

# CIVIL LAW TRUSTS IN LATIN AMERICA: IS THE LACK OF TRUSTS AN IMPEDIMENT FOR EXPANDING BUSINESS OPPORTUNITIES IN LATIN AMERICA?

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## I. INTRODUCTION

Many differences between the Anglo-American and Latin American legal systems are rooted in dissimilar cultural and societal approaches. Equity is a major area of contrasting jurisprudence. Whereas equity plays a relegated, subordinate role in Latin American courts, equity permeates Anglo-American legal institutions—both in the criminal and civil arenas—in almost all areas, including evidence, remedies, precautionary measures, trials, juries, sentencing, and trusts. The field of trust law epitomizes this contrast; this area exemplifies how the subdued role of equity in Latin American civil laws and its vitality in Anglo-American common law create divergent legal approaches.

Due to its flexibility, the trust is considered one of the most useful legal tools for promoting business in the United States. In contrast, use of the Latin American trust (*fideicomiso*) is limited to commercial and financial purposes and has been described as a rigid<sup>1</sup> and archaic instrument.

Due to the common law underpinnings of Anglo-American trusts, attempts at merely transplanting the use of these trusts into Latin America would likely fail. However, this does not preclude the possibility of transforming the Latin American *fideicomiso* into a modern and effective legal tool. The need to improve the Latin American *fideicomiso* has been suggested in the past. In 1921, a study supported by the U.S. Congress concluded that one of the reasons for the inefficiency of Latin American banking systems was “the lack of the trust.”<sup>2</sup>

A redesign of the Latin American *fideicomiso* into a more Anglo-American type of business trust should help enhance investment and promote growth and development in the region. Whatever the approach, the search for the modernization of the Latin American trust must avoid the extremes of either merely introducing cosmetic changes or upsetting the very foundations of Latin American civil law systems. Nor should this undertaking meet defeatism based on the enormous task of updating an outdated institution.

With this context, this article first reviews the essential aspects of trusts in both legal systems, identifies their key differences, highlights the benefits derived from Anglo-American business trusts, and studies the aspects of the Latin American

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1. Jairo Mayda, “Trusts” and “Living Law” in Europe, 103 U. PA. L. REV. 1041, 1052 (1955).

2. MAURIZIO LUPOLI, TRUSTS: A COMPARATIVE STUDY 269 (Simon Dix trans., Cambridge Univ. Press 2000).

*fideicomiso* that challenge the expansion of trade and business. The section also advances general criteria and examples of legal *fideicomiso* reforms that would make it perform similarly as the diverse tool that the Anglo-American trust represents.

Part Two outlines the main elements of the Latin American *fideicomiso* and the Anglo-American *inter vivos* trust. This section recognizes the contractual nature of the former and the more flexible nature of the latter. To understand its benefits, a review of the origin and definition of the Anglo-American *inter vivos* trust is included, focusing on the divided concept of ownership, the notion of entrusting, the segregation of assets principle, tracing, and tax treatment.

Part Three explores the points of convergence and divergence between the Anglo-American trust and the Latin American *fideicomiso*. This section posits that the trust lies at the heart of the Anglo-American legal system because it is based upon thoughts, processes, cultural approaches, priorities, and conceptions concerning the organization of individual and societal life distinctive to Anglo-American societies. In contrast, Latin American legal systems rest on a significantly different mode of legal thought and analysis, characterized by the formality of civil law. Ten specific areas of comparison are incorporated, including the powers of grantors, courts, the publicity requirement for trusts, and their termination.

Part Four sets forth the quest for equivalence between the Anglo-American trust and the Latin American *fideicomiso*, exploring the points of comparison previously described. This section looks at particular kinds of business and commercial trusts in common law and attempts to match them, as applicable, with their Latin American counterparts. The section arrives at the conclusion that it is not possible to find an absolute simile to the Anglo-American business trust in Latin America. As a consequence, the Latin American experience with business and commercial trusts is limited in reach and scope and needs to be deepened to foster business and investments in the region. Despite this conclusion, the article recognizes the value of striving to discover points of convergence, as exemplified by governmentally-created trusts.

Part Five looks at what lies ahead for furthering the concept of *inter vivos* trusts in the Latin American region. It analyzes past attempts, placing special emphasis on the Hague Convention on the Law Applicable to Trusts and on their Recognition. It also points out several trust alternatives available in Anglo-American law that do not exist in Latin America. The section concludes by laying out basic criteria for the redesign of the Latin American *fideicomiso*.

Part Six, in conclusion, confirms the need to change the Latin American *fideicomiso* and to update it for the increasing challenges in the region created by economic globalization.

## II. GENERAL ASPECTS OF THE LATIN AMERICAN AND THE ANGLO-AMERICAN *INTER VIVOS* TRUST

### A. The Latin American *Fideicomiso*

## 1. In General

The idea that a patrimony can be created and adopt an independent existence from its owner in order to serve a particular purpose is common to both Anglo-American and Latin American law. The institution of the trust and *fideicomiso* are the vehicles through which—to different degrees, as it shall be reviewed in this article—these objectives are achieved.

The *fideicomiso* is Latin America's version of the Anglo-American *inter vivos* trust. Its origins have been traced to the Latin *fiducia*, which “originally concerned the transfer of property to a creditor or manager by a formal act of sale, yet with an agreement that the creditor would reconvey the property upon payment of a debt”<sup>3</sup> whereas “[t]he manager of the *fiducia* property held complete legal and equitable title in the property.”<sup>4</sup> The Roman law institutions of the *fiducia* and *fideicommissum* have been identified as the remote predecessor of the *fideicomiso*. *Fiducia*<sup>5</sup> was understood as an agreement under which the transferee must return the full ownership of the property to the transferor.<sup>6</sup> The Napoleonic Civil Code, an offspring of the French Revolution and the inspiration to most Latin American civil codes,<sup>7</sup> abolished the *fiducia* but maintained the *fideicommissum*,<sup>8</sup> which ultimately became the predecessor of the Latin American *fideicomiso*.

The Latin American *fideicomiso* has been unflatteringly criticized by the Anglo-American legal world as “a fossil, inelastic, inflexible institution with no

3. Carly Howard, *Trust Funds in Common Law and Civil Law Systems: A Comparative Analysis*, 13 U. MIAMI INT'L & COMP. L. REV. 343, 358 (2006).

4. *Id.*

5. *Id.* Howard notes that:

[T]he primary difference between the common law trust and the *fiducia* is that a trust beneficiary has a legal right to property in the trust, while a *fiducia* beneficiary is, in essence, no more than a mere creditor . . . . Another discrepancy is that a trust may be revocable if established properly as a revocable trust, while a *fiducia* may not be revoked. Still, many civil law countries . . . offer a contemporary variation of the *fiducia* as a trust substitute.”

*Id.*

6. Donovan Waters, *The Future of the Trust from a Worldwide Perspective*, in THE INTERNATIONAL TRUST 619 (John Glasson ed., 2002).

7. See generally M.C. Mirow, *The Power of Codification in Latin America: Simón Bolívar and the Code Napoléon*, 8 TUL. J. INT'L & COMP. L. 83, 84-85 (2000) (explaining the close relationship between the Napoleonic Civil Code and many Latin American civil codes); see also M.C. Mirow, *Borrowing Private Law in Latin America: Andres Bello's Use of the Code Napoleon in Drafting the Chilean Civil Code*, 61 LA. L. REV. 291, 292 (2001) (tracking the origins of the Chilean Civil Code from the French Civil Code).

8. Waters, *supra* note 6, at 619.

scope of action, utterly useless for the varied and complex civil relations of modern life.”<sup>9</sup> Others have stated that Latin America possesses “complicated trust laws that [make it] difficult to fashion transactions.”<sup>10</sup> On the other hand, civil lawyers generally believe that the common law trust is but a “jumble of ideas”<sup>11</sup> and wonder “[h]ow can the civilian effectively design that equivalent if there is uncertainty where the common law trust idea is to be found on the spectrum?”<sup>12</sup>

It has been broadly thought on both sides of the aisle that there is no possible equivalent between the Anglo-American trust and the *fideicomiso*.<sup>13</sup> Even the relevance of finding a common ground has been hotly disputed,<sup>14</sup> whereas, in common law countries, the trust “for hundreds of years . . . has played a vital role in organizing transactions of both a personal and a commercial character . . . [in civil law countries] . . . the private trust does not exist as a general form.”<sup>15</sup>

This inauspicious environment provides the context for an in-depth analysis of the Latin American *fideicomiso*.

## 2. The Quintessential Latin American *Inter Vivos* Trust is Always Contractual

It is broadly believed in Latin American civil law that a contractual form provides more certainty<sup>16</sup> than verbal agreements or unilateral statements of

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9. See Albert S. Golbert & Yenny Nun, *Chapter V: Trusts and Future Interests*, in *LATIN AMERICAN LAWS AND INSTITUTIONS* 90 (1982).

10. Georgette Chapman Poindexter et al., *En Ruta Hacia el Desarrollo: The Emerging Secondary Market in Latin America*, 34 *GEO. WASH. INT'L L. REV.* 257, 286 (2002).

11. Waters, *supra* note 6, at 639.

12. *Id.*

13. See LUPOI, *supra* note 2, at 195-96 (“[T]o speak of a trustee as one would of a (civilian) fiduciary is a serious error.”).

14. Henry Hansmann, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 *N.Y.U.L. REV.* 434, 451 (1998) (“Contract law in the civil law countries is also generous in permitting enforcement of a contract by a third party beneficiary, with the consequence that in those jurisdictions, too, the importation of trust law doctrine would add nothing significant to the law in this regard.”).

15. *Id.* at 434.

16. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 *TEX. L. REV.* 515, 601 (2004) (“An enforceable contract represents the most common substitute for trust. Contract law can compensate for a lack of trust because parties do not need to rely as heavily on trust that another party will keep her promise if a court will enforce the promise either by awarding damages or requiring court-monitored specific performance. When commercial players have access to information and legal sanctions in case of breach, ‘commercial transactions can succeed even in the presence of some distrust.’”).

commitments.<sup>17</sup> This explains the preference for a contractual trust instead of the unilateral approach to trust creation found in common law.<sup>18</sup> Panama<sup>19</sup>—a country that introduced trusts long before most other Latin American countries<sup>20</sup>—defined the *fideicomiso* in 1941 as “an irrevocable agency whereby determined property is transferred to a person called the *fiduciario*, for this person to dispose of them according to the instructions of the *fideicomitente*, for the benefit of a third party, called *fideicomisario*.”<sup>21</sup> This definition lays out the main elements of the *fideicomiso* commonly found in most Latin American jurisdictions. For example, Peru’s banking law of 1993 defines *fideicomiso* as:

[A] legal relationship through which a person called *fideicomitente*, transfers property to another person, called *fiduciario*, for the formation of a fiduciary patrimony, subject to the fiduciary ownership of the *fiduciario* and subject to the achieving of a specific purpose or purposes for the benefit of a third person or of the *fideicomitente* himself, called *fideicomisarios*.<sup>22</sup>

A typical *inter vivos* Latin American *fideicomiso* benefits both the *fiduciario* and the *fideicomisario(s)*. The *fiduciario* holds both legal and equitable title, possession, and

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17. See CÔD. CIV. arts. 1708-10 (2005) (Chile) (expressing the civil law rule that the lack of a writing concerning contracts that, according to the law, must be memorialized in a document, voids the contract, and that witness testimony is generally inadmissible to prove the obligations arising therefrom).

18. Paul Matthews, *The New Trust: Obligations Without Rights?*, in TRENDS IN CONTEMPORARY TRUST LAW 1, 1 (A. J. Oakley, ed., 1996) (“Had the [beneficiary’s] right remained purely personal, it might have developed into a law of obligations rather like the civil law of contract, i.e. voluntarily assumed obligations.”).

19. This country enjoys the privilege of being called the home to a trust scholar who has been called “the father of the Latin American legislation on trust.” See Kathryn Venturatos Lorio, *Louisiana Trusts: The Experience of a Civil Law Jurisdiction With the Trust*, 42 LA. L. REV. 1721, 1725 (1982) (quoting Roberto Goldschmidt, *The Trust in the Countries of Latin America*, 3 INT’L AM. L. REV. 29, 31 (1961)).

20. See LUPOLI, *supra* note 2, at 269 n. 12 (quoting R. J. Alfaro, *The Trust and the Civil Law with Special Reference to Panama*, 33 J. COMP. LEGIS. & INT’L L. 25 (1951)).

21. Ley No. 17, 20 Feb. 1941, Ley sobre fideicomiso [Law About Trust] art.1, Gaceta Oficial [G.O.], 6 Mar. 1941 (Pan.) (translation by author); see also Decreto Ejecutivo No. 16 (3 Oct. 1984), reglamenta la ley No. 1 que regula el ejercicio del negocio de Fideicomiso (Regulating the Exercise of the Business Trust), Gaceta Oficial [G.O.] (Oct. 18, 1984) (Pan.) amended by Decreto Ejecutivo No. 53, 30 Dec. 1985, modifica el Decreto Ejecutivo No. 16 por el cual se regula el ejercicio del negocio de Fideicomiso [Amendments to the Regulation of Trust], Gaceta Oficial [G.O.] (Dec. 31, 1985) (Pan.).

22. Resolucion SBS N. 1010-99, 11 Nov. 1999, approving Reglamento del Fideicomiso y de las Empresas de Servicios Fiduciarios [Regulation of Trust and of Trustee Service Companies], tit. II, art. 2, *El Peruano* [E.P. (Nov. 13, 1999) (Peru) (translation by author).

use of the trust's assets in his own right. The rights of third parties, namely, the *fideicomisario(s)*, do not limit the *fiduciario's* disposal of the property. The *fiduciario's* only limitation is to transfer the trust corpus to the *fideicomisario(s)* upon the occurrence of a condition<sup>23</sup> and then to "return the property when the purpose is fulfilled (when the condition has been met), either to the original transferor or to a third party nominated by him."<sup>24</sup> Statutorily, the condition fails if it does not occur within a certain period of time from the creation of the *fideicomiso*.<sup>25</sup> The grantor<sup>26</sup> may appoint a plurality of *fiduciarios* or *fideicomisarios*.<sup>27</sup> But while the first *fideicomiso* is pending, the *fideicomisario* does not have any rights over the trust corpus; he will only receive what is left according to the use or disposition the *fiduciario* has made in compliance with the grantor's instructions. In other words, if the grantor authorized the *fideicomisario* to execute acts of disposition over the property, the *fiduciario* will get "that what is left at the time of the transfer, if any."<sup>28</sup>

Important differences arise from the exclusive contractual nature of the Latin American *fideicomiso* and the general Anglo-American *inter vivos* trust:

(i) The Latin American *fiduciario* is not a trustee in Anglo-American terms. The *fiduciario* does not hold the corpus "for another" but in his own name; legal and equitable ownership rights converge fully on him. This is an important difference with the Anglo-American trustee whose essential task is to hold the property for another.

(ii) The Latin American *fideicomisario* should not be considered analogous to Anglo-American beneficiaries since the latter possess equitable rights to the trust assets that the former does not have.<sup>29</sup>

(iii) The *fiduciario's* obligation to transfer the assets to the *fideicomisario* once a condition occurs is another important difference<sup>30</sup> with the trust, where other events and conditions may trigger such transfer.<sup>31</sup> The Anglo-American beneficiary obtains

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23. See CÒD. CIV. art. 773 (Chile 2005) ("Fiduciary ownership is that which is subject to the burden of passing to another person in the event that a condition occurs.") (translation by author).

24. Venturatos, *supra* note 19, at 1722.

25. See CÒD. CIV. art. 739 (Chile).

26. For ease of reference, the word "grantor" is used throughout this article. This term should also be understood to include the concepts "settlor" and "trustor."

27. CÒD. CIV. art. 742 (Chile).

28. *Id.* at art. 760.

29. *Id.* art. 761 (allowing the beneficiaries to require discrete measures for the protection and conservation of *fideicomiso* assets).

30. *Id.* art. 733 (mandating the *fiduciario* to transfer the assets to the *fideicomisario* once a condition occurs).

31. *Id.* at Part V, Section II.

the property through the transfer of the legal title over the assets by the trustee.<sup>32</sup>

(iv) Another important distinguishing characteristic of the *fideicomiso* from the Anglo-American trust arose from Napoleon's reaction against the French Old Regime. The Napoleonic Civil Code eliminated the possibility of creating two or more successive *fideicomisos*.<sup>33</sup> This prohibition prevented the perpetuation of property ownership within a family in violation of property succession laws. Most Latin American civil codes incorporated this prohibition in the nineteenth century.<sup>34</sup> This prohibition prevents the grantor from creating a *fideicomiso* that forces the *fiduciario* to transfer the corpus to a *fideicomisario* who, in turn, transfers the corpus to a second *fideicomisario* or back to the *fiduciario* when a condition occurs.<sup>35</sup> A violation of this prohibition renders void the transfer from the first to the second *fideicomisario* or the transfer back to the grantor. In these cases, trust assets remain the property of the noncompliant transferor<sup>36</sup> because the civil law *fiduciario* holds trust property "for his own benefit."<sup>37</sup> The *fideicomisario(s)* have "no vested rights but merely an untransferable expectancy, a contingent interest."<sup>38</sup> The central concept of holding trust assets for the benefit of another that define the Anglo-American express *inter vivos* trust is absent in the Latin American *fideicomiso*.<sup>39</sup>

## **B. The Anglo-American *Inter Vivos* Trust**

Trusts serve as a tool for the organization of wealth and the pursuance of public-interest objectives. Their flexibility makes them available to the ordinary citizen. In fact, Anglo-American families use trusts as a device to achieve a variety

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32. Hansmann, *supra* note 14, at 439-40.

33. CòD. CIV. art. 742 (Chile).

34. See the civil codes of Mexico (Oaxaca State, 1827); Bolivia (1830); Costa Rica (1841); Dominican Republic (1845); Peru and Guatemala (1852); Chile (1855); Ecuador (1858); El Salvador (1859); Venezuela (1862); Nicaragua (1867); Argentina (1869); Paraguay (1876); Honduras (1880); and Colombia (1887).

35. See CòD. CIV. art. 773 (Chile).

36. *Id.* art. 739.

37. Golbert, *supra* note 9, at 88.

38. *Id.*

39. *Id.*

of objectives including the preservation of family assets and the economic protection of mentally and physically incompetent persons.<sup>40</sup> In the business realm, trusts are commonly used to raise capital for commercial transactions, to channel investment for financial ventures, and to support other related uses.<sup>41</sup>

This broad recognition of trusts as a multifarious and flexible tool for the organization and distribution of wealth has run parallel to a profound distrust of this device in the eyes of some Anglo-American scholars. Some have expressed doubts that the trust could ever achieve a completely legitimate role in American legal culture.<sup>42</sup> Nevertheless, experience demonstrates that the trust is “one of the most flexible Anglo-American legal devices in that it can play a part in almost any sphere of life.”<sup>43</sup>

### 1. The Search for a Definition of the Anglo-American Trust

There is not a single or a unanimously accepted definition for the Anglo-American trust. Undoubtedly, the notion of trust finds its etymologic origin in the concept of confidence,<sup>44</sup> which most communities consider a fundamental element of social life – and this idea deeply permeates the Anglo-American trust. Only a few experts have attempted to provide a unique stand-alone definition of trusts.<sup>45</sup>

The debate as to the core of the Anglo-American trust is extensive. Some commentators find the essence of the trust in the “duty of confidence imposed upon a

40. See Paul D. Finn, *A Comment*, at the First International Conference on Trust Law, Cambridge, U.K. (Jan. 6-7, 1996), reprinted in *TRENDS IN CONTEMPORARY TRUST LAW*, 212 (A. J. Oakley ed., 1996) (“In equity the predominant thrust has been to prevent the exploitation or manipulation of a person in a position of vulnerability.”).

41. See Ignacio Arroyo Martinez, *Trust and the Civil Law*, 42 *LA. L. REV.* 1709, 1714 (1982) (citing that among the multiple uses of the trust include “the protection and care of incompetents, to the distribution of an inheritance or the preservation of a family estate, to the giving of security for the transfer of immovable property, or the issuing of bonds; to the structure of profit-sharing plans for workers, not to mention the many commercial and financial uses such as investment trusts, guaranteed trusts and life insurance, voting trusts, trusts for underwriting purposes, and, finally, the international trusteeship”); see also Waters, *supra* note 6, at 606 (other trust uses include “investment, security provision, lending, and property title holding”).

42. *Id.* at 1713 (“[A]ccording to historical investigations, it can be proved today, without any risk of error, that the trust was born of an illegal purpose: the transfer of lands to bogus intermediaries, avoiding in that way the payment of taxes and the enforcement of the laws governing mortmain.”).

43. *THE TRUST: BRIDGE OR ABYSS BETWEEN COMMON AND CIVIL LAW JURISDICTIONS?* 7 (Frans Sonneveldt & Harrie L. van Mens eds., 1992).

44. See Leslie, *supra* note 16, at 523 n.40 (citing Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 *B.U. L. REV.* 531, 539 (1995)).

45. Emmanuel Gaillard & Donald T. Trautman, *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*, 35 *AM. J. COMP. LAW* 307, 317 (1987) (“[T]rusts experts often have great aversion to giving a precise definition of the ‘trust.’”).



trustee in respect of particular property and positively enforceable in a Court of Equity by a person.”<sup>46</sup> For others, the trust exists to protect the “beneficiaries’ rights to enforce the trust and [to] make the trustees account for their conduct with the correlative duties of the trustees to the beneficiaries.”<sup>47</sup> An examination of the main elements of the trust provides a workable definition. Traditional and accepted definitions of a trust<sup>48</sup> conceptualize it as:

[A]n equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called beneficiaries or *cestuis que* trust), of whom he may himself be one, and any one of whom may enforce the obligation.<sup>49</sup>

This definition is valid only for *inter vivos* contractual trusts, which are but a small portion of the trusts available in today’s Anglo-American legal world. This definition fails to recognize that trusts may be created irrespective of and even against the grantor’s desires and that beneficiaries may not necessarily be “born” persons but also unborn fetuses,<sup>50</sup> buildings, or pets. Moreover, the definition overlooks the fact that trusts may also benefit causes, ideas, or movements, as in the case of trusts created for the promotion of literacy or religion. Finding a comprehensive and broadly accepted definition of the Anglo-American trust is difficult, even among Anglo-American attorneys who are most familiar with this institution.<sup>51</sup>

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46. For a review of the duty of loyalty, see John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929 (2005).

47. David Hayton, *The Irreducible Core Content of Trusteeship*, in TRENDS IN CONTEMPORARY TRUST LAW 47, 148 (A. J. Oakley ed., 1996) (“It is the beneficiaries’ right to enforce the trust that is at the core of the trust.”).

48. Martyn Frost, *Overview of Trusts in England and Wales*, in TRUSTS IN PRIME JURISDICTIONS, 13 (Alon Kaplan ed., 2000) (quoting SIR ARTHUR UNDERHILL, LAW OF TRUSTS AND TRUSTEES 3 (11th ed.)).

49. *Id.* at 13; see also LUPOI, *supra* note 2, at 95; see also Waters, *supra* note 6, at 604 (quoting UNDERHILL & HAYTON, LAW OF TRUSTS AND TRUSTEES (Butterworths, 15th ed, 1995)).

50. Exceptionally in Latin America, Panama’s Law 17 of 1941 contains a groundbreaking provision allowing the naming of the unborn as beneficiary.

51. The trust has been extolled as the “most distinctive achievement of English lawyers.” Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91, 99 (2000) (quoting F.W. MAITLAND, *Equity, also, the Forms of Action at Common Law; two courses of lectures* 23 (A.H. Chaytor & W.J. Whittaker eds., 1984)).

## 2. A Look at the Origin of the Trust to Understand its Current Status

The trust is as much of an institution in English culture as is “football” (soccer) and tea. In fact, the influence of the British trust was felt everywhere throughout the former British Empire.<sup>52</sup> The trust’s origins can be traced back to the Middle Ages and are intimately connected with the religious and historical events of that age. As early as the thirteenth century, Catholic monks used trusts for the implementation of their vows of poverty.<sup>53</sup> In those cases, trusts served as a basic means of property holding in the name of a titleholder—usually a community—for the benefit of another, in this case the monks, who were not allowed to own anything besides minimal personal items.<sup>54</sup> Trusts also served as a means of landholding for Crusaders while they went on their missions.<sup>55</sup>

During later times, trusts developed in England as a useful tool for devising real property and for the organization and distribution of familial wealth—both *inter vivos* and *causa mortis*—in accordance with the succession priorities of the age, which were mainly based on primogeniture laws.<sup>56</sup> With the growth of commerce

52. See Waters, *supra* note 6, at 625 (“Wherever the British went, the trust went with them.”).

53. See Gaillard, *supra* note 45, at 315 (“The history of the trust, from its very beginning [w]as a device used by the Franciscan monks to enable them to observe the letter of their vows of poverty.”); see also LUPOLI, *supra* note 2, at 185 (“[A]s we know, the friars could not own anything, and, according to the strictest interpretation, could not own any right, on pain of violating their vow to poverty.”).

54. See TRUST: BRIDGE OR ABYSS, *supra* note 43, at 3 (“It all began with the Franciscan friars who came to England in the second quarter of the thirteen century. They were bound by their oath of poverty not to possess any wealth. Still they needed land to live and work on. A solution was readily found. Lands were conveyed to the borough community *ad opus fratrum*, to the use of the friars.”).

55. Matthews, *supra* note 18, at 30 (“Trusts came into existence because lawyers were asked to create structures to serve particular purposes: holding land whilst the owner went off to the Crusades, devising land when there was no power of testation, avoiding feudal incidents of tenure.”); see also THOMAS F. MADDEN, *A CONCISE HISTORY OF THE CRUSADES* 10 (1999) (“As a pilgrim, a crusader’s lands and properties were placed under the protection of the church until his return.”).

56. Henry Christensen & Charles T. Dowling, *Foreign Trusts and Alternative Vehicles*, American Law Institute – American Bar Association Continuing Legal Education, SK024 ALI-ABA 115, 117 (2004). Christensen and Dowling state that in

[T]he beginning, then, the trusts were used for dividing estates in real estate, and facilitating the donor’s testamentary plans in the face of the laws of primogeniture and other restrictions imposed by the Crown on transfers of land, which constituted most of the wealth of medieval society. John Langbein suggests that well into the 19th Century, trusts by and large were still used in England as instrument of conveyancing and that only in the last 150 years do we find developing the widespread use of trusts to manage family fortunes consisting of assets other than land.

and the rise of a wealthy merchant class in England, utilization of trusts greatly increased.<sup>57</sup> At the turn of the twentieth century, the use of trusts increased exponentially in the corporate arena and came to include “trusts of corporate supplied assets to secure the company’s debenture holders, public subscription unit investment trusts . . . and the management of urban businesses by trustees following the death of the unincorporated successful entrepreneur.”<sup>58</sup> By the end of the twentieth century, a massive body of case law on trusts existed in England.<sup>59</sup>

Trusts in American law can be traced to practices in feudal England and English courts of equity,<sup>60</sup> and their use goes back to the original thirteen colonies. For example, in the seventeenth century, trusts were used to avoid unwanted professional liability and to provide for the needs of a spouse and children.<sup>61</sup> However, trusts only became popular in the United States after World War II.<sup>62</sup>

In today’s American society, trusts are used in almost every private and public aspect of the economy. In the private sector, trusts “are used as estate planning devices to minimize estate taxes, as perpetuators of dynastic wealth, and as a way to preserve assets against the improvidence of a beneficiary and his creditors.”<sup>63</sup> By far the most important role of trusts in the United States is witnessed in the field of capital markets.<sup>64</sup> The tax advantages that trusts provide for grantors

*Id.*

57. See Waters, *supra* note 6, at 600. (“[A]n unprecedented growth of mercantile wealth in the Victorian period and of a prosperous urban middle class had also occurred, and the successful merchants’ trusts reflected much of the rural landed families’ settlements.”). During this period, trusts were used “for the holding and disposition of individual wealth within the family, both real estate and securities, cash, jewelry and art, furniture and other assets of value.” *Id.* at 605.

58. *Id.* at 605; see also George L. Gretton, *Trusts without Equity*, 49 INT’L & COMP. L.Q. 599 (2000).

59. Waters, *supra* note 6, at 600. (“Only in the late 1960s and the 1970s did a changed world of equity and trust begin to emerge, and only in part did this slow revival of interest in equity come to be reflected in the traditional case-law of trusts.”).

60. Edward C. Halbach, *The Uses and Purposes of Trusts in the United States*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW, 124 (David Hayton ed., 1999) (“The origin of American trust law can be traced to practices involving what was called a ‘use’ in feudal England, and then to more modern law that evolved in the English courts of equity (or ‘chancery’).”).

61. See Rosenberg, *supra* note 51, at 103 (“A physician in Maryland created a trust for his wife and children to avoid liability for potential damages in a lawsuit. In a less formal arrangement, a woman in Massachusetts entered into a verbal trust-like arrangement with her future husband to provide for her children and prevent her husband from controlling her property.”).

62. Howard, *supra* note 3, at 351.

63. Rosenberg, *supra* note 51, at 105.

64. *Id.* at 105 (Currently, “[t]he largest growth of the trust [in America] has been in the area of commercial trusts, which. . . constitute a significant portion of personal and national

and beneficiaries foster this widespread use.<sup>65</sup> The trust device also grants beneficiaries immunity against their creditors and the possibility of alternative management by professional trustees.<sup>66</sup> In the public arena, trusts have found a unique role, especially in the form of charitable trusts, which have been considered a “positive force in American culture.”<sup>67</sup>

### 3. Essential Elements

The original Anglo-American trust took the form of the express, contractual *inter vivos* trust. Over the centuries, the many benefits provided by this legal instrument gave way to other forms of trusts, some of which have retained little resemblance to the original trust form. Thus, it is necessary to provide an examination of the main elements of the express *inter vivos* Anglo-American trust.

#### a. The Divided Concept of Ownership

Much debate has taken place as to the essential elements of a trust. In common law, the voluntary expression of the grantor’s will, essential in all contracts, is not a fundamental element when it comes to the creation of a trust. For centuries, Anglo-American courts have imposed trusts upon individuals based on equitable principles. A trustee’s express acceptance is not a requirement for the establishment of an Anglo-American trust; contractual-like voluntary ascension does not lie at the essence of the Anglo-American trust.<sup>68</sup> The key elements required for the existence of the “contractual” trust are the grantor, a trustee, and a beneficiary.<sup>69</sup> These

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wealth”); *see also* Hansmann, *supra* note 14, at 437 (“[A]sset securitization trusts are now the issuers of a large fraction of all outstanding American debt securities—more than \$2 trillion worth.”); *id.* (such is the case mutual funds and pension funds, which currently hold “roughly forty percent of all United States equity securities and thirty percent of corporate and foreign bonds.”).

65. G. Warren Whitaker, *Revocable Trusts: Fact and Fiction*, N.Y. ST. B.A. J. 44 (2005).

66. Hansmann, *supra* note 14, at 467 (“Immunity from the creditors of the fund’s manager is also a critical reason for use of the trust form for mutual funds. If a fund’s manager were simply the agent of the fund’s investors, the fund’s portfolio would always be at risk of the fund manager’s insolvency—a risk that the investors would have great difficulty monitoring or controlling. For this reason, mutual funds that are not formed as trusts are typically formed as business corporations.”); *id.*, at 468 (“For this purpose, an essential feature of the trust is that it is . . . ‘bankruptcy remote.’”).

67. *Id.* at 7.

68. *Common Law Trusts in Civil Law Courts*, 67 HARV. L. REV. 1030, 1032 (1954) (“[A]t common law a trust need not be founded upon a contract.”).

69. Howard, *supra* note 3, at 347 (“[T]here are three persons crucial to the establishment of a trust: the settlor, the trustee, and the beneficiary.”).

elements do not always converge at the moment of the trust's creation. In fact, a court may appoint a trustee after the creation of a trust according to the instructions of the grantor.<sup>70</sup> Moreover, these three elements can and are often intertwined and mixed. For instance, the same person can simultaneously be the grantor, the trustee, and the beneficiary of a trust. Alternatively, a person can simultaneously be both the trustee and the beneficiary of a trust.<sup>71</sup>

#### b. The Trustee

In the view of many trust law scholars, the trustee lies at the center of the *inter vivos* Anglo-American trust.<sup>72</sup> If a trustee is present, a trust may exist without a grantor and beneficiaries. The rules generally applicable to common law trustees are:

(i) a plurality of trustees is commonly permitted;<sup>73</sup>

(ii) there are some limitations on the performance of trust obligations by the trustee; for example, English law allows for the appointment of a protector, who is defined as someone whose consent is necessary before the trustee can take any actions, who has veto power over the trustee's decisions, who has the power to change the law governing the trust, and who can even remove the trustee;<sup>74</sup>

(iii) there are not many restrictions concerning who can be a trustee, as both natural and juridical persons may act as such; some restrictions apply based on residence or citizenship requirements. But these are isolated cases in the Anglo-American world;<sup>75</sup>

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70. See *infra* note 188.

71. Howard, *supra* note 3, at 347.

72. LUIPOI, *supra* note 2, at 179 (“[T]he trustee . . . is the only essential person in a trust.”).

73. UNDERHILL, *supra* note 48, at 3; *id.* at 16. (“[T]here is in general no limit to the number of trustees for a trust.”).

74. David Hayton, *Exploiting the Inherent Flexibility of Trusts*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 321 (David Hayton ed., 1999).

75. See Frost, *supra* note 48, at 16 (noting that in England, *e.g.*, “there is no bar to a non-resident acting as a trustee”).

(iv) the trustee's role is not generally delegable unless otherwise expressly provided in the trust instrument;<sup>76</sup>

(v) strict liability is usually the rule when it comes to the trustee's statutory liability<sup>77</sup> (if there are two or more trustees, "their responsibility to the beneficiaries is joint and several"<sup>78</sup> and their defenses are extremely scant),<sup>79</sup> and

(vi) exoneration or indemnification clauses favoring trustees for negligent acts or omissions are generally considered valid "except in cases of the trustee's own fraud."<sup>80</sup> Whether the settlor should be allowed to anticipatorily waive a trustee's negligence at the moment of the trust's creation is much debated, but there seems to be a consensus that a limitation should exist and that this limitation is the trustee's fraud or extreme carelessness.<sup>81</sup>

### c. The Entrusting

The act of entrusting is just as important as the existence of the trustee.<sup>82</sup> The entrusting consists of the vesting of trustee rights and the simultaneous total dispossession of these rights by the grantor, who becomes the former owner of the trust's assets.<sup>83</sup> This concept is also present in the Latin American *fideicomiso*. For example, the Argentinean *fideicomiso* builds upon the idea of entrusting,<sup>84</sup> it recognizes the existence of a trust when "a person [settlor] conveys the fiduciary ownership of particular assets to another [trustee] who commits to act as owner for the benefit of whomever is designated in the contract [beneficiary] and to transmit the property upon the expiration of a given term or the fulfillment of a condition, to the settlor, to the beneficiary or to the residual beneficiary."<sup>85</sup> Additionally, for instance, the Mexican trust is defined as the entrusting of an asset to the trustee who

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76. See LUPOI, *supra* note 2, at 228.

77. *Id.* at 176-77.

78. *Id.*

79. *Id.* at 178 ("The Statute of Limitations *never* operates in favour of a trustee when he has acted fraudulently or he has appropriated a trust asset.")

80. Frost, *supra* note 48, at 22.

81. Hayton, *supra* note 47, at 59.

82. See LUPOI, *supra* note 2, at 197 ("[I]f there is no entrusting in favour of the trustee, there is no trust.")

83. *Id.* at 196-97.

84. Jorge R. Hayzus, FIDEICOMISO 44 (Astrea de Alfredo & Ricardo DePalma eds., 2004).

85. Law 24,441 (Law on Housing Financing) of 1995), art. 1. (translation by Hayzus).

holds it for the beneficiary's profit.<sup>86</sup> In the Mexican *fideicomiso*, the grantor appoints and removes the trustee(s) and beneficiary(ies) and reserves for himself all of the rights and actions he deems fit in the trust instrument.<sup>87</sup>

#### d. The Principle of Asset Segregation

A trust's assets are prohibited from being commingled with the trustee's personal assets. The trustee is only given legal title and lacks equitable interests over the trust corpus; equitable title belongs to the beneficiary. The trustee is forbidden from disposing of trust assets as though they were his personal property. The trustee has legal and equitable ownership rights over his own personal assets, but not over the trust's assets.

The primary purpose of the segregation or separation of assets principle is the protection of the trust corpus from third parties, especially creditors of the trustee and the beneficiary. Trust assets remain isolated even after the trustee's death.<sup>88</sup>

Similar rules occur in Latin America. For instance, the segregation of trust assets is also an element of Uruguayan trust law.<sup>89</sup>

#### e. Tracing

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86. Francisco Corrales, *The Real Property Trust in Mexico*, NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE, <http://natlaw.com/interam/mx/rp/sp/fidpaper.htm> (according to Mexican law, "a trust is a mechanism through which the Maker transfers ownership over property or rights over to a Trustee, who pursuant to instructions from the Maker, administers the property for the Beneficiary until the fulfillment of a stated objective, by agreement or by law"). See Ley General de Títulos y Operaciones de Crédito [L.G.T.O.C.] (Securities and Credit Operations Law), art. 381, *Diario Oficial de la Federación* [D.O.] (Aug. 27, 1932) (Mex.); Jorge Domínguez, *El Fideicomiso en México*, available at <http://www.juridicas.unam.mx/publica/librev/rev/podium/cont/32/pr/pr32.pdf> (last visited Jan. 2008).

87. Corrales, *supra* note 86, at 1.

88. As a consequence, the assets do not become a part of the trustee's estate. See Quebec Civil Code, art. 1261 ("The fiduciary patrimony . . . constitutes an autonomous and distinctive patrimony of affectation.") (translation by author), *quoted in* LUPOI, *supra* note 2, at 308; see also Hansmann, *supra* note 14, at 460 ("It would be extremely difficult for the pursuance of business and legal acts in general to imagine the existence of trusts without the segregation rule." In that hypothetical situation, the trustee "would need to insert explicit language in each of her contracts insulating her personal assets from creditors' claims - a costly burden that would presumably be impractical in many circumstances.").

89. Ley 17,703 [Law 17.703], art. 7, ¶ 3, *Diario Oficial* [D.O.] (Nov. 4, 2003) (Uru.).

Tracing is a direct consequence of the violation of the segregation principle. Tracing operates when “the trustee has mixed trust assets with personal assets and it therefore becomes necessary to return to the appropriate condition of separation.”<sup>90</sup> The trustee breaches his duties when he transfers the assets to himself or to a third party who knows about the conflict of interest. The third party or the trustee also breach their duties when they use profits from the transfer to make investments or to purchase other assets. Tracing serves as an equitable procedural tool to determine the whereabouts of proceeds obtained by the transfer of property acquired in violation of the rights of third parties.<sup>91</sup> When the proceedings from the unlawful transfer have been identified, the beneficiary can then recover the assets and profits that the trustee has obtained from the commingling of his personal assets and the trust corpus.<sup>92</sup>

#### 4. Characteristics and Benefits of the Trust

The flexibility in the administration of Anglo-American trusts is a key reason for their popularity in the Anglo-American world. The trust is a flexible and popular instrument because it lacks corporate entity characteristics, it is not bound by agency principles, it has useful tax advantages, and courts have broad discretion over trusts in equity.

##### a. The Trust is not a Corporate Entity

Trusts do not have corporate structures, issue securities, or distribute dividends. Occasionally, they may perform some of these functions depending on the type of trust and the jurisdiction involved, but that function does not transform the trust into a corporation. One of the benefits is that trusts can be “created and managed less formally and less expensively than companies.”<sup>93</sup> The fact that trusts are a separate legal entity does not make them into a corporation.

##### b. The Trust is not an Agency

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90. Hansmann, *supra* note 14, at 440.

91. *Id.*

92. *Id.* at 448.

93. David Hayton, *The Uses of Trusts in the Commercial Context*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 158, 160 (David Hayton, ed., 1999).



A trustee is neither the agent of the grantor nor the trust. In an agency relationship, the agent acts on behalf of and under the directives of the principal,<sup>94</sup> and all of the acts legitimately carried out by the agent are acts of the principal.<sup>95</sup> In a trust relationship, the trustee enjoys full discretion to administer the trust assets and, unlike the agent,<sup>96</sup> is not subject to the continuous directions and instructions of the grantor.<sup>97</sup> Once the trust is created by the grantor, he relinquishes all rights over the corpus and retains no rights except for those specifically mentioned in the trust instrument,<sup>98</sup> including the right to terminate the trustee.<sup>99</sup> Generally, the power to enforce the trust's terms,<sup>100</sup> including the removal of the trustee, lies with the courts.<sup>101</sup>

### c. The Powers of Courts with Respect to Trusts

In general, Anglo-American courts have multiple powers with respect to trusts. Courts may vary their terms, appoint and remove trustees, and change the trustees' investment powers. Courts also can generically interpret and enforce the

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94. RESTATEMENT (THIRD) OF AGENCY § 1.01 (1999) ("An essential element of agency is the principal's right to control the agent's actions . . . . [A] principal has the right to give interim instructions or directions to the agent once their relationship is established . . . . [A] relationship of agency is not present unless the person on whose behalf action is taken has the right to control the actor . . . . The common-law definition of agency requires as an essential element that the agent consent to act on the principal's behalf, as well as subject to the principal's control.").

95. *Id.* § 4 (1999) ("When an agent acts with actual authority, the principal is bound by the legal consequences of the agent's action.").

96. *Id.* § 1.01 (1999) ("[T]he principal has a power of control even if the principal has previously agreed with the agent that the principal will not give interim instructions to the agent or will not otherwise interfere in the agent's exercise of discretion.")

97. *See* RESTATEMENT (THIRD) OF TRUSTS § 42 (2003) ("When a settlor transfers property to another as trustee . . . the trustee takes the settlor's full title or interest in that property.").

98. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 63 (2003) (on the grantor's power to revoke or modify an *inter vivos* trust).

99. RESTATEMENT (THIRD) OF TRUSTS § 37 (2003) ("The settlor may remove the trustee if the power to do so is reserved in the terms of the trust, or if the settlor has retained the power to revoke (or unrestricted power to amend) the trust.").

100. RESTATEMENT (THIRD) OF TRUSTS § 66 (2003) (on the powers of a court to modify a trust, including its "prompt termination.").

101. RESTATEMENT (THIRD) OF TRUSTS § 37 (2003) ("A court may remove a trustee whose continuation in that role would be detrimental to the interests of the beneficiaries" and "[c]ourts may grant more limited relief to deal with cases in which removal is not necessary or appropriate.").

trust's terms, decide whether there has been a breach of the trust, and award damages.<sup>102</sup>

#### d. Tax Benefits

Trusts have long been used as devices to avoid corporate taxes.<sup>103</sup> The relevance of the trust as a tool for corporate tax avoidance depends on whether it exists as an independent entity for purposes of U.S. federal tax law.

The criterion to determine if an entity is independent is whether it carries out business and possesses associates (partners, shareholders, members, etc.); if it does not, "it will be taxed as a trust."<sup>104</sup> The rationale of U.S. tax law is to favor trusts be used either as "public investment vehicles"<sup>105</sup> or to "protect and conserve property for the benefit of beneficiaries who cannot share in the discharge of the responsibility [of conducting a business]."<sup>106</sup> Thus, the definition of trusts by the Internal Revenue Code is "arrangements for the management of property, not for the conduct of a business."<sup>107</sup>

In the case of an individual as grantor, transferring part of his assets to a trust decreases the amount of his taxable income, thereby generating a lower tax base for himself and preventing beneficiaries from being taxed while trust income is not distributed.<sup>108</sup> In using a trust as an estate-planning device, it causes income taxes to

102. Frost, *supra* note 48, at 20.

103. MIGUEL CHECA, *EL TRUST ANGLOAMERICANO EN EL DERECHO ESPAÑOL* 29, 156 (McGraw Hill, 1998). The expression "tax avoidance" refers to the use of legal methods or devices for estate planning or business organization aimed at decreasing the payment of taxes. Tax avoidance is different from the notion of tax evasion, which is used to describe illegal practices put in practice to escape taxes. *See generally* Robert F. Hudson, Jr., et al. *U.S. Tax Planning for U.S. Companies Doing Business in Latin America*, 27 U. MIAMI INTER-AM. L. REV. 233 (1996); Yoram Margalioth, *Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries*, 23 VA. TAX REV. 161 (2003).

104. Christensen, *supra* note 56, at 120.

105. *Id.* at 122.

106. *Id.*

107. Christensen, *supra* note 56, at 121.

108. Christensen, *supra* note 56, at 122. Christensen states that:

[B]ecause a trust is an entity taxed as such, it will be taxed upon income it does not distribute. This is because, by definition, the beneficiaries are passive, and don't participate in the affairs of the trust, and so should not be taxed on income they don't receive. At the same time, because a trust manager [the trustee] is not conducting a business, there should not be a separate entity level of taxation imposed upon a trust if it is distributing all of its income to the beneficiaries.

be deferred during the grantor's life, but, at his death, "trust property will be included in the settlor's estate."<sup>109</sup>

An extreme case of trust utilization is the "bare trust," where "the trustee is not faced with a group of successive beneficiaries, or when the trustee is not called upon to carry out any activity other than maintaining ownership of the asset or performing merely administrative tasks."<sup>110</sup> Bare trusts are usually created in a foreign jurisdiction and are protected by double-taxation treaties.<sup>111</sup> In the words of an expert, these trusts become something "little more than a shell . . . that is, the instrument does not contain the whole of the trust."<sup>112</sup> This flexibility is essential for tax purposes, so that trustees may transfer trusts assets to new trusts, sub-trusts, or other existing trusts<sup>113</sup> by means of the so-called "pour over trust."<sup>114</sup>

With such flexibility, the Anglo-American trust can be used for either legitimate or unlawful purposes, such as tax evasion or fraud,<sup>115</sup> thereby acting as a double-edged sword. This potential for good or evil fully permeates the regulation of Anglo-American trusts, especially when it comes to tax issues and the protection of third parties.<sup>116</sup> In effect, as it is reviewed later in this article,<sup>117</sup> the use of offshore trusts generates broad polemic in the United States, as some say such trusts are nothing more than paper entities created to divert income from the reach of tax authorities in order to avoid income and other corporate taxes. Third parties may also experience damages caused by the creation of a trust; that is, in the situation of a grantor transferring assets to an independent entity [a trust] in order to escape liability from creditors. Tax avoidance and liability for third parties are thus two important concerns to take into account at the moment of re-visiting the current Latin American *fideicomiso*, if Anglo-American forms are to be taken into account for this endeavor.

## 5. Modalities

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109. Edward C. Halbach, *The Restatement Third of Trusts: A Look Ahead*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 210 (David Hayton, ed., 1999).

110. *Id.* at 157.

111. Waters, *supra* note 6, at 612.

112. *Id.* at 609.

113. *Id.* at 612.

114. Halbach, *supra* note 109, at 211 ("[Pour over trusts] involve attempted dispositions by settlers to add other properties at the time of death to the assets already held in their *inter vivos* trusts. These additions are usually made by will.").

115. See Gaillard, *supra* note 45, at 315 ("[T]he trust, depending on its function and purpose in any particular case, can either be a marvelous instrument in the evolution of law or a dangerous means of evasion or even fraud.").

116. *Id.*

117. See *infra* note 281.

The flexibility of trusts is exemplified by their ability to be discretionary or nondiscretionary and to be revocable or irrevocable.

#### a. Discretionary and Nondiscretionary Trusts

A discretionary trust allows the trustee to “decide which member or members of a class of beneficiaries should be entitled to the trust property.”<sup>118</sup> The trustee’s power can extend to deciding the timing of the trust-corporus distribution to the beneficiary and the amount or proportion of the distributions when there is a plurality of beneficiaries. When the trust instrument<sup>119</sup> empowers the trustee to make decisions related to the trust concerning the distribution of trust income or capital, the beneficiaries generally may not challenge the trustee’s discretion. Some exceptions apply, however, depending on the jurisdiction. For instance, beneficiaries of a closed class, pursuant to their equitable rights, may ask a court to declare an early termination of the trust in some circumstances. Fraud by the trustee in the administration of the trust also allows a challenge to a trustee’s discretion.<sup>120</sup>

On the other hand, provisions established in nondiscretionary trusts by the grantor in the trust instrument bind the trustee. Unlike discretionary trusts, which provide substantive rights to the beneficiaries, nondiscretionary trusts confer only “procedural equitable rights” to the beneficiaries.<sup>121</sup>

#### b. Revocable and Irrevocable Trusts

The grantor can set the trust as either a revocable or irrevocable trust. Tax considerations are critical when making this decision. By means of irrevocable *inter vivos* trusts, the grantor designates assets that are transferred as gifts, “primarily for tax and asset protection advantages.”<sup>122</sup> Experience shows that irrevocable trusts give rise to many controversial tax issues, such as “the application of registration

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118. TRUST: BRIDGE OR ABYSS, *supra* note 43, at 11 (quoting J.G. Riddall, *THE LAW OF TRUST* 205 (3d ed. 1987)).

119. Hayton, *supra* note 93, at 158. (noting that [T]he trust instrument “can be whatever the settlor and the trustee agree as worthwhile for producing the benefits intended by the settlor”). Thus, it can take the form of a stand-alone document, or it may be a provision of a larger instrument, or it may consist of two or more writings. In general, the key elements to determine the validity of a trust are the finding of the true and explicit intent of the trustor to create a trust, and the compliance with the required local formalities for the execution of the trust instrument. No differences exist with the Latin American *inter vivos fideicomiso* in this aspect. More formalities might be required, but no difference in substance.

120. Matthews, *supra* note 18, at 26.

121. LUPOLI, *supra* note 2, at 190-91.

122. Whitaker, *supra* note 65, at 44.

taxes, transfer taxes, mortgages taxes, property taxes and income taxes, calculations of capital gains and losses.”<sup>123</sup>

Revocable *inter vivos* or “living” trusts are those “where the assets are managed by the grantor who is usually the beneficiary thus receiving income or principal during his lifetime, and are disposed of at the grantor’s death according to her disposition.”<sup>124</sup> Due to the inherent risk of tax evasion posed by revocable *inter vivos* trusts, there are many restrictions placed on them so they do not become “a means of circumventing the legal system.”<sup>125</sup> These trusts “are treated for all tax purposes as if the trust property still belongs to the grantor, and thus do not offer tax advantages to the grantor during his life or to his estate at death.”<sup>126</sup>

### III. COMPARISON BETWEEN THE ANGLO-AMERICAN AND THE LATIN AMERICAN *INTER VIVOS* TRUST

#### A. In General

For civil law scholars in general, “the trust concept is hard to grasp.”<sup>127</sup> Some even question the usefulness of the Anglo-American trust, which has been regarded as “functionally unnecessary in light of the many existing civilian mechanisms which may be used to accomplish the same ultimate results.”<sup>128</sup> Despite these approaches, academic efforts have sought an equivalent of the *fideicomiso* to the Anglo-American trust.<sup>129</sup> There have been efforts in identifying instruments in civil law systems close to the Anglo-American trust. For example, a party in 1936 sought recognition of a common law trust in Switzerland.<sup>130</sup> The Swiss Supreme Court undertook a comparison of “trusts” with the civil law institutions of “contract, mandate, usufruct, *fiducie*, a donation *inter vivos*, or a donation *mortis causa*.”<sup>131</sup> The court evidenced its frustration at not finding an exact civil law equivalent and

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123. Ferdinando Albisinni et al., *Chapter 13: Italy*, in *THE INTERNATIONAL TRUST* 592 (John Glasson, ed., 2002).

124. See Halbach, *supra* note 60, at 129.

125. Whitaker, *supra* note 65, at 46.

126. Halbach, *supra* note 60, at 139.

127. TRUST: BRIDGE OR ABYSS, *supra* note 43, at 1.

128. Venturatos, *supra* note 19, at 1722-23.

129. In spite of suggestions to the contrary, the Argentinean *fideicomiso* can hardly be equated to the Anglo-American *inter vivos* trust. See Hayzus, *supra* note 84, at 29. (“The Republic of Argentina is currently characterized as a country that practices and recognizes the *fideicomiso* (a trust-law country).”) (translation by author).

130. Harrie L. van Mens, *The Trust and Swiss Tax Law*, in TRUST: BRIDGE OR ABYSS, *supra* note 43, at 47 (citing Bundesgericht [BGer] [Federal Court] May 26, 1936, 62 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 144 (Switz.)).

131. *Id.* at 47-48.

“denied the existence of a trust and ruled that the underlying legal concept should be explained as a ‘contract *sui generis*,’”<sup>132</sup> that is, an institution of a special, undefined nature. The general conclusion has been that “in civil jurisdictions there is no concept comparable to the trust.”<sup>133</sup>

There are disputes as to where the trust (or *fideicomiso*) originated. As previously stated, some civil law jurists have claimed paternity of civil law trusts, or *fideicomisos*, in Roman law, tracing its origins to the Roman *fideicommissum*, the Spanish *comisiones de confianza*, or the French *confiance* or *fiducie*.<sup>134</sup> Certain transfers to a beneficiary, which in the Anglo-American legal world constitute trusts, have been equated to the “Romano-Canonical *usus*.”<sup>135</sup> The main argument used to justify their ancestry is that the French Civil Code of 1804 (Code Napoleon)—upon which Andrés Bello’s Civil Code took close inspiration<sup>136</sup>—defines *fiducie*, a term from which *fideicomiso* derives as “a contract between the ‘constituant’, i.e. the settlor, and the ‘fiduciaire’, i.e. the trustee.”<sup>137</sup> But this notion is utterly insufficient to fully equate the *fideicomiso* to the *fiducie*.

On the other hand, the idea of incorporating a civil law version of the Anglo-American trust has met reactions ranging from initial reluctance<sup>138</sup> to outright opposition.<sup>139</sup> It is broadly thought in civil law circles that full recognition of the Anglo-American trust would mean nothing less than an overhaul of the domestic legal system, because “the trust, like property dispositions in general, does not exist in a vacuum but is closely tied to other legal relationships, such as marriage and family law, contract, and succession.”<sup>140</sup>

Distrust between the two sides over the issue of trusts seems to be the current paradigm. In the words of a learned trust scholar, “the simple answer is that common law scholars have not attempted a comparative study of the civil law institutions, while civil law scholars have not attempted a comparative study of

132. *Id.* at 47.

133. *Id.* at 48.

134. Christensen, *supra* note 56, at 130.

135. LUPOLI, *supra* note 2, at 185.

136. See Mirow, *Borrowing Private Law in Latin America: Andres Bello's Use of the Code Napoleon in Drafting the Chilean Civil Code*, *supra* note 7.

137. Ineke A. Koele, *France: A Law Proposal Introducing 'La Fiducie,'* in TRUST: BRIDGE OR ABYSS, *supra* note 43, at 68.

138. Mayda, *supra* note 1, at 1041 (“[W]e deem it dangerous to incorporate . . . in our law an exotic institution like the Anglo-American trust” and “[w]e are not faced with a minor incongruity between civil and common law, but with a basic contrariety as to their legal approach.”).

139. See Waters, *supra* note 6, at 629. (“[S]ince civil law jurisdictions do not need a trust, and recognition of the common law trust in their conflict-of-law rules has no particular attraction for most civil law jurisdictions, there is no point in their modifying this analysis [...] the civilian may think, why not simply leave the civil law contract for the benefit of the promisee, or of a third party, as it is? Why rename it?”).

140. Gaillard, *supra* note 45, at 329.

trusts.”<sup>141</sup> Early Latin American initiatives aimed at expanding the scope of *fideicomisos* were thwarted by the belief that a simple “translation” of the Anglo-American trust “was in the realm of impossibility,”<sup>142</sup> and that such “insertion into civil-law countries . . . would be impossible.”<sup>143</sup> In spite of this intractable position, others believe that “the mere fact that trusts exist in civil law countries should prove the point that there is no basic incompatibility with civil law structures.”<sup>144</sup>

Perhaps the only existing point of convergence between both versions of trusts is the underlying ethical idea of *fides*, the confidence or “trust” permeating them.<sup>145</sup>

## **B. Specific Differences**

An important difference between the express *inter vivos* common law trust and the Latin American *fideicomiso* is found in the context of the *fiduciary* and the *fideicomisarios*. This treatment reveals that, unlike common law countries, fiduciary ownership is not considered a separate ownership but a form of restriction on full absolute property rights. It is interesting to note that the Chilean Civil Code, for example, regulates the *fideicomiso* or *propiedad fiduciaria* (fiduciary ownership), under a paragraph headed *Of the Limitations to Ownership*.<sup>146</sup>

Other important differences between both trust law systems are noteworthy and discussed below.

### **1. Contractual Nature**

The central difference between the Latin American *inter vivos fideicomiso* and the Anglo-American trust resides in the exclusively contractual nature of the former.<sup>147</sup> Three consequences arise from this assertion. First, it is not possible to equate the many Anglo-American versions of trusts to the Latin American *fideicomiso*, due to the exclusively contractual character of the latter. Second, as

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141. Maurizio Lupoi, *The Civil Law Trust*, 32 VAND. J. TRANSNAT'L L. 967, 976 (1999); see also Studio Lupoi, *The Civil Law Trust*, [http://www.ag-internet.com/push\\_news\\_one\\_two/thecivillawtrust.htm](http://www.ag-internet.com/push_news_one_two/thecivillawtrust.htm) (last visited Jan. 2008).

142. LUPOI, *supra* note 2, at 267.

143. *Id.*

144. Lupoi, *supra* note 141, at 976.

145. See Waters *supra* note 6, at 618 (“Trust means simply placing confidence in and reliance upon another.”).

146. See CÒD. CIV. arts. 732 *et seq.* (Chile).

147. See CHECA, *supra* note 103 (“The *trust* is created through a unilateral juridical act, it does not have a contractual nature at all.”) (translation by author).

non-contractual trusts are non-existent in the Latin American civil law world, foreign common law trusts generally are denied recognition as trusts in Latin America.<sup>148</sup> Third, practical or academic attempts at finding an exact equivalent between the Anglo-American trust and the Latin American *fideicomiso* are likely to fall short.

The Argentinean *fideicomiso* exemplifies the strictly contractual nature of Latin American trusts.<sup>149</sup> In effect, unlike the Anglo-American trust where the grantor's unilateral expression of will is sufficient to create a trust,<sup>150</sup> in Latin American civil law a contract signed by the *fideicomitente* (grantor) and the *fiduciario* is necessary to create a *fideicomiso*.<sup>151</sup> Several differences emerge between both ideas of trusts. For example, in an Argentinean *fideicomiso*: (a) the *fiduciario* becomes the owner of the trust corpus,<sup>152</sup> a feature opposite to the Anglo-American trust; (b) the *fideicomiso* does not distinguish between "legal title" and "equitable/beneficial ownership,"<sup>153</sup> which is a crucial element of the Anglo-American *inter vivos* trust; (c) fiduciary ownership is limited in time, that is, it has to pass to the *fideicomisario* within a certain period of time from the inception of the *fideicomiso*,<sup>154</sup> in contrast with the Anglo-American trust, which can in some situations be perpetual; (d) the *fiduciario*'s liability is limited to the value of the trust's assets,<sup>155</sup> which is hardly a matter of statutory law in the Anglo-American legal world where juries and courts, in general, enjoy broad freedom to award damages to plaintiffs beyond purely compensatory damages; and (e) there exists a lack of *cy prês* in the Argentinean *fideicomiso*, where the unworkability of the trust's purpose terminates the trust and the corpus reverts to the grantor.<sup>156</sup>

In Uruguay,<sup>157</sup> the *inter vivos* trust—loyal to the Latin American tradition—is also defined as a contract.<sup>158</sup>

## 2. Lingering Powers of Grantors

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148. See Koele, *supra* note 137, at 68 ("Devices like implied trusts and trusts created by will or by a decision of a judge are excluded.").

149. See Hayzus, *supra* note 84, at 133 ("The framework of the *fideicomiso* is typically contractual, about which there aren't any doubts.") (translation by author).

150. See Matthews, *supra* note 18.

151. See CÒD. CIV. art. 735 (Chile) (referring to the constitution of *fideicomisos* through a public deed).

152. See Hayzus, *supra* note 84, at 143 ("For the law, there is one owner alone and that is . . . the fiduciary [or trustee]") (translation by author).

153. *Id.* at 30.

154. *Id.* at 62; see also *id.* at 63 (noting that thirty days is the term and that several exceptions apply including minors and incompetents). See also CÒD. CIV. art. 800 (Colom. 2006).

155. See Hayzus, *supra* note 84, at 180.

156. *Id.* at 210.

157. See Ley 17,703, *supra* note 89.

158. *Id.* art. 2, ¶ 2.



Civil law systems usually let the grantor maintain some rights over the trust for the duration of the trust.<sup>159</sup> To ensure that the trustee complies with his fiduciary duties, a grantor can revoke the trust or ask a court to terminate the trust.<sup>160</sup> The grantor's unilateral power somehow conflicts with the alleged exclusive contractual nature of civil law trusts. In that sense, these lingering powers of the trustee are an exception to the contractual rule.

### 3. The Transfer

The Anglo-American distinction between legal ownership rights and equitable rights, which is key to understanding the common law trust, is completely foreign to Latin American legal systems. The concept of equity differentiates the two legal systems in many important matters.<sup>161</sup> The source of the Anglo-American distinction between equitable and legal ownership is rooted in the notion of equity. While the Anglo-American trustee holds legal ownership rights over the corpus and the beneficiary maintains equitable rights, the Latin American *fiduciario* holds both legal and equitable rights over the trust's assets.<sup>162</sup> Only when the common law trust property is transferred to the beneficiary does a consolidation of the legal and equitable property of the trust take place. This arrangement is foreign to Latin American civil law because both legal and equitable rights are consolidated in an absolute ownership right from the onset.

The common law legal system and equitable title separation provides increased protection to beneficiaries. Common law beneficiaries have "rights to prevent misuse of the trust funds, [and] rights to require the trust to be performed."<sup>163</sup> The Latin American *fideicomisario*, on the other hand, may receive only what is left

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159. LUPOLI, *supra* note 2, at 310-11.

160. See *id* at 310.

161. Phanor J. Eder, *Equity*, in A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW 66-85 (1950). Common law courts have broad discretion to grant remedies based on their equitable powers. Injunctive relief is used generally when legal remedies are not available (e.g., in cases of nuisance, trespass to land, waste, conversion of or trespass to chattels, defamation, invasion of privacy, abuse of judicial process, and unfair competition.). One specific instance is the abuse of judicial process, which requires a wrongfully instituted suit or a wrongfully obtained judgment. The exceptional and extremely limited power of civil law courts to grant equitable remedies and to use equity to solve disputes is clear in the Chilean legal system. See CÔD. CIV. PROC. art. 170(5) (Chile 1855) (stating that trial court decisions may only resort to equitable principles only if "there are no laws applicable to the case."); see also CÔD. CIV. art. 24 (Chile 2005) (expressing that natural equity can be used by judges for legal interpretation only when legal rules on interpretation cannot be applied).

162. Matthews, *supra* note 18, at 27.

163. *Id.*

upon the termination of the *fideicomiso*. It does not have the broad scope of remedies that Anglo-American beneficiaries enjoy to prevent waste, force conservation measures, request an accounting of the trustee's administration, or even remove the trustee; only limited rights are available to petition the protection of trust assets.<sup>164</sup>

Furthermore, the grantor may appoint himself as beneficiary, an alternative that does not exist in Latin American trust law.<sup>165</sup>

#### 4. The Publicity Requirement

In common law jurisdictions, trusts are not required to comply with any publicity formalities, and, in some cases, publicity is strictly prohibited,<sup>166</sup> such as when shares are owned by a person as a trustee, real estate is held in trust, or bank accounts are held in the name of the trust or the trustee.<sup>167</sup> In these cases, the property is registered in the grantor's name, not the trust's name. The rationale is to promote "the free circulation of assets,"<sup>168</sup> thus encouraging business activity rather than to fully protect market participants, which might lead to potentially fraudulent instances.

In civil law countries, the transfer of trust assets from the grantor to the *fiduciario* is subject to strict rules concerning their registration under the latter's name.<sup>169</sup> The trust instrument alone is insufficient to perfect the transfer of trust assets from the grantor to the *fiduciario* when dealing with property subject to registration requirements without such registration.<sup>170</sup> This is the situation, for

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164. See CÓD. CIV. art. 761 (Chile) (empowering the *fideicomisario* to request limited conservation measures "if the assets seem to be in danger or experience deterioration at the hands of the *fiduciario*") (translation by author).

165. These rules do have some exemptions, see the case of Panama's new Trust Law of 1984 defining *fideicomiso* as "a juridical act whereby a person called *fideicomitente* transfers property to another person called *fiduciario* for this to administer or dispose of them for the benefit of a *fideicomisario*, who may also be the *fideicomitente*." Ley No. 1, 5 Jan. 1984, art. 1, Gaceta Oficial [G.O.] (Jan. 10, 1984) (Pan.) (translation by author). Furthermore, this Law expressly lifts the prohibition against the appointment of two or more *fiduciaros*. *Id.* at art. 20.

166. See UK Companies Act, 1985, § 360 (Eng.), cited in LUPOI, *supra* note 2, at 173 n.380.

167. LUPOI, *supra* note 2, at 172-73.

168. *Id.* at 173.

169. See *id.* at 306 ("The transfer must be accompanied by the forms of registration provided for in the laws relating to each kind of property."); see also CÓD. CIV. art. 735(2) (Chile) (providing that "the constitution of any *fideicomiso* comprising or affecting real estate, must be registered in the competent Registry). The violation of this rule renders the *fideicomiso* null and void. *Id.* art. 1681 ("[A]ny act or contract that lacks any of the elements required by law for the validity of such act or contract is void . . .") (translation by author).

170. Panama's trust law states that for a *fideicomiso* constituted upon real estate to be enforceable against third parties, it must be registered in the property registry under the

example, of *fideicomisos* involving real estate that, to be valid, must be registered under the *fiduciario*'s name in the respective property registry.<sup>171</sup> Generally, no obligation to register trust assets, including real estate and securities, under the trustee's name exists in Anglo-American jurisdictions for the trust to be valid and enforceable. Trust property can be registered in the name of the grantor and still be subject to the trust.<sup>172</sup>

The lack of publicity requirements in common law jurisdictions has long puzzled civil law attorneys who believe the policy breeds fraud against innocent third parties. The common law world has responded to this objection as evidenced by the multiplicity of remedies available to avoid such risk.<sup>173</sup>

### 5. The Divided Concepts of Estate and Interests Applicable to Land Trusts<sup>174</sup>

The basic common law concepts of estate and interests in land, which generate two separate sets of ownership rights—legal and equitable—coexist at the center of the Anglo-American trust.<sup>175</sup> These notions do not find an equivalent in civil law systems, generating several consequences relating to the nature of the trust as an independent entity, the enjoyment of rights by the beneficiaries, the type of interests over the assets, the division of ownership rights, and other particularities of common law concerning the classification of estates according to their duration.

First, in common law, a land trust is not an independent legal entity, but in civil law it is. Second, with regards to the rights enjoyed by the trustee and the beneficiaries, common law estate trusts may confer legal and equitable rights. Civil law *fideicomisos*, instead, only confer legal rights to the *fiduciario*. Third, different types of real or *in rem* rights are identifiable in civil law. The most important distinction occurs between absolute *in rem* rights (property or ownership) and limited *in rem* rights (lease, usufruct, *fideicomiso*, etc.). This differentiation is not as rigorous in common law jurisdictions. Fourth, as a legacy of feudal law, there is a flexible concept of property ownership in common law that allows for its division and fragmentation. Due to its Roman law roots, the concept of ownership in civil

*fiduciario*'s name. Ley No. 17, 20 Feb. 1941, sobre Fideicomiso, arts. 20-22, G.O., 3 June 1941 (Pan.); see also CÓD. CIV. art. 796 (Colom. 2006).

171. See CÓD. CIV. art. 747 (Chile 2005).

172. See LUPOI, *supra* note 2, at 356 (“[I]n the English-model trust no provision is made for any form of registration, whether in a land registry or any other kind of registry.”).

173. LUPOI, *supra* note 2, at 173.

174. See generally Justin P. Thorens, *The Common Law Trust and the Civil Law Lawyer*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY* 310 (David S. Clark, ed., 1990).

175. LUPOI, *supra* note 2, at 1.

law is unitary, absolute, and indivisible. As a result, only the owner can fully exercise the rights of use, enjoyment, and administration over the property. Fifth, in common law, an estate is an interest in land, and this interest is the object of ownership and possession. The word “interest” is used exclusively for an interest in land. In civil law, the object of ownership and possession of land is the piece of land itself, the material thing. Sixth, common law estates can be classified based on their duration. Estates can be: (i) finite or infinite; and (ii) freehold or nonfreehold, according to their certain or uncertain duration (freehold estates include fee simple, which “is the complete estate that includes all others;”<sup>176</sup> and estate for life, “limited to the duration of the life of its holder or to the life of a third person (called ‘*pur autre vie*’ estate).”<sup>177</sup> A present interest can only exist as vested and, whether vested or contingent, future interests are nonexistent. Unlike these common law categories, it is not possible to think of a civil law trust without a present owner since all estates in a Latin American *fideicomiso* must be present and vested at the moment of their creation. Furthermore, under civil law: (i) absolute property ownership is always perpetual; thus, it is inaccurate—or rather flatly wrong—to speak of “finite” ownership in civil law systems; (ii) non-freehold estates in general are all types of leases and are regulated by the law of obligations, not by the law of property; (iii) the notion of civil law property is closer to that of fee simple absolute; and (iv) estates for life are nonexistent; and (v) common law estates can be owned, by present and future interests. Various temporal interests can exist simultaneously over the same land. Therefore, “a trust can be constituted in favor of successive beneficiaries, and in particular in favor of beneficiaries who do not yet exist.”<sup>178</sup> In civil law, successive *fideicomisos* are outright prohibited.<sup>179</sup>

## 6. Powers of Appointment

The common law trust instrument may provide for the involvement of a third party.<sup>180</sup> Such a third party might have rights to give instructions to the trustees or be required to provide consent for the administration of the trust’s corpus.<sup>181</sup> This power of appointment does not exist in Latin American civil law.

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176. Thorens, *supra* note 174, at 311.

177. *Id.*

178. *Id.* at 314.

179. Ley 17,703 [Law 17.703], art. 9, Diario Oficial [D.O.], 4 de Noviembre de 2003 (Uru.).

180. There are multiple potential sources for the appointment of the trustee: by a third party holding a power of appointment given by the grantor, by a prior trustee, by a court, or by the beneficiaries. LUPOLI, *supra* note 2, at 167.

181. *Id.* at 101 (explaining that over the centuries the Anglo-American trust was developed to allow the settlor to appoint herself as trustee). *See also id.* at 163 (noting that the classic example can be found in case “of a departure for the Crusades or on a dangerous journey, where instructions were given in the event he [the settlor] did not return, but provision was made to take back the property if the story ended happily”).

The common law trustee has greater flexibility to administer the trust than the civil law trustee.<sup>182</sup> These common law obligations command the trustee to generally act with due diligence and to the best of his skills and abilities, to observe the utmost good faith, to exercise the standard of care of a reasonable and prudent person, and to avoid conflict of interests.<sup>183</sup> Two purely Anglo-American rules usually govern trustees' behavior: the rule against self-dealing and the rule of fair dealing.<sup>184</sup> Latin American trust laws, in contrast, generally do not spell out the trustee's obligations in such detail. Furthermore, the role of the civil law trustee is to dutifully implement the instructions established by the grantor in the trust instrument and to not go beyond such instructions.

### 7. Tracing

There is not an exact equivalent to tracing in civil law. A close parallel could be drawn with the *acción reivindicatoria* or replevying action, where the grantor retains his condition as a substantial owner and the trustee is nothing more than an apparent owner or agent. Similar to tracing protections received by beneficiaries in Anglo-American law, civil law beneficiaries are protected by the *acción reivindicatoria*.<sup>185</sup> For instance, Panama's trust law of 1984, which was strongly influenced by the American trust, contains a close similarity with the Anglo-American trust in that the beneficiary of the Panamanian trust has personal actions

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182. Frost, *supra* note 48, at 17. (concerning investment trusts, e.g., "in England besides abiding by the instructions laid out in the trust instrument, there are additional statutory duties, *i.e.*, to act with care, impartially with respect to the beneficiaries and to keep them informed, to act jointly and unanimously with co-trustees, to invest and manage trust funds prudently").

183. LUPOLI, *supra* note 2, at 226.

184. The former prohibits the trustee "from purchasing trust property from and for himself," whereas the latter "forbids the trustee from buying trust assets while taking advantage of his position, and without the full and informed consent of the beneficiary and full value paid to the beneficiary." See Justice B. H. McPherson, *Self-dealing Trustees*, in TRENDS IN CONTEMPORARY TRUST LAW 135, 135 (A. J. Oakley ed., 1996). The consequences of the violation of these two rules are twofold. First, "the interests of the beneficiary continue to subsist in, the trust property," regardless of the validity of the underlying transaction or conveyance. *Id.* at 144. Second, a "dishonest appropriation [by the trustee or his agents] is a criminal offence" and "without more, it can never effect a transfer of title to the trustee." *Id.* at 151.

185. CHECA, *supra* note 103, at 23.

against the trustee.<sup>186</sup> However, third parties, such as creditors, are excluded as passive subjects of the replevying action.<sup>187</sup>

### 8. Interventions of Courts in Trusts

In cases of disputes regarding the appointment of a trustee, common law courts enjoy equitable powers to appoint and remove a trustee.<sup>188</sup> Latin American courts do not intervene in the appointment or removal of trustees,<sup>189</sup> based on the general belief that court intervention in societal life should be very limited.<sup>190</sup> In common law, the grantor can create a trust explicitly by executing a trust instrument. The grantor's will may also be inferred from his behavior, provided that other conditions are met. A fundamental condition is the "evidence of a deprivation of a right or entitlement for the benefit of a third party, or 'for the attainment of a purpose.'"<sup>191</sup> Since Latin American courts do not have the power to "create" trusts absent an express manifestation of intent by the grantor, unlike common law trusts in Latin America which cannot be created in such manner.

### 9. Remedies Available for the Breach of Fiduciary Duties

In common law jurisdictions, equitable remedies are broadly available to beneficiaries in cases of trustee's obligatory noncompliance.<sup>192</sup> Included among these equitable remedies are: (i) actions compelling the trustee to perform his duties;<sup>193</sup> (ii) injunctions enjoining the trustee from committing a breach of trust; (iii) specific performance forcing the trustee to redress a breach of trust (i.e., seeking the restitution of trust property);<sup>194</sup> (iv) the appointment of a temporary receiver;<sup>195</sup> and (v) the removal of the trustee and the appointment of a new trustee.<sup>196</sup>

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186. *Id.* at 20. ("The regulations of Venezuela and Panama [. . .] are separated from [. . .] the model of the Anglo-American *trust* to the extent to which the beneficiary only has actions of a personal character against the *fideicomisario*." (translation by author).

187. *Id.*

188. LUPOL, *supra* note 2, at 195-96.

189. See Cód. Civ. art. 735 (Chile) (stating that *fideicomisos* are constituted by public deed or will); see also art. 763 (listing the causes for the termination of the *fideicomiso*, not including court decisions).

190. See *supra* note 7.

191. LUPOL, *supra* note 2, at 100.

192. See Finn, *supra* note 40, at 214 ("compensation can be awarded for breaches of fiduciary duty, of confidence, and of trustees' and directors' duties of care.").

193. Golbert, *supra* note 9, at 100.

194. A. J. Oakley, *The Liberalising Nature of Remedies for Breach of Trust*, in *TRENDS IN CONTEMPORARY TRUST LAW 220* (A. J. Oakley, ed., 1996) ("The remedy afforded to the beneficiary by equity is compensation in the form of restitution of that which had been lost to the trust estate, not damages.").

When an illegal transfer of trust property by the trustee occurs in Latin American civil law jurisdictions, only three actions are usually available: (i) an *acción revocatoria* aimed at annulling the transfer and restituting the trust's assets to the beneficiary or beneficiaries; (ii) an action for compensation based on the trustee's unjust enrichment;<sup>197</sup> and (iii) possibly an action for personal subrogation, comparable to the Anglo-American subrogation and novation, that is, the substitution of one person to another in an obligation.<sup>198</sup>

The civil law *acción revocatoria* is common to all cases where restitution is sought from third parties and does not only apply where the transfer has been effectuated in violation of a fiduciary duty.<sup>199</sup>

### 10. Termination of Trusts

Trusts are voidable for reasons that are intrinsic<sup>200</sup> or extrinsic to the trust instrument.<sup>201</sup> Trusts also are voidable when their object or purpose contradicts public policy.<sup>202</sup> Additionally, trusts may be terminated by the trustee or

195. Golbert, *supra* note 9, at 100.

196. *Id.*

197. See CHECA, *supra* note 103, at 23 (in some civil law jurisdictions this is the only remedy available: "in case of noncompliance with his personal obligations by the trustee [the trustor] can only obtain an indemnification for the damages arising from that noncompliance") (translation by author).

198. See Golbert, *supra* note 9, at 103 (the civil law "real" subrogation, or subrogation of the *res*, instead corresponds somewhat to our equitable conversion following the trust *res*; in Anglo-American law the term "subrogation" is used only in the sense of the personal subrogation of Latin law").

199. See Hayzus, *supra* note 84, at 126 (noting that the general requirements of the *acción revocatoria* are: (i) damage to the creditor arising from the unlawful transfer; (ii) debt prior to the unlawful transfer; (iii) debtor's intent to defraud his creditors (intent is presumed in cases of insolvency); and (iv) debtor availed himself of accomplices in cases of a transfer for value; the knowledge of debtor's insolvency presumes complicity; a transfer not for value is revocable, even if the transferee was not aware of the debtor's insolvency).

200. RESTATEMENT (THIRD) OF TRUSTS § 61 (2003) ("A trust will terminate in whole or in part upon the expiration of a period or the happening of an event as provided by the terms of the trust; in the absence of such a provision in the terms of the trust, termination will occur in whole or in part when the purpose(s) of the trust or severable portion thereof are accomplished.").

201. Matthews, *supra* note 18, at 9 (referring to the lack of a beneficiary as the most common cause for the failure of a trust).

202. See Frost, *supra* note 48, at 22 (*e.g.*, when the trust attempts to "deceive the public administration of the country, discouraging service in the armed forces or public office, restraining marriage, or subverting morality or religion.").

beneficiaries upon a ground established in the terms of the trust.<sup>203</sup> With respect to their duration, the general rule is that common law trusts may not exist in perpetuity,<sup>204</sup> charitable trusts are the only exception to the rule.<sup>205</sup>

There are noteworthy differences between common and civil law trusts concerning their termination. First, a trust instrument in common law may empower a third-party to terminate a trust, an alternative that generally does not exist for the Latin American *fideicomiso*.<sup>206</sup> Second, with respect to the termination of charitable trusts, in Latin America, all trusts—both charitable and not charitable—have a finite life span. For instance, consider the case of Mexico,<sup>207</sup> where the General Law of Credit Institutions and Banking Establishments of 1926,<sup>208</sup> which regulates *fideicomisos*, specifically bans transfers in perpetuity and limits the duration of *fideicomisos* to any life in being or in conception at the time of the grantor's death.<sup>209</sup> “[T]he maximum term a trust may operate for is set at 30 years.”<sup>210</sup> Third, charitable trusts in common law may “survive” through the application of the *cy près* doctrine,<sup>211</sup> when their purposes become unattainable. This doctrine allows courts to change or expand the purposes of a charitable trust “as close as possible” to the grantor's objectives. This doctrine is not used in Latin America, as courts are not permitted to “fill in” the grantor's defective or unfeasible will.<sup>212</sup> For example, the Colombian Civil Code states that in default of an express provision in the trust, “the property shall belong to the Nation, subject to the obligation to use it for purposes analogous to those of the institution . . . . The Congress shall prescribe such purposes.”<sup>213</sup> Thus, the legislature, and not the judiciary, is bestowed with the power to determine the fate of a voidable *fideicomiso* in Colombia. This solution is consistent with the general distrust that Latin American legal systems show toward judicial activism, which stems from the Napoleonic Civil Code.<sup>214</sup>

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203. See RESTATEMENT (THIRD) OF TRUSTS § 61 (2003).

204. Frost, *supra* note 48, at 21. See also Halbach, *supra* note 60, at 127 (“In the various American states, ‘rules against perpetuities’ limit the duration of these complicated property arrangements.”).

205. Frost, *supra* note 48, at 21. See also Halbach, *supra* note 60, at 131 (“Under American law charitable trusts—unlike private trusts—may last in perpetuity.”); see also Matthews, *supra* note 18, at 10.

206. See CÒD. CIV. art. 763 (Chile).

207. Since 1905 Mexico has endeavored to produce its own versions of the Anglo-American trust. LUPOI, *supra* note 2, at 267.

208. See Corrales, *supra* note 86, at 3.

209. Hayton, *supra* note 47, at 98.

210. See Corrales, *supra* note 86, at 4.

211. See Mayda, *supra* note 1, at 1049 (*cy près*, a French-born doctrine meaning “as near as possible,” is based “on the absolute right of the lower courts to interpret testaments.”).

212. Halbach, *supra* note 114, at 216.

213. See CÒD. CIV. art. 822 (3) & (5) (Colom. 2006); see also Golbert, *supra* note 9, at 109.

214. See generally Mirow, *supra* note 7.



#### IV. THE SEARCH FOR A LATIN AMERICAN EQUIVALENT OF THE ANGLo-AMERICAN BUSINESS TRUST<sup>215</sup>

##### A. Possible Equivalences with the Latin American *Fideicomiso*

Legal experts in different civil law jurisdictions have long tried to find an equivalent to the Anglo-American express *inter vivos* trust in the civil law world. As already mentioned, history reveals attempts to find an instrument akin to the Anglo-American trust in the Roman law *fideicommissum*, which still “exists in Roman law countries such as Italy and France and Spain, and in Latin American countries which trace their law to the law of Spain, such as Chile.”<sup>216</sup>

These efforts have tried to utilize civil law notions of “agency, deposit, [and] contracts for the benefit of third parties,”<sup>217</sup> as points of commonality with common law trusts. However, as the analysis above has demonstrated, these efforts are inherently defective because, in the absence of an explicit *inter vivos* agreement, no *fideicomiso* may exist in Latin America.

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215. There are other types of Anglo-American non-business or “social” trusts. Some trusts are created for the protection of certain persons, such as minors, mentally ill persons, persons subject to alimony or other family benefits, creditors of bankrupt persons, or persons whose assets are administered by third parties. Examples of statutory “social” trusts are: (i) *supplemental needs trusts* and (ii) *employee share ownership trusts*. Supplemental needs trusts are trusts that have been created by specific legislation in the United States with the purpose of allowing disabled persons to obtain health care services and other benefits thus enhancing their quality of life. These trusts also “create opportunities for independent living, innovative rehabilitation and therapy, employment, and other activities that give life meaning.” See Rosenberg, *supra* note 51, at 151. Support trusts are the antecedent of supplemental needs trusts. *Id.* at 1088. Employee share ownership trusts are trusts that allow for the employee’s participation in the ownership of the company. In this case, the company issues shares that are transferred to a trust; the trust allocates the shares to the employees tax-free, provided that a specific period of time elapses from the transference. Hayton, *supra* note 93, at 163.

216. Christensen, *supra* note 56, at 130.

217. TRUST: BRIDGE OR ABYSS, *supra* note 43, at 1.

### 1. Real Estate Donations

In Latin America, gifts of real estate are performed as outright conveyances, achieved by means of a public deed executed before a notary public. The donee accepts the land, and such acceptance is recorded in a land registry. Otherwise, “a gift [of real estate] is not presumed except in cases expressly provided by the laws.”<sup>218</sup> Real estate donations performed by means of an Anglo-American trust require entrusting or the holding of a property in the hands of the trustee for another, namely, the beneficiary. In Latin America, as already stated, real estate donations can only be performed as an outright gift from the donor to the donee and is subject to any of the conditions or encumbrances available for the *inter vivos* in common law trust.

### 2. Usufruct

In Latin America, the usufruct is “a personal, contractual civil law right over land through which a property owner grants to another the use and enjoyment of the property.”<sup>219</sup> Three differences arise between the Latin American *usufructo* and the Anglo-American trust from this definition. First, the *usufructuante* (creator of the *usufructo*) retains his right to receive back his property upon the termination of the usufruct. When the Anglo-American trust terminates, instead, trust property does not revert back to the grantor. Second, the usufruct “does not bind subsequent landowners and cannot last longer than the life of the beneficiary.”<sup>220</sup> Third, the Anglo-American trust, in contrast, terminates the grantor’s ownership over the assets and bestows permanent ownership rights on the beneficiary. Upon the death of the beneficiary, the assets become a part of the beneficiary’s estate and are acquired by the beneficiary’s heirs, regardless if the succession is testate or intestate.

### 3. Commodatum or Gratuitous Bailment

The civil law *commodatum* is a temporary, conditional land alienation instrument. The *commodatum* or gratuitous bailment is a “civil law contract through which the landowner lends land, or rights to resources on the land, to another person free of charge.”<sup>221</sup> In a *comodato*, the transferor [or *comodante*] recovers the property at the expiration of the term or at the occurrence of a specified condition

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218. Golbert, *supra* note 9, at 107.

219. Byron Swift et al., *Private Lands Conservation in Latin America: The Need for Enhanced Legal Tools and Incentives*, 19 J. ENVTL. L. & LITIG. 85, 124 (2004).

220. *Id.*

221. *Id.* at 125.

made known when the transferor transfers the asset to the transferee [*comodatario*]. Beneficiaries of *comodato* rights cannot assign these rights to other subsequent owners.<sup>222</sup> At the death of *comodato* beneficiaries, these rights are assigned to their heirs.<sup>223</sup> These two differences make it hard to equate the Latin American *comodato* to the Anglo-American trust.

#### 4. Agency and Deposit Contracts

The civil law agency agreement and deposit contract do not provide ownership rights to beneficiaries. In the civil law agency agreement [*mandato*] the agent does not take title, either legal or equitable, over the assets.<sup>224</sup> The agent [*mandatario*] acts as on behalf of his principal [*mandante*] as an intermediary before third parties. Title to the assets passes directly from the principal to the third party.<sup>225</sup> In the deposit contract [*bailment*] the bailee [*depositario*] does not take title to the assets but only undertakes to keep custody and to restitute it in kind to the bailor.<sup>226</sup> Thus, the Anglo-American trust is at odds with the civil law agency agreement and the deposit contract since neither of these situations provides beneficiaries ownership rights over the assets involved in the transactions.<sup>227</sup>

#### 5. Use, Habitation

Civil law jurisdictions allow “real” *in rem* rights to exist simultaneously for the same property with possessory rights.<sup>228</sup> These *in rem* rights, including the use and habitation right, “allow for the total or partial utilization or exploitation of property belonging to someone else and, in some cases, the appropriation or

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222. See CÒD. CIV. art. 1734 (Peru) (providing that “the *comodatario* may not assign the use of the asset to a third party without the written authorization of the *comodante*, under the penalty of nullity”) (translation by author).

223. *Id.*

224. See, e.g., CÒD. CIV. art. 1691 (Venez.) (“When the agent acts on his own name, the principal does not have any actions against those whom the agent contracted with, and neither do these against the principal. In that case, the agent is bound directly toward the person with whom he has contracted, as if the act were his own.”) (translation by author).

225. *Id.* art. 1698 (“The agent must comply with all of the obligations contracted by the agent within the limits of the agency.”) (translation by author).

226. See, e.g., CÒD. CIV. art. 2143 (Ecuador) (defining the deposit as a contract “whereby a person entrusts a corporal thing to another, who in turn assumes the obligation to restitute it in kind.”).

227. Hayzus, *supra* note 84, at 5.

228. Albinini, *supra* note 123, at 568.

acquisition of its fruits or income [by somebody else].”<sup>229</sup> These *in rem* civil law rights allow the beneficiary to administer or control the property subject to the right of the full owner-grantor. In Anglo-American jurisdictions, the trustee is the only party who can administer the property; the beneficiary has no right to administer the trust property prior to the transference.

## 6. Other Legal Institutions

Several other European civil law instruments have been considered to come close to the functionality of the Anglo-American trust. Among them, the “*foundation, mandat, fiducie, Treuhand*, contract for the benefit of a third party, usufruct, naked ownership, fideicommissary substitution, appointment of an heir or legatee subject to a condition (“charge”), testamentary execution, the Dutch *bewind*, certification, and others.”<sup>230</sup> Nevertheless, by no means could these institutions be considered an equivalent to the common law trust, because *fides*, the sole element common to all these instruments, is insufficient to explain the Anglo-American trust.

## B. Government Trusts: A Point of Convergence

Anglo-American regulatory compliance trusts are used to tackle problems that affect the public-at-large. Examples of these trusts include nuclear decommissioning trusts, environmental remediation trusts, liquidation trusts, prepaid funeral trusts, foreign insurers’ trusts, and law office trust accounts.<sup>231</sup>

Latin American governments have expanded their use of regulatory compliance trusts since the 1970s. Colombia established a fiduciary system to administer a special trust designed to promote security and the restoration of public order in the country.<sup>232</sup> Mexico presents many examples of public-interest trusts: (i) the Trust for the Establishment of the Historical Studies of the Mexican Workers’ Movement Center created in 1973;<sup>233</sup> (ii) the Trust for Commercial Development of 1980;<sup>234</sup> (iii) the Rural Promotion Trust of 1981;<sup>235</sup> (iv) the Trust to Grant Loans to

229. Martinez, *supra* note 41, at 1718.

230. Thorens, *supra* note 174, at 314.

231. John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 177, 179-81 (David Hayton, ed., 1999).

232. See Decree 1965 of 1989 published in the *Diario Oficial* of Aug. 31, 1989, arts. 4-6, regulating Law 45 of 1923.

233. Accord of May 30, 1973, issued by the Secretariat of Labor and Social Welfare, published in the *Diario Oficial* (June 28, 1973).

234. Accord of May 17, 1980, issued by the Secretariat of Programming and Budget, published in the *Diario Oficial* (Mar. 24, 1980).

235. Accord of June 30, 1981, issued by the Secretariat of Programming and Budget, published in the *Diario Oficial* (July 2, 1981).

the Concessionaires of the Freight Transportation Public Service in the Federal District of 1990;<sup>236</sup> (v) the National Trust Fund for Development of Tourism of 1992;<sup>237</sup> (vi) the Mining Promotion Trust of 2001;<sup>238</sup> (vii) the Trust Fund for Quality Cinematographic Production of 2001;<sup>239</sup> (viii) the Trust Fund of Micro Financing for Rural Women of 2002;<sup>240</sup> and (ix) the Trust Fund for the Strengthening of Saving and Lending Associations and Cooperatives and for the Support of their Members of 2004.<sup>241</sup>

In 1991, Guatemala appropriated government funds to institute the National Trust for Peace.<sup>242</sup> Guatemala also created the Roads Trust in 2000 to improve the country's highways<sup>243</sup> and the Trust Fund for Banking Capitalization of 2002 to provide financial support to the national banking system.<sup>244</sup>

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236. Accord of 1984, issued by the Secretariat of Programming and Budget, published in the *Diario Oficial* (Oct. 17, 1984), amended by Resolution of June 13, 1990, issued by the same Secretariat, published in the *Diario Oficial* (June 21, 1990).

237. Federal Law of Tourism, published in the *Diario Oficial* arts. 26-29 (Dec. 31, 1992).

238. The Mexican Non-Metallic Minerals Trust Fund was created on November 1, 1974 with the purpose of providing support to *ejidos* [small land holdings], rural communities and small proprietors in mining activities. In 1990, the trust was renamed as Mining Promotion Trust, which currently depends of the Secretariat of Energy. *See also* the Accord issuing the Rules of Operation for the Discount of Credits of the Mining Promotion Trust, approved by Accord of March 14, 2001, published in the *Diario Oficial* (Mar. 15, 2001).

239. *See* Rules of Operation, management and evaluation indicators approved by the Secretariat of Public Education and published in the *Diario Oficial* (Mar. 16, 2001).

240. Pursuant to an Accord issued by the Secretariat of Economy on December 31, 1998, this trust was created by a contract executed on June 10, 1999. *See also* Accord of March 11, 2002 approving Rules of Operation for the Trust, published in the *Diario Oficial* (Mar. 14, 2002).

241. Law creating this trust was published in the *Diario Oficial* (Jan. 28, 2004). This law was amended, *see* Decree of June 23, 2004, published in the *Diario Oficial* (June 29, 2004).

242. Governmental Accord 408-91 of 1991, published in the *Diario de Centro América* (Aug. 2, 1991) (created FONAPAZ). *See also* the Transportation Trust established by Decree 106-96, as amended by Decree No. 75-98, published in the *Diario de Centro América* (Dec. 9, 1998).

243. The Roads Trust was created by Governmental Accord 736-98 of October 14, 1998, and amended by Governmental Accord 97-2000, published in the *Diario de Centro América* (Mar. 15, 2000).

244. Decree 74-2002, published in the *Diario de Centro América* art. 2 (Nov. 29, 2002) (directed the Guatemalan Government to create a Trust Fund for Banking Capitalization with seed money in the form of loans of up to \$150,000,000 provided by the World Bank. The Trust was created by public deed of December 23, 2003). *See also* Regulations of the Trust's Technical Committee approved by Ministerial Accord No. 51-2004 published in the *Diario de Centro América* (Oct. 4, 2004).

Honduras's Special Law on the Naturalization Chart of 1991<sup>245</sup> appointed the Central Bank of Honduras as a "fiduciary institution."<sup>246</sup> Honduran trust funds consist of deposits made overseas in U.S. dollars by non-citizens seeking to become Honduran citizens. The trust's *fideicomisarios* are the beneficiaries of the Naturalization Chart.<sup>247</sup> Other examples of government-established trusts in Honduras are the Road Maintenance Trust Fund of 1993<sup>248</sup> and the Social Funds Trust of 1995, which established to finance social development programs.<sup>249</sup>

Argentina's public interest trusts (*fideicomisos de derecho público*) were established to organize and implement projects for the benefit of the community at large.<sup>250</sup> Examples of this type of trusts are: (i) the Fiduciary Fund for Federal Electricity Transportation of 1999;<sup>251</sup> (ii) the "National Development Fund for Micro, Small and Medium-size Businesses" of 2005;<sup>252</sup> (iii) the Trust Fund for Provincial Development of 2003;<sup>253</sup> and (v) the Trust Fund for Household Gas Consumption Subsidies established in Law 25,565 of 2002.<sup>254</sup>

Costa Rica has created public trusts for health and agricultural purposes. The Organic Law of the Ministry of Health of 1999 authorized the Ministry to execute trusts with the National Banking System for the financing of its programs and activities.<sup>255</sup> The Law 8147 of 2001 created the Trust for the Agricultural Protection and Promotion of Small and Medium-size Producers.<sup>256</sup> The Regulation of

245. Decree 26-90-E, December 14, 1990, *approved by* Resolution 620-9/91 of the Central Bank, art. 16, L.G., 23 Oct. 1991 (Hond.).

246. *Id.* art. 3.

247. *Id.* art. 7.

248. *See* Decree 131-93, 10 Aug. 1993, Law of the Roads Maintenance Fund, art. 14, L.G., 2 Dec. 1993 (Hond.).

249. Accord 000621, 22 June 1995, arts. 2-3, L.G., 8 July 1995 (Hond.).

250. LUPOL, *supra* note 2, at 87.

251. *See* Resolution 657, Dec. 3, 1999, *modified by* Decree 1135/2000, Dec. 5, 2000, [29540].

252. *See* Law No. 25,300 of June 2, 2005, and Decree No. 1,633/2002 of the Ministry of Economy, published on the *Boletín Oficial* (Sept. 4, 2003). Argentina's Ministry of Economy is the trustor and the National Bank of Argentina is the trustee. Certificates of Participation are issued and drawn over the trust corpus for the benefit of the aforementioned entities.

253. *See* Law 25,725 art. 62, which approves the Expenditures Budget and the Resources for the National Administration for Fiscal-Year 2003, published in the *Boletín Oficial* (Jan. 27, 2003). This trust assumed the debts that the Provinces had accrued, such as public titles, debentures, treasury bonds, or loans.

254. Law 25,565 was published in the *Boletín Oficial* (Mar. 19, 2002).

255. *See, e.g.*, Organic Law of the Ministry of Health, modified by Law No. 7927 of Oct. 12, 1999, art. 13; *see also* Decree 31,198-S of May 15, 2003, published in *La Gaceta* (June 12, 2003) (approves a trust contract executed between the Ministry of Health and the National Bank of Costa Rica).

256. Law 8147 of October 24, 2001 was amended by Law 8390, published in *La Gaceta* (Nov. 7, 2003), and by Law 8427 creating a trust for debt purchase and restructuring, published in *La Gaceta* (Dec. 27, 2004). Interestingly, the trust is exempted from income tax (*See* Law 8147, art. 9, as modified by Law 8427).

Law 8147 specified that the Bank of the State be the *fiduciario*, that the state be the *fideicomitente*, that the producers be the *fideicomisarios* and the financial institutions or other public or authorized private organizations be the creditors.<sup>257</sup>

El Salvador also shows some degree of experience in the creation of government-funded public trusts. For instance, the Trust for the Development of the Reciprocal Guarantees System for the Micro, Small and Medium Size Company, Rural and Urban of 2001 (the “System”) facilitates access to financing and to government procurement opportunities to these companies.<sup>258</sup> The System is composed of reciprocal guarantee companies, re-securitizing reciprocal guarantee companies, and the *Fideicomiso*. In this trust, the *fideicomitente* is the government of El Salvador, the Multisectoral Bank of Investments is the *fiduciario*, and the *fideicomisarios* are the micro, small, and mid-size rural and urban businesses, guarantee companies, and the Government of El Salvador.<sup>259</sup> The *fideicomiso* promotes the creation of guarantee companies, participates as investors in their initiatives, and provides support to micro, small and medium-size companies.<sup>260</sup> The *fideicomiso* is fully funded by the state, but is open to contributions from domestic and foreign entities, both public and private.<sup>261</sup> Another example is the Responsible Artisan Fishing Trust of 2003, established to strengthen the artisan fishing organization by encouraging investments for sustainable and orderly fishing.<sup>262</sup>

Panama’s Trust Development Fund of 2004 is another example of a government trust in the region.<sup>263</sup> Finally, Brazil’s Law 11,146 of 2005 authorized the executive branch to contribute to the maintenance of the Trust Fund created by the Inter-Governmental Group of Twenty-Four (G-4).<sup>264</sup>

### **C. The Case of the Anglo-American Business Trust**

What follows are various expressions of Anglo-American business trusts.

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257. See Decree 32,101-MAG (Ministry of Agriculture and Livestock), published in *La Gaceta* on January 12, 2005, containing the Regulation of Law 8147. See also Decree 32,677-MAG, published in *La Gaceta* (Oct. 11, 2005), modifying Decree 32,101-MAG.

258. See Legislative Decree 553 of 2001, published in the *Diario Oficial* (Oct. 22, 2001) (which contains the Law of Reciprocal Guarantees System for Micro, Small and Mid-size Rural and Urban Businesses. Chapter V creates the Trust).

259. *Id.* at art. 69.

260. *Id.*

261. *Id.* art. 70.

262. See Legislative Decree 1215 published in the *Diario Oficial* (May 9, 2003), authorizing the Ministry of Agriculture and Livestock for the creation of the “*Fideicomiso PESCAR*.”

263. Law 20 of 1995 creates the Fiduciary Fund for Development, amended by Law 52 published in the *Gaceta Oficial* (Oct. 21, 2004), and Law 57, published Dec. 22, 2004.

264. See Lei No. 11,146, 26 July 2005, D.O. 27 July, 2005. (Braz.).

### 1. Purpose trusts

Purpose trusts are created when the grantor deliberately fails to designate a beneficiary. When first originally conceived, purpose trusts were considered null in English law for lack of a party entitled to enforce the trust's terms.<sup>265</sup> Later case law upheld the validity of purpose trusts because courts held that members of a benefited class could be identified, save specific exceptions.<sup>266</sup>

The charitable trust is the most common type of purpose trust. Its origin can be traced back to Medieval England, where properties held by certain religious organizations were granted certain exemptions.<sup>267</sup> Characteristics of the charitable trust include: (i) the promotion of a charitable purpose;<sup>268</sup> (ii) governmental intervention by means of state courts or attorneys general for enforcement purposes;<sup>269</sup> (iii) the application of *cy-près* theory which states that "when the purpose indicated by the settlor may not be attained, the court will identify the most similar purpose possible and modify the trust instrument accordingly;"<sup>270</sup> and (iv) the perpetual nature of charitable trusts in the United States.<sup>271</sup>

Non-charitable purpose trusts can be used: (i) to erect or maintain sepulchral monuments, graves, or tombs; (ii) to promote the saying of masses to the extent that they are not charitable; (iii) to maintain particular animals; (iv) to benefit unincorporated associations; and (v) to promote idiosyncratic purposes such as (a)

265. Matthews, *supra* note 18, at 4.

266. Frost, *supra* note 48, at 26 (stating that "the basic rule is that trusts created for abstract or impersonal purposes are void as there is no beneficiary to enforce the terms against the trustee, provided that the purpose is not charitable"); *see also* Matthews, *supra* note 18, at 4.

267. David Villar Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 132 (2000) ("Because of this, feudal lords were denied the usual benefits of property once religious corporations obtained land through charitable gifts . . . . To defeat these mortmain and forfeiture statutes, religious charities quickly found a loophole by which property was conveyed to individuals for use by a religious order.").

268. There is extensive case law as to what the specific definition of a charitable purpose is, but courts generally have approached the issue on a case-by-case basis. *See* Rosenberg, *supra* note 51, at 98 ("Throughout its history, the trust has furthered social justice by providing for the needs of people who are subject to the harsh dictates of the law."); *see also* LUPOLI, *supra* note 2, at 127 ("In an opinion of Lord Macnaghten in a decision from 1891, four categories of purpose were listed: relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community.").

269. *See* Villar Patton, *supra* note 267, at 136 (noting that Chancery courts in England enforced charitable trusts "as early as the 1400s"; *see also* Vidal v. Girard, 43 U.S. 127 (1844), *quoted in* Patton, *supra* note 267, at 156.

270. LUPOLI, *supra* note 2, at 130.

271. Halbach, *supra* note 60, at 131.



fox-hunting; (b) the disposal of property of the testator for ‘best spiritual advantage’; and (c) the provision of a maintenance fund for an historic building.<sup>272</sup>

Charitable trusts also have been implemented in Latin America. In Argentina, for instance, munificence trusts (*fideicomisos de liberalidad*) allow the donation of specific assets or values during the donor’s lifetime to the beneficiary.<sup>273</sup> Beneficence trusts (*fideicomisos de beneficencia*) are used to organize donations intended for appropriation of public benefit works.<sup>274</sup> It is not clear whether the income generated from these donations is tax-deductible,<sup>275</sup> but this characteristic may operate as a disincentive for the widespread use of munificence trusts use in Argentina.

## 2. Asset-Protection or Protective Trusts

Asset-protection or protective trusts allow for the grantor to shield his assets from any creditors’ claims by expressly prohibiting their transfer, either voluntarily or by statute.<sup>276</sup> Spendthrift trusts are the most common category of protective trusts; they impede the beneficiary from transferring trusts interests and limits his ability to receive income from the trust.<sup>277</sup> The asset protection benefit is lost when the settlor acts fraudulently against his creditors<sup>278</sup> and, in some jurisdictions, when the creditor is “a *bona fide* purchaser of a legal security interest for value without notice of the trust.”<sup>279</sup>

Asset-protection trusts are rarely available in Latin America. One exceptional case is that of Argentina’s Commerce Fund (*Fondo de comercio*), which protects family businesses by holding family assets as a separate entity that is beyond the reach of third parties.<sup>280</sup>

### a. Offshore Trusts

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272. Matthews, *supra* note 18, at 5.

273. See Hayzus, *supra* note 84, at 88 (“They are gifts of particular goods that the fiduciary gives during his lifetime . . . through the periodic distribution of a sum of money or the conveyance of specific assets for the compliance of the stipulated condition.”) (translation by author).

274. *Id.* at 89.

275. *Id.* at 90.

276. LUPOLI, *supra* note 2, at 133.

277. Halbach, *supra* note 114, at 215.

278. Matthews, *supra* note 18, at 19-20.

279. Hayton, *supra* note 93, at 154.

280. Hayzus, *supra* note 84, at 70-71 (there is a real transfer of resources to the *fideicomiso* in this case); see also Law 11,867 on *Fondos de Comercio* (Commerce Funds).

Also known as “international trusts, or foreign grantor trusts, or a foreign non-grantor trust,”<sup>281</sup> offshore trusts are “set in tax-haven countries or territories which provide tax benefits for grantors and beneficiaries.”<sup>282</sup> Foreign banks or other private trusts companies act as trustees.<sup>283</sup> Offshore trusts own shares, controlling or non-controlling, in a company located onshore,<sup>284</sup> causing this company to appear “on no-one’s balance sheet.”<sup>285</sup> Offshore trusts are very popular among wealthy persons in the United States, who use them “to remove some of their assets from the U.S. litigation system, to permit the trust assets to be invested in foreign funds closed to U.S. citizens and resident aliens and for tax and estate planning purposes.”<sup>286</sup> Presently, “offshore trusts are the largest number of trusts created for the carrying out of business in the international arena.”<sup>287</sup> There are no analogue trust institutions to Anglo-American offshore trusts in Latin America.

#### b. Limited Partnership

The use of limited partnerships in combination with trusts can provide enhanced asset protection benefits. Limited partnerships are composed of a general partner and one or more limited partners. Limited partners restrict their liability to the amount of their contribution to the business, while general partners are “jointly and severally liable for all partnership debts and obligations.”<sup>288</sup> In an effective asset protective limited partnership, a person “can have a trust hold the ninety-nine percent partnership interest . . . [and also have] an interest as a general partner, thus making it even more difficult for a creditor someday to get.”<sup>289</sup> Consequently, trusts in conjunction with limited partnerships work as a powerful tool for asset protection planning in the United States.<sup>290</sup>

Other alternatives for the isolation of trust assets from creditors are also available.<sup>291</sup> Both offshore and other protective trusts have stirred debate in the

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281. Frost, *supra* note 48, at 128.

282. *Id.*

283. *Id.*

284. Matthews, *supra* note 18, at 20-21.

285. *Id.* at 22.

286. J. Richard Duke, *Use of Trusts by U.S. Citizens in International Tax Planning*, in TRUSTS IN PRIME JURISDICTIONS 127 (Alon Kaplan ed., 2000).

287. Frost, *supra* note 48, at 128.

288. Carter G. Bishop & Daniel S. Kleinberger, *Limited Liability Companies: Tax and Business Law*, 1998 WL 993456, 1 (W.G.&L.) (2007).

289. See Symposium, *The Rise of the International Trust*, 32 VAND. J. TRANSNAT’L L. 779, 783 (1999).

290. *Id.*

291. Symposium, *The Rise of the International Trust*, 32 VAND. J. TRANSNAT’L L. 779, 810-11 (1999), commenting that:

United States in recent decades. Legal and ethical considerations have been argued against and in favor of these types of trusts, and this debate is far from over.<sup>292</sup> This debate is absent in Latin America since neither offshore trusts nor protective trusts exist in the region.

### 3. Securitization Trusts

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“[W]e might set up a partnership, for example, where the client, who is the general partner of his partnership, transfers a million dollars into the entity. He would retain a one percent interest. A ninety-nine percent interest in that partnership then would be assigned immediately to his foreign trust, appointing a foreign trustee as the trustee of that trust. And in that fashion, divesting himself, for all intents and purposes, of ninety-nine percent of the equity in that partnership. Any representations to a lender in future financial statements would only reflect that he owns a one percent interest in that structure with his trust owning now a ninety-nine percent interest. He can be a discretionary beneficiary of that trust, if he wishes, assuming that the jurisdiction designated allows him to remain a beneficiary of that trust. His spouse, if he is married, and his children may also be discretionary beneficiaries of that trust, as well as charities and any other individuals he would like to favor, either during his lifetime or upon his death. And this trust would also serve the purpose of being his primary dispositive instrument for estate planning purposes. It would contain, just like his will, his credit shelter provisions, his marital trust provisions, and his generation-skipping trust provisions, and the trust would become, in effect, his will substitute.

292. Among those arguing for the acceptance of offshore trusts, *see* Rothschild, *supra* note 291, at 3 (noting that, “there should be nothing wrong with an individual who wishes to protect his assets by using a trust.”); *see also* Rothschild, *supra* note 291 at 17 (declaring that “there’s nothing wrong either morally, ethically, or legally with structuring the trust at the correct moment in time when there are no foreseeable creditors on the horizon. This is no different than any other pre-bankruptcy planning that debtors’ attorneys very often recommend”). *See also* Rothschild, *supra* note 291, at 21 (warning about the consequences of the widespread use of offshore trusts: “the real reason Alaska passed their legislation, and then Delaware copied them [was] because they saw the flight of money leaving this country for offshore places”). On the opposite end, some scholars hold a scathing view about the consequences of the “rife use of offshore trusts.” *See, e.g.,* Symposium, *The Rise of the International Trust*, 32 VAND. J. TRANSNAT’L L. 779, 786-87 (1999) (stating that, “from a societal perspective . . . these asset protection trusts are a bad thing” because they destroy the basic principle that “when you do something wrong, you have to pay for it”); *see also id.* at 26 (noting that in light of the fraudulent purposes for which offshore trusts are usually utilized, “for the most part, we’re hearing about ordinary people who have accumulated an unusual amount of wealth [and what is striking is that] they’re trying to isolate themselves in a very particular way from the rest of society”).

Trusts can be used to create asset securitization instruments that enable more efficient investment. A business corporation forms a private trust and transfers to it title to some subset of the corporation's assets. The trust in turn issues bonds that are securitized by these assets and pays the proceeds of the bond sale to the corporation. The trust is used as an intermediary in a transaction where a corporation pledges some of its assets as security to back an issuance of marketable bonds.<sup>293</sup>

Securitization trusts are beneficial because they enable "a complex group of assets to be disposed of to a trustee to be available as security to investors,"<sup>294</sup> bringing about lower transactional costs and bankruptcy protection benefits for the trust assets.<sup>295</sup>

Several Latin American countries have recently passed laws dealing with securitization.<sup>296</sup> In Guatemala, for instance, the Law on Trust Operations by Insurance Companies of 1991<sup>297</sup> allows these companies to promote trust operations in any banking or financial institution through the issuance of guaranteed securities of life insurance policies with prior authorization from the Superintendence of Banks.<sup>298</sup> Insurance companies act as *fideicomitentes* and perform transferences of funds to the trust on behalf of their insured clients.<sup>299</sup> Trust funds originate from loans provided by insurance companies guaranteed by insurance policies based on the securities being guaranteed by the respective life insurance policies.<sup>300</sup>

Argentina also possesses broad experience with credit securitization [*titulización de créditos*]; this tool is used to open access to capital markets for the promotion of house financing.<sup>301</sup> The *fiduciante* [mortgagor/creditor] assigns its rights to an entity legally enabled to act as financial *fiduciario*. The securitization assignment may occur when the loan is made. The mortgage may be registered directly under the fiduciary's name, allowing the mortgagor to borrow against the *fideicomiso*.<sup>302</sup> The mortgagor may issue Certificates of Participation in the fiduciary

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293. Hansmann, *supra* note 14, at 18.

294. Hayton, *supra* note 93, at 165.

295. *E.g.*, in the case of the securitization of credit card receivables, the bank, "[called the originator or packager], buys the credit card receivables as before, but then transfers them in trust to a separate trustee . . . [S]hares in that trust are sold to various participating investors who . . . are not lenders to the bank but share owners in the trust." See Langbein, *supra* note 231, at 177.

296. Chile, Colombia and Peru. See Claire A. Hill, *Latin American Securitization: The Case of the Disappearing Political Risk*, 38 VA. J. INT'L L. 293, 318 (1998).

297. Governmental Accord 637-91 of 1991, published in the *Diario de Centro América* (Oct. 1991) (approves the Regulations for the Promotion and Development of Trust Operations by Insurance Companies).

298. *Id.* art. 1.

299. *Id.* art. 2.

300. *Id.* art. 6.

301. Hayzus, *supra* note 84, at 117 (referring to Law No. 24,441, *supra* note 85).

302. *Id.* at 118.

ownership;<sup>303</sup> these certificates are titles to the debt generated. This method for obtaining secondary financing is called *titulización* and has been used in various areas of the Argentinean economy. Financial *fideicomisos* have been created for money owed in the purchase of flight tickets, domestic appliances, and credit card debts,<sup>304</sup> and for the special system established by Law 25,798, which created a trust for the implementation of the mortgage refinancing system.<sup>305</sup>

Brazil's Law 9,514 of 1997 introduced the Real Estate Finance System. This Law regulates the securitization of real estate loans where the credits are expressly linked to the issuance of titles of credit. Securitization firms are empowered to issue certificates of real estate receivables, whereby the fiduciary agent is a financial institution expressly authorized to that effect.<sup>306</sup>

#### 4. Land Trusts

These trusts are “local, state, regional, and national nonprofit organizations that actively work to conserve land for the public benefit through a variety of means, including, most commonly, the acquisition of land and conservation easements by gift, purchase, or bargain purchase.”<sup>307</sup> Through them, a private landowner that “donates a conservation easement to a land trust for one or more of the conservation purposes enumerated in the statute generally will be entitled to a charitable income tax deduction equal to the value of the donated easement.”<sup>308</sup>

No general rules concerning the use of business trusts in Latin America can be drawn. For example, business trusts [*fideicomisos de negocios*] are used in Argentina for a variety of purposes. Real estate *fideicomisos de negocios* are a rough equivalent to the U.S. real estate investment trust. These *fideicomisos* are used for the planning, development, construction, and commercialization of housing and are comprised of a collection of different stakeholder: the landowner, developers, planners, project coordinators, and financiers as well as the fiduciary, who stands at

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303. *Id.* at 46 (quoting Law No. 24,441 art. 21) (“[T]he certificates of participation shall be issued by the trustee. The debt securities backed by trust assets may be issued by the trustee or by third parties, as the case may be. The certificates of participation and the debt securities can be in bearer form, or registered, whether endorsable or not, or in book-entry form.”) (translation by Hayzus).

304. *Id.* at 119-20.

305. See Law 25,798 (Nov. 7, 2003).

306. See Lei No. 9,514, de 20 de novembro de 1997, D.O. de 21.11.1997 (Braz.).

307. Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 453 (2002).

308. *Id.* at 455.

the center of the venture.<sup>309</sup> The fiduciary is charged with selling the housing units and holds fiduciary title to the land, the buildings built thereon, the materials used for the construction, and the funds used during the project.<sup>310</sup> The “Gas Trust” approved by Law 24,076, which created the Fiduciary Investment Fund for the transportation and distribution of gas, is another example of a business trust in Argentina.<sup>311</sup> The Costa Rican government, for instance, promotes the use of the *fideicomiso* for real estate investments in the country.<sup>312</sup>

#### **D. The Case of the Financial Trust**

Financial trusts are a fundamental element for the organization of investment and the administration of wealth in the United States. Among the many benefits of using trusts for financial purposes are bankruptcy and tax protection, the protective regime of fiduciary law, lower costs, and easier governance.<sup>313</sup> Commenting on the parallel between trusts and corporations, an author has stated that even though they both “supply . . . for the particular venture a highly adaptable, contract-like regime of rights, of fiduciary duties, and of internal governance, the trust offers investors an insolvency regime superior to that of corporate law, packaged in a way that facilitates pass-through taxation.”<sup>314</sup>

During recent decades, Latin America has seen a progressive use of *fideicomisos* for financial purposes, especially in the area of real estate construction and investment. These expressions are nevertheless restricted by limitations, many of them inherent to civil law systems, as seen throughout this article. The rigidity of Latin American financial trusts in general can be seen in that only certain institutions may serve as trustees, areas of investment are highly regulated and limited, and maximum investment amounts exist in specific sectors. Nationality restrictions apply as to who can serve as trustee, legally-mandated prohibitions exist on the assignment or re-assignment of securities held or commercial paper bought by a trust, and grantors may issue lingering instructions to trustees that interfere with the latter’s powers of administration. High fees are charged by institutional trustees, trusts are prohibited as devices for the reinvestment of profits, and there exists a lack

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309. See Hayzus, *supra* note 84, at 109.

310. *Id.* at 109-110.

311. The Fund issues fiduciary stocks and participation certificates to raise financing. See Law No. 24076, art. 2, § b (June 7, 1992) (pertaining to the Regulation of the Transportation and Distribution of Natural Gas). See also Letter of Intent Implementing the Fund (Nov. 29, 2004). See also Law 26,028, art. b (June 5, 1995) (creating the Trust on the Transportation Infrastructure System).

312. See Ministry of Justice and Grace of Costa Rica, [http://www.registronacional.go.cr/htm/inmuebles/tramites/contrato\\_fideicomiso.htm](http://www.registronacional.go.cr/htm/inmuebles/tramites/contrato_fideicomiso.htm) (last visited Sept. 2007).

313. See Langbein, *supra* note 231, at 169 (“[W]ell over 90 percent of the money held in trust in the US is in commercial trusts as opposed to personal trusts.”).

314. *Id.* at 194.

of tax incentives for trust use by individuals in estate planning. Throughout Latin American countries, there exists heavy government involvement in trust administration and a generally adverse climate and even lack of knowledge toward trust use from the legal community.

Three specific types of financial trusts deserve particular attention for their proven effectiveness in the Anglo-American environment: trusts for financial operations, mortgage trusts, and blind trusts. As it will be appreciated, there are some resemblances of these versions of the Anglo-American financial trust in Latin America, but not exact equivalents. These categories could serve as examples for the creation of modernization of the Latin American civil law trust.

### 1. Trusts for financial operations

There are certain modern versions of the *fideicomiso* in Latin America that remotely resemble the main characteristics of the Anglo-American financial trust. They nevertheless fall short from fully incorporating the proven benefits of the common law financial trust, such as broad tax benefits and other benefits already discussed.<sup>315</sup>

An example of Anglo-American trusts for financial operations is the pension fund, also called an “investment trust,” which is one of the better-known and often-used Anglo-American trusts for financial operations. A pension fund is “a pool of assets that is accumulated as a reserve with which to pay the pensions of employees at a given firm, and that is both funded and managed by the corporation whose employees are covered by the fund.”<sup>316</sup> The trust corpus is formed by the pension funds.<sup>317</sup> Investment trusts are often used in Latin America. For instance, Argentina’s financial trusts (*fideicomisos financieros*)<sup>318</sup> are composed of public certificates issued by the state and purchased in public offerings. Another expression of these trusts are funds built as trusts by retirement and pension fund administrators who are then authorized to invest in these types of trusts. Nevertheless, these

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315. See *supra* Part II.D.

316. See Langbein, *supra* note 231, at 17.

317. *Id.* Pension fund trustees contract with expert investment or insurance companies to manage the trust corpus.

318. For further analysis of the Argentine financial trust, see also Luis Moisset de Espanés & María del Pilar Hiruela, *Algunos Lineamientos Generales del Fideicomiso de la Ley 24.441*” (Some General Guidelines of the Trust established in Law 24,441), available at <http://www.acader.unc.edu.ar/artallgunoslineamientosgeneralesdelfideicomiso.pdf> (last visited Jan. 2008) (translation by author).

investment tools are affected by heavy limitations in the amounts that can be invested<sup>319</sup> thus impairing the expansion of these devices.

In Colombia, Decree 1730 of 1991 contains the New Statute on the Financial System, authorizing the creation of fiduciary companies. These companies are specifically empowered to act as trustees for mortgage operation or bond issuance by any domestic or foreign firm.<sup>320</sup> Decree 1730 also establishes the "Investment Trust," which is defined as "a fiduciary business undertaken by fiduciary companies with their clients, for the benefit of the latter or of third parties appointed by them, with the principal objective or the contemplation of the possibility of, investing or placing sums of money, according to the instructions provided by the client."<sup>321</sup> Fiduciary companies are entitled to the fee established in the fiduciary contract executed with the beneficiaries and may issue bonds on behalf of a pool of companies.<sup>322</sup>

The Stock Market Law passed by Ecuador in 1998<sup>323</sup> amended the Commercial Code of 1857 and introduced the *Fideicomiso Mercantil* (Commerce Trust). According to this law, only banks, authorized financial companies, and investment fund management companies can act as fiduciaries.<sup>324</sup>

In Mexico, the General Law of Credit Institutions and Banking Establishments of 1926<sup>325</sup> regulated *fideicomisos* with the peculiarity that all trusts were considered commercial acts.<sup>326</sup> Later in 1932, the country undertook a revision

319. See Law No. 24,241 art. 74-76, approved by Decree No. 1518/94, and modified by Decree No. 163/01. See also Instruction No. 19/2001, issued by the Superintendence of Retirement and Pension Funds Administrators, published in the *Boletín Oficial* (Aug. 7, 2001).

320. See Decree 1730, 7 Apr. 1991, art. 2.1.3.1.1. §(c), *Diario Oficial* [D.O.], (Aug. 31, 1989) (Colom.).

321. *Id.* (translation by author).

322. See Decree 1730 of April 7, 1991, published in the *Diario Oficial* of August 31, 1989, art. 2.1.3.1.19; Decree 1730, art. 2.4.11.1.1 (expressly authorizing the state-owned "Fiduciary Company *La Previsora*" (created by Decree 1547 of 1984) to operate as a fiduciary for the management of the National Fund of Calamities).

323. Stock Market Law, Law No. 107, published in the *Registro Oficial* (July 23, 1998). See the General Regulation of the Stock Market Law contained in Decree 390 of December 8, 1998, was published in the *Registro Oficial* on December 14, 1998.

324. See, e.g., Accord No. 20020057 issued by the Ministry of Tourism, published in the *Registro Oficial* (Sept. 25, 2002) (contains the General Regulations for the Operations of the Mix Fund of Touristic Promotion created in the Commerce Trust memorialized in the public deed executed by that Ministry on July 29, 2002). According to the General Regulations, "*La Fiduciaria*," or "The Fiduciary," established in the public deed, administers the Fund. The funds collected in the trust can only be used for the promotion of products, programs, projects, or touristic services qualified as a priority by the Council of Touristic Promotion. *Id.* at art. 63.

325. See Corrales, *supra* note 86, at 3.

326. *Id.*



of its commercial code with the idea of a “dedicated fund,”<sup>327</sup> and the General Law on Negotiable Instruments and Money Operations of 1932 was passed. The Law amended the commercial code, introducing a new right into the legal system called *titularidad*.<sup>328</sup> Currently, the *fideicomiso* is used broadly for financial operations and, in some cases, for real estate investments.<sup>329</sup>

Paraguay’s Law 92 of 1996 on Fiduciary Businesses (*Negocios Fiduciarios*), establishes the procedure for the registration of securities issued through public offerings in the stock market.<sup>330</sup>

Peru’s banking law of 1993 instituted the trust commission (*comisión de confianza*), defining it as a commercial act that only banking institutions may carry out.<sup>331</sup> The trust issues Certificates of Participation, which are held under the name of the *fideicomisario*.<sup>332</sup> The regulation of this law<sup>333</sup> created three types of *fideicomisos*: (i) *Fideicomisos* in guarantee, where the assets are destined to guarantee the performance of an obligation, and where the *fideicomisario* is the creditor;<sup>334</sup> (ii) the Testamentary *Fideicomiso*;<sup>335</sup> and (iii) the *Fideicomiso de Titulización*<sup>336</sup> – a type of financial trust.

The 2003 Trust Law of Uruguay<sup>337</sup> regulates the financial trust, defined as “that where the beneficiaries are entitled to certificates of participation in the fiduciary ownership, of securities representative of debt guaranteed by the assets composing the trust, or of mixed securities granting credit rights and participatory rights over the remainder.”<sup>338</sup> Only financial entities or administrators of investment funds may act as financial *fiduciaries*.<sup>339</sup>

Finally, in 1956, Venezuela sought to “introduce a notion of trust with no restrictions as to its range of applications.”<sup>340</sup> The civil code *fideicomiso* continued to exist, but the 1956 law permitted banks, insurance companies, and financial

327. See Waters, *supra* note 6, at 628. (This idea “was first coined by French advocate of the trust, Pierre Lepaulle, whose writings were instrumental in 1932 in Mexico adopting the idea in its code revision of that year.”).

328. LUPOI, *supra* note 2, at 284-85.

329. *Id.*

330. Law 92/96 on Fiduciary Businesses (*Negocios Fiduciarios*), is regulated by Resolution 854, published in the *Gaceta Oficial* (June 15, 2005).

331. See Regulation of the Trust and Fiduciary Service Companies, *supra* note 22.

332. *Id.* art. 7.

333. *Id.*

334. Law 92/96 on Fiduciary Businesses, *supra* note 330, arts. 15-6.

335. *Id.* arts. 17-18.

336. *Id.* arts. 19-21.

337. Hansmann, *supra* note 14, at 59.

338. Law 92/96 on Fiduciary Businesses, *supra* note 330 art. 25, para. 1.

339. *Id.* art. 26, para. 1.

340. LUPOI, *supra* note 2, at 290-91.

companies to perform as fiduciaries for certain operations within their respective industries.<sup>341</sup>

## 2. Mortgage trusts

Mortgage trusts are a useful mechanism for real estate financing. The lender/seller sells the property (trust property) to the borrower/buyer. Title to the property is retained by the lender/seller who becomes the trustee for the duration of the trust; the borrower/buyer becomes the beneficiary enjoying the use of the property. The trust terminates upon full payment of the debt by the borrower/buyer who becomes the full owner of the property. Without these trusts, it would be impossible to explain the expansion of the U.S. housing market after World War II.<sup>342</sup>

In Latin America, by contrast, the mortgage trust is a largely underutilized institution. Some instances are worth mentioning. Argentina's collateral trusts (*fideicomisos de garantía*) usually operate in mortgage operations by the transference of the legal title for property from the debtor (borrower) to the lender (usually a bank or other financial institution).<sup>343</sup> This mechanism allows the borrower to obtain financing and the lender to simultaneously secure a strong guarantee for the re-payment of the loan. Trusts have played a role in the Mexican real estate sector as well. Due to the many restrictions imposed after the Mexican Revolution of 1910, investment in real estate trusts and the participation of foreign investors have been particularly controversial topics in that country. A Presidential Agreement of 1971 was the first government regulation allowing the participation of foreign investors in real estate trusts over Mexican lands.<sup>344</sup> According to this regulation, only "duly certified Mexican financial institutions [are permitted] to acquire title to real property as trustee in the name of the beneficiary foreign investor."<sup>345</sup> Foreign beneficiaries only "acquired beneficiary rights to use and profit from the real property without constituting ownership rights."<sup>346</sup> Later, mirroring the

341. *Id.* at 291.

342. See generally Rothschild, *supra* note 291; see also Andersen, *supra* note 62.

343. See Hayzus, *supra* note 84, at 113-14 (arguing that "there is an improvement here over the classical collateral forms available . . . in that the debtor relinquishes part of his assets") (translation by author).

344. See Rafael Martínez de Escobar, *General Restrictions on Individual Foreign Investment in Mexico*, 6 TEX. INT'L L. 217 (1970-1971).

345. Corrales, *supra* note 86, at 4; see also Fernando Orrantia, *Comercial Contracts, Including Joint Ventures, Acquisitions, and Real Estate, Under Mexican and United States Law*, LOY. L.A. INT'L & COMP. L.J., 954 (explaining that "real estate trusts in Mexico are very similar to trusts in the United States, except that only a bank may act as trustee")

346. Corrales, *supra* note 86, at 4.

effect of world changes and in order to raise additional capital for infrastructure development, the Foreign Investment Law of 1993 broadened authorization for the use of real property trusts controlled by foreign investors in Mexico.<sup>347</sup> Other restrictions to real estate trusts include the requirement that the trustee be a Mexican financial institution<sup>348</sup> “duly authorized by the federal government.”<sup>349</sup>

### 3. Blind Trusts

Blind trusts are designed to avoid conflicts of interest for persons holding government positions or otherwise dealing with the government in influential posts. In this kind of trust, “the manager-trustee is prohibited from communicating with the interested party regarding the investments made, and the interested party may not request any information directly from the trustee.”<sup>350</sup> There are several Latin American experiences with this type of trust.<sup>351</sup>

## **V. THE ROAD AHEAD: LOOKING BEYOND THE CURRENT PARADIGM**

### **A. In General**

In today’s globalized world of business, finances, and exchanges, the Latin American region has long been familiar with Anglo-American trusts,<sup>352</sup> and it is likely that attempts at deepening this familiarity will continue to take place “if only

347. *Id.* at 5 (explaining that after 1993, the lifting of prior restrictions allowed foreign investors to participate in real estate trusts for the acquisition of the “rights to the use and profits from real property located along the border and coastline of Mexico by means of the irrevocable trust [which] . . . had to be commercial or industrial in nature and no ownership rights were acquired.”). These trusts allow the trustee to issue securities called Ordinary Participation Certificates. Poindexter, *supra* note 9, at 270 (“Certificados de Participación Ordinaria.”); *see also* arts. 11 (I) & 17 of the Foreign Investment Law of Mexico published in the *Diario Oficial* (Dec. 27, 1993).

348. Corrales, *supra* note 86, at 3.

349. *Id.* at 2. *See also* generally Fernando Sánchez, *Mexico’s New Foreign Investment Climate*, 18 SYRACUSE J. INT’L L. & COM. 41 (1992).

350. Albinini, *supra* note 123, at 591.

351. For a fairly recent discussion on the blind trust (*fideicomiso ciego*) see a discussion in the Chilean Senate, *Presidente del Senado califica fideicomiso ciego como ‘un proyecto fantasma’* (Senate president labels the blind trust a ‘fantasy project’), June 2, 2005, [http://www.senado.cl/prontus\\_senado/site/artic/20050602/pags/20050602182005.html](http://www.senado.cl/prontus_senado/site/artic/20050602/pags/20050602182005.html) (last visited Jan. 2008).

352. *See* Gaillard, *supra* note 45, at 313 (“[T]he civil-law countries find themselves more and more frequently confronted with international situations involving trusts.”).

to capture back some of the lucrative international financial work which has gone to common law jurisdictions.”<sup>353</sup> A commentator has noted that civil law scholars feel jealous “when they visit the universities, hospitals, and other general social institutions [in Great Britain and the United States and see them] prospering because of the [trust] mechanism.”<sup>354</sup> Therefore, the need for an expansion of trusts as business and financial tools is more necessary than ever.

The discussion about the compatibility or equivalence—or the lack thereof—between the trust and the *fideicomiso* is not just an academic exercise, but rather, has real life ramifications in the international business world. The problem arises particularly in situations where a trust created in a common law country seeks recognition in a civil law jurisdiction,<sup>355</sup> and where a trust created pursuant to a statute in a civil law jurisdiction seeks recognition in another “jurisdiction [which] has adopted a form of trust by statute.”<sup>356</sup>

Globalization increasingly will require the need for mutual recognition of trusts created in both legal systems. The construction of a more modern or business-friendly version of the Latin American *fideicomiso* seems to be the starting point.<sup>357</sup>

Reality is that most civil law countries have and will continue to adopt “trust-like institutions.”<sup>358</sup> Despite the apparent irreconcilable strands of common

353. Matthews, *supra* note 18, at 22.

354. Mayda, *supra* note 1, at 1052 (indicating that “[o]ne may be allowed to ask whether it is really the legal technique of trusts or rather the greater availability of money . . . which makes the difference.”).

355. See generally WALTER H. DIAMOND ET AL., *INTERNATIONAL TRUST LAWS AND ANALYSIS* (2001).

356. Symposium, *International Recognition and Adaptation of Trusts: The Influence of the Hague Convention*, 32 *VAND. J. TRANSNAT’L L.* at 1006.

357. Latin American courts do not enjoy the breadth of equitable powers that Anglo-American courts do and, therefore, the quest for resulting and constructive trusts has to necessarily focus on statutory law. In this context, the obligation to reconstitute the trust assets or the values or income generated thereof—which is germane to the resulting trust—is also present in several Latin American legal institutions. In effect, statutory law in Latin America generally provides that if the grantor gratuitously conveys property to the donee and the transfer fails due to the noncompliance with any of the legal formalities necessary to perfect the transfer, in this case, the third party who receives the trust property is under the obligation to reconstitute it to the intended beneficiary. With respect to resulting trusts, the same effect may roughly be obtained through the Latin American doctrine of simulation. See *CÓD. CIV.* art. 989 (Argentina 1917) (“Simulation is present when the juridical character of an act is concealed under the appearance of another act, or when the act contains clauses which are not sincere, or dates which are not true, or when rights are constituted or transferred thereby to interposed persons, other than those for whom they are really constituted or to whom they are transferred.”). These legal actions aim at annulling the effects of the unlawful act. *Id.* art. 1078 (“Juridical acts are void when the parties have proceeded with simulation . . . .”) (translation by author).

358. Hansmann, *supra* note 14, at 2.

and civil law,<sup>359</sup> there are academic notions of harmonizing the concept of a trust between both legal systems. One author has modeled a process of “reception” of a foreign legal institution, which could help to develop a working hypothesis for the reception of Anglo-American trusts in Latin American countries.<sup>360</sup>

The “reception” in the proposed model would not happen overnight, but in stages: arrival, reaction, assimilation, and reconciliation. The first stage is “the arrival of the foreign doctrine,”<sup>361</sup> which, in this case, is the discussed common law trust doctrine. Subsequently, a reaction to the newly introduced doctrine occurs, which could range from rejection, acceptance, or acceptance followed by repentance.<sup>362</sup> The next stage is “assimilation with the underlying law,”<sup>363</sup> coupled with possible subsequent positive experiences for the users of the initially foreign doctrine. The last stage is the reconstruction of the doctrine and its full reconciliation with domestic institutions and practices.<sup>364</sup> This process of “reception” or incorporation would entail obstacles and potential misunderstandings. The change is a particularly daunting task when it comes to “the adaptation of legal institutions that is necessary in order to recognize trusts created under foreign law.”<sup>365</sup>

## **B. Potential Avenues for the Expansion of Business and Financial Trusts in Latin America**

Other types of Anglo-American business trusts not currently in use in Latin America could be used as important investment tools in the region. These options are listed below.

### 1. Flee Clauses or “Grasshopper” Trusts

In these trusts, the trustees and the law governing the trust are substituted for other trustees and for the law of a new jurisdiction “when any of a broad range of specified events occur.”<sup>366</sup>

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359. Venturatos, *supra* note 19, at 1721 (“Incorporating a common law concept into a jurisdiction of the civil law jurisdiction tradition presents many difficulties, not only in terminology, but in basic underlying legal concepts.”).

360. Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 29 (2003) (noting that “the trust fits the model neatly enough.”).

361. *Id.* at 28.

362. *Id.*

363. *Id.*

364. *Id.*

365. Dyer, *supra* note 356, at 1019.

366. Hayton, *supra* note 74, at 323.

## 2. “Blackhole” Trusts

These conveyance devices are meant to distribute income for a period of a hundred years to the beneficiaries, “upon the expiry of which the capital is to be distributed to the youngest then living descendant of [the grantor] born after 82 years have elapsed from creation of the trust.”<sup>367</sup>

## 3. Unit Trusts

These are “collective investment vehicle[s] in which the value of units in the trust held for a unit-holder is directly related to the value of the assets held by the unit-trustee.”<sup>368</sup>

## 4. Custodian Trusts

In a custodian trust, a corporation custodian holds the securities for a broker, who holds them for a client. Custodian trusts are practical tools that foster a “speedy inexpensive dealing in stocks and shares.”<sup>369</sup>

## 5. Debenture Trusts

In this complex type of trust, “a trustee can hold on [to the] trust for the lenders the borrower’s covenant to repay, together with property charged to the trustee as a security for the loan.”<sup>370</sup>

## 6. Subordination Trusts

Subordination “is a transaction whereby one creditor, the ‘subordinated’ or ‘junior’ creditor, agrees not to be paid by a debtor until another creditor, the ‘senior creditor,’ . . . has been paid.”<sup>371</sup>

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367. *Id.* at 329.

368. Hayton, *supra* note 93, at 163.

369. *Id.* at 163.

370. *Id.* at 164.

371. *Id.* at 165.

### 7. Retention Trust Funds

Used in the building industry, retention trust funds provide security to the employer that the “project [will be] properly completed, while the management contractor and work contractors are protected in the event of the insolvency of the employer.”<sup>372</sup>

### 8. Trust Proceeds Clause

This trust operates as a guarantee for the wholesaler *vis-à-vis* the retailer.<sup>373</sup>

### 9. Client Account Trusts

These are used by professional service providers to isolate and protect their clients’ property from third parties.<sup>374</sup>

### 10. Voting Trusts

In voting trusts, shareholders place shares into a trust and appoint a trustee to vote on their behalf. Generally, the trustee takes instruction from the shareholders and he “enjoy[s] little or no discretion”<sup>375</sup> in how to vote.

### 11. Trust Receipt

A trust receipt has been explained as follows:

[I]t may happen that a borrower needs to retain physical possession of the property on which he has been granted credit by a bank or

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372. *Id.* at 166.

373. See Waters, *supra* note 6, at 607 (“Upon transfer of possession to the retailer the trustee holds title to goods, the proceeds clause gives the unpaid wholesaler an immediate absolute equitable interest in the proceeds upon authorized sale of the goods by the retailer. In this way the wholesaler retains his interest as against the floating charge of the retailer’s lending bank, and against the retailer’s bondholders. The property is never in the retailer.”).

374. Hayton, *supra* note 93, at 166.

375. Hansmann, *supra* note 14, at 17.

wholesaler in order to be able to make advantageous sales of finished products or to be able to manufacture raw materials into salable property. A pledge therefore would be out of the question, and the bank may not feel that the customer is good for an unsecured loan. The creditor therefore allows the property to remain in the possession of the borrower but will require him to give a trust receipt evidencing he holds the property as 'trustee' for the bank, and that the proceeds of sale belong to the bank. In case of the borrower's bankruptcy the bank has a prior claim on the property; if the loan were unsecured, it would have to share with other creditors.<sup>376</sup>

## 12. Other

Real estate investment trusts and oil and gas royalty trusts are expressions of business trusts broadly used in the Anglo-American world.<sup>377</sup>

This long list of statutory trusts reflects the extensive expressions available for the Anglo-American trust. Needless to say, the Latin American *fideicomiso* presents an alarming shortage of possibilities *vis-a-vis* the Anglo-American trust and, at the same time, suggests the breadth of opportunities for modernization.

## **C. The Multilateral Approach**

A crucial attempt at harmonizing the relationship between the civil law *fideicomiso* and the Anglo-American trust took place at the conference leading to the adoption of the Hague Convention on the Law Applicable to Trusts and on Their Recognition (Convention).<sup>378</sup> The Convention has been described by a leading international trust law scholar "as the first serious attempt in 600 years to bridge the gap of the 'English' Channel . . . in the field of fiduciary law."<sup>379</sup> The scholar was referring to the Convention's efforts "to furnish judges and practitioners [in both civil and common law jurisdictions] with the elements that would allow them to understand this legal institution more clearly."<sup>380</sup>

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376. Golbert, *supra* note 9, at 74.

377. Langbein, *supra* note 231, at 175-6.

378. Convention on the Law Applicable to Trusts and on their Recognition, Jan. 1, 1992 [*hereinafter* The Convention]. Latin American member states include Argentina, Brazil, Chile, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela.

379. Dyer, *supra* note 356, at 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)).

380. *Id.* at 1014.



The purpose of the conference was “not to introduce the trust into the civil law countries”<sup>381</sup> but to “validate the activities of common-law trustees in civilian systems.”<sup>382</sup> The results were mixed and, as a trust expert has pointed out, the conference was the stage for “confrontations and misunderstandings.”<sup>383</sup>

### 1. A compromised definition of the trust

The conference’s goal was to find a definition valid for civil and common law systems. The Convention defined “‘trust’ [as] the legal relationships created – *inter vivos* or on death– by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.”<sup>384</sup> This definition also outlines the features of the trust: (a) the assets constitute a separate fund and are not a part of the trustee’s own estate; (b) title to the trust’s assets stands in the name of the trustee or in the name of another person on behalf of the trustee; and (c) the trustee has the power and the duty, under which he is held accountable, to manage, employ or dispose of the assets in accordance with the trust’s terms and the special duties imposed upon him by law.

Several problems immediately arise from this “shapeless” definition.<sup>385</sup> First, the term “trust” is not reserved in Anglo-American systems exclusively for expressly created trusts. Resulting and constructive trusts are still fully regarded as trusts even though they do not require a specific act by the trustor. The Convention’s definition completely obliterates the possibility of equitable trusts being recognized outside the common law world. Second, the definition states that the assets are not a part of the trustee’s own estate. The Latin American *fideicomiso* establishes that if the trustee dies before the condition fails or a term expires for the transfer of the trust assets, these become a part of the trustee’s own estate. This concept diverges from that of the Anglo-American trust since the civil law *fiduciario* is the full owner of the corpus and, as such, the corpus becomes a part of his estate at his death. This effect is unthinkable in common law. Third, in Latin American civil systems, the trustee holds both legal and equitable title to the assets, not just legal title as seen in common law. Therefore, the definition fails to endorse this essential element of Anglo-American trusts. Lastly, whereas in common law a trustee may be also a beneficiary, this scenario is generally unacceptable in civil law systems, where a person is either a trustee or a beneficiary, but not both simultaneously. The definition contains a rather anodyne reference to this circumstance by stating that

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381. *Id.*

382. LUPOI, *supra* note 2, at 345.

383. *Id.* at 327.

384. Convention, *supra* note 378, art. 2.

385. As a consequence, a ‘shapeless trust’ “was ultimately recognized.” LUPOI, *supra* note 2, at 332.

“the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.” However, this statement of compromise does not alter the essential difference between the Anglo-American and the Latin American trust when it comes to the trustee’s powers. In sum, the rules contained in the definition only postpone legal debates instead of clarifying them at once.

The Convention’s definition of trusts is so flawed that the only valid explanation for its issuance is, as an author has pointed out, that it was conceived as “an image that caters to the need for judges and lawyers in non-trust countries to be able to identify trust-like devices operationally from their specific characteristics, rather than having to view them as a whole and try to fit them within a comprehensive definition.”<sup>386</sup>

## 2. The limited scope of the Convention’s application

The Convention limited the reach of its discussions exclusively to “trusts created voluntarily and evidenced in writing.”<sup>387</sup> A commentator has noted that the “provision is intended to limit the scope of the application of the Convention to clear and unambiguous trust relationships and to release the judge in civil law countries from the difficult task of dealing with more complicated forms of common law trusts, in particular with constructive trusts and the trusts which are established by a court order.”<sup>388</sup>

In the light of this provision, if an Anglo-American constructive trust seeks recognition in Latin America, a Latin American judge will probably not recognize it based on the principle that recognition is a matter of domestic legislation that cannot be trumped by international treaties. If, however, a foreign judge has established the trust, it is a matter of enforcing a foreign judgment. Therefore, the establishment of common law trusts in Latin America will always be a matter pertaining to their respective common law jurisdictions. But their effects in civil law jurisdictions will be left to Latin American judges to decide. The recognition of a trust—whatever its origin and the form it takes—is an issue within the exclusive jurisdiction of a civil law judge, who will recognize the trust as long as it conforms to civil law rules. The Convention addresses this dilemma but it does not provide a satisfactory and complete solution.

## 3. The challenge of reaching full recognition of a trust

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386. Dyer, *supra* note 356, at 1000.

387. Convention, *supra* note 378, art. 3.

388. Hein Kotz, *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 Jeffrey Schoenblum, *The Hague Convention on Trusts: Much Ado About Very Little*, 3 J. INT’L TRUST & CORP. PLAN. 5, 5-22 (1994).

When a foreign trust is recognized in one of the signatory jurisdictions, the Convention forces them to accord, as a minimum, to the following effects of recognition: (i) that the trust property constitutes a separate fund; (ii) that the trustee may sue and be sued in his capacity as trustee; (iii) that the trustee may appear or act in this capacity before a notary or any person acting in an official capacity; (iv) that personal creditors of the trustee shall have no recourse against the trust's assets; (v) that the trust's assets shall not form part of the trustee's estate upon his insolvency or bankruptcy; (vi) that the trust's 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; and (vii) that the trust's assets may be recovered when the trustee, in breach of trust, has mingled them with his own property or has alienated them.<sup>389</sup> As reviewed earlier, effects (iv), (v), (vi), and (vii) are by and large excluded in Latin American jurisdictions.

Other points of conflict exist in the Convention. Purpose trusts are accepted by the Convention in general, a notion that conflicts with civil law, which accepts them very restrictively. With respect to the double capacity of an individual as grantor and trustee, the Convention explicitly forbids that the trustor appoints himself as trustee, in contrast with Anglo-American law, which allows the grantor to appoint himself simultaneously as trustee and beneficiary. In regards to the legal relationship between grantor and trustee, the Convention characterizes this relationship as "lasting," which is "the very antithesis of the English-model trust,"<sup>390</sup> where such relationship is inherently nonexistent, save extremely circumscribed exceptions. Under the segregation of assets rule, the Convention does not make a clear-cut distinction between the legal and equitable rights vested in the trustee, which, as already seen, is a fundamental difference between civil and common-law trusts. Constructive and resulting trusts are excluded from the Convention due to the supposed lack of the trustor's voluntarily expressed will.

The Conventions provisions flagrantly overlook the fact that common law courts often intervene to "complete the implicit intention of the settlor, not to oppose or contravene it [thus not creating but simply declaring] its existence."<sup>391</sup> 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 affords extremely limited solutions to this conundrum.

#### **D. The Unilateral Approach**

An alternative to the multilateral approach may come in the form of initiatives undertaken by Latin American countries in shaping their own versions of

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389. Convention, *supra* note 378, art. 11.

390. LUPOL, *supra* note 2, at 336.

391. *Id.* at 341.

trusts. These proposals must be framed necessarily around civil codes.<sup>392</sup> In fact, civil codes serve as the basis for a “superstructure of theory [which purports to be] valid for any time or place.”<sup>393</sup> Common law is based instead on the notion that as society changes legal solutions need to change as well. A significant evidence of this profound dissimilitude is shown in the relevance of *stare decisis*, so entrenched in common law systems and utterly rejected by civil law countries.<sup>394</sup> As a consequence, whereas common law has developed a “highly sophisticated methodology for interpreting case law,”<sup>395</sup> civil law systems count with very specialized methodologies for statutory interpretation.<sup>396</sup> Therefore, in general, both systems lack the expertise in methodological interpretation enjoyed by the other.<sup>397</sup> In this context, the differences in the nature, treatment, and legal consequences of trusts in both legal systems need to be understood. These differences relate to the very foundations of these legal cultures, which often find themselves in stark opposition to one another.<sup>398</sup>

As trust law is a genuine common law byproduct, it can only be fully understood within the nuts and bolts of Anglo-American legal principles. Any attempts at equalizing Anglo-American and Latin American trust law needs to address the overarching issue of the relationships between both legal systems. More specifically, without the idea that courts may use equitable powers to enforce trusts as used in Anglo-American legal systems, there could never be a total identification

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392. Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 100-01 (2001) (commenting that civil codes have been defined by a common law jurist as “written texts designed to govern throughout time, designed to embody the immutably true, to embody principles so reliable that they supersede and can withstand the vicissitudes of the particular, of the temporal, of the myriad contextual elements that connect human beings to the legal issues they ask courts to adjudicate”).

393. *Id.* at 23.

394. *Id.* at 96 (“Judicial creation of law in civil-law legal cultures remains the exceptional recourse.”); *id.* at 21. (“Where the legal system contains gaps or lagoons, it is said that interpretation can be done [b]eyond the Civil Code but by means of the Civil Code.”).

395. *Id.* at 85.

396. See generally Konrad Zweigert & Hans-Jürgen Kötz, *Statutory Interpretation-Civilian Style*, 44 TUL. L. REV. 704 (1970); see also John W. Van Doren, *Things Fall Apart, or Modern Legal Mythology in the Civil Law Tradition*, 2 WIDENER J. PUB. L. 447 (1993); Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985), reprinted in JOHN HENRY MERRYMAN, ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 192-210 (1994).

397. Grosswald Curran, *supra* note 392, at 15.

398. *Id.* at 63 (“[T]he defining characteristics of civil-law legal culture not only are largely absent from common-law legal systems, but [...] they consciously and repeatedly were rejected by England.”).

of trust institutions in both legal worlds because “melding of the two signifies a profound alteration of each.”<sup>399</sup>

Another structural obstacle to the reception of the Anglo-American trust in civil law jurisdictions is the unitary concept of ownership, which is completely inconsistent with the common law idea that two types of interests, or ownership rights, co-exist in common law trusts: equitable rights and legal rights.<sup>400</sup> The Napoleonic Code decidedly rejected this split.<sup>401</sup>

As already noted, nothing in the Anglo-American *inter vivos* trust resembles a civil law contract.<sup>402</sup> The trustee is neither an agent of the trustor nor the beneficiary, and the beneficiary is not a principal of the trustee.<sup>403</sup> The position of the common law beneficiary is much different in civil law jurisdictions and “it would be doubtful, in principle, to sustain that [the beneficiary] has something more than personal rights.”<sup>404</sup>

These apparently insurmountable challenges come at a time when a large number of legal experts in the Americas accept that the trust tool is superior to traditional civil law institutions for the purposes of managing assets, reducing transactional costs, and obtaining additional benefits such as tax benefits and the simplification of administration procedures.<sup>405</sup>

Any proposal must consider these realities and the possibility, as an ultimate alternative, to fully upgrade the Latin American *fideicomiso* to the standards of the Anglo-American trust. Such proposals will need to be implemented with the passing of specific legislation in Latin American jurisdictions.<sup>406</sup>

### **E. Advancing Criteria for a Reformulation and Deepening of Latin American Business *Fideicomiso***

When drafting legislation to reformulate the Latin American business *fideicomiso*, a number of criteria need to be considered.

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399. *Id.* at 120.

400. TRUST: BRIDGE OR ABYSS, *supra* note 43, at 14-15 (quoting V. Bolgár, *Why No Trusts in the Civil Law?*, 2 AM. J. COMP. L. 204, 210 (1953)).

401. *See* Hansmann, *supra* note 14, at 5. (The “trust doctrine runs counter to the so called unitary theory of property rights. During the French revolution, divided property rights came to be considered characteristic of feudalism.”).

402. CHECA, *supra* note 103, at 108.

403. *Id.*

404. *Id.* at 110.

405. *Id.* at 18.

406. *Id.* (highlighting that “the resource to a special law is the suitable method to introduce in the ambit of a civil law system an appropriate regulation of the Anglo-American trust”) (translation by author).

### 1. Contract law or property law

With respect to the old debate “as to whether the law of trusts is properly considered a branch of contract law or of property law,”<sup>407</sup> new attempts for the expansion of trusts in Latin America should overcome this dogmatic question. In that sense, pragmatic approaches need to prevail in the region.

An initial approach to the expansion of business trusts in the region for any legislative innovation to be successful should take into account that the very concept of unitary ownership cannot subsist as it is currently conceived. In fact, the change should come from expanding contractual freedom by allowing grantors to devise and built their trust instruments in a manner that would mean real advancement from the present situation. New alternatives should allow grantors to confer different levels of enjoyment, both in form and duration, to different individuals. Mindful of certain appropriate limitations, Latin American legislatures should generate laws permitting companies to expand the use of trusts for new and more creative business ventures through the allocation of specific and dedicated resources without having to resort to certain legal schemes that are sometimes neither effective for economic growth nor transparent in the authorities’ eyes. Also, for instance, individual grantors should be allowed to set property aside for their own benefit or the benefit of third parties – including the unborn— without the limitations posed by current straightjacket-like real property registration requirements. Possible risks such as fraud or tax evasion should be tackled by better and more sophisticated legislation and enforcement thereof. The lack of means to enforce legislation –an unfortunately common excuse for the stalling of initiatives in the region— should never be considered an obstacle to the construction of new innovative legal structures that would promote business and enhance the overall functioning of the market. Besides, specific trust registries could perfectly be created alongside the many existing registries that are extensively present in Latin American legal markets (*e.g.*, concerning real estate, securities, multifarious deeds, water rights, intellectual and industrial property, to name but a few). Needless to say, each piece of new trust legislation conceived at the national level in Latin American countries must take into account the particularities of each local society and legal entourage.

### 2. The concept of ownership

The unitary and indivisible concept of property puts a strong obstacle to the goal of extending trusts in the region.<sup>408</sup> A practical take in the matter, and the

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407. Hansmann, *supra* note 14, at 19. For a complete analysis of the legal nature of trusts, see John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

408. Mayda, *supra* note 1, at 1055 (quoting V. Bolgár, *supra* note 400, at 216-17) (“[I]t has been suggested that the concept of indivisible property, the primary reason advanced for

utilization of already existing civil law institutions that recognize a right of partial enjoyment over an item should overcome this obstacle.<sup>409</sup> It would be of particular interest to study the institution of the usufruct [*usufructo*], which is a legal abstraction allowing the co-existence of two different sets of rights over the same thing. In the *usufructo*, the holder of *usufructo* rights [*usufructuario*] enjoys proprietary rights over his right.<sup>410</sup> Furthermore, *usufructo* rights over real estate may be transferred directly by the *usufructuario* via annotations in the respective registry.<sup>411</sup> Thus, there are sufficient experiences in Latin American civil law allowing the “dismembering” and “co-existence” of ownership rights over the same thing that could be deepened via restructuring of the current *fideicomiso*.

### 3. Registration requirements

Public registration requirements for land trusts are another important barrier to creating an Anglo-American-type of *fideicomisos* in Latin America.<sup>412</sup> In formulating new legislation, it should not matter whether title to the property is held under the name of the trustor or the trustee as long as the property is a sufficient guarantee for a transaction and exist are satisfactory remedies for cases of fraud by the debtor – be it the grantor, the trustee, or even the beneficiary.

### 4. Registrations on encumbrances

As currently regulated, restrictions on encumbrances are another impediment for trust expansion in Latin America.<sup>413</sup> As a result of the Napoleonic Civil Code’s legacy, restrictions on the free alienability of rights over items are frowned at in Latin America. Similarly, the trustee’s restriction from alienating (encumbering or transferring) the trust corpus in violation of his fiduciary duties is at the heart of the Anglo-American *inter vivos* trust. The obstacle that the rule against restrictions on free alienability poses on the expansion of trusts is minimal because these restrictions apply to trustees both in common and civil law systems.

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the non-existence of trusts in the civil law, has in it germs of economic collectivism and, perhaps, authoritarianism.”).

409. See *supra* Part IV analyzing the civil law institutions of real estate donations, usufruct, *commodatum*, agency contract, deposit contract, use and habitation.

410. See CòD. Civ. art. 584 (Chile 2005) (stating that the *usufructuario* has ownership rights over his right of *usufructo*).

411. *Id.* art. 686.

412. Martinez, *supra* note 41, at 1719.

413. *Id.*

### 5. Formation costs

The low cost involved in the formation of a trust is one of the reasons frequently raised to explain the wide success of trusts in the Anglo-American world. Lower costs should be an important characteristic of a new Latin American *fideicomiso*. As one scholar proposes, “reducing the burden of drafting; reducing information costs for various actors—lawyers, judges, and businesspeople—by inducing them to use the same form; making it easier for actors to bond themselves credibly to certain structures or forms of conduct; and facilitating an accretion of clarifying legal precedent.”<sup>414</sup>

### 6. The trustee

The function of the trustee should be extended beyond the current status in Latin America where often only banks and financial institutions can serve as trustees. Instead, individuals should also be allowed to serve as trustees,<sup>415</sup> especially concerning financial trusts. Furthermore, the fiduciary duties to which trustees are subject to should also be revised and expanded. There are no strong reasons for allowing only financial entities to act as trustees in the business realm. Other reputable institutions, companies and individuals with sound financial track records could as well act as trustees. Existing oversight mechanisms could extend their reach as to include these entities and individuals. Furthermore, by broadening the scope of who may be a trustee the very institution of the trust would become more available and consequently be of more use for the common citizen.

Charitable institutions and even governmental entities should be permitted to act as trustees as well therefore, taking advantage of their existing human and material resources and expertise in specific fields. There are no convincing rational arguments to justify the current denial of the availability to become trustees for the aforementioned individuals and entities.

### 7. Tax consideration

An appropriate tax treatment for trusts in Latin America would be the number one factor for their expansion in the region.<sup>416</sup> The widespread fear that trusts would become a tool for rampant tax evasion is overly exaggerated. For instance, Panama—a country that has taken important steps in the direction of deepening its trust institutions—shows the increased presence of trusts does not equal unlawful activity given its relatively successful experience with modern

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414. Hansmann, *supra* note 14, at 23.

415. *Id.* at 13.

416. Gaillard, *supra* note 45, at 322.



trusts.<sup>417</sup> Argentina is another country where the introduction of trusts has had limited adverse tax consequences. In 1995, Argentina passed Law 24,441 introducing the notion of “fiduciary ownership.”<sup>418</sup> This law acknowledged the close relationship between the *fideicomiso* and other areas of law, such as family law, intestate and testamentary law, property and personal rights, and tax law.<sup>419</sup> Despite the apparent wide availability of the Argentinean *fideicomiso*, it has had limited success. The likely reason for this is the unresolved question about the tax treatment of the *fideicomiso*.<sup>420</sup> At the corporate level, the trust corpus is taxed in the same manner as company assets.<sup>421</sup> *Inter vivos* and testamentary trusts do not receive a favorable tax treatment either, because whatever tax exemptions the grantor enjoyed are lost upon the transfer to the *fiduciarios*.<sup>422</sup> The only exception seems to be the preferential tax treatment accorded to financial trusts.<sup>423</sup>

Finally, Panama’s trust law of 1984 includes a broad tax exemption for all transactions related to the creation, amendment, or termination of a *fideicomiso* or the conveyance, inheritance, or encumbrance of *fideicomiso* property. Exemptions extend to the income generated and all other *fideicomiso* transactions relating to property located abroad, cash deposited from income generated overseas by non-Panamanian sources, or shares and securities of any type issued by firms whose income is generated overseas by non-Panamanian sources that are deposited in Panama.<sup>424</sup>

As reviewed, these are samples of the multiple experiences Latin American countries have in offering tax exemptions or credits for trust operations. These cases have not generated obstacles to tax collection that did not already exist, as tax enforcement is a real challenge for many governments due to inadequate or insufficient policies. Therefore, tax exemptions or credits for new forms of *fideicomisos* would not pose exceptional hindrances to existing tax collection policies in the region and their prospective benefits would outweigh the foreseeable risks.

## 8. Civil liability

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417. Panama’s Law 1 of January 5, 1984 basically makes that country a “tax-haven” jurisdiction. Ley No. 1, 5 Jan. 1984, art. 35, G.O., 10 Jan. 1984 (Pan.).

418. See Law No. 24441, Jan. 16, 1995, [28061] B.O., arts. 1, 11 & 13.

419. Hayzus, *supra* note 84, at 30.

420. *Id.* at 74.

421. *Id.* at 80.

422. *Id.* at 81.

423. See generally Chapman Poindexter, *supra* note 10.

424. See Ley No. 1, 5 Jan. 1984, art. 35, G.O., 10 Jan. 1984 (Pan.). The current Trust Law of Uruguay includes several tax exemptions for financial trusts. Ley 17,703 [Law 17.703], art. 39, ¶ 1, Diario Oficial [D.O.], 4 de Noviembre de 2003 (Uru.).

Trusts should not be used to avoid compliance with Latin American countries' fundamental laws and public order regulations.<sup>425</sup> For example, donative trusts should not be allowed to circumvent tax and succession rules or to "defraud creditors or to defeat claims of divorcing spouses."<sup>426</sup> Absent these circumstances, they should be allowed to survive and thrive in Latin America. Where trusts are used to defraud third parties, existing legal actions—such as the *acción reivindicatoria*—could be applied in a modified version, or outright new annulment and trust-related tort actions could be created. With respect to the case of trusts becoming a tool for tax evasion, enforcement efforts by tax authorities should be correct approach to the challenges posed by new Latin American business trust versions.

### 9. Remedies

Remedial measures should be extended in Latin America, allowing the beneficiaries and innocent third parties to enforce their rights through expeditious and efficient means. As many experts have noted, the remedies available in common law and civil law countries are quite similar: this is the case for instance of the replevying action [*acción reivindicatoria*],<sup>427</sup> specific performance [*acción de cumplimiento*],<sup>428</sup> or actions for damages [*acción de indemnización de perjuicios*].<sup>429</sup> The difference lies in the lack of usage and effective enforcement of these remedies in civil law systems to harms related to *fideicomisos*.<sup>430</sup>

## VI. CONCLUSION

This article has identified the main similarities and differences between the Anglo-American trust and the Latin American *fideicomiso*. Special attention was given to the core differences between both institutions in assessing the possibility of creating a truly useful Latin American *fideicomiso*. For this purpose, the article reviewed existing *fideicomiso* legislation in Latin America and advanced general criteria for future proposals in this area.

The ground is fertile for changes that will bring more business opportunities for everybody in the region. Domestic and foreign investors, claim and expect more creative and innovative legal tools to welcome more investment in the region. A

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425. See Hansmann, *supra* note 14, at 25. ("Indeed, the protean nature of the trust makes it particularly well suited to efforts at fiscal and regulatory avoidance, and this has been among the reasons that the European civil law countries have been reluctant to adopt the form.")

426. Hayton, *supra* note 74, at 336.

427. See *supra* note 103.

428. See *supra*, Part III (I).

429. See, e.g., CÓD. CIV. arts. 284, 317, 421 & 450 *et seq.* (Par. 1985).

430. Hansmann, *supra* note 14, at 6.

new modern version of a Latin American trust goes to the heart of these expectations. A growing number of stakeholders think there are convincing reasons to believe trusts would bring many benefits to common law countries such as preferential tax treatments, the avoidance of probate procedures, and the isolation of assets from third parties. The Latin American region can not avail itself of these types of benefits unless a more modern form of trusts is implemented, either on an international context or within an internal country context.

A solution on the international level for the international recognition of trusts in the Anglo-American and Latin American legal systems is still a strong alternative. In the meantime, many would regard the unilateral design of a new modern Latin American trust as a beneficial first step. The analysis and proposals contained in this article seek to provide some guidance to that effect.

