VOLUME 17
ISSUE 4 2019

TRUST QUARTERLY *REVIEW*

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ALL OVER THE PLACE

This edition of the *Trust Quarterly Review* explores cross-border philanthropy in Europe; New Zealand's trust law reforms; pour-over trusts in British Columbia; challenges for the introduction of a Swiss trust law; and the legal limits of undue influence in England and Wales

Thirty years after the fall of the Berlin Wall, the western model of society is confronted with new challenges on the political, social, economic and environmental front. One of the key features of this western model, which should assist in tackling these challenges, is personal responsibility.

This responsibility finds its expression, among others, in the growing movement towards charitable giving and philanthropy by the wealthy. In a global world, such giving does not know frontiers; however, this can lead to frictions where national legislations apply different standards to domestic and foreign charities. Keith Wallace takes us on a fascinating tour of this important subject, with a focus on Europe and the jurisprudence of the European Court of Justice (ECJ). It is truly amazing to see how obstinately certain European countries have tried to defend protectionist elements of their fiscal legislation, despite the clear line adopted by the ECJ, in particular in its landmark decision in the *Persche* matter. We hope this article will raise awareness of this issue and help reduce these cross-border frictions.

In New Zealand, a major reform of the trust law was adopted earlier this year and will enter into force in January 2021. Rhonda Powell TEP presents very clearly and comprehensibly the key changes that the New Zealand *Trusts Act 2019* will bring about, as well as the relationship of this Act with existing New Zealand trust law. Of particular importance for practitioners are certain obligations imposed by the reforms: trustees will have active duties to provide trust information to beneficiaries, while persons advising on the creation or the terms of a New Zealand law trust will have to take steps to ensure the settlor understands clauses restricting the duties or liability of the trustee. This article is a must-read for all practitioners involved with New Zealand law trusts and for anyone interested in the latest developments of a well-established and respected trust legislation.

The development of substantive trust laws also seems to be without boundaries. After having introduced a comprehensive trustee regulation that will come into force on 1 January 2020, Switzerland is now considering promulgating a domestic substantive trust law. The Swiss Parliament has tasked the Federal Council with drawing up a Bill in that respect. Jessica Schaedler TEP analyses the challenges that the implementation of a domestic trust law presents for a civil-law country such as Switzerland. With reference to other civil-law countries that have enacted trust legislation (Liechtenstein in particular), the article identifies possible challenges and highlights the impact such a domestic trust law would have on other areas of Swiss law. Based on solid legal argumentation, this article is a welcome addition to the lively debate on this subject in the country and merits the attention of readers within and outside Switzerland.

After having enlightened us on the content and significance of the Ontario Divisional Court decision in *Milne* regarding multiple wills,[1] Pamela Liang and Maria Velichko TEP analyse another aspect of wills: the use and validity of pour-over clauses in light of recent case law in Canada, including the *Quinn Estate* decision rendered in British Columbia. Great caution and professional advice will be required in respect of such clauses.

In a slightly different area of law, but one that is also very relevant to trust and estate practitioners, Teresa Rosen Peacocke TEP examines the requirements for a presumption of undue influence to be given in the light of two recent England and Wales cases, *Macklin* v *Dowsett* and *Perwaz* v *Perwaz*. The article methodically and convincingly demonstrates that the second case was incorrect in introducing new requirements in this regard.

THE EDITORS

1 Pamela Liang and Maria Velichko, 'The *Milne Estate* Saga', *Trust Quarterly Review*, Vol17 Iss1, p.17

UNDER THE INFLUENCE

A discussion of two England and Wales cases and the relationship necessary to raise a presumption of undue influence

BY TERESA ROSEN PEACOCKE

ABSTRACT

- *The author discusses two contrasting cases concerning the question of whether there are limits in principle on when and how a relationship of influence can arise for the purposes of the doctrine of presumed undue influence.*
- *The first case is* Macklin v Dowsett, *in which the England and Wales Court of Appeal allowed an appeal on the basis that a relationship of influence sufficient to ground a finding of presumed undue influence arose in the course of the transaction under scrutiny.*
- *The second case is* Perwaz v Perwaz, *in which HHJ Cooke upheld an appeal against a finding of presumed undue influence on the basis that it was wrong in law to ground such a finding on a relationship of influence that arises in relation to the impugned transaction itself.*
- *The author argues that* Macklin *is correct and* Perwaz *is wrong, as a matter of precedent, principle and policy of the doctrine of undue influence. The only requirements are that the relationship is operative at the time the impugned transaction is effected, and is of a kind that is capable of influencing such a transaction.*

Two cases on presumed undue influence draw attention to the question of whether there are legal limits on the relationship sufficient to raise a presumption of undue influence.

The first case is *Macklin* v *Dowsett,*[1] in which the England and Wales Court of Appeal (the Court) found a relationship of influence sufficient to raise the presumption arising from the transaction being impugned.

The second case is *Perwaz* v *Perwaz,*[2] a decision of HHJ Elizabeth Cooke in the Upper Tribunal (Tax and Chancery Chamber), in which the judge doubted that *Macklin* decided that the requisite relationship of influence could arise from the transaction itself and held that a relationship of influence must, as a matter of legal principle, pre-exist and be independent of the dealings between the parties resulting in the contract or gift that the claimant seeks to rescind.

In this paper, I suggest that, notwithstanding the analysis of *Macklin* by HHJ Cooke, that case did decide that a relationship sufficient to raise a presumption of undue influence can arise from the transaction itself. I also suggest that *Macklin* is by no means the first case of that kind. Further, I contend that HHJ Cooke's holding in *Perwaz* that the requisite relationship of influence must

1 [2004] EWCA Civ 904
2 [2018] UKUT 325 (TCC). The Court granted permission to appeal from the Upper Tribunal decision but that (second) appeal was settled before the hearing.

'The authorities show that the requisite relationship may be inferred from the nature and effect of the contract or gift itself, irrespective of when, or in what circumstances, it arose'

pre-date the transaction, was simply wrong, for two main reasons.

The first is that precedent, pre-dating *Macklin* by more than 100 years, has established that the relationship between the parties in cases of undue influence can arise from the dealings between them leading up to the contract or gift being impugned or, indeed, at the time of the making of the gift or contract.

In fact, the authorities show that the requisite relationship may be inferred from the nature and effect of the contract or gift itself, irrespective of when, or in what circumstances, it arose.

The second reason is that requiring a pre-existing and independent relationship of influence ignores the connection that a relationship of influence must have with the impugned transaction. The principle espoused by HHJ Cooke ignores the important point that even a pre-existing relationship of influence is irrelevant unless it is of a kind that would affect the specific transaction under scrutiny. These points will be explored in more detail below.

MACKLIN v *DOWSETT*

HHJ Cooke held in *Perwaz* that the Court in *Macklin* did not find that the requisite relationship of influence can arise from the circumstances surrounding the transaction itself.

On the contrary, that was precisely the finding of the Court in *Macklin*. Auld LJ's analysis of the relationship of influence is focused entirely on the impugned transaction, which, in that case, was the 1999 option enabling the Macklins to require Mr Dowsett to surrender his life tenancy for a nominal payment.

The finding of Auld LJ (with which Sedley and Jacob LJJ agreed) was that the relationship of influence arose in relation to that option agreement. He rejected the argument advanced on behalf of Mr Dowsett that the relationship arose from the respective positions of the parties following the earlier 1996 agreement.

Auld LJ finds the relevant relationship this way:[3]

> '... just before entering into the 1999 agreement, Mr. Dowsett was potentially on the brink of losing the valuable planning permission for construction of the bungalow on the land, for want of commencing construction within the five-year period ... The Macklins knew, just before they proposed the option agreement to him, that he had not the means to save the planning permission himself ... the additional factor in this first element of undue influence to be established is, in the circumstances, the financial disparity in the parties' bargaining positions just before entering into the option agreement, a disparity of which the Macklins were all too well aware and which was, at least, vulnerable to exploitation by them' (paragraph numbers omitted).

Sedley LJ's short concurring judgment in *Macklin* finds the relationship of influence to be '... a relationship at the time of the agreement of ascendancy and dependency'.[4]

The decision in *Macklin* is consistent with previous undue influence cases involving family members, that were successfully founded upon a relationship of influence between the parties arising in the course of the impugned transaction; e.g. *Tate* v *Williamson*,[5] *Vale* v *Armstrong*,[6] *Humphreys* v *Humphreys*[7] and *Paull* v *Paull*.[8] *Macklin* seems to have attracted attention mainly because it involved a commercial transaction in which the parties were prima facie at arm's length.

3 Above note 1, paras.26 and 28
4 Above note 1, para.36
5 (1866) 2 Ch. App. 55
6 [2004] EWHC 1160
7 [2004] EWHC 2201
8 [2018] EWHC 2520

The decision in *Macklin* was subsequently acknowledged in *Turkey* v *Awadh*[9] and *Thompson* v *Foy*,[10] and approved in *Hewitt* v *First Plus*[11] and *Malik* v *Sheikh*.[12]

Further, the Court in *Macklin* held that the nature of the transaction itself may assist the court in determining whether the operative relationship between the parties at the time was one of influence.

Auld LJ put the matter this way:[13]

> 'There may well be circumstances in which such a contractual relationship does not tell the whole story and where some other aspect develops so as to colour the overall relationship as to make it one of ascendancy and dependency. There may equally be circumstances in which a court may approach the matter first through the transaction itself and its apparent inexplicability, by asking what relationship, if any, could have given rise to it.'

Sedley LJ said this:[14]

> '... no argument could overcome the fundamental inequity of the option agreement, itself, in my judgment, redolent of a relationship at the time of the agreement of ascendancy and dependency.'

This approach to a finding of a relationship of influence, from a consideration of the resulting transaction, can also be found in the earlier cases.[15] Such a line of cases is inconsistent with a principle requiring proof that the relevant relationship arose prior to and outside the circumstances of the transaction sought to be impugned, and strongly suggests that questions of when and how the relationship arose would, in many cases, simply be irrelevant.

THE ABSENCE OF A PRE-EXISTING RELATIONSHIP OF INFLUENCE

Perwaz was a case in which a mother alleged undue influence by her son in respect of a transaction in which the son acquired the legal title and a 75 per cent equitable interest in her house. HHJ Cooke upheld the appeal from the lower court's finding of presumed undue influence on the basis that the judge in the lower court failed to find a relationship of influence that pre-dated the pursuit of the proposed transaction, between January and July 2013, leading to the transfer from mother to son on 30 July 2013. The judge's finding, HHJ Cooke held, was therefore wrong in law.

HHJ Cooke asserts this legal principle as follows:[16]

> 'The requirements [of a relationship of influence and a transaction that calls for an explanation] are sequential; there must be a relationship of influence, whether described as one of trust and confidence or one of vulnerability, and then a transaction. The reason for that is that the pre-existing relationship lays the claimant open to influence, so that all that is required for the evidential presumption to arise is a transaction that calls for an explanation. By contrast, a claimant who can show that she entered into a transaction that calls for an explanation, and that in the course of the transaction (but not beforehand) she reposed trust and confidence in the defendant, does not get the benefit of the presumption.'

The only authority relied upon by HHJ Cooke was a single sentence in the speech of Lord Nicholls in *Royal Bank of Scotland plc* v *Etridge and Others (No. 2)*,[17] in which he said:

> 'The second form [of conduct underlying undue influence] arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage.'

From that sentence, HHJ Cooke determined:[18]

> 'The two elements that have to be proved for the presumption to arise are generally

9 [2005] EWCA Civ 382
10 [2009] EWHC 1076
11 [2010] EWCA Civ 312
12 [2018] EWHC 973
13 Above note 1, para.25
14 Above note 1, para.36
15 *Credit Lyonnais Bank Nederland NV* v *Burch* [1997] 1 All ER 144; *Glanville* v *Glanville* [2002] EWHC 1587 (Ch); *Wright* v *Hodgkinson* [2004] EWHC 3091

16 Above, note 2, paras.71–72
17 [2001] UKHL 44, para.8
18 Above note 2, para.55

> regarded as sequential. Notice the word "then" in the words of Lord Nicholls quoted above. There must be a relationship of influence, and then a transaction that calls for explanation. The term "relationship" itself denotes something that continued over time.'

In deciding that the two elements giving rise to a presumption of undue influence were sequential, HHJ Cooke makes no reference to the many earlier decisions, referred to above, containing findings of a relationship of influence from the parties' dealings in respect of the impugned transaction.

Crucially, HHJ Cooke fails to consider the seminal case of *Allcard* v *Skinner*,[19] cited by Lord Nicholls in *Etridge*, where Cotton LJ describes the two classes of undue influence as:

> 'First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor.'

Elsewhere in *Etridge* itself, the two elements of the doctrine are described as essentially concurrent. Lord Scott in *Etridge* says that:[20]

> 'The presumption arises where the combination of the relationship and the nature of the transaction justify, in the absence of any other evidence, a conclusion that the transaction was procured by the undue influence of the dominant party.'

It follows, then, from long-standing authority that the two elements necessary to give rise to an evidential presumption of undue influence are not 'generally regarded as sequential'. There are, of course, cases where the elements arise chronologically, but there is not, and should not be, a legal principle that only such cases would 'get the benefit of the presumption'.

Lord Nicholls' use of the word 'then' in his description of the second form of unacceptable conduct does not mandate such a qualification. The passage simply refers to a person, who is in a position of ascendancy, who proceeds to take unfair advantage. That is the only way this oft-cited passage can be reconciled with *Etridge* itself, the cases relied upon in *Etridge*, and those decided before and after *Etridge*.

There is, moreover, no support in the authorities for HHJ Cooke's observation that:[21] 'the term "relationship" denotes something that continues over time'. The learned judge's analysis is too simplistic and too narrow. An operative relationship of influence may involve little more than one party recognising another's vulnerability, or their limited experience or understanding, at the time of the transaction, without interactions between them over any appreciable time. As Lord Nicholls said in *Etridge*:[22]

> 'The law has long recognised the need to prevent abuse of influence in these "relationship" cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various ... Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the

'There is no support in the authorities for HHJ Cooke's observation that: "the term 'relationship' denotes something that continued over time"'

19 (1887) 36 Ch D 145, para.171
20 Above note 19, para.158
21 Above note 2, para.58
22 Above note 19, paras.10–11

principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place' (paragraph numbers omitted).

The courts considering undue influence cases have consistently eschewed any technical rigidity in describing the circumstances in which a presumption of undue influence can be established. In *Tate* v *Williamson,*[23] Lord Chelmsford LC said: '[T]he courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise'. More than a century later, Lord Nicholls made the same point in *Etridge*:[24]

> 'The means used [to produce the intention to enter into the transaction] is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.'

As the long line of undue influence cases show, the requisite relationship of influence may be a long-standing or historic one,[25] may arise from the parties' dealings in relation to the impugned transaction itself,[26] or may be inferred from the nature and effect of the impugned transaction.[27]

23 (1866) L.R. 2 Ch. App. 55, para.61
24 Above note 19, para.7
25 See, e.g. *Re Craig* [1971] Ch. 95 (secretary/companion and employer); *Lloyds Bank* v *Bundy* [1975] Q.B. 326 (bank and customer); *O'Sullivan* v *Management Agency and Music Ltd* [1985] Q.B. 428 (manager and pop singer); *Goldsworthy* v *Brickell* [1987] Ch. 378 (farm manager and farm owner); *Credit Lyonnais Nederland NV* v *Burch* [1997] 1 All E.R. 144 (employer and junior employee); *Abbey National plc* v *Stringer* [2006] EWCA Civ 338 (son and mother); *Goodchild* v *Bradbury* [2006] EWCA Civ 1868; [2007] W.T.L.R. 463 (great-nephew and great-uncle); and *Murphy* v *Rayner* [2011] EWHC 1 (Ch) (carer and employer)
26 *Macklin* v *Dowsett* [2004] EWCA Civ 904, as recognised in *Turkey* v *Awadh* [2005] EWCA Civ 382, *Thompson* v *Foy* [2009] EWHC 1076
27 *Credit Lyonnais Nederland NV* v *Burch* [1997] 1 All E.R. 144 at 154–155 per Millett LJ; *Huguenin* v *Baseley* (1807) 14 Ves. 273 at 296; 33 E.R. 526 at 536 per Lord Eldon LC; *Zamet* v *Hyman* [1961] 1 W.L.R. 1442 at 1449 per Lord Evershed MR; *Alec Lobb (Garages) Ltd* v *Total Oil Great Britain Ltd* [1985] 1 W.L.R. 173 at 181–183 per Dillon LJ

In the words of Lord Scarman in *National Westminster Bank plc* v *Morgan*:[28]

> '… the relationships which may develop a dominating influence of one over another are infinitely various. There is no substitute in this branch of the law for a "meticulous examination of the facts".'

There is, then, no basis in law to say, as HHJ Cooke does, that a relationship of influence must not only pre-date the contract or gift being impugned, but must also be found to have arisen prior to and independently of the interactions between the parties in relation to the challenged contract or gift. A finding that a relationship of influence arose in the course of dealings leading to the impugned transaction is a perfectly common and perfectly sound basis for finding that the ultimate execution of the challenged document(s) was vitiated by undue influence.

THE ESSENTIAL CONNECTION BETWEEN THE RELATIONSHIP OF INFLUENCE AND THE IMPUGNED TRANSACTION

Even where the evidence establishes a long-standing, historical relationship of general trust and confidence, such evidence is only relevant if it establishes that the defendant 'was in a position to influence the will of the [claimant] in relation to a transaction of the relevant nature'.[29] As Sir Kim Lewison explains in 'Under the Influence':[30]

> 'It is common to hear cross-examination put to a witness that he enjoyed a relation of trust and confidence with the complainant. But that is a point which is almost meaningless, unless the particular kind of trust and confidence is clearly established in relation to the impugned transaction.'

In an important respect, then, the only relationship of influence that is relevant in a case of presumed undue influence is one that is operative in relation to the impugned transaction.

28 [1985] A.C. 686, para.708
29 [2005] EWCA Civ 382, para.38
30 (2011) 19 Restitution Law Review 1-14

IS THERE A BAR BETWEEN PRESUMED AND ACTUAL UNDUE INFLUENCE?

HHJ Cooke states that:[31]

> 'Where the only problematic elements arise in the transaction itself (and by that I mean during a period long enough to encompass anything described as a troubling feature of the transaction) … the claimant can only succeed in a plea of undue influence if she proves that activities or pressure amounting to undue influence actually happened. To allow the presumption to be raised as a result of what happened in the transaction itself would simply lower the bar for the proof of actual undue influence.'

This statement seems to reflect a serious misunderstanding of the difference between what Lord Nicholls in *Etridge* called 'two forms of unacceptable conduct' and the underlying basis for there being two such forms.

The first form of unacceptable conduct referred to by Lord Nicholls is 'overt acts of improper pressure or coercion such as unlawful threats', while the second form occurs when 'the influence one person has over another provides scope for misuse without any specific overt acts of persuasion'.

The fundamental underlying rationale for the doctrine of presumed undue influence is the courts' recognition over two centuries of the subtle, but no less pernicious, nature of influence comprised in the second form of conduct described by Lord Nicholls, and the manifest difficulty in detecting the opportunistic exercise of such influence. In *Pesticcio* v *Huet*,[32] Mummery LJ said:

> '… the basis of the court's intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives: *Allcard* v *Skinner*[33] at 171. The court scrutinises the circumstances in which the transaction, under which benefits were conferred on the recipient, took place and the nature of the continuing relationship between the parties, rather than any specific act or conduct on the part of the recipient. A transaction may be set aside by the court, even though the actions and conduct of the person who benefits from it could not be criticised as wrongful'.

'The defendant's behaviour need not be dishonest; it can consist of a failure to ensure that the claimant was properly informed'

In many, possibly most, cases, the exercise of such influence will be concealed or engineered to appear remote from the transaction at hand. Exploitation may be passive. The defendant's behaviour need not be dishonest; it can consist of a failure to ensure that the claimant was properly informed, was thinking through the consequences and was acting free of the defendant's influence. The transaction need not always be to the claimant's disadvantage at the time it is made.

To require a victim of such influence, during the course of dealings with the party exercising that influence upon them, to positively prove activities or pressure (that, by the very nature of the influence are undetectable) is simply to deny that victim a remedy.

It makes no sense to say that a case of the second form of conduct, in which the claimant's consent is vitiated by the influence of another during the course of the transaction under scrutiny, can only succeed upon proof of 'activities or pressure' that, by definition, do not exist. 'The law has long recognised the need to prevent abuse of influence in these "relationship" cases despite the absence of evidence of overt acts of persuasive conduct.'[34]

There is no principle or policy applicable to the law of presumed undue influence that would

31 Above note 2, para.72
32 [2004] EWCA Civ 372, para.20
33 (1887) 36 Ch D 145
34 Above note 19, para.10

justify the limitations on the doctrine described by HHJ Cooke in *Perwaz*. The unacceptable exploitation of trust, confidence, ascendancy or vulnerability by one party over another is much more subtle than 'overt acts of improper pressure or coercion such as unlawful threats'. The equitable doctrine that affords relief to victims of the second form of unacceptable conduct described by Lord Nicholls must be, and is, maximally flexible and available whenever, and in whatever circumstances, such unacceptable conduct occurs.

CONCLUSION

Whether a transaction was brought about by the exercise of undue influence is a question of fact, Lord Nicholls states in *Etridge*. Proof of a (relevant) relationship of influence coupled with a transaction that calls for an explanation will suffice to raise the presumption of undue influence and lead to a finding of undue influence in fact, where the presumption is not rebutted.

There are no grounds for inferring from Lord Nicholls' description of the elements of undue influence in *Etridge*, or any principle derived from the decided cases, that the required relationship of influence and the transaction that calls for an explanation must be chronologically sequential or in any meaningful sense independent of one another. As a matter of precedent, principle and policy, a finding of undue influence is appropriate whenever a relationship of influence, which will be 'infinitely various',[35] is found to be, or inferred to have been, operative when the impugned transaction is effected.

TERESA ROSEN PEACOCKE TEP IS A BARRISTER AT OUTER TEMPLE CHAMBERS

35 paras.10 and 86

A CLAUSE IN CONTEXT

Clarity on the use and validity of pour-over wills in estate planning following the recent *Quinn Estate* decision in British Columbia

BY PAMELA LIANG AND MARIA VELICHKO

ABSTRACT

- *A 'pour-over' clause in a will directs that assets be transferred to an* inter vivos *trust established outside of the will. Despite certain benefits of including such a clause in a will, they are, generally, ineffective in a will in Canada.*
- *Courts in Canada have not looked favourably on such clauses because they allow a testator to circumvent the rules governing the doctrine of incorporation by reference and the formal validity of wills, both of which give certainty and finality to gifts made in a will.*
- *As the law stands in Canada, testators may wish to consider alternate planning strategies or include alternate gift provisions in the will in the event that a pour-over clause in their will is found to be invalid.*

Simply put, a 'pour-over' clause in a will directs that assets be transferred to an *inter vivos* trust. Effectively, assets are 'poured over' from the estate into another trust established outside of the will. In Canada, such clauses are, generally, ineffective in a will. This paper will explore the reasons for having such clauses, the challenges of having them and why Canadian courts have not looked favourably on such clauses.

REASONS FOR HAVING A POUR-OVER CLAUSE

Possible benefits of having a pour-over clause stem from administrative efficiencies and from the separation of legal and beneficial title in a trust structure,[1] including the use of a pre-existing trust structure, possible tax benefits, privacy and some degree of creditor protection.

Pouring estate assets into a pre-existing trust may reduce the costs of administration.

1 For a list of possible benefits of pour-over wills, see A. Stacey and N. Hastings, 'Pour-Over Wills in Canada', *Estates, Trusts and Pensions Journal*, 35:3 (May 2016) at pp.224-225 (Stacey and Hastings, 'Pour-Over Wills').

> 'Although not foolproof, a pour-over clause may give the testator some control over their assets and protection from a spendthrift beneficiary'

Where a testator establishes an *inter vivos* trust for certain beneficiaries and where their will directs testamentary trusts to be established for the same beneficiaries, a doubling-up of expenses associated with establishing and maintaining the separate trusts occurs. Administratively, then, a possible benefit of a pour-over clause comes from using a pre-existing trust structure to administer the estate assets.

Other possible benefits of a pour-over clause stem from the beneficiaries owning an interest in a trust rather than the estate assets themselves. In Ontario, where an executor applies for a Certificate of Appointment of Estate Trustee with a will (commonly referred to as 'probate'), the will becomes part of the public record. Where the gift is made to a trust rather than to named beneficiaries, the identity of the ultimate beneficiaries may be kept private. This may not be a significant benefit in Canada as, from 2021, trusts will have to start filing a new income tax return that lists all of the trust beneficiaries. Nevertheless, pouring over estate assets into a pre-existing trust may preserve some degree of privacy for the testator's intentions with respect to the disposition of their assets on death.

There may also be tax benefits from pouring over estate assets into a pre-existing trust. Where a trust has multiple beneficiaries, it may be possible to minimise income taxes among beneficiaries by distributing trust income to beneficiaries with a lower marginal tax rate (i.e. income splitting). There may also be savings on probate fees and taxes[2] to a beneficiary. If estate assets form part of a trust and a beneficiary of the trust dies owning an interest in the trust rather than the assets themselves, on the beneficiary's death, it would generally be the interest in the trust that would be valued for the purposes of estate administration tax. The value of the beneficiary's interest in the trust may be different from the value of the trust assets because, for example, if the trust is discretionary,[3] the beneficiary does not have any right to the trust assets unless they are actually allocated to the beneficiary. All the beneficiary has is a right to be considered for a distribution, along with certain rights to information about the trust.

A creditor of a beneficiary (including a spouse) may have more difficulty accessing the estate assets if such assets are held in a trust. If the trust is discretionary, a beneficiary does not have a right to demand distributions from the trust, but only a right to be considered for a distribution. This acts as a barrier through which a potential creditor first has to pass before being able to access the underlying trust assets to satisfy a claim against the beneficiary. A court may look through the trust structure to allow a creditor to access the trust assets, if, for example, as a factual matter, a beneficiary actually has control over the trust (e.g. the beneficiary has the power to remove trustees, or is a trustee with veto power over decisions). Although not foolproof, a pour-over clause may, therefore, give the testator some control over their assets and protection from a spendthrift beneficiary or a beneficiary with marital difficulties.

CHALLENGES

Although seemingly straightforward and potentially beneficial, a pour-over clause presents several challenges from the perspective of trust law and the requirements for a valid will in Canada,[4] including determining the nature of the gift and the mismatch between the formalities for a valid trust and a valid will.

THE NATURE OF THE GIFT

There is some question about the nature of a gift in a will to another trust. As a trust is not

2 Ontario implements an estate administration tax, which is levied at a rate of 1.5 per cent after the first CAD50,000 of value passing through the will.

3 Generally, a trust in which the trustees have the discretion to allocate trust assets among a class of beneficiaries.

4 As provincial laws differ, this article will focus on the requirements of a valid will in Ontario.

a separate legal entity like an individual or a corporation, it cannot receive a gift (unless such a gift is for charitable purposes). A gift to a trust may, therefore, be construed as a gift to the trustees of the trust of legal title and a gift to the beneficiaries of the trust of beneficial title.[5]

VALIDITY OF TRUSTS v WILLS

The laws governing the validity of trusts and wills are different. Generally, the requirements for a valid will are more onerous than those governing trusts. An attested will (or codicil) in Ontario requires that it be signed by the testator in the presence of two witnesses who sign the will in the presence of each other.[6] No such requirement exists for trusts in Ontario.

An amendment to a will can be made by codicil or the execution of a new will that, in either case, complies with the formalities of execution of wills. Where the assets from the estate are poured over into a trust that is established outside the terms of the will, it would be the terms of the trust and not the will that ultimately govern how the assets are dealt with. This could be problematic if the trust allows the trustees to amend the trust to add or remove beneficiaries, or if the trust includes a power of appointment with respect to trust assets. In such cases, amendments may be made to the ultimate distribution of the estate assets without complying with laws governing wills. As an *inter vivos* trust does not need to comply with the formalities of execution of a will to be a valid trust, a pour-over clause can allow a testator to get around the requirements for a valid will. A pour-over clause effectively directs that assets be transferred from one vehicle for distributing assets among beneficiaries governed by one set of rules to another vehicle that also deals with the distribution of assets among beneficiaries, but is governed by another set of rules. Canadian cases have picked up on these issues.

THE CANADIAN CONTEXT

Recent case law in Canada has provided further clarity on the use and validity of pour-over clauses in estate planning.

RE CURRIE

One of the first reported cases dealing with pour-over clauses in Canada was *Re Currie*.[7] The testatrix, who died resident and domiciled in Ontario, executed a codicil in Ontario shortly before her death in an effort to avoid the impact of the Ontario *Succession Duty Act*.[8] In the codicil, the testatrix bequeathed her shares and securities in any Alberta company she owned on her death to a specific trust (the Currie Trust), provided that such a trust existed at the time of her death. The day following the execution of the codicil, the testatrix acquired shares in and a promissory note from an Alberta company. Two days after the codicil was executed, the Currie Trust was settled by an Ontario resident with Ontario-resident beneficiaries and an Alberta-resident trustee. Ten days after executing the codicil, the testatrix died. The Minister of National Revenue at the time included the value of the Alberta shares and the promissory note in his assessment of the succession duties owed by the estate. The beneficiaries of the estate appealed the inclusion of the value of the Alberta shares and promissory note in the assessment, on the basis that the shares and promissory note passed to a non-Ontario trustee and that the Ontario *Succession Duty Act* did not apply to such transfers.

The Ontario Court of Justice held that the codicil could not effectively incorporate the trust agreement nor could it effectively 'pour over' the Alberta shares and promissory note to the Currie Trust on two grounds:

- In order for a non-testamentary document to be incorporated by reference into a will, the document must actually be in existence at the time of the execution of the will.
- Testators cannot reserve unto themselves the right to make future unattested dispositions of trust property nor can they empower others to define prospectively the terms of dispositions of trust property.

Thus, the Alberta shares and promissory note passed in accordance with the will and were subject to succession duties in Ontario.

5 Stacey and Hastings, 'Pour-Over Wills' at p.224
6 *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.4

7 *Re Currie; Labatt* v *Minister of National Revenue* (1978), 21 O.R. (2d) 709 (Ont. H.C.) (*Re Currie*)
8 R.S.O. 1970, c. 449. This was repealed on 15 December 2009 by the *Succession Duty Legislation Repeal Act*, 2009, S.O. 2009, c. 34, Sched. T.

KELLOGG ESTATE

After a lengthy hiatus, pour-over clauses and the doctrine of incorporation by reference were revisited in the 2013 case of *Kellogg Estate (Re)*.[9] The testator executed a will containing a pour-over clause that made a gift of the testator's interest in a real estate property to an existing trust (the KF Trust). The will also contained a second clause where, in the event the pour-over clause was found to be invalid, the terms of the KF Trust were to be incorporated by reference into the will. Significantly, both clauses made reference to the terms of the KF Trust as they existed at the time the will was executed and that they may thereafter be amended.

The Supreme Court of British Columbia (the Court) was asked to rule on three issues. One issue was the executor's authority to sell the property to fund the expenses of the estate; this issue is not relevant for the purposes of this article. The other two issues that the Court did address were whether:

- the pour-over clause in the will was valid; and
- the will should be interpreted as incorporating the terms of the KF Trust or the incorporation by reference clause should be held invalid because of the reference to subsequent amendments.

On the first issue, the Court determined that the pour-over clause was invalid. If the relevant trust is amended following the date of the will, the amendment will usually fail to comply with the formal requirements for testamentary documents under British Columbia's *Wills Act*.[10] In this case, the KF Trust was subsequently amended but the amendments did not include witness signatures. The gift could therefore not 'pour over' to be held by the trustees of the KF Trust because the amended terms were not in existence at the time of the execution of the will, and the effect would be to permit the testator to have amended his will without complying with the *Wills Act*.

On the second issue, the Court determined that the incorporation by reference clause incorporated the terms of the KF Trust which governed on the date that the testator executed his will.

> 'If the trust is amended following the date of the will, the amendment will usually fail to comply with the formal requirements for testamentary documents under British Columbia's *Wills Act*'

Under the doctrine of incorporation by reference, for a non-testamentary document to be incorporated into a will it must be clear that the testator in the will referred to some document then in existence, and the document in question must be beyond doubt the document referred to.[11] Unlike the pour-over clause, which serves to add to the assets of an *inter vivos* trust without creating a new testamentary trust, incorporation by reference 'serves to create a separate testamentary trust with terms and conditions that are precisely the same as those of a previously existing trust'.[12] Applying these requirements to *Re Kellogg*, the KF Trust was in existence at the time the will was executed. Accordingly, the trustee was bound by the terms of the KF Trust indenture and the property in dispute passed to a testamentary trust that had the same terms as the KF Trust as at the date the testator executed his will.

The Court also commented briefly on the doctrine of facts of independent significance, which contemplates certainty in a will being achieved by reference to a fact that is independent of testamentary significance.[13] Under this doctrine, a fact that arises outside of the will after the will is signed but which impacts the will does not have to comply with the formalities of

9 2013 BCSC 2292 (B.C. S.C.), additional reasons 2014 BCSC 1541 (B.C. S.C.), additional reasons 2014 BCSC 1556 (B.C. S.C.), additional reasons 2014 BCSC 2056 (B.C. S.C.), additional reasons 2015 BCCA 203 (B.C. C.A.), affirmed 2018 BCCA 490 (*Re Kellogg*).

10 For a will to be valid, this legislation required that it be in writing and signed by the testator in the presence of two or more witnesses present at the time who also sign the will in the presence of the testator.

11 *Re Kellogg* at para.75

12 Stacey and Hastings, 'Pour-Over Wills' at p.241

13 Paul Trudelle, 'Know your Doctrines: The Doctrine of "Facts of Independent Significance"' (28 March 2019), online: Hull & Hull LLP, bit.ly/2WFMN2s

‘The Court of Appeal rejected the application of the doctrine of incorporation by reference, as the Trust, as amended, was not an existing document at the time of the will’s execution’

execution under wills legislation. In the context of an amendment to a trust, the application of the doctrine of facts on independent significance was dismissed on the basis that the doctrine was not recognised in British Columbia.

The case was appealed to the British Columbia Court of Appeal (the Court of Appeal), but the appeal was dismissed as the issue raised was of no practical consequence to the distribution of the estate.

QUINN ESTATE

In 2018, pour-over clauses returned to the spotlight in *Quinn Estate*,[14] a case that dealt with the estate of well-known hockey coach, Pat Quinn. Quinn executed a will in respect of his assets situated in Canada. The will included a pour-over clause gifting the residue of his estate to the Quinn Family Trust (the Trust), which was a revocable, amendable *inter vivos* trust established prior to the execution of the will. About one year after Quinn executed the will, the Trust was amended to meet the requirements of a qualified domestic trust for US tax purposes.

The Court, referring to the decision in *Re Kellogg*, declared the pour-over clause in the will invalid on the basis that the gift of residue could not ‘pour over’ to be held by the trustees of the Trust when the amended terms were not in existence at the time of the execution of the will, which could have allowed Quinn to make a testamentary disposition in the future without complying with the formalities required by British Columbia legislation. In particular, the Court held:

> ‘The Legislature’s purpose in requiring particular formalities for the proper execution of a will is to ensure certainty as to the deceased’s final wishes and to avoid controversy (and possible litigation). The possible use of a revocable, amendable, inter vivos trust as the recipient of a testamentary gift, bequest or devise creates that uncertainty the Legislature sought to avoid. Put bluntly, a person could one day execute his or her will, fully observing the execution strictures of s. 37(1) of *WESA*, leaving the residue of his or her estate to a revocable, amendable, inter vivos trust, which he or she could then revoke or amend the following day without regard to any execution strictures.’[15]

One of Quinn’s daughters appealed the decision on the basis that the pour-over clause was validated by the doctrines of incorporation by reference and facts of independent significance.[16] In the alternative, she argued that the frailties of the pour-over clause could be remedied by a particular provision of the *Wills, Estates and Succession Act*,[17] which will not be addressed in this article as it is specific to British Columbia legislation.

The Court of Appeal rejected the application of the doctrine of incorporation by reference, as the Trust, as amended, was not an existing document at the time of the will’s execution and the will did not refer to incorporating the terms of the Trust into the will; rather, Quinn ‘demonstrated the obvious intention of making a gift to the trust’.[18]

The doctrine of facts of independent significance was also inapplicable because it would grant testators unlimited power to circumvent the legislative testamentary formalities by making future testamentary dispositions through amendments to their *inter vivos* trust.

14 2018 BCSC 365 (*Quinn Estate*)

15 *Quinn Estate* at para.49
16 [2019] B.C.J. No. 373 (*Quinn v Rydland*)
17 S.B.C. 2009, c.13, s.58
18 *Quinn v Rydland* at para.21

POUR-OVER CLAUSES AFTER *QUINN ESTATE*: WHAT STRATEGIES ARE AVAILABLE?

The decision in *Quinn Estate* reaffirms that pour-over clauses cannot be used in a will to make testamentary dispositions to revocable and amendable *inter vivos* trusts. In finding pour-over clauses (at least in certain types of situations) to be invalid, the courts in Canada have aimed to preserve the rules governing the validity of wills.

In particular, the courts have sought to prevent a testator from circumventing the rules governing the doctrine of incorporation by reference and the formal validity of wills, both of which give certainty and finality to gifts made in a will, by transferring estate assets to a revocable and amendable *inter vivos* trust that does not have to comply with such rules. The courts have not yet made findings regarding gifts to an irrevocable, non-amendable trust in existence at the time the will was signed, but based on the analysis above, it is possible that such a gift may be valid.

As the law regarding pour-over clauses stands in Canada today, a testator may wish to consider alternate planning strategies. If the testator wishes to create an additional level of protection from a beneficiary's creditors or possible income-splitting opportunities, they may provide for a testamentary trust in the will itself. If minimising estate administration tax is a consideration, a testator may wish to establish an alter ego or a joint spousal/partner trust which, in certain circumstances, allows individuals aged over 65 to transfer assets into a trust for the sole benefit of the individual or their spouse on a tax-deferred basis.

As the trust assets would be dealt with outside of the estate on the individual's (or their spouse's) death, estate administration tax would not be payable on the value of such trust assets. Finally, if a testator wishes to include a pour-over clause in their will, notwithstanding the risks associated with such clauses, such a clause should include a gift to alternate beneficiaries if the pour-over provision is found to be invalid.

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OLD WINE IN A NEW BARREL

An overview of the New Zealand *Trusts Act 2019* and how it will impact foreign and domestic trusts

BY RHONDA POWELL

ABSTRACT

- *The New Zealand* Trusts Act 2019 *(the Trusts Act) will come into force on 30 January 2021, affecting all express trusts, including New Zealand foreign trusts.*
- *Key changes include the concept of 'mandatory' and 'default' trustee duties, active duties to provide trust information to beneficiaries and restrictions to trustee exculpation clauses.*
- *With the introduction of these reforms, new duties have been imposed on lawyers and other advisors when restricting trustee duties or including trustee exculpation clauses.*
- *This article explores the Trusts Act and its relationship with existing New Zealand trust law. Many of the changes restate or codify the existing law; other concepts are new.*
- *Now is the time for those with involvement in New Zealand trusts to review their deeds and their practices to ensure they will be fit for purpose when the Trusts Act comes into force.*

The *Trusts Act 2019* (the Trusts Act) received royal assent on 30 July 2019 and will come into force on 30 January 2021. This is the first major trust law reform in New Zealand in 70 years and will affect both domestic and foreign trusts.

New Zealand foreign trusts, used to hold the wealth of international families, must have at least one New Zealand-resident trustee. Foreign trusts that adhere to compliance and disclosure rules receive a tax exemption for foreign-sourced income.[1]

Domestically, trusts play a central role in private client and charity law, and are used in governance structures for businesses and to hold Māori land.[2] The most common form of trust in New Zealand is a broad discretionary trust, with the settlors as trustees, and the settlors and other family members as beneficiaries. It is not uncommon to encounter trustees who have a limited understanding of their duties and settlors who have a limited recollection of the reasons why they settled property on trust in the first place.

Many of the key changes are aimed at making trust law more accessible to both lawyers and the

1 *Tax Administration Act 1994* (New Zealand), ss.59B–59D
2 Law Commission Te Aka Matua o te Ture, *Review of the Law of Trusts: A Trusts Act for New Zealand* (Report 130, August 2013) p.iv

> 'The historic foundations of New Zealand trust law in English equitable principles will continue to support the new legislative regime'

public, strengthening the ability of beneficiaries to hold trustees to account. A consequence of this may be that the new legislation increases the potential for dispute between trustees and beneficiaries.

APPLICATION AND GUIDING PRINCIPLES

The Trusts Act applies to all express trusts that are governed by New Zealand law,[3] including those created before the commencement of the Trusts Act.[4] It also applies to trusts that are created by statute, such as the trusts that arise for intestate estates,[5] and when a court deems it to be necessary or appropriate to apply the provisions of the Trusts Act to resulting, constructive or other forms of trust recognised at common law or in equity.[6]

The Trusts Act does not purport to be a code or to replace the existing rules of common law and equity.[7] The historic foundations of New Zealand trust law in English equitable principles will therefore continue to support the new legislative regime. Similarly, the inherent jurisdiction of the High Court of New Zealand (the High Court) over the administration of trusts is unaffected.[8] The Trusts Act does not attempt to create a firewall against judicial decisions from other countries.

Section 4 of the Trusts Act sets out the principles that apply to those (including courts, trustees and lawyers) exercising powers or performing functions or duties under the law.[9] A trust should be administered in a way that is consistent with its terms and objectives, and avoids unnecessary cost and complexity.

These principles are not new, but it is telling that the New Zealand parliament has seen fit to make them explicit. They could be seen as akin to mandatory relevant considerations in administrative law. The duty is to 'have regard' to the principles rather than any more stringent requirement, and so, potentially, a trustee could have regard to the principles but then choose to take an expensive and complex course of action, if doing so would be in the best interests of the beneficiaries and is most consistent with the terms and objectives of the trust. This is an area in which we might expect some case law to develop in the future.

Trustees (and others exercising powers, duties or functions under the Trusts Act) would be wise to keep records of having considered the s.4 principles, potentially as part of any minutes. Lawyers drafting documents recording trustee decisions may consider adapting their precedents.

MANDATORY AND DEFAULT TRUSTEE DUTIES

The New Zealand Law Commission has suggested that there is currently 'confusion in the community' about the role of settlors, the rights of beneficiaries and the duties of trustees:[10]

> 'We have seen our role as one of ensuring that trust law is as robust as it can be for 21st century New Zealand ... Part of ensuring that robustness requires the law to be clear as to what is, and what is not, a trust, and the fundamental duties trustees must owe.'

There is a tendency to think of a trust as an entity, like a company. Rather, a trust is a fiduciary relationship through which somebody holds property subject to obligations to administer it for the benefit of another. It is the obligations or duties that are the core of a trust relationship.

The obligations of a trustee may arise:

- expressly through the terms of a will or deed;
- by conveyance of property to trustees for a particular purpose;

3 *Trusts Act 2019* (New Zealand), s.5(1). Express trusts are defined in more detail in ss.12–15
4 sch.1, cl.2
5 *Administration Act 1969* (New Zealand), ss.75–80
6 s.5(2)
7 s.5(8)
8 s.8. The jurisdiction of the District Court and Family Court is extended.
9 Defined in s.74
10 Law Commission, above note 2, p.iv

‘The Trusts Act imposes a statutory duty on any person advising on or preparing the terms of a trust to take reasonable steps to ensure that the settlor understands the meaning and effect of any modification or exclusion of any default duty’

- by implication of the circumstances; or
- by construction, when the court imposes a trust.

This separation of legal and beneficial ownership, and the imposition of duties, is central to the role of trusts as a mechanism for asset protection. If the trustee can do what they like with the property, without the imposition of any enforceable duties, then there is no trust.

One of the aims of the Trusts Act is to clarify the trustee duties. The Trusts Act lists the core trustee duties that were already part of the law; however, it goes further to classify the duties as either ‘mandatory’ or ‘default’.[11] Mandatory duties must be performed by the trustee and may not be modified or excluded by the terms of the trust. Default duties can be modified or excluded, within defined parameters. In exercising both types of duty, a trustee must have regard to the contents and objects of the trust.[12]

The mandatory duties are to:

- know the terms of the trust;
- act in accordance with the terms of the trust;
- act honestly and in good faith;
- act for the benefit of the beneficiaries or to further the permitted purpose of the trust; and
- exercise powers for a proper purpose.

None of these duties are new. They include but go further than the ‘irreducible core of obligations’ identified by Millet LJ in *Armitage* v *Nurse*.[13]

In the unlikely case that a trust deed, including one that existed prior to the Trusts Act coming into force, purports to exclude any of the mandatory duties, the exclusions would be of no effect. The exclusion of mandatory duties may also be evidence that there was no intention to create a trust in the first place,[14] and thereby undermine the asset-protection strategy.

Default duties may be modified or excluded by the terms of the trust, subject to certain limits.[15] The default duties are also well established as a matter of trust law. Some of the default duties are already commonly excluded by trust deeds. This practice will continue to be acceptable (provided that the exclusions fit within the permitted limits) but the Trusts Act imposes a statutory duty on any person advising on or preparing the terms of a trust to take reasonable steps to ensure that the settlor understands the meaning and effect of any modification or exclusion of any default duty.[16]

The statutory duty applies to all ‘advisors’ who are advising on the creation of a New Zealand trust or preparing the terms of a trust. That clearly extends beyond lawyers to accountants, trustee corporations, wealth managers, family offices and others in the trust industry.

It is unclear how this duty should operate in the context of a firm in which several people are involved in drafting. For example, if one staff member is involved with aspects of preparing the deed under supervision, does the statutory duty apply to them too? Can and should they rely on their supervisor to provide the requisite advice? Failure to comply on the part of the advisor does not invalidate the relevant clauses of the trust deed; however, it is at least likely to have repercussions for any claims for professional negligence, breach of fiduciary duty or complaints to professional bodies.

Those advising trustees about existing trusts are not caught by the statutory duty. Nevertheless, it would be prudent to advise trustees about any modification of a default duty contained in an

11 The mandatory duties are set out in ss.23–27 and the default duties are set out in ss.29–38
12 s.21
13 *Armitage* v *Nurse* [1997] EWCA Civ 1279, [1997] Ch 241
14 *JSC Mezhdunarodniy Promyshlenniy Bank* v *Pugachev* [2017] EWHC 2426 (Ch); *Webb* v *Webb* CA No 7/17 24 November 2017 (Cook Islands Court of Appeal)
15 As set out in s.5(4), s.(5) and sch.2
16 s.39

existing trust deed and to consider whether a variation is nevertheless desirable to bring the trust deed into line with the Trusts Act (and if so, whether it is possible).

The default duties are to:[17]

- exercise reasonable care and skill;
- invest prudently;
- not self-benefit;
- actively and regularly consider exercises of trustee power;
- not bind future trustees to a future exercise or non-exercise of discretion;
- avoid conflicts of interest;
- treat beneficiaries impartially;
- not profit;
- act for no reward (the reimbursement of legitimate expenses is allowed); and
- act unanimously.

Although these duties largely resemble the trustee duties developed under the existing law, the codification is likely to be helpful to lay trustees who are seeking to understand their role. The existing rules of common law and equity will be relevant to interpreting these provisions.

The duty to exercise reasonable care and skill is to be interpreted with regard to the actual specialist knowledge of experience of the trustee or that the trustee holds themselves out as having, or that is reasonably expected of a person acting in that sort of business.[18] Professional trustees will therefore continue to have an enhanced duty of care.

Similarly, for investments, trustees are required to have the care and skill that 'a prudent person of business would exercise in managing the affairs of others', having regard to any actual specialist knowledge or experience of the trustee or that the trustee holds themselves out as having, or that it is reasonable to expect them to have.[19] Existing common-law authority on the duty of prudent investment will remain relevant.[20] If a breach of the duty to invest prudently is alleged, a court will take into account whether the trustee complied with any investment strategy and whether investments have been appropriately diversified.[21] It is common to contract out of the duty of prudent investment and it can be expected that this practice will continue.

'Another option opened up by the Trusts Act is the ability to appoint a "special trust advisor" who could advise the trustee about investment matters'

Another option opened up by the Trusts Act is the ability to appoint a 'special trust advisor' who could advise the trustee about investment matters (or other matters).[22] A special trust advisor does not have the power of a trustee and the trustee is not bound to follow their advice;[23] however, the new rules on delegation of certain trustee powers[24] may also enable a trustee to go further and delegate investment decisions to a special trust advisor. Special trust advisors may be remunerated if the trust deed provides for remuneration of trustees (as they nearly always do, at least for professional trustees).

Appointment of investment advisors is currently more common for New Zealand foreign trusts than it is for 'ordinary' family trusts, but this may change in the future. It may be particularly useful for fixed or life-interest trusts for which investment decisions will affect the balance struck between different classes of beneficiaries.

BENEFICIARIES' RIGHTS TO INFORMATION

In contrast to the codification of the existing trustee duties, the Trusts Act sets new rules about keeping trust documentation and the provision of information to beneficiaries. The requirements on trustees under the Trusts Act are much more stringent than ever before. The starting point is the duty on trustees to keep certain information.

The Trusts Act requires trustees to keep core trust documents, including documents setting out the terms of the trust or varying those terms;

17 ss.28–38
18 s.29
19 s.30
20 *Jones v AMP Perpetual Trustee Company NZ Ltd* [1994] 1 NZLR 690 (HC)
21 s.128
22 s.74
23 s.75
24 s.67

'The Trusts Act creates a presumption that a trustee must make "basic trust information" available to every beneficiary and "trust information" available to beneficiaries who request it'

records of the trust property appropriate to the value and complexity of that property; records of trustee decisions, contracts, accounting and financial statements; appointment, removal and discharge documents; letters of wishes by the settlor; and other documents necessary for the administration of the trust.[25]

It is permissible for one trustee to hold most documents, but each trustee must hold at least a copy of the terms of the trust and any variation to those terms.[26] The documents must be kept for the duration of the trusteeship and provided to a replacement or continuing trustee at the end of the trusteeship.[27]

These rules may appear onerous, but they should be seen as routine and essential to good trust administration.

The principled basis of the current approach to disclosure is the inherent jurisdiction of the court to supervise the administration of trusts. In *Erceg* v *Erceg*,[28] the New Zealand Supreme Court confirmed that beneficiaries may seek trust information in order to ascertain whether a trustee has acted in accordance with the trust deed. The decision about which information should be disclosed depends on the interests of the proper administration of the trust and the interests of the beneficiaries as a whole, not only the interests of the beneficiary seeking disclosure. The trustee must weigh up a list of competing factors.[29] It would normally be the case that a 'close beneficiary' seeking disclosure of core trust documents would be entitled to the documents. The more remote the beneficiary's interest and the broader the range of documents sought, the less likely they are to obtain disclosure.[30] There is no presumption of disclosure.

The Trusts Act changes this position, creating a presumption that a trustee must make 'basic trust information' available to every beneficiary[31] and 'trust information' available to beneficiaries who request it. However, before providing the information, trustees must consider a range of factors[32] and if the trustee reasonably considers that the information should not be disclosed, then it may withhold the information.

'Basic trust information' includes:

- the fact that a person is a beneficiary;
- the name and contact details of a trustee;
- the occurrence of and details about any change to the trusteeship; and
- the right to request a copy of the terms of the trust or trust information.

'Trust information' is information regarding the terms of the trust, the administration of the trust or the trust property that is reasonably necessary for the beneficiary to have to enable the trust to be enforced.[33]

The trustee has a duty to consider at 'reasonable intervals' whether the trustee should be making the basic trust information available. If no beneficiary has any trust information because no beneficiary can be identified or the trustee decides to withhold all information, the trustee is required to apply to the court for directions.[34]

This creates a new ongoing active obligation on the part of the trustee and the potential of a significant increase in disclosure of information about trusts. At the same time, there is sufficient flexibility to cater for most circumstances in

25 s.45
26 s.46
27 ss.47–48
28 *Erceg v Erceg* [2017] NZSC 28
29 Above at [56]
30 Above at [62]
31 s.51
32 s.53
33 s.49
34 s.54

which trustees might reasonably choose to withhold information. The list of relevant factors, whether for routine disclosure of basic trust information or responding to a request for trust information, includes:[35]

- the nature of the beneficial interests;
- whether there are any issues of personal or commercial confidentiality;
- the expectations of the settlor;
- the age and circumstances of the beneficiary;
- the nature and context of any request for information;
- the effect of giving the information, including the effect on relationships within the family and relationships between the trustees and beneficiaries; and
- the practicality of giving the information or imposing restrictions or safeguards.

Importantly, the reasons for trustee decisions are not required to be disclosed.[36] Presumably, this means that trustees' reasons for deciding not to disclose information would also not need to be disclosed.

In a circumstance in which a particular beneficiary is unreasonably litigious, family relationships could be damaged or when the settlor intended the information to be kept confidential, trustees might reasonably withhold information. It will be important for trustees to develop robust practices of decision-making around the provision or withholding of trust information and to seek appropriate advice to help them strike the right balance.

The Trusts Act may still lead to an increase in trust litigation both in terms of applications for directions by trustees and applications by beneficiaries to seek access to further information or to enforce the trust. A practice of including clear statements in relation to confidentiality in settlors' memoranda of wishes, or even in trust deeds, may develop.

APPOINTMENT AND REMOVAL OF BENEFICIARIES

As a consequence of these new provisions on provision of information to beneficiaries, it can be anticipated that, in future, New Zealand trusts will have more restricted classes of beneficiaries. The strategy of including a wide range of discretionary beneficiaries with no more than 'mere expectancies' as a mechanism of asset protection may no longer make sense to those concerned with the privacy of their financial affairs.

'It will be important for trustees to develop robust practices of decision-making around the provision or withholding of trust information'

Many, but not all, New Zealand discretionary trusts include the power to remove beneficiaries. However, care must be taken by those advising and drafting documents to remove beneficiaries about whether it would be a proper exercise of that power.[37]

EXEMPTION AND INDEMNITY CLAUSES

The Trusts Act makes it clear that trust deeds 'must not limit or exclude a trustee's liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct or gross negligence'.[38] Nor may the trust deed grant an indemnity for the same.[39] Any terms in a trust deed that purport to limit the liability of the trustee or to indemnify them in breach of these provisions is invalid.[40]

This means that trustees can no longer rely on broad indemnity clauses that purport to protect them against gross negligence. They may still be protected in relation to ordinary negligence, if this is covered by an appropriately drafted limitation of liability and indemnity clause.

The Trusts Act details factors that a court must consider in determining whether a trustee

35 s.53
36 s.49
37 See *McLaren v McLaren* [2017] NZHC 161 at [63]-[64]
38 s.40
39 s.41
40 s.42

has been 'grossly negligent'. The core test is reminiscent of *Wednesbury* unreasonableness[41] in administrative law:[42]

> 'whether the trustee's conduct … was so unreasonable that no reasonable trustee in that trustee's position and in the same circumstances would have considered the conduct to be in accordance with the role and duties of a trustee'.

A list of relevant factors for a court to consider in determining whether a trustee was grossly negligent is included in the Trusts Act.[43]

As with contracting out of default duties, advisors (those advising on the creation of a trust or preparing the terms of a trust) will have a statutory duty to take reasonable steps to ensure that the settlor understands the meaning and effect of any limitation or indemnity clause contained in the trust deed. If they fail to properly advise, in breach of the statutory duty, then the limitation and indemnity would have no effect in relation to that person if they are appointed as a trustee, but it would not be invalidated in relation to other trustees (unless it is too broad).[44] As with contracting out of default duties, a failure for a professional advisor to advise about the scope of a trustee indemnity clause could lead to complaints or allegations of professional negligence.

APPOINTMENT AND REMOVAL OF TRUSTEES

The statutory powers for appointment and removal of trustees have been modernised and broadened to minimise the need to apply to the court.[45]

The Trusts Act confirms and extends the position reached in case law[46] that a person with a power of appointment or removal of trustees must exercise it honestly and in good faith, and for a proper purpose.[47] In other words, the power to appoint and remove trustees will always be subject to fiduciary duties. A beneficiary may apply to the court to review a decision to remove or appoint a trustee.[48]

Retiring as a trustee is to become slightly more difficult insofar as a discharge must be given in writing.[49] If a trustee loses capacity, there is a new duty imposed on the person with the power to remove trustees to remove them.[50] The issue of trustees losing capacity while holding the power of appointment and removal can cause practical difficulties, particularly if the trust holds land, which cannot then be conveyed to the new trustees without a vesting order of the High Court. This difficulty will continue under the Trusts Act. The best way to avoid an expensive and cumbersome procedure will still be to engage early in appropriate succession arrangements, including considering the succession of the powers to appoint and remove trustees.

ABOLITION OF THE RULES AGAINST PERPETUITIES AND ACCUMULATIONS

The rule against perpetuities and remoteness of vesting is abolished,[51] which will set New Zealand apart from other common-law jurisdictions.

Trusts that might otherwise have breached the rule against perpetuities for failing to specify a termination date are instead deemed to terminate after 125 years. If permitted by the trust instrument, trusts already in existence with shorter trust periods may be extended to a maximum duration of 125 years.[52] Trusts that are excluded from the current rule on perpetuities (most obviously, charitable trusts and certain superannuation schemes)[53] are unaffected.[54]

This is a welcome change and provides clarity in the law. The former rules on perpetuities were difficult to apply. Care will still need to be taken for resettlements as the 125-year maximum duration applies from the time the property was first settled on trust, not the date of the resettlement.[55] It may be expected that clients seek to vary trusts to take advantage of the longer trust period (currently a maximum of 80 years) so as to have the option to continue the asset-protection benefits of the trust for longer.

41 *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 KB 223
42 s.44(2)
43 s.44(3)
44 s.43(3) and (4)
45 s.92
46 *McLaren* v *McLaren*
47 s.94
48 ss.95, 126 and 127
49 s.101
50 s.104
51 s.16
52 sch.1, cl.3(1)
53 s.16(6)
54 sch.1, cl.3(3)
55 s.17

OTHER CHANGES

Other changes include:

- a reduction of the age of majority from 20 to 18 years old;[56]
- statutory powers for trustees to appoint delegates and nominees to exercise certain trustee powers;[57]
- codification and extension of the rule in *Saunders* v *Vautier*[58] that adult beneficiaries may unanimously bring a trust to an end;[59]
- a trustee power to determine whether return on an investment is to be treated as 'income' or 'capital' for the purposes of distribution;[60]
- reform of rules about apportionment of receipts and expenses to give trustees discretion;[61]
- changes to the grounds on which the court may review trustee decisions;[62] and
- new alternative dispute resolution procedures.[63]

TRUST REVIEWS

At the time of publication, the Trusts Act will come into force in just over a year. Those advising settlors and trustees of New Zealand trusts should consider a comprehensive review of trust deeds and provision of information to clients about the Trusts Act. It is also a good opportunity to review succession plans for New Zealand trusts.

Key aspects of a Trusts Act trust review are likely to include consideration of:

- whether the trust deed can, or should, be amended to take advantage of the longer trust period or otherwise to comply with the Trusts Act;
- how the trustee duties in the trust deed align with the mandatory and default duties set out in the Trusts Act;
- what trustees need to do to comply with their duties, including duties of prudent investment, duties to keep copies of core trust documentation and duties to provide beneficiaries with information;
- whether a special trust advisor or an investment advisor would be beneficial; and
- whether the trust is still appropriate to achieve its purposes.

CONCLUSION

It is to be expected that there will be an increase in trust litigation after the Trusts Act comes into force. This is inevitable given the new concepts that have been introduced into New Zealand trust law and the likely 'teething period' during which trustees and their professional advisors learn new ways of doing things.

Particular concerns are likely to arise about the new rules on disclosure of information to beneficiaries. Professional advisors will play a critical role in guiding trustees through the routine exercise of balancing considerations before deciding what to disclose.

Overall, the Trusts Act can be seen as 'old wine in a new barrel'. The core aspects of New Zealand trust law will remain unchanged and clients and their advisors should be reassured that it will be business as usual for the most part. However, just as the barrel can affect the quality and flavour of the wine, the new concepts and practices will no doubt bring about an evolution of aspects of New Zealand trust law over the next decade.

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56 s.20
57 ss.67–73
58 *Saunders* v *Vautier* (1841) 4 Beav 115
59 ss.121–122
60 s.60
61 s.61
62 ss.126–127
63 ss.142–148

MOUNTAIN TO CLIMB

Potential challenges in the implementation of a Swiss trust law

BY JESSICA SCHAEDLER

ABSTRACT

- *Switzerland is about to discuss the introduction of a Swiss substantive trust law. There are some important considerations that must be made to ensure the implementation of a new trust law is smooth.*
- *While foreign trusts are recognised and the administration of these has a long tradition in Switzerland, the introduction of a domestic Swiss trust law would challenge lawmakers and trust practitioners alike.*
- *This article highlights the main legal and regulatory challenges in the introduction of a Swiss trust law.*

In March 2019, Switzerland's Council of States mandated the Federal Council to draw up a Bill for a Swiss trust law and create the legal basis for a Swiss trust. The Federal Council was mandated in 2017 to present a report on the advantages and disadvantages of a possible introduction of a Swiss trust law and an adaptation of the applicable tax law.

Foreign trusts are, in principle, recognised if they do not violate the *loi d'application immédiate* rules or Swiss *ordre public*, pursuant to arts.16 and 18 of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (the Hague Convention).

OBSTACLES

While a draft Swiss trust law is being drawn up, there are two main obstacles in the existing Swiss law that collide with the intended effects of trusts:

'One of the several ways to cater for a functional equivalent to these principles in civil-law jurisdictions that do not know the concept of equity is the fragmentation of ownership'

- Article 335(1) of the *Swiss Civil Code* (the Code)[1] limits the use of family foundations to instances where such a foundation's purpose is limited to providing for 'the costs of raising, endowing or supporting family members or similar purposes'. Article 335(2) further forbids the establishment of entailments; irrevocable links of a patrimony to a certain family with a defined order of succession.
- Pursuant to art.488(1) of the Code, the appointment of one reversionary heir is allowed. Article 488(2) expressly limits this capacity to one succession of a single reversionary heir. A direct consequence of this principle is the above-mentioned prohibition on establishing family foundations for intergenerational maintenance purposes.

Although it is generally agreed that neither art.335 nor art.488 of the Code inhibits the recognition of foreign trusts following the ratification of the Hague Convention, the introduction of a domestic Swiss trust law would obviously collide with these provisions, which would have to be amended to provide for the legal framework to allow intergenerational asset-protection trusts.

Even if the two articles were amended or abolished, there remain other aspects to be considered when introducing a common-law concept into a civil-law environment.

LAW OF PROPERTY v '*SACHENRECHT*'[2]

The unity of property and the *numerus clausus*[3] of limited rights *in rem* are the two leading principles of Swiss property law. Only one person can have the absolute right in an object, and this right is enforceable against the world at large. In addition, there is a closed number of limited rights *in rem* that convey a right to use or exploit an object, but do not constitute absolute rights; namely usufruct and other personal servitudes, real burdens over immovable property and mortgage contracts.

The indivisibility of ownership is often used as an argument for the incompatibility of the common-law trust concept with Swiss legal doctrine.

Taking historical and theoretical aspects into account, such objections must be denied.

As Gretton[4] points out: 'The trust presupposes neither equity nor divided ownership.' In order to understand the trust from a civil-law point of view, the trust does not have to be conceptualised within the framework of English and Welsh law.[5] Gretton further cites Bernard Rudden, who held that: 'The orthodox explanation, given in terms of the traditional distinction between law and equity, provides only a historical and not a rational account of the trust.'

Thévenoz[6] similarly sets out that the concept of trust does not require a splitting of ownership. According to him, some of the essential functional features of the trust are the split of economic benefits of certain assets from control and the administration of these assets. The allocation of the assets exclusively to the beneficiaries and the ring-fencing of the assets from the personal creditors of the trustee are further essential features.

One of the several ways to cater for a functional equivalent to these principles in civil-law jurisdictions that do not know the concept of equity is the fragmentation of ownership.

An example would be Liechtenstein, where the 'administrative right *in rem*' (*dinglich beschränktes Verwaltungsrecht*) was introduced in order to allow the functional division of ownership and

1 *Swiss Civil Code* of 10 December 1907 as in force on 1 January 2019
2 *Sachenrecht* translates to 'property law' in German.
3 A concept of property law which limits the number of types of right that the courts will acknowledge as having the character of 'property'.
4 G. L. Gretton, '*Trusts without Equity*' (2000), 49(3) Westlaw I.C.L.Q. 599, 620
5 For the purposes of this article, all references to the law of England and Wales will be shortened to 'English law'.
6 L. Thévenoz, 'Trusts: The Rise of a Global Legal Concept' in M. Bussani and F. Werro (eds.), *European Private Law: A Handbook* (Vol.II, Stämpfli 2014), p.17

administration of the trust assets. The trustee, as owner of an administrative right *in rem*, has the standing of a self-entitled person with an administrative right *in rem* under the effect of the fiduciary relationship.

SWISS TRUST LAW WITHOUT THE PRINCIPLES OF EQUITY

Even though the Swiss civil-law system is different from the classic common-law system, it is not impossible to recreate the effects of a common-law trust within the Swiss legal landscape.

As Cincelli[7] in his thesis, and later Thévenoz[8] in a recent publication, agree, a Swiss trust law should not be a 'legal transplant': it should not be a copy-paste of the common-law trust. Both agree that this is neither possible nor desirable for various reasons.

Swiss law follows intrinsically different principles than common law. Even if a copy-paste were theoretically possible, the practical implementation and enforcement of those foreign concepts (such as the distinction between legal and beneficial ownership and, in this scope, questions about tracing trust property in heirship or matrimonial disputes, or questions relating to the current prohibition of entailments) would be major challenges to Swiss trustees, lawyers, courts and judges.

If enactment of trust legislation is desired, one must differentiate between the traditional English common-law trust, based on uncodified equitable principles, and the more recently and internationally developed institution of the largely codified international (or offshore) trust.

Rather than being a legal transplant of the common-law trust, a Swiss trust law should be based on an approach of emulation (*Nachempfindung*) of trust principles. It should be based on domestic legal principles and it should provide an added value to the Swiss economy by catering for the needs of modern, international families, both foreign and living in or having ties to Switzerland.

Cincelli[9] has identified several approaches undertaken by civil-law countries and how they integrated the trust and its effects into their legal systems. He concludes that there is not a 'right' way to do so, but that the model of the trust as a fiduciary private law relationship (*Treuhand*), where the trustee has a limited right *in rem* over the trust property while retaining the principle of indivisibility of ownership, proves to be a promising way to create a functional equivalent of the trust without violating the Swiss legal principle of full ownership. At the same time, by limiting the trustee's right over the trust property, the beneficiaries' position would be strengthened (for example, the remedy of tracing would be open to the beneficiaries).

KEY FEATURES OF A SWISS TRUST LAW

A Swiss trust law should ideally be designed to extend Switzerland's offering to modern, international families seeking to simplify the management and administration of, and to protect and to preserve over generations, their international wealth, and all this in full compliance with international regulatory challenges and transparency initiatives.

The key legal features required for a Swiss trust law should be analysed and chosen in a holistic approach that takes into account further relevant areas, such as anti-money laundering (AML) laws, the regulatory environment, enforcement and litigation, and tax laws.

In order to identify key legal features for a Swiss trust it is necessary to agree on a definition of 'the trust' first. There is no generally accepted definition of the common-law trust, but one of the most cited is Justice David Hayton's in *Underhill and Hayton Law of Trusts and Trustees*:[10]

> 'A trust is an equitable fiduciary obligation, binding a person (called a trustee) to deal with property (called trust property) owned and controlled by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, ces*tuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.'

As mentioned, the classic English common-law trust is, in its narrow sense, dogmatically

7 R. Cincelli, *Der Common Law Trust* (*Dissertation Freiburg, Schulthess Schriftenreihe, Arbeiten aus dem juristischen Seminar der Universität Freiburg Schweiz* Bd.366, 2017), para.794
8 L. Thévenoz, '*Propositions pour un Trust Suisse*' (Proposal for a Swiss Trust) (2018) *Revue Suisse de droit des affaires et du marché financier*, 90:2, https://archive-ouverte.unige.ch/unige:105758
9 R. Cincelli (2017), para.796

10 D. J. Hayton, P. Matthews and C. Mitchell, *Underhill and Hayton Law of Trusts and Trustees* (19th ed., LexisNexis UK, 2016)

incompatible with the Swiss legal system, since the latter does not know the rules of equity.

Nevertheless, as established earlier, the concept of equity is not necessary in order to have trusts.

THE BASIC INVARIABLE ELEMENTS OF A TRUST

A more appropriate approach to define the trust for civil-law purposes generally, and for Swiss purposes specifically, is one that does not rely on definitions based on and translated from a common-law point of view, but one that describes the basic invariable elements constituting the legal structure named 'trust'.

According to Lupoi,[11] the five basic invariable elements of the trust are:

- **Establishment**: the establishment of the trust is made by transfer of a right to the trustee or by a unilateral declaration of trust.
- **Segregation**: the trust assets transferred to the trustee must not be confused with the trustee's own assets; they must be segregated.
- **Entrusting**: the loss of any powers over the assets transferred to the trustee by the settlor.
- **Beneficiaries or purposes**: the trustee must exercise the rights transferred to it for the benefit of beneficiaries or purposes.
- **Fiduciary element**: the exercise of the rights owned by the trustee is subject to a fiduciary duty and in exercising this fiduciary duty, the trustee must avoid conflicts of interest.

Similar to this approach, the definition of the trust, as published in *Principles of European Trust Law*, also authored by Justice David Hayton TEP,[12] seems appropriate to define the common-law trust in a civil-law context:

> 'In a trust, a person called the "trustee" owns assets segregated from his private patrimony and must deal with those assets (the "trust fund") for the benefit of another person called the "beneficiary" or for the furtherance of a purpose.
>
> 'There can be more than one trustee and more than one beneficiary; a trustee may himself be one of the beneficiaries.
>
> 'The separate existence of the trust fund entails its immunity from claims by the trustee's spouse, heirs and personal creditors.
>
> 'In respect of the separate trust fund a beneficiary has personal rights and may also have proprietary rights against the trustee and against third parties to whom any part of the fund has been wrongfully transferred.'

'A more appropriate approach to define the trust for civil-law purposes is one that does not rely on definitions based on and translated from a common-law point of view'

It is with respect to these principles that the key elements of a Swiss trust law should be established and further developed.

WIDER PRACTICAL IMPACTS IN RELATION TO LAWS AND REGULATIONS

Besides the legal aspects of trusts in Switzerland, there are other areas that are of practical importance to Swiss trust practitioners. A discussion about the introduction of a Swiss trust law without considering regulatory and AML aspects would not give a complete picture of whether, why and how a Swiss trust law is conceivable.

TRANSPARENCY, REGULATION AND AML LEGISLATION

The increase in worldwide automatic exchange of information (AEOI) has become an inescapable reality, and with further transparency initiatives induced by the Financial Action Task Force (FATF) gaining momentum globally (for example, public beneficial ownership registers and sharpened due-diligence requirements for professionals), it is not possible to avoid data sharing. The focus should now be on ensuring

11 M. Lupoi, *Trusts: A Comparative Study* (Cambridge University Press, 2000), pp.204 and 271
12 D. J. Hayton, S. C. J. J. Kortmann and H. L. E. Verhagen (eds.), *Principles of European Trust Law* (Wolters Kluwer Law & Business, 1999), p.13

> ‘Under the *Financial Institutions Act*, Swiss trustees classified as financial institutions will be obliged to always act in compliance with the provisions of the governing law of the trust’

that data is stored in and exchanged with politically stable and safe jurisdictions with a mature and solid infrastructure.

While the treatment of foreign trusts administered in Switzerland or having Swiss trustees is more or less solidly regulated under current AML and AEOI legislation, the treatment of a Swiss trust would necessarily lead to amendments of the current AML law in order to cater for the treatment of trusts established under a Swiss trust law with either Swiss or foreign trustees. Questions would have to be answered, such as what a foreign trustee’s AML duties in relation to a Swiss trust are.

Under the *Financial Institutions Act* (FinIA), which enters into force in January 2020, Swiss trustees classified as financial institutions and, therefore, subject to prudential supervision by acting as trustees of foreign trusts, will be obliged to always act in compliance with the provisions of the governing law of the trust. If such governing trust law provides for firewall legislation, it can be incompatible with the Hague Convention or with the property, inheritance or debt-enforcement laws of the country of residence of the settlor, their spouse, heirs or creditors. In such cases, the Swiss trustee of the foreign trust may face legal and reputational risks that must be avoided under FinIA. Conflicts like these could possibly be avoided if Swiss trustees act as trustees of a trust governed by Swiss trust law. A Swiss trust law would necessarily be drafted in compliance with Swiss property, inheritance, matrimonial and debt-enforcement laws (i.e. not containing adverse firewall provisions) and, therefore, Swiss trustees of a Swiss trust law should not face conflicts between compliance with FinIA and compliance with trustee duties, under the governing law (Swiss law) of the trust.

EFFECTS OF A SWISS TRUST LAW ON OTHER AREAS OF SWISS LAW

As a consequence of the introduction of a Swiss trust law, several other laws would have to be adapted accordingly. This would apply (in particular, but not exhaustively) to the following:

- *Swiss Code of Obligations* – Being an obligatory relationship between the trustee and the beneficiaries, the Swiss trust law may be added as a new part to the *Code of Obligations* (express *inter vivos* trusts).
- *Swiss Civil Code* – The law of property, the matrimonial property law and inheritance laws would have to be amended (e.g. codification of segregation of trust assets, addition of a limited right *in rem*, codification of application of the principle of real subrogation for trust assets, allowing of multiple reversionary heirs, clarification of treatment of assets transferred into trust of the settlor and subsequent distribution to a beneficiary, etc.).
- *Debt Enforcement and Bankruptcy Act* – Entitlement rights of trustees, beneficiaries and third parties will have to be encoded.
- Subject to further analysis, the following laws/regulations will also have to be looked at and potentially amended:
  - o *Private International Law Act* (to include specific provisions for domestic trusts with foreign elements);
  - o Tax law (to include specific provisions for treatment of domestic trusts);
  - o FinIA (will Swiss trustees be subject to prudential supervision, but not Swiss trusts?);
  - o *Commercial Register Ordinance* (would Swiss domestic trusts need to be registered, similar to the requirements under the EU’s Fifth and Sixth Anti-Money Laundering Directives?); and

- o *Federal Act on the Automatic Exchange of Information in Tax Matters* (to include express provisions for Swiss trusts, if necessary).

Besides the impact on material laws, changes to current practice in formal law must be considered. In common-law countries, trusts are controlled and supervised by courts and trustees can seek court guidance. Judges intervene into trust matters if the integrity of a trust is endangered or if the trustee seeks guidance on legal questions.

LEGAL ALTERNATIVES TO A SWISS TRUST LAW

The desirability of having the trust codified, and the legal alternatives to the introduction of a Swiss trust law, have been keenly discussed among practitioners and legal scholars in Switzerland.

Although related to the trust, the *Treuhand* is used in practice for purposes other than the trust. Rather than being an instrument used to administer assets and use them for the benefit of beneficiaries or for transmission purposes, the *Treuhand* is mostly used in business transactions. If the *Treuhand* were to be codified as it is, it would not be a useful equivalent to the trust.

Another option to introduce a Swiss trust equivalent based on existing legal instruments is the Swiss foundation. Despite the differences, by removing existing restrictions in relation to multiple succession and purposes, the foundation could achieve similar results as the common-law trust for succession-planning purposes.

However, by amending the current foundation law, the Swiss family foundation would only be an alternative to, not a substitute for, the common-law trust; the foundation will keep the form of a legal personality, designed for specific purposes, and hence not directly comparable to the very flexible nature of the trust.

CONCLUSION

Since Switzerland's ratification of the Hague Convention in 2007, the legal and regulatory landscape has drastically changed. If Switzerland were to introduce a domestic trust law, it should be designed in such a way that it does not add unnecessary complexity, but that its economic value outweighs the efforts and complexities involved in its enactment and implementation. Admittedly, the drafting of such a law and any necessary amendments to further laws and regulatory provisions will not be an easy undertaking.

> 'The call for a new instrument is loud, but what that new instrument should be is subject to debate among Switzerland's practitioners and scholars'

There is wide consensus among legal practitioners and scholars in Switzerland that under the current laws there are not sufficient solutions to provide for the transmission of property between generations of a family. The call for a new instrument is loud, but what that new instrument should be is subject to debate among Switzerland's practitioners and scholars. While some are in favour of encoding a substantive Swiss trust law, others vote in favour of either abolishing the prohibition of entailments and opening the law for a genuine family foundation, or, and sometimes in addition, encoding the so-far only fragmentarily encoded *Treuhand*.

Considering the current circumstances, a Swiss trust law is likely to be a pragmatic, typical Swiss solution, namely the further development of the existing (*de lege lata*) and the completion of the missing (*de lege ferenda*) by adding a new chapter to the *Code of Obligations*.

THE WAY FORWARD

Although the drafting of a Swiss trust law is currently taking place, some preliminary questions must now be addressed with Swiss trust practitioners:

- Are Swiss courts fit for dealing with trusts? There is trust litigation in Switzerland, but so far only in relation to foreign trusts where foreign trust laws apply.
- Are Swiss practitioners prepared for Swiss trust solutions? For many years, Swiss trustees

have offered foreign trust solutions to an international clientele. Thereby, practitioners often work together with experienced common-law lawyers. If a Swiss trust is introduced, there will be no experienced Swiss lawyers to advise trustees of Swiss trusts on how to interpret and apply the new law. What steps are necessary to prepare the Swiss trust industry to offer a Swiss trust solution?
- As the situation stands now, a Swiss trust would primarily aim to suit Swiss residents for asset protection and, within the limits of forced-heirship rules, estate planning. It is in the nature of 'the Swiss' to rely on the established and to be cautious when it comes to 'experimenting' with the new. In order to increase appetite for a Swiss trust among wealthy Swiss families and entrepreneurs, the industry needs convincing and knowledgeable advisors. How will Swiss advisors be trained to understand, convey its advantages to clients and apply a Swiss trust law?

Questions like these are now coming up and it remains to be seen how they will be answered.

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CROSS PURPOSES

Legal frictions in European cross-border philanthropy

BY KEITH WALLACE

ABSTRACT

- *The commendable impulse towards benevolence is encouraged by individual states, but barriers exist to the movement of benevolence across frontiers. Responses by states have been patchy, local protectionism is seen and any movement towards harmonisation is slow.*
- *Europe illustrates these frictions in a microcosm. This article discusses the issues and explains those 'milestones' already passed towards the lessening of needless discriminations. The lessons learnt illustrate what needs to be tackled on the wider global stage.*

I use 'charity' as a universal and imprecise term to denote any structure delivering philanthropy. This embraces philanthropic 'foundations' and some 'not-for-profits'.

For brevity, I use A or Country A for the state from which funds flow, activities originate or where the entity is sited; B or Country B receives the funds, is the location of delivery or is the entity's site. Every European country has developed its own delineations of 'charity' or 'philanthropy', as we will see. They necessarily differ in theme, degree and exclusions.

This article has had to be necessarily selective. My apologies for the consequent omissions.

DONOR FLOWS

To start the analysis, one has to remind oneself of how benevolence may flow between countries. Three classes of donor are present (excluding state and supranational agencies): A benefactors may donate directly to a Country B charity or individual; or may indirectly benefit B as when an A water treatment business gratuitously ships equipment to a B village, or an A donor pays a

'For every donation one has to consider whether it is "reportable": amenable to public record and analysis or otherwise identifiable, and whether it has a tax consequence'

contractor in B to dig a well. One therefore has nine kinds of flow. See Table 1.

State supervision of charities normally requires production and publishing of accounts. Where done, these are susceptible to aggregation and analysis, though any clear identification of geographic application may be elusive.

Where states foster benevolence by according individuals some form of tax relief or deduction, statistics are produced but are necessarily limited to those who actually claim, and to eligible causes, and are unlikely to capture geographic application. Similarly, benevolence by business often attracts a business expenditure deduction. Here, there may be no call nor process for publicly identifying the amounts at all, nor geographic destination (there may be exceptions connected with publicly listed businesses' stewardship).

Individual-to-individual donations fall outside the charity accounts or tax reclaim processes (as do 'crowdfunding' and some online gifts); they are outside conventional data capture and also pose categorisation difficulties. Where is the line drawn between benevolence and family duty in the case of the immense home remittances (USD689 billion)[4] made by expatriate workers?

So, for every donation one has to consider whether it is 'reportable': amenable to public record and analysis or otherwise identifiable, and whether it has a tax consequence in A or B to donor or donee.

As well as non-reporting or non-tax-eligible donations, there can be the converse risk of double-counting. An A individual donates to buy a cow for B. The conduit may be both an A charity and a B charity, both of which may report that figure as well. The cooperative spirit of cross-border charitable agencies involves joint ventures, commissioned services, subcontracting and the like, all of which confuse analysis.

QUANTIFYING CROSS-BORDER DONATIONS AND OPERATIONS

In the face of problems of categorisation and uncaptured and uncapturable flows, giving some sense of quantum is not easy.

Country A (donor)	Country B (donee)	Remarks	Statistically captured
Charity	Charity	Reportable in A and B. Modest/nil tax consequence	A and B
	Individual	Reportable in A if tax consequence	A
	Direct/contract/other[1]	Reportable in A where tax consequence	A
Corporate/business	Charity	Deductible but possibly unidentified in A	No/possible
	Individual	Probably deductible but unidentifiable in A	No/possible
	Direct/contract/other[2]	Probably deductible but unidentifiable in A	Unlikely
Individual	Charity	Reportable/identifiable where tax eligible in A? Tax consequence in B charity	A possible B likely
	Individual	–	No
	Direct/contract/other[3]	–	No

Table 1: Flows schematic

1 Such as where donor pays builder direct to build a school.
2 Includes gratuitous provision of goods or services.
3 May be benevolent remittances by expatriate, or intermediated by a charity e.g. 'sponsoring' a school child.

4 World Bank estimate for 2018, bit.ly/2P7VaQX

Country	'Past month' donor score	Global rank
UK	68%	4
Netherlands	66%	6
Ireland	65%	9
Norway	65%	7
Switzerland	60%	13
Sweden	57%	15
Germany	55%	19
Austria	54%	21
Luxembourg	50%	26
Belgium	45%	28
Finland	39%	35
Italy	35%	44
Spain	35%	45
France	27%	67

Table 2: Generosity reach[5]

Worldwide data is available on the persistence of the habit of generosity, though this model has no estimates for quantum of generosity generally nor the cross-border component. See Table 2 for selected European countries.

In monetary terms, estimates of gross spend or gross activity are available and some cross-border deployment figures given (see Table 3). There are many limitations inherent, but a percentage of cross-border donation or assistance is suggested at 10.3 per cent, 5.5 per cent and 6 per cent for Australia, Canada and the US, respectively.

For Europe, three figures of gross spend with a wide range between them are offered by three studies, each with differing base dates and country coverage. The table gives all three. For the purposes of Europe in Table 3, I have simply adopted a 6 per cent guess, in the absence of data, as to the percentage that cross-border European philanthropy bears to the total. I suspect my 6 per cent is on the low side in states with close proximity to their neighbours (e.g. the contiguous EU Member States) or where there are cross-border historic, diaspora, religious or ethnic associations between A and B.

Some statistics are available that analyse grant receipts by continent. They draw on the largest transactions only and are skewed by a single large donor. See Table 4.

Separately, the UN's aspiration is for member nations to donate a minimum of 0.7 per cent of GDP to overseas aid. Such aid is often tied, it is said, to the retro-purchase of goods or services from the donor country, and the target is, in practice, met by few members. Nevertheless, the point is relevant for our inquiry, since, by eliminating friction and facilitating its own citizens' external benevolence, a state may

Country	Annual spend	Cross-border estimate	Remarks, source
US	USD410 billion	USD24.6 billion	National Center for Charitable Statistics
Canada	CAD66 billion	CAD4 billion[6]	Global Philanthropy, Blumberg
UK	EUR218 billion	EUR13 billion[7]	European Economic and Social Committee Opinion SOC/611
Europe (estimates and country coverage vary)	EUR60 billion EUR87.5 billion EUR440 billion	EUR3.6 billion[7] EUR5.2 billion[7] EUR26.7 billion[8]	24 countries 2009 20 countries ERNP 2017
Australia	AUD20.4 billion[9] donations, individuals and business	AUD2.1 billion	McGregor-Lowndes[10]

Table 3: Scale of cross-border philanthropy

5 Selected European countries only. Score is number of responders replying they had 'donated money to a charity' in the past month. It is not a measure of the amount(s) donated. No composite EU figure is offered. Fieldwork by Gallup. Data sourced from Charities Aid Foundation (UK), *CAF World Giving Index 2018*, October 2018, bit.ly/2Y8tWOt

6 Excludes gifts to UN and foreign colleges.
7 Domestic/cross-border split not known nor externally estimated. Inferred by author using US and Canadian ratio of 6 per cent as example.
8 Heidelberg University and Max Planck Institute, *Feasibility Study on a European Foundation Statute*
9 Donations by individuals and business, hence omits grants by charities.
10 M. McGregor-Lowndes and M. Crittall, *An Examination of Tax-Deductible Donations Made By Individual Australian Taxpayers in 2015–16*, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology (2018)

Inward recipient-continent	USD (billion)	%
Africa	6.6	28
Asia	4.1	17
Latin America	2.0	8
Europe	0.5	2
Unattributed, multi-regional	10.8	45
	24.0	

Table 4[11]

legitimately take corresponding credit for the amounts thus liberated in meeting its overall development aid goal.

THE EU EXPERIENCE

'Europe' is a loose association of historic independent states, many of them being members of the EU (28 currently);[12] other states have varying relationships of greater or lesser adhesion to the EU. The EU and its governing European Commission (the Commission) share some ground with other supranational or pan-European bodies in, for example, defence, human rights and so on.

For EU Member States, the *Treaty on the Functioning of the European Union* (the TFEU, the Treaty) seeks to achieve its purposes through broad statements of principle, often couched as 'freedoms': the free movement of goods and services, workers, capital and a right of establishment.

Originally termed the *Treaty of Rome*, the name changed through the *Treaty establishing the European Economic Community* to the *Treaty establishing the European Community*, and is currently the TFEU. The numbering of the salient articles has changed three times, a trap for any reader of the law reports.

Where the Treaty is silent, no rights exist. Some stated policy aspirations need further implementation in the form of directives. Where an aspiration is stated, proponents must identify a treaty right to be enforced or a principle of sufficient width to justify the aim espoused and to afford ground for the European Court of Justice (the ECJ) to uphold, should challenge be made. Some adaptations of the Treaty need unanimous member assent, while some may be achieved by qualified majority voting.

Infractions of the Treaty can be litigated in the ECJ as between citizen and citizen, citizen and state agencies and, as a form of treaty enforcement action, between the Commission and Member State.

FOURNIER

Milestones in the uncompleted journey towards reducing cross-border friction in philanthropy are shown in Table 5 at the end of this article. Forty-eight years after the signing of the Treaty, the first relevant case is *Fournier,*[13] where the tax-paying business was denied a business tax deduction for research costs conducted in B when its A domestic rules stipulated that only research in A was deduction-eligible.

In *Fournier*, the taxpayer had 1995 and 1996 research expenditure disallowed in a 1998 tax audit since the expenditure had not been on 'activities carried out in France', as the local tax code required. The *Tribunal administratif de Dijon* referred to the ECJ the question of whether that code restriction was contrary to the 'freedom to provide services' (throughout the EU) principle: and if it was, whether it was permissible through a saving provision that Member States had to be allowed a coherence in the taxing rules they might, consistently with the Treaty, impose. Additionally, the French government defended the restriction, to my mind unconvincingly, on the ground of fiscal supervision.

Between the *Tribunal administratif*'s reference and the ECJ hearing, the latter's advocate general reviewed the issues for the benefit of the ECJ judges, a standard practice. In his opinion, he identified two further freedoms under the Treaty that he invited the ECJ to consider; procedure rules permit the ECJ itself to widen the question and grounds posed.

The advocate general drew attention to an 'equal treatment of companies' article, and to an article guaranteeing 'free movement of capital'. The judges adopted the former, but ignored the latter.

> 'The French Government submits, however, that the national legislation in question in the main

11 Source: OECD Survey, cited at 2.2.1, *Private Philanthropy for Development*. Confined to the largest foundations.
12 Pre-'Brexit'.

13 *Laboratoires Fournier SA v Direction des vérifications nationales et internationals*, Case C-39/04

'The district court refused on the grounds that such a registrable merger was only available under German domestic law where both entities were established in Germany'

proceedings is justified by the objective of promoting research and by the need to ensure effective fiscal supervision.

'Although the promotion of research and development may, as argued by the French Government, be an overriding reason relating to public interest, the fact remains that it cannot justify a national measure such as that at issue in the main proceedings, which refuses the benefit of a tax credit for research for any research not carried out in the Member State concerned.

'Effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty … A Member State may therefore apply measures which enable the amount of costs deductible in that State as research expenditure to be ascertained clearly and precisely …

'However, national legislation which absolutely prevents the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States has actually been incurred and satisfies the prescribed requirements cannot be justified in the name of effectiveness of fiscal supervision. The possibility cannot be excluded a priori that the taxpayer is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other Member States.'[14]

14 Above note 13, paras.22–25

SEVIC

SEVIC followed in the same year. SEVIC's German company applied to the *Amtsgericht Neuwied* (the district court) to register a merger to wholly absorb the operation of a Luxembourg company. The district court refused on the grounds that such a registrable merger was only available under German domestic law where both entities were established in Germany. The appellate court, *Landgericht Koblenz*, referred to the ECJ whether the restriction was permitted under the 'freedom of establishment' (throughout the EU) principle.

Defending the restriction, Germany and the Netherlands argued that their domestic merger regime provided the certainty of certain protections. While acknowledging the possibility of justification, the ECJ nevertheless struck it down in slightly guarded terms:

> 'In that respect, it is not possible to exclude the possibility that imperative reasons in the public interest such as protection of the interests of creditors, minority shareholders and employees … and the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions … may, in certain circumstances and under certain conditions, justify a measure restricting the freedom of establishment.
>
> 'But such a restrictive measure would also have to be appropriate for ensuring the attainment of the objectives pursued and not go beyond what is necessary to attain them.
>
> 'To refuse generally, in a Member State, to register in the commercial register a merger between a company established in that State and one established in another Member State

has the result of preventing the realisation of cross-border mergers even if the interests mentioned in paragraph 28 of this judgment are not threatened. In any event, such a rule goes beyond what is necessary to protect those interests.'[15]

Note, of course, that this was a commercial merger; however, it has encouraged the view that cross-border mergers between charities may be equally protected and available.

'A European directive had defined "movement of capital": despite the lapse of this directive, the ECJ held that this definition had an "indicative value"'

STAUFFER

In *Stauffer*,[16] the A charity owned investment property in B. B allowed property tax relief on B properties but only to B charity owners. This was held unlawful.

Here, the referring appellate court, the *Bundesfinanzhof*, itself cited three 'freedoms' in the issues it posed to the ECJ: the 'right of establishment', the 'freedom to provide services' and the 'free movement of capital'. The ECJ chose to focus on the latter.

The first problem was the definition of 'capital', something absent from the Treaty. A European directive[17] had defined 'movement of capital': despite the lapse of this directive, the ECJ held that this definition had an 'indicative value', though, it observed cautiously, it was not 'exhaustive'.[18] Since 'investments in real estate' formed part of the old definition, that issue was resolved.

Argument then turned to the unquestioned right reserved to EU Member States to control their own taxes.[19] The relevant article:

'… takes effect without prejudice to the right available to Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or the place where their capital is invested.

'However, … this derogation from the fundamental principle of the free movement of capital, must be interpreted strictly (and) cannot be interpreted as meaning that any tax legislation making a distinction between taxpayers by reference to their place of residence of the Member State in which their capital is invested is automatically compatible with the Treaty. The derogation … "shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital …".'

A further derogation, reserving control of 'education and training' was argued by Germany, but failed.[20]

Then three governments, Germany, Ireland and the UK, sought to justify Germany's rule through:

'… the difficulty of ascertaining whether, and to what extent, a charitable foundation which is established abroad actually fulfils the objects laid down in its statutes in accordance with national law and, secondly, by the need to monitor the effective management of that foundation'.

The ECJ was unsympathetic.

'There is nothing to prevent the tax authorities concerned from requiring a charitable foundation claiming exemption from tax to provide relevant supporting evidence to enable those authorities to carry out the necessary checks. Further, national legislation which absolutely prevents the taxpayer from submitting such evidence cannot be justified in the name of effectiveness of fiscal supervision.'[21]

15 *SEVIC*, C-411/03, paras.28–31
16 C-386/06
17 *Council Directive 88/361*, which was repealed.
18 Above note 16, para.22
19 para.31
20 para.44
21 para.46

A further defence as to a need to preserve the 'cohesion of the national tax system' was attempted, but failed.[22]

Finally, and even less convincingly, Germany asserted:

'… that it is not inconceivable that criminal gangs and terrorist organisations may assume the legal status of a foundation for the purposes of money-laundering and the illegal transfer of funds from one Member State to another'.

To which the retort was:

'… the fact that a foundation is established in another Member State cannot give rise to a general assumption of criminal activity'.

The upshot of *Stauffer*, therefore, is that 'free movement of capital' became the Treaty freedom called in aid in subsequent cases.

PERSCHE

The cross-border donation case is *Persche*.[23] Herr Persche, an A resident and taxpayer, made a charitable donation to a B charity. He would have been entitled to an A tax deduction, were it an A charity. No corresponding deduction was allowed to him. This was held unlawful. Interestingly, Herr Persche's occupation was cited as 'a tax advisor', so his confidence in this challenge (or pugnacity) may have been higher than other donors. The referring local appellate court, the *Bundesfinanzhof* again, this time based the issue on free movement of capital alone.

Defending the status quo, five governments argued:

'… that it is not contrary to the Treaty provisions on the free movement of capital that a Member State provides for the deduction for tax purposes of gifts only if they benefit bodies located in that State. First of all, national charitable bodies and those established abroad are not in a comparable situation … In addition the restriction of tax advantages to gifts made to national charitable bodies is, in their submission, justified by the need to guarantee the effectiveness of fiscal supervision.'[24]

The ECJ was unsympathetic.

'As the Advocate General pointed out in … his Opinion, since the possibility of obtaining a deduction for tax purposes can have a significant influence on the donor's attitude, the inability in Germany to deduct gifts to bodies recognised as charitable if they are established in other Member States is likely to affect the willingness of German taxpayers to make gifts for their benefit.

'Such legislation constitutes, therefore, a restriction on the free movement of capital …'[25]

Much argument turned on the difficulty said to face Member States.

'Whilst it is true that, in contrast to such a recipient body, the donor does not himself have all the information necessary for the tax authorities to verify whether that body satisfies the conditions required by the national legislation for the grant of tax advantages, particularly those relating to the manner in which the funds paid are managed, it is usually possible, for a donor, to obtain from that body documents confirming the amount and nature of the gift made, identifying the objectives pursued by the body and certifying the propriety of the management of the gifts which were made to it during previous years.

'In that regard, declarations by a body which fulfils, in its Member State of establishment, the requirements of the law of that Member State for the grant of tax advantages, cannot be left out of consideration, particularly if that legislation makes the grant of tax advantages intended to encourage charitable activities subject to identical requirements.'[26]

The asserted imperative of the state to satisfy itself as to the due conduct of the donee

22 para.51
23 C-318/07
24 Above note 23, para.32
25 paras.38–39
26 paras.57–58

'The ECJ restated the utility of the old definition of "capital", one component of which is personal capital movements, including gifts and endowments'

charity and its due applications of funds was undermined by the concession extracted from the German government:

> 'In fact, as the German Government explained at the hearing, even in relation to national charitable bodies, an on-the-spot inspection is not usually required since the monitoring of compliance with the conditions imposed by the national legislation is carried out, generally, by checking the information provided by those bodies.'[27]

There was subsidiary discussion as to how far Member States might place a burden of proof on the taxpayer and how far each state was compelled to invoke a mutual tax assistance mechanism.[28]

MATTNER

Mattner was a cross-border case of discriminatory loss of tax relief on a real estate gift, held unlawful. Here, the referring German court (*Finanzamt Velbert*) bypassed the *Bundesfinanzhof* and founded the issue in both free movement of capital and on the free movement of people.

The ECJ found it unnecessary to consider the latter at all.[29] It restated the utility of the old definition of 'capital', one component of which is personal capital movements, including gifts and endowments. The basic principle was shortly stated:

> 'In the case of gifts, it follows from that case-law that the measures prohibited … as being restrictions on the movement of capital include those whose effect is to reduce the value of a gift by a resident of a Member State other than that in which the property concerned is located and which taxes the gift of that property…'[30]

Some debate turned on a Member State's ability to control its own taxes, an available derogation from the Treaty.[31]

To the argument that the coherence of a Member State's tax system justified the practice, the ECJ held:

> '… for such a justification to be accepted, a direct link has to be established between the granting of the tax advantage concerned and the offsetting of that advantage by a particular tax charge…'[32]

HEUKELBACH

The Heukelbach Mission successfully contested the non-availability of a reduced tax rate on a cross-border legacy, a case of inadmissible tax discrimination. The Mission was a German-based religious organisation, receiving a legacy from a Belgian resident. The legacy was taxed by Belgium at 80 per cent; had she made a similar bequest to a Belgian charity the rate would have been 7 per cent. The referring court framed the question widely, on four Treaty articles, including free movement of workers and freedom of establishment. The ECJ acceded to the Commission's argument that these latter two were not in point, confining its consideration to the free movement of capital. 'Capital' was

27 para.67
28 *Council Directive 77/799*
29 C-510/08, para.23
30 Above note 29, para.26
31 paras.32 and 33
32 para.53

'The ECJ drew attention to Belgium's tax rate confining the 7 per cent concession to charities having a "centre of operations" in Belgium'

accorded the old definition again, and that includes 'inheritances and legacies'.

In finding in favour of the mission, the ECJ restated the now core principles:

> 'The Court has consistently held that, for national tax legislation to be capable of being regarded as compatible with the provision of the ... Treaty on the free movement of capital, the [permissible] difference in treatment must concern situations which are not objectively comparable or it must be justified by an overriding reason in the public interest.[33]
>
> 'The Court has also held that, where a body recognised as pursuing charitable purposes in one Member State satisfies the conditions laid down for that purpose in the legislation of another Member State and where its object is to promote the very same interest of the community at large, so that it would be likely to be recognised in the latter Member State as pursuing charitable purposes – a matter which it is for the national authorities of that Member State, including its courts, to determine – the authorities of the latter Member State cannot deny that body the right to equal treatment solely on the ground that it is not established in the territory of that Member State (see, to that effect, *Persche*, paragraph 49).
>
> 'A body which is established in one Member State but satisfies the conditions laid down in another Member State for the grant of tax advantages, is, as regards the grant by the latter Member State of tax advantages intended to encourage the charitable activities concerned, in a situation which is comparable to that of the bodies established in the latter Member State which are recognised as having charitable purposes (see, to that effect, *Persche*, paragraph 50).'[34]

Interestingly, for the consideration of the cross-border operations of charities themselves, the ECJ drew attention to Belgium's tax rate confining the 7 per cent concession to charities having a 'centre of operations' in Belgium.[35]

> 'By taking the centre of operations of the body concerned as the criterion for establishing the existence of a close link with the Belgian community at large, not only does the legislation at issue in the main proceedings treat bodies which have their seat in Belgium differently from those which do not, even where the latter have a close link with that community, it also treats all bodies which have their centre of operations in Belgium in the same way, whether or not they have established a close link with that community.'

This part of the ruling opens a door for further harmonisation within the EU.

EC v AUSTRIA

EC* v *Austria[36] saw the Commission directly enforce against Austria the latter's practice of curtailing cross-border donations by according A tax relief solely to gifts to A bodies.

Austria is bound in to the Treaty's observance through having joined as a former European Free Trade Association nation, so the legal route was slightly different.

Austria's attempted justifications of an apparent infraction of the free movement of capital principle centred on overriding public interest and on the argument that the denial of cross-border relief justifiably supported Austrian bodies and correspondingly relieved the state. Once again, the narrowness of any permissible derogation was stressed.

33 C-25/10, para.29

34 Above note 33, para.36

35 Or in any EU Member State in which the deceased worked or resided.

36 C-10/10

'Accordingly to the Court's case-law, for national tax legislation such as that at issue, which distinguishes between gifts to national institutions and those to institutions established in other Member States, to be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable, or must be justified by an overriding reason in the public interest. In order to be justified, moreover, the difference in treatment must not go beyond what is necessary to attain the objective of the legislation in question (see, to that effect, Case C-386/094 *Centro di Musiocologia Walter Stauffer* [2006] ECR 1-8203, paragraph 32, and *Persche*, paragraph 41).'[37]

And:

'It follows that the sole criterion capable of distinguishing between taxpayers making gifts to institutions whose seat is in Austria and those making gifts to corresponding institutions established in other Member States is in fact the place of establishment of the recipient of the gift. Such a criterion, by definition, cannot be a valid criterion for assessing the objective comparability of the situations or, consequently, for establishing an objective difference between them.[38]

'The Republic of Austria confines itself to submitting, moreover in general terms, that the effect of extending the benefit of deductibility from tax to gifts to institutions established in other Member States would be a partial displacement of the gifts currently directed to Austrian institutions and hence a reduction of the means made available to them as a result of income from gifts. It argues that the funds deriving from private gifts supplement those institutions' budgets, so that the deductibility from tax of the gifts at issue makes it possible to place additional financial means at their disposal without increasing budgetary expenditure.

'As far as this argument is concerned, it is settled case-law that the need to prevent the reduction of tax revenues is neither among the objectives stated in Article 58 EC nor an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the Treaty (see, to that effect, *Persche*, paragraph 46 and the case-law cited).'[39]

Similarly, in 2011 the Commission contested *Germany*'s discriminatory withholding tax practice. While not a 'charity' case, the ruling assists charities as to their cross-border dividend income.

Finally, the recent UK case of *Routier*[40] should be noted. The UK Supreme Court was sufficiently confident in deriving the outcome from ECJ decisions not to need to make a reference to that court. A Jersey resident had bequeathed a legacy to an English charity. A similar legacy by an English testator would have attracted UK inheritance tax relief but it had been refused in this case. Jersey is a Crown Dependency: it is not an independent state and only limited, specific facets of the Treaty have been applied to it. The Supreme Court held that Jersey was to be treated as a third country, rather than an entity internal to the UK. 'Free movement of capital' applied to the legacy and the British tax authorities' refusal to grant relief was countermanded.[41]

In Table 5, at the end of this article, I have also noted the Treaty grounds supporting the ECJ's decisions, these being the sole authority available to that court, of course.

EU PRINCIPLES NOW

The principles in play here can now be summarised.

- EU Member States have the right to set their own taxes and the terms of these, but the right must be exercised in conformity with the Treaty.
- States are permitted, by way of tax derogation, to differentiate between resident and

37 Above note 36, para.29
38 para.35

39 paras.39 and 40
40 [2019] UKSC 43
41 The judgment contains a useful summarising analysis of how and in what circumstances EU Treaty terms impact all the 'offshore' states with some affiliation to an EU 'parent'.

non-resident taxpayers, but that must not constitute 'a means of arbitrary discrimination or a disguised restriction' on the free movement of capital. States may apply to pre-clear a measure for compatibility.[42] This tax derogation argument failed in *Mattner* and was clearly unavailable in *Heukelbach, Austria* and *Germany*.

- Likewise, each state has a general discretion over charity tax reliefs which must be similarly exercised.[43]
- Hence, a 'disinterested' discretion may be deployed by any Member State as to the public interest to be promoted, which might allow selective barring to B entities even where accorded to A entities.[44] One suspects the justification would have to be compelling.
- The outright non-availability of comparable relief could be justified by:
  - o the effectiveness of fiscal supervision;[45]
  - o the need to safeguard the cohesion of the tax system;[46]
  - o crime prevention; or
  - o other public order considerations.

However, attempts to justify under these reasons were rejected by the ECJ in these cases. The possible loss of tax revenues is not an admissible justification.

Member States are barred from preventing an applicant from even attempting to substantiate comparability, in order to receive comparable treatment.[47]

POST-*PERSCHE* COMPLIANCE

The reader will have noticed that all of the initial running in the cases was made by private citizens and one charity. The Commission has always had ample enforcement powers but had apparently failed both to consider their deployment or to engage them. Whether shamed or spurred on by *Persche* one cannot say, but at that point the Commission began to flex its long-available muscle and was said to have initiated 28 enforcement processes against ten Member States in the succeeding three years. The *Austria* case is the only enforcement action that went to the ECJ, so one has to infer that in the other 27 actions compliance has been achieved without the need for an ECJ hearing.

The reaction of Member States to the *Stauffer, Persche* and *Heukelbach* cases has been unimpressive.

While the case law confers rights, giving practical effect to these has been obstructed and delayed by many member countries. Successive requests for ever more detailed substantiation of the recipient's status, efficiency, honesty and due application of the gifted property continue to wear down claimants and discourage future claims. Leaving aside bureaucratic foot-dragging, differing district tax offices in the same country have been reported to have issued contradictory rulings over the same recipient. The key work here, by Thomas von Hippel,[48] lists 22 instances of inadmissible charity tax discrimination yet to be corrected by the Member State's domestic legislation.

> 'We find that in 22 of a possible 84 cases the wording of Member States' laws discriminate…
>
> '… in the remaining 62 cases in which the wording of the law does not discriminate against foreign-based … donors, (practical) barriers continue to exist, since it is not at all clear under which circumstances Member States consider a foreign EU-based PBO [public benefit organisation] comparable to a resident one. There is no common approach as to how Member States check/test such comparability.
>
> 'Tax laws differ in their details and it is often unclear at what level of detail the respective national tax law requirements have to be fulfilled in order to show a potential comparability. The practice can even vary from one authority to the other within one country.
>
> 'Formal compliance *[in domestic legislation]* does not however solve all problems. One key problem with the current system is that the comparability tests imposed by Member States are demanding and create significant

42 art.65 of the Treaty
43 C-415/04 *Kinderopvang*
44 *Stauffer*, para.39
45 *Stauffer*, para.47
46 *Stauffer*, para.52; *Mattner*, para.53
47 *Stauffer*, para.49; *Fournier*, para.25

48 'Taxation of Cross-Border Philanthropy in Europe after *Persche* and *Stauffer*', TGE and EFC 2014

‘Two countries stand out in honouring the letter and spirit of cross-border donation tax relief: Luxembourg and the Netherlands’

legal uncertainty: long and complicated procedures, translation costs, and fees for legal/tax counselling.’

Another study (2017)[49] records:

‘In only 10 countries do formal procedures exist, while in a majority of countries [i.e. 18] no such rules or even procedural guidelines for the tax authorities appear to exist … Decisions are mostly taken on a case-by-case basis and often require inordinate amounts of time.’

The same report, however, suggests that these very uncertainties are being exploited by the more stout-hearted:

‘Donors … are sometimes just going ahead and claiming fiscal advantages, even without legal certainty, and are ready when challenged by tax authorities or local courts to push it further at national court level, or even at European level. In many cases claimants are not challenged by tax authorities as Member States are aware of the risk of these procedures, due to existing judgments.’

Against these reports of delay and non-compliance, two countries stand out in honouring the letter and spirit of cross-border donation tax relief: Luxembourg and the Netherlands. Luxembourg principally relies on receipt from the claimant donor of a simple model certificate with four assurances.

The Netherlands’ approach differs in that the Country B charity must register with the Tax Authority Oost Brabant to obtain Dutch ANBI[50] status. The submitting Country B organisation must answer eight questions and provide some undemanding back-up documentation. On the award of ANBI status, which 300 external bodies had thus received by 2017, any Dutch donor to the now-registered entity has uncontested tax deductibility. This is more favourable to a donor since the compliance formalities are attended to by the recipient; but, although it saves the donor trouble, it limits recipients. The Luxembourg approach allows domestic donors an unlimited field of recipients.

The effect and limitation of the cases cited needs to be emphasised. The principle is not universality nor even ‘harmonisation’, but a preclusion of discrimination for an A action within B where the outcome would be different for a B actor. B may relieve from tax donations up to a ceiling of ‘X’ per cent of taxable income, a turnover percentage (for a business), to a monetary ceiling of EUR ‘Y’, or may set a minimum donation level before relief can be claimed. The external claimant cannot obtain better treatment than is available to the internal party. What the cases confer is some form of restricted comparability.

EU INITIATIVES

Cross-border philanthropy has been understandably low on the EU’s list of priorities, the EU having been predicated on a single (commercial) market. In 2005, the Commission issued a panic-stricken paper following bombings in Madrid and London, suggesting some link between charities and terrorism.[51]

A commendable attempt[52] to frame an EU-wide acceptable foundation was the subject

49 ‘Boosting Cross-border Philanthropy in Europe’, EFC and TGE 2017
50 Public Benefit Organisation (*Algemeen Nut Beogende Instelling*, ANBI)
51 Commission Communication (2005) 620 Final
52 Universität Heidelberg and Max Planck Institute, *Feasibility Study on a European Foundation Statute*, 2007

of detailed groundwork in 2007. The EU had already promulgated model EU constitutions for three vehicles,[53] but a fourth, the Societas Unius Personae (SUP),[54] had been politically blocked. In the light of this defeat, the European Foundation has not moved forward. Commentators suggest a foundation model could be brought in through mechanisms that avoid any need for Member State unanimity,[55] the current perceived main stumbling block.

Also in 2007, a recommendation was adopted on behalf of the 47 Member States of the Council of Europe (hence larger than the EU) pressing for fuller recognition of and facilitating for non-governmental organisations (NGOs) within this wider European sphere.[56] The Council of Europe's 1986 attempt[57] to establish a convention recognising international NGOs has been poorly supported.

Commendable technical support has been provided by a comparative European study[58] including valuable country-by-country mapping, a study of global cross-border barriers[59] and an excellent European summary.[60]

In 2019, the European Economic and Social Committee, on the initiative of the Romanian presidency, published *European Philanthropy: An untapped potential*,[61] making a convincing and necessary case for the elimination of operating frictions. Interestingly, this opinion calls in aid a further possible ground, the EU *Charter of Fundamental Rights*, which confers the right of association and the freedom to create and organise structures for philanthropy, none of which have provided the rationale for the key ECJ judgments in Table 5.

LESSONS FROM EUROPE/EU

1. First, there is no common ground or acceptance of what constitutes charitable purposes. A useful source[62] categorises 19 potentially charitable themes for local acceptability across 40 countries. The distinctions do not seem major, but they include some surprises. Sweden does not accept assistance to persons with disabilities nor the arts, Italy does not recognise animal protection, amateur sports have a mixed acceptance and so on.
2. There is no available common structure. See earlier as to the failure of the 'European Foundation' project.
3. Acceptable structures have different attributes. Some European countries insist on endowment preservation; others impose a mandatory distribution level.[63] Some may continue to benefit their founder; others require the total dedication of funds to charity. Some may properly apply income both to charitable and non-charitable purposes.
4. Good causes are delivered by varying structures, some of which may indeed lack legal personality, thus exacerbating comprehension and recognition in other countries.
5. Revenue arising from a charity's own activities in delivering its own purposes may or may not be subject to local taxation. For example, in Denmark charities bear tax on donations received.
6. The rules for deductibility or relief, in the hands of individual or business donors, differ widely though are generally available. Sweden does not accord relief to business donations.
7. Registration, supervision, reporting and tax recognition similarly differ.
8. Inability to merge is cited as a structural disincentive. The case law, *SEVIC*, recognised the right to merge across borders, SEVIC being a business. The wording of the Treaty does not seem positively to bar mergers for foundations. The process could be explicitly permitted either by ECJ decision or adoption of a facilitating directive. In the light of the many inter-country differences already listed, it is difficult to see how any permitted merger would take effect, hence its utility has to be questioned.

53 Societas Europaea (2004); Societas Cooperativa Europaea (2006); and Societas Privata Europaea (2011)
54 A single member company, proposed 2014.
55 Using arts.20 and 352 of the Treaty; or promulgating it through a directive.
56 HDIM 20/59/08
57 ETS 124
58 EFC, *Comparative Highlights of Foundation Laws: The Operating Environment for Foundations in Europe*, 2015
59 Douglas Rutzen, 'Aid Barriers and the Rise of Philanthropic Protectionism', *International Journal of Not-for-profit Law*, 17:1 (March 2015)
60 Professor Oonagh Breen, EFC and DAFNE, *Enlarging the Space for European Philanthropy*, 2018
61 SOC/611, EESC 2018
62 EFC, *Comparative Highlights of Foundations Laws*, 2015
63 Above note 57, pp.12 and 17, 13 out of 40 countries surveyed.

9. Similarly, an inability to move the 'seat' of a charity across a border is also cited as an obstacle. Between countries there are, as well, differing views about what the 'seat' comprises. Is it the 'real seat' (effective place of direction) or the 'site of incorporation'? This is another obstacle to arriving at a common approach. The same question of utility arises. How does, in practice, an A-sited medical research charity moving its legal seat to B expect to be treated in B? It can hardly expect to continue to have the A tax treatment. To remain under A's supervision rather than to be subjected to B's could, in theory, be achieved by the same kind of passporting one encounters in European financial services, but all of the necessary regulatory cooperation and infrastructure is absent.[64]
10. The converse risk, that the change of residence of an office-holder may inadvertently trigger a change of tax residence, is more serious.
11. Operational obstacles do indeed exist that are not in the main charity-specific: anti-money laundering processes, anti-terrorism or crime funds prevention, money transfer costs, and the like. Charities report banks withdrawing general and remittance services or increasing bureaucracy, but these are not solely European issues.

WORKAROUNDS

Services have been developed to assist donors and charities in these areas. Global custodians and professional firms offer withholding tax reclaim services to cross-border investing charity customers. Such services may embrace both 'incontestable' claims under explicit double-taxation conventions and, within the EU, remediating claims based on the case law.[65] Readers may not be aware that the ECJ rulings have the capacity to benefit non-EU investors as well.

For cross-border donation deductibility, assistance may be given by Transnational Giving Europe. The UK's Charities Aid Foundation[66] offers help to its users, making use, *inter alia*, of A/B twin structures where an A donation to the A twin secures unchallengeable tax relief. The A twin then correspondingly donates under due process demonstrating independence to the B twin. The fees these charge are an obvious friction and disincentive. In the light of *Persche*, utilising them for intra-EU benevolence should be superfluous.

Larger fund-seeking charities may adopt their own twin structure, receiving A domestic donations in the A-sited charity which, again under due process, are then passed to the B charity. For charities with global aspirations, a chain of affiliated entities can be formed, each necessarily conforming to local norms.

EXPANSION v PROTECTION

The frictions observed in cross-border benevolence and operations mostly derive from possibly unthinking local chauvinism. Is this self-defeating? National protectionism seems founded on the premise that a citizen's benevolent propensity is fixed in amount.

On this supposition, facilitation of cross-border benevolence would drain the state of an equal amount, but is this so? If the A citizen is discouraged and effectively precluded from supporting tropical disease treatment in B, will they instead donate the same intended amount to their local opera house? It seems unlikely. Table 3 suggests that a minimum 6 per cent of benevolence passes across European borders. States have been making some praiseworthy attempts to reduce frictions and the process will hopefully continue, but how much more 'new' giving would be prompted by more streamlined processes?

SUMMARY

Europe provides a neat laboratory housing the disorganised and messy steps towards some reduction in cross-border philanthropy frictions. Even within such a relatively tight-knit body as the EU, the, may we say creative, efforts of the ECJ have produced useful, though rather limited, benefits. These do not assist much in non-EU Member States.

The US does not yet provide a much better example, except that there is a working

64 However, relocation and refoundation costs of EUR90–101 million were cited to be calculable in Professor Breen's paper op. cit. note 60; itself drawing on op. cit. note 52.
65 Cited earlier and, more generally, *Denkavit* C-283/294 and *Fokus* EFTA E-1/04.
66 As does Chapel & York.

Year	ECJ reference	Case	Basis/rationale
2005	39/04	*Fournier* Cross-border discrimination in research costs tax relief. Unlawful.	Freedom to provide services
2005	411/03	*SEVIC* Company's right to cross-border merger (and by extension to foundations with economic activities).	Freedom of establishment (FEE) Equal treatment of companies (ETC) A-G canvassed free movement of capital[68] (FMC) as well
2006	386/06	*Stauffer* Discrimination in denying property tax relief to cross-border charity owner. Unlawful.	FMC
2009	318/07	*Persche* Cross-border discrimination denying tax relief on donations. Unlawful.	FMC Mutual tax assistance (MTA)[69] available
2010	510/08	*Mattner* Discriminatory loss of relief on real estate gift where non-resident involved. Unlawful.	FMC Permissible tax discrimination (TD) against non-residents did not apply
2011	25/10	*Heukelbach* Non-availability of reduced tax rate on cross-border legacy. Unlawful.	FMC
2011	10/10	*EC v Austria* Cross-border donations: relief confined to 'Austrian' bodies. Unlawful.	FMC
2011	284/09	*EC v Germany* Discriminatory withholding tax ruling against non-residents. Unlawful. Assists with charities' cross-border dividend income.	FMC

Table 5: Case finder and rationale

acceptance that recognition by the Internal Revenue Service (IRS) accords charity status; and that, for those entities under IRS oversight, that oversight generally displaces other local supervision. Interstate donation is, of course, available, though there is very limited cross-border donation relief.

Reducing cross-border frictions should encourage more benevolence, with a second advantage of helping states meet their UN target of 0.7 per cent of GDP.

There is clearly a long way still to go. One hopes that public pressure will drive a necessary political and diplomatic will.[67]

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67 The research for this study was ably assisted by Reed Smith's library manager, Fiona Fogden MA, to whom my thanks.
68 Refer to repealed *Council Directive 88/361/EEC* for 'indicative' and 'non-exhaustive' definition of 'capital'.
69 *Council Directive 77/779/EEC*

INTERNATIONAL TAXATION OF TRUST INCOME: PRINCIPLES, PLANNING AND DESIGN

ISBN: 9781108492256 *PRICE:* GBP95 *PUBLISHER:* Cambridge University Press

BY DR MARK BRABAZON TEP

REVIEWED BY EMMA CHAMBERLAIN

This is not a book for everyday client use (although the UK tax summaries are very accurate and commendably up to date); nevertheless, it is one that all practitioners, academics and policymakers interested in trusts should read. It presents an illuminating and thought-provoking review of the principles behind the taxation of trusts, with particular reference to Australia, New Zealand, the UK and the US.

In his analysis, Dr Brabazon identifies unintended non-taxation and double taxation scenarios and considers principles of tax design that might deal with cross-border problems, e.g. where the trustees are in one country, the assets in another and the beneficiaries located in various countries.

International Taxation of Trust Income makes a strong case for the development of a set of coherent global principles when taxing trusts and trust distributions, and contrasts the recent moves to tax companies in cross-border situations. The author points out the peculiar features of trusts that can make them challenging in an international tax context, i.e. their flexibility and the difficulty, particularly in civil-law countries, in conceptualising an entity without separate legal personality. The emphasis is on what Dr Brabazon terms 'donative trusts' for holding personal and family wealth, rather than trusts used for collective investments such as pension funds.

The book has three goals: identify the principles by which countries tax trust income and distributions internationally; identify unintended non-taxation and double taxation associated with trusts; and propose some principles of tax design to respond to problems of double and non-taxation.

The introduction begins by tackling key questions:

- Who should be regarded for tax purposes as deriving the income of the trust: the grantor, the beneficiaries or the trustees?
- Should the trust itself be regarded as the proper taxpayer; that is, is it fiscally opaque or purely transparent?

- To what extent should the trust be regarded as a proper taxpayer and to what extent should distributions from the trust be regarded as income analogous to corporate dividends?

These are questions that no doubt frequently exercise Her Majesty's Revenue and Customs (HMRC), particularly in relation to the taxation of non-resident trusts, but a common global approach would be preferable and the author sets out some useful principles to consider.

Hence, the first part contains an interesting comparison of the national income tax laws in Australia, the UK and the US, particularly in relation to foreign grantor trusts in the US and the settlement provisions in the UK. Obvious problems arise where the country in which the trust and/or beneficiary resides attributes the income to a non-resident grantor and the grantor's country attributes the same income to the trust or beneficiary, resulting in an absence of any taxation. Equally, double taxation can arise when countries disagree about attribution or taxation is deferred until distributions are made to beneficiaries. The author illustrates the diversity of international and domestic approaches with a useful table summarising grantor attribution between Australia, the US and the UK, in relation to income and gains.

He highlights the major differences between the four countries in their enthusiasm to claim a trust as fiscally resident and, therefore, taxable on a worldwide basis on all its income. Australia is relatively expansive; the US is more restrictive in designating a trust as a US taxable person; and the UK is more easily manipulated. In contrast, New Zealand taxes trusts by reference to the current residence of the grantor rather than the residence of the trustees per se. The capacity for dual trust residence or, alternatively, trust 'fiscal homelessness' is neatly illustrated. The appendix contains very useful factual material on the way in which the four countries tax beneficiaries and trusts.

The second part is more theoretical and considers the international tax order, including treaties, the OECD Base Erosion and Profit Shifting project and their applicability to trusts in contrast to companies.

In its conclusions, the book identifies a strong case for countries to act cooperatively, not only to protect their own tax base but also to prevent or neutralise trust-based tax arbitrage. The book recommends a range of strategies for consideration in the design of national tax laws and tax treaties. It does not tackle areas that might be particularly relevant to trusts, such as inheritance tax, and it does not consider entities that may display some characteristics similar to trusts, such as foundations and usufructs. However, it is expressly conceived as 'foundational'.

Its strong theoretical analysis will hopefully encourage practitioners, academics and policymakers to think through proposed trust taxation changes more rigorously and coherently, and encourage further academic research.

If you are a practitioner at all interested in policy, I strongly recommend you read this book. You will learn a lot more about how these four countries tax beneficiaries and trusts and you will also be stimulated by the analysis and ideas presented. If you are at HMRC considering the taxation of trusts (a consultation that has been going for more than a year), then it will be even more useful to you.

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READING THE TRUST QUARTERLY REVIEW COUNTS TOWARDS STEP'S CPD REQUIREMENTS: WWW.STEP.ORG/CPD