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The Liechtenstein trust as an instrument of estate planning for Latin American resident settlors by means of the example-countries of Argentina and Brazil

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Abstract

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Equity is a major area of contrasting jurisprudence. While trusts evolved in England over centuries from the Roman fideicomissum and elements of Germanic law, the development in civil law countries was once forestalled by the civil law's insistence on unity of title. Nevertheless, in the last century, we saw civil law catching up with common-law with its recognition and use of trusts. Recent groundbraking decisions of the European Court of Justice such as the *Olsen* case in 2014 and the *Panayi* case in 2017 are expected to boost the trust, at least on European territory. The aims of the Master's thesis were to analyse the legal recognition of classic three-party Anglo-Saxon foreign trusts on the other side of the Atlantic, namely in the civil law countries of Argentina and Brazil. In this context, existing codes, statutes and regulations regulating the foreign trust were investigated. Moreover, relevant domestic case law and statements of public authorities were elaborated and discussed. As a result, it can be said, that Brazilian courts and authorities maintain to date a sceptical and restrictive position towards foreign trusts, nonetheless giving thoughts in public of how to tax resident settlors and/or beneficiaries. This despite of article 17 of the Law of Introduction to the Brazilian Legislation (Decree No. 4,657 of September 4, 1942) that stipulates that perfected legal transactions and acquired rights shall always be observed and respected if they do not offend national sovereignty, public order or good morals. As a result, and despite of the unclear interpretation of Brazilian courts and authorities to date, trusts created under foreign law should be recognized for Brazilian legal purposes. Argentina, on the other hand, on 1994 partially adopted the common law trust concept in its national laws and has a vivid and continuing jurisprudence in this context. Foreign trusts, if properly established according to a catalog of criteria elaborated in this thesis, do reach full legal recognition in Argentina. As a result and in order to cope with continous political and economical instability as well as to further safeguard financial privacy, the trust is to be expected to play a predominant role in the future in these two countries.

1 Introduction

1.1 Starting point and problem

Under the Napoleonic code, which was widely used as a model by most Latin American countries, a beneficiary could not have equitable title to what a trustee owned. Nevertheless, in Latin America, scholars and practitioners in the early 20th century recognised the flexibility and usefullness of trusts and started developing their trust equivalent, the local *fideicomiso,* at the same time making up their minds on the legal qualification of foreign Anglo-Saxon trusts. It is to say, that as a result of the historical high political instability in the region, coupled with countries emerging to powerful globalized economies, as it is the case with Brazil for instance, wealthy citizens do ask more and more for sophisticated instruments from abroad to protect their wealth and to organize succession. Trusts are complex in nature, nonetheless, once understood, properly legislated and judged, they can contribute highly valued advantages in terms of estate planning. Amidst this growing interest for foreign trusts in Latin American countries, it is important to analyse whether the legal effects of a classic three-party Anglo-Saxon trust would be fully recognised in such countries or not. It is important to analyse, if foreign trusts in general, are suitable estate planning vehicles for Argentinean and Brazilian resident settlors. Given the fact that many Latin American individuals created in the past or are willing to create trusts in foreign jurisdictions nowadays and in the future - for several reasons which will be elaborated below - there is a growing and serious concern in knowing exactly if these trusts, amongst them the Liechtenstein trusts as well, will be recognized in their home jurisdictions as legally valid. Although Argentina, Brazil, Chile, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela are members of the Hague Conference on Private International Law, none of them ratified the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition that entered into force on 1 January 1992. It is though of outmost importance to analyse the law enacted and the jurisprudence passed in this respect in Brazil and Argentina, two major Latin American economies. In view of establishing legal certainty and in order to avoid serious conflicts with national inheritance-, marriage- and tax laws, it is important to bring light into the dark.[1] What is for sure, both countries having recently passed through rigid tax amnesty programs, will experience an increased demand for foreign trusts in the future in view to protect their assets now fully declared to the local authorities.

[1] See *Malumian*, Case law on foreign trust recognition by Latin American countries, TRUST & TRUSTEES (2010), 666-671.

1.2 Aim of the Master's thesis

The aim of the Master's thesis is the examination of the suitability of the use of foreign trusts for Brazilian- and Argentinean resident settlors for holding assets overseas. The focus will lie on the suitability of the Liechtenstein trust according to Art 897 et seqq PGR. Can the trust as such, and the Liechtenstein trust in particular, step into that gap and be a sophisticated estate planning tool for these Latin American nationals? Can it or is that figure already legally recognised by the respective courts and national authorities? Apart from that, it is the aim of the Master's thesis to set the trust in context and elaborate on the sound legal reasons to have one or even various and on the possible pitfalls which can come with it. For wealthy families and serious entrepreneurs, these questions are of high priority. Latin American emerging markets had and still have a bright future on the horizon, nonetheless the uncertainty, being economical or political, is sky-high, which triggers the high demand for estate planning tools in that region.

1.3 Methodology and composition

The Master's thesis is structured in five parts. It will first give an overview on the reasoning for the use of trusts as well as an analysis of specific needs of Latin American families with respect to estate planning. Part Two will outline the fundamentals of the trust figure in general and the Liechtenstein trust in particular. It will include different circumscriptions of the trust and refer to the differentiation between *legal* and *equitable* interest. Part Three will elaborate on the existing trust statutes in Latin American countries as well as compare the Anglo-Saxon trust with the Latin American trust, the so-called *fideicomiso*. The advantages as well as the weak points of the Hague Convention on the Law Applicable to Trusts and on their Recognition will be discussed as well. Part Four sets then forth with an in depth breakdown of the recognition of the trust figure in Brazil and Argentina. It will analyse in detail the substantial domestic case law and other relevant legal elements that support the thesis that selected Latin American jurisdictions do in fact recognize foreign trusts. Part Five will then outline different approaches and ideas in view of strenghtening the recognition of foreign trusts in Latin American legislations. A schedular overview at the end of part five will then give the reader a sum up of the findings of the thesis. At the very end, the Master's thesis will provide a conclusion.

2 Needs of clients and reasoning for the use of Trusts

2.1 Preliminary remarks

Due to the fact that the Napoleonic Code was used as a model by most Latin American countries, the trust in its classical Anglo-Saxon form was never developed in that region. Despite of the fact that Brazil and Argentina have had an impressing economical success in the last decades and have powerful emerging markets with strong economic relations towards European- and Anglo-Saxon countries, they never adopted any comparable Anglo-Saxon laws codifying the trust and separating *equitable interest* from *beneficial interest* in its classical form.[2]

Nevertheless and despite of that unfamiliarity with these structures, it is not uncommon to see advisors eagerly recommending offshore trusts to high net worth individuals and international families as a solution to their needs, being it estate-planning necessities, asset protection or otherwise.

2.2 Specific needs of Latin American families

People in Latin America have always been faced with political and economical uncertainty, which at the end triggered increased attention for wealth protection and wealth preservation. The establishment of structures is evidence of foresight and a keen sense of responsibility.[3] For instance, Brazil's recent political issues and corruption find increasingly international exposure. First came the Petrobras scandal, with an estimated price tag of approximately USD 20 billion, perhaps the largest in Brazil's financial history, closely followed by a tax-adjudicator bribery scandal, with an estimated loss of more than USD 5 billion to the national coffers. It is not a surprise that people feel thoroughly mismanaged politically and cheated financially. Moreover, although they pay taxes like citizens of OECD countries, education, infrastructure and health services could be classed as third world.[4] A wide range of the Brazilian society still remembers the so-called *Collor Plan* which stands for a collection of economic reforms and radical inflation-stabilization plans carried out in Brazil during the presidency of Mr. Fernando Collor de Mello between 1990 and 1992, when he at the end was impeached.[5] The policies

[2] See *Vargas Beloch/Cone*, Cracking the Brazil nut: trusts in Brazil, TRUST & TRUSTEES (2011), 1-5.

[3] See *Prince von und zu Liechtenstein*, Possible Uses of Liechtenstein Wealth Preservation Structures, in: *Schurr* (ed), Trusts in the Principality of Liechtenstein and Similar Jurisdictions (2014) 39.

[4] See *Abletshauser*, Postcard from Brazil, STEP JOURNAL (2015), 59.

[5] See *Carvalho*, As origens e a gênese do Plano Collor, NOVA ECONOMIA (2007), 3.

included, amonst other harsh measures, the freezing of 80% of private assets for as long as eighteen months, an extremely high tax on all financial transactions, the elimination of most fiscal incentives, the increase in the prices charged by public utilites as well as a temporary freeze on wages and prices.[6] These measures caught the Brazilians off guard and by surprise at that time. Having this in mind, they nowadays are highly interested in protecting assets against political and economical turmoils and thus against expropriation of assets by governments which involve in corruption schemes, excessive public spending and harsh austerity measures.[7]

2.3 Reasoning for Trusts in general

Despite the fact that the trust has been unfortunately used for illegal intentions in the past,[8] it always covered a variety of very useful functions too: For instance, a trust can serve as an asset protection vehicle from governmental interference, as a tool to avoid national forced heirship rules[9] as well as an instrument to legitimate privacy reasons and confidentiality for the persons involved (i.e. settlor, beneficiaries and potential beneficiaries).[10] Financial privacy is not an issue which only concerns wealthy people, it is and remains an issue which concerns freedom of humanity.[11] Moreover, a trust can serve to regulate succession[12] and in that way secure heritage for a long period of time and overcome in such way multiple generations, can secure the education and upbringing of next generations,[13] secure care and help for disabled persons (such as children and family members, etc.), avoid the spoiling effects and a tendency towards extravagance within a family as well as realise and protect a family's values and vision in a broader sense.[14] Moreover, a trust can accomplish a long-term binding estate, can serve for charitable purposes, manage the assets of a multitude of persons (eg as business trust, investment trust, voting trust, etc), assign to the owner third-party business profits as well as deal with misappro-

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[6] See *Villela*, The Collor Plan and the Industrial and Foreign Trade Policy, IPEA (1997), 57.

[7] See *Brooke*, Brazil Freezes All Wages and Prices, NEW YORK TIMES, on February 1st (1991), 1.

[8] See quote from the court case of *Attorney vs Sands* which indicates: "The parents of the trust were fraud and fear and the court of conscience was its nurse", see also *Bogert,* Trusts (1987) 7.

[9] See *Gasser/Moser*, "How to protect the assets of a Liechtentein Foundation from the onslaught of creditors and forced heirs, TRUST & TRUSTEES (2014), 595-600.

[10] See *Lakhan*, The Beginning of the End of Anonymity?, in *Schurr* (ed), Trusts in the Principality of Liechtenstein and Similar Jurisdictions (2014) 51.

[11] See *Prince von und zu Liechtenstein* in *Schurr* 43.

[12] See *Gasser*, Erbrecht-Shopping: Wie man mit liechtensteinischen Stiftungen und Trusts am besten vererbt und enterbt, PRIVATE-MAGAZIN (2004) 48 - 51.

[13] See *Prince von und zu Liechtenstein* in *Schurr* 45.

[14] See *Prince von und zu Liechtenstein* in *Schurr* 42.

priated assets or faulty assets dispositions.[15] Thinking of entrepreneurs, a trust can of course serve as a holding structure of a business enterprise (voting trusts) as well as be used as an alternative to corporations and companies limited by shares (unit trusts).[16]

2.4 Advantages of the Principality of Liechtenstein

One of the most outstanding advantages of the Principality of Liechtenstein is its rarely comparable, flexible and liberal Persons and Company Act (PGR).[17] Liechtenstein has always been and will continue to be a highly attractive jurisdiction for trusts as well as estate planning in general. *STEFAN WENAWESER* summarised the most important advantages of Liechtenstein and its trust law.[18]

Therein, he pointed out that the Liechtenstein trust, being an outmost flexible planning instrument, even permits pure (non-charitable) purpose trusts allowing for a wide flexibility in the design of a trust. Then, it is of considerable importance to note that foreign judgements are generally not enforced in Liechtenstein, which permits to assure a high asset protection level.[19] With regard to the enforcement of forced heirship claims a limitation period of two years has to be observed according to Liechtenstein law, unless there is a shorter period stipulated under the law governing the estate of the deceased settlor.[20] Creditor claims are only allowed within a prescription period of five years time, which does enforce the asset protection qualities of the Principality of Liechtenstein as well. In this context, asset protection must definitely be considered as a core element, which does not mean hiding wealth from tax authorities but to protect wealth from unwarranted and unauthorized claims.[21] These elements provide for a good basis for asset protection since there are only a few possibities to attack a trust, these being ongoing instruction rights of the settlor, beneficiaries or other parties involved in particular.[22]

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[15] See *Künzle*, Special Issues concerning Domestic Swiss Trusts and Liechtenstein Trust Law, in: *Schurr* (ed), Trusts in the Principality of Liechtenstein and Similar Jurisdictions (2014) 39; Similar *Kötz*, Trust und Treuhand, Eine rechtsvergleichende Darstellung des anglo-amerikanischen trust und funktionsverwandter Institute des deutschen Rechts (1963) 38, 60.

[16] See *Prince von und zu Liechtenstein* in *Schurr* 46.

[17] See *Jeeves*, A personal note in *Jeeves* (ed): Liechtenstein Company Law (1992) XIII/XVI.

[18] See *Wenaweser*, Wealth Preservation Trusts in Liechtenstein. Selected Aspects of Substantive and Procedural Law, Conference held at the Universität of Liechtenstein on April 26th, 2012 (2012/1) 6.

[19] Exception of certain Swiss/Austrian judgements and judgments in Child Support Matters.

[20] See article 29 FL-IPRG.

[21] See *Prince von und zu Liechtenstein* in *Schurr* 42/43.

[22] See *Schurr*, Der Liechtensteinische Trust als alternatives Gestaltungsinstrument zur Stiftung, in: 3. Liechtensteinischer Stiftungsrechtstag (2010), 5 and 21.

3 The Liechtenstein Trust according to Art 897 et seqq PGR

3.1 Definitions

Despite the fact that the trust has been recognized for hundreds of years, its nature and function has not been constant. According to GRBICH, "the term trust is not clear and unchanging like a cristal, it is the skin round a living and growing concept."[23] Trust specialists refuse to provide a specific definition of the trust. They are afraid that the flexibility which comes with the trust instrument could be lost.[24] HAYTON said the following: "It is impossible to frame a precise definition of a trust, which, unlike a company, has no legal personality, but it is possible to provide a description sufficient to enable others to know in a general way that one is concerned with."[25] In terms of an approach to the trust concept, in the following, the classic circumscription of UNDERHILL/HAYTON and the circumscription of the HAGUE TRUST CONVENTION (HTC) will be analysed.

3.1.1 Circumscription of the Trust by UNDERHILL/HAYTON

UNDERHILL/HAYTON do describe the trust as follows: "A trust is an equitable obligation, binding a person (called trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, *cestuis que trust*), of whom he may himself be one, and anyone of whom may enforce the obligation."[26] This circumscription puts the functionality of the trust as well as the rights and obligations of the trustee and beneficiary to the foreground. Putting the term *equity* aside, a central characteristic of the trust is the separation between control and administration of the trust fund and the enjoyment of the trust fund on the other side.[27] The trustee controls and administrates the trust fund and is the legal owner of the trust assets. The trust fund constitutes a *separate fund* and is as such separated from the own estate from the trustee. The beneficiary enjoys the economical benefit of the trust fund. Moreover, he has the power to enforce the trust respectively the trust provisions. This definition will be con-

[23] See *Grbich*, Baden: Awakening The Conceptually Moribund Trust, THE MODERN LAW REVIEW (1974), 643 - 656.

[24] See *Gaillard/Trautmann*, Trust in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts (1987) 317.

[25] See *Hayton*, The Hague Convention on the law applicable to trusts and on their recognition (1987) 260.

[26] See *Hayton/Matthews/Mitchell*, Law relating to trusts and Trustees (2010) 2 N 1.1 (1); this circumscription is used as well in various court decisions as for instance in the decision *Re Marshall's Will Trusts* (1945) Ch 217, 219 and in *Green v Russel* (1959) 2 QB 226, 241.

[27] See *Mowbray*, Lewin on Trusts (2004) 14 N 1-20.

fronted with the one of the Hague Trust Convention, which departs primarly from the external structure of the trust.[28]

3.1.2 Circumscription of the Trust by the Hague Trust Convention

Beforehand, it has to be noted that the Hague Trust Convention has no standard definition of the trust. In fact, Article 2 HTC names in a non-exhaustive enumeration the *essentialia* respectively the key characteristics which a legal relationship has to present in order to be qualified as a trust in the sense of the Convention. In this context, the Convention does not refer to any particular type of trust out of the common law or to any specific institute from a national legal system. The circumscription out of Article 2 HTC can in fact cover civil law institutes which fullfil the *essentialia* according to Article 2 HTC.[29]

Art. 2 HTC says as follows:

"For the puposes of this Convention, the term *trust* refers to the legal relationships created - *inter vivos* or on death - by a person, the settlor, when assets have been placed under control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics -

a) the assets constitute a separate fund and are not part of the trustee's own estate;

b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

[28] See *Dudli*, Unmittelbare Wirkung der Anerkennung von Trusts in der Schweiz (2011) 2.

[29] See *Gutzwiler*, Schweizerisches Internationales Trustrecht (2007) N 2-1.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust."

Article 2 par. 1 puts though the triangle-relationship in between the settlor, trustee and beneficiary to the forefront. HUDSON even speaks of the *magic triangle* which consists of a settlor as so-called absolute owner who passes over legal title to the trustee and equitable interest to the beneficiary. The trustee holds the trust fund in favour of the beneficiary and accordingly meets personal obligations towards the beneficiary.[30] It becomes evident from the circumscription that a settlor, a trustee and a beneficiary are needed and that the settlor has to transfer the assets to the trustee. Moreover, the Convention points out the fiduciary relationship between the trustee and the beneficiary. The trust is settled by a unilateral act of the settlor and does not consist of a contract between settlor and trustee. The trust is not a legal entity but a *separate estate*. In this sense, the trust has no seat comparable to the one of a legal entity, but a *place of administration*.[31]

3.2 Parties involved

As already described, the trust consists of a triangle relationship. These are the settlor who creates the trust, the trustee who holds *legal title* and the beneficiaries who hold an *equitable title*. Nevertheless, in the case of a a self-declaration of trust, the relationship can be bilateral too.[32]

3.2.1 The Settlor

The settlor is the one who creates the trust determining its terms. It is important to note that the settlor, once the trust has been created, is not the one who enforces it, if this might once be necessary. It is then the beneficiaries only who are entitled to do so. The creation of a trust is in terms of *equity* a "disposition" of the trust property, i.e. the settlor disposes of his interest in the trust property in a way that it is no longer his.[33] The settlor transfers the assets to a trustee and that one has to administrate the assets according to the provisions, obligations and powers defined in the *trust deed*. To retain a certain

[30] See *Hudson*, Equity and Trusts (2015) 51.

[31] See *Gutzwiler*, Trustrecht N33; see also Article 7 par. 2 lit. a) HTC.

[32] See *Böckli*, Der angelsächsische Trust - Zivilrecht und Steuerrecht, GesKR (2007), 211; see also *Penner*, Law of Trusts (2016) 2.25.

[33] See *Penner*, Law 2.25.

influence on the administration, the settlor drafts a so-called *letter of wishes,* which is, however, not binding on the trustee. Therein, he also names the beneficiaries.[34] In Liechtenstein law, there is no definition of the settlor. The only provisions that describe the settlor are Art 897 PGR and Art 932a § 49 par. 1 PGR. In case of doubt, the person that actually transfers the assets to the trustee and/or assures such a transfer, is considered to be the settlor.[35] Interesting from a settlor's perspective is Art 917 PGR which finds its limits right after in Art 918 PGR. A settlor can reserve the right that certain actions of the trustee be subject to his explicit confirmation. Nevertheless, Art 918 PGR states clearly that the trustee cannot legally be bound to *continous instructions* from the settlor.[36] This topic has an important influence whenever having to analyse whether the trust has his *own mind and management* and is thus fully detached from the settlor, or not.

3.2.2 The Trustee

The trustee holds *legal title* of the trust property in his own name, administrates the assets according to the provisions of the trust deed and holds it in the interest and for the benefit of the beneficiaries.[37] The trustee is committed to loyalty, *bona fide* and to act to the benefit of the beneficiaries.[38] Trustee can be one or more natural persons or legal entities from inland or abroad. However, it is important to stress that at least one of the trustees must fulfill the requirements of Art 180a PGR.[39] The general legal position of a trustee is governed by Art 897 PGR under which persons are considered to be a trustee if certain assets are transferred to such persons in accordance with the trust deed on the condition that the

[34] See *Sorrosal*, in REPRAX 1/2002 48.

[35] See *Schurr*, Der Trust im Fürstentum Liechtenstein - Rechtsdogmatische und rechtsvergleichende Überlegungen, in *Altmeppen/Fitz/Honsell* (Hrsg.), Festschrift für Günter H. Roth zum 70. Geburtstag (2011) 766.

[36] See *Schurr*, Trust, in 3. Liechtensteinischer Stiftungsrechtstag (2010) 164.

[37] ; See *Sorrosal*, in REPRAX 1/2002, 49.

[38] See *Armitage v Nurse* (1998) Ch 241.

[39] Art 180a PGR states: at least one member of the administration of a legal entity authorized to manage and represent must be a Liechtenstein citizen domiciled in the Principality of Liechtenstein or the European Economic Area (EEA) and be in possession of the professional license to act as lawyer, legal agent, trustee or auditor, or a government-recognized business qualification. On the same footing are persons resident in Liechtenstein or in the EEA who possess a government-recognized certificate of qualification which corresponds to one of the requirements laid described above, whose fixed, main employment is with a lawyer, legal agent, trustee, auditor or a juridical person with license to act as trustee or auditor, or with a bank, and pursue their activity within the intendment, within the framework of this employment.

trustee administers and applies the trust property in his own name and for the benefit of one or more beneficiaries.[40]

3.2.3 The Beneficiaries

The beneficiary is the person for whom the trust property is held by the trustee. The beneficiary has *equitable interest* and benefits economically from the trust property. Moreover, he is entitled to enforce the trust provisions and has the right, in case of a *breach of trust*, to sue the trustee and under certain circumstances, third parties as well.[41] An important differentiation between English- and Liechtenstein trust law is the fact that English law follows the *beneficiary principle* when as Liechtenstein law commits to the *equitable principle* when it comes to beneficiary rights. The first one says that a trust has always to have beneficiaries[42] and that so-called purpose trusts, which do not have determinable beneficiaries, are not allowed under English law. The latter does not impose such limitations and as such, Liechtenstein trust law allows for purpose trusts having all imaginable purposes, of course within the limits of civil-, criminal- and tax laws only.[43]

3.2.4 Optional further parties

Within the trust deed, the settlor may specify futher participants. In fact, in practice, settlors do often name further organs such as *advisory bodies* for additional professional advice, *protectors* for supervision or inspection, *collators*[44] for determining beneficiaries (from a class of potential beneficiaries), *curators* representing the rights of incapable or minor beneficiaries or the like. Although there is no explicit provision in that regard in the PGR, additional organs are widespread in practice. As discussed above, the settlor *drops out of the picture* at the moment of the transfer of the assets to the trustee with no right to recover them (exception: if the trust is designed to be a revocable one). Again, the ones to enforce the trust are the beneficiaries only. In order to *keep an eye* on the trustee, the settlor might

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[40] See *Schurr*, A Comparative Introduction to the Trust in the Principality of Liechtenstein, in *Schurr (ed)*: Trusts in the Principality of Liechtenstein and Similar Jurisdictions. Aspects of Wealth Protection, Beneficiaries' Rights and International Law (2014) 31.

[41] See *Hudson*, Equity 57; see also *Hayton/Matthews/Mitchell*, Trusts 4 N 1.1 (6) and (8).

[42] See *Leahy v Attorney-General (NSW)* (1959) HCA 20; "a trust may be created for the benefit of persons as *cestuis que trustent* but not for a purpose or object unless the purpose or object be charitable."

[43] See *Biedermann*, Die Treuhänderschaft des liechtensteinischen Rechts, dargestellt an ihrem Vorbild, dem Trust des Common Law (1981) 38 et seqq.

[44] See Article 932a § 111 PGR (TrUG).

install a so-called *protector*. These individuals do monitor the trust, and by using this sort of powers conferred on them it is hoped that they can *protect* the trust, i.e. ensure that its administration by the trustees is to be expected standard and coincides with the settlor's original purposes for setting it up.[45]

3.3 The medieval roots of the Trust

3.3.1 Preliminary remarks

The trust is a typical English legal institute which has its roots in the 13th century and the back then prevailing social, legal and political frame conditions. Moreover, the trust is not a result of a structured legislative process but rather a component of *property law* which was developed over centuries based on specific cases. This is what makes trusts being a complex subject. Though, knowledge of the historic roots of the trust are indispensable to understand the trust itself but also the *equity*-concept.[46]

3.3.2 The Trust as a grown historical legal structure

There are several theories on the origins of the trust respectively his predecessor, the *use*. Back in the 13th century, the *use* was essentially a conveyance device for the holding of land to avoid financial liabilities and restrictions on the inheritance of property. Basically, this device was used to transfer land to people who would hold it for the use of the transferor for life and after its death for selected family members. This way, the transferor could ensure that the land was inherited by a member of his family rather than by an English lord. This concept was used as well where the tenant of a piece of land was fighting abroad, for example in the Crusades, so that the trustee could be appointed to manage the land on his behalf.[47] Another theory tells us of the fact that the franciscan monks at that time had to live in poverty for which reason they could not hold property, neither individually nor in community. This was the reason that the monks passed their *legal title* on the piece of land to a friend, the so-called *feoffe to uses* (Trustee), who then held the piece of land for the monks, the so-called *cestui que use* (Beneficiaries). That concept spread quickly on further parts of the population.[48] Important to note that the obligations of the Trustee back then were moral ones only since there was no specific

[45] See *Penner*, Law 2.26.

[46] See *Davies/Virgo*, Equity & Trusts. Text, Cases and Materials (2013) 3; see also *Penner*, Law 1.1.

[47] See *Davies/Virgo*, Equity 24.

[48] See *Maitland*, in: *Chaytor A.H./Whittaker W.J.* (Hrsg.), Equity. Also the Forms of Action at Common Law (1929) 30.

claim to enforce these obligations in front of the common-law-courts.[49] The *cestui que use* (Beneficiary) was though dependant on the honesty of the *feoffee to uses* (Trustee) and this led to abuse. In order to correct that, the *equity*-doctrine was developed. This one has its roots in the English judicature of the 13th century when there were only three courts: (1) the Court of King's Bench, (2) the Court of Common Pleas and (3) the Court of Exchequer. These courts however, did not hear any claim from any beneficiary against the trustee since they only applied common law and statute law. Equity as an own complex of rules was not yet borne at that time. The only way forward was a petition to the King who then solved the matter outside of common law. This authority of jurisprudence was then given to a Chancellor, at that time the most important Minister. This is how the Court of Chancery arose.[50]

The Chancellor could take a decision in matters which were not assigned to common-law-courts based on *equity*. The rules of equity were back then called *"the rules of equity and good conscience."* According to an ancient decision of the Court of Chancery, *equity* rules the conscience of a person who based on common-law would be authorized to act fraudulent.[51] According to the decision *Westdeutsche Landesbank Girozentral v. Islington London Borough Council,* the central principles of of the trust are summarized as follows: "Equity operates on the conscience of the legal owner of the legal interest. In case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust)."[52]

The modern equity-law today consists of substantive and procedural rules. Although, today the same courts deal with common-law and equity-law, both disciplines follow own rules with own particular claims and remedies.[53]

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[49] A claim could only be launched by a so-called *writ*. These writs were prepared by the common-law courts whereby there were only a limited number of writs available. Did a case not fit into a pre-existing writ, a claim was not possible. See *Atkins*, Equity and Trusts (2013) 6 et seqq.

[50] See *Penner*, Law 1.1 et seqq; see also *Maitland* in *Chaytor A.H./Whittaker W.J. (ed)* 27; see also *Atkins*, Equity 5 et seqq.

[51] See Lord Dudley and Ward, an infant, by the Honourable Thomas Newport v. The Lady Dowager Dudley, 24 E.R. 118 Court of Chancery (1705) Prec CH 241 et seqq, 244.

[52] See Westdeutsche Landesbank Girozentrale v. Islington LBC, (1996) 2 All ER 961, 988; see also *Hudson*, Equity 62.

[53] See *Hudson*, Equity 20 et seqq.

3.4 Legal and Equitable interest

3.4.1 The Legal title of the trustee

As discussed above, the common-law trust can only be understood by studying the dualism of England's legal system and the particular evaluation of the term *property*. The originally separate judicial judgement of rights and obligations of the trustee on one hand and the beneficiary on the other hand, explains the distinction between *legal* and *equitable interest*, respectively *beneficial interest*. Since the trustee is the legal owner of the trust fund and the beneficiary has an equitable interest at it, the literature as well as Swiss case-law speaks of "dual ownership" or "split ownership".[54]

The trustee has though the so called *legal title* on the trust fund and is as such legitimate and full owner.[55] MATTHEWS explains that as follows: "...the trustee is... the *owner* of the trust assets in the most complete sense possible."[56] "...there is no "double property, where the trustee is legal owner, and the beneficiary is the equitable owner."[57] The pretended incoherency of a simultaneous entitlement of beneficiary and trustee on the trust fund is solved by saying that the beneficiary is merely "owner" of the commitment of the trustee. AMES says: "A cestui que trust is frequently spoken of as an equitable owner of the land. This, though a convenient form of expression, is clearly inaccurate. The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing. What the *cestui que trust* really owns is the obligation of the trustee; for an obligation is as truly the subject-matter of property as any physical res."[58] The trustee is as such vis-à-vis the outside world full owner of the trust fund. He has the right to dispose, to liquidate as well as to charge the trust funds.[59] *Inter se*, the trustee's powers are limited by the terms of the trust deed and the rights of the beneficiaries. In this sense, the trustee has towards the outside world more powers as based on the internal powers conferred to him based on the terms of the trust deed.[60]

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[54] See *Bogert*, Trusts 2§17; see also BGE 96 II 79 E. 8 where the term "split-up" is used.

[55] See *Matthews*, The compatibility of the trust with the civil law notion of property, in: Smith, The Worlds of the Trust 322; *Underhill/Hayton*, Law relating to trusts and Trustees, 3 N 1.1 (3) et seqq; 8 N 1.2, 74 N 2.6.

[56] See *Matthews* in *Smith* 316.

[57] See *Matthews* in *Smith* 316; see also *Underhill/Hayton*, Law 57 N 1.95 (a).

[58] See *Ames*, Purchase for Value Without Notice, HARVARD LAW REVIEW (1887), 9.

[59] See *Underhill/Hayton*, Law N 1.2.

[60] Example: Should the trustee acquit personal liabilities by using the trust funds, the legal transaction towards the third party would remain valid, internally however, the trustee would be held liable for damages towards the beneficiaries; see *Matthews* in *Smith* 317; see also *Underhill/Hayton*, Law 647 et seqq.

3.4.2 The Equitable interest of the beneficiary

The beneficiary has an *equitable* respectively *beneficial interest* on the trust fund. The powers/interests of the beneficiary are *equitable* because they are acknowledged by the *equity*-doctrine. In view of analysing what covers an *equitable interest*, it is important to know the content of the interest itself as well as how and against whom such an interest can be enforced.[61] *Equity* permits basically the same arrangement of interests as under common law, such as *life interest* and *remainders*. Moreover, based on *equity*, further interests are acknowledged which do not exist under common law, such as namely *discretionary interests*.[62] In the event that the beneficiary has so-called *fixed interests*, he can enforce them towards the trustee. Based on his equitable interest, the beneficiary has beyond that various legal remedies for the case that the trustee does not adhere to the terms of the trust deed (so-called *breach of trust*). In the event of a breach of trust, the beneficiary can held the trustee personally liable. Besides of the personal claims towards the trustee, the beneficiary has at his disposal legal remedies against any acquirer in bad faith too.[63] The equitable interest though "sticks" on the trust fund acquired by someone in bad faith. The beneficiary has the possibility to trace the trust fund and to reclaim the assets to be repaid on behalf of the trust fund.[64]

3.5 Express Trust and Trusts by operation of law

A trust can be set up in many different ways. Types, categories and forms of trusts generally show a considerable variety. They can be set up intentionally by act of a party, being the case with express trusts[65], or they may arise by operation of law, as is the case with resulting trusts[66] and constructive trusts[67].[68] The latter two normally arise by *operation or implication of law* when circumstances happen to which the parties have not addressed their minds. These main categories can be found in Liechtenstein law as will be shown next.

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[61] See *Hudson*, Equity 64 et seqq.

[62] See *Smith*, Property Law, p 30; " Equity permitted the same rights as recongized at common law, so that one can have life interests and remainders, for example. Although most trusts would employ these conventional interests, equity was prepared to recognize some novel rights. One area which opens up considerable flexibility is that one of the discretionary trust or power."

[63] See *Hudson*, Equity 64 et seqq and 181 et seqq.

[64] See *Underhill/Hayton*, Law 77 N 2.12; see also *Smith*, Property 31 et seqq.

[65] Art 897 PGR

[66] Art 906 sec 4 PGR

[67] Art 898 PGR

[68] See *Penner*, Law 2.1.

3.5.1 Express Trust

The express trust is one that is set up intentionally. The term "express" refers to the fact, that in order to create a trust intentionally, the settlor must express his intentions, either orally or in writing, as in the case of a trust created by someone in his will. Basically, there are two ways in which a settlor can create a trust: by "self-declaration" or by transfer of the intended trust assets to another person to hold on trust. The first way refers to the situation where the settlor makes himself the trustee and the latter to the classical triangle relationship.[69] Moreover, a valid express trust requires *certainty of intention*, *certainty of subject* matter and the *certainty of objects* ("the three certainties").[70] With regard to the set up of a Liechtenstein Trust ("Treuhänderschaft") it is important to distinguish between the disposition agreement and the executory agreement. The first one can take place in three different ways whereby the set up can happen *inter vivos* or by reason of death: 1) by agreement between the settlor and the trustee according to Art 899 par. 1 PGR; 2) by unilateral act of law of the settlor according to Art 899 par. 2 PGR whereby the trustee has to accept in writing; 3) by disposition of will according to Art 899 par. 2 PGR. It is important to note, that all three alternatives require, in contrast to English law, the written form according to Art 899 par. 1 and Art 899 par. 2 PGR. The written form is mandatory for both parties of the agreement, the settlor as well as the trustee.

On the other hand, the executory agreement consists of the contribution of the trust assets to the trustee, respectively for the case that the settlor becomes the trustee himself, the declaration in writing of the trustee to hold assets under trust. In the case of the disposition by will, the disposition - and executory agreement, fall into the same legal act.[71]

3.5.2 Constructive Trust

The distinctive feature of a constructive Trust comparing it to the express trust as discussed above is the fact that it arises by *operation of law*, without regard to the intentions of the parties.[72] It is important to note, that most constructive trusts are triggered by the defendant's unconscionable conduct. Thereby, the unconscionability can be interpreted either in a narrow and subjective sense, with reference to the conscience of the particular defendant, or a wider objective sense, with reference to the

[69] See *Penner*, Law 2.2.

[70] See *Davies/Virgo*, Equity 65.

[71] See *Plachel*, Trusts im Liechteinsteinischen Recht (2009) 16.

[72] See *Air Jamaica v Charlton* (1999) 1 WLR 1399, 1412 (Lord Millett).

conscience of a reasonable observer.[73] In this context, it is worthwile to note the remarks of *Lord Browne-Wilkinson* in the judgement *Westdeutsche Landesbank v Islington LBC*: "Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).[74] In this context, *PENNER* identifies three broad categories of constructive trusts: 1) those in which the law anticipates the result of legal title passing at law, with the result that the legal owner is regarded as holding his title on trust for the transferee until the transfer of the legal title is effective; 2) the "trust" under which a *non-bona fide* third-party recipient of property transferred in breach of trust holds the title to the property he receives; and 3) those in which individuals acquire for the first time an interest in another's property because of their past dealings or relationships with the legal owner.[75] It is important to stress, that the constructive trust has been adopted into Liechtenstein law.[76] The adoption is also supported by *SCHURR*.[77]

3.5.3 Resulting Trust

Resulting trusts do operate in the space between express trusts and constructive trusts. In this context, the room for resulting trusts might be squeezed by both, finding an express intention of the settlor to create the trust (would lead to an express trust), or by a greater willingness to impose a constructive trust. They are as such a limited category of trusts that do arise on certain facts where neither an express trust nor a constructive trust exists. There are two categories of resulting trusts being that "presumed" resulting trusts and "automatic" resulting trusts. The first one is given where a person voluntarily transfers property for no consideration in return, or contributes to the purchase of property in the name of another. The second ones arise where an express trust fails initially or subsequently. The property is then held by the trustee for the settlor.[78] The resulting trust has been introduced from English law into Liechtenstein law in its Art 932a § 105.1 PGR. According to that article, it is possible to replace an erroneous and/or incomplete instruction (Begünstigungsregelung).[79]

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[73] See *Davies/Virgo*, Equity 318.

[74] See *Westdeutsche Landesbank v Islington LBC* (1996) AC 669.

[75] See *Penner*, Law 4.4.

[76] See *Wenaweser*, Zur Rezeptionsfrage der Treuhänderschaft und ihrem Anwendungsbereich nach liechtensteinischem Recht, LJZ (2001), 12.

[77] See *Schurr*, Trust, in 3. Liechtensteinischer Stiftungsrechtstag (2010) 143.

[78] See *Davies/Virgo*, Equity 353.

[79] See *Schurr*, Trust, in 3. Liechtensteinischer Stiftungsrechtstag (2010) 143.

3.6 Types of Trusts

3.6.1 Discretionary Trust and fixed Trust

Under the terms of a *fixed trust*, the name does imply it, the beneficial interests of the beneficiaries are fixed, which means that the share of the trust property that they will receive is defined by the terms of the trust. In this context, *fixed* does not mean that the monetary value of the distribution will be fixed for all time. The amount of the distribution benefitting the beneficiaries can vary since the terms of the trust can foresee for instance an annual income distribution which will then obviously depend on the economic success of the trust property. Therefore, *fixed* means "not discretionary" and nothing else.[80]

Conversely, the terms of a *discretionary trust* do give the trustee, or someone else, a dispositive discretion. Under these terms, such discretion will allow the trustees to choose any share at all, even a "zero share" being possible, so that they might decide to give one beneficiary all capital or income, leaving the others with nothing. The main reason behind that, i.e. giving the trustees such a high level of independency in their decisions, is that of flexibility. This will allow the trustees to immediately react to changing circumstances. Should for instance one descendant raise a family with his wife and four children, while the other decides to forego education, refuse employment, behave lavish and just try to live off whatever income he could prise out of the trustees, it might be advisable for the trustees to cut him off for a time. Under a discretionary trust, no beneficiary of the class of beneficiaries has any individual "equitable title" in the trust property until the trustee actually exercises his discretion and declares that such and such share or amount will go to a specific individual. The possible beneficiaries do have a hope or expectancy for distribution only, whereas under the fixed trust they enjoy an enforceable right to their share. However, the trustee having full discretion does not mean that he can do anything he wants. He still is under the obligation to carefully carry out the terms of the trust, and therefore, exercise his discretion *within* the terms of the trust and hence distribute the trust property.[81]

The position of beneficiaries does change in a remarkable way depending on whether there is a fixed interest trust or a discretionary trust under analysis. Moreover, with regard to beneficiary rights in Liechtentein it is important to stress that Liechtenstein has a locational advantage for settlors from abroad in the sense that the *Saunders v Vautier*[82] rule, allowing beneficiaries, who are all *sui juris* and

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[80] See *Penner*, Law 3.4.

[81] See *Penner*, Law 3.5 et seqq.

[82] See *Saunders v Vautier* (1841) Cr & Ph 240; see also *Re Smith* (1928) Ch 915 where it has been held that the rule in *Saunders v Vautier* applies to discretionary trusts as well as to fixed trusts; see also that the rule has been repeatedly affirmed in

absolutely entitled to the trust property, to dissolve a trust against the wishes of the settlor or against the will of a trustee, does not apply. This might of course also be interpreted the other way around arguing that the position of the beneficiaries is weak in Liechtentein, at least compared to other jurisdictions.[83]

3.6.2 Private Trust and Public (or Charitable) Trust

Express trusts as discussed above, can be further classified into private trusts and public trusts.[84] *Private trusts* or personal trusts are trusts created for the benefit of one or more ascertainable beneficiaries, and not for the promotion of the welfare of the general public or for the advancement of a cause.[85] On the other hand, *charitable trusts* are created for charitable purposes benefitting the public. Thereby, charitable trusts are not subject to the requirement of certainty of objects, or at least not in the same sense as private trusts are. For instance, a testamentary trust for "charitable objects" without further specification is a valid trust. In that case, the court (or the Charity Commisioners) would specify those objects to which the trust funds should be devoted.[86]

3.6.3 Revocable Trust and Irrevocable Trust

A trust can be set up as a revocable- or irrevocable one. In the case of a revocable trust, the settlor can anytime revoke the trust and hence resume his property right on the trust property. In the case of an irrevocable trust, the settlor resigns to that right at the moment of creation. In this context and from a terminological point of view as well, it is important to distinguish the *revocation* from the *termination* of trust. The first one refers to the revocation as stated above, the second refers to the termination of a trust by a third party or by a court with the consequence that the trust property is distributed either to the settlor, the beneficiaries or to third parties. Despite of differing judgements[87], the predominant no-

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common law jurisdictions by means of the following judgements: *Re Chardon* (1928) Ch 464; *Re Smith* (1928) Ch 915; *Re Nelson* (1928) Ch 920n; *Re Becket's Settlement* (1940) Ch 479; *Re AEG Unit Trust* (1957) Ch 415.

[83] See *Schurr* in *Schurr* 27.

[84] See *Biedermann*, Treuhänderschaft 43 et seqq.

[85] See http://www.businessdictionary.com/definition/private-trust.html accessed on March 19, 2018.

[86] See *Penner*, Law 13.3 et seqq; see also *Shergill v Khaira* (2014), where a settlor creates a trust in general or vague terms, the trustees have the power and the obligation to execute a trust deed which gives practical contours to how the trust funds are to be spent, so long as it does not conflict with the broad purpose the settlor intended.

[87] See for instance dismissive judgement *Jones v Clifton*, 101 U.S. 225 (1879).

tion is that such a right to revoke can be used to satisfy claims of creditors.[88] This however, that is to be said, clashes with the understanding of a classic asset protection trust where the trust property is shielded from creditor claims. This is why asset protection trusts are always structured to be irrevocable whereby the settlor completely resigns from his right to ever revoke the trust.[89]

3.6.4 Asset Protection Trust

An asset protection trust is merely a "shape" of a normal and classic common law trust. In general terms it is understood that it is a legal construct where assets are efficiently protected from claims of creditors. The assets are not thought to be put at disposal of creditors in the event of a judicial execution and/or foreclosure proceedings. In this context, a debtor can declare himself bankrupt without completely loosing his financial independence. It is the idea that the trust property can be economically disposed of without giving the creditors a legal position to attack the assets. Even if creditors would raise the idea of executing into the trust property directly, the dimension of complexity of such trusts as well as the enormous legal efforts and costs attached to such proceedings, would discourage the creditors. The logical consequence of that situation would then be for the creditor to try to negotiate an out of court agreement, however with a poor legal position.[90]

3.6.5 Dynasty Trust

Like the asset protection trust, the dynasty trust is merely a "shape" of a normal and classic common law trust. It is a long-term trust created to pass wealth from generation to generation and at the end, from a tax point of view, to avoid transfer taxes such as the gift tax, estate tax and generation-skipping transfer tax as long as the assets remain in the trust. Such a trust is usually designed to be irrevocable and discretionary in order to best protect the family assets throughout various generations from creditors, lavish family members, divorces and further risks alike.[91]

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[88] See *State Bank and Trust Company v Reiser*, 7 Mass.App.Ct. 633, (1979); *Johnson v Commercial Bank*, 588 P.2d 1096; *In re Kovalyshyn's estate*, 343 A.2d 852 (1975).

[89] See *Hermann*, Asset Protection Trusts (2012) 52 et seqq.

[90] See *Hermann*, Asset Protection 40 et seqq.

[91] See https://www. investopedia.com/terms/d/dynasty-trust.asp#ixzz5ACzfwdG5 accessed on March 19, 2018.

4 Trusts in Latin America

4.1 Adoption of Trust Statutes in Latin American Countries

Most legal systems of Latin American countries were based on European continental civil law and in particular on the French Napoleonic Code. The Code Napoleon of 1804 highly influenced the Roman law of Western European countries and these ones, in particular Spain and Portugal, brought it to Central and South America. However, it is important to note, that the Latin American Trust as such does not derive from such body of thoughts. According to MALUMIAN as well as RODRIGUEZ AZUERO, the concept of the Latin American Trust (called *fideicomiso* or *fiducia*) was not founded on Roman law antecedents but on the adaption of the US trust.[92]

Going back to the first and very important antecedents in the development of trusts in Latin America, the work of Mexican jurist PABLO MACEDO as well as RICARDO J. ALFARO, Panamanian jurist, has to be stressed. The first one drafted what would become the first operative trust legislation in Mexico, which influenced beyond any doubt all trust legislations in Latin America, the latter being the author of a classic and very renowned book[93] on trusts and the Law No. 9 of 1925. This Panamanian bill considered the trust "an irrevocable mandate by virtue of which certain assets are transmitted to a person, called the trustee, for him to dispose of them in accordance to the settlor's mandate, for the benefit of a third party, called the beneficiary."[94] The Panamanian jurist clearly influenced the first, in that respect relevant Mexican piece of legislation, the *Ley General de Instituciones de Crédito y Establecimientos Bancarios* (Credit and Banking Establishments General Law) of November 24, 1924. Subsequently, on June 30, 1926, the *Ley de Bancos de Fideicomiso* (Trust Banks Law) was passed which said in its article 6 that the "trust is an irrevocable mandate by virtue of which certain assets are delivered to the bank in its capacity of trustee for it to dispose of them, or its proceeds, according to the will of the one doing that delivery, called settlor, in the benefit of a third party, called beneficiary." That law created in fact the Mexican "trust banks". Subsequently, the *Ley General de Instituciones de Crédito y Establecimientos Bancarios* (Credit Institutions and Banking Establishments General Law) was passed upholding ALFARO'S thoughts of an irrevocable trust. Nevertheless, on June 28, 1932, a new *Ley de*

[92] See *Malumian*, Trusts in Latin America 16; see also *Rodriguez Azuero*, Negocios Fiduciarios (2017) 16.

[93] The book is entitled: "El Fideicomiso: Estudio Sobre la Necesidad y Conveniencia de Introducir en La Legislacion de los Pueblos Latinos Una Institucion Nueva, Semejante al Trust del Derecho Inglés. The title of the book could be translated as follows: TRUST: STUDY ON THE NEED AND CONVENIENCE OF INTRODUCING A NEW LEGAL STRUCTURE IN LATIN AMERICAN LAWS SIMILAR TO THE TRUST IN ENGLISH LAW (Imprenta Nacional, Panama, 1920).

[94] Section 1 of Law No. 9 of 1925 of Trust Institution, published in official gazette Nr. 4567 of January 29, 1925.

Instituciones de Crédito (Credit Intitutions General Law) was passed, shortly followed by the *Ley General de Titulos y Operaciones de Crédito* (Securities and Credit Transactions General Law) on August 26, 1932. Both laws, complementary to each other since one regulated the trustee and the other the trust itself, however, broke away from the *Alfaro law* and the concept of a trust as an irrevocable mandate. This is where the classic Anglo-Saxon idea of a trust as an irrevocable mandate clashed with Roman law. Nevertheless, Latin American countries recognized by then the benefits of the use of the trust for the domestic economy and trust legislation moved from north to south in the following order: Panama (1925),[95] Colombia (1941),[96] Ecuador (1948),[97] Honduras (1950)[98], Venezuela (1956)[99], Costa Rica (1961),[100] Brazil (1965), Guatemala and El Salvador (1970)[101], Bolivia (1977)[102], Argentina (1995), Peru and Paraguay (1996), and Uruguay (2003).[103]

It remains to say that the harmonization and uniformity of a *Ley de Fideicomiso y de Trusts* for all Latin American countries was first discussed at the II Interamerican Conference of Attorneys, celebrated from 6th to 13th August 1943 in Rio de Janeiro (Brazil). It has been since then the goal of the participants to harmonize the different trust laws in Latin America, however, up to today, without success.[104]

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[95] See Law No. 9 of January 6, 1925, as amended by Law No. 17 of February 20, 1941 (*fideicomiso*).

[96] In Colombia, the "fiduciary relationship" was originally established by the *Ley de Establecimientos Bancarios* n° 45, dated 16th July 1923, as evolution of the "fidcuciary ownership" foreseen in its Colombian Civil Code art. 793 to 822. The matter was subsequently consolidated in its Commercial Code art. 1233 to 1242 enacted on 27th March 1971.

[97] See Codification of the General Law of Banks of March 17, 1948 (*mandato*).

[98] See Commercial Code of Honduras of 1950, art. 1033 et seqq.

[99] See Law of Banks of January 24, 1940, as amended by Law of July 22, 1941, and Law of August 25, 1943. These laws have been superseded by Law of *Fideicomisos* of July 23, 1956 (*fideicomiso*).

[100] See Commercial Code of Costa Rica of 1964, art. 633 et seqq.

[101] See Commercial Code of El Salvador , art. 1233 et seqq as well as the *Ley de Fideicomiso* dated 13th November 1937, subsequently ruled in the *Ley de Instituciones de Crédito y Organismos Auxiliares* (LICOA) on 17th September 1970.

[102] See General Law of Banks No. 608 of July 11, 1928, as amended by Supreme Decree of August 20, 1928, Law of January 26, 1929, Regulatory Decree of October 24, 1929, Supreme Decree of June 30, 1942, Law of December 9, 1941, Law of July 18,1944. Decree-Law of July 19, 1944, Supreme Decree No. 255 of January 30, 1945, and Decree of May 10, 1955 (*fideicomiso*).

[103] See *Malumian*, Trusts 19.

[104] See *Foerster*, O "Trust" do direito Anglo-Americano e os negocios fiduciarios no Brasil (2012) 672.

4.2 The Nature of the Latin American Trust

With regard to the nature of the Latin American trust it is to say, that the main barrier to succeed, were the difficulties of transferring to a civil-law concept an Anglo-Saxon concept based on a law system in which two parallel classes of property coexisted. Additionally, the predominant principle of *numerus clausus* enabled the possibility to create new rights which were not codified by law. Hence, with no specific piece of legislation in place, trust property could not be created by agreement of the parties. To overcome that resistance, the theory of a *special-purpose patrimony* was created by the most influential Latin American scholars of that time which clearly separated the trust property from the trustee's own property. The trust though, not only implied the unfolding of the property, but also created a special-purpose patrimony[105].[106]

Amongst several theories, the one described above bests fits into the trust regulations enacted today in Latin America and is the most cited by scholars. The theory said that the special-purpose patrimony was the total mass of existing and potential rights that belonged to a person (the trustee) and tended to a specific purpose in benefit of a third person (the beneficiary). It is important to note that this was not the *ordinary* patrimony of the trustee but a *trust patrimony* separated from the trustee's own estate and with an own objective and purpose. The trust patrimony though differed from the trustee's estate. It was under a specific mandate and had to be used for a specific purpose. In this context, it was important that for this patrimony to be *separated patrimony*, an act is passed to establish such patrimony as the object of a particular treatment. Most of the Latin American jurisdictions do follow this theory and have special trust acts passed by their parliaments in place. It should be noted that since the patrimony is separated from the trustee's patrimony, any liability that arises in relation to one patrimony does not affect the other. In other words, as the trust property is separated, it cannot be executed by the trustee's or grantor's creditors. Under Latin American law, the term "trust" though refers to the following: a) a contract or a will (trust instrument by which property interests are vested in the trustee); b) a special-purpose patrimony (both, affected to the execution of a special purpose and having the trustee as the owner; c) the trust property (an *in rem* right).[107]

[105] In Spanish, *patrimonio de afectación.*

[106] See *Malumian*, Trusts 19 et seqq.

[107] See *Malumian*, Trusts 21 et seqq.

4.3 Comparison of Anglo-Saxon and Latin American Trusts

In order to compare both trusts it is important to know that one originates out of common law while the other grounds on a civil law tradition. The roots of common law date back to A.D. 1066 when the Normans defeated the defending natives at Hastings and conquered England, while civil law, being the oldest and most widely spread system of law, dates back to 450 B.C., the supposed date of publication of the XII Tables in Rome. Common law judges always had the role of being "law-makers" while the role of civil law judges was more the one of a "law-finder".[108] All this lead to the fact that civil law today does recognize statutes, regulations and custom as sources of law only. In addition, they are considered to be exclusive. There is also a descending order of authority ordering that a statute prevails over a contrary regulation and both, statute and regulation, prevail over an inconsistent custom.[109] This very much differs from the common law tradition where even though they do have codes[110], however, they are usually merely reenactements of judicially established rules. In this context, we have to take note of the fact that in the American legal system, judges remain the most powerful component. Having exposed that, it is not to be expected that trusts are created and/or substantially ruled by court decisions in civil-law countries in the absence of express statutory trust regulations.[111] Summarizing, and with respect to the main differences between Latin American and U.S. trusts originating out of common law, the following can be noted:

a) While in the United States most scholars and practitioners do consider trusts as an institution in the field of gratuitous transfers, trusts in Latin America are mainly represented by business[112] and guarantee trusts. Common law trusts are a mean of transferring wealth within the family and are as such understood as vehicles for organizing intergenerational wealth transmission when the transferor has substantial assets or complex family affairs. In Latin America, trusts as such are widely used for business structuring purposes.[113]

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[108] See *Merryman*, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America (1985) 3, 4.

[109] See *Merryman*, Civil Law Tradition (1985) 15, 23.

[110] such as for example the *Penal Code*, the *Internal Revenue Code*, *Codes of Criminal and Civil Procedures*, *Uniform Commercial Code*, etc.

[111] A good example of the importance of Codes in Latin Americ was the huge effort made by Brazil to enact its new unified Civil and Commecial Code, which did replace the previous one of 1916. The new Brazilian Civil Code (Act No. 10.406 of January 10, 2012) entered into force on January 11, 2003, and was drafted by a commission headed by the prestigious Brazilian jurist *Miguel Reale*.

[112] Schemes such as the Massachusetts Trusts.

[113] See *Langbein*, The Secret Life of Trust: The Trust as an Instrument of Commerce, Yale L.J. (1997-1998), 166.

b) Contrary to the separation of common law and equity, continental law never had such a separation. As a consequence, it is not possible to consider the Latin American trust as a relationship under which a beneficiary has a right in "equity". Moreover, under civil law, a *just in rem right* can only be created by law. Though, in the absence of a statute that provides the existence of trust property, such concept cannot be established by agreement in between the parties.[114]

c) Latin American countries, according to their statutes passed, do know the *express trust* only. In most of the countries, this one has to be established by mean of a written agreement. The implied trust as well as trusts created by instrument of law in general, remain fully unknown.[115]

d) The Uniform Trust Code provides the possibility to create a trust in favor of an animal (*in re* Trust for Care of Animal 408). Most Latin American countries would deny the validity of such a trust. Moreover, the Uniform Trust Code rules in its article 602(a) that "unless the terms of a trust expressly provides that the trust is irrevocable, the settlor may revoke and amend the trust." On the other hand, Latin American law provides that for *inter vivos* trusts, the rule is that they are irrevocable unless the settlor expressly reserves the right to revoke the trust. In other words, the rule with regard to the assumption of the revocability of the trust is exactly the opposite.[116]

e) In Latin America, in fact only banks or special purpose companies can be trustees, whereas in the United States the rule says that any person can be the trustee. Moreover, US law permits the creation of a trust by unilateral act. Put in other words, US law permits the settlor to be the trustee himself. In most of the Latin American countries, with some exceptions for securitization companies which are in some countries[117] allowed to create trusts being the settlor the trustee at the same time, the general rule is that the settlor cannot be the trustee at the same time.[118]

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[114] See *Malumian*, Trusts 25.

[115] This can be compared to par. 407 of the Uniform Trust Code, which provides that "except as required by a statute other than this (Code), a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence."

[116] See *Malumian*, Trusts 25.

[117] This is the case in Bolivia, Brazil, Chile and Peru. In the case of Argentina, although it used to be permitted under certain conditions by the CNV rules (the Argentine equivalent to the SEC rules), these rules were changed, and today there cannot be a settlor that acts as trustee.

[118] See *Malumian*, Trusts 26.

f) The concept of the protector is not foreseen in Latin American legislations. In Mexican law, there exists the figure of a "technical committee", whose functions are defined by the grantor. It has a similar role as the one of a protector and is expressly ruled by the law. In all other Latin American countries the law does not stipulate specific provisions to that end. As a result, the general rule says that the figure of a protector, although not expressly ruled in law, can be established by agreement of the parties. There are no obstacles by law to do that.[119]

g) Finally, Latin American countries do understand that the agreements that created a trust are contracts. This point of view very much differs from the understanding in common law countries. In this context, there is a debate as to the nature of the trust agreement and whereby LANGBEIN[120] noted that US "black letter law[121] has resisted the insight that trusts are contracts."[122]

4.4 The Hague Trust Convention and the Latin American Trust

When analyzing the recognition of foreign trusts by Latin American jurisdictions, it is of outmost importance to have an in depth view of *The Convention of July 1, 1985, on the Law Applicable to Trusts and on their Recognition* entered into force on January 1, 1992, drafted by the Hague Conference on Private International Law.[123] Notwithstanding the fact that Argentina, Brazil, Chile, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela are members of the Hague Conference on Private International Law, none of them, nor any other Latin American country, ever ratified the Convention. It is more, the involvement and influence of representatives of Latin American countries at the moment of drafting the Convention revealed their interest and the importance for their home countries of the subject matter. As can be read in the *Explanatory Report on the 1985 Hague Trusts Convention*[124], experts from Argentina and Venezuela participated in the special commission that adopted the pre-

[119] See *Malumian*, Trusts 26.

[120] See *Langbein*, The Contractarian Basis of the Law of Trusts 660.

[121] In common law legal systems, black letter laws are the well-established legal rules that are no longer subject to reasonable dispute. Black-letter law can be contrasted with legal theory or unsettled legal issues.

[122] See *Malumian*, Trusts 26.

[123] The full text of the convention, a list of the countries that have ratified it as well as a full list of the members of the Hague Conference on Private International Law can be found at the website of the Hague Conference on Private International Law, *available at* http://www.hcch.net. The Hague Conference on Private International Law is an intergovernmental organization, whose purpose is "to work for the progressive unification of the rules of private international law" (article 1 of the Statute of the Hague Conference). The method applied is the drafting of mulilateral treaties called "Hague Conventions".

[124] See *von Overbeck*, Explanatory Report on the 1985 Hague Trusts Convention, in 2 The Proceedings of the fifteenth Session (1984): Trusts - Aplicable Law and Recognition (1985) 371.

liminary draft of the Convention. The government of Argentina even made comments on the draft. In addition, Argentina, Uruguay and Venezuela sent representatives and Panama sent an observer to the fiftheenth session of the Hague Conference in which the convention draft was discussed. An Argentine representative was even part of the subcommittee in charge of the final clauses.[125]

Given the fact that Latin American countries have not ratified the Convention to date, although having participated intensely as stated above, could let one think that foreign trusts would not be recognized by such countries. This, however, is the wrong conclusion. According to MALUMIAN, because of the existence of domestic trust regulations in Latin America, foreign trusts would very much be recognized as an existing and valid legal scheme. He is of the opinion that Latin American judges would recognize trusts and therefore, all consequences of such recognition, would follow.[126] Article 11 of the Convention states "that a trust created in accordance with the law specified...shall be recognised as a trust. Such recognition shall imply, as a minimum, that the trust property consitutes 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." As such, the recognition shall imply, in particular, that a) personal creditors of the trustee shall have no recourse against the trust assets; b) the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy; c) the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death; d) the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets.[127]

Nevertheless, bearing in mind the rigid inheritance and matrimonial asset protection rules in Latin American countries, most of them considered to be public policy of the country and not derogable by a voluntary act, may obstruct the recognition of article 11 lit. c saying that "the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death." Indeed, this situation is reflected in article 15 of the Convention which says that "the Convention does not prevent the application of provisions of the law designated by the conflict rules of the forum, in so far as those provisions cannot be derogated by voluntary act, relating in particular to the following matters: a) the protection of minors and incapable parties; b) the personal and proprietary effects of marriage; c) succession rights, testate and intestate, especially the indefeasable shares of spouses and relatives; d) the transfer of title to property and security interests in property; e) the pro-

[125] See *Malumian*, Trusts 27 et seqq.

[126] See *Malumian*, Trusts 28 et seqq.

[127] See Article 11 of *The Convention of July 1, 1985, on the Law Applicable to Trusts and on their Recognition* entered into force on January 1, 1992, drafted by the Hague Conference on Private International Law.

tection of creditors in matters of insolvency; f) the protection, in other respects, of third parties acting in good faith."[128] Nevertheless, if the recognition of a trust is prevented by the application of the above, the court shall try to give effect to the objects of the trust by other means.[129] Finally, article 18 foresees that "the provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (ordre public)."[130]

4.5 Weakness of The Hague Trust Convention

Notwithstanding the remarks made above, the Convention is criticized as well. When it comes to the recognition of trusts, important limits have to be mentioned. For instance, the Convention is only applicable to "trusts created voluntarily and evidenced in writing."[131] It is understood, that the provision intends to limit the application of the Convention to clear and unambigous trust relationships and to release judges in civil law countries from the complicated task to deal with constructive trusts or trusts established by a court order.[132] As a consequence, when an Anglo-American constructive trust seeks recognition in Latin America, the judge will most probably not recognize it based on the principle, that recognition is a matter of domestic legislation. However, in the case of a foreign judge establishing a trust, the matter at hand will be a question of enforcing a foreign judgement. The effects of trusts in civil law jurisdictions will though always be left to Latin American judges to be decided. The recognition of a trust, whatever its origins and forms are, will though always be an issue within the exclusive jurisdiction of a civil law judge, who will recognize the trust as long as it conforms to its local civil law rules.[133]

From another point of view, it is to mention that purpose trusts are accepted by the Convention whereas this conflicts with most civil law jurisdictions which accept them only very restrictively. An-

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[128] See Article 15 lit. a-f of *The Convention of July 1, 1985, on the Law Applicable to Trusts and on their Recognition* entered into force on January 1, 1992, drafted by the Hague Conference on Private International Law.

[129] See Article 15 par. 2 of *The Convention of July 1, 1985, on the Law Applicable to Trusts and on their Recognition* entered into force on January 1, 1992, drafted by the Hague Conference on Private International Law.

[130] See Article 18 of The Convention of July 1, 1985, on the Law Applicable to Trusts and on their Recognition entered into force on January 1, 1992, drafted by the Hague Conference on Private International Law.

[131] See The Hague Convention on the Law Applicable to Trusts and Their Recognition 378, art. 3.

[132] See *Kötz*, The Hague Convention on the Law Applicable to Trusts and Their Recognition, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 40 (David Hayton ed., 1999); see also *Schoenblum*, The Hague Convention on Trusts: Much Ado About Very Little, INTERNATIONAL TRUST & CORPORATE PLANNING (1994), 5-22.

[133] See *Figueroa*, Civil law trusts in Latin America: Is the lack of trusts an impediment for expanding business opportunities in Latin America?, ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (2007), 758.

other clash is identified with regard to the double capacity under common law of an individual to serve as grantor and trustee at the same time since the Convention explicitly forbids that construction. This of course highly contrasts with Anglo-American law, which allows the grantor to appoint himself simultaneously as trustee and beneficiary. In addition, the Convention foresees a "lasting" relationship between grantor and trustee, which is exactly the opposite thinking of the English-model trust, where such relationship in fact disappears at the moment of creation of the trust.[134]

As a result and in spite of its good intentions to effectively address the apparent need for mutual recognition of Anglo-American trusts and civil law *fideicomisos*, the Convention unfortunately affords extremely limited solutions.

4.6 Compared Tax Treatment of Trusts in Latin America

Latin American countries have a considerable diversity of political systems and solutions regarding the taxation of trusts. It is therefore impossible to find tax rules which are applicable to all countries at the same time. Nevertheless, some general principles can be drawn.[135]

The first important point to note is that there are centralized as well as federal countries. This means that countries belonging to the first group do tax on two levels, i.e. on the municipal and on the federal or national level. Countries belonging to the second group, such as Argentina and Brasil, exhibit three levels of taxation: the national or federal, the state or provincial and the municipal. Due to that intermediate layer of taxation, a greater impact as well as fiscal complexity is to be expected. In addition, it makes it necessary to analyse where exactly the assets of the trust lie, i.e. in the Federal District (Brasilia) or in one of Brazil's 26 states. Tax rates do vary significantly from state to state.[136]

As a second point, the taxation system itself would have to be analysed. Most countries do tax worldwide source income, while others (Costa Rica, Panama and Uruguay) only tax national source income. Though, if a trust is located in a country which taxes worldwide source income, it must pay taxes on its profits in that jurisdiction as well as on the profits generated by the trust assets lying in foreign

[134] See *Figueroa*, ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (2007), 759.

[135] See *Malumian*, Trusts 43 et seqq.

[136] See *Malumian*, Trusts 43 et seqq.

countries. The only exception to that principle are with the three countries named above, in which trusts are only taxed on the profits obtained within the country itself.[137]

4.7 Main obstacles to the recognition of Trusts

When it comes to the main obstacles of recognition of a trust, the lack of freedom of testation and the impact of matrimonial property regimes have to be named first. In addition, the protection of creditors, the uncertain registration of trusts as direct land owners as well as fictitious arrangements (sham), can limit the recogntion as well, as will be shown next.

The vast majority of Latin American civil law countries, with the exception of Mexico, limit the testator's right to dispose of his estate with complete freedom. Instead, the testator is forced to give a specified minimum portion of it to near relatives. That portion is called the "reserved portion" and must be passed upon the testator's death to his or her descendants in equal shares regardless of his wishes. What is important when setting up a trust during an individual's lifetime is, that gifts into a trust might be subject to *clawback* whenever the gift violates the reserved portion. In this case, the protected heirs will initiate clawback injunctions in order to make up the deficit. This leads to the conclusion, that due to the possibility of clawback, gratuitous transfers as well the property rights arising out of such transactions, remain uncertain until the settlor's death. When succession is governed by civil law, forced heirship can generally not be avoided (unless there is an exception like in the case of Mexico). When succession is governed by common law, then the issue of whether forced heirship is a rule of domestic public policy or international public policy, matters. Both, Argentina and Brazil do rule forced heirship in their respective civil law and qualify the concept of forced heirship as a domestic public policy. The latter applies in a situation of conflict of laws where for instance, an Argentinean or Brazilian court, has to apply foreign law providing freedom of testation.[138]

Most civil law countries do apply the system of common matrimonial property. Under this concept, all property acquired during a marriage is deemed to be one-half owned by each spouse. In this context, it is important to note that a transfer of community assets by a spouse into a trust is obviously null and void without the consent of the other spouse. In general terms and in most of the countries, community

[137] See *Malumian*, Trusts 43 et seqq.

[138] See *Tirard*, Introduction, THE GLOBAL GUIDE TO TRUSTS (2017), XV et seqq.

property also includes any income generated during the marriage, irrespective whether the origin of such income are common or personal properties.[139]

Another limitation of the recognition of trusts is the protection of creditors. As a genral rule, a transfer into a trust cannot be fraudulent or intentionally designed to defeat creditors. The transfer would be vulnerable and be legally attacked by creditors before being declared null and void.[140]

Then, it has to be noted that although a trust can hold any type of property if fully recognised, as for instance amongst the signatories of the Convention of 1 July 1985 on the Law Applicable to Trusts and their Recognition, the direct registration of land in the name of a trust can cause difficulties. Eventhough it should be theoretically possible, some local offices deny the registration due to their lack of familiarity with trusts. In practice, should this come up, the land has to be registered in the name of a domestic corporation, whose shares then are held directly by the trust.[141]

Finally and for the sake of completeness, the abuse of rights is never defended. In a large number of jurisdictions, the courts have the power to disregard legal arrangements when they are fictitous (sham) and/or when they are only intended and designed to avoid the application of compulsory rules.[142]

5 Foreign trust recognition by Argentinean courts & authorities

5.1 Legal considerations on foreign trusts

As stated at the beginning, Argentineans have a high interest protecting their wealth and their right of ownership in general. Learnings from the past lead to the conclusion, that Argentina faces an economical and political crisis every ten years. Whenever that arises, Argentineans' right of ownership is considerable at risk. The citizens then usually face a devaluation of currency, asymetric pesification and foreign exchange restrictions, to name just a few very serious threats to wealth. Combined with the fact that according to the OECD, Argentina has the highest tax burden in Latin America, citizens

[139] See *Tirard*, THE GLOBAL GUIDE TO TRUSTS (2017), XV et seqq.

[140] See *Tirard*, THE GLOBAL GUIDE TO TRUSTS (2017), XV et seqq.

[141] See *Tirard*, THE GLOBAL GUIDE TO TRUSTS (2017), XV et seqq.

[142] See *Tirard*, THE GLOBAL GUIDE TO TRUSTS (2017), XV et seqq.

look for protection of assets and an ease of their tax burden.[143] Nonethless, the new Argentine administration which is in office since December 2016 and lead by president Mauricio Macri, has taken several steps to make Argentina open for business, both for foreign and Argentine residents. The main improvements to be mentioned at this stage are the termination of the conflict with holdouts, the implementation of a new foreign policy as well as the abrogation of most foreign exchange restrictions permitting now the free transfer of funds abroad.[144]

As is commonly known, the Argentine legal system is based on the civil law system, supported by Roman continental law principles. As stated above, Argentinean law has regulated the trust concept which was incorporated into the Argentine Legal System in 1994 by Law No. 24,441. In addition, the new Argentine Civil and Commercial Code ("CCC") under Law No. 27,077, in force since August 1, 2015, provides for new and further regulations on trusts.[145] With regard to the recognition of foreign trusts established by Argentineans it is to say that even though Argentina did not ratify the Convention of 1 July 1985 on the Law Applicable to Trusts and their Recognition, which entered into force on 1 January 1992, the lack of ratification does not automatically mean that foreign trusts are not recognized by Argentine authorities. The contrary is in fact the case. Considering the existence of domestic trust regulations in Argentina since 1995, Income Tax regulation on foreign trusts benefits for Argentine beneficiaries and relevant court decisions, such as *Vogelius, Angelina T et al v Vogelius, Federico et al* (Buenos Aires City Civil Chamber of Appeals, Room F, 2005) and *Moreno, Julio C v Tax Authorities* (Buenos Aires City Contentious Administrative Chamber of Appeals, Room 2nd, 2007), it is very clear that foreign trusts are recognized by Argentine authorities.[146]

In the light of the relevant Argentine legislation and the court decisions passed to date, which will be explored in detail towards the end of this chapter, a foreign trust is generally recognised if the following criteria is met: a) The trust has to be an irrevocable one. Revocable trusts are considered from the Argentines authorities' and courts' point of view to be a mere investment mandate; b) The trustee must be fully independent from the settlor who at the end should not have any power over the assets by means of controlling the trustee; c) Clear proof and evidence as to when exactly the trust was established and the funds transferred to the trust. This would include the notarization and apostille of the trust deed as well as the notarization and apostille of the instrument of transfer of property, i.e. for

[143] See The Big Picture: Wealth and Estate Planning in Argentina http://whoswholegal.com/news/features/article/31835/big-picture-wealth-estate-planning-argentina accessed on March 17, 2018.

[144] See *Malumian*, Argentine Tax Amnesty and Foreign Trusts, TRUST & TRUSTEES (2017), 170-174.

[145] See *Canosa*, Argentina, in *Tirard* (ed), The Global Guide to Trusts (2017), 1 et seq.

[146] See *Malumian*, TRUST & TRUSTEES (2017), 170-174.

instance the transfer of the shares of any foreign company. Moreover, in the event that the settlor is establishing the trust by means of a power of attorney given to that effect to any local or foreign attorney, the notarization and apostille of such power; d) The actual loss of control over the assets. The settlor must fully detach himself from the assets; e) The trust has to be discretionary. It will be unacceptable that a beneficiary is entitled to receive a certain portion of the assets in a specific due date. Nevertheless, Argentine courts have stated their doubts in this point and considered discretionary trusts to be "unbelievable trusts" since it is unimaginable to them that a wealthy person transfers his assets to a trustee, loosing control over the assets, without giving the trustee clear instructions. Despite of the courts' doubts, the discretion of the trustee is a criteria of recognition; f) Appointment of a fully independent asset manager to manage the trust funds. Otherwise, the tax authorities might think of any sort of sham trust whereby the settlor retains control over the assets since he retains powers to manage them; g) Settlor is not to be included in the class of beneficiaries. This is important. It is advisable that the settlor does not retain any power to replace beneficiaries in the future. Moreover, the trust instrument should leave it clear that the settlor is not empowered to appoint himself or any company belonging to him as beneficiary of the trust in the future. Any coexistence of settlor and beneficiaries will make the case difficult to be defended before any Argentine court; h) Finally, any protector, if appointed, should be fully independent from the settlor. Courts are aware that the settlor usually selects a person to be protector who stands close to the family and/or has its confidence. In this case, courts will consider that a way for the settlor to retain control over the assets. This catalog of criteria described has been elaborated based on the Argentine court decisions passed so far, as will be shown later.[147]

In general terms, a trust created under foreign law may be recognised in Argentina as such, provided that it does not conflict with *public order*, for instance with forced heirship rules as well as matrimonial community property rules.[148]

On one side, the chapter of the Argentine Civil and Commercial Code (CCC) that regulates trusts, says that any marketable property may be held in trust. Moreover, section 2493 of the CCC regulates that the assets may be held in testamentary trusts as well. Nevertheless, on the other hand, section 2493 foresees certain restrictions ruling that "the creation of the trust shall not affect the forced heirship portion." In addtion, section 2445 rules that the percentage of the reserved portion shall not be deprived either by will or by any free *inter vivos* act.[149]

[147] See *Malumian*, TRUST & TRUSTEES (2017), 170-174.

[148] See *Canosa* in *Tirard* 1 et seq.

[149] See *Argentine Civil and Commercial Code* ("CCC") under Law No. 27,077, in force since August 1, 2015.

The newly modified CCC defines now the reserved portions as follows: (i) with regard to the descendants, the forced portion changed from 4/5 to 2/3 of the estate of the decedent; (ii) with regard to ascendants, from 2/3 to 1/2 of the estate of the decedent; (iii) the surviving spouse maintains his/her 1/3 reserved portion.[150] The exception to these rules is set forth in section 2448 which allows for the decedent to reduce the reserved portion in order to exclusively support any possible disabled heirs, regarless of them being descendants or ascendants. This would mean that the decedent can freely dispose, by whatever mean he might deem appropriate, even by mean of a trust, to use 1/3 of the reserved portions in order to support disabled heirs. He would then be allowed to dispose on the availabe portion as well as in addition, on 1/3 of the reserved portions. Finally, rules on community property have to be taken into consideration when setting up a trust and defining the trust fund amount to be transferred. The freedom of transfer of assets is though limited by that rule. In other words, for assets acquired during the marriage, under a community property regime which is now optional under the newly introduced CCC, the disposition of such assets requires the consent of the other spouse.[151]

5.2 Tax implications on foreign trusts

A key consideration when creating a foreign trust is without any doubt its tax treatment. It defines at the end, after all other highly valuable advantages attached to a trust, its financial usefullness. In this context, it is important to separate the tax treatment in chronologically three parts: tax impacts at the moment of the creation of the trust; tax treatment during the life of the trust (including the tax treatment of income and capital gains derived from assets in the trust); tax treatment at the moment the settlor dies and/or the termination of the trust.

With regard to the tax treatment at the moment of the creation of the trust, it is important to take note of the fact that the Autonomous City of Buenos Aires ("Capital Federal") does not levy transfer and/or inheritance taxes at all. Significant taxes would be levied in the case the settlor would have his permanent tax residence in the Province of Buenos Aires, its neighbour province called Entre Rios and or any other Argentine province. The establishment of a foreign trust by any tax resident of the Autonomous City of Buenos Aires would though not trigger taxes at all, which benefits the creation of trusts in general, being transfer tax in general terms one of the most important restriction at the moment of establishing a foreign trust. Should the trust then be a proper irrevocable one, as recommended above, then the settlor would not be held liable for the personal assets tax on the trust fund anymore. This

[150] See *Argentine Civil and Commercial Code* ("CCC") under Law No. 27,077, in force since August 1, 2015 (section 2445).

[151] See *Canosa* in *Tirard* 1 et seq.

would then be considered by the authorities as a divestment of the settlor. In addition, since the trust is set up abroad, the trust would not be considered to be an Argentine taxpayer and/or a Argentine taxable entity, wherefore the trust itself would be held liable for income tax on its income generated, not the Argentine resident settlor. [152] This rule does change in the event the settlor is a beneficiary himself, which is not recommended as stated above for estate planning purposes. During the life of the trust, when it comes to distributions to Argentine resident beneficiaries from the trust fund, then the Argentine Income Tax Law for trusts provides that distributed trust income as well as capital gains are taxed at 35%. The distribution of capital would not trigger any income tax for which reason it is important to control this differentiation at the accounting level of each trust. Section 140 of the Argentine Income Tax Law provides the assumption that every distribution of the trust is taxable income unless it is proved in contrary that it is a capital distribution.[153]

Finally, the duration and/or termination of the trust highly depends on whether the purpose or its term has been achieved. In the affirmative, tax-wise, upon the termination and full distribution of the trust to the beneficiarires, income tax would be charged on the trust income. Then, going forward, the beneficiaries themselves would be held liable for personal assets tax and income tax.[154]

5.3 Argentine landmark court decisions on foreign trusts

5.3.1 *Vogelius, Angelina T et al v Vogelius, Federico et al* (Buenos Aires City Civil Chamber of Appeals, Room F, 2005)

Mr. Federico Vogelius was born in Argentina, was Argentinean citizen and lived there most of his life. Nevertheless, he also spent some years in the UK where he then established a foreign common-law trust and transferred to a trustee the basement, garage and first floor apartment located at 149 Abbey Road, Camden, London NW6. He appointed two (both born in the UK to his second wife) out his five

[152] This has been confirmed by the last Argentinean tax reform which was published and entered into force on the last working day of 2017. Income tax was amended as such that an Argentinean resident beneficiary has not to report income received from a trust until he gets a distribution. Properly structured irrevocable trusts where the settlor is not a beneficiary and does not retain any control and power to decide on the investments and administratio of the assets are perfectly tax efficient. The income generated by the trust is attributed to the trust and not to the settlor and/or beneficiary until a distribution takes place. See *Malumian*, Tax treatment of foreign trust for Argentineans under the New Tax Reform, TRUST & TRUSTEES (2018), 384-385.

[153] See *Canosa* in *Tirard* 1 et seq.

[154] See *Canosa* in *Tirard* 1 et seq.

children as beneficiaries of that trust. As Mr. Vogelius died in Buenos Aires, the three children not appointed as beneficiaries started a probate procedure in Argentina asking for the application of the Argentinean forced heirship rules. In this context, the judgement based on the opinion of the honourable and most respected Argentinean judge ZANNONI who stipulated that "the trust is not a legal scheme unknown to our law and therefore section 14 of the Civil Code is not applicable." It is to say that the said section provides for the cases in which foreign law is not applicable in the country. He further stated that "even before the enactement of Act No. 24,441 (that introduced the trust in Argentine Law), there were good reasons to admit *inter vivos* trusts...". Judge ZANNONI further explained that "the circumstance that the trust is ruled by the law of the place of execution - i.e. the English Law due to application of the locus *regit actum* principle established by Section 8 of the (Argentine) Civil Code - it does not mean that for inheritance regime purposes, the effects of such trust cannot be evaluated under Argentine law...in the case under analysis the validity and execution of the trust is ruled by English Law which, as it is known, has different (inheritance) principles from the local law."[155]

In other words, the Argentinean Court definitely recognized the foreign trust. The judgement stated that foreign trusts are legal schemes that are not alien to the law of most Latin American countries, and if they should violate inheritance law, i.e. public order law, the results must be modified as it must be done with any other contract, real estate right or legal entity.[156]

5.3.2 *Moreno, Julio C v Tax Authorities* (Buenos Aires City Contentious Administrative Chamber of Appeals, Room 2nd, 2007)

In the case *Moreno, Julio* the tax authorities ruled that an Argentine settlor of a US trust, who was beneficiary and trustee at the same time as well, was subject to Argentine income tax on the income received by the trust. The ruling held that the US trust was considered *transparent* for Argentine income tax purposes, and consequently its settlor, being an Argentine resident, was subject to tax on the income of the US trust.[157]

In this context, it should be noted that a revocable non-resident trust may be challenged by the Argentinean tax authorities under the principle of *economic reality*. The tax authorities did not accept the

[155] See *Malumian*, TRUST & TRUSTEES (2010), 666-671.

[156] See *Malumian*, TRUST & TRUSTEES (2010), 666-671.

[157] See *Moreno, Julio C v Tax Authorities* (Buenos Aires City Contentious Administrative Chamber of Appeals, Room 2nd, 2007).

claim of the settlor to have divested itself of ownership and control of the assets while at the same time retaining the right to unilaterally take back the assets. Even more, the tax authorities stated that the trust income was to be taxed regardless whether it is distributed to the beneficiary or not. In addition, they stated that the right of revocation of the trust may trigger scrutinity of the trust under the Argentine *substance-over*-form[158] rules. What concerns the recognition of the foreign trust, the Court upheld that based on sections 12 and 1205 of the Argetine Civil Code, foreign trust form, validity, nature and obligations emerging from it were ruled by the law of of the place of creation. Although this was stated in an *obiter dictum*, the Court recognized the validity of the foreign trust.[159]

5.3.3 *Eurnekian, Eduardo* (Buenos Aires City Criminal Court of Appeals, 2004)

In this tax case, the Argentinean tax authorities challenged the trust arguing that the settlor was still in control of the assets and as a consequence, he should have included the assets in his Personal Tax return. The tax authorities based their arguments on the fact that the trust had installed a *protector committee* with broad powers and with persons of the settlor's confidence, which allowed him in fact to manage the assets. However, as stated by the Criminal Court of Appeals, the tax authorities' position was turned down referring to section 1205 of the Argentine Civil Code which stated that "foreign trusts form, validity, nature and obligations emerging from it are ruled by the law of the place of creation and no challenge to its recognition should be made."

First important take-away in this case was that the tax authorities' challenge based on the *economic reality principle*, similar to the *substance over form rule*, whereas the court upheld that the recognition of the trust had never been questioned. However, as a second take-away and an advice for future trust setups, care must be taken at the moment of appointing related persons as protectors of the trust. [160]

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[158] With regard to "substance" see also the leading decision of the Argentinean National Tax Court, Chamber D, *Molinos Río de la Plata SA*, 14th August 2013, 172 et seqq, where it was upheld that tax benefits are not applicable if there is a lack of substance (critical criteria: rented space, services hired at the name of the company, no corporate directors, meeting minutes, financial statements with certified signatures, etc.).

[159] See *Malumian*, TRUST & TRUSTEES (2010), 666-671; see also *LawInContext*, Interactive Knowledge from Baker & McKenzie https://www.lawincontext.com/LinxDev/viewNuggetLink.aspx?src=2&DocID=1145 accessed on March 28, 2018.

[160] See *Malumian*, TRUST & TRUSTEES (2010), 666-671.

5.3.4 *Deutsch Gustavo A* (Buenos Aires City, City Criminal Court of Appeals, 2009)

The case *Deutsch Gustavo A* is another tax case whereby the Criminal Court of Appeals of the City of Buenos Aires pronounced itself as to the criteria of recognition of foreign trusts. The renowned business man Gustavo Deutsch was accused of having created a sham trust with the sole purpose of avoiding taxation. In line with the judgement *Cadbury*[161], the tax authorities argued that the trust was a merely artificial arrangement intended to escape tax only. The judges stated that the form of the trust was ruled by the law of the place of settlement and that there were no doubts about its recognition. The court did not object as to validity of the trust but expressed itself on the lack of proof of the transfer of the assets to the trust. In addition, the judges were disturbed on the level of control the settlor had retained himself over the trust assets. The Court stated that: *"...the decisive point here is if a gratuitous transfer of property was made or not by the defendant through a trustee. That this last circumstance is far from being proven with the documentary evidence received in court....that the signatures on the documents are illegible and the signatories fail to provide their names...that the period of duration of the trust is provided in such a manner that it may extend for one hundred years or until a previous date to be set at the discretion of the trustees (section 1, "The Trust Period")...that this underlying naiveté cannot be understood when thousands of millions of dollars are at stake."*[162]

The striking conclusion of the case is that if a foreign trust is created by any Argentinean resident settlor, adequate instruments are necessary, with reasonable terms and conditions and, in the event of large sums being involved, the highest formalities are required.[163]

5.3.5 *Fiorotto, Fernando Bernabe c DGI s Recurso Directo de Organismo Externo* (2017) Court: Room III of the Federal Contentious-Administrative Chamber of Appeals of Buenos Aires City

The case of *Fiorotto, Fernando Bernabe* is the most recent judgement (2017) issued by the Federal Contentious-Administrative Chamber of Appeals of Buenos Aires City, upholding the recognition of foreign trusts, as long as they are duly documented. The judgement made it clear that trust documents have to be certified and apostilled to avoid any risk before any Argentinean court. In addition, the trust

[161] See European Court of Justice (ECJ): Case C-196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd. v Commissioners of Inland Revenue* (2006) ECR I-7995.

[162] See *Malumian*, TRUST & TRUSTEES (2010), 666-671.

[163] See *Malumian*, TRUST & TRUSTEES (2010), 666-671.

documents have to be translated into Spanish language whenever an Argentinean court should pass a judgement on them. In this context, the court stated that any document not fulfilling these requirements, is considered a "mere copy" and is, for all intents and purposes, without any value.[164]

The so-called Litoral Trust established in 2001 by Mr. Fiorotto abroad, allegedly transferring the sum of USD 55 Million to the trustee, was by no means acknowledged by the Chamber of Appeals. The settlor could apparently neither provide documents proving the existence of the trust, nor could he prove the actual transfer of the assets to the trustee. In addition, no substantial or reasonable explanation for the establishment of the trust could be given to the judge. The court was of the opinion that the assets should still be considered to form part of Mr. Fiorotto's personal wealth, and as such, be subject to Personal Wealth Tax.[165] In addition, the court stated that profits derived from these assets would be subject to personal income tax. The main obstacles for not considering the documents provided to be sufficient were the following: a) the shares of the underlying company, which were transferred to the trust were issued one day after the date of the trust deed; b) there were no financial statements duly certified and apostilled of the company transferred; c) there was no proof of the contribution of the amount of USD 55 Million to the underlying company; d) the settlor could not provide a copy of the trust deed.[166]

In practical terms, it is very useful that the trustee can provide the court with evidence of his independence, evidence of his experience as a trustee as well as the details with regard to the work accomplished in relation with the trust under analysis. Needless to say that this helps to prove the existence of the trust as well as the well "functioning" of the same. Finally, and as stated in this court decision, there is no doubt that a well documented foreign trust is fully recognised under Argentinean law.[167]

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[164] See *Malumian*, Trust recognition by Argentine Tax Authorities (commentary to the "Fiorotto" case), TRUST & TRUSTEES (2017), 955-957.

[165] Tax rates used to range between 1.25 per cent and 0.5 per cent. However this was amended and for 2017 the Personal Wealth Tax rate will be at 05 per cent and as from 2018 onwards, the rate is meant to be at 0.25 per cent.

[166] See *Malumian*, TRUST & TRUSTEES (2017), 955-957.

[167] See *Malumian*, TRUST & TRUSTEES (2017), 955-957.

6 Foreign trust recognition by Brazilian courts & authorities

6.1 Legal considerations on foreign trusts

Beforehand and to start the analisys of the Brazilian stance on foreign trusts, it is to say, that trusts are neither part of the Brazilian domestic law nor have Brazilian authorities to date manifested themself formally and clearly on a common understanding on the legal aspects connected to a trust. Moreover, despite of a few statements issued by the Brazilian authorities as will be shown later, there is a significant lack of legislation and formal positions from the judicial courts on this matter. In addition, as mentioned before, Brazil has not signed The Hague Convention on the Law Applicable to Trusts and on their Recognition[168].[169] As discussed, civil law does substantially derive from Romanic and Germanic conceptions, which tend to rely on abstract ideals and principles, rather than on empirical experiences and instances.[170] As a consequence, certain concepts conceived in civil law systems do not always conform. This clash is striking when analysing the Brazilian legal concept of property and the relationships arising from the settlement of a trust. The article 1,228 of the Brazilian Civil Code defines property and says: *"An owner has the power to use, enjoy and dispose of the thing, and the right to recover it from the power of anyone who wrongfully possesses or holds it."* The Brazilian concept though originates from the Roman formula "usus", "fructus" and "abusus".[171] In this context, the conception of property (as the possiblity to use, enjoy, dispose and recover) in Brazilian domestic law does not encompass with the legal relationships connected to an Anglo-Saxon trust.[172] Nevertheless, under Brazilian private law, from a pure contractual perspective, nothing hinders the execution of an agreement pursuant to which a party commits itself to hold and administer assets conveyed to it in a fiduciary nature and to do so according to certain standards and purposes. After some academic confusion, scholars and courts have now started to generally accept local fiduciary agreements as lawful, albeit atypical contracts. Highly admired Brazilian civil law jurists such as PONTES DE MIRANDA[173], CARVALHO SANTOS[174] and ORLANDO GOMES[175] have expressed themselves on this matter. Their con-

[168] Despite the fact that Brazil did not sign the Hague Convention on the Law Applicable to Trusts and their Recognition, the House of Representatives, when analyzing a Complaint filed against a Representative before the Parliamentary Ethics Committee mentioned its conceptions.

[169] See *Matarazzo*, Brazil, in: *Tirard* (ed), The Global Guide to Trusts (2017), 47 et seqq.

[170] See *Cooper/Mackay*, in: The Common Law and Civil Law - A Scot's View, HARVARD LAW REVIEW (1950), 470.

[171] See *Gilissen*, Introdução Histórica ao Direito. Lisboa: Fundação Calouste Gulbenkian (1995) 635.

[172] See *Matarazzo* in *Tirard* 47 et seqq.

[173] See *Pontes de Miranda*, Tratado de Direito Privado (2000) 42.

[174] See *de Carvalho Santos*, Código Civil Brasileiro Interpretado, Principalmente do Ponto de Vista Prático (1988) 54.

[175] See *Gomes*, Contrato de Fidúcia ("trust"), REVISTA FORENSE (1965), 66.

tribution to the matter at hand has promoted the discussion and the advancement in Brazilian legislation.[176]

With regard to the discussion of a possible recognition of foreign Anglo-Saxon trusts by the Brazilian legislation, two paths of argumentation, i.e. doctrines, have emerged. The first one is called the *classic conceiving* while the second one is named the *recent conceiving*.

The *classic conceiving* results from the interpretation of article 9 and 17 of the Decree No. 4,657, dated September 4th, 1942 (Law of Introduction to the Brazilian Legislation). Article 9 says that *"the law of the country in which an obligation has been constituted shall determine and govern such obligation."* Its par. 1 says that *"if the obligation is to be perfomed in Brazil and requires that essential formalities be met, such formalities shall be observed, taking into consideration the foreign law as to any requirements extraneous to the corresponding act."* Its par. 2 says that *"an obligation ensuing from the contract shall be deemed to have been constituted in the place of residence of the proponent."* Combined with article 17 of the Law of Introduction to the Brazilian Legislation which stipulates that perfected legal transactions and acquired rights shall always be observed and respected, if they do not offend national sovereignty, public order or good morals[177], trusts created under foreign law should be recognized for Brazilian legal purposes. This is the general rule.[178] The said conceiving has been adopted amongst others by the Brazilian Central Bank when clarifying the procedure to report on Brazilian funds located abroad (Declaração de Capitais Brasileiros no Exterior - DCBE). Therein, the Brazilian Central Bank stated that the resident beneficiary (or the trustee on behalf of the resident beneficiary) of a trust was the one to report the funds to them on a yearly basis. This however, leads to the conclusion amongst Brazilian scholars and practitioners, that the orientation of the Brazilian Central Bank reveals a) the recognition of the trust as such and b) the consistency with the common trust understanding that the settlor drops out of the picture at the moment of setting up the trust.[179]

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[176] See *Vargas Beloch/Cone*, TRUST & TRUSTEES (2011), 1-5.

[177] See *Diniz*, Lei de introdução ao código civil brasileiro interpretada, 11 ed. adaptada à Lei n. 10.406/2001 (2005) 405-406; Article 17: The laws, acts and decisions of another country, and any statements will not be effective in Brazil, when it offends the national sovereignty, public order and good morals.

[178] See *Matarazzo* in *Tirard* 47 et seqq.

[179] See *Matarazzo* in *Tirard* 47 et seqq.; according to MATARAZZO, the reporting obligations connected to trusts will be further analyzed, but it shall be noted that in his opinion, only beneficiaries with control over irrevocable trusts should be obligated to report their share.

While the classic conceiving is based on the Law of Introduction to the Brazilian Legislation, the *recent conceiving* does base its arguments on a combination of article 17 of the Law of Introduction to the Brazilian Legislation and the articles 112, 113 and 125 of the Brazilian Civil Code and consists primarily, in the prevalence of the substance over form principle. For instance, recent manifestations of Brazilian authorities have shown that revocable trusts are not recognized for Brazilian legal purposes. Article 112 says that *"in declarations of will, more heed shall be given to the intention embodied in the declaration than to the literal meaning of the language."* Article 113 stipulates that *"juridical transactions shall be interpreted in conformity with good faith and the practice of the place in which they are made."* Article 125 then says that *"if the efficacy of a juridical transaction is subject to a suspensive condition, the right contemplated by the transaction is not acquired until the condition is fulfilled."* Both, article 112 and 113 support the substance over form principle stipulating that economic and material circumstances should prevail over the formal statements that support the transaction. Hence, a revocable trust would be at risk and be most probably challenged by the Brazilian authorities and courts. This understanding has emerged recently in the guidance[180] provided by the Brazilian tax authorities on the occasion of the voluntary disclosure program launched in 2016 as well as in a report issued by the Parliamentary Ethics Committee regarding a complaint filed against a representative, *Mr. Eduardo Cunha*[181]. As from this guidance, the recent conceiving leads to the conclusion that Brazilian authorities would say that in the case of irrevocable trusts, where the settlor has no right to revoke the trust, the owner of the assets for Brazilian legal purposes, shall be the beneficiary of the trust. In the case of revocable trusts, for Brazilian legal purposes, the settlor would remain the owner of the assets and as such, be obliged to inform the Brazilian Central Bank on funds held abroad on a yearly basis.[182]

Given this lack of formal position from Brazilian authorities and courts, unknown for which conceiving they would decide in the future at the occasion of a judgement, Brazilians should not transfer any property or funds directly to a foreign trust. In fact, what is viable and has been experienced, is that an offshore company is capitalized with assets, before the company itself settles the trust and transfers the company shares to the trust.[183]

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[180] See http://www.idg.receita.fazenda.gov.br/orientacao/tributaria/declaracoes-e-demonstrativos/dercat-declaracao-de-regularizacao-cambial-e-tributaria/perguntas-e-respostas-dercat accessed on March 29, 2018

[181] See http://www.politica.estadao.com.br/blogs/fausto-macedo/wp-content/uploads/sites/41/2016/06/VOTO-FINAL-EDUARDO-CUNHA-A-1.pdf accessed on March 29, 2018.

[182] See *Matarazzo* in *Tirard* 47 et seqq.

[183] See *Matarazzo* in *Tirard* 47 et seqq.

Nevertheless, similar to the Argentine legislation, attention is necessary at the moment of transferring assets to a trust since there are at least two constraints to be observed: forced heirship rights and the rights of creditors. Acccording to Brazilian inheritance laws, 50% of the heritage has to go to the necessary heirs, i.e. descendants, ascendants and spouses. Any act and/or donation that violates that provision will be fully disregarded for legal purposes according to Articles 1,854 and 1,857, par. 1 of the Brazilian Civil Code. As a consequence, Brazilians are only allowed to transfer 50% of their heritage into a trust, safeguarding the portion reserved for their necessary heirs ("legítima") upon death. On the other hand, transmissions which are considered a fraud against creditors, are disregarded for legal purposes according to article 158 of the Brazilian Civil Code. *"Transactions for gratuitous transmission of property or remission of debt, if carried out by a debtor who is already insolvent or is reduced to insolvency by such transactions, even though he is ignorant of the fact, may be annuled by ordinary creditor, if their rights are injured."* As a consequence, the act of transmission of assets shall not produce any legal effects if challengend at court by the creditors.[184]

Finally, and since the institute of an Anglo-Saxon trust is from a legal point of view not well received in Brazil up to today, local alternatives can be contemplated. In this context, the *usufructo*, the *propiedade fiduciária*, the *fideicomisso*, the *comissão*, the *gestão de negócios* and the *fundação* are noteworthy.[185]

6.2 Tax implications on foreign trusts

A key consideration when creating a foreign trust is without any doubt its tax treatment. It defines at the end, after all other highly valuable advantages attached to a trust, its financial usefullness. In this context, it is important to separate the tax treatment in chronologically three parts: tax impacts at the moment of the creation of the trust; tax treatment during the life of the trust (including the tax treatmetn of income and capital gains derived from assets in the trust); tax treatment at the moment the settlor dies and/or the termination of the trust.

The Brazilian tax system grounds on the Federal Constitution of 1988 providing powers to the Federal-, State- and Municipal Governments to introduce and collect taxes from the tax payers. Unlike Argentina, it is important to point out that Brazil has not introduced specific laws to deal with the taxa-

[184] See *Matarazzo* in *Tirard* 47 et seqq.

[185] See *Vargas Beloch/Cone*, TRUST & TRUSTEES (2011), 1-5; see also *Matarazzo* in *Tirard* 47 et seqq.

tion of trusts. As a consequence and based on the domestic tax regime, three different taxes would most probably apply to foreign trusts, namely: income tax (*Imposto de Renda - IRPF*); tax on transmission of property causa mortis and donations, the gift tax (*Imposto sobre Transmissão Causa Mortis e Doação - ITCMD*) and tax on financial transactions (*Imposto sobre Operações Financeiras - IOF*). The last tax being a federal regulatory tax levied on the liquidation of foreign exchange transactions, credit, derivatives, insurance and security transactions. Should funds be transferred abroad in order to settle a trust, the remittance would be subject to IOF, at a rate of 0.38% on the total amount of the funds.[186]

With regard to the tax treatment at the moment of the creation of the trust, two scenarios of tax impacts have to be considered. Bearing in mind the *classic conceiving* considerations as discussed before, were trusts incorporated abroad (rather revocable or irrevocable) are recognized for Brazilian legal purposes, the transmission of assets to the trust would be subject to a donation/gift tax. These rates do vary depending on the tax residency of the settlor.[187] Moreover, should the transfer be executed with a value above the amounts given to tax authorities in the yearly tax forms, or even above cost value or market value, then the difference would be taxed as capital gain according to the article 23 of Law 9,532 of December 10th, 1997.[188] Bearing in mind the idea provided above for Brazilian residents wishing to set up a trust albeit the lack of appropriate legislation and judgements, the capitalization of an offshore company would only trigger the IOF tax at 0.38% instead of the donation/gift tax at max. 8%. The subsequent settlement of the trust by the company would then be subject to local tax laws.

Then, the taxation of the income and capital gains derived from the trust fund would depend on the *conceiving* applied. Under the *classic conceiving* doctrine they would be subject to taxation according to the jurisdiction and tax laws were the trust is established. Under the *recent conceiving* doctrine, and in the event that the substance of the structure prevails over the form (for instance not the case with revocable trusts), they would be subject to the same taxation. Should the principle however not be met, income and capital gains would be collected from the settlor, since the tranfer would not be recognized for Brazilian legal puposes.

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[186] See *Matarazzo* in *Tirard* 47 et seqq.

[187] The rates are limited throughout Brazil to 8% and vary according to each State. In São Paulo, for example, the donation/gift tax is at a 4% rate. The State of Rio de Janeiro just increased for donations as from 2018 the donation/gift tax from a 4% rate to a 8% rate.

[188] Capital gains tax was for transactions executed until the 31st December 2016 at 15%. For transactions as from 2017 onwards, at variable rates from 15% to 22.5%.

Basically, when it comes to distributions, three different tax scenarios have to be contemplated. The first one is to assume that the distribution to the benefit of the Brazilian beneficiary is purely considered income and as such taxed at rates as from 0% to 27.5%. Secondly, tax authorities could classify the distribution as a donation to the beneficiary and levy a tax at rates as from 0% to 8% (exact percentage depending on each State). Finally, a combination of both could be applied as a third scenario, saying that capital distributions would be taxed by the Brazilian donation/gift tax, capital gains distributions would be taxed by the capital gains tax while income distributions would be taxed by the income tax. This scenario, however, would call for a segregated accounting at the level of the trust. Finally, the settlor's death and/or the termination of the trust does not trigger any taxable event. Tax impacts related to a trust structure are primarily ocurring at the moment of establishement and distribution to the beneficiaries.[189]

6.3 Brazilian landmark court decisions on foreign trusts

6.3.1 *Commissão de Valores Mobiliários*, Proc CVM RJ2005/0364

This case which was heard before the Brazilian Securities Commission (Commissão de Valores Mobiliários) concerned a New York trust which had been established by a Brazilian telecom company named Brasil Telecom S.A. (BRT). In this context, minority shareholders filed a complaint against the company alleging that the company had transferred illegally, by means of a trust agreeement, certain rights to a trustee, to Prof. Roberto Mangabeira Unger. In addition, the claimants alleged that the trustee appointed was associated with and a closely related to the Grupo Opportunity, the asset manager of certain funds. In this context, the claimants stated that the full control of the Brazilian telecom company had been illegally transferred to the trustee.[190]

The court finally accepted the claim partially. Nevertheless and with regard to the foreign trust established, the commission decided that the trust as such, including the "dichotomy of property", was fully effective in Brazil as it violated neither national sovereignty nor public order or decency. In this particular case, the trust assets (rights) were intangible and directly connected to Brazil.

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[189] See *Matarazzo* in *Tirard* 47 et seqq.

[190] See *Vargas Beloch/Cone*, TRUST & TRUSTEES (2011), 1-5; see also decsision Commissão de Valores Mobiliários, Proc CVM RJ2005/0364 in detail.

6.3.2 *Netto v Thornton* (71 8 F Supp, 122 [SD NY 1989]

This case refers to a Brazilian resident husband who had transferred in the early eighties a part of his assets to a trust established in New York as well. Upon the death of the settlor, the trust then affected his wife's right to inherit. As seen before and acccording to Brazilian inheritance laws, 50% of the heritage ("legítima") has to go to the necessary heirs, i.e. descendants, ascendants and spouses. Any act and/or donation that violates that provision will be fully disregarded for legal purposes according to Articles 1,854 and 1,857, par. 1 of the Brazilian Civil Code. Nevertheless, the New York court confirmed the legal validity of the trust as from their perspective, which was accepted by the Brazilian court. Nowadays, any Brazilian court would interfere and say that the transmission of assets to a foreign trust seriously violated Brazilian public order (matrimonial property laws and inheritance laws) whereupon it would disregard the transmission of assets.[191]

6.3.3 *Eduardo Cunha* (Report of the Parliamentary Ethics Committee)[192]

This is the most recent case (2016) where an official Committee of the Brazilian Parliament, in this case the Parliamentary Ethics Committee, had to discuss and to decide a disciplinary complaint brought forward against the speaker and former president of the Chamber of Deputies (Lower House of Congress) of Brazil, Mr. *Eduardo Cosetino da Cunha*. The disciplinary process which took nine months and was the longest ever conducted in Brazilian Congress, concluded with the removal of Mr. Cunha from all his political positions by the Brazilian Supreme Court, sending the prominent and before highly admired politician additionally to jail to complete his sentence. This case was very much geared towards the media and the defendant finally was accused having accepted bribes in the amount of USD 40 Million all in connection with the Petrobras bribes scandal. What is interesting for the thesis's purpose, is that the politician had accepted the bribes received to be transferred in a trust which had underlying offshore companies with bank accounts with Julius Bär & Co., Switzerland. In this context, the defendant tireless alleged before the Parliamentary Ehics Committee that the trust funds did not belong to him but to the trust itself. That he was a potential beneficiary only with no property rights to the assets.

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[191] See *Vargas Beloch/Cone*, TRUST & TRUSTEES (2011), 1-5; see also decision Netto v Thornton (71 8 F Supp, 122 [SD NY 1989] in detail.

[192] See http://www.politica.estadao.com.br/blogs/fausto-macedo/wp-content/uploads/sites/41/2016/06/VOTO-FINAL-EDUARDO-CUNHA-A-1.pdf accessed on March 29, 2018.

After a long debate on the trust structure itself, supported by highly admired international trust specialists, the Committee followed the Brazilian *recent conceiving doctrine*. The Ethics Committee was in possession of documents showing that the politician had spent USD 46'601 on hotels and luxury restaurants at the occasion of an overseas trip to Paris with his wife and daughter. The credit card used for these private expenditures was however directly linked to the trust accounts at Julius Bär & Co, Switzerland. Moreover, documents evidenced that the politician gave regularly direct asset management instructions to the bank in order to manage the trust funds. Finally, amongst other incriminating documents found, various KYC bank forms showed that the client in record was in fact the politician himself. The Ethics Committee came to the conclusion that Mr. Cunha diposed of the trust assets in accordance with article 1,228 of the Brazilian Civil Code, i.e. that he had the possibility to freely use, enjoy and dispose over the trust funds. In addition, the trust was a revocable one whereby the politician retained the rights to revoke the trust at any time he deemed right. According to the members of the Committee, revocable trusts should not produce any legal effects in Brazil and referred to article 125 of the Brazilian Civil Code that prescribed that conditions subject to the pure discretion of one of the parties are prohibited in Brazil. Moreover, no divestment of assets had taken place since he had retained the right to revoke the trust. Concluding, taking into account the beneficiary's use of credit cards covered directly by the trust funds, the substance over form principle is not fulfilled and thus the legal validity of the trust to be rejected.

6.3.4 *Normative Instruction of the Brazilian Federal Revenue* No. 1,627 of 2016

In connection with the voluntary disclosure program (*Regime Especial de Regularização Cambial e Tributária - RERCT*) established by the Brazilian government in 2016, the Brazilian Federal Revenue issued a Normative Instruction No. 1,627, 2016[193], clarifying their understanding of who should declare assets held abroad by means of a trust. Referring to article 9 of the Instruction, the declarant of the trust should be its beneficiary, including the settlor, in case he was beneficiary on December 31st, 2014. However, the settlor would be entitled to declare the assets even in the event he would not figure as a beneficiary of the trust as of December 31st, 2014. In this context and analysing the understanding of the Brazilian Federal Revenue, the concept emerging is clearly the one of the *recent conceiving* described above. Should the trust be irrevocable, then the owner of the assets, for Brazilian legal purposes, shall be considered the beneficiary of the trust. In case the trust is revocable, then the owner of the assets shall be considered the settlor.[194]

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[193] See idg.receita.fazenda.gov.br/orientacao/tributaria/declaracoes-e-demonstrativos/dercat-declaracao-de-regularizacao-cambial-e-tributaria/perguntas-e-respostas-dercat accessed on March 31, 2018.

[194] See *Matarazzo* in *Tirard* 47 et seqq.

6.3.5 *Double Taxation Agreement Brazil - Canada*, June 1st 1984

Finally, from the Double Taxation Agreement (DTA) signed on June 1st, 1984 (entered into force on January 1st, 1986) between Brazil and Canada, we learn from its article 3 par. 1 litera d) in connection with point 1 of the additional Protocol, that Brazil explicitly recognized trusts created under Canadian law. Brazil agreed to treat them as "foreign person" with legal validity in Brazil.[195]

7 Possible methods of resolution

7.1 The Multilateral Approach

A solution at international level for the international recognition of trusts in the Anglo-Saxon and Latin American legal systems would most probably be the best alternative to enable Latin American citizens to plan their estate by means of foreign trusts with legal certainty. Up to today, the Hague Convention on the Law Applicable to Trusts and on Their Recognition (Convention) is the only framework attempting to harmonize the relationship between the civil law *fideicomiso* and the Anglo-Saxon trust. Leading international trust law scholars said the Convention had been seen "as the first serious attempt in 600 years to bridge the gap of the English Channel...in the field of fiduciary law." In this context, the scholar referred to the efforts of the Convention "to furnish judges and practitioners with elements that would allow them to understand this legal institution more clearly. [196] It is important to stress, that the purpose of the conference was not to introduce the trust into the civil law countries but to validate the activities of common-law trustees in civilian systems. The results, however and as mentioned before, were mixed.[197]

The "shapeless" definition of the trust created many points of conflicts which would have to be rectified. Purpose trusts for instance are accepted by the Convention while civil law accepts them very restrictively. The Convention explicitly forbids that the trustor appoints himself as trustee, while this is fully accepted and common under Anglo-Saxon law. With regard to the legal relationship between the

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[195] See *Double Taxation Agreement between Brazil and Cananda* signed on June 1st, 1984.

[196] See *Dyer*, International Recognition and Adaption of Trusts: The Influence of the Hague Convention, 32 Vand. J. Transnat'l L (1999), p 993 (quoting *Donovan W.M. Waters*, The Institution of the Trust in Civil and Common Law; in: Collected Courses of the Hague Academy of International Law 113, 129-30 (1995).

[197] See *Lupoi*, Trusts: A Comparative Study (2000) 269.

settlor and the trustee, the Convention speaks of a "lasting relationship" while this is exactly the opposite in the English-model trust.[198] Moreover, the Convention does not make a clear cut between legal and equitable rights, which represents a fundamental criteria in the common-law understanding. Under the Convention there is unfortunately no clear segregation of assets rule. Finally, constructive and resulting trusts are fully excluded from the Convention due to the fact that there is no voluntarily expressed will from the settlor.[199]

The Convention ignored that common law courts often intervene to complete the implicit intention of the settlor instead of contravening its existence. The Convention provides very limited solutions to the mutual recognition of Anglo-Saxon trusts and civil law *fideicomisos*. This in spite of the good intentions to bridge the gap.[200]

7.2 The Unilateral Approach

An alternative to the multilateral solution could be individual initiatives of Latin American countries creating their own versions or understanding of trusts. This of course would have to be framed in their local civil codes. As from a common law perspective, civil law is seen as a "superstructure of theory" valid for any time or place. A thinking, which differs from the common law understanding which says that as society changes, legal solutions need to change as well. In this context, both systems, in general, lack the expertise in methodological interpretation enjoyed by the other. Taking into account that trust law is a genuine common law byproduct, it can only be understood by adapting the Anglo-Saxon legal principles. Now a merging of both systems at the level of trust law would have as a consequence a profound alteration of Latin American civil codes. The unitary concept of ownership would have to go and an inter vivos trust could not be seen as a civil law contract any longer. The trustee is neither an agent of the trustor nor the beneficiary, and the beneficiary is not a principal of the trustee.[201]

Any suggestion by any Latin American legislator would have to consider all these discrepancies to date and try to fully upgrade the Latin American fideicomiso to the standards of an Anglo-Saxon trust. This would of course entail an adaption of the Latin American Civil Codes.

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[198] See *Lupoi*, Trusts 336.

[199] See *Figueroa*, ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (2007), 759.

[200] See *Figueroa*, ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (2007), 759.

[201] See *Figueroa*, ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (2007), 761.

8. Schedular overview

Schedular overview on Master's thesis	
threats to wealth	• continous political and economical uncertainty • continous political and economical mismanagement • temporary freeze of financial assets (inflation stabilization) • temporary freeze on wages and prices (inflation stabilization) • sudden increase of financial transaction taxes • sudden implementation of wealth taxes • sudden increase of prices charged by public utilities • illegal corruption schemes in general • possible excessive public spending • implementation of harsh austerity measures • sudden and inaccurate governmental expropriation • economic crisis in general (bubble burst in 2008; financial crisis)
needs of clients	• legal certainty in general • asset protection from governmental interference • avoid national forced heirship rules (if desired) • instrument to legitimate financial privacy and confidentiality • intrument to regulate succession (intergenerational) • secure education and upbringing of next generations • secure care and help for disabled family members • avoid spoiling effects of wealth on descendants • avoid tendency towards extravagance within family • realise and protect family's values and vision • accomplish a long-term binding estate • realise charitable purposes and ideas
advantages of the Principality of Liechtenstein	• flexible and liberal Persons and Company Act (PGR) • combination democracy/monarchy: high political stability • allows for pure purpose trusts increasing flexibility • foreign judgements are not enforced (re-litigation necessary) • short limitation period on enforcement of forced heirship: 2 years • short limitation period on enforcement of creditor claims: 5 years • *Saunders v Vautier* rule is not applicable
The Hague Trust Convention (HTC)	***minimum implications resulting from recognition*** • trust property constitutes a separate fund • trustee may sue and be sued in his capacity as trustee • trustee may appear or act in this capacity before a notary or any person acting in an official capacity ***further, the recognition shall imply, in particular that...*** • personal creditors of the trustee have no recourse to trust assets • trust assets do not form part of trustee's estate upon his insolvency and/or bankruptcy • trust assets do not form part of the matrimonial property of the trustee or his spouse • trust assets do not form part of the trustee's estate upon his death • trust assets may be recovered when the trustee is in breach of trust, has

	mingled assets with his own property or has alienated trust assets ***no derogation by voluntary act possible in the following matters*** • protection of minors and incapable parties • personal and propietary effects of marriage • succession rights, testate and intestate, especially indefeasable shares of spouses and relatives • transfer of title to property and security interests in property • protection of creditors in matters of insolvency • protection of third parties acting in good faith ***provisions of the Convention do not apply when...*** • their application would be evidently incompatible with public policy (ordre public)
The Hague Trust Convention (HTC) (weakness)	• HTC only applicable to trusts created voluntarily and evidenced in writing (no constructive trusts or trusts established by court order • HTC accepts purpose trusts whereas this conflicts with most civil law jurisdictions which accept them very restrictively • HTC forbids the double capacity of an individual to serve as grantor and trustee at the same time • HTC stipulates a "lasting relationship" between grantor and trustee, which is exactly the opposite thinking of the English-model trust
Trusts in Latin America (fideicomiso)	• Panama 1925, Colombia 1941, Ecuador 1948, Honduras 1950, Venezuela 1956, Costa Rica 1961, Brazil 1965, Guatemala 1970, El Salvador 1970, Bolivia 1977, Argentina 1995, Peru 1961, Paraguay 1996, Uruguay 2003
Main obstacles of recogntion of trusts	• lack of freedom of testation (forced heirship) • impact of matrimonial property regimes • protection of creditors (no fraudulent transfer allowed) • uncertain registration of trusts as direct land owners • frictitious arrangements (sham) are disregarded • Brazil rules forced heirship as domestic public policy • Argentina rules forced heirship as domestic public policy
Comparison (foreign Anglo-Saxon trust)	• Common law judge seen in particular as "law maker" • Codes and reenactments of judicially established rules • trust as an institution of gratuitous transfers (i.e. thought to be vehicles for organizing intergenerational wealth transmission) • separation of common law and equity, i.e. beneficiary has right in equity (see differentiation of equitable and beneficial interest) • express trusts, implied trusts and trusts created by operation of law are fully recognised (no written agreement as condition) • the Uniform Trust Code provides the possibility to create a trust in favour of an animal (in re Trust for Care of Animal 408) • the settlor may revoke the trust unless expressly provided for irrevocability in the terms of the trust deed • any individual can be trustee • the concept of a protector is foreseen • trust agreements are not qualified as contracts

Comparison (local fideicomiso)	• Civil law judge seen in particular as "law finder" • Recognition of statutes, regulations and custom • fideicomisos mainly represented by business- and guarantee trusts (i.e. business structuring purposes) • no separation which leads to the conclusion that a beneficiary has no right in equity as this (just in rem right) only could be created by law • only express trusts are recognized, by means of a written agreement • implied trusts and/or trusts created by operation of law remain unknown (written agreement as a condition) • trusts created in favour of an animal are not valid • inter vivos trusts are irrevocable unless expressly provided for revocability in the terms of the trust deed • trustee can only be banks and/or special purpose companies • the concept of protector does not exist in Latin American legislation • trust agreements are qualified as contracts
Argentina	
Cases on foreign trust recognition	**references/ judgements / authorities pronounciations** • *Vogelius, Angelina T et al v Vogelius, Federico et al* (Buenos Aires City Civil Chamber of Appeals, Room F, 2005) • *Moreno, Julio C v Tax Authorities* (Buenos Aires City Contentious Administrative Chamber of Appeals, Room 2nd, 2007) • *Eurnekian, Eduardo* (Buenos Aires City Criminal Court of Appeals, 2004) • *Deutsch Gustavo A* (Buenos Aires City, City Criminal Court of Appeals, 2009) • *Fiorotto, Fernando Bernabe c DGI s Recurso Directo de Organismo Externo* (2017) Court: Room III of the Federal Contentious-Administrative Chamber of Appeals of Buenos Aires City
Criteria catalog for highest legal recognition possible	• the trust has to be irrevocable; revocable trusts are considered to be a mere investment mandate • trustee must be fully independent from the settlor with no powers over the assets by means of controlling the trustee • clear proof and evidence as to when the trust was established and the funds transferred to the trust; including notarization and apostille of the trust deed and instrument of transfer of assets • full detachment of the settlor, loss of control over the assets • the trust has to be fully discretionary • appointment of a fully independent asset manager • settlor not to be included in the class of beneficiaries • any protector appointed to be fully independent from the settlor

Brazil	
Cases on foreign trust recognition	**references/ judgements / authorities pronounciations** • *Commissão de Valores Mobiliários*, Proc CVM RJ2005/0364 • *Netto v Thornton* (71 8 F Supp, 122 [SD NY 1989] • *Eduardo Cunha* (Report of the Parliamentary Ethics Committee) • *Normative Instruction of the Brazilian Federal Revenue* No. 1,627 of 2016 • *Double Taxation Agreement Brazil - Canada*, June 1st 1984
Criteria catalog for highest legal recognition possible	• the trust has to be irrevocable; revocable trusts are not considered to represent an efficient divestement • the trust has to be fully discretionary • no offence against national sovereignty, public order or good morals • "substance over over form" principle must be complied with • trustee must be fully independent from the settlor with no powers over the assets by means of controlling the trustee • clear proof and evidence as to when the trust was established and the funds transferred to the trust; including notarization and apostille of the trust deed and instrument of transfer of assets • full detachment of the settlor, loss of control over the assets • appointment of a fully independent asset manager • settlor not to be included in the class of beneficiaries • any protector appointed to be fully independent from the settlor

9 Conclusion

Foreign trusts have always been a very popular tool to achieve asset protection, organise succession and preserve wealth from unforeseen negative events. They have always been a suitable option at the heart of estate planning. The Latin American *fideicomiso*, being in fact a methodological forerunner of the Anglo-Saxon trust in Latin America and established in that region in the early 20th century, however, never matched the criteria and never unfolded the effects of a classic three-party Anglo-Saxon trust. The Master's thesis gave special attention to the core differences between both institutions at the moment of assessing the possibility and recognition of the creation of a purely foreign Anglo-Saxon trust in these countries. Neither Argentina nor Brazil have ever ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition, which would of course have given at once full legal recognition to foreign trusts in these countries. Nevertheless, as we learnt from the analysis of this Master's thesis, a properly established foreign trust, at least in the case of Argentina, is a very powerful vehicle to protect assets from foreign judgements or creditor claims, to efficiently avoid local heirship rules, to profit from preferential tax treatments, to avoid probate procedures and to isolate assets from third parties. The Liechtenstein Trust is the most efficient asset protection vehicle for these purposes since the Principality does not at all enforce foreign judgements and has rather short limitation periods when it comes to defend against creditor claims and/or forced heirship violation demands. In this context, asset protection must definitely be considered as a core element of the Liechtenstein trust, which does not mean hiding wealth from tax authorities but to protect wealth from unwarranted and unauthorized claims.

In the case of Argentina, a foreign trust settled by an Argentinean resident settlor, if properly established, does reach full legal recognition. Various Argentinean court decisions passed, as discussed in detail above, assembled meanwhile a catalog of criteria to be strictly followed in view of establishing a fully recognised foreign trust. The judgments of *Moreno Julio*, *Eurnekian Eduardo*, *Deutsch Gustavo* as well as *Fiorotto Fernando Bernabe* paved the way for foreign trusts to be recognised in Argentina in the event that the conditions elaborated are fully and carefully implemented.

In the case of Brazil, albeit having fewer court decisions and authorities' pronounciations on foreign trusts to be analysed, it can be stated that according to Brazilian international private law, all acts, judgments and laws of another country are effective in Brazil, provided they do not offend national sovereignty, public order, or public decency. This is provided for, as discussed above, in Article 17 of the Introductory Law to the Brazilian Civil Code (Decree - Law 4657/42). Meeting these conditions, a foreign trust settled by a Brazilian resident settlor, should reach full legal recognition as well. An ex-

ample of this understanding was given in the judgement *Netto v Thornton*, where the Brazilian court fully upheld the foreign trust established and denied the wife's rights to inherit.

Wealthy Argentinean and Brazilian families always did and still do face constantly economical and political uncertainty, which at the end always triggered increased attention for wealth protection and wealth preservation solutions. Bearing in mind the recent tax amnesties in Argentina and Brazil as well as the Automatic Exchange of Information (AEOI) which is just around the corner, Argentinean's and Brazilian's demand for financial privacy must be sky-high these days. The simple solution to cope with these countries' unstable regimes and curiosity is to carefully set up a fully discretionary three-party Anglo-Saxon trust. In the event that asset protection matters, a Liechtenstein trust would most probably be the best choice for the reasons elaborated above. As was said by the PRINCE VON UND ZU LIECHTENSTEIN, financial privacy is not an issue which only concerns wealthy people but an issue which concerns freedom of humanity. Wealthy Argentinean and Brazilian families have well deserved to make use of this highly sophisticated international instrument.

Concluding, besides of the various judgements passed in these countries which give in fact full legal recognition to foreign trusts to date, a solution on the international level for the international recognition of foreign trusts in the Latin American legal systems would be still be the best alternative. Meanwhile, many practitioners would welcome a new unilateral proposal to be implemented in the Argentinean and Brazilian Civil Codes whereupon the foreign Anglo-Saxon trust would be given full legal recognition.

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List of abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch
A.D.	Anno Domino
Art.	Article
B.C.	Before Christ
BGE	Bundesgerichtsentscheid
BGH	Bundesgerichtshof
BJR	Business Judgment Rule
BRT	Brasil Telecom SA
BVI	British Virgin Islands
CC	Civil Code
CCC	Civil and Comercial Code
C.F.	Capital Federal
CFC	Controlled Foreign Company
CNV	Comisión Nacional de Valores
DCBE	Declaração de Capitais Brasileiros no Exterior
DERCAT	Declaração de regularização cambial e tributária
DGI	Dirección General Impositiva
DTA	Double Taxation Agreement
ed	Editor
ed	Edition
EEA	European Economic Area
EEAA	Agreement on the European Economic Area
EFTA	European Free Trade Association
eg	for example
et al.	et alia; and others
etc.	et cetera
et seq	et sequentia; and that which follows
et seqq	et sequentia; and those which follow
FATF	Financial Action Task Force on Money Laundering
FL OGH	Oberster Gerichtshof des Fürstentum Liechtenstein
GesKR	Schweizerische Zeitschrift für Gesellschafts- und Kapitalmarktrecht sowie Umstruktu rierungen
HNWI	High-Net-Worth-Indidividual
Hrsg.	Herausgeber

HTC	The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition
i.e.	id est
IPEA	Institute of Applied Economic Research
IOF	Imposto sobre Operações Financeiras
IPRG	Gesetz über das internationale Privatrecht (Private International Law Act
IRPF	Imposto de Renda
ITCMD	Imposto sobre Transmissão Causa Mortis e Doação
KYC	Know your customer
lit	litera
LJZ	Liechtensteinische Juristenzeitung
max.	maximum
No.	Number
NY	New York
OECD	The Organisation for Economic Co-operation and Development
OLG	Oberlandesgericht
OUP	Oxford University Press
PGR	Persons- and Companies Act
p	page
par.	paragraph
pp	pages
Prof.	Professor
REPRAX	Zeitschrift zur Rechtsetzung und Praxis im Gesellschafts- und Handelsregisterrecht
RERCT	Regime Especial de Regularização Cambial e Tributária
RJ	Rio de Janeiro
sec	Section
SEC	U.S. Securities and Exchange Commission
SteG	Steuergesetz Liechtenstein (Liechtenstein Tax Act)
STEP	Society of Trust and Estate Practitioners
StGH	Staatsgerichtshof
TrUG	Gesetz über das Treuunternehmen
UK	United Kingdom of Great Britain and Northern Ireland
US(A)	United States of America
USD	United States Dollars
v	versus
Vol	Volume
Yale L.J.	The Yale Law Journal

ZPO	Zivilprozessordnung