

Other conflictive points worth noting in the Convention are: (a) purpose trusts are accepted by the Convention in general, a notion conflicting with civil law, which accepts them very restrictively; (b) with respect to the double capacity of an individual as grantor and trustee, the Convention explicitly forbids that the trustor appoints himself as trustee; yet Anglo-American law is entirely different and allows the settlor to appoint himself as trustee and beneficiary at the same time; (c) in regards to the legal relationship between settlor and trustee, the Convention characterizes this relationship as "lasting," which is "the very antithesis of the English-model trust,"³²⁶ where such relationship is inherently nonexistent, save extremely circumscribed exceptions; (d) under the segregation of assets rule, the Convention does not make a clear-cut differentiation between the legal and equitable rights vested in the trustee, which, as already seen, is a fundamental difference between civil and common-law trusts; and (e) in what respects are constructive and resulting trusts – due to the supposed lack of the trustor's voluntarily expressed will — excluded from the Convention.

Needless to say, the Conventions provisions flagrantly overlook the fact that common law courts often intervene to "complete the implicit intention of the settlor, not to oppose or contravene it [thus not creating but simply declaring] its existence."³²⁷

In spite of its good intentions to effectively address the apparent need for mutual recognition of Anglo-American trusts and civil law *fideicomisos*, the Convention affords extremely limited solutions to this conundrum.

4. The Unilateral Approach

³²⁵ Convention, art. 11.

³²⁶ Lupoi, *supra* note 1, at 336.

³²⁷ *Id.* at 341.

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An alternative to the multilateral approach may come in the form of initiatives undertaken by Latin American countries in shaping their own versions of trusts. These proposals must be framed necessarily around civil codes.³²⁸ In fact, civil codes serve as the basis for a “superstructure of theory [which purports to be] valid for any time or place.”³²⁹ Common law, instead, is based on the notion that, as society changes legal solutions need to change as well. A significant evidence of this profound dissimilitude is shown in the relevance of *stare decisis*, so entrenched in common law systems and utterly rejected by civil law countries.³³⁰ As a consequence, whereas common law has developed a “highly sophisticated methodology for interpreting case law,”³³¹ civil law systems count with very specialized methodologies for statutory interpretation.³³² Therefore, in general, both systems lack the expertise in methodological interpretation enjoyed by the other.³³³ In this context, the differences in the nature, treatment, and legal consequences of trusts in both legal systems need to be understood. These differences relate to the very foundation of each legal culture, which more than often find themselves in stark opposition.³³⁴

As trust law is a genuine common law byproduct, it can only be fully understood within the nuts and bolts of Anglo-American legal principles. Any attempts at equalizing Anglo-American and Latin American trust law needs to address the overarching issue of the relationships between both legal systems. More specifically, without the idea that courts may use equitable powers to enforce trusts, as it happens in Anglo-American legal systems, there could never be a total identification of trust institutions in both legal worlds, because “melding of the two signifies a profound alteration of each.”³³⁵

Another structural obstacle to the reception of the Anglo-American trust in civil law jurisdictions is the unitary concept of ownership, which is completely inconsistent with the common law idea that two types of interests [or ownership rights] co-exist in

³²⁸ Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, (2001), at 23 (“Civil codes have been defined by a common law jurist as “written texts designed to govern throughout time, designed to embody the immutably true, to embody principles so reliable that they supersede and can withstand the vicissitudes of the particular, of the temporal, of the myriad contextual elements that connect human beings to the legal issues they ask courts to adjudicate.”).

³²⁹ *Id.* at 23.

³³⁰ *Id.* at 22 (“Judicial creation of law in civil-law legal cultures remains the exceptional recourse...”); *Id.*, at 21 (“Where the legal system contains gaps or lagoons, it is said that interpretation can be done “[b]eyond the Civil Code but by means of the Civil Code.”).

³³¹ *Id.* at 14.

³³² See generally Konrad Zweigert & Hans-Jürgen Kötz, *Statutory Interpretation-Civilian Style*, in CIVIL LAW, 259-74 (Ralf Rogowski ed., 1996); John W. Van Doren, *Things Fall Apart, or Modern Legal Mythology in the Civil Law Tradition: The Civil Law Tradition*, 2 WIDENER J. PUB. L. 447, 1, 5-10, 20-3, (1993); Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 1-5, 17-24 (2003); and JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985), reprinted in JOHN HENRY MERRYMAN, ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA*, 192-210 (1994).

³³³ Grosswald Curran, *supra* note 328, at 15.

³³⁴ *Id.* at 1. (“[T]he defining characteristics of civil-law legal culture not only are largely absent from common-law legal systems, but [...] they consciously and repeatedly were rejected by England.”).

³³⁵ *Id.* at 36.

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common law trusts: equitable rights and legal rights.³³⁶ The Napoleonic Code decidedly rejected this split.³³⁷

As already noted, nothing in the Anglo-American *inter vivos* trust resembles a civil law contract.³³⁸ The trustee is neither an agent of the trustor or the beneficiary, nor is the beneficiary a principal of the trustee.³³⁹ The position of the common law beneficiary is much different in civil law jurisdictions and, as a commentator states, “it would be doubtful, in principle, to sustain that [the beneficiary] has something more than personal rights.”³⁴⁰

These apparently insurmountable challenges come at a time when a large number of legal experts in the Americas accept that the trust tool is superior to traditional civil law institutions for the purposes of managing assets, reducing transactional costs, and obtaining additional benefits, such as tax benefits and the simplification of administration procedures, among others.³⁴¹

Therefore, any proposals must consider these realities and the ultimate alternative available to fully upgrade the Latin American *fideicomiso* to the standards of the Anglo-American trust and needs to come as a result of the passing of specific legislation in Latin American jurisdictions.³⁴²

5. Advancing criteria for a reformulation and deepening of Latin American business *fideicomiso*

Among the criteria that legislation should take into account are:

5.1. Contract law or property law

With respect to the old debate “as to whether the law of trusts is properly considered a branch of contract law or of property law,”³⁴³ new attempts for the expansion of trusts in Latin America should overcome this dogmatic question. In that sense, pragmatic approaches should meet their hour in the region.

5.2. The concept of ownership

³³⁶ V. Bolgár, *Why No Trusts in the Civil Law*, 2 Am. J. Comp. L. 204, 216-17 (1953), at 210, quoted in Sonneveldt, *supra* note 31, at 15.

³³⁷ See Hansmann, *supra* note 11, at 5 (The “trust doctrine runs counter to the so called unitary theory of property rights. During the French revolution, divided property rights came to be considered characteristic of feudalism.”).

³³⁸ Checa, *supra* note 75, at 108.

³³⁹ *Id.*.

³⁴⁰ *Id.* at 110.

³⁴¹ *Id.* at 18.

³⁴² *Id.* (“[T]he resource to a special law is the suitable method to introduce in the ambit of a civil law system an appropriate regulation of the Anglo-American trust.”) (translation by author).

³⁴³ Hansmann, *supra* note 11, at 19; for a complete analysis of the legal nature of trusts see also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

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The unitary and indivisible concept of property puts a strong obstacle to the goal of extending trusts in the region,³⁴⁴ but, with a practical take in the matter, and based on already existing civil law institutions that recognize a right of partial enjoyment over an item, this obstacle certainly could be worked out.

5.3. Registration requirements

Public registration requirements for land trusts are another important barrier to creating an Anglo-American-type of *fideicomisos* in Latin America.³⁴⁵ In formulating new legislation, it should not matter whether title to the property is held under the name of the trustor or the trustee, as long as the property is a sufficient guarantee for a transaction and there are satisfactory remedies for cases of fraud by the debtor – be it the grantor, the trustee, or even the beneficiary.

5.4. Restrictions on encumbrances

As currently regulated, restrictions on encumbrances are another impediment for trust expansion in Latin America.³⁴⁶ A result of the Napoleonic Civil Code's legacy, restrictions on the free alienability of rights over items are frowned at in Latin America. , Similarly, the trustee's restriction from alienating (encumbering or transferring) the trust corpus in violation of his fiduciary duties is at the heart of the Anglo-American *inter vivos* trust. Therefore, the obstacle that the rule against restrictions on free alienability poses on the expansion of trusts is minimal – reason being that these restrictions apply to trustees both in common and civil law systems, meaning no significant differences exist in the matter.

5.5. Formation costs

The low cost involved in the formation of a trust is one of the reasons frequently raised to explain the wide success of trusts in the Anglo-American world. This should be an important characteristic of a new Latin American *fideicomiso*, which should involve, as one scholar proposes, “reducing the burden of drafting; reducing information costs for various actors – lawyers, judges, and businesspeople — by inducing them to use the same form; making it easier for actors to bond themselves credibly to certain structures or forms of conduct; and facilitating an accretion of clarifying legal precedent.”³⁴⁷

5.6. The trustee

The function of trustee should be extended beyond the current status in Latin America where oftentimes only banks and financial institutions can serve as trustees.

³⁴⁴ V. Bolgár, *supra* note 336, at 216-17. (“[I]t has been suggested that the concept of indivisible property, the primary reason advanced for the non-existence of trusts in the civil law, has in it germs of economic collectivism and, perhaps, authoritarianism.”), *quoted in* Mayda, *supra* note 101, at 8.

³⁴⁵ Arroyo, *supra* note 29, at 7.

³⁴⁶ *Id.*

³⁴⁷ Hansmann, *supra* note 11, at 23.

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Individuals also should be allowed to serve as trustees,³⁴⁸ especially concerning financial trusts. Furthermore, the fiduciary duties to which trustees are subject to also should be revised and expanded.

5.7. Tax considerations

An appropriate tax treatment for trusts in Latin America would be the number one factor for their expansion in the region.³⁴⁹ The widespread fear that trusts would become a tool for rampant tax evasion is overly exaggerated. Panama — a country that has taken important steps in the direction of deepening its trust institutions — shows the increased presence of trusts does not equal unlawful activity, based on its recent relatively successful experience with modern trusts.³⁵⁰ Another instance of the limited adverse tax consequences that a trust has created in Latin America occurs in Argentina. In fact, in 1995, this country passed Law 24,441 introducing the notion of “fiduciary ownership.” This law acknowledged the close relationship between the *fideicomiso* and other areas of law, such as family law, intestate and testamentary law, property and personal rights, and tax law.³⁵¹ Despite the apparent broad availability of the Argentinean *fideicomiso*, it has had limited success. The likely reason is the unresolved question about the tax treatment of the *fideicomiso*.³⁵² At the corporate level, the trust corpus is taxed in same manner as any company’s assets.³⁵³ *Inter vivos* and testamentary trusts do not receive a favorable tax treatment either, because whatever tax exemptions the grantor enjoyed are lost upon the transfer to the *fiduciarios*.³⁵⁴ The only exception seems to be the preferential tax treatment accorded to financial trusts.³⁵⁵

Finally, Panama’s trust law of 1984 includes a broad tax exemption for all transactions related to the creation, amendment, or termination of a *fideicomiso* or the conveyance, inheritance, or encumbrance of *fideicomiso* property. Exemptions extend to the income generated and all other *fideicomiso* transactions relating to property located abroad, cash deposited from income generated overseas by non-Panamanian sources, or shares and securities of any type issued by firms whose income is generated overseas by non-Panamanian sources that are deposited in Panama.³⁵⁶

As reviewed, these are samples of the multiple experiences Latin American countries have in offering tax exemptions or credits for trust operations. These cases have not generated obstacles to tax collection that did not already exist, as tax enforcement is a real challenge for many governments due to inadequate or insufficient policies.

³⁴⁸ Hansmann, *supra* note 11, at 13.

³⁴⁹ Gaillard *supra* note 33, at 322.

³⁵⁰ Panama’s Law 1 of January 5, 1984 published in the *Gaceta Oficial* on January 10, 1984, art. 35, which basically makes that country a “Tax-haven” jurisdiction.

³⁵¹ Hayzus, *supra* note 65, at 30.

³⁵² *Id.*, at 74.

³⁵³ *Id.*, at 80.

³⁵⁴ *Id.*, at 81.

³⁵⁵ See Chapman Poindexter, *supra* note 7.

³⁵⁶ See *supra* note 350. The current Trust Law of Uruguay includes several tax exemptions for financial trusts. See *supra* note 68, art. 39, paragraph 1.

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Therefore, tax exemptions or credits for new forms of *fideicomisos* would not pose exceptional hindrances to existing tax collection policies in the region and their prospective benefits would outweigh the foreseeable risks.

5.8. Civil liability: Trusts should not be used to avoid compliance with Latin American countries' fundamental laws and public order regulations.³⁵⁷ For example, donative trusts should not be allowed to circumvent tax, succession rules, or to “defraud creditors or to defeat claims of divorcing spouses.”³⁵⁸ Absent these circumstances, they should be allowed to survive and thrive in Latin America.

5.9. Remedies: Remedial measures should be extended in Latin America, allowing the beneficiaries and innocent third parties to enforce their rights through expeditious and efficient means. In light of this point – as noted in books — there are not many differences between the remedies available in common law and civil law countries; the difference lies in the effective enforcement of those measures in civil law systems.³⁵⁹

Conclusion

This article has identified the main similarities and differences between the Anglo-American trust and the Latin American *fideicomiso*. Special attention was given to the core differences between both institutions, to assess the possibility of creating a truly useful Latin American *fideicomiso*. For this purpose, the article reviewed existing *fideicomiso* legislation in Latin America and advanced general criteria for future proposals in this area.

The ground is fertile for changes that will bring more business opportunities for everybody in the region. Investors, both domestic and foreign, claim and expect more creative and innovative legal tools, welcoming more investment in the region. A new modern version of a Latin American trust goes to the heart of these expectations. A growing number of stakeholders think there are convincing reasons to believe the many benefits trusts bring to different stakeholders in common law countries – whether in the form of preferential tax treatment, as a means to avoid probate procedures, or to isolate assets from third parties – would not also flow within the Latin American region once a more modern form of trusts is implemented, but also from the outside.

A solution on the international level for the international recognition of trusts in the Anglo-American and Latin American legal systems is still a strong alternative. In the meantime, many would regard the unilateral design of a new modern Latin American trust as a beneficial first step. The analysis and proposals contained in this article seek to provide some guidance to that effect.

³⁵⁷ See Hansmann, *supra* note 11, at 25 (“Indeed, the protean nature of the trust makes it particularly well suited to efforts at fiscal and regulatory avoidance, and this has been among the reasons that the European civil law countries have been reluctant to adopt the form.”).

³⁵⁸ Hayton, *supra* note 58, at 336.

³⁵⁹ Hansmann, *supra* note 11, at 6.

In the absence of changes, either multilateral or unilateral – as a Harvard report stated more than half a century ago referring to transnational trust law practitioners – as "a possible safeguard available to the draftsman of a trust instrument [drafted in one jurisdictions with potential effects in another] may be a provision for alternative legal dispositions, conforming to the civil law, to insure against the effect of a possible adverse holding."³⁶⁰

³⁶⁰ *Common Law Trusts in Civil Law Courts*, 67 Harv. L. Rev. 1030 (1954), at 7.