“Trusts without Equity” and Prospects for the Introduction of Trusts into European Civil Law Systems

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1. Introduction

Conventionally, the biggest legal feature of a trust was said to exist in the separation between the trustee’s common-law power and the beneficiary’s equity power. For this reason, civil law countries were unable to adopt a legal structure in which common-law power and equity power belong to separate entities, and it was considered that most European countries had their own trust-like systems but they could never have a trust itself as a legal system.

However, in recent years, in pursuit of the introduction of a trust system in Europe, the dominant approach has been to find the characteristics of a trust in the concept of independence of segregated property, without relying on a legal structure specific to Anglo-American laws. In this respect, it should be noted that the theoretical structure of a trust that has been recently argued in Scotland has given rise to a new concept of a trust in Europe.

2. Introduction of Trusts into the mixed legal system ~Scotland’s Case

2.1 “Trusts without Equity” in Scotland

In Scotland, a legal system called trust has become firmly established as it has in England, but the legal structures of the trust systems of these countries significantly differ. At present, Scotland is one of the jurisdictions that officially comprise the United Kingdom. However, due to the long period of its rivalry with and independence from England, as well as a historical background consisting of strong relations with civil law countries in terms of legal matters, Scotland has private law that is deeply influenced by civil law. This is the reason why Scotland did not have equity as a substantive and was unable to adopt a traditional English structure of a trust, in which common law right and equity right belong to separate entities. A trust in Scotland, in its core, has unique features that are different from a trust in England.

Through various theoretical twists and turns, in Scotland, it has become an established view that a beneficial interest is not a real right but personal right. Since the court decision was made in Inland Revenue v. Clark's Trs 1939 SC 11, no particular question has been raised to challenge the view that the beneficial interest has the nature of personal right, and this view has been established since that decision.

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However, confusion in terms of the concept of a trust has not yet been settled, and in such a situation, it has been difficult to say that all theoretical problems have been clarified.

2.2 Patrimony Theory

Under such circumstances, Professor Gretton has been asserting the necessity of a new theoretical framework for the legal structure of a trust in Scotland, and recently attempting to build a legal structure of a trust by using the concept of *patrimony*.

*Patrimony* is a concept that represents the aggregate of an individual’s property (the sum of his/her assets and liabilities). Every individual has his/her patrimony, and in general, he/she cannot have more than one patrimony. However, the beneficiary of a trust has a *special patrimony* which is segregated and independent from his/her patrimony in general terms. Such special patrimony is the trust property. The trust patrimony is a property that is separate from the private patrimony, and the creditor entitled to make a claim for either of these patrimonies is not entitled to make a claim for the other patrimony. When property that belongs to a certain patrimony is sold, the sales proceeds are substituted for the property thus sold, and belong to the same patrimony.

When handling the mixed property, practical problems basically do not arise because there is more than one trustee, and experts such as solicitors and accountants administer such property. It is provided by law that where a sole trustee resigns his/her office, he/she should appoint new trustees as his/her successors.

Patrimony has its counterparts not only in common law jurisdictions but also in jurisdictions under other legal systems, e.g. *peculium* under Roman law, *patrimonie* under French law, and *Sondervermögen* under German law. Professor Gretton says that he received inspiration to conceive his patrimony theory from the theory advocated by a French scholar, Pierre Lupaulle (*patrimonie d’affectation*). The Province of Quebec, Canada, has legal provisions concerning trusts created by using the concept of patrimony (Civil Code, Art. 1260). This clearly suggests that Quebec’s trust law was developed under the strong influence of Lepaulle’s theory.

A *special patrimony* functions as if it were a juridical person, and historically, it has tended to function as such. For these reasons, Lepaulle suggested the idea of considering a trust as a juridical person. However, in response to the theory put forward by Lepaulle, an Australian comparative law scholar, K.W.Ryan, criticized that Lepaulle’s theory confuses *Zweckvermögen* (purpose estate) with *Sondervermögen* (special estate) under German law and the concept of special patrimony is irrelevant with a juridical person.

In addition to Professor Gretton, Professor Kenneth Reid of the University of Edinburgh also advocates the patrimony theory, and also argues that the trust patrimony is the *substantial legal entity*. It is true that, based on this presupposition, the vacancy of the office of the trustee does not affect the trust patrimony, and the consistency of the theory can be strengthened. However, there is no theory which goes so far as to assert that the trust patrimony has “juridical personality” in terms of legal formality.

If the trust patrimony ultimately does not have juridical personality, the patrimony theory is suspended temporarily in the event of the vacancy of the office of the trustee. In this respect, there is another view that places emphasis on the office of the trustee, supplementing the patrimony theory.

The patrimony theory is an effective approach for explaining the structure and legal effect of a
trust, not by adopting the English legal structure in which *common-law power and equity power belong to separate entities*, but by recognizing the *independence of segregated property*. However, in Scotland, this theory has been advocated by scholars only recently. It cannot generally be said that historically, the parties to trusts in Scotland have been clearly aware of the concept of patrimony. In this respect, Professor Gretton argues that the concept of patrimony is a synonym with the concept of estate, which has been commonly accepted in Scotland for many years. This is an interesting question from the perspective of the history of legal systems in Scotland. At any rate, it is noteworthy that the introduction of the concept of patrimony into the substantive legal framework is under discussion at the Scottish Law Commission.

3. **Prospects for the Introduction of Trusts into European Civil law Jurisdictions**

It was considered that most European countries had their own *trust-like systems* but they could never have a *trust* itself as a legal system, because they cannot adopt a legal structure in which *common-law power and equity power belong to separate entities*. However, in recent years, in the course of building a uniform trust law theory in Europe, it has become a dominant approach to find the characteristics of a trust in the concept of *independence of segregated property*, without relying on such a legal structure. The theoretical structure of a trust that has been recently argued in Scotland has given rise to this new concept of a trust in Europe.

3.1 **Hague Convention**

At the 15th session of the Hague Conference on Private International Law held on October 20, 1984, the Draft Convention on the Law Applicable to Trusts and on Their Recognition was adopted. In 1985, Italy, Luxemburg, and the Netherland first signed the draft convention, which made it officially established as the “Draft Convention on the Law Applicable to Trusts and on Their Recognition.” After being ratified by the United Kingdom, Italy, and Australia, the convention took effect as of January 1, 1992.

It is said that recognizing trusts in Scotland was one of the major reasons for concluding the Convention. The United Kingdom ratified the convention by the Recognition of Trusts Act 1987. Subsequently, the Convention was ratified by Canada, the Netherlands, Hong Kong, and Luxemburg, with Malta also acceding to it. In 2006, Switzerland also ratified it.

The Convention begins as follows:

The States signatory to the Convention, “considering that the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution, desiring to establish common provisions on the law applicable to trusts and to deal with the most important issues concerning the recognition of trusts, have resolved to conclude a Convention to this effect, and have agreed upon the following provisions.”

Article 1: This Convention specifies the law applicable to trusts and governs their recognition.

Article 2: For the purposes of this Convention, the term “trust” refers to the legal relationships created - inter vivos or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.
Article 2 specifies the following characteristics of a trust: (a) the trust assets as independent property [the assets constitute a separate fund and are not a part of the trustee’s own estate]; (b) the trust assets held in the name of a third party [title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee]; and (c) the trustee's special duty [the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.]

Article 2 further provides that: “The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.”

Article 6 expressly stipulates that “A trust shall be governed by the law chosen by the settlor.” Article 7 further stipulates that “Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.”

Since the provisions on the characteristics of a trust in the Convention are written with words and phrases that may allow flexible interpretation, the Convention is applicable to many various trust-like systems.

3.2 Principles of European Trust Law

To encourage the development of a trust-like segregated fund concept in Europe, which is already present to some extent in most jurisdictions, an international working group has produced eight articles, backed by a general commentaries. They hoped that such principles, coupled with implementation of the Hague Trusts Convention, will lead to increasing flexibility in the laws of European civil law jurisdictions which will maximize opportunities for wealth preservation and wealth generation.

The “Principles of European Trust Law” was developed in 1999. These Principles were the product of the project organized in 1996 at the University of Nijmegen, the Netherlands, and led by Professor David Hayton, who was at that time invited to that university from the King’s College, the University of London. The aim of the project was to unify the trusts and trust-like systems implemented in European countries and offshore jurisdictions. The Principles consist of eight clauses of basic principles, comments thereon, and reports by the project members from Scotland, Germany, Switzerland, Italy, France, Spain, Denmark, and the Netherlands. Although the Principles are compiled in the form of recommendations by a researchers’ group, they potentially have a significant impact on the process toward establishing and unifying trust laws in European countries.

The key is Article 1, which has as the core of the European “Trust” concept a segregated trust fund owned by the trustee apart from his private patrimony and so immune from the claims of his creditors, spouse or heirs. The idea of a segregated fund is already represented in various civil law systems, for example the segregation of a deceased’s assets vested in the heir until he accepts them with the benefit of an inventory of assets and liabilities, the assets of an undisclosed principal in the hands of his agent are protected against the agent's insolvency under Swiss and Italian law, the Italian *fondo patrimoniale* under Arts 167-171 of the Civil Code which concerns assets held by the spouse(s) for satisfying the needs of the family, and the Dutch notary's client account. However, it is up to each jurisdiction how far it develops special personal or even proprietary rights against the trustee or third parties.

The Principles of European Trust Law are not advocated as comprehensive provisions of trust law.
Rather, they are developed with the intention of recognizing that it is possible for many European countries to have trusts as specified in Article I under their own legal systems, although such trusts may not be as sophisticated as those in common law jurisdictions (e.g. England), thereby promoting various transactions within Europe. The Principles are also intended to recognize the possibility of development of legal relationships in civil law jurisdictions, and further indicate various possible forms of development against different cultural, legal system, and socioeconomic backgrounds.

The Principles do not rely on the legal structure specific to trusts under Anglo-American law, but find the characteristics of trusts in the concept of independence of segregated property. Article I of the Principles provides that in a trust, person called the “trustee” owns assets segregated from his private patrimony,” and must deal with those assets for the benefit of another person or for the furtherance of a purpose. The Principles consist of eight clauses, which respectively provide for: the main characteristics of the trust (Article I), creation of the trust (Article II), trust fund (Article III), trust for beneficiaries or for enforceable purposes (Article IV), trustees’ duties and powers (Article V), remedies against trustees for breach of trust (Article VI), liabilities of third parties (Article VII), and termination of a trust (Article VIII).

With regard to matters that would particularly raise problems when civil law countries introduce the trust system, e.g. the beneficiary’s right against the trustee and the third parties to whom part of the trust fund has been wrongfully transferred (Article I, paragraph (4)), and declaration of trust (Article II), the Principles use the term “may,” thereby leaving these matters to the discretion of each country that introduces the Principles. The term “may” is used intentionally for these matters. Another feature of the Principles is that they establish provisions on the presupposition of the existence of a trust created for a purpose, in consideration of offshore trusts and trust services (Article IV [Trusts for beneficiaries or for enforceable purposes], Article III, paragraph (2), Article V, paragraph (2), Article VIII, paragraph (4)).

The theoretical structure of a trust recently advocated in Scotland is, curiously enough, identical to a patrimony and segregated fund, which are unique theories of property rights as seen in Article I of the Principles. This means that the essential part of the theory of the Scottish trust law can possibly become the essential part of a uniform trust law theory in Europe.

In fact, Dutch scholars who were the members of the project argue that the trust law in mixed jurisdictions such as Scotland will be a precedent in the process of developing trusts in civil law countries such as the Netherlands, and it will finally mature into Principles of European Trust Law.

3.3 Draft Directive on Protective Funds

Recently, movements are also being seen toward creating a European uniform trust law, such as (i) the attempt to establish a limited European uniform trust law which addresses only specific purposes and types of trusts (e.g. trust-type funds for commercial purposes), and (ii) the attempt to establish a full-fledged European uniform trust law.

The attempt to establish a law of trust funds for commercial purposes is an extension of the advocates of the Principles of European Trust Law, and it is being made mainly by Dutch scholars. Those who work on this attempt try to create uniform provisions applicable in Europe for trust-type funds called protective funds, while daring not to use the term “trust” in the provisions. Thus, they intend to avoid national controversies, to the greatest possible extent, about whether or not the introduction of trusts is
In 2004 the Business and Law Research Centre of the Radboud University Nijmegen reinstated the International Working Group on European Trust Law, which was subsequently enlarged, so as to prepare the way for a new law on “protected funds” in the EU and backed by a broad range of National Reports explaining the current legal position and considering implementing the protective fund directive into national law. By doing so, the International Working Group on Trust Law has shifted its purpose. Instead of reviewing or consolidating current law, as was the case in the previous projects, it has taken a step further by working towards a proposal for new legislation in the European Union, a draft Directive on Protective Funds.

Under the draft Directive, beneficiaries of the fund are protected against the insolvency, liquidation or death of the administrator because the protective fund is a fiduciary patrimony separate from the private patrimony of the administrator. Moreover, the administrator is subject to a rigorous regime of duties owed to the beneficiaries which may be supplemented or modified by the document creating the protective fund (Article 8).

Protected funds can be used in the commercial and financial sector for the same purposes as trusts, but as compared to trusts they are relatively simple and do not give rise to proprietary effects.

Likewise, to establish the full-scale Europe unification law of trust, it seems that the draft is prepared by Coordinating Group on Trust Law which is a part of Study Group on a European Civil Code which consists of a scholar and a judge of EU each country. What is worthy of special mention is that in both attempts, the concept of patrimony, or independence of segregated property, is placed as the basis for the legal structure of a trust. The Co-ordinating Group on Trust Law agreed on the following provision in their Trust Law Draft: “The trust fund is a special patrimony distinct from the personal patrimony of the trustee and any other patrimonies owned or managed by the trustee”.

4. Introduction of Trusts Through Legislation in European Civil Law Countries

As recent movements in Europe, the introduction of trusts is being attempted by legislation.

In Luxemburg, the Law of July 27, 2003, related to trust and to fiduciary contracts (loi du 27 juillet 2003 relative au trust et aux contrats fiduciaries) was enacted. Article 6, paragraph (1) of said law provides that a fiduciary patrimony is independent from the fiduciary trustee’s personal patrimony and other fiduciary patrimonies.

In France, the Law Instituting Trust (Loi Instituant La Fiducie, Loi n° 2007-211 du 7 février 2007) introduced trusts (fiducie) under a statute. Said law consists of 18 articles, and the 21 provisions in Article 1 are introduced into the Civil Code. The legislative bill in 1992 failed, mainly because the concern about the abuse of trusts for the purpose of tax evasion could not be eliminated. The present law, which has been successfully enacted, is dedicated in large part to tax-related provisions (Articles 3 to 11). The major factor that backed up the enactment of the law may be the promotion of economic activities carried out with the use of trusts, from the perspective of increasing the country’s international competitiveness. Said law provides that the settlor shall be a juridical person, thereby prohibiting the creation of a trust for the purpose of inheritance or gift (liberalties, the gratuitous transfer of assets) (Article 1, the second
sentence of Article 2014). This suggests that said law is designed to be applicable to trusts for commercial purposes.

Article 2011 of Article I of said law provides that “Trust is the transaction by which the settlor transfers his own assets and rights in whole or in part to the trustee, and the trustee retains such assets and rights by segregating them from his own patrimony, for a specific purpose or for one or more beneficiaries.” It should be noted that also in France and Luxemburg, the core of the concept of trust is patrimony.

5. Recognition of “internal trust” in civil law jurisdictions under the Hague Convention ~Italian Case

In Europe, it is still a dominant approach—not to recognize trusts that are created under the country’s own legal system but, from the perspective of conflict of laws, to recognize trusts that are lawfully created under foreign laws and exist in the country’s own territory.

5.1 Recognition of the “internal trust” in Italy

The Contracting States of the Hague Convention shall, irrespective of whether or not they have trust laws as their national systems, recognize a trust created under the applicable law as chosen under Chapter II of the Convention. Here, a question arises: in Italy, for instance, will a foreign trust law be applicable only to foreign trusts, that is, trusts created by foreign nationals in foreign countries, or will a foreign trust law be applicable, via the provisions of the Hague Convention, to domestic trusts also, which are created by Italian nationals who live in Italy on the trust property located in Italy for the benefit of Italian nationals who live in Italy? If a foreign trust law is applicable to an Italian domestic trust, it would lead to the situation where although Italy has no trust law as its national system, it would be possible to create trusts freely in Italy by applying a foreign trust law.

Italy was the first civil law state to ratify the Hague Trusts Convention. This obliged Italian courts, within the limits of the Convention, to recognize trusts, even though Italy has no domestic trust law.

Since the ratification, however, there has been an important polemic on the question. Whether it was now possible for an Italian settlor in Italy to create a trust (necessarily governed by the law of another state of Italian assets for Italian beneficiaries.

5.2 The Opinions of the Italian Scholars

As far as the interpretation of Article 13 of the Hague Convention is concerned, the opinions of Italian scholars are divided into those who have argued the impossibility of recognizing the effects in Italy of an “internal” trust and those who—on the contrary—favor such possibility.

The scholars who have supported the restrictive solution have maintained that Article 13 of the Convention would force Italian judges not to recognize an “internal” trust. It is argued that the Italian statute implementing the Hague Convention introduced only those modifications of the Italian legal system that were necessary to the fulfillment by Italy of its international obligations arising out of the Convention. Therefore, according to such a scholar, the Italian system has not been modified to such an extent
that "internal" trusts can be given effect in Italy. 

They said that the Hague Trust Convention assumes an international relationship exists. In purely domestic situations, the choice of a foreign trust law can never set aside the mandatory rules of Italian law. It is possible that where other civil law jurisdictions ratify the Hague Trust Convention, the courts of those jurisdictions will only recognise trusts which have been created in an international setting, and which have genuine common law connections.

It is true that the Hague Trust Convention does not oblige the Contracting States to introduce the trust into domestic law. However, it does constitute a powerful argument for such introduction. To this it may be added that the development of civilian rules for a trust-like institution could also be beneficial to the functioning of the Hague Trust Convention itself. For it would be possible to rely on those rules when a foreign trust is to be recognised in a civil law jurisdiction pursuant to the rules of the Convention.

Thus by applying these newly developed rules of domestic trust law, foreign trusts would in many cases be more easy to fit into the system of property law and bankruptcy law of these jurisdictions. Also, this would further reduce the scope of Articles 15, 16 and 18 of the Hague Trust Convention, provisions which otherwise might adversely affect the full recognition of trusts.

In order to support the solution that it is possible to create an "internal" trust, other scholars have submitted that the entry into force of the Hague Convention should have introduced the trust institution into the Italian law system from the viewpoint of substantive law.

A third thesis has been submitted, according to which the judge - in deciding whether to recognize an "internal" trust in Italy or not – has to use his discretionary power.

5.3 Lupoi's Opinion

Professor Maurizio Lupoi has recently argued that citizens of ratifying countries where trusts are not generally known are entitled to form wholly "domestic" trusts governed by a foreign law. According to Lupoi, this academic argument has been taken up by Italian legal practice and there are now many instances of trusts all the elements of which (with the exception of their governing law) are connected with Italy: Italian assets, Italian trustees, Italian settlors and beneficiaries. He says that Article 6 of the Convention ("A trust shall be governed by the law chosen by the settlor") covers any trust, including one which presents no connection with the law which the settlor has chosen as the governing law. The choice made by the settlor is not conditional upon the trust being international in character. Contrary to a widely-held belief, the Hague Convention has nothing to do with "international trusts", nor with trust characterised by a foreign element. The only foreign element which the Convention requires is that the law governing a trust be a foreign law (that is, foreign with respect to the forum).

However, on the other hand, he is strongly against any wide-ranging legislation on trusts, be it based on the Principles or otherwise. The proper way to develop trusts in Italy is to resort to trusts which, although "Italian" in their subject matter and as to the parties involved, are governed by a foreign law. Recently many trusts of this sort have been formed in Italy and favourable judicial notice has been taken of two of them.
5.4 The Attitude of the Italian Courts

Until recently, Italian courts confronted with a trust found it impossible to accept that assets were vested in and controlled by the trustee and that an action concerning trust assets should be brought against the trustee. One can see this, for example, in the decision of the court of Cassation of Naples of 29 March 1909.35

The compatibility of trusts with the Italian legal system was further confirmed in quite a different case by the Court of Appeal of Milan on 6 February 1998. The Court of Appeal of Milan held that it could not be claimed that trusts should be considered void under Italian law since Italy had ratified the Hague Convention, it had to be recognised that the trust deed conferred upon the trustee the exclusive right to act against the Nigerian government and that a majority vote of the settlor-creditors was binding.36

These decisions confirm that trusts closely connected with a foreign legal system are recognised in Italy. The situation, however, is not so clear if the significant elements of the trust are considered to be more closely connected with the Italian legal system than with a foreign legal system. In these instances the courts, pursuant to article 1 of the Hague Convention, can at their discretion refuse to recognise the trust.37

Article 13 says: ‘No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.’

The discretion left to the courts by article 13 can clearly cause uncertainty. Thus in 1999 the Tribunale di Santa Maria held that, pursuant to article 13 of the Hague Convention, it would not recognise a trust that had been created in Italy by an Italian settlor, with Italian assets and Italian beneficiaries, notwithstanding that the settlor had specified that the trust was to be governed by English law. The court held that since all significant elements of the trust were closely connected with Italy in ascertaining the law with which a trust is most closely connected reference shall be made in particular to the place of administration of the trust designated by the settlor.38

Generally, most Italian decisions have held it possible to create an “internal” trust. Such judicial attitude that is favourable to the possibility of recognizing in Italy the effects of an “internal” trust governed by a foreign law was questioned by a decision of the Tribunale di Belluno on 25th September 2002. It denied the recognition in Italy of an “internal” trust, basing itself on the arguments submitted by the supporters of the above-mentioned restrictive thesis and particularly the argument on the minimal effect of the treaty implementation order.39

However, soon afterwards, a decision of the Tribunale di Bologna on 1 October 2003 resolutely reaffirmed the thesis which is favourable to the recognition in Italy of “internal” trusts. The judgement of the Tribunale di Bologna contains an interesting and exhaustively developed analysis of the place of Article 13 among other limits upon the operation of the Hague Convention contained in its Articles 15, 16 and 18 – concerning respectively mandatory norms, lois de police and public policy.40
6. The Ambiguity of “Property” and Difference in flexibility of Trusts between Anglo-American Trusts and Civil Law Trusts

6.1 The Ambiguity of “Property”

Civilian lawyers often say that the trust cannot be admitted into their system because they cannot accept that one person should have the legal ownership and another person should have the equitable ownership. However, Professor Paul Matthews cast the doubt on such a thinking. When we say that the beneficiary of a trust in English law has a proprietary interest in the assets subject to the trust we are only saying that he has a property right according to English notions. We are not saying that he has a property right according to civilian notions. Upon analysis of the rights given to the beneficiary it is not necessarily the case that they amount to property in the civilian sense, and hence there is no infringement of the principle that there should only be one owner at a time⁴¹.

In English law the requirements for a right to be regarded as a property right are less rigorous and conceptual than they are in the civilian systems. It must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. This requirement is incomplete, and has been criticised for its circularity⁴².

But Professor Matthews went further to say that the thing to notice was that it consists of pragmatic characteristics rather than conceptual ones. So the trust beneficiary’s bundle of personal rights against successive transferees could together constitute such an interest in the property. But it could not meet the more analytical and intellectually rigorous tests required by the civilian systems to be accorded the status of property. This is clearly seen if we compare English law with Scots law. So, on the other hand, the English law textbooks are quite right in that it describes the beneficiaries of a trust as having a proprietary interest, and the civilian authorities are quite right to say that he has not. It all depends what we mean by property⁴³.

6.2 Constructive Trust

As stated above, it is possible in civil law jurisdictions to create a right like beneficiary’s right in trust, at least in theory. Then, why it has been unusual that there exists a law of trusts in civil law jurisdictions and it has been a big problem how we structure the concept of trust legally ?

In my opinion, the fundamental difference between Anglo-American trust and civil law trust (or trusts in mixed legal system) is the “flexibility” of the notion of trust itself. A good example of this is the difference in reaction to “constructive trust” between them.

A *constructive trust* is a trust which may be created by a court in cases where the parties have no intention to create a trust.

English law does not give any clear or comprehensive definition of a constructive trust, and its scope has been left vague, probably intentionally, so that the court will not be constrained by restrictions under detailed bylaws when deciding what must be done for justice in a particular case. Under English law, scholars have consistently supported the creation of a constructive trust in the event of (i) the breach of the fiduciary duty, (ii) disposition of property in breach of the trust, and (iii) unconscientious act. In addition, (iv) secret trusts and trusts by mutual wills, (v) the seller under the sales contract that is spe-
cifically enforceable, and (vi) the mortgagee by transfer, are often discussed in terms of a constructive trust, even though some controversy does exist.

On the other hand, in Scotland, the creation of a constructive trust is permitted only in very limited cases, i.e. (i) where profit gained from the trust property through the breach of the trust is retained in the form of a constructive trust in the interest of the beneficiary of the trust property and (ii) where a third party has acquired part of the trust property without paying compensation or while knowing the breach of the trust.

Most trusts included in the scope of constructive trusts under English law are not recognized as constructive trusts under Scottish law, but they are mostly handled by applying concepts of contract, delict, express trust, and unjustified enrichment. Acknowledging the creation of a constructive trust without the parties' intention to create a trust would have a significant influence on bankruptcy law, because in such cases, priority right would be given to the beneficiary in the event of the trustee's bankruptcy. For this reason, there are only a few cases where constructive trusts were actually created, and Scottish courts are reluctant to allow the creation of constructive trusts. This is because trusts exist as exceptions to the Scottish legal system, especially from the position of bankruptcy law. Scottish judges are very negative about expanding the range where trusts are created by courts.

7. Conclusion

The history of trust law in Scotland which has a mixed legal system can be described as a long painstaking effort to understand how to build a legal structure of a trust without equity. With its history of complex relationships with England, Scotland has built and developed its own system of law, without distinguishing common law and equity. The legal concept of trust in Scotland may be the key to understanding its system of law.

To begin with, the very existence of the controversy over the nature of a beneficiary interest in Japan is often considered as being derived from the peculiar circumstances of Japan's inclusion of laws from foreign countries. However, in a sense, the same may apply to the United Kingdom, although it is said to be the place of origin of trusts. In England, the basic structure of a trust has long been explained as separation between common-law power and equity power. This is, strictly speaking, a legal structure originating in England. On the other hand, Scotland, although it has officially formed part of the United Kingdom since 1707, has held a system of private law that is akin to the civil law system, like Japan, due to its historical background. In Scotland, it is considered to be impossible to adopt the same legal structure as the one adopted in England, and an original legal structure has been attempted.

The situation in Japan is the same as that in Scotland, in that it is difficult to treat a beneficial interest as a real right. Lacking the concept of patrimony, Japan recognizes the trust property as having the nature of special property under the provisions of the Trust Act.

As described thus far, there have recently been movements in Europe toward building a uniform trust law, which does not rely on the conventional Anglo-American legal structure in which common-law power and equity power belong to separate entities, but has the concept of patrimony as its basis, so that such uniform law will be applicable to a wide range of trusts, including various trust-like systems in European countries and trusts in various offshore jurisdictions. If these movements are eventually real-
ized in the form of legislation, it will have a considerable impact on the legal theories of trusts in Japan.

As I reviewed in this article, the legal structure of a trust on the basis of the concept of patrimony has some weak points and demerits. It will be important in the future to consider how to make up for such weak points and demerits theoretically and how to deal with them practically.

In Europe, movements toward unification of laws are active in various sectors. For instance, in the sector of private law, a group of scholars have developed “Principles of European Contract Law,” etc., and this undertaking seems to be having a progressive impact, while inviting diverse arguments on its significance. The approach employed in these movements is to, with the ultimate goal of creating a uniform law in Europe, narrow down common features with the aim of drafting a law in the most functional method possible. This approach is also being used with respect to trusts. Will it be possible to enact a European uniform trust law or law (directive) of trust funds for commercial purposes, and further transpose it into national laws? In either case, there may be high hurdles to overcome. As stated above, the fundamental difference between Anglo-American trust and civil law trust is the “flexibility” of the notion of trust itself although it is possible in civil law jurisdictions to create a right like beneficiary's right in trust. However, an attempt to achieve unification of laws will, as the fruit of efforts made in comparative law, motivate each country to introduce the trust system. It is nearing the time for us to sum up the concepts and legal structures of trusts, giving due consideration to the movements in Europe toward the introduction of trust systems.

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(Endnotes)

2 See: Hiroyuki Watanabe, “'Ekuitei naki shintaku’ to Ōshū ni okeru shintaku dōnyū heno tenbō” ('Trusts without equity,' and vision for the introduction of trusts in Europe), Sofutorokenkyū, No. 10, p. 79, et seq. (University of Tokyo, 2007), Watanabe, “Sukottorando ni okeru 'shintaku' no hōgainen to Ōshū ni okeru shintaku dōnyū heno tenbō” (Legal concept of trust in Scotland, and vision for the introduction of trusts in Europe), Shintakuhokenkyū No. 32, p. 35, et seq. (Japan Association of the Law of Trust, 2007), Watanabe, “Sukottorando ni okeru 'shintaku' no hōgainen” (Legal concept of trust in Scotland), Hikakuhogaku Vol. 39, No. 3, p. 35, et seq. (Waseda University, 2006).
4 Trusts (Scotland) Act 1921 s3(1).

Under Quebec law, the trustee is not the owner of the trust patrimony (Civil Code, Art. 1261), but the trust property has no owner.

Whether or not to grant judicial personality to a trust was discussed at the Scottish Law Commission, but to date, no specific movement has occurred toward granting juridical personality to a trust. Discussion Paper on the Nature and the Constitution of Trusts (Scottish Law Commission, October 2006), at 16-17.

M.J. De Waal and R.R.M. Paisley, Trusts, in edited by Zimmermann, Visser and Reid, Mixed Legal Systems in Comparative Perspective (2004), at 833. Professor Gretton also suggested the necessity of such a thinking. Gretton, Trusts without Equity, at 617-618.

Gretton, Trusts and Patrimony, at 189.


Id, at 15-16.

Hayton, Kortmann and Verhagen (eds.), Principles of European Trust Law, at 34.

Ownerless funds for which there is no trustee (e.g. trusts in Quebec) and funds owned by the beneficiary and administered by the trustee (bewind, etc. in the Netherland and South Africa), which are intended for the benefit of the beneficiary or for the furtherance of a specific purpose, are excluded from the scope of trusts specified in Article I of the Principles. Funds for which the beneficiary has no enforceable right are also excluded from this scope. Where the trustee owns the segregated trust fund and the subject to whom the trustee is authorized to provide benefit is, in actuality, only the subject whom the trustee has the right to nominate, such trust is regarded as having no beneficiary and the trust funds are deemed to be retained for the benefit of the settlor. Hayton, Kortmann and Verhagen (eds.), Principles of European Trust Law (1999), at 30 (Commentary).

Id, at 38.

Mixed legal systems are seen in Scotland and South Africa, as well as Liechtenstein, Quebec, Puerto Rico, etc.


David Hayton often calls such a trust fund a ring-fenced fund. Edited by David Hayton, Extending the Boundaries of Trysts and Similar Ring-Fenced Funds (2002)

Edited by Kortmann, Hayton, Faber, Reid and Biemans, Towards an Directive on Protected Funds (Kluwer Legal Publishers, 2009), at XXI-XXII.

Id, at 7.

Ibid.

This law is a comprehensive revision to the former law enacted in Luxemburg in 1983.

It is provided that the settlor (constituent) shall be a juridical person who is subject to corporation tax law (impôt sur les sociétés) (Article 1, the first sentence of Article 2014).

L. Fumagalli, National Report for Italy, in Edited by Kortmann, Hayton, Faber, Reid and Biemans,
Towards an Directive on Protected Funds (2009), at 225.


30 Introduction to the Principles of European Trust Law, in Edited by Hayton,Kortmann, Verhagen, Principles of European Trust Law, at. 10-11.

31 Ibid.

32 Maurizio Lupoi, The Civil Law Trust, in Rosalind F. Atherton (ed.), The International Academy of Estate and Trust Law : Selected Papers 1997-1999 (2001), at 44-46. For example, one of the major Italian banks has formed a charitable trust in Milan under English law.

33 M. Lupoi and T.Arrigo, National Report for Italy, in Edited by D.J.Hayton,Kortmann, Verhagen, Principles of European Trust Law, at 129.

34 Ibid.


36 Id, at. B8/3.

37 Ibid.

38 Id, at. B8/4.

39 L. Fumagalli, National Report for Italy, at 226.

40 Id, at 227.

41 Paul Matthews , La collocazione del trust nel sistema legale: contratto o proprieta ?, Trusts, Estratto dal n. 4-2004, at. 531-532. In citing this Italian article, I referred to the resume of the lecture in English by Professor Paul Matthews at the University of Tokyo (12/2/2002, unpublished).

42 Id, at. 532-533.

43 Ibid.

44 e.g., Cherry’s Trs v. Patrick (1911).

45 e.g., Soar v. Ashwell (1893).


47 For instance, making a comparison of the provisions of the laws recently enacted in Europe, the Luxembourg law uses the term “patrimonie,” whereas the French law uses the term “patrimonie d’affectation.” The former term represents the concept of special property, which has been used from old days, whereas the latter represents the concept of substantial legal entity derived from Lupaulle’s theory. In the official documentation of the Hague Convention on trusts, the English version is written with the former term, whereas the French version is written with the latter. Confusion of concepts is also seen among experts. In my opinion, the concept of patrimonie (special property, patrimony) is more appropriate than the concept of patrimonie d’affectation (substantial legal entity) as the basic concept of a trust. Paul Matthews, The French Fiducie : And Now For Something Completely Different ?, Trust Law International, Vol. 21, No. 1 (2007), at 31. ;Maurizio Lupoi, The Development of Protected Trust Structure in Italy, in edited by David Hayton, Extending the Boundaries of Trysts and Similar Ring-Fenced Funds (2002), at 89-90.