

CROSS BORDER TESTAMENTARY TRUSTS AND THE CONFLICT OF LAWS*

TRUSTS TESTAMENTARIOS TRANSFRONTERIZOS Y CONFLICTO DE LEYES

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Abstract: The trust is a creation of equity and the English Common Law which has not passed to civil jurisdictions. Among the different types, the testamentary trusts are created by the testator in the will to provide the benefits of property after his or her death. This article explores the issue of conflict of laws –jurisdiction and applicable law- and the cross-border testamentary trusts from the perspective of English Common Law. The paper highlights the obstacles arising in the application of the conflict of law rules in this matter and concludes that in order to avoid them an approach between the Common and Civil law systems would be desirable. In this sense, the introduction and recognition of the trust into the Civil legal systems, by signing and ratifying the Hague Trusts Convention, could be a first step toward achieving this objective, since it would allow to introduce specific conflict of laws rules for testamentary trusts into their legal systems, applying, when necessary, the mandatory provisions as foreseen in the Convention in order to ensure the application of the forced heirship rights recognised in the majority of Civil law systems.

Keywords: trusts, cross-border testamentary trusts, conflict of laws, jurisdiction, applicable law, Hague Trusts Convention, European Union Law, English Common Law.

Resumen: El trust anglosajón es una creación de los tribunales de equidad en los países del *Common Law* que no se encuentra regulada en la mayoría de los países de tradición jurídica de *Civil Law*. Entre los diferentes tipos existentes, los trusts testamentarios son creados por el causante en su testamento y, tradicionalmente, se han considerado muy útiles en la planificación sucesoria. Este artículo ofrece un análisis de la aplicación de las normas de Derecho internacional privado a los trusts testamentarios transfronterizos –competencia judicial internacional y ley aplicable- desde la perspectiva del Derecho inglés, poniendo de manifiesto las dificultades que surgen y destacando la conveniencia de llevar a cabo una convergencia entre los sistemas de *Common law* y *Civil law* en esta materia. En este sentido, la ratificación del Convenio de La Haya sobre la ley aplicable al trust y a su reconocimiento podría ser un primer paso que permitiese introducir normas de conflicto aplicables a los trusts testamentarios en los ordenamientos jurídicos continentales sin perjuicio de la aplicación de las disposiciones imperativas y de orden público previstas en el propio Convenio con el fin de garantizar la aplicación de los derechos de legítima previstos en la mayoría de las legislaciones continentales..

Palabras clave: trust, trusts testamentarios transfronterizos, Derecho internacional privado, competencia judicial internacional, ley aplicable, Convenio de La Haya sobre el trust, Derecho de la Unión Europea, Derecho inglés.

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Summary: I. Introduction. II. Differences between Common and Civil law approaches. 1. The trust and the civil law concept of ownership. 2. Forced heirship rights. III. Jurisdiction of the English Court over cross-border testamentary trusts. 1. Jurisdiction under European Union legislation. A) Brussels I Regulation. a) Domicile of the defendant as general jurisdictional rule. b) Jurisdiction of the Court in which the trust is domiciled. c) Exclusive jurisdiction. d) Prorogation of jurisdiction. B) European Union Successions Regulation. 2. Appropriate forum under the common law rules. A) General rule: person of defendant and subject matter. B) Forum conveniens. C) Forum non-conveniens. IV. The governing law of cross-border testamentary trusts. 1. European Union legislation. A) Rome I Regulation. B) Rome II Regulation. C) European Union Successions Regulation. a) Exclusion of the trusts from the scope of the Regulation. b) Reasons for excluding the trusts from the scope of the Regulation. 2. The Hague Trusts Convention and the Recognition of Trusts Act 1987. A) Introduction. B) Preliminary issues excluded from The Hague Trusts Convention. a) The validity of the will. b) The law governing the assets transferred to the trustee. C) Applicable law. a) The choice of law by the settlor as a general rule. b) Governing law in default of choice: the most closely connected principle. c) Trusts governed by several laws. d) Exclusion of renvoi. e) Mandatory provisions, overriding provisions and public policy. f) Forced heirship rights and the applicable law. g) Scope of application of the governing law. h) Multi-legal system states. C) Recognition of trusts. V. Concluding remarks.

I. Introduction

1. The trust is a creation of equity and the English common law which involves the notion of holding property on behalf of someone else. In the trust there is not an absolute owner of the property and, once the settlor has constituted the trust, some ownership rights are vested in the trustee – management and control of the property – while others are vested in the beneficiary – the rights to benefit and profit¹. Therefore, there is a division of the ownership rights between the trustee, who has the legal title to the property for the interest and benefit of the beneficiaries (legal ownership) and the beneficiaries who have the beneficial title (equity ownership). It has its origin in feudal land law of the Middle Ages where no person, apart from the Crown, was an absolute owner of land.²

This institution has not passed to civil jurisdictions where ownership is an abstract concept which, contrary to what happens in the trust, requires the owner to have the right of disposition, management and enjoyment of the property, in short, all the ownership rights³. For this reason, civil law states find it very difficult to give effect to a trust in their jurisdictions where this figure is unknown, although some concepts developed under the civil law jurisdictions have some features or characteristics of the trust, for instance, the *fiducia*.⁴

¹ P. MCLOUGHLIN and C. RENDELL, *Law of Trusts*, London, Macmillan, 1992, pp. 3-4.

² S. PANESAR, *Exploring Equity and Trusts*, Harlow, Longman, 2010, pp. 49 y 50, quoting J.L. BARTON, *The Medieval Use*, *Law Quarterly Review*, n° 562, 1965.

³ Nonetheless, this figure has been studied by authors in most jurisdictions. Thus, for references to the relevant literature in Spain *Vid.*, among others, E. ARROYO AMAYUELAS (Coord.), *El trust en el derecho civil*, Barcelona, Bosh, 2007; M. A. ASÍN CABRERA, “La ley aplicable al trust en el sistema de Derecho internacional privado español”, *Revista General de Derecho*, n° 547, 1990, pp. 2089-2119; E. CASTELLANOS RUIZ, “El trust en el Derecho sucesorio español”, *Revista Crítica de Derecho Inmobiliario*, n° 704, 2007, pp. 2429-2479; M. CHECA MARTÍNEZ, *El “trust” angloamericano en el derecho español*, Madrid, McGraw Hill, 1998; C. GONZÁLEZ BELFIUS, *El trust: la institución angloamericana y el derecho internacional privado español*, Barcelona, Bosh, 1997; B. UBERTAZZI, “El trust en el derecho internacional privado italiano y español”, *Anuario Español de Derecho Internacional Privado*, Vol. V, 2005, pp. 199-219; and M. VIRGÓS SORIANO, *El trust y el Derecho español*, Navarra, Thomson Civitas, 2006.

⁴ *Vid.*, A. DYER and H. VAN LOON, *Report on trusts and analogous institutions*, paras. 147-78, 77-92 (available at http://www.hcch.net/index_en.php?act=publications.details&pid=5791&dtid=1). For a comparative study between the trust and the *fiducia*, *Vid.*, J. DE ARESPOCHAGA, *El trust, la fiducia y figuras afines*, Madrid, Marcial Pons, 2000; F. BARRIÈRE, *La réception du trust au travers de la fiducia*, Paris, LexisNexis, 2004; S. CÁMARA LAFUENTE, “El trust y la fiducia : posibilidades para una armonización europea”, *Derecho Privado Europeo*, 2003, pp. 1099-1172; E. CASHIN RITAINE, “Panorama compare du droit materiel du trust (ou une esquisse impressionniste des concepts de trust et de fiducia)”, in *Le trust en droit international privé, Perspectives suisses et étrangères*. (Actes de la 17ème Journée de droit international privé du 18 mars 2005 à Lausanne (Institut suisse de droit comparé, Schulthess, 2005) pp. 17-28; and D. A. R. BECKNER, A. DEVAUX and M. RYZNAR, “The trust as more than a common law creature”, *Ohio Northern University Law Review*, n° 20, 2014, pp. 19-24.

2. Nevertheless, in the sphere of the European Union many authors recognise the modern utility of the trust⁵ and some civil law countries – Italy, the Netherlands, Malta and Luxembourg – have adopted an approach which involves ratifying the Convention on the Law Applicable to Trusts and on their Recognition or just have signed the Convention but not yet ratified it – such as Cyprus and France –;⁶ while others have introduced trusts or functionally similar devices into their legal systems – i.e. Czech Republic, Hungary, Liechtenstein or Romania –. Thus, as has already been said, the Hague Convention represents “a vital commencement between legal cultures in an agreement on trust law”.⁷ In this way, the introduction of the trust into the conflict of law rules of civil law states could be a first step forward for the introduction of the trust into their domestic systems.⁸

In addition, there are other initiatives in Europe aimed at facilitating the understanding of the figure of the trust, and to encourage and enable its incorporation and development into the civil law system countries, for example, the Principles of European Trust Law⁹ or the project of Common Core of European Private Law,¹⁰ that try to demonstrate a relationship between the different laws relating to the concept of the trust. More recently, reference should be made to the *Draft Common Frame of Reference (DCFR)*¹¹, a project, promoted by the European Commission¹² which contains Principles, Definitions and Model Rules of European Private Law, it is to say, model rules on several areas of private law including provisions relating to trusts. Therefore, it intends to provide Europe with a uniform trust law and may contribute to resolve the problems that divergent national trust law within the member states creates on cross border trusts. The *DCFR* defines the trust as follows: “A trust is a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes”¹³.

⁵ *Vid.*, among others, S. CÁMARA LAPUENTE, “Trusts y patrimonios fiduciarios como vías de protección de la persona, la familia y la sucesión”, in *Autonomía de la voluntad en el derecho privado*, Estudios en conmemoración del 150 aniversario de la Ley del Notariado, L. PRATS ALBENTOSA (Coord.) (Derecho de la persona, familia y sucesiones), Madrid, Wolters Kluwer España, Vol. 1, 2012, pp. 791-792; *Ibid.* “Trusts y patrimonios fiduciarios: acerca de sus posibles aplicaciones en el derecho de la persona, familia y sucesiones y su eventual regulación”, *Diario La Ley*, nº 7685, 2011, p. 4; M. GRAZIADEI, U. MATTEI and L. SMITH, *Commercial trusts in European Private Law*, Cambridge, Cambridge University Press, 2005; H. HANSMANN and U. MATTEI, “The Functions of Trust Law: A Comparative Legal and Economic Analysis”, *New York University Law Review*, nº 73, 1998, pp. 434; D. J. HAYTON, S. C. J. J. KORTMANN, and H. L. E. VERHAGEN (eds.), *Principles of European Trust Law*, The Hague, Kluwer Law International, 1999; J. H. LANGBEIN, “The Contractarian Basis of the Law of Trusts”, *Yale Law Journal*, nº 95, 105, pp 625, and 640–643; M. LUPOI, *Trust: A Comparative Study*, Cambridge, Cambridge University Press, 2000; U. MATTEI, “Basic Issues of Private Law Codification in Europe: Trust”, *Global Jurist Frontiers*: Vol. 1: No. 1, 2001, Article 5; and G. G. TRIANTIS, “Organizations as Internal Capital Markets: the Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises”, *Harvard Law Review*, nº 117, 2004, p. 1102.

⁶ This Convention was concluded on 1 July 1985 and entered into force on 1 January 1992. By now it has been ratified by the following States: Australia, Canada, Italy, Luxembourg, Malta, Monaco, the Netherlands, Switzerland and the United Kingdom (available at http://www.hcch.net/index_en.php?act=conventions.text&cid=59). (henceforth, the Hague Trusts Convention).

⁷ D. W. M. WATERS, “The Hague trusts Convention twenty years on”, in M. GRAZIADEI, U. MATTEI and L. SMITH (eds), *Commercial Trusts in European Private Law*, Cambridge, Cambridge University Press, 2005, p. 97.

⁸ *Vid.*, J. HARRIS, *The Hague Trusts Convention*, Oxford, Hart Publishing, 2002, p. 336.

⁹ These principles were the result of the project organised in 1996 at the University of Nijmegen, the Netherlands, and led by Professor David Hayton. *Vid.*, D. J. HAYTON, S. C. J. J. KORTMANN, and H. L. E. VERHAGEN (eds), *Principles of European Trust Law*, *op. cit.*

¹⁰ This comparative law study was launched in 1995 by U. MATTEI and M. BUSSANI. *Vid.*, M. GRAZIADEI, U. MATTEI and L. SMITH, *Commercial trusts in European Private Law*, *op. cit.*

¹¹ *Vid.*, “Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)”, Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). Based in part on a revised version of the Principles of European Contract Law. Edited by C. Von Bar, E. Clive and H. Schulte-Nölke and H. BEALE, J. HERRE, J. HUET, M. STORME (available at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf).

¹² *Vid.*, European Commission, Communications to the European Parliament and the Council – A more coherent European Contract Law: an action Plan, COM (2003) 68 final, OJ 2003 C 63/1; and European Commission, Communications to the European Parliament and the Council – European Contract Law and the revision of the Acquis: The way forward, COM (2004) 651 final

¹³ *Vid.*, X. – 1:201: Definition of a trust, Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR).

3. Among the different types, the testamentary trusts are express private trusts created intentionally by the absolute owner of property (settlor)¹⁴. In such a cases, the testamentary trusts have to meet three certainties – intention, subject matter and object – as the settlor (the testator) must demonstrate in the will a clear intention to create a trust,¹⁵ and the properties' legal title must be transferred to the trustees before it is effective.¹⁶

4. The reasons to include a trust in the will can be varied, for example, to provide protection for young children or a disabled person, to save tax, or simply to protect the testator's assets after he or she dies. Certainly, the trust is created by the testator in his or her will to provide the benefits of property after the death of that person. Thus, often a family property is held on a trust established by the will of the testator because the testator does not want to leave his or her property directly to one or several persons. In addition, when the trust is created by will it is irrevocable since the testator has died and questions regarding the validity of a trust could arise. This issue must be resolved applying not only the law of trusts but also the law of successions, because of the interrelation of both laws¹⁷.

5. The creation of trusts by will can occur in two cases: a) where the will specifies that all or part of the property of the deceased person has to be held on trust; or b) where the recipient of the property is under the age of 18 and the legal title has to be held for him or her until the mentioned age. Accordingly, where the trust is created by the will, the trustees will be appointed by the will and, once the executors have finished the administration, they will transfer the property of the deceased person to the trustees, although sometimes it does not happen, as when the executor and the trustee are the same person.¹⁸ Nevertheless, it is arguable that it is not always appropriate that the same person plays the role of executor and trustee at the same time in view of the existing differences between the executor's duties –which can be completed within a few years– and the trustee's tasks, as the management of the trust can last up to 125 years. In addition, sometimes the powers given to the executors and the trustees may come into conflict.¹⁹ Thus, once the *settlor* has died, he or she is no longer the owner of the assets in the trust fund, but the trustees who will own the legal title to the assets and, consequently, the possibility of managing them after the death of the settlor.

II. Differences between Common and Civil law approaches

6. As previously stated, the trust is a common law legal concept that does not exist in the majority of civil law jurisdictions, since the civil law legal tradition does not recognise the divisibility of property as the trust does. On the other hand, there are some legal concepts, such as *forced heirship rights*, recognised in the majority of national legislations in civil law countries which make the implementation and recognition of the trust institution under civil law jurisdictions difficult. Although, under English law -Inheritance (Provision for Family and Dependants) Act 1975²⁰- there are mandatory family protection rules, it can be said that there is a wide discrepancy between the common and civil law approaches considering that the English mandatory protection rules are discretionary while the civil law rules are fixed.²¹

¹⁴ *Re Kayford* [1975] 1 WLR 279; *Paul v Constance* [1977] 1 WLR 527.

¹⁵ *Knight v Knight* (1840) 3 Beav 148; *Knight v Boughton* (1840) 11 Cl & Fin 513.

¹⁶ *Milroy v Lord* (1862) 4 De GF&&J 264.

¹⁷ R. LAFUENTE SÁNCHEZ, "Testamentary trusts in English Law: An introductory approach", *Cuadernos de Derecho Transnacional*, Vol. 7, n° 1, 2015, pp. 100-102.

¹⁸ S. WILSON, *Todd & Wilson's Textbook on Trusts*, Oxford, Oxford University Press, 2013, pp. 28-30.

¹⁹ G. STEEL, *Trust practitioner's handbook*, 3rd edn, London, The Law Society, 2012, pp. 45-46.

²⁰ *Vid.*, Chapter 63 of the Inheritance (Provision for Family and Dependants) Act 1975 (available at <http://www.legislation.gov.uk/ukpga/1975/63>).

²¹ D. HAYTON, "European Commission's Green Paper Consulting on Succession with an International Dimension, Appendix B", 5 (available at http://ec.europa.eu/justice/news/consulting_public/successions/contributions/contribution_ls_appb_en.pdf)

Therefore, the approach to succession is more flexible under common law systems than under civil law systems and the concept of the trust is crucial to explain this flexibility. The following example can be very instructive: in common law systems the trust can be used to transfer majority shareholdings in companies to trustees to manage for the benefit of the heirs (descendants and spouse). Meanwhile, in civil law systems the compulsory application of the *forced heirship rights* would forcefully be passed small minority shareholdings to each of one's heirs. Which of the two systems is better for protecting the interests of the heirs? Arguably, the common law system allows a greater amount of flexibility.

1. The trust and the civil law concept of ownership

7. Some civil law authors have considered the trust as equivalent to other institutions like the *fidei commissum* or the usufruct. Nevertheless, it could be a mistake inasmuch as the trust is unique for the following reasons:

First of all, in the trust there is a clear separation between the legal ownership (the legal title) vested in the trustee and the beneficial ownership of the trust vested in the beneficiaries. Secondly, the trust property constitute a separate fund²². It means that the assets held by the testamentary trusts belong to the trust not to the beneficiary personally. Consequently, the creditors will be unable to access the assets in the trust, for example, where the trustee become bankrupt. Thirdly, the proprietary interests of the beneficiaries in the trust property lead to the control of the property by the trustees, because the interests of the beneficiaries prevail not only over the interests of the trustee but also over any claiming under the trustee. Finally, the trust property is considered as a fund and part of the assets of the trust could be sold and reinvested.²³

8. On the contrary, civil law systems recognise that the ownership is an absolute right by extension of individual freedom. It means that the ownership is unique, indivisible and inalienable, and that only one person has the ownership or *dominium* over property –right to use, to enjoy and to dispose, meanwhile the others have personal claims against the owner of the property²⁴. Therefore, there is no division between the legal and the beneficial ownership.

2. Forced heirship rights

9. Continuing with the differences between the common and civil law approaches, now the following question arises: may an individual be free to dispose of his property as he or she pleases? The answer will be different depending on the legal system we refer to. Thus, civil law systems recognise the *forced heirship rights*, that is to say, the rights conferred by the law on some relatives of the deceased if they accept the succession. These rights cover a part of the estate of the deceased, are governed by the testator's personal law and cannot be disposed by the will. It means that there is a reserve portion of which certain heirs cannot be deprived and a free portion which can be disposed of by the testator according to his or her will.²⁵ Consequently, one thing is clear: that the approach adopted by the different

²² Hague Trusts Convention, art 11.

²³ J. MOWBRAY, L. TUCKER, N. LE POIDEVIN, E. SIMPSON and J. BRIGHTWELL, *Lewin on Trusts*, 18th ed., London, Sweet & Maxwell, 2008, pp. 14-15, para 1–20.

²⁴ D. A. R. BECKNER, A. DEVAUX and M. RYZNAR, "The trust as more than ...", *loc. cit.*, p. 12; and F. W. MAITLAND, *Equity, a course of lectures*, 2nd edn, Cambridge, Cambridge University Press, 1936, p. 24. Thus, for instance, the Spanish Civil Code, in its article 348, stipulates that the right of property includes the right to enjoy and dispose of a thing, without other limitations than those established by law, and that the owner has an action against the holder and possessor of the thing to claim it. *Vid.*, Real Decreto de 24 de julio de 1889 (available at <https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763>). In the same way, article 544 of the French Civil Code defines ownership as "the right to enjoy and dispose of things on the most absolute manner, providing they are not used in a way prohibited by statutes or Regulations" (available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>)

²⁵ For example, the Spanish Civil Code in article 806 refers to the reserved portion, "legítima", as the portion of the deceased's estates which the testator cannot dispose of under his or her freedom of testation, since it is guaranteed by law to certain heirs, so-called forced heirs. *Vid.*, Real Decreto de 24 de julio de 1889 (available at <https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763>). The French Civil Code also refers to forced heirship in article 912 and considers that it is a

jurisdictions to answering this question will have consequences in other jurisdictions and, as far as the trust is concerned, *forced heirship rights* could raise problems because of the clawback feature.

10. Generally speaking, the different approach between the two systems resides in the distinct concept of protection of the family that each system recognises. Hence, while the English system considers that the parents have no legal obligation to their grown-up children, except if they have physical or mental problems, the civil law system believes that parents must protect their children by giving them a part of their property.²⁶ Therefore, the trust – which reflects the importance of the freedom of a person to alienate his or her property at the time of death – and the *forced heirship rights* – which try to protect the interests of family members – are not compatible to the extent that when the testator has disposed of a portion greater than that available, according to the free portion, gifts or legacies are subject to the “clawback” rule, that is to say, the forced heirship is allowed to clawback lifetime gifts or legacies in order to protect their rights. Otherwise, the forced heirs would not receive a proper share of the estate of the testator, which is considered unfair under civil law systems.

11. It is arguable whether or not *forced heirship rights* may be considered by the law as public policy. Some civil law jurisdictions have considered that they are and could be imposed as a limit to the application to foreign law and, consequently, to the trust.²⁷ But some authors have argued that the *forced heirship rights* as public policy should only apply under exceptional circumstances in order to achieve the unity of law.²⁸ Otherwise, the direct consequence would be that *forced heirship rights* may be ignored in favour of the trust. Of course, this system could be contrary to the common law system of inheritance. As a result, a testamentary trust created by an English testator could be affected by the *forced heirship rights* of a civil law country, for example the French, where there are no restrictions as far as the years are concerned in order to claim for compensation where property was given away before the death of the testator. This rule would be considered uncertain and unfair considering that under common law systems property given away by the testator in his or her lifetime will not be considered as part of his or her estate at death. Accordingly, where somebody claims *forced heirship rights* under a foreign *lex successionis* it would operate only for the estate of the testator at the moment of death.

12. However, does it mean that the English system is unfair to heirs compared to the civil law system? Obviously no, since the Inheritance (Provision for Family and Dependents) Act 1975 allows people to challenge the gifts made in bad faith within six years of the death with the intention of defeating an application for financial provision under this Act. In such a cases, “*the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order*”.²⁹

13. In conclusion, generally speaking *forced heirship* rules are contrary to the principle of autonomy of the testator to dispose of his or her property when creating a testamentary trust. In addition, where the public policy rules apply, the testamentary trusts will have to reduce the estates to the ne-

reserved portion of the deceased’s estates guaranteed free of charges by the law to certain vesting heirs if they are called to the succession and they accept (available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>).

²⁶ D. HAYTON, “European Commission’s Green Paper ...”, *doc. cit.*, p. 5.

²⁷ *Vid.*, for example, the Spanish Supreme Court Decision on 23 October 1992 (STS 7948/1992). In the Spanish doctrine, J. C. FERNÁNDEZ ROZAS and S. SÁNCHEZ LORENZO, *Derecho internacional privado*, 8th ed., Pamplona, Civitas Thomson Reuters, 2015, p. 151, consider the forced heirship rights as a matter of domestic public policy instead of international public policy and, therefore, could not be imposed a limit to a trust.

²⁸ D. A. R. BECKNER, A. DEVAUX and M. RYZNAR, “The trust as more than ...”, *loc. cit.*, p. 19, in the context of the European Union Succession Regulation.

²⁹ Inheritance (Provision for Family and Dependents) Act 1975, *doc. cit.*, section 10, Dispositions intended to defeat applications for financial provision. *Vid.*, the Report of The Law Society, “Joint Response of the Law Society of England & Wales and the Society of Trust & Estate Practitioners to the European Commission’s Green Paper on Succession and Wills”, 2-3 (available at http://ec.europa.eu/justice/news/consulting_public/successions/contributions/contribution_ls_en.pdf).

cessary extent in order to guarantee the *forced heirship rights*. Hence, it cannot be said that the trust is incompatible with *forced heirship rights* but it could be argued that there is a boundary to the trust under foreign jurisdictions which apply the *forced heirship rights* since this rule limits the right of the settlor and, consequently, the trustee.³⁰

III. Jurisdiction of the English Court over cross-border testamentary trusts

1. Jurisdiction under European Union legislation

A) *Brussels I Regulation*³¹

14. It may seem that the Recast Regulation only applies to *inter vivos* trusts and not to trusts arising on death under a will due to the exclusion of “wills and successions” from its scope.³² However, for the purposes of the Regulation one must distinguish between the will that creates the trust which is out of the scope of the Regulation and the trust of property which is within the scope of the Regulation.³³ Consequently, the Regulation does not apply to disputes concerning the validity or interpretation of the terms of a will which sets up the testamentary trusts, nor to the disputes concerning the creation, interpretation and administration of trusts arising under the law of successions. Moreover, internal relationships of a trust –between settlor, trustees and beneficiaries– are not covered by the provisions on jurisdiction under the Recast Regulation in the case of testamentary trusts, since they are not of a contractual nature.

15. On the contrary, the external relationships with third parties –for instance, the disputes arising between the trustee and persons other than beneficiaries by virtue of contract, tort, delict or quasi-delict– are of a contractual nature and will fall within the scope of the Recast Regulation which contains specific rules which also apply to trusts created in a will.³⁴

a) *Domicile of the defendant as general jurisdictional rule*

16. As stated in the Recast Regulation, the primary jurisdiction rule is the “domicile of the defendant”. This means that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”.³⁵ Therefore, the English court will have jurisdiction where the defendant trustee is domiciled in England and Wales. As regards the concept of “domicile”, it will be determined according to the internal law of the Member State “whose courts are seised of a matter”.³⁶ In this sense, English law determines that an individual is considered as domiciled in the United Kingdom if has reside therein for the last three months or more³⁷. When the defendant is a company or other legal

³⁰ D. A. R. BECKNER, A. DEVAUX and M. RYZNAR, “The trust as more than ...”, *loc. cit.*, pp. 9-10.

³¹ Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) [2012] OJ L 351 (henceforth, the Recast Regulation).

³² Recast Regulation, art. 1.2 f).

³³ D. HAYTON, “The need for harmonisation of Private international law rules on succession, Appendix C, Topicality in view of the European Commission Green Paper”, 3 (available at http://ec.europa.eu/justice/news/consulting_public/successions/contributions/contribution_ls_appc_en.pdf)

³⁴ *Vid.*, the official Explanatory Report of Professor Dr P. SCHLOSSER, “Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice” (OJEC C 59, 5/03/79), para 52 and 109 *et seq.*

³⁵ Recast Regulation, art. 4.

³⁶ *Ibid* art. 62.1.

³⁷ *Vid.*, The Civil Jurisdiction and Judgment Act 1982, s.41 (available at <http://www.legislation.gov.uk/ukpga/1982/27/contents>) and the Civil Jurisdiction and Judgment Order 2001, Sched.1, para 9 (available at <http://www.legislation.gov.uk/uksi/2001/3929/contents/made>)

person or association of natural or legal persons they will be considered domiciled at the place where they have their: (a) statutory seat, or b) central administration, or (c) principal place of business.³⁸

17. Where there are several defendants domiciled in more than one jurisdiction, the English court will have jurisdiction, as long as one of the defendants is domiciled in England, “provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”.³⁹ On the other hand, where at least one defendant is domiciled in a non-Member State, the English court could have jurisdiction according to the rules on service and with the permission of the court, provided that there is no prorogation of jurisdiction. Where the English court is unable to exercise jurisdiction over a non-European defendant, they could argue for the application of the doctrine of *forum non-conveniens* in favour of a non-European forum.⁴⁰

18. However, as mentioned by Prof. Schlosser in his Report on the Brussels Convention, in trust matters, it would not be appropriate to base jurisdiction on the domicile of the defendant trustee because it could happen that the domicile of the defendant has no links to the place where the trust property is located and administered.⁴¹

b) Jurisdiction of the Court in which the trust is domiciled

19. In order to provide a better solution, the Recast Regulation, following the exception to the general rule foreseen in the Recast Regulation, sets up an special jurisdiction based on the concept of the domicile of the trust, considering that although trusts have no legal personality they have a geographical centre of operation. In this way: “A person domiciled in a Member State may, in another Member State, be sued: (6) as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled”.⁴² To determine whether a trust is domiciled in the Member State whose courts are seised of a matter, the court shall apply its rules of private international law.⁴³

20. Certainly, the proposed solution, in order to fix the domicile of the trust, will be a difficult matter for the civil law jurisdictions where the trust institution is neither known nor regulated and where no rules of private international law determine the domicile of a trust. In such a case, the solution to solve this conflict could be to apply the domestic law (*lex fori*) which determines the domicile of the natural or legal entities, or to consider that the domicile of the trust is located in the jurisdiction with which the trust is most closely connected.⁴⁴

On the contrary, the concept of domicile is well-developed under English law where a trust is considered to be domiciled in the United Kingdom or a part thereof “if, and only if, the system of law of that part is the system of law with which the trust has its closest and most real connection”.⁴⁵ It is

³⁸ Recast Regulation, art. 63.1; the Civil Jurisdiction and Judgment Act 1982, s.42 (available at <http://www.legislation.gov.uk/ukpga/1982/27/contents>), and the Civil Jurisdiction and Judgment Order 2001, Sched.1, para 12 (available at <http://www.legislation.gov.uk/uksi/2001/3929/contents/made>)

³⁹ Recast Regulation, art. 8.1.

⁴⁰ J. MOWBRAY et al., *Lewin on Trusts*, *op. cit.*, pp. 381-382, paras 11-2405.

⁴¹ *Vid.*, the official Explanatory Report of Professor Dr P. SCHLOSSER, *doc. cit.*, para 113.

⁴² Recast Regulation, art. 7.6.

⁴³ *Ibid* art. 63.3.

⁴⁴ This is the solution proposed by the Spanish doctrine in order to determine the domicile of the trust. *Vid.*, for example, M. DESANTES REAL, *La competencia judicial en la Comunidad Europea*, Barcelona, Bosh, 1986, p. 326; and J. C. FERNÁNDEZ ROZAS and S. SÁNCHEZ LORENZO, *Derecho internacional privado*, *op. cit.*, pp. 637-638; other authorities consider that in such a case, the domicile of the trust will be the domicile of the trustee, *Vid.*, M. VIRGÓS SORIANO, *El Trust y el Derecho ...*, *op. cit.*, p. 89.

⁴⁵ *Vid.*, The Civil Jurisdiction and Judgment Act 1982, s.45 (3) (available at <http://www.legislation.gov.uk/ukpga/1982/27/contents>) and the Civil Jurisdiction and Judgments Order 2001, Schedule. 1, para 12 (available at <http://uk.practicallaw.com/uklegislation/uksi/2001/3929/contents>). In *Gomez v Gomez-Monche Vives*, [2008] EWCA Civ 1065, [2009] Ch 245 at [87] and [90] the Court of Appeal held that the system of law with which the trust had its closest and most real connection would apply to determinate its domicile under Article 5(6) of the Recast Regulation.

noteworthy that this will normally be the system of law that provides the law governing the validity of the trust.⁴⁶

c) Exclusive jurisdiction

21. In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the Recast Regulation establishes exclusive jurisdiction to “*the courts of the Member State in which the property is situated*”⁴⁷ even though neither party is domiciled in a Member State. In such a case, the court of a Member State will have exclusive jurisdiction regardless of the defendant’s domicile.⁴⁸ Nevertheless, the European Court of Justice has interpreted this provision in a restrictive way considering that “*an action for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff does not constitute an action in rem within the meaning of Article 16 (1) of the Convention*”, and that “*the conferring of exclusive jurisdiction in the matter of rights in rem in immovable property on the courts of the State in which the property is situated is justified because actions concerning rights in rem in immovable property often involve disputes frequently necessitating checks, inquiries and expert assessments which must be carried out on the spot*”.⁴⁹

22. Therefore, where there is an *in personam* claim exclusive jurisdiction does not apply. In such a case, the trustee may be sued either in the courts of the Member State where he is domiciled or where the trust is domiciled.

d) Prorogation of jurisdiction

23. Moreover, the Recast Regulation allows a trust instrument to include a provision conferring jurisdiction in favour of the court of a Member State “*in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved*”,⁵⁰ provided that such agreements are not contrary to Articles 15, 19 or 23, referring to the agreement of jurisdiction, nor exclude the competence of the courts which have exclusive jurisdiction by virtue of Article 24.⁵¹ In any case, this provision refers exclusively to the internal relations among the settlor, trustees and beneficiaries and their rights or obligations under the trust. Therefore, being disputes that fall under the scope of creation, interpretation and administration of trusts the choice of jurisdiction clause foreseen under the Recast Regulation will not apply to testamentary trusts.

B) European Union Successions Regulation⁵²

24. This Regulation applies from 17 August 2015⁵³ and provides a uniform system for determining the jurisdiction, the applicable law and the recognition and enforcement of judgements in matters

⁴⁶ D. HAYTON, “Trusts in Private International Law”, *Collected Courses of the Hague Academy of International Law* (Vol 366), Brill, Nijhoff, Leiden, Boston, 2014, p. 46. *Vid.*, *Chellaram v. Chellaram* (Nº 2) [2002] 3 All ER 17 at [162]; and *Gomez v. Gomez-Monche Vives* [2008] EWCA Civ. 1065 [2009] Ch 245, at [72].

⁴⁷ Recast Regulation, art. 24.1.

⁴⁸ J. HARRIS, “Jurisdiction and the enforcement of foreign judgments in transnational trusts litigation”, in D. HAYTON (ed) *The international trust*, 3rd ed., Bristol, Jordans, 2011, pp. 13-14.

⁴⁹ *Vid.*, case C-294/92, *Webb v Webb* [1994] ECR I-1717; and *Case 73/77 Sanders v Van der Putte* [1977] ECR 2383, at para 13).

⁵⁰ Recast Regulation, art. 25.3.

⁵¹ *Ibid* art. 25.4.

⁵² Regulation (EU) Nº 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201 (henceforth, the European Union Successions Regulation).

⁵³ The Regulation entered into force on 16 August 2012 (Article 84) and applies to the succession of persons who die on or after 17 August 2015 (Article 83).

of succession at the European Union level, as well as for the creation of a European Certificate of Succession. Accordingly, it provides for general procedural rules similar to those of other European Union instruments in the sphere of judicial cooperation in civil matters and introduce harmonised conflict of law rules in this subject. This harmonisation only affects to the conflict of law rules of the European Union Member States but does not affect the substantive inheritance national laws⁵⁴.

25. Nevertheless, trusts are partially excluded from the scope of the European Union Regulation, particularly all the questions relating to the creation, administration and dissolution of trusts.⁵⁵ Besides, as far as jurisdiction and testamentary trusts are concerned, the Regulation does not include rules of jurisdiction.

2. Appropriate forum under the common law rules

26. Where the European Union legislation does not apply, common law rules will be applied in order to determine the jurisdiction of the English court. As a general rule, the English court can have jurisdiction on the basis of the person of defendant (*in personam*) or the subject matter concerned.

A) General rule: person of defendant and subject matter

27. As far as the defendant is concerned, the common law rule is that where the defendant, for example the trustee, is an individual within the jurisdiction of the English court, he or she may be served there. Likewise, where the defendant is a corporation with a presence in England it may be served within the jurisdiction of the English court. Conversely, where the defendant is in another territory, he or she can be served in that territory, but in order to do that, the claimant has to obtain permission from the English court.⁵⁶ In addition, the English court may have jurisdiction *in personam* over the defendant under the submission to the jurisdiction of the English court.⁵⁷

28. So far as the subject matter is concerned, the English court will have jurisdiction to enforce the trust to the extent that the trustee can be brought before it, regardless of the governing law of the trust – English or foreign – and the place where the trust property is located – either in England or abroad.⁵⁸

B) Forum conveniens

29. It will apply in cases where the claimant can prove that serving the proceeding under the English court will be the most appropriate method for the resolution of the dispute and the best solution for the interests of all parties involved in the process compared with the alternative of other foreign courts.⁵⁹ In order to prove that, the nature of the dispute, the legal and practical issues involved in the dispute, or the availability of the witness shall be taken into account.⁶⁰ On the other hand, the applicable law to the trust will not be decisive in order to determine the *forum conveniens* of the English court.

⁵⁴ The Regulation applies in all European Union States except the UK, Republic of Ireland and Denmark. (Recitals 82 and 83).

⁵⁵ *Ibid* art 1 2 (j).

⁵⁶ Civil Procedure Rules, Part 6, Services of documents, Rule 6.36, specifies: *In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply* (available at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06#6.36>).

⁵⁷ J. MOWBRAY et al., *Lewin on Trusts*, *op. cit.*, p. 367, para 11-05 at 11-06.

⁵⁸ *Ewing v Orr Ewing* (1883) 9 App. Cas. 34, HL; *Re Ker's Settlement Trusts* [1963] Ch 553; *Chellaram v Chellaram* [1985] Ch. 409; and *Webb v Webb* [1991] 1 W.L.R. 1410.

⁵⁹ *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460, HL; *Vid.*, also DICEY, MORRIS and COLLINS *on The Conflict of Laws*, 15th ed., London, Sweet & Maxwell, 2012, vol. 1, pp. 429-430, para. 11-142 at 11.143; and A. BRIGGS and P. REES, *Civil Jurisdiction and Judgments*, 5th ed., London, Informa Law, 2009, pp. 628-630, para 5.65.

⁶⁰ *Spiliada Maritime Corp v Cansulex Ltd*, 449.

Nevertheless, it is a positive point if the trust is governed by English law, which the court should take into account in determining its jurisdiction.⁶¹

C) *Forum non-conveniens*

30. Conversely to the case of *forum conveniens*, it could happen that the English court considers that it is not the most appropriate forum for determining the claiming but a foreign court. In these cases, the defendant should be submitted to the same considerations referred to above and will have to prove that a foreign forum is much more appropriate than English court.⁶² Where it happens, the English court can decline jurisdiction in favour of a foreign court of which the jurisdiction is considered more appropriate.⁶³

IV. The governing law of cross-border testamentary trusts

1. European Union legislation

31. As a general principle, the European Union conflict of laws rules dealing with the applicable law excludes the trusts from the scope of application of such instruments. Thus, for example, the Rome I Regulation on the law applicable to contractual obligations,⁶⁴ the Rome II Regulation on the law applicable to non-contractual obligations,⁶⁵ or the Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.⁶⁶

A) *Rome I Regulation*

32. The Rome I Regulation does not apply to the constitution of trusts and the relationship between settlors, trustees and beneficiaries.⁶⁷ As the trust is excluded from the scope of the Regulation, there is no definition of this concept and it has to be understood that the referred exclusion covers all types of trusts, even those arising under a contractual agreement.⁶⁸ On the other hand, the Rome I Regulation shall not prejudice the application of international conventions to which one Member State is party at the time when this Regulation is adopted and which lay down conflict of law rules relating to contractual obligations such as, for example, the Hague Trusts Convention.⁶⁹

B) *Rome II Regulation*

33. Likewise, the Rome II Regulation excludes from its scope non-contractual obligations arising out of the relations among the settlors, trustees and beneficiaries of a trust created voluntarily.⁷⁰ Without a doubt, the words of this provision are more accurate than the equivalent in the Rome I Regu-

⁶¹ *EMM Capricorn Trustees Ltd v Compas Trustees Ltd* (2001-02) 4 I.T.E.L.R. 34 at 26; and *Koonmen v Bender* (2003-04) 6 I.T.E.L.R. 568 at 38.

⁶² *Spiliada Maritime Corp v Cansulex Ltd*, *cit.*, at 464-465 and 474-478; *Vid.*, also DICEY, MORRIS and COLLINS *on the Conflict of Laws*, *op. cit.*, p. 539, para. 12-010; and A. BRIGGS and P. REES, *Civil Jurisdiction ...*, *op. cit.*, p. 355, para 2.255.

⁶³ To the exception of United Kingdom and Ireland, the theory of *forum non-conveniens* is rejected by the rest of European Union countries. *Vid.*, DNotI, Institute Notarial Allemand, "Les Successions Internationales dans l'UE. Perspectives pour une Harmonisation" (2004) Bruxelles, 10-11.05.2004, 40, 44.

⁶⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177.

⁶⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199.

⁶⁶ Council Regulation (EU) No 1259/2010, of 20 December 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L 343, art Article 1 (2) h.

⁶⁷ Rome I Regulation, art 1 (2) (h).

⁶⁸ *Vid.*, DICEY, MORRIS and COLLINS *on Conflict of Laws*, *op. cit.*, Rule 168, para 29-009.

⁶⁹ Rome I Regulation, art 25 (1).

⁷⁰ Rome II Regulation, art 1 (2) (e).

lation because it refers specifically to the trusts created voluntarily. Certainly, it should be interpreted in the same fashion as in the Hague Convention.⁷¹ *Sensu contrario*, those trusts not created voluntarily, which do not include testamentary trusts, may be affected by Rome II. Again, this Regulation shall not prejudice the application of international conventions to which one Member State is party at the time when this Regulation is adopted and which lay down conflict of law rules relating to non-contractual obligations,⁷² for instance, the Hague Trusts Convention.

34. As The Hague Trusts Convention applies only to trusts created voluntarily and evidenced in writing, it means that it prevails on the Rome II Regulation. Nevertheless, the Hague Trusts Convention stipulates that “any Contracting State may, at any time, declare that the provisions of the Convention will be extended to trusts declared by judicial decisions”.⁷³ The United Kingdom has gone beyond to the Convention in view of the Recognition of Trusts Act 1987 that extends the application of the provisions of the Hague Trusts Convention “to any other trusts of property arising under the law of any part of the United Kingdom or by virtue of a judicial decision whether in the United Kingdom or elsewhere”.⁷⁴ Consequently, the Hague Trusts Convention also prevails over the Rome II Regulation in relation to the trusts created by judicial decision but not in those cases related to any other trust of property arising under the law of any part of the United Kingdom if Rome I or Rome II were applicable.⁷⁵ In short, the Rome II Regulation will apply to non-voluntary trusts as well as all those trusts of property arising under the law of any part of the United Kingdom; meanwhile the Hague Trusts Convention will apply to voluntary trusts, for example, testamentary trusts and trusts created by judicial decisions.

C) European Union Successions Regulation

a) Exclusion of the trusts from the scope of the Regulation

35. As pointed out above, trusts are partially excluded from the scope of the Regulation, particularly the creation, administration and dissolution of trusts. Therefore, it is important to distinguish between the validity of the will that creates the trust – the will is under the scope of the Regulation – and the validity of the trust – creation, administration and dissolution – which is excluded from the Regulation. Hence, when the testator creates a testamentary trust the court will apply the *lex successionis* according to the Regulation in order to determinate the validity of the will, it is to say, to ascertain whether a trust can arise respect of property which is going to pass under a testator’s will. Where the will is valid, then the trust created by the will is also valid regardless of the law applicable to the succession and provided that it observes the provisions of the domestic law governing the trust.⁷⁶

36. However, the Regulation sets out some exceptions. Thus, “where a trust is created under a will or under statute in connection with intestate succession, the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries”.⁷⁷ It means that the applicable law to the succession specified by Regulation will govern the “obligation to restore or account for gifts, advancements or legacies when determining

⁷¹ Hague Trusts Convention, art. 3.

⁷² Rome II Regulation, art 28.1.

⁷³ Hague Trusts Convention, art 20.

⁷⁴ Recognition of Trusts Act 1987, section 1 (2) (available at <http://www.legislation.gov.uk/ukpga/1987/14>), which enacts as English law the choice of law rules of the Hague Trusts Convention. This Act came into force on 1 August 1987.

⁷⁵ *Vid.*, DICEY, MORRIS and COLLINS *on Conflict of Laws*, *op. cit.*, Rule 168, para 29-011, and D. HAYTON, “Trusts in Private International ...”, *loc. cit.*, pp. 69-70.

⁷⁶ J. CARRASCOSA GONZÁLEZ, *El Reglamento sucesorio europeo 650/2012 de 4 de julio 2012. Análisis crítico*, Granada, Comares, 2014, pp. 250-251; and A. BONOMI, “Choice of law aspects of the future EC Regulation in matters of succession. A first glance at the Commission’s proposal” in K. BOELE-WOELKO, T. EINHORN, D. GIRSBERGER and S. SYMEONIDES (eds), *Convergence and divergence in Private international law – Liber amicorum Kurt Siehr*, The Hague-Zürich, Eleven International Publishing and Schulthess, 2010, pp. 157-172.

⁷⁷ European Union Successions Regulation, Recital 13.

the shares of the different beneficiaries”,⁷⁸ and it may affect the dispositions made by the testator in the trust.

Regarding the *lex successionis* and the devolution of the assets, it can be distinguished between the devolution of the assets from the testator (the settlor) to the trustee, or from the trustee to the beneficiaries. In the first case, it is a matter dealing with the creation of the trust. Therefore, the *lex successionis* cannot regulate the devolution of the assets from the testator to the trustee since it is excluded from the scope of the Regulation. In the same way, the devolution of the assets from the trustee to the beneficiaries of the trust is a matter dealing with the administration of the trust and, consequently, shall be excluded from the scope of the Regulation.⁷⁹

On the other hand, the scope of the law applicable to the succession will also determine the beneficiaries in any given succession.⁸⁰ A broad interpretation of the term “beneficiary” – which has not been defined under article 3, definitions, of the Regulation – could cover not only heirs and legatees and persons entitled to reserve share but also the trusts beneficiaries. In this sense, the Recital 13 of the Regulation should be understood as referring also to the beneficiaries of the trusts created under a will. Nevertheless, it is a controversial matter, since, if we consider that the term “beneficiaries” includes the beneficiaries of the trust, the *lex successionis* would regulate a matter dealing with the creation of the trust – the parties to a testamentary trust – which is excluded from the scope of the Regulation. Consequently, the term “beneficiary” should not refer to the trusts beneficiaries.⁸¹

37. In conclusion, it becomes apparent that there is a contradiction between the limitation provided for in article 1 of the Regulation, which excludes the creation, administration and dissolution of trusts from the scope of the Regulation, and the statement under Recital 13 of the Regulation, when it stipulates that the *lex successionis* under the Regulation shall apply with respect to the devolution of the assets and the determination of the beneficiaries. In my opinion, the interpretation to be given to that provision will have to be clarified in the future by the European Court of Justice.

b) Reasons for excluding the trusts from the scope of the Regulation

38. Undoubtedly, it could have been a good opportunity to deal with the figure of the trust in a European Union Regulation, which harmonises the conflict of laws rules on succession matters. Nevertheless, the Regulation has excluded the trust in order to prevent civil law system countries having to recognise a discretionary trust included in a will that gives the testator the discretion to specify a group of beneficiaries on the trust property, and which can be contrary to the *forced heirship rights* foreseen in these jurisdictions.

On the other hand, it was unrealistic to think that the Regulation could deal with such a legal concept unknown in the jurisdictions of the majority of the European Union countries, taking into account that, apart from the United Kingdom, only four European Union countries – Italy, Luxembourg, Malta and the Netherlands – have ratified the Hague Trust Convention, while the rest have avoided doing that – only Cyprus and France have signed, although not yet ratified the Convention.

Finally, considering the existence of the Hague Trusts Convention, it is also arguable whether the solution is the adoption of a specific and different conflict of law rules at the European Union level.⁸²

⁷⁸ *Ibid* art 23.2 (i) and Recital 14.

⁷⁹ P. H. PETTIT, *Equity and the Law of Trusts*, 10th edn, Oxford, Oxford University Press, 2006, pp. 100-104; and R. S. PAZ LAMELA, “La exclusión de los “trusts” del futuro Reglamento Bruselas/Roma IV”, *Anuario Español de Derecho Internacional Privado*, Vol. XI, 2011, p. 454.

⁸⁰ European Union Successions Regulation, art 23.2 (b) and Recital 47.

⁸¹ R. S. PAZ LAMELA, “La exclusión ...”, *loc. cit.*, p. 453; and E. CASTELLANOS RUIZ, “Sucesión hereditaria, Reglamento 650/2012 sobre sucesión internacional”, in A. L. CALVO CARAVACA and J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*, Granada, Comares, 2014, p. 610.

⁸² G. BAIGNONI, “L’ambito di applicazione del regolamento sulle successioni”, in P. FRANZINA and A. LEANDRO (a cura di), *Il diritto internazionale privato europeo delle successioni “mortis causa”*, Milano, Giuffrè, 2013, p. 43.

2. The Hague Trusts Convention and the Recognition of Trusts Act 1987

A) Introduction

39. The rules governing the trust are held in the Hague Trusts Convention,⁸³ which were incorporated as part of the law of the United Kingdom by the Recognition of Trusts Act 1987. It is noteworthy that the Convention determines the law applicable to the trust once it has been created. Pursuant to the Convention “the term “trust” refers to the legal relationships created - *inter vivos* or on death” -, and applies only to “trusts created voluntarily and evidenced in writing” – therefore, it applies to testamentary trusts – but does not “to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee”. The Convention will also not apply to the extent that the law, which would be applicable, “does not provide for trusts or the category of trusts involved”.⁸⁴ On the other hand, the Convention does not introduce the trust into the domestic law of the States, but facilitates the recognition of the trusts created in accordance with the law specified by the Convention as far as the purpose of private international law is concerned.

40. The Recognition of Trusts Act 1987, which enacts as English law the choice of law rules of the Hague Trusts Convention, governs the applicable law to trusts in England which applies the Convention’s provisions “*not only in relation to the trusts described in Articles 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of any part of the United Kingdom or by virtue of a judicial decision whether in the United Kingdom or elsewhere*”.⁸⁵

Thus, when a case of trust is under English jurisdiction the court will decide first whether the Convention is applicable in order to determine the choice of law. Otherwise, the court will apply the common law rules of choice of law. Nevertheless, before that, the court will have to analyse a number of preliminary issues which are excluded from the Hague Trusts Convention.

B) Preliminary issues excluded from The Hague Trusts Convention

41. Where the trust is created by the testator in the will, preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee will be governed by the common law rules since these preliminary issues are excluded from The Hague Trusts Convention⁸⁶. Obviously, in order to create a trust there should be previous or preliminary acts, although they do not relate to the trust. It has been defined by some authors as the “rocket-launcher and the rocket”.⁸⁷ Thus, “*the law*

⁸³ For more information about the conception and evolution and content of the Hague Trusts Convention, *Vid.*, A. E. VON OVERBECK, “Explanatory Report on the 1985 Hague Trusts Convention”, 1-10 (available at <http://www.hcch.net/upload/expl30.pdf>). The literature on this subject is immense. *Vid.*, among others, J. HARRIS, *The Hague Trusts Convention, op. cit.*; D. W. M. WATERS, “The Hague trusts Convention twenty years on”, *loc. cit.*; D. HAYTON, “The Hague Convention on the Law applicable to Trusts and on their recognition”, *International and Comparative Law Quarterly*, N° 36, April 1987, pp. 260-282; H. KÖTZ, “The Hague Convention on the Law applicable to trusts and their recognition”, in D. HAYTON (ed) *Modern international developments in trust law*, London, Kluwer Law International, 1999, chapter 3; M. O’SULLIVAN, “The Hague Convention on Trusts-Further considerations”, *Journal of International Trust and Corporate Planning*, n° 2, 1993, pp. 65 ss.; D. HAYTON, “The Hague Convention on Trusts: A little is better than nothing but why so little?” *Journal of International Trust and Corporate Planning*, n° 3, 1994, pp. 23 ss.; C. JAUFFRET-SPINOSI, “La Convention de la Haye relative à la loi applicable au trust et à sa reconnaissance”, *Journal du Droit International*, n° 114, 1987, pp. 23 ss.; E. GAILLARD, “Les enseignements de la Convention de La Haye du 1er juillet 1985 relative à la loi applicable au trust et à sa reconnaissance” *Revue juridique et politique*, n° 304, 1990, pp. 304 ss.; E. GAILLARD and D. T. TRAUTMAN, “La Convention de La Haye du 1er juillet 1985 sur la loi applicable au trust et à sa reconnaissance”, *Revue Critique de Droit International Privé*, 1986, pp. 1 ss. An extensive bibliography on the Convention may be consulted on the website of the Hague Conference on Private International Law (available at <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=1&cid=59>)

⁸⁴ Hague Trusts Convention, art 2, 3, 4 and 5. D. HAYTON states that the Convention provides a broad description of a trust in order to render the Convention more acceptable to civilian jurisdiction with trust-like institutions. *Vid.*, “Trusts in Private International...”, *loc. cit.*, at p. 61.

⁸⁵ Recognition of Trusts Act 1987, section 1 (2).

⁸⁶ Hague Trusts Convention, article 4.

⁸⁷ *Vid.*, J. HARRIS, *The Hague Trusts ...*, *op. cit.*, pp. 151-157; D. HAYTON, “The Hague Convention ...”, *loc. cit.*, pp. 260-268; and A. E. VON OVERBECK, “Explanatory Report ...”, *doc. cit.*, para 53.

designated by the Convention applies only to the establishment on the trust itself, and not to the validity of the act by which the transfer of assets is carried out".⁸⁸ In cases of testamentary trusts, the previous existence of the will is necessary – it will be the launcher – to launch the rocket – the testamentary trust. Therefore, in English law, it is clear that the validity of the will and the validity or administration of a trust contained in the will are governed by different laws,⁸⁹ although, in some cases, the law chosen for the trust, or the law which is more closely connected to the trust according to the Convention, could be the same law, for example, the *lex successionis*.

a) The validity of the will

42. According to English common rules, the formal validity of the will shall be governed by “*the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator’s death, he was domiciled or had his habitual residence, or in a State of which, at either of those times, he was a national*”.⁹⁰

Thus, as stated by the Will Act 1837 a will should comply with the following formalities and conditions in order to be valid:

- a) it has to be in writing;
- b) it must be signed by the testator, or by some other person in his or her presence and by his or her direction; and
- c) the signature should be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.⁹¹

On the other hand, in order to enforce a testamentary trust, a grant of probate or of administration has to be obtained. It will be the proof of the validity of the will, which will allow the English court to give effect to the will.⁹²

b) The law governing the assets transferred to the trustee

43. As far as the law governing the assets transferred to the trustee is concerned, it will depend on the nature – movable or immovable – of the assets. So far as the immovable property is concerned, the English court will apply the English rules to decide where a particular asset is located⁹³; then, the court will determine the nature of the assets according to the law of the place where the asset is located –*lex situs*– and, where the immovable is situated in England and Wales, English law will apply. Conversely, where according to the English rules the immovable is located in a foreign territory the English court will have to consult the appropriate foreign law – including the choice of law rules – in order to determine the applicable law. The governing law to these preliminary issues will rule not only the asset transfer to the trustee but also the validity of the testamentary gift of immovable property, as well as

⁸⁸ A. E. VON OVERBECK, “Explanatory Report ...”, *doc. cit.*, para 54.

⁸⁹ *Re Lord Cable* [1976] 3 All ER 417 at 431; *Chellaram v Chellaram* [1985] 1 All ER 1043 at 1056. Cf. V. LATHAM, “The creation and administration of a trust in the conflict of laws”, in G. W. KEETON and G. SCHWARZENBERGER (eds), *Current Legal Problems*, London, Stevens & Sons limited, Vol. 6, 1953, pp. 180-181, who consider that the law governing the construction of the will ... should presumably be used to construe any trust dispositions contained in it.

⁹⁰ Wills Act 1963, chapter 44.1 (available at <http://www.legislation.gov.uk/ukpga/1963/44/enacted>), which incorporates as part of the law of the United Kingdom the disposition of the Hague Convention on the conflicts of laws relating to the form of testamentary dispositions (available at http://www.hcch.net/index_en.php?act=conventions.text&cid=40).

⁹¹ Wills Act 1837, as amended, section 9 (available at <http://www.legislation.gov.uk/ukpga/Will4and1Vict/7/26/contents>).

⁹² *Whicker v Hume* (1858) 7 H.L.C. 124 at 143; *New York Breweries Company Ltd v Att.-Gen.* [1899] A.C. 62, HL; *Finnegan v Cementation Co. Ltd* [1953] 1 Q.B. 688 at 693.

⁹³ *New York Life Insurance Co v Public Trustee* [1924] 2 Ch. 101 at 117; *Rossano v Manufacturers’ Life Insurance Co* [1963] 2 Q.B. 352 at 378-379.

other important issues as the *forced heirship rights*⁹⁴. The main consequence is that when English law applies the domestic law that the court of the *lex situs* would apply it can give rise to the *renvoi*.⁹⁵

44. On the contrary, the validity of a testamentary gift of movable property will be governed by the law of the testator's last domicile.⁹⁶ When a testator dies abroad, the foreign law will be applied including the rules for the choice of law and, therefore, the applicable law could be either the foreign law if the testator is domiciled abroad or the English law when the *renvoi* applies.⁹⁷

45. While most of the doctrine agrees to apply the foreign choice of law rules in the case of immovables, there are some discrepancies as far as the application of this principle in cases of movables. The main reason is that in the immovables the authorities of the *lex situs* have the physical control of the assets, and therefore, there is no choice for the English court, which has to do what the *lex situs* court would do. However, it does not happen with the movables since the testator's last domicile does not have the same control of the assets and, consequently, the English court has fewer limitations. Therefore, some authors suggest that reference to the whole foreign law should apply to cases of immovables but not to cases of movables where the foreign law should not include its choice of law rules. In this way, the English court could know in advance which domestic law would apply in the foreign court avoiding the application of the *renvoi*.⁹⁸

C) Applicable law

a) The choice of law by the settlor as a general rule

46. The Hague Trusts Convention, as given effect by the Recognition of Trust Act 1987, lays down that “a trust shall be governed by the law chosen by the settlor”, having into account that it means “the rules of law in force in a State other than its rules of conflict of laws”⁹⁹. For the validity of the choice it must be “express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case”.¹⁰⁰ Thus, the choice of law which will govern the validity of the trust can be express but also be implied whenever there is a clear and sufficient reference to the governing provision which can indicate the intention of the settlor.¹⁰¹ In such a case, the court will have to take into account the trust instrument or written evidence in order to ascertain that there is a clear intention of the settlor. Otherwise it will have to examine all circumstances of the case to help with the interpretation of the trust instrument.¹⁰² In testamentary trusts these circumstances may be inferred from the testators' intentions and could be, for example, the residence of the trustees and the place of investment of the trust's assets;¹⁰³ or the *situs* of the assets and the place of administration.¹⁰⁴ Most of the time, the courts will have to find the intention of the testator hidden in the factors with which the trusts have a close connection.¹⁰⁵

⁹⁴ *Earl Nelson v Lord Bridport* (1846) 8 Beav. 547; *Re Miller* [1914] 1 Ch 511 (form of limitation of entail); *Re Hernando* (1884) 27 Ch.D. 284; and *Re Ross* [1930] 1 Ch 377 (forced heir of Italian immovables).

⁹⁵ *Re Ross* [1930] Ch. 377; and *Re Duke of Wellington*, [1947] Ch. 506. *Vid.*, also G. W. KEETON, “Trusts in the conflict of laws”, in G. W. KEETON and G. SCHWARZENBERGER (eds), *Current Legal Problems*, London, Stevens & Sons limited, Vol. 4, 1953, pp. 116-117.

⁹⁶ *Thornton v Curling* (1824) 8 Sim. 310; *Whicker v Hume* (1858) 7 H.L.C. 124; and *Macdonald v Macdonald* (1872) L.R. 14 Eq. 60.

⁹⁷ *Re Johnson* [1903] 1 Ch 821.

⁹⁸ J. MOWBRAY et al., *Lewin on Trusts*, *op. cit.*, pp. 393-394, para 11-41.

⁹⁹ Hague Trusts Convention, article 17.

¹⁰⁰ *Ibid* art 6.

¹⁰¹ A pre-Convention example of implied choice of law can be *Vid.*, in *Re Duke of Marlborough v Att.-Gen* [1945] Ch. 78 at 88-90. *Vid.*, also V. LATHAM, “The creation and administration ...”, *loc. cit.*, p. 183.

¹⁰² *Tod v Barton* [2002] EWHC 506 (Ch); (2001-02) 4 I.T.E.L.R 715 at 33-35.

¹⁰³ *Re Lord Cable* [1977] 1 WLR 7.

¹⁰⁴ *A-G Campbell* (1872) LR 5 HL 524.

¹⁰⁵ *Lindsay v Miller* (Nº 1) [1949] VR 13.

47. On the other hand, the chosen governing law does not have to be objectively connected with the trust. In this sense, it can be said that the Convention does not impose any limitation and there is a complete freedom to choose the governing law. This fact implies, for example, that an English settlor could choose a foreign law to govern the trust even whether the properties – movable or immovable – were located in England and the beneficiaries of the trust were English citizens domiciled in England. It is clear that in such a case, the English court would be bound by the foreign law chosen by the parties.¹⁰⁶

Nonetheless, it is debatable whether in this case the settlor would have taken the best decision having into account that the chosen law is not the most closely connected with the trust. Hence, for instance, where a trust concerns land it seems that the selection of the *lex situs* should be more appropriate to govern the trust since the property is more closely connected to the State where the land is located. That said, it is interesting to note that the proposed solution would not be the most appropriate in cases where the *lex situs* does not recognise the validity of the trust or, simply, does not regulate the figure of the trust – for example, the Spanish law¹⁰⁷.

In such a case, it can be said that there is a cross border testamentary trust by the fact that the settlor has chosen a foreign law to govern it. Nevertheless, some commentators have criticised this possibility and consider that the settlor should not create a conflict of laws by the mere fact of choosing a foreign law to govern the trust where it is a domestic trust.¹⁰⁸

48. Furthermore, the choice of law is subject to the mandatory rules and public policy provisions of the Convention. Accordingly, under certain circumstances this freedom should be limited because, otherwise, it could lead to the election of an inadequate law in cases in which:

- (a) the law could not be applicable due to the mandatory rules¹⁰⁹ designated by the conflict of laws of the forum or its overriding rules;¹¹⁰ or
- (b) the chosen law is that of a State that has not adopted the Hague Trusts Convention; or
- (c) the chosen law is that of a State that does not recognise the trust;¹¹¹ or
- (d) the application of this law would be manifestly incompatible with public policy (*ordre public*).¹¹²

b) Governing law in default of choice: the most closely connected principle

49. In default of choice by the parties, *a trust shall be governed by the law with which it is most closely connected*, as long as the trust is valid under the referred law. The same thing happens where the law chosen by the settlor does not provide for trusts or the category of trust involved, since in these cases the choice will not be effective¹¹³.

In ascertaining the law with which a trust is most closely connected, the Convention refers in particular to four factors: “(a) *the place of administration of the trust designated by the settlor; (b) the situs of the assets of the trust; (c) the place of residence or business of the trustee and; (d) the objects of the trust and the places where they are to be fulfilled*”.¹¹⁴

No doubt, the factors mentioned in the Convention for establishing close connection to the trust ignore testamentary trusts where connecting factors such as nationality, domicile or habitual residence are

¹⁰⁶ G. THOMAS And A. HUDSON, *The law of trusts*, 2nd edn, Oxford, Oxford University Press, 2010, p. 1200, para 43.77.

¹⁰⁷ R. LAFUENTE SÁNCHEZ, “Cuestiones actuales sobre los trusts testamentarios y el Derecho internacional privado”, *Anuario Español de Derecho Internacional Privado*, Vol. XIV-XV, 2014-2015, pp. 547 ss.

¹⁰⁸ *Vid.*, J. HARRIS, *The Hague Trusts ...* pp. 182-183; and A. E. VON OVERBECK, “Explanatory Report ...”, *doc. cit.*, para 66.

¹⁰⁹ Hague Trusts Convention, art 15.

¹¹⁰ *Ibid* art 16.

¹¹¹ *Ibid* art 5, in conjunction with art 6, second paragraph.

¹¹² *Ibid* art 18.

¹¹³ *Ibid* art 6.

¹¹⁴ *Ibid*, art 7.

of great significance¹¹⁵. But, on the other hand, this is not exhaustive and, therefore, the court might consider other factors like the domicile or residence of the settlor, or the references to a particular law included in the document of trust. In addition, the court should be free to take into consideration and to weigh all the factors given without being influenced or limited by the order laid down by the Convention.¹¹⁶

50. Nonetheless, taking into account that testamentary trusts do not frequently contain a choice of law clause, it is debatable whether the settlor's domicile, which does not appear in the list of factors given by the Hague Trusts Convention, could be taken into account by the court as a relevant factor in order to probate the closest connection of the trust with the law of the settlor's domicile. In my opinion, the domicile of the testator (*settlor*) has a clear and close connection to the trust, because this is the person who creates the trust and in many cases the law of the settlor's domicile will be the law which governs the validity of the trust. In addition, in certain circumstances it will be easier to determine the domicile of the testator than to ascertain the *situs* of the assets or the place of administration.¹¹⁷

In any case, the majority of the doctrine considers that there are four factors which have to be taken into consideration in order to determine the applicable law in default of choice and the settlor's domicile is not there. Consequently, where the mentioned factors clearly determine the applicable law, the settlor's domicile cannot be taken into account.¹¹⁸

c) Trust governed by several laws

51. As happens in the law of contracts,¹¹⁹ The Hague Trusts Convention admits the *dépécage* or the choice – express or implied – of more than one law to govern the different aspects of the trust, particularly matters of administration.¹²⁰ Thus, the settlor may select the law of the place where the trust is going to be administered to govern those matters, and the law of another country –for example, the law of the State with which the trust is more closely connected– to govern other aspects of the trust –either the construction of the terms of the trusts or its validity.

Nevertheless, some authors have argued that choosing a separate law to govern distinct aspects of the trust could generate more problems than benefits because it is not an easy task to define the term “administration”, which varies depending on the context or the duties associated with this concept. As a result, it is desirable to treat a trust as a unit governed by a single law.¹²¹ In addition, the right to split the trust could lead to the choice of the law of a non-trust State where the concept of trust is unknown, for example, to govern its administration, in which case it would imply more difficulties than advantages in order to carry out this duty.

In this sense, the Convention stipulates that “the law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law”.¹²² By contrast with the provisions of the Rome I Regulation,¹²³ it is clear that the Hague Trusts Convention does not allow the change of applicable law at any time but provides a conflict of law rule to establish the validity of the change.

52. Where the law applicable to the validity of the trust is the English law, the change of the governing law may occur only in cases where all the beneficiaries of the trust collectively agree to change

¹¹⁵ *Vid.*, D. HAYTON, “Trusts in Private International...”, *loc. cit.*, p. 88.

¹¹⁶ J. MOWBRAY et al., *Lewin on Trusts, op. cit.*, pp. 406-407, para 11-67; and H. KÖTZ, “The Hague Convention ...”, *loc. cit.*, pp. 41-42.

¹¹⁷ *Vid.*, J. HARRIS, *The Hague Trusts ...*, *op. cit.*, pp. 225-226.

¹¹⁸ *Vid.*, M. O’SULLIVAN, “The Hague Convention ...”, *loc. cit.*, pp. 65-68.

¹¹⁹ Rome I Convention, art 3 (1).

¹²⁰ Hague Trusts Convention, art 9. *Vid.*, a good pre-Convention example of *dépécage* in *Re Pollak's Estate* [1937] T.P.D. 91.

¹²¹ *Vid.*, G. THOMAS and A. HUDSON, *The law of trusts, op. cit.*, p. 1203, para 43.86-43.91; DICEY, MORRIS and COLLINS *on the Conflict of Laws, op. cit.*, Rule 168, para 29-26; and J. HARRIS, *The Hague Trusts...*, *op. cit.*, p. 287.

¹²² Hague Trusts Convention, art 10.

¹²³ Art 3 (2) of the Rome I Regulation states: *The parties may at any time agree to subject the contract to a law other than that which previously governed it ... Vid.*, also J. HARRIS, *The Hague Trusts...*, *op. cit.*, p. 298.

it.¹²⁴ Likewise, the governing law could be changed also in cases where there is a provision in the trust instrument explicitly allowing such a change.¹²⁵ Finally, law can also be changed by the court insofar as the Variation Trusts Act 1958 allows it.¹²⁶ Conversely, the governing law will not be changed just because there is a change in the place of investment of the trust property, the place of residence of the trustees, or the domiciles of the beneficiaries.¹²⁷ In any case, mandatory provisions of the initial governing law will continue to apply even where the applicable law changes.¹²⁸

53. On the other hand, the right to *dépécage* or to split the trust has some limits. First of all, the trust may be governed by different laws as far as they do not give rise to contradictions. Secondly, where a matter of the trust cannot be split, obviously the entire trust should be subjected to a single law. Finally, the split of the trust may not result in the non-application of the mandatory rules foreseen in The Hague Trusts Convention.¹²⁹

d) Exclusion of renvoi

54. The law resulting from applying the Convention will be “*the rules of law in force in a State other than its rules of conflict of laws*”,¹³⁰ that is to say, the substantive law with the exclusion of rules of conflict of laws. With this statement, the doctrine of *renvoi* is clearly excluded from the Convention in the same way that it is excluded in contracts under the Rome I Regulation¹³¹ and taking into account that “*this solution is that of all the modern conventions*”.¹³² Conversely, some authors have criticised this solution, considering that the need for *renvoi* has not passed¹³³ and that this exclusion suggests that the governing laws shall not be applied as a judge in the foreign State would do.¹³⁴

e) Mandatory provisions, overriding provisions and public policy

55. Mandatory provisions of the State whose law has been appointed by the choice of law rules of the forum will be applicable insofar as they cannot be derogated from a voluntary act. This is what follows from the statement of the Convention when it states that: “*the Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act*”.¹³⁵

Among the matters subject to mandatory rules established by the Convention, it is interesting to note the “*succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives*”,¹³⁶ because it directly connects the testamentary trusts and the *forced heirship rights* which exist under certain civil law legislations.

56. This matter is very controversial and it is convenient to distinguish between the transfer of the legal title to the trustee – a matter outside the Hague Trusts Convention and, therefore, the manda-

¹²⁴ *Re Duke of Marlborough v A--G* (N 1) [1945] Ch. 78, 85.

¹²⁵ J. MOWBRAY et al., *Lewin on Trusts*, op. cit., p. 410, para 11-74.

¹²⁶ Variation Trusts Act 1958, section 1 (available at <http://www.legislation.gov.uk/ukpga/Eliz2/6-7/53/section/1>).

¹²⁷ *Re Fitzgerald* [1904] 1 Ch. 573, 588 (CA) so far as the change in the place of investment is concerned; and *Re Hewitt's Settlement* [1915] 1 Ch. 228, 233-234, with respect to the change of the place of residence of the trustees and the change of domicile of the beneficiaries.

¹²⁸ G. THOMAS and A. HUDSON, *The law of trusts*, op. cit p. 1204, para 43.95 at 43.96.

¹²⁹ *Vid.*, J. HARRIS, *The Hague Trusts...*, op. cit., pp. 281-282.

¹³⁰ Hague Trusts Convention, art 17.

¹³¹ Rome I Regulation, art 20.

¹³² A. E. VON OVERBECK, “Explanatory Report...”, doc. cit., p. 160.

¹³³ *Vid.*, J. HARRIS, *The Hague Trusts...*, op. cit., pp. 387-388; A BRIGGS, “In praise and defence of *renvoi*”, *International and Comparative Law Quarterly*, Vol. 47, 1998, p. 877; and E. RIMMELL, “The place of *renvoi* in transnational litigation—a pragmatic approach to an impractical doctrine” *Holdsworth Law Review*, n° 19, 1998, p. 55. A good example which shows that *renvoi* has not passed is the European Union Successions Regulation that recognise *renvoi* under article 21.1.

¹³⁴ *Vid.*, J. HARRIS, *The Hague Trusts...*, op. cit., p. 190.

¹³⁵ Hague Trusts Convention, art 15.

¹³⁶ *Ibid.*, at paragraph (c).

tory rules should not be applied – and the creation of the trust itself, which is a matter falling within the Convention and, consequently, restricted by the mandatory rules of *forced heirship rights*.¹³⁷ Thus, as explained earlier, *forced heirship rights* claims to movables will be governed by the law of the testator's domicile at death, while in the case of immovables it will be governed by the *lex situs*.

From the English law viewpoint the transfer of property to trustees is considered as an *intervivos* transfer of property, therefore, a preliminary issue governed by the *lex situs* and not by the *lex successionis*. Consequently, such a transfer is valid since the Convention cannot prevent the transfer of title to property in so far as cannot be derogated from by voluntary act.¹³⁸

As far as *forced heirship* provisions are concerned, they fall outside the Convention since may be considered as a preliminary issue subject to the *lex successionis*. Nevertheless, they could impede the launch of the trust in so far as the property of the deceased person is subject to the *forced heirship rights* claims.¹³⁹

57. Besides, the Hague Trusts Convention protects the application of the mandatory rules of the law of the forum “*which must be applied even to international situations, irrespective of rules of conflict of laws*”.¹⁴⁰ It refers to overriding provisions, some times called *lois de police* –laws protecting public health, cultural heritage of the country, certain vital economic interests, or the protection of interests of the weaker contracting parties in a contract–,¹⁴¹ which cannot be derogated and which will be applied irrespective of the law governing the trust.

In exceptional circumstances, the *lois de police* of another State which has a sufficiently close connection with the case may apply. However, this provision may create uncertainties and the United Kingdom made a reservation to avoid the application of such paragraph.¹⁴²

Where domestic mandatory rules foreseen under article 15 and international mandatory rules predicted under article 16 conflict it has to be assumed that international mandatory rules will prevail over domestic ones.

58. Last, but not least, where the application of any or all provisions of the Convention would be manifestly incompatible with public policy (*ordre public*) they will be disregarded.¹⁴³ Obviously, this provision refers to the forum's public policy and, consequently, this provision has to be interpreted in a restrictive way and after applying the possibilities foreseen under articles 4, 13, 15 and 16; otherwise, the Convention could be adversely affected. In addition, it is noteworthy that the expression *ordre public* which contains the Convention in brackets at the end of article 18 has not been included in the Recognition of Trusts Act 1987, where only the term public policy appears. According to some authors it is a clear sign of the restrictive way in which this article should be applied, since the doctrine of *ordre public* in continental legal systems has a wider meaning than the doctrine of public policy under the English law¹⁴⁴ where some examples of public policy might be: discriminatory rules, rules violating human rights,¹⁴⁵ or oppressive foreign exchange control legislation.¹⁴⁶ Thus, as Professor D. Hayton states “*the*

¹³⁷ J. HARRIS, *The Hague Trusts...*, *op. cit.*, pp 54-55.

¹³⁸ D. HAYTON, “Trusts in Private International ...”, *loc. cit.*, p. 92. *Vid.*, *Gorjat v Gorjat* [2010] EWHC 1537 (Ch) at [8]

¹³⁹ *Vid.*, D. HAYTON, “Trusts in Private International ...”, *loc. cit.*, p. 91. *Vid.*, *Casani v Mattei* (1998/1999) 1 ITEL 925 at 947; and *Re Annesley* [1926] Ch 692.

¹⁴⁰ Hague Trusts Convention, art 16.

¹⁴¹ *Vid.*, DICEY, MORRIS and COLLINS *on The Conflict of Laws*, *op. cit.*, Rule 168, para 29-032; and A. E. VON OVERBECK, “Explanatory Report ...”, *doc. cit.*, para 149.

¹⁴² Hague Trusts Convention, article 16.

¹⁴³ *Ibid* art 18.

¹⁴⁴ *Vid.*, J. HARRIS, *The Hague Trusts...*, *op. cit.*, pp. 391-392, quoting A. E. ANTON (with P. R. BEAUMONT), *Private International Law: A Treatise from the standpoint of Scots Law*, 2nd edn, Edinburgh, W Green, p. 641.

¹⁴⁵ *Oppenheimer v Cattermole* [1976] A.C. 249 (H.L.); *William & Humbert Ltd. v W. & H. Trade Marks (Jersey) Ltd* [1986] A.C. 368 HL.

¹⁴⁶ *Re Helbert Wagg & Co. Ltd* [1956] Ch. 323 at 351; *The Playa Larga* [1983] 2 LLoys's Rep. 171 at 190, CA. *Vid.*, J Mowbray et al., *supra* n 20, 415 at 416, para 11-83.

*fact that a local civil law does not know the trust institution as such does not entitle the Convention to be negated by article 18*¹⁴⁷

59. To conclude, attention should be given to the inter-relationship between the mandatory provisions under article 15, for example the *forced heirship rules*, and the public policy considered under article 18 of the Convention, as it is debatable whether the English court could apply article 18 to matters affected by article 15. An example is a testamentary trust governed by English which infringes the *forced heirship rights* rules of Spain where the testator is domiciled. In this case, should the English court apply the Spanish mandatory rules or, on the contrary, can the English court declare that the Spanish *forced heirship* rules are incompatible with English public policy? Generally speaking, public policy rules prevail on mandatory provisions but the English court should not disregard the application of Spanish mandatory rules because they differ from English law¹⁴⁸.

f) *Forced heirship rights and the applicable law*

60. As pointed out above, article 15 of The Hague Trusts Convention contains mandatory rules. This provision is dealing with matters other than trust, as for example, *forced heirship rights* which are considered a matter of succession and have to be governed by the *lex sucesionis* instead of the law applicable to the trust.

61. According to this article, the English court has to give effect to the succession rights, that is to say, the *forced heirship rights* governed by the law which the conflict of law rules have identified instead of applying the law designated by the Hague Trusts Convention to govern the trust questions. Thus, where the *lex sucesionis* applicable to the transfer of estates to a trust is the law of a civil law country which includes *forced heirship* provisions, for example the Spanish law, then the English court will enforce them and the trust will take effect after the application of forced heirship rules. Otherwise, the trust would be void or should be reduced in order to clawback the portion that the testator cannot be freely disposed by the will. Therefore, the *forced heirship rights* may question the validity of the trust and can constitute a problem because of the clawback feature,¹⁴⁹ in short, they may limit the application of testamentary trusts.

62. On the contrary, where the *lex sucesionis* is the law of a common law country which does not recognise the *forced heirship rights*, for example the English law, then neither the English court nor the foreign court could enforce them since the *forced heirship rights* constitute an internal mandatory rule but not an international mandatory rule. It means that the *ordre public* dispositions of the *lex fori* cannot be invoked to limit the freedom of testation nor the creation of the trust.¹⁵⁰

g) *Scope of application of the governing law*

63. The Hague Trusts Convention and the Recognition of Trusts Act 1987 describe what specific matters the applicable law of a trust shall govern. Thus, “*the validity of the trust, its construction, its effects, and administration of the trust*”¹⁵¹. By contrast, case law in common law before the Recognition

¹⁴⁷ D. HAYTON, “Trusts in Private International ...”, *loc. cit.*, p. 94.

¹⁴⁸ R. LAFUENTE SÁNCHEZ, “Cuestiones actuales sobre los trusts testamentarios ...”, *loc. cit.*, pp. 552-555.

¹⁴⁹ A. BRAUN, “Italy”, in J. GLASSON and G. W. THOMAS (eds), *The international trust*, 2nd edn, Bristol, Jordans, 2006, p. 813; A. DUCKWORTH, “Forced heirship and the trust”, in J. GLASSON and G. W. THOMAS (eds), *The international trust*, 2nd edn, Bristol, Jordans, 2006, Chapter 14, p. 711; D. HAYTON, “Forced heirship and the trust” in D. HAYTON (ed), *The international trust*, 3rd edn, Bristol, Jordans, 2011, p. 714; and J. CARRASCOSA GONZÁLEZ, *El Reglamento sucesorio... op. cit.*, pp. 255-256.

¹⁵⁰ Thus, for example, the Spanish Supreme Court Decision on 23 October 1992 (STS 7926/1992), which declared that the *forced heirship rights* constitute an “internal order public principle”. *Vid.*, J. CARRASCOSA GONZÁLEZ *El Reglamento sucesorio... op. cit.*, p. 255, and J. C. FERNÁNDEZ ROZAS and S. SÁNCHEZ LORENZO, *Derecho internacional ...*, *op. cit.*, p. 157.

¹⁵¹ Hague Trusts Convention, art 8.

of Trusts Act 1987 states that the law applicable to the trust governs the material or essential validity of the trust,¹⁵² its interpretation,¹⁵³ and its effects.¹⁵⁴

h) Multi-legal system states

64. According to the Hague Trusts Convention, the applicable law must be that which is in force in the territorial unit in question. Therefore, “... *where a State comprises several territorial units each of which has its own rules of law in respect of trusts, any reference to the law of that State is to be construed as referring to the law in force in the territorial unit in question*”¹⁵⁵. This provision has not been scheduled to the Recognition of Trusts Act 1987. As a result, the Convention shall apply to trusts governed by English law.

In addition, “*A State within which different territorial units have their own rules of law in respect of trusts is not bound to apply the Convention to conflicts solely between the laws of such units*”.¹⁵⁶ Nevertheless, in the case of the United Kingdom it can be said that the Convention will apply because:

- a) the Recognition of Trusts Act 1987 extends the provisions of the Convention “*not only in relation to the trusts described in Articles 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of any part of the United Kingdom*”¹⁵⁷ and,
- b) the mentioned Act extends the meaning of State in article 17 “*to any country or territory (whether or not a party to the Convention and whether or not forming part of the United Kingdom) which has its own system of law*”.¹⁵⁸

D) Recognition of trusts

65. Where the trust is valid, because it has been created in accordance with the law specified by the Recognition of Trusts Act 1987 and The Hague Trusts Convention to which it gives effect, the consequence is that it must be recognised as a trust. The recognition shall imply, as a minimum, “*that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity*”.¹⁵⁹

In any case, the recognition of a trust as foreseen under the Convention is subject to the fulfilment of the mandatory, overriding and public policy rules as explained earlier. On the contrary, the Convention permits that the States may refuse to recognize a trust since, “*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*”.¹⁶⁰ Nevertheless, it is interesting to note that the United Kingdom has not adopted this article under the Recognition of Trusts Act 1987 because it is considered that there are enough protections for States’ legitimate interests in articles 15, 16 and 18.¹⁶¹

66. On the other hand, the Convention “*shall not prevent the application of rules of law more favourable to the recognition of trusts*”.¹⁶² The main consequence of this provision is that the English

¹⁵² *Lindsay v Miller* [1949] V.L.R. 13; *Augustus v Permanent Trustee Co (Camberra) Ltd* (1971) 124 C.L.R. 245.

¹⁵³ *Perpetual Executors and Trustees Association of Australia Ltd v Roberts* [1970] V.R. 732.

¹⁵⁴ *Re Fitzgerald* [1904] 1 Ch. 573 (CA); *Trustees Executors and Agency Co Ltd v Margottini* [1960] V.R. 415. *Vid.*, DICEY, MORRIS and COLLINS *on The Conflict of Laws*, *op. cit.*, Rule 169, para 29-051.

¹⁵⁵ Hague Trusts Convention, art 23.

¹⁵⁶ *Ibid* art 24.

¹⁵⁷ Recognition of Trusts Act 1987, section 1 (2).

¹⁵⁸ *Ibid* section 1 (4).

¹⁵⁹ Hague Trusts Convention, art 11.

¹⁶⁰ *Ibid* art 13.

¹⁶¹ D. HAYTON, “Trusts in Private International ...” *loc. cit.*, p. 89.

¹⁶² Hague Trusts Convention, art 14.

common law conflict rules shall apply to the extent that they are more favourable than the rules of the Convention. Thus, for example, the rule that extends the recognition to the trusts to any other trusts of property arising under the law of any part of the United Kingdom or by virtue of a judicial decision whether in the United Kingdom or elsewhere.

V. Concluding remarks

67. The trust is a common law legal concept that does not exist in the majority of civil law jurisdictions. Testamentary trusts are express private trusts created by the testator in the will to provide the benefits of property after his or her death. Its introduction in civil law jurisdictions is a difficult matter as well as a controversial issue which has generated a large discussion which is still going on, especially because there are some legal concepts, as the *forced heirship rights*, which makes the implementation and recognition of the trust institution under civil law jurisdictions difficult. The situation, nevertheless, could change in the coming years since many authors in civil jurisdictions recognise the modern utility of the trust. Further, there are new projects that may contribute to the increasing international development of this figure and its acceptance in civil law jurisdictions, for instance, the *Draft Common Frame of Reference (DCFR)*, which contains Principles, Definitions and Model Rules of European Private Law and intends to provide Europe with a uniform trust law.

Nevertheless, some authors have criticized the inconsistencies that presents the treatment of trusts in the *DCFR* and argue that the proposed trust model is not the best solution for Europe. Thus, some of them believe that this instrument has tried to create a new European model of trust influenced by a “continental” approach which may be alien to the existing concept in common law countries¹⁶³. In addition, it is not clear if jurisdictions which already have trust law could benefit from the *DCFR* rules having into account that, in the absence of European harmonised conflict of law rules for trust, the adoption of the *DCFR* involves a new legal framework and may contribute to generate even more complexity to the currently applicable legal framework¹⁶⁴. Finally, as far as testamentary trusts are concerned, the transplant of the *DCFR* trust provisions into civilian legal systems, where the trusts is an unknown institution, may enter into conflict to national laws of those countries where provisions in family or succession matters may take precedence over the law governing the trust¹⁶⁵.

68. Accordingly, the ignorance of trusts in domestic civil law jurisdictions is an important boundary when applying the conflict of law rules to cross-border testamentary trusts. As far as jurisdiction is concerned, the trusts are partially excluded from the scope of the European Union Successions Regulation, particularly all the questions relating to the creation, administration and dissolution of trusts. Besides, the Regulation does not include rules of jurisdiction for that matter. Therefore, in order to determine the jurisdiction of cross-border testamentary trusts, the Recast Regulation will apply with respect to the external relationships of the trust, for instance, the disputes arising between the trustee and persons other than beneficiaries.

69. Regarding the applicable law, the Rome I Regulation does not apply to testamentary trusts, but the Rome II Regulation will apply to non-voluntary trusts as well as all those trusts of property arising under the law of any part of the United Kingdom. On the other hand, The Hague Trusts Convention

¹⁶³ *Vid.*, A. BRAUN, “Trusts in the Draft Common Frame of Reference: the best solution for Europe?”, *Cambridge Law Journal*, n° 70 (2), July 2011, pp. 338, 339, 349; L. RICHARDSON, “The DCFR, anyone?”, *The Journal Online* (available at <http://www.journalonline.co.uk/Magazine/59-1/1013494.aspx>); W. SAGAERT, “The Trust Book in the DCFR: A civil lawyer’s perspective”, in S. VAN ERP, A. SALOMONS and B. AKKERMANS (Dir.) *The Future of European Property Law*, München, Sellier European Law Publishers, 2012, pp. 31-46; and W. SWADLING, “The DCFR Trust: A Common Law Perspective”, in S. VAN ERP, A. SALOMONS and B. AKKERMANS, *The Future of European Property Law*, München, Sellier European Law Publishers, 2012, pp. 21-30.

¹⁶⁴ A. BRAUN, “Trusts in the Draft Common Frame ...”, *loc. cit.*, p. 344.

¹⁶⁵ A. BRAUN, “Trusts in the Draft Common Frame ...”, *loc. cit.*, pp. 345-346.

and the Recognition of Trusts Act 1987 serves the important purpose of unifying the law applicable to trusts and represents a vital commencement between legal cultures in an agreement on trust law. Hence, the Hague Trusts Convention will be applicable to voluntary trusts, that is to say, to cross-border testamentary trusts. However, in the sphere of the European Union, only Italy, Netherlands, Malta and Luxembourg have ratified the Convention on the Law Applicable to Trusts and on their Recognition, while Cyprus and France have signed the Convention but not yet ratified it. It means that the majority of the continental European legal systems contains no specific rules relating to trusts and do not provide an appropriate and satisfactory solution in matters dealing with testamentary trusts.

70. To conclude, in order to avoid the obstacles arising in the application of the conflict of laws rules, I consider necessary to carry out an approach between the common law and the civil law systems. In this sense, waiting what the future holds for the *Draft Common Frame of Reference*, the introduction and recognition of the trust into the conflict of law rules of civil states, by signing and ratifying the Hague Trusts Convention, could be a first step toward achieving this objective. In my opinion, academics and practitioners, we should foster this proposal since it would allow to introduce specific conflict of laws rules for testamentary trusts into the domestic systems of these countries applying, when necessary, the mandatory provisions as foreseen in the Convention in order to ensure the application of the *forced heirship rights*.