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## Common Law Trusts in Hungary and Other Continental European Civil Law Systems, 49 J. Marshall L. Rev. 709 (2016)

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# COMMON LAW TRUSTS IN HUNGARY AND OTHER CONTINENTAL EUROPEAN CIVIL LAW SYSTEMS

TIBOR TAJTI (THAYTHY)\* & ROBERT WHITMAN\*\*

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## I. ABSTRACT

The increased intensity of global rapprochement of laws is a signature feature of the 21st century. Until the mid-20th century, very little cross-fertilization between common law and civilian systems was the rule. That has now radically changed. The latest example of common law concepts being embraced by the legal systems of Civil Law European countries is the introduction of major aspects of the common law of trusts (“CLT”). Originally CLT were considered to be a non-transplantable idiosyncratic legal institution. Later, however, a discourse began on the versatility and the economic usefulness of CLT in many settings. Starting out, discussions concerning CLT were limited to pointing out that conditional functional equivalents are offered by some European countries, such as the Germanic “*Treuhand*.”<sup>1</sup>

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1. The German term *Treuhand* (also recognized in Austria, Switzerland, and some other European countries, represents “essentially a contractual relationship” that is “a creature of case law.” Under “the *Treuhand*, or mandate, the settlor (*Treugeber*) transfers property to the fiduciary

Today, the prevailing view is that CLT are not just needed by European countries, but that CLT doctrine can be made compatible with the requirements of the civilian legal tradition. The new approach is best expressed by the Draft Common Frame of Reference, Book X – which is devoted entirely to trusts. A growing number of European national laws now embrace the concept of CLT (e.g., the French “*fiducie*”<sup>2</sup> or its Romanian replica).<sup>3</sup>

Hungary is an interesting example of a European country that has adopted major concepts of CLT doctrine, not just because it is the newest member of European countries to embrace provisions of CLT, but because it has specifically chosen to be inspired only by CLT law in spite of otherwise belonging to the Germanic legal tradition.<sup>4</sup>

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(Treuhand) and gives him instructions on its management and for those whose benefit he holds the property . . . [T]he fiduciary administers the property subject to the settlor’s instructions, generally does not conduct business, and distributes benefits to passive beneficiaries who are not associates. Because under German law the difference between legal and equitable title is not known, the Treuhand relationship is enforceable between the settlor and the trustee, at least in damages for breach of trust, but it is not enforceable vis-à-vis third parties, because to them the Treuhänder is the absolute owner.” International Estate Planning § 8.09 (Henry Christensen III ed., 2d ed. 2013). It should also be noted that according to the German Federal Court of Justice, the common law trust is neither reconcilable with the dogmatic system of German law, nor is it comparable to *Treuhand*. See Bundesgerichtshof [BGH] [Federal Court of Justice] June 13, 1984 – Iva ZR 196/82 1984 (Ger.).

2. See *infra* Part D.

3. Attila Menyhárd & Lajos Vékás, *Commentary on Chapter XLIII on Trusts*, in A POLGÁRI TÖRVÉNYKÖNYV MAGYARÁZATOKKAL [Civil Code Commentary] 794 (Lajos Vékás ed., 2013) (statement of Lajos Vékás, Head of the Codification Committee of the 2013 Hungarian Civil Code) (“[[T]he new Hungarian Civil Code of 2013] would like to satisfy an important economic need with the domestication of the legal institution of trust, taking into account as well that in fact a distinct industry already exists in this domain . . .”).

4. At the forefront of the Germanic legal tradition, a sub-group of the civil law legal family, is German law. Other sub-groups of the civil law legal family include Romanic (Napoleonic) and Scandinavian legal traditions. Besides Germanic and Hungarian law, scholars typically list Austria, the Czech Republic, the Netherlands, Poland, the Baltic states, Russia, and Switzerland as members of the civil law legal family. See e.g., PHILIP R. WOOD, *COMPARATIVE LAW OF SECURITY INTERESTS AND TITLE FINANCE* 6-9 (2d ed. 2007). As a direct result of history, geographic proximity, and strong economic ties, Hungarian law, in contemporary times, has been primarily influenced by German and – until cohabitation with the Austro-Hungarian Empire ceased at the end of World War I – Austrian law. As a result, the Hungarian legal system shares most of the key features of Germanic legal tradition, in particular system thinking (as opposed to the topical thinking of common law) and reliance on codes as primary sources of law instead of case law. As the doyens of comparative law, Konrad Zweigert and Hein Kötz put it – though related to both Germanic and Romanic families – these “are marked by a tendency to use abstract legal norms, [and] to have a well-articulated system

CLT will undoubtedly continue to be of great interest to much of Europe. Recognition must be made that both in the United States (U.S.),<sup>5</sup> and in other common law nations, there are variations in CLT, although there is agreement on its basic tenets. Given that in Hungary the gates for professional trustees were recently opened and separate licensing and prudential regulations created,<sup>6</sup> that may place Hungary as a leader in expansion of the

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containing well-defined areas of law..." KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 69 (3d ed. 1998); *see also* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (3d ed. 2007) (explaining in more detail these and other differences that exist between various legal families, including Anglo-Saxon [common laws] and civilian legal systems).

However, the teaching of legal families should serve as no more than a useful starting tool. This is because Hungarian law (similar to the other jurisdictions which belong to this group) has an increasing pool of legal categories and characteristics that are radically different from German law. For example, while Hungary reformed its secured transactions by borrowing numerous elements from Article 9 of the Uniform Commercial Code of the U.S., Germany and Austria have thus far been completely immune to such American influences. Interestingly, Hungary has failed to take over the German conditional equivalent of common law trusts – the previously described *Treuhand* – and thus the new Hungarian common law-inspired concept of trust will be another noteworthy point of departure with the Germanic legal family.

5. Under the Tenth Amendment to the United States Constitution, each of the fifty states retain control over legal issues not specifically delegated to the federal government. U.S. CONST. amend. X. For this reason, trusts and estates law is predominately the law of each state. In an effort to unify state law, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") was created in 1892. While NCCUSL has promulgated several Uniform Acts for state adoption in the field of trusts and estates (e.g., the Uniform Probate Code ["UPC"] and the Uniform Trust Code ["UTC"]), many of the states have chosen not to adopt the Uniform Laws.

6. The function of statute No. XV of 2014 on the Trustees and on the Rule of their Activity (which became law at the same time as the new Civil Code incorporating the concept of trust) is to ensure that only highly professional, ethically impeccable, and financially healthy entities or individuals appear as trustees. *See 2014. évi XV. Törvény a bizalmi vagyonkezelőkről és tevékenységük szabályairól* (Act XV on the Trustees & on the Rules of their Activity) (Hung.). These goals are accomplished by subjecting all professional trustees to licensing, liability insurance, and conduct of business regulations. For example, professional trustees must obtain a high liability insurance coverage policy, the value of which will increase depending upon the value of assets handled. *See* § 7(1) of the Act. The basic liability insurance was set by the Act at 70 million Hungarian Forints (on Oct. 24, 2014, roughly equal to \$291,000 USD). The Act imposes duties also with respect to the qualifications of the staff, as it foresees that professional trust companies must employ one economist, one lawyer, and one accountant, each with university-level degrees. *See* § 4(5) of the Act. Lastly, a separate chapter of the Act addresses specific conduct of business rules. There include: [1] best performance rule (§ 36), [2] duty to inform (§ 37), [3] duty to maintain records (§§ 39-40), [4] duty of confidentiality (§ 42), [5] limitations on benefiting from the trust by the trustee or a specific third party (§ 43), and [6] limitations on outsourcing the services (§ 44).

use of CLT in Europe, both for personal estate planning and for business done with the United States.

## II. INTRODUCTION

### A. *The Broad Picture*

Today, when law is shown to work well in one country, that law is often adopted on a global basis. Whereas until the mid-20th century there was very little cross-fertilization between common law and civilian law systems, that has now radically changed. Almost unnoticed, the era of the dominance of conflict of law rules has been gradually replaced by the age of transplantation; though admittedly variations may still exist from jurisdiction to jurisdiction. One of the latest examples of successful transplants is the adoption of major provisions of CLT by Hungary, so that Hungary now has its own version of trust law (HLT).

### B. *The Impact of Common Law Trusts on European Civilian Systems*

In modern times the impact of CLT on civilian systems can be subdivided into four phases:

**The Era of Rejection and Then Understanding** – characterized by the outright rejection of the feasibility of the transposition of CLT by Continental European mainstream scholarship. This was then followed by decades in which a discourse began on the versatility and the economic usefulness of CLT and its compatibility with European civil laws. This era, which featured the softened stance of European comparatists, can be conveniently named as the era of discourse, especially because it remained limited to stressing and proving that conditional functional equivalents of CLT are offered by some civil law doctrines, such as the Germanic “Treuhand.”<sup>7</sup>

**Infiltration of Common Law Trust Law** – Some aspects of CLT law infiltrated some of the civil law jurisdictions during the early years, such as the pet child of the banking sector – trust versions of escrow accounts. It is fair to claim that the European escrows were normally not thought of as having much to do with CLT. Moreover, in those Continental European civil law jurisdictions that have failed to pick up the reform gauntlet, refusing to introduce CLT as a *sui generis* legal institution, various other types of fiduciary (thus, trust-like) legal categories are being employed.

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7. Hague Conference on Private Int'l Law, *Convention on the Law Applicable to Trusts and on their Recognition* (July 1, 1985), [www.hcch.net/index\\_en.php?act=conventions.text&cid=59](http://www.hcch.net/index_en.php?act=conventions.text&cid=59).

Poland might be mentioned as a perfect example.<sup>8</sup> When asked, local lawyers will point to European legal concepts as equivalent to CLT. But this claim should always be treated with a degree of caution, as these types of substitutes are hardly more than *conditional* functional equivalents.

**The View Today** – The prevailing view today is that CLT concepts are needed and their use can be made compatible with the requirements of the civilian legal tradition. Claiming that we are now in the **trust-transplantation era** is therefore not too far-fetched. The priority of the reasons behind the shift differs from country to country as does the usefulness of the adoption of CLT law. Even if the need for CLT law for estate planning may still be marginal, because of the flexibility of CLT it can be expected to grow in use. The current need to use CLT concepts to facilitate business transactions alone justifies the need for the change.

In France, for instance, one decisive push towards the use of CLT law may be attributed to the desire to make the French capital markets internationally more competitive, including attraction of Islamic investors through the use of the local version of trust – the *“fiducie”* – to satisfy the requirements of Sharia law. In Central and Eastern Europe, trust will predictably become rather a useful tool for the transfer of intergenerational wealth of the indigenous local, typically family-type, businesses that were launched after the fall of communism in the early 1990s.

**Unification** – The shift and the new approach is best expressed by the Draft Common Frame of Reference (DCFR), the product of an elite group of European private and commercial law experts who have expressed the pan-European perspective of what law in Europe should be in the 21st century.<sup>9</sup>

Book X of this civil code-like document is entirely devoted to trusts. The DCFR deserves special mention, not only as the latest European development, but because it seems to be more successful than its predecessors in influencing what national states do – as is

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8. The closest comparable to common law trust may be a single provision of Article 59 of the Banking Act (in force since 2004) in regards to escrow accounts. Namely, here the separation of the assets transferred into the hands of the bank (trustee) and those of the trustor (grantor) seem to be complete. In the case of other fiduciary transactions recognized by Polish law, this is not necessarily so. This applies especially to the so-called ‘security transfers,’ as alternatives of secured transactions. See Krzysztof Kaźmierczyk & Filip Kijowski, *Enforcement of Contracts in Poland*, in THE CASE LAW OF CENTRAL AND EASTERN EUROPE – ENFORCEMENT OF CONTRACTS 633 (Stefan Messmann & Tibor Tajti eds., 2009) (discussing the legal treatment of security transfers (with a case reproduced)).

9. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) Outline Edition (Christian von Bar, Eric Clive & Hans Schulte-Nolke eds., 2009), [http://ec.europa.eu/justice/policies/civil/docs/dcfr\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf).

best illustrated in this article by French and Hungarian laws dealing with CLT.<sup>10</sup>

### C. A Closer Look at the Latest European Developments— The Draft Common Frame of Reference (DCFR)

The DCFR – a *sui generis* soft law instrument, resembling a typical civil code, grew out of the recognition that the prohibitive differences that continue to exist among the private and commercial laws of European national states are a serious obstacle to cross-border trade. Resembling the rationale that led to adoption of the Uniform Commercial Code (UCC) (created as a proposed Uniform Act by the National Conference of Commissioners on Uniform State Laws in the U.S.), there is a crucial difference between the UCC and the DCFR: while the UCC became one of the biggest successes of the 20th century, being adopted in some form by every state in the U.S. and influencing the law of other countries, the idea that the DCFR should be transformed into the first common European civil code was rejected.<sup>11</sup>

Thus, the DCFR remains exploitable only for teaching or for use by courts and arbitrators deciding cases with foreign elements.<sup>12</sup> Notwithstanding the limited use of the DCFR, an important issue should not be left out of sight and thus should be underlined once again: Book X of the DCFR is entirely devoted to trusts, plus Book IX deals with a list of recognized security devices, including the trust receipt – or the trust's employment as a security device. In other words, Europe's academic elite is also of

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10. See Hague Conference on Private Int'l Law, *supra* note 7. See also PRINCIPLES OF EUROPEAN TRUST LAW (David Hayton, S.C.J.J. Kortmann & H.L.E. Verhagen eds., 1999) (analyzing the eight principles of European trust law (together with national reports) developed by the Business and Law Research Centre Nijmegen (the Netherlands), formed in 1996 when under the influence of the Hague trust convention the issue of introduction of trust by civil law systems has been given a thrust). The eight principles aim not only to show to European civil laws what potential lies hidden in the concept but also to provide some guidance to domestication of trust. *Id.* The research centre's webpage is at: [www.ru.nl/law/businessandlawresearchcentre/](http://www.ru.nl/law/businessandlawresearchcentre/).

11. See Tibor Tajti, *The Unfathomable Nature and Future of the European Private Law Project*, 2 CHINA-EUR. UNION L.J. 69, 76 (2013). See also Tibor Tajti, *Systemic and Topical Mapping of the Relationship of the Draft Common Frame of Reference and Arbitration* 11 (Kazimieras Simonavičius University 2013), [www.ksu.lt/downloads/2014/02/tibor-tajati.pdf](http://www.ksu.lt/downloads/2014/02/tibor-tajati.pdf) (canvassing the history, key features and analysis of sales, franchise and secured transactions law of DCFR from the perspective of the arbitrability of the pertaining parts of DCFR. As the DCFR Book X on trusts is linked to Book IX on secured transactions, the reflections on the arbitrability of secured transactions claims apply *mutatis mutandis* also to trusts).

12. See Tajti, *Systemic and Topical Mapping of the Relationship of the Draft Common Frame of Reference and Arbitration*, *supra* note 11.

the opinion that the Old Continent should introduce the concept of trust because available contractual and other conditional substitutes cannot produce the same results needed both in business and in private life. The DCFR has surely influenced the drafters of the new Hungarian Civil Code, including the HLT.<sup>13</sup>

A brief account of some of the key features of the DCFR section on trusts will illustrate some of the problems the drafters faced when trying to reconcile the newcomer institution – perceived functionally or from the perspective of what “performance” is to be expected from the transplant – as it interacts with legal institutions of civil laws. First, although the DCFR extends to all types of trusts, it does not preclude national laws from opting for a narrower reach.<sup>14</sup> This seems to be sensible especially as to such specific trust types as security trusts (normally forgotten about by secured transactions law reformers) and court-made trusts,<sup>15</sup> as well as trusts arising by operation of law.<sup>16</sup>

Unlike Hungarian law, trusts are not deemed to be creatures of contract law, but are rather conceived to be of *sui generis* nature coming closer to property law.<sup>17</sup> As it remains obscure as to what will be the concrete repercussions of the peculiar nature of trust law under the DCFR, one gets the impression that the drafters have been primarily concerned with satisfying the theoretical (dogmatic) expectations of civil laws for an impeccable abstract system rather than wrestling with many of the practical problems.

While the fiduciary nature of the trust is particularly stressed in the DCFR,<sup>18</sup> basically nothing in the provisions tries to give teeth to the application of this complex common law concept. Whereas litigation in the U.S. constantly refines trust law and the duties of a fiduciary, the main explanation the drafters of the DCFR have provided is related only to the transfer of title onto the trustee that gives him “all the rights of an owner of the fund.”<sup>19</sup> Only a modest list of obligations are imposed on the trustee,<sup>20</sup> none

13. See, e.g., Lajos Vékás, A polgári törvénykönyv magyarázatokkal (the comments to the new civil code) 20 (2013); György Wellmann, Az új Ptk. magyarázata 36 (2013).

14. PRINCIPLES, DEFINITIONS, AND MODEL RULES OF EUROPEAN PRIVATE LAW, *supra* note 9, at 5669.

15. *Id.* at Article X.-1:10(2)(a)(ii).

16. *Id.* at Article X.-1:101(2)(b).

17. As the Comments put it: “A trust is treated by [the DCFR] as an obligation *sui generis*. It is not a contractual obligation, though clearly there are substantial parallels...Instead, because of the significant third party effects which a trust is capable of generating, the trust is seen as buttressing (if not part of) property law.” PRINCIPLES, DEFINITIONS, AND MODEL RULES OF EUROPEAN PRIVATE LAW, *supra* note 9, at 5679.

18. Only the Comments stress it and no section of DCFR “explicitly provide for the fiduciary nature of the relationship.” *Id.*

19. *Id.*

20. *Id.* at 5679-80.



of which could be a proper substitute for dealing with the equitable nature of CLT and the many lines of cases on fiduciary duties known to U.S. law. Unlike the many remedies for breach of trust available in the U.S., under the DCFR, the main remedy for breach by the trustee is only damages (a remedy overwhelmingly of ex post nature), and the enforcement of that remedy may take years. As we will see below, most of the limited DCFR remedies were also adopted by the Hungarians, so it is Hungary where the unique model embraced by the DCFR will first likely be tested in practice.

#### *D. Continental European Civil Law Systems Exemplified: the French “Fiducie”*

The French version of trust – the “*fiducie*” – was introduced, after years of hesitation,<sup>21</sup> in 2007,<sup>22</sup> notwithstanding repeated requests for action on the part of bankers and public notaries expressed quite forcefully from the late 1980s on. Once put into practice, the new law underwent significant changes, including making the *fiducie* usable by individuals, erecting a registry for trust instruments in 2010, and adding the possibility of its use as a credit security device (similar to the U.S. security device, the trust receipt).

The *fiducie* is a hybrid form of trust, bearing the features not only of its common law kin but also of its relatives known in the laws of Luxembourg and Lichtenstein. In the end, and to the extent such paradigmatic civil law concepts as the indivisibility of the concept of ownership<sup>23</sup> allow, the *fiducie* can be essentially looked upon as a reasonably close equivalent of the CLT. The French trust is now being used not only for intergenerational transfer of wealth but even for attracting Islamic investors, given that either the trust or the *fiducie* may be exploited to satisfy the

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21. FRANÇOIS BARRIÈRE & MICHEL GRIMALDI, TRUST AND ‘FIDUCIE,’ IN TOWARDS A EUROPEAN CIVIL CODE 1087 (Christian von Bar ed., 2011).

22. Loi 2007-211 du 19 février 2007 instituant la fiducie [Law 2007-211 of Feb. 19, 2007 on the Introduction of Fiducie], [www.legifrance.gouv.fr/affich/Texte.do?cidTexte=JORFTEXT000000821047](http://www.legifrance.gouv.fr/affich/Texte.do?cidTexte=JORFTEXT000000821047).

23. See Michel Grimaldi, *Introduction of the Trust into French Law*, 2 HENRI CAPITANT L. REV. (2011), [www.henricapitantlawreview.fr/article.php?lg=en&id=309](http://www.henricapitantlawreview.fr/article.php?lg=en&id=309). Grimaldi speaks of a ‘fiduciary ownership’ transfer onto the trustee; an ownership that cannot be taken as a full-scale civil law ownership because it has neither the same ‘substantive content,’ nor the same ‘substantive elements.’ For example, the fiduciary ownership of the trustee is neither perpetual, nor exclusive. Likewise, his rights are limited as he cannot gather the fruits or dispose of the object transferred to his own benefit. In brief, notwithstanding the lack of the concept of divided ownership in French law, through contractual means the same entitlements are transferred onto the trustee as in common law. The peculiar restrictions imposed in fact are those factors that make the *fiducie* heavily resemble and functionally make it almost equivalent with common law trusts.

expectation of Islamic finance and Sharia law for issuance of “*sukuk*.”<sup>24</sup> Still, there is a meaningful discourse on demystifying what exactly is happening to fiduciary ownership in the context of the French *fiducie*.<sup>25</sup> Romania has also introduced its own version of the *fiducie* (following the French model) with its new Civil Code of 2011.<sup>26</sup>

### *E. Continental European Civil Law Systems Exemplified: the New Hungarian Trust*

#### *1. The New Civil Code of 2013: Nomination of the Trust Contract*

As Hungary’s very first civil code was adopted during Communism in 1959,<sup>27</sup> the need for a new code was recognized right after the demise of that system. Still, more than two decades were needed for the adoption of the brand new Code in 2013.<sup>28</sup> From a U.S. perspective, it should be of interest that the Hungarian Code was influenced by the common law in many respects, from the nomination of business model franchise (obviously an American transplant) as a self-standing newcomer contract,<sup>29</sup> to taking over further elements from U.S. secured

24. See The Legal Environment of the Paris Financial Marketplace, PARIS EUROPLACE *Financial Law Committee*, (2009-10), [www.paris-europlace.net/files/environnement\\_juridique\\_2009\\_2010.pdf](http://www.paris-europlace.net/files/environnement_juridique_2009_2010.pdf); *Issuing and Listing Sukuk in France How to Take Advantage of the Attractive French Legal and Tax Environment: French Sukuk Guidebook*, PARIS EUROPLACE ISLAMIC FINANCE LAW COMMITTEE, (Nov. 2011), [www.paris-europlace.net/files/French\\_Sukuk\\_Guidebook\\_Nov\\_2011.pdf](http://www.paris-europlace.net/files/French_Sukuk_Guidebook_Nov_2011.pdf).

25. See also Blandine Mallet-Bricout, *The Trustee: Mainspring, or Only a Cog, in the French Fiducie?*, in THE WORLDS OF THE TRUST 141 (Lionel Smith ed., 2013) (Analyzing the differences as far as the position of the trustee is concerned under common law and the French version of trust and concluding that trustees are indispensable for the operation of both institutions). What is important for the purposes of this paper is that in the opinion of the author, common law trusts and the French *fiducie* are ‘*neither siblings nor rivals*.’ *Id.* at 141.

26. 71/2011. This law came into force on October 1, 2011 and replaced the first and only Civil Code of Romania of 1864. See also Luminița Tuleașca, *The Concept of the Trust in Romanian Law*, 6 ROM. ECON. & BUS. REV. 150 (2011), [http://econpapers.repec.org/article/raujournal/v\\_3a6\\_3ay\\_3a2011\\_3ai\\_3a2\\_3ap\\_3a150-160.htm](http://econpapers.repec.org/article/raujournal/v_3a6_3ay_3a2011_3ai_3a2_3ap_3a150-160.htm) (explaining the history and basic features of the newly introduced Romanian version of trust. According to the author, the Romanian trust is looked upon as a specific form of contract).

27. 1959. évi IV. törvény a Polgári Törvénykönyvről (Act IV of 1959 on the Civil Code) (Hung.).

28. 2013. évi V. törvény a Polgári Törvénykönyvről (Act V of 2013 on the Civil Code) (Hung.).

29. Franchise is regulated in Book VI on obligations, Part Three on specific nominated contracts, Title 19, and Chapter LI are entirely devoted to it. Though, as only six relatively short paragraphs are on franchise, very little

transactions law and Article 9 of the UCC,<sup>30</sup> through the introduction of the trust concept. Although some fiduciary transactions – like the escrow account known to American lawyers and bankers – had already arrived to Hungary (and the region) prior to the new Code, these concepts could only conditionally be equated with trust law proper. Similar fiduciary institutions of law dominate in some countries of the region like Poland.

## 2. Hungarian versus US Trusts: Some Dilemmas

Admittedly, Hungary is comparably a small jurisdiction and market, yet what makes it idiosyncratic, and thus of particular interest to scholars of comparative law, is that it deliberately opted for transplantation of not the German *Treuhand* or the French *fiducie*-type model but the Anglo-Saxon trust concept. Drafters of the Hungarian Code undertook what was thought to be impossible not so long ago: domestication of a prototypical common law legal institution into a civil code. The process of adaptation to local conditions, testing the limits of the newcomer legal institution and paying the price for mistakes to be made, has just begun. As Hungary is a typical civilian legal system, it will be

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could be learned about this newcomer contract and business model apart from its recognition by the system. The common law influences are visible also from the fact that the English term *franchise* is added – though in brackets – to the title of the contract. For a review of European regulation of franchise see Tajti, *Systemic and Topical Mapping of the Relationship of the Draft Common Frame of Reference and Arbitration*, *supra* note 11, at 63. See also Tibor Tajti, *Franchise and Contract Asymmetry: A Common Trans-Atlantic Agenda?*, 37 LOY. L.A. INT'L & COMP. L. REV. 245 (2015) (The author vouches for recognition of asymmetric contracts as distinct type of contracts and business format franchise as paradigm asymmetric contracts that has become one of the best example of successful transplants if adjudged based on experiences within Europe and beyond. In addition to arguing that franchise should become regulated also in Europe - for what US experiences should be taken a closer look at - the author argues as well that asymmetry could be deconstructed and consequently contract theory should develop a distinct normative theory for franchises).

30. Book V on Property Law, Part Three on Proprietary Rights, Title VII regulates the law on security interests – extending to both mortgage (real property) and secured transactions (personal property) law. These provisions denote the third revamping of the secured transactions law part; the first being undertaken in 1996 upon the impetus coming from the European Bank for Reconstruction and Development (EBRD) and its Secured Transactions Reform Project. See, e.g., Tibor Tajti, *Comparative Secured Transactions Law* (2002); Tibor Tajti, *Testing the Equivalence of the new Comprehensive Australian Personal Properties Securities Act, its Segmented European Equivalents and the Draft Common Frame of Reference*, 24 BOND L. REV. 85 (2012), <http://epublications.bond.edu.au/blr/vol24/iss1/4/>; Tibor Tajti, *Post-1990 Secured Transactions Law Reforms in Central and Eastern Europe*, 2 BULL. OF THE CHAMBER OF PUB. NOTARIES OF CNTY. SZEGED 18 (2013), [www.researchgate.net/publication/258728087\\_Post-1990\\_Secured\\_Transactions\\_Law\\_Reforms\\_in\\_Central\\_and\\_Eastern\\_Europe](http://www.researchgate.net/publication/258728087_Post-1990_Secured_Transactions_Law_Reforms_in_Central_and_Eastern_Europe).

interesting to see what cognitive and practical results will come out of this legal laboratory. Using CLT as the model means that one should *not* look for a full replica, due to different policy decisions made as well as the differing legal environment.

Some differences deserve brief mention here, not just for the sake of a more precise comparison but because the same concerns ought to be faced by other civilian jurisdictions planning to follow the path of Hungary.

First, unlike CLT, HLT is perceived to be an **agency-type contract**;<sup>31</sup> or as Professor Langbein argued with regard to CLT—a ‘*modern third-party-beneficiary*’ contract.<sup>32</sup> CLT actually is a unique part of the common law that was enforced only in courts of equity, rather than courts of law.<sup>33</sup> Notwithstanding that courts of equity and law have been merged in the U.S., equity law still applies to trusts. It is hard to see at the inception what the repercussions of this special treatment for HLT will be,<sup>34</sup> especially as U.S. literature speaks of CLT as a creature of ‘private’ law.<sup>35</sup> What the Hungarians might test, prove, or negate empirically is the claim of Hansmann and Mattei from 1998 that asset-partitioning offered by trust law is “difficult [if not] impossible to arrange [...] [relying] upon just the ordinary tools of contract and agency law.”<sup>36</sup> The law of equity, including equitable remedies, is of major importance to trust administration in the

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31. This follows, first of all, from the location of the provisions on trust in the Civil Code: it is part of Title 16 on agency-type contracts, in Part Three on Nominated Contracts of Book Six on Obligations. This is crucial for civilian systems where the internal system of the Code is determinative. Secondly, section 6:330 of the Code explicitly foresees that in case of gaps the rules on agency contracts (“*megbízási szerződése*”) should be applied. Thirdly, the Comments also stress that the contractual-features of trust have been given central position. See Menyhárd & Vékás, *supra* note 3, at 794 pt. 3.

32. See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995).

33. See VALERIE J. VOLLMAR, AMY MORRIS HESS & ROBERT WHITMAN, AN INTRODUCTION TO TRUSTS AND ESTATES 168-70 (2003). The authors define trust as an ‘*arrangement*’ which obviously encompasses a contract between the settlor and the trustee if the trust is established by an agreement of trust. This is not the case where the trust is established by a declaration of trust where the same person is both the settlor and trustee when the trust is created.

34. The number of related yet to-be-explored legal questions is significant. For example, given that under Hungarian law no distinction is made between ‘contract’ and ‘agreement’ based on consideration – as opposed to U.S. law, as recently discussed by a court in Texas – this issue does not seem to raise problems in Hungary. See *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013) (consulting leading treatises on the law of contracts for the proposition that the word ‘agreement’ has a broader meaning than the word ‘contract’); see David R. Hodgman & David C. Blickenstaff, *State Upholds Mandatory Arbitration of Trust Disputes*, 41 EST. PLAN. 13 (2014).

35. See Vollmar, Hess & Whitman, *supra* note 33, at 171.

36. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 479 (1998).

U.S. Among other things, it serves the important function of noticing the interests of trust beneficiaries as well as the interests of trustees.

Another difference is that - to the extent possible - the Hungarian lawmakers have tried to fix the areas where trusts can be employed. Two such policy choices are deserving of elaboration. First, whereas from the beginning of the development of trusts in medieval times, oral trusts may exist under Anglo-Saxon law, **only written express trusts** can be created under HLT. This decision obviously serves to avoid all the uncertainties and evidencing problems that recognition of oral trusts will generate, and to force the parties to devote adequate attention to the details of their arrangement under a heretofore completely unknown legal category.<sup>37</sup> Second, whereas all trusts since their development in medieval times can be self-declared under Anglo-Saxon law, in Hungary more stringent requirements are imposed on **self-declared trusts**.<sup>38</sup> Specifically, self-declared trusts can be created only by way of an irrevocable declaration of trust executed in a special deed form (“*közokirat*”).<sup>39</sup>

Under the law of Hungary, HLT cannot be employed as a substitute for a profit-making company because the Hungarian Civil Code limits the variety of business forms to four.<sup>40</sup> The price of this policy choice is that compared to the wider application of trust doctrine in the U.S., HLT is inevitably less versatile.

Beyond these limitations, although the new Hungarian Code’s provisions represent prescriptive drafting, they are no more than a

37. PTK. § 6:310(2) (Hung. Civil Code).

38. Unfortunately, the drafters have refrained from coining a specific term for this type of trust and have rather used descriptive language: roughly ‘when the settlor and the trustee is identical’ (“*ha a vagyonrendelő és a vagyonkezelő személye megegyezik*”). Given that the English translation of the new Hungarian Civil Code is already available, it ought to be noted that the terms the translators opted for may not be equal with the ones used in this article. Concretely, while here we use the terms settlor and trustee, the English-language translation used the pair principal and beneficiary. The choice of terms depends on many factors from the background knowledge of the translators to choices translators make, among others, to better convey the gist of the local law. In Europe, of major impact is also the presence of British English and the nomenclature used in the UK. Readers should always check the exact meaning of local law provisions as the best way not to err. This applies not only to translation from Hungarian to English.

39. PTK. § 6:329(1) (Hung. Civil Code).

40. PTK. § 3:89(1) (Hung. Civil Code). Note that one of the novelties of the 2013 Civil Code was the simplification of the rules on, and the integration of, company law into the Civil Code. The hinted at limitation of company forms means that in the case where a business fails to satisfy the formal requirements of any of the recognized company forms, the company registry will refuse its registration – meaning that the business cannot come into existence. See András Kisfaludi, *Commentary on the Company Law Chapter (Book III, Part III)*, in A POLGÁRI TÖRVÉNYKÖNYV MAGYARÁZATOKKAL 127 point 2 (Lajos Vékás ed., 2013).

combination of those few mandatory but predominantly default provisions that are necessary to provide the guidance needed for the introduction of a brand new legal institution.<sup>41</sup> This means that in the future the success of HLT will depend on the innovativeness of Hungarian counsel who may soon realize that foreign experiences may be resorted to for inspiration. It may yet be validly claimed that the new HLT law as well gives “almost unlimited freedom to decide on the ‘trust terms’ (the provisions governing how the trust will be administered and what distributions of income or principal will be permitted or required).”<sup>42</sup> What adds a significant layer of uncertainty to this seeming similarity is that for all the gaps, interpretative questions, or dilemmas, HLT makes resort to agency and general contractual principles a must – instead of creating a *sui generis* trust law.

Equally interesting are trust-linked idiosyncratic common law legal institutions that Hungarian drafters must strive to disregard, or to create functional equivalents for. For example, while it has been repealed in many U.S. states, the rule against perpetuities might be one of the best illustrations of this point. The Hungarian equivalent rule is seemingly straightforward: trust contracts can only be concluded for a maximum of fifty years and all contrary stipulations are null and void.<sup>43</sup> Besides this sentence-long provision of the Code, however, there is no further elaboration, and thus it is unclear whether the myriad corollary dilemmas known to U.S. law will occur.<sup>44</sup> There are also many variations to U.S. trust law (e.g. spendthrift trusts, discretionary trusts, directed trusts, asset protection trusts, dynasty trusts, and decanted trusts). It is still unclear if Hungary will eventually move to embrace these doctrines and, if so, which of the many variations adopted by various U.S. states it will embrace.

### 3. *The Concomitant Licensing and Prudential Regulation*

Given that the concept of the trust is a genuine newcomer in Hungary, it was crucial to set the right track of development and make the new system for Hungary maximally predictable and safe. It was also logical to attempt to create the licensing and prudential regulation of a new industry. While no distinct licensing has been applied to the trust-lookalikes imported to the country by the financial services industry (e.g., escrow accounts), banking regulations have been created. The new regime was

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41. Menyhárd & Vékás, *supra* note 3 at 794, point 4.

42. VOLLMAR, HESS & WHITMAN, *supra* note 33, at 171.

43. PTK. § 6:326(3) (Hung. civil code).

44. *See, e.g.*, VOLLMAR, HESS & WHITMAN, *supra* note 33, at 966.

introduced by enactment of a quite technical and detailed statute<sup>45</sup> providing for formalities on the execution of trusts.<sup>46</sup>

The prudential system created in Hungary rests essentially on four pillars: (1) licensing and rules ensuring the financial strength of professional trustees; (2) registration of service-providers (trustees); (3) registration of trust instruments; and (4) supervision by the Hungarian National Bank.<sup>47</sup> There are also various other rules that attempt to properly regulate trustees.

The system foresees two types of trustees with differing rules applicable to them: ad hoc and professional trustees. Ad hoc, or 'non-professional' ("*nem üzletszerűen eljáró bizalmi vagyonkezelő*") trustees, are not subject to licensing, however, they have to register the key data on the trust with the National Bank and file the instrument containing the trust agreement. The registry of these trust agreements is accessible only to various public authorities (e.g., tax authorities, the agency controlling competition law, and the public prosecutor's office).

The rules are logically much more rigorous with professional trustees. Similar to banking regulations, the law imposes quite high requirements for capitalization and liability insurance. Then, obviously following the logic of continental European company laws, the rules limit the types of business vehicles available for this new business sector, essentially limiting the HLT to be employed like the closed corporations known to U.S. law. The registry of trustees naturally is fully public and thus anybody could double-check with the National Bank whether somebody claiming to be a trustee is duly registered and therefore subject to oversight. The remainder of the rules include the requirement of employment of at least one lawyer, one economist, and one accountant. The National Bank's oversight powers are quite meaningful. Yet time will tell whether these powers will be sufficient to create a legal environment that can properly weed out those who would carry out fraud and generally those who should not be entrusted with the task of serving as trustees. Because the quintessential feature of trusts is the demand of fiduciary character in order to protect beneficiaries and others, much work may have to be done in dealing with these needs. For instance, will it be necessary for a trustee to invest with modern portfolio theory

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45. 2014. évi XV. törvény a bizalmi vagyonkezelőkről és tevékenységük szabályairól" (Act XV of 2014 on Trustees and on the Rules Applicable to their Activities) (Hung.).

46. See VOLLMAR, HESS & WHITMAN, *supra* note 33, at 191. For example, while Florida imposes the same formalities as required for the execution of wills, New York makes "every inter vivos trust be acknowledged before a notary public or executed in the presence of two witnesses." *Id.*

47. National banks in European countries are normally mentioned as the kin of the Federal Reserve System (Fed) in the United States, though as the mentioned Hungarian example shows, important differences exist as far as their functions, powers, and general position are concerned.

in mind, as is the case in the U.S.? Or will an overconcentration of shares in a company be allowed as an acceptable investment strategy? Will agreements be allowed to exonerate trustees? And to what extent will the creators of trusts be allowed to fix their terms?

Ultimately, the needed balance between giving effect to the reasonable intentions of the trust creator while protecting the rights of trust beneficiaries and others must be found. On this matter, the U.S. has not been able to fully succeed, due, in part, to the power of the banking industry to discourage the enactment of provisions favoring the protection of the rights of trust beneficiaries and others.<sup>48</sup>

#### 4. *Speculation on the Future of Hungarian Trusts*

From the perspective of comparative law, it should be of utmost interest how the trust – the newcomer type of common law institution – will be domesticated in Hungary. At this inaugural phase there is still much uncertainty. Concern for the unknown issues that will surely present themselves causes unease. How will the fiduciary duties of trustees, originally established by the equity courts, be established and enforced in Hungary?

Given the versatility of the trust it may even make sense to raise issues – which from the perspective of U.S. law may seem outdated – regarding questions as to whether the HLT can be exploited as a security device to bypass the secured transactions system introduced first in 1996, following the unitary model of security interests originating in Article 9 of the UCC. Those familiar with the pre-UCC history of U.S. secured transactions law know that in the pre-1952 period, the independent security device of trust receipt played an important role in the U.S., especially in the financing of the automobile industry (floor-planning).<sup>49</sup> The

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48. See Robert Whitman & Kumar Paturi, *Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries*, 16 QUINNIPIAC PROB. L.J. 64 (2002).

49. See generally Grant Gilmore, *Chapter 4: The Trust Receipt*, in SECURITY INTERESTS IN PERSONAL PROPERTY 86, 86-128 (1965) (regarded as, perhaps, the best summary of the pre-UCC history of trust receipts as independent security devices). There is one important misunderstanding related to the continued relevance of the law on trust receipts. Namely, albeit trust receipts have been subsumed under UCC Article 9 and today they are not visible from it – as instead of trust receipts normally a security agreement (named as such) is used – the exploitability of trust as a security device continues to be an issue in all systems that have a non-comprehensive secured transactions system, like the Hungarian one. Likewise, jurisdictions that have not known trust receipts but have decided to reform their laws following UCC Article 9 must provide for this possibility, or trusts – due to their versatility – could be resorted to in order to bypass the system. The best recent example is Australia, which has reformed its system in 2009 and has specifically named ‘trust receipts’ as security interest-creating transactions. See *Personal*



question of whether HLT can allow trust receipt transactions is uncertain because Hungary has failed to introduce a comprehensive secured transaction system, as the U.S. has.<sup>50</sup>

Examples directly linked to trust law proper can also be found. One interesting question is whether the use of the revocable living trust will become a strong competitor to the use of wills. Besides understanding trust doctrine and realizing that lots of cautious legal innovation will be needed, undoubtedly challenging will be the realization that more interdisciplinary study is required in the context of trusts compared to what has been the case in the past with wills.

For example, is new law needed to make a judgment on mental capacity in the case of modification or termination of revocable living trusts?<sup>51</sup> Can fees charged by trustees be regulated?<sup>52</sup>

The future course of events may also depend on the relative strength or exploitability of local fraudulent transfer laws by creditors of the settler. This is of key importance because, as it is commonly known, the federal-cum-state fraudulent transfer laws of the U.S. are on average much more creditor-friendly than their Continental European kin. This concretely has the effect that while in the U.S. fraudulent transfer laws are frequently and successfully utilized by both bankruptcy trustees and private claimants, this is hardly so in Hungary and much of Central and Eastern Europe. In brief, one may safely predict that, at least in the initial years to come, attacks on HLT based on fraudulent transfer laws (both within and outside the context of bankruptcy law) will not be promising and hardly great in numbers.<sup>53</sup>

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*Property Securities Act 2012* (Cth) § 12(2) (Austl.) and the related commentary in ANTHONY DUGGAN & DAVID BROWN, *AUSTRALIAN PERSONAL PROPERTY SECURITIES LAW* 47 (2012), sections 3.11 through 3.13.

50. See TIBOR TAJTI, *Chapter on Hungary*, in *COMPARATIVE SECURED TRANSACTIONS LAW* (2002) (discussing the Hungarian UCC Article 9-inspired secured transactions reforms); see also Tibor Tajti, *Post-1990 Secured Transactions Law Reforms in Central and Eastern Europe*, *supra* note 30 (identifying the latest developments in Hungary and in its neighbors). For updates on Hungarian, Lithuanian, and Polish secured transactions and bankruptcy laws (reforms, achievements, trends, open issues) see Tibor Tajti, *Security Rights and Insolvency Law in the Central and Eastern European Systems*, in *SECURITY RIGHTS AND EUROPEAN INSOLVENCY REGULATION* (Gerard McCormack & Reinhard Bork eds.) (forthcoming February 2017).

51. See Robert Whitman, *Capacity for Lifetime and Estate Planning*, 117 *PENN ST. L. REV.* 1061 (Spring 2013).

52. See generally *THE LAW OF TRUSTS AND TRUSTEES* § 971 CREDITS TO TRUSTEE ON ACCOUNTING; LEGAL FEE OF TRUSTEE (Alan Newman, George Gleason Bogert, George Taylor Bogert & Amy Morris Hess eds., 2014); UNIF. TRUST CODE § 708 (amended 2010); Sarah S. Batson, *Administrative Expenses of Trusts: What did Congress Mean?*, 59 *S.C. L. REV.* 551 (2008); Philip N. Jones, *Final Regulation on Trust Administration Expenses – No Surprises*, 121 *J. TAX'N* 25 (July 2014).

53. Fraudulent transfers law is a neglected topic of comparative law, yet –

Clearly, however, above all, the decisions to be made regarding the law of “fiduciary duty” will likely prove to be the most challenging. What will be the right, if any, for a beneficiary to receive a fiduciary accounting?<sup>54</sup> Who will be given notice about decisions to be made by a trustee?<sup>55</sup> When will a potential claim expire because of time lapse?<sup>56</sup> What will be the rules regarding spendthrift trusts<sup>57</sup> and discretionary trusts?<sup>58</sup> Which trust provisions will be found to violate public policy?<sup>59</sup>

In any event, while it is a fact that HLT can offer numerous heretofore unavailable tools to fill gaps in the law that will be useful to business and private concerns, some of the law in use in Hungary and Central Europe, such as the usufruct on residential properties, may cease to be employed.<sup>60</sup> It can only be speculated that parallel with the emergence of a professional class of trustees

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as the U.S. experiences show and as U.S. authors stress – it plays a key role not just in the context of trust law but generally asset protection. Besides fraudulent transfers law proper, some other closely linked elements of the system are also lacking in Hungary and many of the civilian systems. No better example could be mentioned than the contempt of court rules, which are much more severe in the U.S. Thus, for the time being at least, a claim that “if the transfer is fraudulent or preferential, the debtor, along with his or her planner, risks charges of contempt, bankruptcy fraud, and civil conspiracy” might not necessarily be comprehensible. JAY D. ADKISSON & CHRISTOPHER M. RISER, *ASSET PROTECTION: CONCEPTS AND STRATEGIES FOR PROTECTING YOUR WEALTH* 57 (2004).

54. See generally Julia C. Zajac & Robert Whitman, *Fiduciary Accounting Statutes for the 21st Century*, 36 ACTEC L.J. 443 (Fall 2010); Committee on National Fiduciary Accounting Standards (The American College of Trust and Estate Counsel), *National Fiduciary Accounting Standards* (May 1984), [www.actec.org/assets/1/6/Study19.pdf](http://www.actec.org/assets/1/6/Study19.pdf).

55. See generally ROBERT WHITMAN & DAVID M. ENGLISH, *FIDUCIARY ACCOUNTING AND TRUST ADMINISTRATION GUIDE* (2002); JoAnn Engelhardt & Robert W. Whitman, *Administration with Attitude: When to Talk, When to Talk*, 16 JUN. PROB. & PROP. 12 (May/June 2002).

56. In the United States, statutes of limitations for state matters are handled on a state-by-state basis and the statutes vary regarding the length of time provided for.

57. See generally Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1 (1995); William H. Wicker, *Spendthrift Trusts*, 10 GONZ. L. REV. 1 (1974).

58. See generally Edward C. Halbach Jr., *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425 (1961).

59. See generally *Exceptions to the Calidity of Spendthrift Trusts – Public Policy*, in *THE LAW OF TRUSTS AND TRUSTEES* § 224 (Helene S. Shapo, George Gleason Bogert & George Taylor Bogert eds., 2014).

60. One of the disadvantage of the usufruct is that it is irrevocable and thus, for example, the owner of an apartment – who has foolishly granted a usufruct to an untrustworthy person damaging the property – cannot terminate the usufruct without the consent of the beneficiary. He may only ask for some kind of security for the damages, first amicably and – upon refusal of the beneficiary – through court. This is not analogous but in certain respects similar to the advantages of trusts over legal life estates discussed by VOLLMAR, HESS & WHITMAN, *supra* note 33, at 186.

and their advisors, professionals will seek to employ new ideas imported from the U.S. or created in other countries in Europe or elsewhere.

### III. CONCLUSION

The realization that trust law can fill important niches in continental legal systems brings with it the realization that there will certainly be new and challenging problems that will not be solved immediately. The process of refinement of trust law on the Continent so that it properly fits with civil law concepts entails the creation of new ideas to be formulated by comparatively oriented legal scholars. This entails also cognitive advancements which can come from discussions between lawyers in common law and civil law countries.

It is hoped that this article is seen as representing only a start, rather than an ending, of the need for the comparative study of trusts in the 21st century.