TRUSTS:
A comparative study

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CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK http://www.cup.cam.ac.uk
40 West 20th Street, New York 10011–4211, USA http://www.cup.org
10 Stamford Road, Oakleigh, Melbourne 3166, Australia

Originally published in Italian as *Trusts* by Giuffrè Editore 1997

First published in English by Cambridge University Press 2000 as *Trusts: a Comparative Study*

First published 2000

Printed in the United Kingdom at the University Press, Cambridge

Typeset in Swift Regular 9.75/13pt [VN]

A catalogue record for this book is available from the British Library

Library of Congress cataloguing in publication data

Lupoi, Maurizio.
[Trusts. English]
Trusts: a comparative study / Maurizio Lupoi; translated by Simon Dix.
p. cm. – (Cambridge studies in international and comparative law)
Includes index.
ISBN 0 521 62329 4 (hardback)
1. Trusts and trustees. I. Title. II. Series.
K795.L8713 1999 346.05′9 – dc21 99–24171 CIP

ISBN 0 521 62329 4 hardback

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1 Introduction

1. Preliminary aspects

A civilian who wishes to understand trusts must try to immerse himself in them more than is normally necessary under the current comparative law tenets. He must also take unusual pains to avoid making immediate, and almost instinctive, comparisons with institutions of the legal system with which he is familiar. He must try to forget any ideas which he may already have on the topic, because there is an extremely high likelihood that the limitations in comparative analysis which have often distinguished the civil-law approach to trusts have rendered these ideas imprecise, and, therefore, misleading.

I shall now lay out a few propositions as a preparatory mental exercise. They relate to the traditional English model of trusts, and I do not propose to explain them at this stage. Some may appear to be incorrect if traditional concepts are used as a starting-point, but each will be illustrated in the appropriate section of this book.

1. *Trusts are not only 'voluntary'.*
   Voluntary trusts (or expressly established trusts, as I prefer to call them) are not the only type of trust; on the contrary, it is my belief that the 'heart of the trust' lies elsewhere, in those trusts which are created when equitable principles are applied independently of a valid declaration of intent to form a trust.

2. *There need not be three persons involved.*
   It is not true that a trust involves three persons. As the classic basic configuration would have it, these persons are:
   (1) The settlor, who transfers an asset to the trustee;
   (2) The trustee, who acquires 'legal' ownership of the asset (or rather, a

right of 'ownership' protected by common law)[1] in favour of the beneficiary;

(3) The beneficiary, or *cestui que trust*,[2] who acquires equitable ownership of the asset (or rather, a right of 'ownership' protected by equity).

A person may establish a trust of which he is both trustee and beneficiary, or only the trustee or only the beneficiary. The three persons in the basic configuration may therefore be reduced to two, or even only one.[3] Furthermore, charitable trusts and, where they are permitted, trusts for purposes, do not have a beneficiary at all. In order to preserve the theory of trusts, it is often said that in these cases the purpose, or even society as a whole, is the beneficiary of the trust. Finally, as I will explain below, where a trust is not expressly established, there is by definition no settlor.

3. *There need not be a transfer of the property to the trustee.*
It is not even true that the establishment of a trust is the consequence of a transfer in favour of the trustee. In addition to the instance mentioned above, in which the settlor is himself the trustee (and therefore no transfer takes place), the very nature of constructive and resulting trusts prevents there being any transfer to the trustee, because there is no settlor.

Furthermore, the element which characterizes those trusts which are not expressly established is not a transfer to the trustee, but the existence of an *act of disposition*: even a settlor who appoints himself as trustee carries out an act of disposition, by which he changes his legal standing.

4. *There is no splitting of ownership.*
It is not true to say that the rights of the beneficiary of a trust fall within the notion of 'ownership' (as that term is understood in civil-law cultures), thereby standing in contrast with the rights of the trustee, which also represent an 'ownership' position. The splitting of ownership rights between trustee and beneficiary, and the existence of two ownership rights in the same asset ('legal ownership' and 'equitable ownership'), represent misunderstandings which the time has now come to explain and overcome. In charitable trusts and trusts for purposes, on the other hand, where there are no beneficiaries, there cannot be an equitable owner.[4]

[1] It has become fashionable for writers in Romance languages to employ the term 'common law' in the masculine (see most recently R. C. van Caenegem, 'Le jugement sous l'angle historico–comparatif', in [1995] ArchPhilDr 125, note 6). Giovanni Criscuoli troubled Lord Denning for his opinion (G. Criscuoli, *Introduzione allo studio del diritto inglese. Le fonti* (2nd edition), Milan, 1994, p. x) and obtained his *placet*. My mentor, Gino Gorla, has always used the term common law in the feminine, and that is enough for me.

[2] There are various plurals of this expression. These days, *cestuis que trust* is the preferred form.

[3] The settlor may also be the trustee and one of the beneficiaries. When no beneficiary has an actual interest until the death of the settlor, in the practical life of the trust only one person derives benefits from it. This does not mean that he may abuse his rights.

[4] This point was made in F. W. Maitland, *Selected Essays*, edited by H. D. Hazeltine, G. Lapsley and P. H. Winfield, Cambridge, 1936, p. 138.

To combat other current theories, I have nevertheless been obliged to use, and will continue to use, the term 'equitable ownership' in the remainder of these preliminary discussions.

5. *What does identify trusts is a lack of equitable fullness of ownership on the part of the trustee.*
The different types of trust, including constructive and resulting trusts, can be brought together by taking the position that the trustee's ownership position is distinguished by a lack of equitable fullness, and that what is lacking in order to obtain that fullness does not necessarily belong to another person.

6. *The beneficiaries need not be 'equitable owners'.*
It is not true that where a trust calls for the existence of beneficiaries they need necessarily be 'equitable owners'. Many modern trusts fall within the category of discretionary trusts, where it is the duty of the trustee to decide from time to time to whom to distribute income or rights, or indeed whether to make a distribution at all. The discretionary trust does not create any entitlement in the beneficiaries, except that they have the right to expect that the trustee will exercise his discretionary powers and will administer the assets of the trust in a proper manner.

   It is the notion of the beneficiary which needs to be reviewed, and associations with the concept of '*equitable ownership*', which are not applicable in all cases, must be done away with: the equitable entitlement which is lacking in the trustee is not necessarily in the possession of others.

7. *The trust may have purely 'equitable' interests as its subject matter.*
Furthermore, it is not the case that the trustee must necessarily have a legal status which is recognized by common law, so that the position of the beneficiary would be recognized by equity:[5] the subject matter of the trust may perfectly well be an *equitable right*, as in the case where the beneficiary of a trust declares that he will in turn place the rights to which he is entitled as beneficiary (and which therefore belong exclusively to equity) into a trust. More generally, one might say that any kind of entitlement is capable of forming the subject matter of a trust.

8. *The trust is not a* negotium *which may be compared to the* fiducia.
It is not true that the trust is a fiduciary *negotium*, as the concept is

[5] I do not believe it is appropriate in these introductory pages to explain what is meant by equity. In various parts of the book, as the need arises, I shall make some observations (see, in particular, §§4 and 5 of chapter 2). I prefer that the reader should enter into the understanding of equity in this way rather than by general pronouncements which would of necessity be limited in nature. As will also be seen with reference to the notion of the trust, which will not be discussed until the end of chapter 3, I have chosen an inductive method for the book. The reader will probably have to work harder to get to the heart of the issues without the benefit of introductory definitions, but at least he will not be misled. I hope that in the end he will thank me.

understood in civil-law legal systems. The trust is a form of 'confidence', either in favour of specific parties or to attain a purpose. It is not necessarily voluntary in origin, and in no cases does it naturally attribute any rights to the person who 'confides' with respect to the person in whom his 'confidence' is placed.

9. *The trust is not born out of a contract.*
It is not true that, as many civilians believe, the basis of the trust is a contract between the settlor and the trustee. One needs only to recall that in many cases, as we have already seen, there is no settlor, while in others the basis of the trust is a will. Moreover, in the limited area of trusts expressly established *inter vivos*, there are two transactions which underlie the trust, not one: the creation of the trust and the transfer of the right to the trustee. The former, which actually gives life to the trust, is a unilateral act.

10. *Trusts and innovations in case law.*
It is not true that the law of trusts is a specialized and archaic field which has become rigid in the formulation of its rules.[6] The rules governing the area of trusts which have their origin in case law are in evolution, and show notable flexibility in adapting to modern society. Good examples may be found in the area of property rights among persons who live together, or in the area of responsibilities of a fiduciary (not necessarily a trustee) who may have obtained improper benefits from his position.

11. *Equity, common law and statute law.*
It is not true that the supplementary or complementary function of Equity is a historical legacy because for more than a century Equity and common law have been one. Precedents from the most recent decades illustrate how equitable obligations are introduced to give effect to precepts of conscience which contrast with precepts of statute law in cases where application of the latter would permit the perpetration of a fraud (within the special meaning which Equity gives to that word). It is the traditional concept of Equity as a mere supplement to common law which should be discussed and re-examined; it is an idea which appears today to be extremely limiting and outdated.

12. *Trusts also exist in legal systems which do not belong to the common-law world.*
It is not true to say that the trust is a legal device which is found exclusively in common-law systems. Numerous civil-law or mixed-law systems have institutions which, although they may not make use of the distinction between common law and Equity (which is unknown in these systems), perfectly reflect the legal structure of trusts created according to the traditional English model.

[6] The accusation that equity is *functa officio* was first discussed and rejected by H. G. Hanbury, 'The Field of Modern Equity', in 45 LQR (1929) 199, at 209–11.

2. Layout of the book

a 'Trust' or 'trusts'. The English and international models

The French title of the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition[7] is *Convention relative à loi applicable au trust et à sa reconnaissance*, while the English title is *Convention on the Law Applicable to Trusts and on their Recognition.* In French, as is customary in Italian, the singular is used. In English, on the other hand, the word is used in the plural.[8] Does this different linguistic use have any significance?

The determination of whether to speak of the trust in the singular or in the plural is a matter of no small significance,[9] and I will state from the outset that I personally lean towards the second alternative. Of course, if we reach a high level of abstraction it is possible to propose a notion of trust (in the singular) which, in an effort to take account of the different varieties of the institution, would be so technical and highly articulated that it would become difficult for the civilian to comprehend. It would also be misleading, given that the civilian does not know how to place a value on the role of definitions and classifications in common law, leading to the birth of errors and the adoption of false premises. Attempts to be intelligible to those unfamiliar with the myriad practical applications of the institution too easily result in an adoption of obvious and generalized positions: a sure way to hinder the development of awareness of and increase the ignorance of foreign law. Nevertheless, as we shall see, this was the path chosen by the authors of the Hague Convention, who in the end found themselves confronted by a shapeless and ill-defined creature.

[7] It was ratified in Italy by L. 16 ottobre 1989 n. 364, and came into force on 1 January 1992. The Convention has also been ratified by Australia, Canada (by nearly all the Provinces), Malta, the Netherlands and the United Kingdom. The law by which it was adopted by the United Kingdom (Recognition of Trusts Act 1987) has extended the Convention to a number of British Colonies and other territories, as we shall see in chapter 4. One must, however, take account of the special method by which the Convention has been adopted by the United Kingdom, by transcribing some, but not all, of the articles of the Convention: for example, articles 13, 19, 20 and 21, and the second and third sub-sections of article 16 are omitted.

The Convention has been signed, but not ratified, by France, Luxembourg and the United States.

[8] Legal texts in the area of trusts also follow this practice. In English, Fratcher, *Trust*, and in French Béraudo, *Trusts*, are exceptions to the rule.

[9] S. Tondo, in 'Ambientazione del trust nel nostro ordinamento e controllo notarile sul trustee', in *Atti Milano*, chapter 15, discusses this question at length. He formulates interesting linguistic proposals, and asserts that the singular with the definite article (. . . *au trust* . . .) and the plural without the article (. . . to trusts . . .) are equally suited to satisfying the expression of an abstract term.

I would tend not to take great account of definition problems when considering an institution which has developed historically over the centuries and which has been subjected to what has been, all things considered, rather limited legislative interference. Above all, there are many who believe that the typology of trusts cannot be ascribed to any unifying theory, since there exist examples in which one can clearly identify a trust, but which equally clearly challenge any attempt to apply systematic consistency.[10] I believe that this belief is incorrect, and that it is possible to propose a notion – or, perhaps, a definition – of trusts which grasps the essence of the institution in its many forms, though these forms are so markedly different, both functionally and structurally, that the use of the word 'trust' in the singular may be allowed only when a systematic approach is attempted.

The word 'trusts' in the plural serves in the first place to underline the polymorphic nature of the institution, as appears from actual use, which is a long way from the classic purpose of protecting the assets of a family.[11] In the second place, use of the plural serves to bring to light the fact that no systematic dimension exists in common law, where what we shall call the 'English-law model' has been subjected to various modifications outside England which have not been accepted in the trust's land of origin, or, *vice versa*, where it has undergone developments in England which have not always been acknowledged in other jurisdictions.[12]

The laws of Australia, Canada, New Zealand and the United States will frequently be referred to,[13] even if only as a counterpoint to English law, in

[10] I am referring to the so-called 'anomalous trusts', of which more in chapter 3 §2.b.

[11] In *Target Holdings v. Redferns* (1995) the House of Lords, with reference to the rules concerning breach of trust, stated:

> it is in any event wrong to lift wholesale the detailed rules developed in the context of traditional trusts and then seek to apply them to trusts of quite different a kind . . . it is important, if the trust is not to be rendered commercially useless, to distinguish between the basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind (362).

[12] In *Invercargill City Council v. Hamlin* (1996) the Privy Council confirmed the legitimacy of local developments in common law, even where they contrast with precedents of the House of Lords (the case dealt with a decision from New Zealand in the area of the responsibility of the public authorities for failure to supervise the construction of a building).

[13] There is not really an Australian, Canadian or American law in the area of trusts, because trusts fall within the competence of the individual states, and not of the federal government. Both in Australia and in Canada, state or provincial laws on trusts have been passed, while in the United States, the Restatements of Trusts and of Restitution, as well as the model laws adopted by most of the States, are almost always applied, as, for example, with the revocatory action which may be commenced against the creation of a trust which prejudices the rights of creditors.

the context of the basic model to which they all belong. English law will, however, be the principal subject of this book, and the implicit point of reference for every comparative illustration.[14]

In effect, plurality within common law has been complicated by the laws promulgated in recent years by many States, giving rise to a kind of 'rush for the trust' in which tax havens have played a noteworthy role. While the evolution of Australian, Canadian, New Zealand and United States law has been substantially in line with the traditional English model, the 'rush for the trust' is bringing about the creation of a model, which we shall call the 'international trust model', notably different from the English model, although inspired by the same fundamental principles.

The plural 'trusts' also serves to underline that the multiplicity of legislative experiences has taken on a new dimension as a result of the adoption of special laws in civil or mixed law jurisdictions. This may be due to the 'rush for the trust', or to already existing tendencies which had their origins in the perception that there was an opportunity to introduce new transactional instruments, and thereby compensate for certain limitations which were impeding the development of the traditional civil-law instruments. It may have been due, finally, to the persistence of old transactional forms, to which new functions are nowadays attributed. Civil-law legislation on trusts contains many elements which are common both to those legal systems and to the international trust model, to such an extent that it is unclear whether they should be traced back to this model, or whether, in fact, they permit the identification of a separate civil-law trust model.

It is a matter of regret that common law and comparative literature on trusts[15] should have dedicated so little attention to types of legislation which do not belong to the traditional model, above all because they are of significant technical value, and have been applied by judicial bodies at the highest professional level.[16] It is also to be regretted that civil-law scholars

[14] Whether the 'American' trust belongs to the English model is doubtful; see U. Mattei, *Il modello di common law*, Turin, 1996. The author not only submits that the American model is autonomous with respect to that of England, but states that 'today, the paradigmatic experience is American' (p. 196).

[15] A review of current literature in the area of trusts is found in D. W. M. Waters, 'The Role of the Trust Treatise in the 1990s', in 59 Missouri LR (1994) 121. It is interesting to compare this position with that of Hanbury, Equity (see above, footnote 6), who proposed a 'modern manual of equity' in the wake of the Law of Property Act and the Trustee Act of 1925.

[16] Despite its scarcity, I have paid particular attention in my research to the case law of States such as Barbados, Jersey and the Cayman Islands which adhere to the international trust model. A reading of the judgments reveals an unexpectedly high standard.

have rarely sought to describe in detail the solutions adopted by civil-law systems other than their own.

b The purpose of the individual chapters

The next chapter is dedicated to those types of trusts which are customarily considered by comparative literature to be of secondary importance, or which the literature completely ignores. I have chosen to begin my explanation of English law in this way because I am convinced that the 'heart of the trust' should be sought not in the classic area of expressly established trusts but in implied, constructive and resulting trusts, some of which have long histories, while others are called, for a variety of underlying motives of evaluation, 'new models' of trusts.[17] The fact that even in current writings in the English language they are categorized as 'secondary' has its origins in a cultural inertia which contents itself with explanatory models which are often more than a century old.

The developments on which we shall dwell have created a distance between English law and the laws of Australia, Canada, New Zealand and the United States, and, in general, that of those countries which borrowed the English law during the colonial period. It is not possible to forecast whether we are looking at an unbridgeable gap: what is certain is that English case law, while containing some exaggeratedly novel elements, has provided evidence of a conceptual clarity and a level of intellectual sophistication which, it seems, will not be easy to adopt, especially within the legal environment of the United States and the countries most closely tied to it.[18]

The legal remedies offered by equity are also described in chapter 2. Even though they are obviously a typically English product, and cannot, therefore, be exported, an understanding of them is essential if one is to be able to grasp the institutional context of trusts as a whole. I conclude the

[17] The expression is taken from Lord Denning's opinion in *Eves v. Eves* (1975), 771.

[18] I must warn the reader that there are authoritative opinions which contrast radically with the one I have expressed in the text. I cite as a general example the unusually violent opinion of Jacobs, *Trusts*, p. 279: 'The recent English judicial effusions on this topic might display greater attraction if it were possible to know what they meant. But to peruse the English cases concerned . . . is to observe a wilderness of single instances, productive of no principle and indicative only of decay in legal technique.'

Gambaro, in *Proprietà*, pp. 633–4, is more radical still: 'L'insipienza giuridica dei giudici inglesi e la loro ignoranza verso le fondamentali categorie romanistiche . . .'; '[I giudici inglesi] hanno sempre ragionato con rozze categorie economicistiche.' It is noteworthy that Gambaro carries out his entire review of trusts without citing a single English judgment, except on one occasion, and then in passing. I am aware of no writing in which he has given reasons for his opinion.

chapter by considering the equitable foundation of constructive trusts, which is clearly of central significance to my theory – which considers the 'heart of the trust' to lie here – and by submitting a hypothesis for constructive and resulting trusts upon which I shall then attempt to build a unified theory of trusts.

A consideration of the issues which the civil lawyer customarily believes to be the *only* subjects belonging to the field of trusts, *viz.* the classic topics relating to expressly established trusts, either *inter vivos* or by will, are found in chapter 3. In analysing these classic topics we shall see how it has been possible to use venerable institutions to satisfy the needs of modern economies and societies, and how English case law has followed this practice and strengthened it. In conclusion, I illustrate the notions of 'entrusting' and 'segregation' on which the theory of trusts hinges, and show the difference between this and the notion of 'fiduciary relationship' in civil law.

In recent years, a growing number of common-law systems has promulgated comprehensive laws of trusts. I have decided to dedicate an entire chapter (the fourth) to them, both because, as I have already indicated, they are seldom discussed, and because these laws are new. At the end of chapter 4 I discuss those elements which come from English law and those which are peculiar to these laws, and sketch the international trust model, comparing it with the traditional English model.

In chapter 5, I shall present a panorama of non-common-law systems. These are sometimes referred to as 'importers' of the trust. Rarely have I come across such a brutal falsification of legal reality, which perpetuates itself thanks to second-, third- and fourth-hand references. Even the report on which the Hague Conference based the studies which led to the Convention on the Law Applicable to Trusts and on their Recognition is guilty of grave imprecision and misinformation. Subjects examined in the fifth chapter include neither 'trust-like devices' nor 'analogous institutions', to follow the language of the report, but rather civil-law trusts, which I identify by starting with the determination of 'minimum data' for comparison and verifying the cases where they may be found in civil-law systems. In other words, I will propose a comparative notion of the trust (on this occasion using the term in the singular).

It is doubtful whether it is possible to identify a trust model in the civil-law environment; it is certain, however, that the conceptual difficulties which non-common-law legislators have had to overcome have often been the same. We will, therefore, illustrate certain constants in these laws, from which lessons may be learned if a decision is taken to write an Italian

law on trusts (an event which I hope will not come to pass). The Scottish and South African laws of trusts are treated separately: they share both a notable interaction with the English model and a conceptual legacy from civil law (the latter more evident in South Africa). The combination of these two elements has produced institutions which are perfectly compatible with the English trust model, not, however, with the legislative enactments of the civil-law countries examined in the fifth chapter.

Chapter 6 is dedicated to the Hague Convention of 1 July 1985, and in particular to showing that it hinges on a notion of trust which has very little to do with the English (or, in the language of the Hague, Anglo-Saxon or 'Anglo-American') trust model, to the point that I speak of a 'shapeless trust', the consequences of which are pointed out. The 'trust' in the Hague Convention therefore corresponds neither to the 'trust' in the English model nor to a comparative notion of the trust: it must be seen as a specific product which finds its home only within the provisions of the Convention. I then illustrate how the system of the Convention leads to the recognition of trusts wherever and by whomever they are established, and consequently also in civil-law countries by citizens of those countries.

This latter aspect, on which the attention of the legal professions is currently being concentrated, forms the subject matter of chapter 7, in which I examine the profiles of the institution of 'internal' trusts, that is to say, of trusts which although regulated by foreign law are in every other aspect 'Italian'. I demonstrate the distinctive elements with relation to civil-law situations, and make some remarks on the tax aspect of trusts in Italy.[19]

I have entirely omitted including any texts in an appendix, because a complete collection of laws on trusts has recently been published:[20] the reader will find all the necessary sources there.

3. *Regulae*, knowledge of foreign law, comparisons

Never more than in the case of trusts has the principle that comparison can only be made at the level of *regulae* been truer. I use the term '*regula*' in the sense in which it was used in European common law of the High Middle Ages, and therefore as it is understood in modern common law ('rule'):[21]

[19] Only the first part of chapter seven has been translated.

[20] M. Lupoi, *Trust Laws of the World*, Rome, 1996. An updated edition has just been published.

[21] I have attempted to show that English common law is a continuation of European common law of the High Middle Ages in my book *The Origins of the European Legal Order,* Cambridge, 2000 (*Alle radici del mondo giuridico europeo*, Rome, 1994). This theory is inextricably linked with that which identifies a *caesura* in the eleventh and twelfth

that is, as a criterion of judgment which is unequivocally *suited to the determination of a real case*. It is not a principle, because it is not generic enough; it is not a decision in a case, because it is not specific enough; rather, it is a (difficult) balance between these two extremes. The defects and limitations of this definition will be obvious to everyone, but I am not able to propose any other.[22]

The second and third chapters are based on the *regulae*, and not, the reader should be warned, on cases. The difference affects the method of the exposition, principally in the relationship between the scholar and his sources; obviously, it affects the purpose of the exposition; and finally, it affects the reader, of whom I ask a dual effort. In addition, I shall deal somewhat off-handedly and implicitly with the comparative themes which arise constantly, and I ask the reader to note these on his own, following the exposition of the *regulae* with patience and not rushing in search of principles which will frequently not be found. In any event, the choice of terms employed to explain a *regula* of foreign law inevitably has a comparative undertone.

It is this undertone which requires the *regula* to be formulated in such a way as to be comprehensible to the civilian without appearing strange (or inaccurate) to the common-law reader. Second-rate comparative literature is instantly identifiable by the large number of foreign legal terms which it contains. This is not a question of taste, which it would be an indulgence to debate here, but, more simply, one of intellectual shortcomings. Of course, when writing for a non-English readership there are terms which cannot be translated (for example, 'equity', 'trust', 'trustee' – all terms to which this entire book is dedicated! – and 'common law'), and others where once the meaning has been explained it is more appropriate to continue using the original word (for example, 'mortgage', 'estate' and 'charitable trust'), but these are fairly infrequent cases, even in an area as technical and specific as trusts. In most cases, the failure to translate (in the etymological sense of the word) only sig-

centuries, when continental Europe began to take a new path. P. G. Monateri, *Il modello di civil law*, Turin, 1996, chapter 1, endorses this position, and offers appropriate clarifications; cf. G. Santini, 'Le radici della cultura giuridica europea', in [1996] Contr. e impr./Europa 43.

[22] Principles are not the same thing as *principia*, of which I have written at length in *Origins* (see above, footnote 21); the former belong to an analytical or conceptual explanation of a group of *regulae* which have a similar purpose, while the latter address the most important aspects and concerns of society, and therefore cut across the boundaries of different subjects.

For more details on the relationship between *regulae* and *principia* the study of Puerto Rican law, which has been Americanized by force, is very interesting; see L. Fiol Matta, 'Civil Law and Common Law in the Legal Method of Puerto Rico', in 40 AJCL (1992) 783.

nifies lack of knowledge, and, therefore, a lack of ability to explain.[23]

The 'importation' or 'reception' of the trust, which is frequently referred to in non-technical contexts, is the result of inaccurate translation (in addition to being erroneously based on a unified notion of 'trust'). Any civilian – not to speak of comparative-law scholars – would entertain possibly insurmountable doubts if it were suggested that one legal system had adopted by legislation a foreign institution which had its origins in and was developed by case law, especially if the sources and basic structures of the foreign legal system found no counterpart in the system which was adopting the institution. The developments in case law reviewed in the second and third chapters will clearly show how difficult it would be to 'import' the trust into legal systems which had gained no experience of it by belonging to the world of common law. What would be imported would, therefore, be a hybrid creation. This would not make it unworthy of citizenship, of course, but its certificate of citizenship would have to provide the appropriate morphological data.

The *regulae* may not be expressed without direct contact with the sources of the law, specifically case law (whatever formal importance may be attached to it), legislative enactment and practice. With regard to the former, it is sufficient to review the index of cases at the beginning of this volume to understand how I have tailored my studies. I was able to satisfy the dominance of case law fully only in the second and third chapters (concerning trusts in the traditional English model), while in the fourth and fifth chapters (concerning the international trust model and trusts in non-common-law systems, respectively) the large number of States under consideration, the newness of most of their legislation and the scarcity of relevant decisions made it impossible to be equally exhaustive. The reader will note, however, that I have been able to use a certain number of local precedents.

The reader may ask why there is no historical introduction. The reasons are threefold: in the first place, I described the history of the trust in a book I published in 1971, to which I shall make frequent reference. The second reason (and the only one which is of any methodological significance) is that I do not believe in historical introductions; they are often (perhaps of necessity) a kind of superstructure which leaves the reader unmoved, if not actually irritated. Besides, either a writer knows the history of his subject or he does not; if he does not, he can write all the historical sections he wants and will create only confusion; if he does, he will guide the reader through history as the need arises, and will from time to time offer him such

[23] Cf. R. Sacco, *Introduzione al diritto comparato* (4th edition), Turin, 1990, pp. 27–44.

information and views as may be appropriate.[24] In addition – and this is the third reason – I have realized that it is not necessary to give a historical explanation of the *regulae* based on general precepts of equity. There will be a few exceptions relating to the structural aspects of legal relationships and entitlements, and therefore for the most part where I present my unitary theory of trusts,[25] I shall furnish a historical explanation, within the limits of my ability, of certain basic *regulae;* otherwise, most *regulae* transcend the historical context. The precepts of equity belong to the universal.[26] It is more important to observe the systematic framework in which they occur, and thereafter to compare this framework, if it is appropriate to do so, with that of other legal systems. Here, if possible, one must evaluate the ability of systems which do not have a formal system of equity to embrace those precepts of equity which, because they belong to the universal, are probably present in all legal systems, but which, equally probably, may have been suppressed or violated.[27]

Indeed, when a *regula* is bred out of a principle of equity, it necessarily comes into contact with *regulae* which have a totally different origin, because they have their roots (in England) in the common law, and therefore in a different system of values. It is here, as we shall see, that one can appreciate the 'meaning' of equity in the present, rather than in clichéd discussions on Chancery case law and the assonance (for it is no more than that) with praetorian Roman jurisprudence which have become so trite over time that they now lack any cognitive capacity.[28]

[24] On the need to know the history of English law and its methods and reasoning, see, most recently, M. Graziadei, 'Il patto e il dolo', in P. Cendon (ed.), *Scritti in onore di Rodolfo Sacco*, Milan, 1994, I, pp. 589ff., at pp. 589–93 and references; other angles may be found in L. Moccia, 'Prospetto storico delle origini e degli atteggiamenti del moderno diritto comparato. (Per una teoria dell'ordinamento giuridico ''aperto'')', in [1996] Riv. trim. dir. proc. civ. 181. [25] Chapter 2 §5.c and chapter 3 §3.

[26] Cf. I. C. F. Spry, *The Principles of Equitable Remedies* (4th edition), Sidney, 1990, ch. 1.

[27] In the course of chapter 4, we shall consider a number of systems which, although they do not have a separate equity jurisdiction, apply principles derived from the case law of the English courts of equity (see, for example, the judgment from Jersey referred to in chapter 4 §1).

The Scottish experience, on the other hand, illustrates one aspect of the obstacles to the expansion of the *regulae* of equity, where they are rooted in technical notions and may not, therefore, easily be exported: see chapter 3 §3, with reference to the decision in *Sharp v. Thomson* (1995).

[28] As A. Watson, has clearly pointed out in 'Roman Law and English Law: Two Patterns of Development', in L. Moccia (ed.), *Il diritto privato europeo: problemi e prospettive*, Milan, 1993, 9ff., but see also G. Gorla, 'Studio storico–comparativo della ''common law'' e scienza del diritto (le forme di azione)', in [1962] Riv. trim. dir. proc. civ. 25, §8.

The positions of G. Pugliese, 'Ius honorarium a Roma ed equity nei sistemi di common law', in [1988] Riv. trim. dir. proc. civ. 1105 and P. Stein, 'I rapporti interni fra il diritto romano classico ed il common law inglese', in *Incontro con Giovanni Pugliese* (various authors), Milan, 1992, 59, are more traditional.