TRUSTS AND THEIR EQUIVALENTS IN CIVIL LAW SYSTEMS: WHY DID THE FRENCH INTRODUCE THE *FIDUCIE* INTO THE CIVIL CODE IN 2007? WHAT MIGHT ITS EFFECTS BE?

THE WA LEE LECTURE 2012

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I INTRODUCTION

It was a privilege to be asked by Tony Lee to present this lecture in his honour. Unfortunately I had not had the greater privilege of having been taught by him. He was on sabbatical when I studied equity and succession at the University of Queensland, well before the establishment of QUT's law school. He had taught my older brothers, however, so I was well informed about his great capacity as a lecturer, the enthusiasm he conveyed for his subjects and the genuine affection his students held for him. I have also come to know him over the years and to appreciate the scholarship and energy he has brought to his work as academic, teacher, law reformer and writer of leading treatises on the law of trusts and succession. It is work which he continues to enjoy well past any ordinary person's retirement age. Long may he do so.

When I began to think of potential topics for this lecture my thoughts turned to a subject brought to my attention by another outstanding lecturer from my days as a student, the late Professor Kevin Ryan, who subsequently became a judge of this Court. He taught me comparative law among other subjects and was on sabbatical at Cambridge when I was a postgraduate student there. He had completed his doctorate at Cambridge in 1959 on the topic of the reception of the trust in the civil law.[1] The institution we call a trust was then regarded, in Maitland's words, as 'the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence.'[2] The popular view was that the civil

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* Judge of the Supreme Court of Queensland. I have been assisted in researching this paper and reflecting on these issues by time spent at the Max Planck Institute for Comparative Law in Hamburg and at the Institute for Comparative Law in Paris on sabbatical earlier this year and wish to thank those institutions for allowing me to use their libraries and facilities. In particular Professor Reinhard Zimmermann in Hamburg was wonderfully hospitable in spite of his busy timetable. I would also like to thank my associate, Ms Dominique Mayo, and my former associate, M Charles Tellier, a judge in France, for their assistance in the research for this topic.

1 An article derived from the thesis was published; see KW Ryan, *The Reception of the Trust*, (1961) 10 *International and Comparative Law Quarterly*, 265-283. A copy of the thesis is held in the Supreme Court Library.

2 Frederic William Maitland, *Selected Historical Essays*, (1957), p 129.

law systems did not have precise analogues for the trust and that their practitioners and lawmakers were suspicious of it as an institution although interested in its utility, particularly in commercial activity.[3]

I came across a perfect example of that attitude of suspicion at a comparative law conference in Jerusalem in July 2011 during a discussion of a learned paper on the reception of the trust into the law of Palestine, a precursor of its reception into Israeli law. The civilian commentators seemed to believe that the only use for the trust was to facilitate tax evasion, a reflection of its almost literally "diabolical" reputation among some French lawyers.[4] From the common lawyers' point of view we wondered how the civilians could get by without it. That episode in Jerusalem was, in retrospect, another catalyst causing me to reflect on the questions I wish to address in this paper. I believe that exposure to other legal systems through comparative analysis can help give us some perspective on our own system and make us think more broadly about institutions and theories that we would otherwise take for granted.

When I learned of the French introduction of the *fiducie* into their law I wondered what led to its introduction and what it entailed. Kevin Ryan's choice of topic for his thesis was prescient because there have been significant developments in civilian jurisdictions relating to the reception of trust-like institutions and their recognition and enforcement in other countries since he wrote.

Article 2011, introduced into the French *Code Civil* in 2007, provides:

> The *fiducie* is the process by which one or more entities transfer property, rights or securities, or a combination of property, rights or securities, present or future, to one or more fiduciaries who hold them separately from their own property, acting with a specific purpose for the benefit of one or more beneficiaries.[5]

I have used the French term *fiducie* rather than trust because they are different institutions. The *fiducie* has to be established by the law or by contract and must be express. The class of people who may become fiduciaries is generally limited to institutions including credit providers and investment and insurance companies but now also includes lawyers.[6] Fiduciaries are required to be entered on a national register and with the tax office. The *fiducie* cannot be used to confer bounty on a third party so it cannot be used for estate planning or to manage the property of someone under a disability.[7] It is clearly not a complete analogue of the trust in our system but bears some of its characteristics.

What I wish to address here is the distinctiveness of the trust in English law, how the civil law systems deal with similar problems, the limitations of the civilian

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3 Ryan, above n 1, 266.

4 Philippe Marini, *Recueil Dalloz* 2007 no. 20, 1348 and the reference to its "réputation 'sulfureuse'".

5 In my own translation from the text: 'La fiducie est l'opération par laquelle un ou plusieurs constituants transfèrent des biens, des droits ou des sûretés, ou un ensemble de biens, de droits ou de sûretés, présents ou futurs, à un ou plusieurs fiduciaires qui, les tenant séparés de leur patrimoine propre, agissent dans un but déterminé au profit d'un ou plusieurs bénéficiaires.'

6 Articles 2012, 2015.

7 See the Preface by Mr Justice Hayton in Jean-Marc Tirard (ed), *Trust & Fiducie: concurrents ou compléments?* (Editions Academy & Finance SA, Geneva 2008), 10-11.

equivalents, the subsequent adoption of the trust or concepts akin to it in other civil law and mixed systems, particularly since the 1985 Hague Convention on the law applicable to trusts and on their recognition, and the reasons for the introduction of the *fiducie* into the French *Code Civil* in 2007. Is it an example of the internationalisation of legal norms in reaction to globalisation? Or is it an attempted legal transplant introduced into otherwise unprepared soil?

II DISTINCTIVENESS OF TRUSTS

In recent years there has been a tendency among the commentators to water down the view that the trust was unique to English law. Before entering on that debate one needs to know what we are talking about when we discuss the English or "Anglo-Saxon" or "Anglo-American" idea of the trust. Problems of definition are important in this context. As George Gretton has said:

> The trust is functionally protean. Trusts are quasi-entails, quasi-usufructs, quasi-wills, quasi-corporations, quasi-securities over assets, schemes for collective investment, vehicles for the administration of bankruptcy, vehicles for bond issues, and so on and so forth. In software terminology, trusts are emulators. They are not even confined to private law. They can exist in public law, and can also straddle the private/public boundary.[8]

Let me begin the discussion, appropriately enough, with some of the first few paragraphs of Ford and Lee, *The Law of Trusts*:

> A trust may be defined as an obligation enforceable in equity which rests on a person (the trustee) as owner of some specific property (the trust property) to deal with that property for the benefit of a certain person (the beneficiary) or persons, or for the advancement of certain purposes. A trustee may be one of several beneficiaries or a beneficiary may be one of several trustees …
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> Trustees are only one kind of person obliged to act for the benefit of another ... The feature distinguishing a trustee from these other persons in a fiduciary relationship is that title to property has been vested in the trustee so that it can be held for the benefit of the beneficiary ...
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> The essential feature of every trust is that one person is an owner but is bound to use the legal position as owner for the benefit of another person or for the advancement of some purpose. At one extreme it is possible to impose on the trustee no duties beyond the duty of transferring ownership when called upon to do so. In such a bare or passive trust, the trustee does little more than hold title … At the other extreme it is possible to impose on a trustee a wide range of duties of administration so that the beneficiary can have the enjoyment of property without the burdens of administration. A trust may be on a small scale where a trustee holds for a small number of beneficiaries, or it may be a large endeavour where the trustee holds for the benefit of thousands of persons. A trust may be short-lived as where a solicitor receives money on behalf of a client for a few days or it may last for years or, in the case of a charitable trust, for centuries.[9]

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[8] George L Gretton, *'Trusts without Equity.'* (2000) 49 *International and Comparative Law Quarterly*, 599.

[9] Harold Arthur John Ford and William Anthony Lee: *The Law of Trusts*, [1.010], Legal Online (last reviewed 13 August 2009), citations omitted.

Those passages are similar in some respects to one of the most useful definitions of the topic for this discussion; that found in article 2 of the Hague Convention:

> For the purposes of this Convention, the term 'trust' refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.
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> A trust has the following characteristics –
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> *a)* the assets constitute a separate fund and are not a part of the trustee's own estate;
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> *b)* title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
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> *c)* the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.
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> The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.[10]

As Ford and Lee point out however:

> The beneficiary under a trust recognised under the Convention need not be entitled to a proprietary interest in the trust property; it is sufficient that the trust property is segregated from the trustee's estate, that the trustee or his nominee holds title to the property, and that the trustee comes under duties to manage the property on behalf of the beneficiary.[11]

The division of the proprietary interest into legal and beneficial interests, dictated largely by English legal history and the separation between the common law courts and the Chancery courts, lies at the heart of the difficulties civilians have with the concept of the trust. They struggle to come to grips with the concept that there can be separate legal and equitable interests in property. They have been brought up in a system divided conceptually into the law of persons, the law of obligations, the law of property and actions - their Roman law inheritance. In those terms the institution of the trust is a hybrid of the law of obligations and the law of property and their concept of property does not allow for a division in ownership.

In our system, however, the trustee has the legal title to the property but is subject to a competing personal and proprietary right at the suit of the beneficiary. The beneficiary may recover identifiable trust property by tracing it into a wrongdoing trustee's hands and, potentially, to a third party acting in bad faith.[12] The ability to recover the property in rem was not known to the civil law systems. Theirs

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[10] This definition is also described as "helpful" by the editors of *Lewin on Trusts* (18th ed, 2008), 1-01.

[11] Ford and Lee, above n 9, [24.500].

[12] See the discussion by Donovan Waters in Jean-Marc Tirard (ed), *Trust & Fiducie: concurrents ou compléments?*, above n 7, 39-41.

were systems where the remedy came from the law of obligations rather than property law.

Another feature of the trust which is not so foreign to the civil law, however, is the idea of a fiduciary relationship, even if it is a relationship which the civilians would normally regard as arising out of a contract. Under common law, of course, trusts may be imposed by a unilateral declaration of trust, or by operation of law and may commonly be created by a deed but do not depend upon a contractual analysis to justify their existence. What seems to have been an unusual feature of the French *Code Civil* before 2007, and compared to other civilian systems, was that it did not provide for the creation of such a fiduciary relationship in explicit terms as occurred during the 19th century in Quebec and many South American countries. This was the case in spite of French legal history going back well before the Napoleonic code's introduction which recognised a form of fiduciary practice but which had fallen into disuse and was not incorporated into the *Code Civil* when it was first promulgated in 1804.[13]

It was felt, also, in many other civilian jurisdictions that the trust was a useful tool to have available for such beneficial purposes as the protection of debenture holders, the creation of unit trusts and the conduct of banking operations.[14] Liechtenstein introduced its form of the trust from 1926 and this is referred to frequently in the civilian legal literature as a prime example of the existence of a trust-like institution in Europe, introduced for commercial purposes and directly influenced by Anglo-American law as well as German law to some extent.[15] That principality was a centre for the investment of foreign money and saw the trust as a significant facilitator of that part of its economy. Many South American countries and Quebec had systems including a *fiducie* or *fiducia* from the 19th century. The Germans, of course, had their own institution called the *Treuhand* with significant conceptual similarities to the trust. In some of the mixed jurisdictions, such as South Africa and Scotland, the trust was received or, in Scotland's case, perhaps developed independently and, in those countries, third party rights under contracts provided other tools to achieve some of the purposes of the trust.[16]

A concern for the civilians is that, when trusts are used to help in the conduct of business, they can avoid the structure of legislation regulating corporations. Absent an equivalent culture and legislative regime regulating trust administration the concern for civil law systems was that protection for beneficiaries and outside creditors may be inadequate.[17]

What seems to have been a significant attraction to civilians, however, was the utility of the trust in allowing property to be transferred to one person to hold it for the benefit of others. And that seems to be the principal driver of the French legislation, the wish to provide structures for investment where it is clear that the

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13 Adair Dyer, 'International Recognition and Adaptation of Trusts: the Influence of the Hague Convention' (1999) 32 *Vanderbilt Journal of Transnational Law*, 989, 1014.

14 Ryan, above n 1, 266.

15 Ibid, 266-267.

16 See Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (Oxford University Press, 2000) vol 1, 483-484.

17 Ryan, above n 1, 267.

fiducies hold properties separate from their own for the benefit of the beneficiaries.

The adoption of the *fiducie* in 2007 in France should be seen, therefore, as not really an adoption of something akin to the Anglo-Saxon or Anglo-American trust but more as the explicit recognition of the fiduciary relationship itself, where the absence of such an institution might have worked to France's disadvantage in economic competition with other countries.[18]

This, then, raises the question whether one can have a "proper" trust without the divided title - legal ownership in the trustee and equitable ownership in the beneficiary.[19] The practical issue which looms large if there is no such divided title is what is to happen to the trust property if the trustee becomes insolvent? Does it form part of the trustee's bankrupt estate or does it remain available separately for the beneficiary?

Some institutions in civilian or mixed jurisdiction equivalent to the trust can provide appropriate protection to the interests of beneficiaries in the trust property.[20] Dutch and South African law solve the insolvency problem by locating ownership in the beneficiary, the reverse of the trust.[21] They do that through an institution called the *bewind* where the "trustee" is the manager of the property but the property is owned legally by the beneficiaries.

The solution adopted by the Hague Convention was to leave that issue out of the definitions. The trustee has to keep the trust property separate from his own and the title stands in the trustee's name but the question of beneficial ownership is left unstated. The answer adopted by the French legislation is to require the fiduciary under Article 2011 to hold or manage the property as a "ring-fenced fund" or fiduciary estate, immune from the claims of his own creditors or heirs.[22]

III CIVILIAN EQUIVALENTS OR ANALOGUES

The "common core" comparative law theorists, those who believe that much of Europe's law, including the common law, stems from a common background in Roman, canon and feudal law, have mounted some interesting arguments to the effect that the trust is not unique to the common law systems, at least by reference to definitions such as that contained in the Hague Convention or equivalent formulations.[23] They point to the early view that the Roman law *fideicommissum* was the genesis of the use, itself the ancestor of the trust. That view was in turn supplanted by the theory of Oliver Wendell Holmes that the trust, like the modern German *Treuhand*, had sprung from the *Salman* of earlier German law. Maitland

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18 MJ de Waal, 'In Search of a Model for the Introduction of the Trust into a Civilian Context' (2001) *Stellenbosch Law Review* 63, 74.

19 Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 1088-9.

20 De Waal, above n 18, 85.

21 Gretton, above n 8, 603.

22 David Hayton's preface in J-M Tirard (ed), *Trust & Fiducie: concurrents ou compléments? a*bove n 7, 8 and Article 2021's reference to "patrimoine fiduciaire".

23 Professor Maurizio Lupoi, 'The Civil Law Trust,' (1999) 32 *Vanderbilt Journal of Transnational Law*, 967, 970; Helmholz and Zimmermann (eds), *Itinera Fiduciae, Trust and Treuhand in Historical Perspective* (Duncker & Humblot, Berlin, 1998), 31-39.

supported the view that the trust probably had Germanic roots but concluded that they flowered only in England to create, as he perceived it, the greatest feat the English have performed in the field of jurisprudence.

Recent European scholarship takes a more nuanced opinion about the origins of the *Treuhand* and points to the role of canon law in the development of trust-like institutions as well as to the importance of customary law and legal practice. Helmholz and Zimmermann say:

> The frequent use of trusts in order to pass family property from one generation to the next upon terms different from those established by the customary law of succession has … been noted. It was a common feature wherever these devices were used, and it linked English with Continental legal practice. A second example is the trust for the benefit of the poor and disadvantaged. Either in a formal sense of the charitable foundation or in less formal institutions set up to benefit vulnerable individuals, the trust form was particularly appropriate for charitable purposes broadly defined. With reason were the earliest English statutes on the subject called statutes of 'charitable uses'. Using different words, one finds substantially identical trust-like devices created to give effect to gifts *ad pias causas* on the Continent.
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> …
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> More than simple parallels reflecting similar social conditions are evident in the history of *fiducia*. The common features and the common sources evident on both sides of the Channel mean that no wall of incomprehension separated the English trust from analogous institutions on the Continent …
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> It does seem undeniable, and it should be stated, that there was no exact equivalent to the English use or trust in the early historical record of Continental law. The English division between legal title and equitable title, each the source of rights enforceable in different courts and each eventually a fundamental feature of English trust law, was no part of Continental jurisprudence. But does this require us to suppose that the English trust would have been incomprehensible to a civilian? We do not think so. Continental jurisprudence relating to *fiducia* was not homogeneous in itself, but the differences in detail did not present insuperable obstacles to understanding and even to influence. So it was with trust and *Treuhand*. If, as seems to be happening today, modern European law incorporates the trust, there is much to suggest that it will be building upon historical foundations.[24]

In that vein, Professor Lupoi points to the *confidentia* discussed in judgments in several countries as possessing a structure identical to that of a trust and serving the same purposes as English mediaeval trusts.[25] He argues that the English Chancellors were familiar with the civil law and drew from it without mentioning their sources and also that there is no basic incompatibility between the trust and civil law structures. In making that point he suggests that trusts would have been classified as contracts under English law had the common law courts developed a contractual form of action a century before *assumpsit* and *indebitatus assumpsit* took root. He also argues that there has been a high degree of mutual misunderstanding about basic concepts among scholars on either side of the

[24] *Itinera Fiduciae* above n 23, 43-44 (footnotes omitted).
[25] Lupoi, above n 23, 973-975.

common law/civilian divide and says that 'all civil law systems have long known instances in which assets owned by someone are not available to his creditors because they are to be handed over to someone else.'[26]

Many Scottish lawyers regard the trust developed in their system as having different historical origins from the English trust although they concede it has been influenced by developments in English law. In Scottish law the definition of a trust can be simplified to whether there is an arrangement under which one person manages assets for another where the assets are vested in the administrator. If so that will be a trust, but if one defines the trust as involving a division of ownership into legal and equitable then Scots law does not have the trust at all.[27] As Gretton says:

> Scots law is of comparative interest in that it adopted a more or less full system of trusts into a civilian system of property law at an early stage.[28]

Or, as FH Lawson said:

> Perhaps the greatest difficulty the civilians have in accepting the trust is caused by what I have come to regard as an English peculiarity logically detachable from the trust, namely, the distinction between the legal and the equitable estate. In Scots law, which, even if it did not invent and develop the trust for itself but took it over from England - the point is doubtful - has accepted it without inhibitions or reservations, no such distinction has ever been known. There the trustee becomes owner and the beneficiary acquires a contractual right against him.[29]

These examples suggest that, in the broader scheme of things, the separation of property rights between the trustee and the beneficiary may not be integral to the conception of the trust. It may be that the question of ownership of the property in the civil law is not so important as determining who has the power to dispose of it. The argument is that, for comparative purposes, the trust does not have to be conceptualised wholly within the framework of English law.[30]

I have concentrated in what I have said on trusts established for the benefit of individuals rather than charitable or purpose trusts. The civilians have institutions such as the *Fondation* in France or the *Stiftung* in Germany which they believe fill those needs adequately. That may reinforce the view that the idea of the trust need not be wedded to the distinction between the legal and the equitable estate.

IV THE HAGUE CONVENTION

I have previously mentioned the Hague Convention of 1985. It has been a driver for the development of the concept of the trust in civilian systems and, significantly, what drove its establishment was globalisation. A member of the permanent bureau of the Hague Conference which developed the Convention, Adair Dyer, described the background to the establishment of the Convention as follows:

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[26] Lupoi, above n 23, 978.
[27] Reid and Zimmermann, above n 16, 481.
[28] Reid and Zimmermann, above n 16, 483.
[29] FH Lawson, *A Common Lawyer Looks at the Civil Law* (1953), 201.
[30] Gretton, above n 8, 601; De Waal, above n 18, 65-66.

> What were the reasons that led the Hague Conference to undertake this task …? Much can be attributed to the impact of the European Economic Community … The creation of a Common Market among six continental European countries starting in 1957 had made it feasible for businesses from Britain, the United States and Canada to establish multinational operations in Western Europe on a much broader scale than had been possible in the past. This process was accelerated when Great Britain, Ireland, and Denmark joined the EEC in 1973, and business people came to be based and domiciled in a country other than that of their nationality for many years. The reverse process for continental European business people accelerated with the entry of Great Britain and Ireland into the EEC. English, Irish, and US citizens tended nonetheless to do their estate planning in their traditional way (i.e., by setting up *inter vivos* trusts or trusts in their wills), while acquiring property in non-trust countries. Some of the continental European executives living in England or the United States learned to like the flexibility of the trust mechanism and began to use it while still owning or inheriting property in non-trust countries. Notaries and, occasionally, courts in some of the non-trust countries began to be confronted with the existence of an unknown and unrecognized player in the context of the settlement of an estate - the trustee.[31]

The Convention sets up a framework for establishing common conflict of law rules on the law applicable to trusts. Its aim is not to introduce the trust into the domestic law of states that do not already have it. Professor Lupoi, however, expresses the view that it can facilitate the formation of trusts on the Anglo-American model in civilian jurisdictions. The theory is that one could, for example, create a trust in Italy governed by a foreign law, perhaps English or Jersey law, which would then be recognised in Italy by force of the Convention.[32]

The Hague Convention avoided the question of division of ownership of trust property on the basis that it seemed irrelevant and even dangerous 'since some civil law systems had a comprehensive definition of 'ownership' as an absolute concept while in some common law systems this was not a term of legal art … Trust instruments frequently create future and contingent interests in ways that may contradict basic concepts of ownership in non-trust countries.'[33]

Since the Convention there have been efforts to unify the substantive principles of fiduciary law within Europe resulting in the production of a book entitled *Principles of European Trust Law*.[34] More recently there have been significant steps taken towards the development of a common frame of reference for European private law as well for the establishment of the European Law Institute to enhance European legal integration. In the long run I expect that there will be greater harmonisation of the law relating to trusts and fiduciaries in Europe, possibly extending to England also. The number of jurisdictions around the world that now either have the trust in its Anglo-American form or in institutions similar to the *fiducie* is likely to increase, 'both following and promoting the globalisation of business activities and wealth transfers.'[35]

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31 Dyer, above n 13, 993-994.
32 Lupoi, above n 23, 983-988.
33 Dyer, above n 13, 1000.
34 DJ Hayton, SCJJ Kortmann and HLE Verhagen, *Principles of European Trust Law*, (Kluwer Law International, 1999).
35 Dyer, above n 13, 1008.

V INTRODUCTION OF THE *FIDUCIE*

It is against that background that one should view the introduction of the *fiducie* into French law. It was originally proposed there in the 1990s but was opposed by the fiscal authorities and did not proceed. It seems likely that the proposal was partly influenced by the Hague Convention. The *fiducie*'s structure fits with the Convention's definition of a trust.[36] One of its proponents in the French senate, Philippe Marini, describes it as a small juridical revolution or perhaps a renaissance, probably referring to its pre-*Code Civil* existence. He believed it marked real progress in the international competitiveness of French law. He distinguished it from the Anglo-Saxon trust, noting there was no separation between legal ownership in the trustee and equitable ownership in the beneficiary.

He also spoke of the historical difficulty in introducing the measure because of the problems from the fiscal authorities and pointed out that a similar institution has been adopted by France's equivalent jurisdictions such as in Quebec, Luxembourg, Italy, Japan, Lebanon and Russia. I gather the Chinese also have one now. He also laid emphasis on the protective aspects of France's legislation including the creation of a national register of fiduciaries and a protector charged with looking after the interests of beneficiaries. In conclusion, he pointed to the many potential applications of the new regime, particularly in business affairs and banking, referring to the need to facilitate and bring back under French law particular types of loans otherwise created by a trust in the absence of a satisfactory mechanism under French law.[37]

From my research so far there has been little, if any, discussion of the new legislation in judicial decisions from the higher French courts. There is a significant body of professional and academic literature discussing it and I expect that it is likely to be used more commercially once participants in French business life become more familiar with it. These sorts of transplants or revivals, however, can take time to develop popularity. From what I have been told, at the moment it is used rarely and then timidly. However, it may take off in the medium to long term because of its basic compatibility with examples of fiduciary structures in other civil law systems in Europe and elsewhere. It will be interesting to watch further developments.

Of some interest to one of the sponsors of this lecture, the Society of Trust and Estate Practitioners, may be the fact that an early and thorough discussion of the new legislation in France was led by the French branch of that Society at a conference held in Paris in June 2007, the proceedings of which were published in a book called *Trust & Fiducie: Concurrents ou Compléments?*[38]

Mr Justice David Hayton, the current editor of Underhill and Hayton, *Law of Trusts and Trustees*, expresses the view in the book from the French colloquium that the *fiducie* is very limited in scope and describes it as 'a small step for mankind but a great step for a Frenchman whose mentality … is pessimistic.' He was reflecting the views of Professor Aynès who summarised the contributions in

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[36] Dyer, above n 13, 1015.
[37] Marini, above n 4, 1347-1349.
[38] Tirard, above n 7.

the book by remarking, I suspect humorously, on the view that the French character is coloured by Jansenism and pessimism leading to scepticism and distrust towards others, including the State, the tax commissioner and bankers. Professor Aynès asked, rhetorically, how the idea of holding property for somebody else and using it for the other person's benefit could take root in such soil. But he regarded the passage of the legislation in France as an example of changing world views there under the influence of globalisation and believed it was a useful development. His hope is that its structure will be extended in the near future. In a similar vein, Mr Justice Hayton expressed the hope that the *fiducie* will develop, with a less pessimistic French legislature, into a broader and more useful concept.[39]

VI CONCLUSIONS

In conclusion may I remind you that I asked myself earlier whether the introduction of the *fiducie* into the French civil code was an example of the internationalisation of legal norms in reaction to globalisation or an attempted legal transplant into otherwise unprepared soil. The evidence suggests that it was introduced as a reaction to globalisation. The soil is not as unprepared as may previously have been thought by those who regarded the trust as so distinctively Anglo-Saxon in origin.

It is quite true that the trust we have inherited is a much more flexible instrument than the *fiducie* introduced into French law but the overall concepts are not so unfamiliar to the civil law systems. I expect that the idea will take root in France eventually because of the great utility of the trust but I will not be holding my breath in anticipating how quickly this happens.

[39] Tirard, above n 7, 11, 374-375.