Trust Law and International Law

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Trust Law: Civil Law System- A comparison

- fiducia, fideicommissum
- Treuhand
- Fideicommissum
- “It traced its roots back to the Roman Republic. In his will, the testator placed his trust in the loyalty of the heir to faithfully give an object from the estate or the entire estate itself to a third party”
- Early modern time “a fideicommissum was a special piece of property under private law created by a formal act of endowment that thereby became tied to a specific noble family in perpetuity and could neither be divided, alienated, or subject to collection for debt”
Fideicommissum, Elements

(1) a (normally) testamentary act of endowment or entailment,
(2) the construction of a separate estate at all times carrying with it restrictions on its use by the respective holder, and
(3) a determinate line of succession
Parties to the Trust

**Settlor**: the person(s) who creates a trust

**Trustee**: Trustee manages the trust property for the benefit of the beneficiaries. (not part of the trustee's own estate)

**Beneficiary or Beneficiaries**: Beneficiaries are the people for whose benefit the trust has been created
Maxims of Equity

Equity will not suffer a wrong without a remedy

“the legal owner of the property will be prevented from asserting their rights in respect of that property because they are deemed, in equity, to hold the beneficial, or equitable, interest in the property on trust for the beneficiary”
Parties to the trust

Settlor transfers property to trustee

Settlor

Trustee

Beneficiary or class of beneficiaries

Trustee holds on trust for the beneficiary or beneficiaries
Types of Trust

Private Trust: it terminates when its private purpose is completed

Public Trust (to be used for some public use or benefit—charitable trusts): it may last for an indefinite or unlimited period of time.

Fixed trust: “the trustees are given very specific instructions as to how and to whom the subject matter of the trust is to be distributed; the trustees do not have any power to vary the amounts given to the different beneficiaries named, or to decide whether or not to benefit one particular beneficiary over the others”

Discretionary trust: “the trustees are given discretion, either to decide the shares into which the trust fund will be divided, or to decide who will benefit under the terms of the trust, or sometimes both”.
Purpose trust: private and public
Charitable Trusts
Express Trust (by individuals)
Constructive trusts (for example imposed by the court)
Statutory Trust
Examples

- £10,000 towards the education of the nephews and nieces of Mathilda and Edward Jones.

- £10,000 towards the education of children from impoverished backgrounds in the county of North Yorkshire.

- I give £10,000 to my trustees to divide equally between my children, Jacob and Frances.

- I give £10,000 to my trustees to hold for my children, Jacob and Frances (Maxim: **Equity is equality!**).

- I give £10,000 to my trustees to divide between those of my children they consider most deserving in their absolute discretion.
Legal and equitable ownership

Legal owner

Trustee

Equitable owners

Beneficiary or class of beneficiaris
Trust and other concepts: contracts

- Trusts equity – contracts law
- Contracts personal rights – trusts proprietary rights
Modern uses- Trust

- trusts for the protection of family assets;
- trusts to make provision for family members and other dependants;
- trusts for inheritance tax-planning purposes;
- trusts for the protection of creditors;
- trusts as a method of holding property;
- private and public purpose trusts;
- trusts for pensions and investments.
CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR RECOGNITION - 1985

Article 2

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.

A trust has the following characteristics:

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

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

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.
Article 11

A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust. Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity. In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular

a) that personal creditors of the trustee shall have no recourse against the trust assets;
b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;
c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;
d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.
International Law
General overview

- The relationship between International and National Law
- Problems which arise in national courts
- Elements of a happy relationship
Sources of International Law

- Treaties
- Customary international law
- General principles of law
- Jus Cogens (Peremptory Norms)
- United Nations Security Council Resolutions
International Law and Internal Legal Systems

Two general approaches:

- **Monism**: international law and domestic law = same legal system. International law at the top of a hierarchy.

- **Dualism**: international law and domestic law = separate legal systems. Each State has to determine how international rules are applied at the national level.

States can adopt approaches that may include a mix of the two!
Monist Approach to International Law

Example:

**Switzerland**
International instruments become part of Swiss law and are binding on state authorities when ratified. They do not require to be transposed into Swiss law to have effect in the Swiss legal order.

**Germany**
General Rules of international law are seen as an integral part of German Federal Law.
United Kingdom: Dualist Approach to International Law

Parliament is Sovereign

Parliament has to apply international law domestically in order to have any domestic effect.

A treaty ratified by the Government does not alter the laws of UK unless and until it is incorporated into national law by legislation.

International law still applies to the UK on the international level. UK is still bound by obligations it has accepted on the international level.

Customary international law and UK courts: one of the sources of common law.
European Communities Act 1972

- Act that brought the UK into the European Economic Community (EEC), European Atomic Energy Community (Euratom), and the European Coal and Steel Community (ECSC)
- It gave EU law supremacy over UK national law
- It gave legal authority for EU law to have effect as national law in the UK
- In case of doubt, the Act required UK courts to refer judgment to the European Court of Justice.
- Courts were obliged to strike down legislation which is inconsistent with EU law.

Attention! This Act is repealed by the EU Withdrawal Act 2018!
Case Law


“Two dominant principles have traditionally restricted the use of international treaties in British domestic law. The first is that domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law; that they are effectively non-justiciable. The second is that such treaties, unless incorporated into domestic law, are not part of that law and therefore cannot be given direct effect to create rights and obligations under national or municipal law”
Case Law

Miller v Secretary of State for Exiting the European Union, 2017

Overview of the Case:

About constitutional requirements for the UK to give notice of its intention to withdraw from the EU pursuant to Article 50 of the Treaty on European Union.

**Article 50**: voluntary and unilateral withdrawal of a country from the European Union (EU).

- An EU country wishing to withdraw must notify the European Council of its intention to do so.
- The European Council is then required to provide guidelines for the conclusion of an agreement setting out the arrangements for that country's withdrawal.
Case Law

Miller v Secretary of State for Exiting the European Union, 2017

“International law and domestic law operate in independent spheres […] treaties between sovereign states have effect in international law and are not governed by the domestic law of any state”.
Case Law

Miller v Secretary of State for Exiting the European Union, 2017

About the European Communities Act 1972

“EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes. This may sound rather dry or technical to many people, but in constitutional terms the effect of the 1972 Act was unprecedented […] Of course, consistently with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute. For that reason, we would not accept that the so-called fundamental rule of recognition (i.e. the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal”.

“EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and remains sovereign”.
The Relationship between International and National Law

- UK

The executive may conclude treaties which do not involve changes in domestic law – for example, Treaties of Friendship or Investment Promotion and Protection Agreements.

"A treaty is a contract between the governments of two or more sovereign States. International law regulates the relations between sovereign States and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty’s Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into or alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual."

Customary International Law prevail and National Law

Acceptance of customary international law as integral part of national law

➢ Customary international law was incorporated into English law so that when its rules changed, English law also changed.

Lord Denning said: “International law does change, and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules if international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law…”

Trendtex Trading Corporation Ltd v. Central Bank of Nigeria (1977)
Treaty and Inconsistent National Law

- **Aim:** to avoid conflict between national rules and international obligations.
- The approach of English courts was set out by Lord Denning in *Saloman v Commissioners of Customs and Excise (1967)*, where he said of a treaty which could not directly be relied on but which formed part of the background to the statutory provisions in issue:

  “I think we are entitled to look at it because it is an instrument which is binding in international law and we ought always to interpret our statutes so as to be in conformity with international law.”
The French and German Constitution were each amended to ensure the compatibility of the Treaty on European Union signed at Maastricht and succeeding EU Treaties with the national constitutional order.

By the European Communities Act 1972 the UK also amended its constitution in order to accept features of the Community legal order – in particular direct applicability and direct effect – which were inconsistent with its own general approach to the implementation of international obligations.

European Union (Withdrawal) Bill provides that ‘the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made after exit day.’
International Law and National Courts

- Principle of ‘judicial restraint’

  - Sometimes, where a question of international law is central to the claim, US or UK courts have held that they are in effect not competent to answer it.

  - In *Pinochet* cases Lord Lloyd said assumption of jurisdiction would imperil relations between governments and that:

    ”We would be entering a field in which we are simply not competent to adjudicate. We apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our statute law; but we are not an international court.”
Conclusions: elements of a happy relationship

1) Close involvement in the treaty-making process of lawyers with knowledge both of their own legal systems and of international law;

2) Close attention to questions of national implementation during the treaty-making process and before ratification;

3) Detailed parliamentary scrutiny of important treaties before national ratification;

4) Teaching of international law as a compulsory element of a law degree and of professional training; and

5) Involvement of specialist international lawyers as counsel and as *amici curiae* whenever difficult questions of international law arise in national courts.