TRUSTS: IN SEARCH OF THE CORE FEATURES

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> *"The idea of a trust is so familiar to us all that we never wonder at it. And yet surely we ought to wonder. If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea."*
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> Frederic W. Maitland[1]

A. INTRODUCTION

As the previous quotation shows, the trust has been conceived as one the biggest achievements of the common law tradition, and particularly, the English law. It is true that the trust has its roots in England, and that it has also been developed in other jurisdictions that belong to the common law family. Nevertheless, since the last century until now it is possible to see how trust has been widely recognized and incorporated in civil-law countries and mixed legal jurisdictions.[2] This phenomenon has arisen several inquiries regarding the legal nature of the trust, and whether these worldwide adoptions have changed or not the original purpose or structure of the common-law trust. In this environment, several scholars have proposed that there are some core-shared elements of the trust that can be found in any nation that have admitted said institution.[3] Obviously, legal scholars have not agreed regarding a unique list of

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[1] Frederic W. Maitland, 'The Unincorporate Body' in Herbert A. L. Fisher (ed), *The Collected Papers of Frederic William Maitland* (Volume 3, Cambridge, University Press 1911) 271, 272.

[2] Frederick Henry Lawson & Bernard Rudden, *The Law of Property* (3rd ed., Oxford: Clarendon Press 2002) 86.

[3] See, e.g., Marius J. De Waal, 'A European Law of Trust', in Antoni Vaquer (ed), *European Private Law Beyond the Common Frame of Reference* (Europa Law Publishing 2008) 167, 171; Tony Honoré, 'On Fitting Trust Into Civil Law Jurisdictions' (2008) Oxford Legal Research Paper Series Nº 27/2008 <

essential elements, therefore, there are some differences in the proposals of each author.

This article aims to contribute a general catalogue of the so-called “essentials” of a trust, taking the relevant propositions and developments that the trust has had around different jurisdictions. Trust’s evolution has implicated many changes and diverse types of trust that may confuse someone who is entirely new on this field. Considering this, in the next section we will shape and narrow the scope of our essay by making some preventions regarding the kind of trust that we are going to refer to, the jurisdictions that we will allude during this work, the use of the word ‘trust’ when making references to a non-speaking English country, and the methodology use to make the relevant comparisons.

In the next segments of this contribution, we will analyse the core irreducible features of the trust proposed, namely, the inexistent control over the trust assets by the settlor (Subsection C(1)), the existence of a general standard of conduct and fiduciary duties imposed to the trustee (Subsection C(2)), and the benefit to someone or the existence of a purpose (Subsection C(3)). Despite that every feature has its own motives to be considered as an elemental characteristic of a trust, all of them share one main reason: if lacks at least one of them, its existence or validity may be seriously jeopardized (Section D). At the end, the main ideas and conclusions of this work will be summarized (Section E).

B. PRELIMINARY CONSIDERATIONS

As we have stated above, the trust’s history has involved many developments that has resulted in a wide typology of trusts. For instance, we may find statutory trusts, discretionary trusts, *mortis causa* trusts, spendthrift trust, and bare trusts, among others. These examples set up a vast variety of structures, functions, and parties, hence, it is quite challenging (almost impossible) to treat all these trusts as they were just one category. For this reason, and in order to develop and explain the proposed essentials features, we will take into account the most elemental and basic idea of trust, i.e., where the settlor expressly declare and allocate asset(s) to a trustee, who manages it (them) for the benefit of someone (i.e., beneficiary) or to fulfil a particular purpose. Hereinafter, therefore, when we make a mention to a ‘trust’ this is the scheme that we are referring to.

On the other hand, it is also necessary to mention and discard any confusion regarding the translation of the word ‘trust’. Different non-English speaking jurisdictions that have adopted the trust do not refer it by its English name. Instead, they use a different name, for example, *fideicomiso*, *fiducia*, *fiducié, treuhand*, etcetera. To avoid any confusion, when referring to a trust recognized in a non-speaking English country, we will use ‘trust’ as a synonym of these concepts.

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https://ssrn.com/abstract=1270179> accessed 30 November 2023; Donovan WM Waters, ‘The Institution of the trust in civil and common law’ (1995), 252 Collected Courses of the Hague Academy of International Law 347, 427 ff.; Maurizio Lupoi, *Trust: A Comparative Study* (Cambridge University Press 1999) 269ff.

Furthermore, we also consider important to declare that this work will fundamentally take a functionalist approach.[4] In this sense, our aim is to justify the essential features of a trust, first, by analysing the function that they perform and its main characteristics, and second, if that function is fulfilled in the jurisdictions that we have chosen for these purposes, then we can affirm that it is part of the elemental features of a trust. Obviously, and since we are going to make references to countries of different legal systems, the means whereby they achieve these functions are dissimilar. However, that is precisely the value of this perspective, because it allows us to make a proper comparison between common-law, civil-law and mixed jurisdictions without a deeper explanation of the rules, history, and logic behind each legal system.

Last but not least, as this comparison involves references regarding the abovementioned legal taxonomy, we have chosen one jurisdiction of each system to prove how these features are recognized. First, from the common law side, we will refer to England, as this country was the place where this legal device was born and developed for centuries; second, from the civil law world, we have selected Argentina.[5] Recently, this country has enacted a new civil code where explicitly regulates the trust (in Spanish "*contrato de fideicomiso*") through several provisions that determine its content, requirements, effects, etcetera; and third, from the mixed legal jurisdictions, we will refer to Scotland due to its patrimonial approach of trusts, which has remarkable consequences in this matter.

C. THE IRREDUCIBLE CORE FEATURES OF THE TRUST

In so far, we have constantly spoken about the 'core irreducible features' or 'essential elements' of the trust. However, what do we mean with these concepts? By using these notions, we aim to identify two ideas: firstly, those basic elements or factors that intrinsically belong to the trust and can be found in every nation that has incorporated this legal device, no matter its legal background; and secondly, the idea that if you do not have one of these features, you do not have a trust any more[6] or it is not valid in accordance with the relevant legal norms in force within a particular jurisdiction.

Having said that, in the next subsections we will take a closer look with respect of the essential elements proposed by this work.

(1) First Element: Absence of the Settlor's Control over the Trust Asset(s)

As the reader may notice from the scheme of trust that we described in our 'Preliminary Considerations', each of the parties plays a specific role in a trust. The settlor represents the original owner of the trust property, the trustee is in control of those assets, and the beneficiary is whom receives the benefits of the trustee's management

[4] For the popularity of this approach, its advantages and disadvantages see Alexandra Braun, 'The state of the art of comparative research in the area of trusts' in Michele Graziadei and Lionel D. Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar Publishing 2017) 121, 132 – 133.
[5] Regarding the reception and development of trusts in Latin America see Nicolás Malumian, 'Trusts in Latin America' (2010) 16 *Trust & Trustees*, 143, and Nicolás Malumian, 'Conceptualization of the Latin American *Fideicomiso*: is it actually a trust?' (2013) 19 *Trust & Trustees*, 720.
[6] Lionel D. Smith, 'Give the People What they Want? The Onshoring of the Offshore' (2018) 103 Iowa Law Review 2155, 2157.

or, in case that a purpose has been established, the trustee must fulfil a particular cause. Hence, for being in presence of a trust there must be a genuine separation of said features and roles.[7]

In a trust, the control and management of the trust property lies solely in the trustee. The role of settlor is simply that of creator, hence, once creation has taken place, there is no evident role for the settlor in the operation of the trust in his capacity as settlor.[8] Consequently, the settlor drops from the picture absolutely and has no rights, in his capacity, to direct the trustee in how to deal with the trust property.[9] This settlor's role in a trust is just an effect of what professor Lupoi calls "entrusting", that is, 'the loss by the settlor of any power over the trust assets is a natural consequence of their transfer to the trustee.'[10] Of course we need to be careful when talking about a 'transfer' of assets to the trustee, since in common-law jurisdictions this concept may have a different meaning in respect with civil-law or mixed legal countries. However, the remarkable aspect is that the settlor when "transferring" her assets is, on the one hand, dispensing her from them, and on the other hand, giving them to another person for its management. Therefore, when creating a valid trust, the law is essentially saying that 'the trustee is not only a holder but, if administration is to be done, he is the administrator. It is the trustee who essentially is the administrator',[11] and not the settlor (or the beneficiary).

What would it happen if the settlor had control over the trust asset(s)? Suppose, for example, that my father set up in a trust two different lands that he owns in Scotland and £5,000 and appoints his best friend ('John') as trustee of these assets for the benefit of my youngest brother, until 2040. My father, however, does not permit that John transfers or administers properly the lands and the money, being the latter always compels to ask for my father's authorization in order to enter into any juridical act regarding those assets. Let us say, moreover, that this limitation to John's job is not only factual but also it is stipulated in the trust deed. Are we facing a real trust? It is unlikely to conclude that. The facts described certainly do not allow us to consider said legal instrument as a trust, since *de jure* and *de facto* the settlor is exercising powers of management whence there are two clear results: the settlor is taking the position of the trustee and, therefore, the latter turns into an irrelevant party within a trust scheme.

It is true that different jurisdictions of each legal systems may vary this principle giving more or less options to the settlor to interfere in the trustee's performance. Nevertheless, and as we are finding the basic elements of a trust, the trustee's position is generally described as an office that 'implies some degree of outside control over the arrangement made by the settlor. The settlor may be the constituent of the trust, but the trust instrument is its constitution. In administering the trust, the trustee cannot be the mere agent of the settlor or subject to his orders.'[12]

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[7] Jonathan Garton, Graham Moffat, Gerry Bean & Rebecca Probert, *Moffat's Trusts Law: Text and Materials* (6th ed., Cambridge University Press 2015) 15.
[8] Geraint Thomas & Alastair Hudson, *The Law of Trusts* (2nd ed., Oxford University Press 2010) 25.
[9] ibid 25
[10] Lupoi (n 3) 271.
[11] Waters (n 3) 435.
[12] Honoré (n 3) 6.

How is this core element recognized in the countries chosen for this work? Let us begin with Scotland. In this jurisdiction, trusts are conceived from a patrimonial conception whereby the trust assets originate a separate patrimony from the truster (the Scottish way to refer to the settlor) and the trustee.[13] In Scotland, the trustee is 'the owner of the trust property which is in a separated patrimony distinct from his own patrimony'.[14] Furthermore, the Trusts (Scotland) Act 1921 barely refers to the truster and her rights or duties regarding this separate patrimony. In fact, Section 4 of said act provides a generous list of powers conferred to the trustee, which demonstrates the lack of control of the truster regarding this new patrimony. This is an immediate consequence of 'entrusting', where the truster is precisely the "entruster", since the property which he transfers to the trustee 'can hardly be recovered from him, but by his faithfulness in following that, which he knows to be the true design of the Truster'.[15] Thus, the patrimonial approach followed by Scots law denies to the settlor any chance to administer o manage this separate patrimony.

In Argentina, the patrimonial conception of trust is also followed. The new Commercial and Civil Code of Argentina enacted in 2015 (hereinafter "CCCA")[16] recognize the trust in its Third Book, Title IV, Chapter 30 (article 1666 et seq.). Two provisions in this matter are relevant: first, article 1685 CCCA establishes in its first paragraph that the trust assets form a separate patrimony from the settlor, the trustee, the beneficiary and the *fideicomisario*;[17] second, article 1688 also in its first paragraph, expresses that the trustee do not need the settlor's authorization to perform any act of disposition or encumbrance regarding the trust property.[18] These provisions show us that in Argentina the settlor has any role in the management and control over the trust property because, on the one hand, these assets are out of the settlor's patrimony, and on the other hand, the trustee do not need any settlor's approval to dispose or administer said assets.

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[13] Regarding the patrimonial approach dominating in Scotland see George L. Gretton, 'Trust without Equity' (2000) 49 International and Comparative Law Quarterly, 599, and Kenneth G C Reid, 'Patrimony not Equity: The Trust in Scotland", in Remus Valsan (ed), *Trust and patrimonies* (Edinburgh University Press 2015) 110.

[14] Alexandra Popovici, 'Trusting Patrimonies", in Remus Valsan (ed), *Trust and patrimonies* (University Press 2015) 199, 207. Confirming this idea, it has been said that "The trustee is the full, civil law owner, with *usus*, *fructus* and *abusus*". See Lionel D. Smith, 'Trust and Patrimony', in Remus Valsan (ed), *Trust and patrimonies* (Edinburgh University Press 2015) 42, 58.

[15] Lupoi (n 3) 293.

[16] In Spanish *Código Civil y Comercial de la Nación, 2015*.

[17] 'Article 1685. Separate patrimony. Insurance. The trust property constitutes a separate patrimony from the patrimony of the trustee, the settlor, the beneficiary and the *fideicomisario*'. Please note that this is an unofficial translation. As the lector may note, the word '*fideicomisario*' has not been translated. The reason is twofold: firstly, it is common to translate said word in English as 'trustee', but the same occurs with the word '*fiduciario*'; secondly, and most important, it has been said by the Argentinian doctrine that the '*fideicomisario'* is considered as the 'residual beneficiary' of the trust who can be the trustee, the beneficiary or a third party. See Facundo M. Bilvao, 'El contrato de fideicomiso a la luz del nuevo Código Civil y Comercial' (2015) Dirección Nacional del Sistema Argentino de Información Jurídica, 2 <http://www.saij.gob.ar/facundo-martin-bilvao-aranda-contrato-fideicomiso-luz-nuevo-codigo-civil-comercial-dacf150449-2015-07-30/123456789-0abc-defg9440-51fcanirtcod> accesed 5 December 2023. For these reasons, and when referring to Argentinian Law, we will refer the *fiduciario* as the trustee. Furthermore, an when applicable, we will assume that the '*fideicomisario*' is also the beneficiary.

[18] 'Article 1688. Acts of disposition and encumbrances. The trustee may dispose of or encumber the trust property when required for the purposes of the trust, without the consent of the settlor, the beneficiary or the *fideicomisario* being necessary'. Please note that this is an unofficial translation.

In England, this patrimonial conception does not apply.[19] However, that does not imply that we cannot see the settlor's lack of control over the trust property. 'By placing property on trust, a settlor arranges for control of the property to be separated from the right to benefit from it. The trustee has legal title, which confers control of the property, and the beneficiary or beneficiaries have an equitable interest, which is a right to an actual or possible benefit from the property in the way specified in the terms of the trust.'[20] This quote represents in a clear way how trust works in the common law, and most importantly for our purpose, it shows that the settlor order to the trustee to have control over the trust assets, therefore, the former has no management faculties. As we have said before, once the settlor has transferred the assets to the trustee, he has no further interest in this affair.[21]

One may say that in England, the settlor can reserve for himself some powers or faculties, such as the appointment of a new trustee, change the beneficiaries or the purpose of the trust. However, and for our purposes, this reserved powers are limited by 'the effectiveness of the grant and consequently the exercise of the powers of administration and, where relevant, of transfer which result naturally in favour of the trustee and which the settlor may not appropriate for himself: even in a case of genuine doubt as to how to act, the trustee must turn to a court and not to the person who created the trust.'[22]

(2) Second Element: Standard of Conduct and Fiduciary Duties for the Trustee

In the last section we stated that the trustee is entitled with powers of management over the trust property since the settlor had entrusted his assets in benefit of the beneficiary or to achieve a purpose. These powers, nevertheless, put the beneficiaries (or the achievement of a cause) to the peril of mismanagement or misappropriation by the trustee, thus, from an economic analysis of law perspective, this generates a problem of agency costs.[23] How does trust law solve or try to address this pitfall? By subjecting fiduciary duties in the trustee's exercise or non-exercise of his powers.[24]

As the law of trusts imposes fiduciary duties to the trustee, we may conclude that the trustee takes a fiduciary position within a trust. In the language of the law of trusts this idea is almost universally expressed in that way or by saying that the relationship between the trustee and the beneficiary is a fiduciary relationship.[25] Accordingly, 'the fiduciary position of the trustee obliges him to act in a very specific manner with regard to the trust property and *vis-à-vis* the trust beneficiary.'[26] This

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[19] Smith, *Trust and Patrimony* (n 14) 57.
[20] Peter Jaffey, 'Explaining the Trust' (2015) 131 Law Quarterly Review 377, 377.
[21] Paul Matthews, 'From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust' in DJ Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-fenced Funds* (Kluwer Law International 2002) 203, 220.
[22] Lupoi (n 3) 165.
[23] Robert H. Sitko, 'Fiduciary Principles in Trust Law' in Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff (eds), *The Oxford Handbook of Fiduciary Law* (Oxford University Press 2019) 41, 42.
[24] ibid 42.
[25] Marius J. De Waal, 'The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared' (2000) 117 South African Law Journal 548, 557.
[26] Marius J. De Waal, 'In search of a model for the Introduction of the Trust into a Civilian Context' (2001) 12 Stellenbosch Law Review 63, 67.

essential feature leads us to a fundamental question: how the trustee shall act? In other words, what is the content of these fiduciary duties?

As we are addressing a general question regarding the core elements of a trust, it would be audacious to attempt in generating and examining an exhaustive list of fiduciary duties, since each legislation defines which obligations have said characteristic. In general, and from an economic perspective, the main trustee's duty is not to profit from the trust property and all profits he obtains from it belong to the beneficiaries.[27] Nonetheless, when we refer to these fiduciary duties, there is a common and general standard that lies behind all the specific obligations. This standard, as we will see in the next paragraphs, although it has been conveyed in diverse ways by the jurisdictions that we are analysing, we can say that the trustee must act always, as far as possible, considering the beneficiary's interest or the achievement of the purpose. This standard proposed has two advantages: on the one hand, it highlights the idea that trustee's duty is not strict, that is, the content of this position does not involve achieving a particular result, but acting with the intention to benefit the beneficiary[28] or accomplish a particular purpose; on the other hand, it gives to each jurisdiction freedom to define and use their own concepts regarding how the trustee must behave when managing the trust assets.

In England and Scotland it is required that a trustee, in the execution of all these duties, employs the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs.[29] Besides, particularly in England, the terms "reasonableness" and "prudence", despite their differences, are often expressed in different statues or trust instruments.[30] In this sense, the discharge of a trustee's duty to act with due diligence and prudence is flexible and changes with economic conditions and contemporary thinking,[31] therefore, in order to judge his performance it is important to apply the standards of the relevant period. Furthermore, and regarding discretionary powers given to the trustee, it has been stressed that these powers 'must be exercised in a reasonable manner'.[32] Finally, in Argentina this standard it is established in the first paragraph of the article 1674 CCCA: the trustee must fulfil his obligations 'with the prudence and diligence of a good businessman.'[33]

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[27] Lupoi (n 3), 313 – 314.

[28] Lusina Ho, 'Trust: The Essential' in Lionel D. Smith (ed) *The Worlds of the Trust* (Cambridge University Press 2013) 1, 15.

[29] De Waal, *The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared* (n 25) 559. Please note that the author, when stating this idea, refers to the decision given by Lord Herschell (House of Lords) in *Rae and another v Meek* (1889) 16 R (HL). In Scotland, this idea is also support in W.A Wilson and A.G.M Duncan, *Trusts, Trustees and Executors* (2nd ed., Green for the Scottish Universities Law Institute 1995) 454-455. These last authors refer to difference cases, such as, *Knox v Mackinnon* (1888) 15 R. (H.L), *Kennedy v Kennedy* (1884) 12 R. 275, *Buchanan v Eaton* (1911) S.C (H.L), and *Tibber v McColl* (1994) SLT.

[30] Thomas & Hudson (n 8) 292. For example, in England the Trustee Act (2000) in its Part I, section (1), recognize the famous "duty of care", which implies that when applying this duty, the trustee 'must exercise such care and skill as is reasonable in the circumstances (…)."

[31] David Pollard, 'The 'Prudence' Test for Trustees in Pension Scheme Investment: Just a Shorthand for 'Take Care' (2021) 34 Trust Law International 215, 233

[32] Wilson & Duncan (n 29) 400.

[33] 'Article 1674. Standard of conduct. Solidarity. The trustee must fulfil the obligations imposed by law and by the contract with the prudence and diligence of a good businessman acting on the basis of the confidence placed in him). Please note that this is an unofficial translation.

It exceeds the purpose of this work to explain how each country has applied and interpreted said standards. However, what is relevant is that we can see a general guideline of conduct expressed for the trustee, which inspires and justify further rules and court decisions, and shapes the trustee's behaviour.

As we mentioned before, each jurisdiction has also admitted other fiduciary duties that are influenced by these standards, and therefore, these obligations complement the main duty expressed above. In England, for instance, it also exists the duty of safeguard assets, the duty to invest, the duty to keep and render accounts, the duty to provide information,[34] the duty to inform beneficiaries of their status, and the duty to give reasons.[35] In Argentina, for example, the trustee cannot be exempted of her duty to render accounts or the negligence or deceit she may incur.[36] Lastly, in Scotland has been recognized other duties such as the duty to keep the estate under control, the duty to keep proper accounts of their intromissions with the trust estate, and the duty to insure against normal risks to the estate, among others.[37]

(3) Third Element: The Benefit to Someone or the Fulfilment of a Purpose

In the last part, on some occasions we mentioned that the trustee must manage the trust assets for the benefit of someone. Well, this "someone" is the so-called beneficiary, which his existence is the last core element of the trust.

There is a wide consensus regarding the existence of a beneficiary when setting up a trust. 'When there is a trust in the narrow sense, (….), the trustee is obliged to hold the trust property for the benefit of one or more persons. They are called beneficiaries: the persons who are entitled to the trust property.'[38] Similarly and reinforcing the idea of a beneficiary within a trust scheme, it has been said 'that for a valid private trust there must be someone with a beneficial interest, a beneficiary'[39] and that 'the beneficiary is necessary for the existence of the trust'.[40]

The reader may note that the title of this section also refers as a core requirement for trust 'the fulfilment of a purpose'. Undoubtedly, both ideas are opposed to each other. Nevertheless, and following professor Lupoi, it would be unfair not paying attention to purpose trusts, since they have had an enormous expansion around jurisdictions no matter which legal system they belong.[41] Therefore, as think variety of trusts have gained a vast ground within different countries, it has been added as one of the core elements of a trust.

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[34] Thomas & Hudson (n 8) ch 10.
[35] David Fox, 'Non-excludable trustee duties' (2011) 17 *Trust and Trustees*, 17, 20 – 22.
[36] 'Article 1676 CCCA. Forbidden dispensations. The contract may not exempt the trustee from the obligation to render accounts, nor from the fault or deceit which he or his dependants may incur, nor from the prohibition to acquire for himself the property held in trust.' Please note that this is an unofficial translation.
[37] Wilson & Duncan (n 29) 359 – 361.
[38] Lionel D. Smith, 'Massively Discretionary Trusts' (2017) 70 Current Legal Problems 17, 21. Please note that for this author the 'narrower sense' of a trust is an 'an obligation with respect to the benefit of property (…) This is the sense that is used when someone examines a particular provision within a trust structure, and asks, does it create a trust or a power?'. Ibid., 19.
[39] Matthews (n 21) 222.
[40] Smith, *Massively Discretionary Trusts* (n 38) 51.
[41] Lupoi (n 3)

How is this basic feature recognized in the jurisdictions under analysis? In Argentina, the requisite of beneficiary is expressed in various provisions of the CCCA. First of all, when conceptualizing the trust, article 1666[42] expressly mention the beneficiary. Then, regarding the requirements of the trust, article 1667(d))[43] establishes as requisite the beneficiary's identification or the way to identify him, in case there is uncertainty regarding his identification. Finally, article 1671 in its first paragraph says that the beneficiary could be a legal or natural person that might exist or not when setting up a trust, and in this last case, the instrument that create the trust must contain the relevant data that allow the parties to identify him.[44] There are not any reference to purpose trusts in the new CCCA.

In England, the generally accepted rule is that a trust, to be valid, must have an ascertainable beneficiary (individual or corporate) in whose favour performance of the trust may be decreed.[45] This general rule is closely related with the so-called 'beneficiary principle'[46]: this principle is concerned with the enforceability of a trust, thus it requires that during the existence of a trust exists some person who has a sufficient interest to enforce it.[47] The main exception of these general rule and principle are the trusts for charitable purposes, regulated by a statue,[48] whose validity has been justified because they are enforceable by the Attorney-General.[49]

What is the situation in Scotland? When creating a trust, the truster must define with sufficient certainty the trust beneficiaries or the trust objective, otherwise, the purported trust is void.[50] As England, the purpose trusts are only limited to those for charity.[51] Nevertheless, Scottish Parliament has recently enacted the Trusts and Succession (Scotland) Act 2024, where its Chapter 6 incorporates the so-called 'private purpose trusts'. Undoubtedly, the inclusion of the private purpose trusts will signify a serious change not only in Scotland, but also in all the onshore jurisdiction where this matter has been debated.[52]

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[42] 'Article 1666. Definition. There is a contract of trust when one party, called the settlor, conveys or undertakes to convey the ownership of property to another person called the trustee, who undertakes to exercise it for the benefit of another person called the beneficiary, who is designated in the contract, and to convey it on the fulfilment of a term or condition to the *fideicomisario*.'

[43] 'Article 1667. Content. The contract must contain: (...) d) the identification of the beneficiary, or the way of determining him in accordance with Article 1671'.

[44] 'Article 1671. Beneficiary. The beneficiary may be a natural or juridical person, who may or may not exist at the time of the execution of the contract; in the latter case, the information enabling the beneficiary to be identified in the future must be stated. The beneficiaries may be the settlor, the trustee or the *fideicomisario*.'

[45] Thomas & Hudson (n 8) 137.

[46] For a brief explanation regarding how this principle has evolved in the last three centuries up to now, see Sam Chandler, 'The beneficiary principle in the 21st century' (2023) 29 *Trust & Trustees* 38.

[47] Thomas & Hudson (n 8) 142. Even, it has been said that a 'a core requirement of the trust is the presence of someone to enforce it'. See Jason Fee, 'Trust-owned companies and the irreducible core of the trust' (2020) 26 *Trust and Trustees*, 826, 835.

[48] Charities Act 2011.

[49] Thomas & Hudson (n 8) 138.

[50] Marius J. De Waal and Roderick R.M. Paisley, 'Trusts' in Reinhard Zimmermann et al (eds) *Mixed Legal Systems in Comparative Perspective* (Oxford University Press, 2004) 819, 832.

[51] Charities and Trustee Investment (Scotland) Act 2005.

[52] For a critical perspective regarding the introduction of 'private purpose trusts' in Scotland see Alexandra Braun, 'Private Purpose Trusts: Good for Scotland?' (2023). University of Edinburgh School

D. CONSEQUENCES OF THE LACK OF THE CORE FEATURES.

As we stated above, these core elements can be found in every legal system that has recognized trusts, no matter the legal family they belong. So far, we have seen how in different jurisdictions these elemental features have been incorporated. However, we believe that this aspect is not enough to demonstrate why these elements are core to a trust, since is only one side of the coin. These features are core for also another reason: without one of these elements, the trust's existence and validity would be seriously threatened.

Different institutions may help us to prove the aforementioned consequences. Let us begin with both the illusory trusts and the doctrine of sham trusts. On the hand, the classic definition of a sham given by Diplock LJ in *Snook v London and West Riding Investments Ltd* reflects the essential features of this doctrine that refers to 'acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.'[53] An illusory trust, on the other hand, 'purports to be a trust but the nature of the obligations identified are inconsistent with those which operate in a trust and so what has been created is not a trust.'[54] The main difference between both lies in the presence of a subjective intention to mislead, while in the former that is an essential requirement, that is not true for the latter.[55]

The opposite to our first element would be that the settlor retains for himself broad powers that allow him to do whatever he wants with the trust assets. In this case, if sham cannot be established because a dishonest intention is not found, courts have decided that the trust was illusory.[56] In a similar sense, what would happen if the trust does not contemplate a beneficiary? In Scotland, as stated above, it would be void: in Argentina, it would lead to a simulation[57] that if it causes damages to third

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of Law Legal Studies Research Paper Series 2023/05 <https://ssrn.com/abstract=4444542> accessed 10 December 2023. For a critical approach in England see Kelvin F.K. Low, 'Non-Charitable Purpose Trusts. The Missing Right to Forego Enforcement' in Richard Nolan et al (eds), *Trusts and Modern Wealth Management* (Cambridge University Press, 2018) 486-509.

[53] [1967] 2 QB 786, 802.

[54] Graham Virgo, 'Abuse of Trust' in Richard Nolan et al (eds) *Trust and Private Wealth Management* (Cambridge University Press 2022) 285, 294. In this work, it is also highlighted that 'despite the rejection of the phrase 'illusory trust', this is actually a useful descriptor of the doctrine. For, if what the settlor has purported to create cannot be considered to satisfy the core requirements of a trust, then it is not a trust which has been created: the trust is an illusion and the attempt to create can be considered to be an abuse'. ibid 295 – 296.

[55] ibid 296. Supporting the idea of the necessity of an intention to mislead and its main features see also Matthew Conaglen, 'Sham Trusts' (2008) 67 Cambridge Law Journal 176, 183 – 192.

[56] Lusina Ho, 'Breaking Bad' in Richard Nolan et al (eds), *Trusts and Modern Wealth Management* (Cambridge University Press 2018) 34, 43 – 44.

[57] 'Article 333. Characterization. Simulation occurs when the legal nature of an act is concealed under the appearance of another, or when the act contains clauses that are not sincere, or dates that are not true, or when by it rights are constituted or transmitted to interposed persons, who are not those for whom they are in fact constituted or transmitted' (our emphasis added). Please note that this is an unofficial translation.

parties, then this juridical act would be void.[58] English law takes another route: as no one would be able to enforce the trust, and the obligations owed by the trustee to the beneficiaries are fundamental to the concept of a trust, it has been held that if the beneficiaries have no rights enforceable against the trustees there are no trust.[59] In the case of a purpose trust, particularly a charitable trust, the relevant rules in Scotland[60] and England[61] define when we are facing a trust with these characteristics, therefore, if the trust does not comply with these elements, it cannot be treated as charitable trust.

What would it happen then if the trustee acts in a dishonest way, or his acts do not benefit the beneficiary? The standards of conduct and fiduciary duties are consequences of the fiduciary trusteeship between trustee and beneficiary: if a 'trustee exercises a trust power for an improper purpose, that exercise will be invalid by virtue of the doctrine of fraud on the power.'[62] For instance, this would happen if in exercising the power, the trustee secures a benefit for himself or a third party who is not an object of the power'[63] or the trust scheme, situation that, as we stated above, would be contrary to the main duty of the trustee which is act in benefit of the beneficiary. What is the effect of the doctrine of fraud on the power? As its very definition states, 'the exercise of the power will be void since it is as though the power had not been exercised'.[64]

E. CONCLUSION

In this contribution we have proposed and examined what we think are the essential elements of a trust. After some preliminary considerations made to limit and clarify the scope of our proposal, we found three irreducible cores of a trust: the first element, represented by the nonexistence of control over the trust property by the settlor; the second feature expressed by the presence of a general standard of conduct followed by different fiduciary duties imposed to the trustee; and the third and last element symbolized by the existence of a beneficiary or a purpose.

As finding essential features involves taking into account all the jurisdictions around the world, we concentrated in the classical taxonomy that differentiate countries that belong to the common law tradition, the civil law tradition and the mixed legal systems, where England, Argentina and Scotland, respectively, were the representatives of each legal family. We found that the abovementioned core features, by different means, were recognized in each of these nations. The framework that we

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[58] 'Article 334. Licit and illicit simulation. Illicit simulation or that harms a third party causes the nullity of the ostensible act. If the simulated act conceals a real act, the latter is fully effective if it meets the requirements of its category and is neither unlawful nor prejudicial to a third party. The same provisions apply in the case of simulated clauses.' (Emphasis added). Please note that this is an unofficial translation.

[59] Virgo (n 54) 296.

[60] Charities and Trustee Investment (Scotland) Act 2005, s 7.

[61] Charities Act 2011, s 2.

[62] Virgo (n 54) 304. For a critical perspective regarding the doctrine of fraud on the power see Joel Nitikma, 'Goodbye and good riddance to the doctrines of "fraud on a power" and "the entire substratum"—now if only we could figure out the "proper purpose" rule' (2023) 29 *Trust & Trustees*, 248.

[63] Virgo (n 54) 304.

[64] ibid 305.

have proposed allows us to conclude that the proposed elements can be placed in every jurisdiction that has adopted the trust within its legal system regardless the legal family that belongs.

Nonetheless, the fact that these features can be encountered in any country does not provide a complete explanation regarding why these elements are core in a trust. Some might say that is just a coincidence that these aspects are recognized in these jurisdictions, therefore, we need a further justification with respect to this matter. This legitimate inquiry and explanation were addressed in section D: besides the existence of these core elements in the analysed countries, the lack of any of these features would lead to a non-trust or a voidable trust. For this point, the doctrines of sham, illusory trusts, simulation, and fraud of the power gave us a general picture regarding the consequences of an omission of any of these core features when setting up a trust.

To sum up, regarding the question whether there are core irreducible features of the trust across common-law, civil-law and mixed legal jurisdictions, we are in the position to support an affirmative answer to this inquiry. We suggested three irreducible cores, and we demonstrated that they are essential for creating a trust not only because these features can be found across these legal families, but also because their non-inclusion would lead to its inexistence or nullity.