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Legal Transplants: the example of trust and fiduciary asset management contracts

1. Introduction

Ever since society's need for regulations first arose, legislators constantly had to analyse and further develop their current legal system to introduce new solutions, ready to tackle the obstacles of a rapidly changing society and economy. When faced with such a challenge, lawyers often take inspiration from the example of other states, where there is already a legal institution in place that could satisfy their own needs as well. This phenomenon of legal transplants has been a popular research topic of comparative law scholarship for a very long time. The goal of this essay is to take one of the newest and most debated institutions of Hungarian private law, fiduciary asset management contracts, and analyse it together with its „origins", in order to show an example of modern legal transplanting in practice. The paper will first, following a summary of the relevant scholarship, introduce the common law predecessor and source of inspiration for many forms of asset management across Europe, trusts, its far-reaching history, and how it developed into its modern state. From that point on, the reader will have a better understanding of what this institution can provide. Then will come the situation of Hungary: what made the legislator come to the decision to introduce an English, and thus, common-law concept to its otherwise civil-law-based system? We will take a look at what questions fiduciary asset management contracts gave answers to, and how the legislator tried to shape trusts into an acceptable form for our civil-law-based minds.

2. What are legal transplants and why are they useful

Even though this paper would like to be that of a more practical approach, it would be improper to just delve into the topic of trusts and fiduciary asset management without first giving a short explanation of the theoretical background of legal transplants.

Comparative law scholarship attributes the term "legal transplant" to Alan Watson[2], who described his theories in his landmark book, Legal Transplants: An Approach to Comparative Law [3], published in 1974. Watson believed that borrowing from a foreign source was easy, and as such, it was frequently used throughout history. For its success, no expert understanding of the original legal system, or its social or economic background was necessary, even if the law was from a much more developed or politically different system. [4]

His theories received tense criticism from his peers. Robert B. Seidman, for example, has argued that the work was a failure because it excluded the effect of social factors on law. Sir Otto Kahn-Freund, who was one of the most renowned "opponents" of Watson on this topic, gave a thorough and complex review of Legal Transplants. He also based his disagreements on the lack of attention the writer's theory pays to the social and political circumstances, claiming them to be quintessential. [5] He highlighted that it is not guaranteed that a transplant will be successful, and if all the relevant circumstances of the nature of the law are not considered,

[1] University of Szeged, Faculty of Law, law student.
[2] Alan Watson (1933 – 2018): Scottish scholar of legal history with particular expertise in Roman law, and a major contributor to comparative law as well, with his landmark work, Legal Transplants playing a major role in many theoretic discussions even today.
[3] ALAN WATSON: *Legal Transplants: An Approach to Comparative Law*. Scottish Academic Press 1974.
[4] JOHN W. CAIRNS: Watson, Walton, and the History of Legal Transplants. In: *Georgia Journal of International and Comparative Law*, 2013, spring. 638-640. pp.
[5] CAIRNS 2013, 642-649. pp.

there is a chance that new system may simply reject the new "organ". [6] Watson, as a response to Kahn-Freund, had reiterated his idea, and while he acknowledged that a deep understanding of the political and social circumstances of the system being borrowed from can be useful, he stated that a transplant can be successful even with no knowledge of the foreign law. It is important to clarify, however, that Watson's idea was never about fully copying the law of another country, but rather transplanting its central idea. [7]

During the mid-1990s, Pierre Legrand, building on the concept of legal cultures and the work of Bernhard Grossfeld, published even more critical papers on Watson's theories, stating that a legal transplant is impossible. According to him, the context is what gives meaning to the law, therefore if we transfer it to another country, it will never remain the same. [8]

I believe that neither of these scholars was wrong. As lawyers generally tend to say when they are asked whether something is true or not: it depends on the context. This annoyingly overused saying may also be applied to this situation. I especially like Eric Stain's thoughts on the topic. He calls Watson a legal historian, who, in his works, examines the topic from a macro-legal viewpoint, and thus pays attention to monumental movements of law in history, such as the reception of Roman law. On the other hand, according to Stain, Khan-Freund can be considered a lawyer-sociologist following a micro-legal scope, looking at the question in the context of modern law reform. [9] While Stain had expressed his thoughts way earlier than the publishing of Legrand's works, in my view, the latter can also be grouped in the same category as Khan-Freund.

For a developing state, who seeks to completely reform its legal system, Watson's statements seem to be more believable. The more you change, the less will remain from the previous structure, and so there will be fewer "obstacles" in the way of the transplant. Contrastingly, when the legislator aims to adopt one smaller instrument with the intention to fill a gap in its already developed and broad framework of laws, the success of it can be much more easily determined by the "body" where the new "organ" arrives to.

Watson, in a short paper published in 1995 *called From Legal Transplant to Legal Formants*[10], also mentions legal cultures. This work, in my opinion, symbolizes a small shift in his otherwise narrow mindset. Although he still maintains his position that the social background of a law does not matter in the context of legal borrowing, he slightly opens up and gives some room for legal cultures. In his viewpoint, however, legal culture means something different. He begins by stating that throughout history, there were always certain groups, such as Roman jurists, Middle Age English judges, or professors of continental law, etc., who were not, by right, lawmakers, but de facto they were still legislators instead of or together with their rulers or governments. While their role was not to make law, their opinions, theories, or decisions, when they became regarded as having authority by their fellows, were the ones that often became the law. Owing to their theoretical exclusion from legislature, and because of that, the tendency of instead seeking recognition through acceptance by their peers, they developed their own legal culture, one that became detached from society. Watson considers this culture essential, something that one has to be recognized in order to understand the parameters of legal debate, as it explains the legal reasoning and the willingness towards borrowing laws of each society. [11]

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[6] JAAKKO HUSA: Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law. In: *The Chinese Journal of Comparative Law*, 2018/6/2/. 135. p.
[7] HUSA 2018, 134. p.
[8] CAIRNS 2013, 680-681. pp.
[9] Ibid. 648. p.
[10] ALAN WATSON: From Legal Transplant to Legal Formants. In: *The American Journal of Comparative Law*, 1995/43/3.
[11] Ibid. 469. p.

Following his thesis, he brings up many examples to support his statements. In the context of this paper, I consider the part about the Twelve Tables the most useful, and for that reason, I would like to shortly introduce it. In this case, Watson argues, that contrary to popular belief, the Twelve Tables were not the embodiment of the victory of the plebeians, but rather it is the symbol of their defeat. According to Watson, this set of laws contains only what the patricians allowed to be written down, and no more. Among many other things, the rules stated that only the College of Pontiffs, which was in control of the patrician, can construe the Twelve Tables. This fact had set the course of roman legal culture on a determined track for centuries, and its impact is felt even today. One of its effects was that through interpretation, the pontiff, who was a priest, carried over elements of the sacred law into secular law. Religious law did not accept the argument that something should be reformed because another religion does it better. As a result, Roman law did not acknowledge any reasoning based on foreign law, and for that reason, comparative law did not appear in the work of roman jurists. Religious law also did not approve arguments based on morality, justice, or any general ideas, therefore it wasn't accepted in Roman law either, which is still true for the civil law of most western countries. This example of the Twelve Tables demonstrates very well, that the mindset of those making law can sometimes be just as, or even more important, than that of the society. It also shows how the choice of giving the right to interpretation to the College of Pontiffs, a decision made almost 2500 years ago, can have effects on modern law as well. [12]

This perfectly ties into a paper written by Jaakko Husa about the impact of path dependence on the successful borrowing of laws. Path dependence, similarly to legal transplanting, is a metaphor, meaning a "movement between one place and another and an idea of direction in which something moves".[13] In the context of law, this model can be used to help the development of law by providing an explanation on why reforms had failed in the past. It can highlight certain institutions, belief systems, and patterns of behaviour that had become one with a country's society, and thus need not be made light of when considering reform. For example, in the case of developing countries, certain reforms failed because of this very reason. [14]

When talking about path dependence and legal transplants, we again arrive at the important role of legal culture, in this case referring to a "system-specific manner in which values, practices, and legal institutions are integrated into the functioning of a legal system".[15] It is in this context that history matters: we can identify critical junctures, i.e. choices and events in the past, that got "locked in" and for that reason are exceptionally challenging to change. [16] We can distinguish critical junctures both in the distant past and in recent decades, thus we can talk about early and late path dependence. For the former, China is a good example where at a very early time, in the Imperial Age, law and morality started to be treated separately and remained separated ever since. For the latter, the case of Poland can be brought up. Poland had recently failed to adapt to the expectations of the EU regarding rule of law. According to Husa, this resistance is basically a resistance to the legal transplant of western ideas. Legal development in Poland was following the European mainstream up until the 1940s, when it forcibly and radically became part of socialist law. This point in history can also be identified as a critical juncture, in connection with Poland's attitude towards the rule of law in its legal culture. And while the dissolution of the Soviet Union happened more than 30 years ago, traces of the socialist legal mentality persisted and are even present today. In comparison to the EU's morally

[12] Ibid. 471-472. pp.
[13] HUSA 2018. 138. p.
[14] Ibid. 140-141. pp.
[15] Ibid. 141. p.
[16] Ibid. 141. p.

induced mindset, Poland views laws in a much more instrumentalist and positivistic way. [17] In my opinion these two examples perfectly describe what the model of path dependence can provide to the scholarship of legal transplants, and will be important later in this paper as well.

While this was an excessively brief summary of an otherwise broad scholarship, I believe it was enough to outline the basic arguments and provide the necessary theoretical grounds for this essay. With this said, it is time to move on and continue with the history and role of trusts in England.

3. Trust: History and current form

When talking about common law, in this case, English law, it is first important to be aware of its taxonomical differences compared to the system of civil law countries. English law operates with a different logic when it comes to regulation. Owing to the vital role precedents play in the system, there is no uniformly codified body of law, and the dividing line between different legal instruments may not be as sharp as in civil law. The approach towards property is not as unified as it is in Hungary, rather it is characterized and viewed through its individual components, the right to use, the right to harvest, and the right of disposal. [18]

In the Middle Ages, there was no property at all in an absolute sense, since everything belonged to the ruler, while the right of possession was distributed amongst fiefs through the feudal framework. In these times, the right to devolution was limited as well in many aspects, as estates could not be transferred freely either inter vivos, or post mortem. Even the fullest version of rights related to the estates (fee simple) did not allow for a transfer of ownership, only some rights or aspects of it, and the lands would always flow back into the hands of the fee simple holder. [19]

The demand to be able to convey property to another person, either through a will or between the living, without any restriction, arose stronger and stronger. [20] It is notable that this tendency was prevalent not just in England, but everywhere in history where the positive law put too much restraint on the devolution of property. [21] Eventually, the *use* appeared, which satisfied both of these needs, as well as eased the burdens of holding the legal title to the land, such as the payment of relief. Through this institution's most common version, the owner (the feoffor) entrusted the lands to a person who was to hold the property (the feoffee to uses) for the benefit of others or the feoffor themselves (the beneficiary or cestui que use). [22] Other forms of the use could also satisfy temporary purposes[23], e.g. a way for crusader knights to leave their lands in trustworthy hands and for the benefit of their family. [24]

It is important to note that upon their appearance, claims connected to issues around uses could not be enforced in any way, as there was no writ available for this purpose. [25] Common law courts only recognized the rights of the holder of the legal title, since providing a remedy to another party would've meant the encouragement of evading feudal obligations. As a result, up until the Court of Chancery took the institution under its wings, the use was no more than

[17] Ibid. 142-148. pp.
[18] SÁNDOR ISTVÁN: *A bizalmi vagyonkezelés és a trust*. HVG-ORAC Lap- és Könyvkiadó Kft., 2014. 48. p.
[19] Ibid. 49-52. pp.
[20] Ibid. 53. p.
[21] AVINI, AVISHEH: The Origins of the Modem English Trust Revisited. In: *Tulane Law Review* 1995-1996/70/4. 1141. p.
[22] Ibid. 1143-1144. pp.
[23] Ibid. 1143. p
[24] SÁNDOR 2014. 53. p.
[25] AVISHEH 1996, 1145. p

an honorary obligation. From the last years of the 14th century, the procedure of equity courts had given room for discovering and remedying the damages suffered by the beneficiary. [26]

However, since the use offered, amongst many other illegal applications, a way to escape feudal obligations[27], i.e. the payment of the above-mentioned relief, as well as a way to evade creditors[28], it proved highly damaging for the feudal system. In 1535, when he himself was facing serious financial issues[29], King Henry VIII approached the English Parliament with plans to solve the problem of uses. The result of this was the enactment of the Statute of Uses[30], aiming to turn all uses into legal estates[31]. The reception of the new regulations was so severe, that as a form of compromise, the Statute of Wills was enacted in 1540, which made the common law more flexible, leading to less demand for the utilization of use. Also, while the Statutes limited uses in most cases, some forms of the institution slipped through the net of the new regulations, from which the trusts we know today were created. [32]

This process, namely society finding a way to satisfy its needs, which are unprovided by the legal structure, through turning to the use (and later the trust), the state reacting to the issue with new pieces of legislation, followed by the institution's receding into the background, and sooner-or-later, when there is a new need arising, its reappearance is what I consider the most important aspect and historic value of uses and trusts. This tendency is what made trusts a still prominent and indispensable institution in English law.

From the Tudor era, the opportunity of opening joint stock companies appeared, followed by other options offered by the Industrial Revolution. Shortly before, but especially after the South Sea Bubble (1720), establishing joint-stock companies became very difficult. In these times trusts once again proved valuable, as working under a trust was not subject to registration or achieving a legal personality. After the South Sea Company and other great companies had lost their privileges, the empty space left by them had been filled in by unincorporated companies, such as deed settlement companies, which were essentially based on trusts. A few decades later, the free establishment of joint-stock companies was once again allowed. This decreased the popularity of trusts but also resulted in their change and development. Soon after, when society once again lost its conviction towards joint-stock companies, unit trusts have become their alternative. This form of the institution came with its serious professionalization, as the trustees, often specialized companies, have developed into handlers of investments. This was followed by a serious expansion in its regulation, owing to the work of the Chancery. [33]

Both the purpose and the subject of trusts have substantially changed with the times. In the past, it was a way of circumventing the feudal limits on property, a way of creating unincorporated companies, a form of providing separate property for women or was used for illegal activities. Through equity, it became a dominant institution in today's capitalist world. Long ago, its subjects were the conservation and management of certain types of property, nowadays its goal is to increase the value of the assets. [34]

4. Why the Hungarian legislator had chosen to "transplant" trusts in the form of fiduciary asset management?

[26] SMITH, DAVID T.: The Statute of Uses: A Look at Its Historical Evolution and Demise. In. *Case Western Reserve Law Review*. 1996/18/1. 47. p.
[27] SÁNDOR 2014 53. p.
[28] AVISHEH 1996, 1146. p
[29] SMITH 1996, 47. p.
[30] Ibid. 50. p.
[31] AVISHEH 1996, 1146. p
[32] SÁNDOR 2014, 67. p.
[33] SÁNDOR 2014, 70-73. pp.
[34] Ibid. 112. p.

The Hungarian jurisprudence had not dealt much with the definitions of asset management before the appearance of fiduciary asset management. One of the reasons for this could've been, that it was not even ready to do so, as the domestic civil law had not developed the need for a structure that could completely and independently control the wealth of another. There's however a much more self-explanatory cause for the lack of scholarship on the topic. Since fiduciary asset management is the most complete and basic form of asset management, without its existence, it wouldn't have made much sense to delve deeply into the topic at all. [35]

The Ministerial Statement of Reasons (hereinafter referred to as Statement) regarding Book Six Chapter XLIII on Fiduciary Asset Management Contracts of Act V of 2013 on the Civil Code mentions, that providing forms to diversify legal ownership and management of assets is a basic requirement of today's economy. It proclaims, that this new institution has no roots or traditions in Hungarian Civil Law and that it was created based, mainly, on the English trust. [36]

According to the Statement, the legislator, by introducing this new institution, was aiming to satisfy a significant economic demand, which up to that point has only been provided for by foreign institutional infrastructure, draining capital from the Hungarian economy. At the time the new Civil Code entered into force, different forms of trusts were already present in many neighbouring countries, such as the Czech Republic, Poland, and Romania. [37]

Other than the international pressure, many domestic reasons for the introduction of fiduciary asset management contracts can be mentioned as well, of which, without wishing to be exhaustive, I would like to mention a few hereunder.

Following the change of regime in 1989, many family businesses have accumulated serious wealth, the intergenerational transmission of which had not been adequately ensured by inheritance law. [38] Many of those who had built a successful company 30 years ago are now reaching retirement age. A major part of these large companies is the group of first-generation companies. They are unprepared and have no experience in intergenerational transmission. They lack the proper management and structural processes for a transfer. Finally, they are also very vulnerable to the ever-changing factors and fast-paced tendencies of today's economy. [39] 80% of Hungarian family businesses fail at transmissions. [40] By turning to fiduciary asset management contracts, thanks to its flexibility, the principal can help the survival of the business in many cases, e.g. through planning a special asset expenditure framework bound by unique conditions, such as to whom, when, and for what reason can a portion or the whole of the assets can be given. [41]

If the goal is the separation of property, fiduciary asset management contracts can many times offer a better alternative than creating a company or a foundation, owing to the fact that they are less formalized and thus provide freer decision-making for the fiduciary. [42] This institution is flexible and well-regulated and offers a wide range of applications for different business purposes, as well as a necessary trustworthiness towards its usage. As an example,

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[35] B. SZABÓ GÁBOR, ILLÉS ISTVÁN, KOLOZS BOGLÁRKA, MENYHEI ÁKOS, SÁNDOR ISTVÁN: *A bizalmi vagyonkezelés*. HVG-ORAC Lap- és Könyvkiadó Kft, 2014. 26-27. pp.

[36] The version of the Ministerial Statement of Reasons used in this paper was the one available at https://uj.jogtar.hu/. (letölve: 2022.12.20.)

[37] B. SZABÓ, ILLÉS, KOLOZS, MENYHEI, SÁNDOR 2014, 55-56. p.

[38] Ibid. 55-56. p.

[39] LUKÁCS JÁNOS, HAJDU TIBOR ZOLTÁN*:* A bizalmi vagyonkezelés és a családi vállalkozások jövője. In: Budapest, Corvinus Egyetem Számvitel Tanszék (szerk.): *Fókuszban a változás avagy nemzetközi trendek a pénzügyi és a számviteli oktatásban és kutatásban : V. Bosnyák János emlékkonferencia és más kutatási eredmények.* Budapesti Corvinus Egyetem, Budapest 2021.. 220-221. pp.

[40] Lukács, Hajdu 2021, 230. p

[41] B. SZABÓ, ILLÉS, KOLOZS, MENYHEI, SÁNDOR 2014, 61-64. p.

[42] BODZÁSI BALÁZS: A bizalmi vagyonkezeléshez kapcsolódó egyes magánjogi kérdések. In: Bodzási Balázs (szerk.): *A gazdasági jog és az adójog aktuális kérdései 2018-ban*. *Gazdasági jogi kutatások a Budapesti Corvinus Egyetemen*. Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2018.

fiduciary asset management contracts can be used as a form of "quasi representation", or as a safer framework to avoid the risks of joint ventures. [43]

Last but not least, I would like to mention the more social side of the institution, as it has many uses in that field as well. Fiduciary asset management can be an alternative to foundations in the field of handling charity donations. [44] It can be also an option to provide a dual, second form of protection of the assets of people under conservatorship or guardianship, or complement advocated decision-making and prior legal statements. [45]

In my opinion, this merely exemplificative list of possible uses shows the value of trusts for the Hungarian system. Thanks to its simplicity, and also its main idea, i.e. the way it handles the question of ownership, it can satisfy many already existing interests in a new or a better way. It is important to realize, however, that trust is an institution of common law, therefore its transplantation to a civil law country inevitably requires a careful approach and possible changes. In the next chapter, I will shortly focus on the difficulty of transplanting trusts, and how it was executed in the case of Hungary.

5. The difference between Hungarian fiduciary asset management contracts and trusts

5.1. Attitudes towards the transplantation of trusts

As it was mentioned above, trusts had already appeared in many European countries, through different levels of transplantation. All these states are part of the civil law family, which means that they had to find a proper approach to the common law characteristics of trusts. The concept of property in these countries is rooted in the principles of Roman law. In Roman law, property is an indivisible, absolute, in rem right, meaning that there can be only one right of ownership over one piece of property. After the abolition of the feudal system in Europe and the appearance of codified civil law (Code Civil), the bases of the modern structure of in rem rights were built on the doctrines of Roman law. [46] On the other hand, common law in England, to this day, kept some of its feudal roots. Legal principles or precedents that are hundreds of years old can still be invoked in court today. [47]

In the relevant scholarship, there have been discussions for decades about the transportability of trusts. There are many standpoints questioning not just the possibility of such an act, but whether they are needed at all in civil law countries. The noticeable differences deriving from the history of each legal system are considered by many too harsh to allow the movement of trusts to Europe. In contrast to this, other authors believe that the specifically English characteristics of trusts are either not essential to the institution, or they can be replaced by civil law instruments which more or less serve the same purpose.

In the 1930s when the socialist ideology appeared across Europe, the introduction of trusts just did not fit the political picture. The needs which were satisfied through trusts in England were instead supplied with the introduction of limited liability companies. [48] Looking back to our theoretical opening, this fact could be identified as a quasi-critical juncture or at least a major milestone in the legal culture of European countries. There are still viewpoints that suggest that the current institutions of civil law perfectly supplant trusts, therefore there's no

[43] B. SZABÓ, ILLÉS, KOLOZS, MENYHEI, SÁNDOR 2014, 70-73. pp.
[44] Ibid. 80. pp.
[45] FARKAS JÁCINT, NAGY ERZSÉBET GYÖRGYI: A társadalmi akadálymentesítés. Az akadálymentesség teljesebbé válásának egyik lehetséges útja a bizalmi vagyonkezelés alkalmazásával. In: *Jogelméleti Szemle* 2020/4. 6, 14-16. pp.
[46] SÁNDOR 2014, 179-184. pp.
[47] Ibid. 2014, 188. p.
[48] Ibid. 2014, 191. p.

need for the latter. [49] In my opinion, if we only look at the few examples above regarding the improvements that trusts could bring to Hungarian law, we can confidently state that in the case of our country, this is certainly not true. At this point, it might also be useful to consider the approach of Lupoi. He raises the important point that as different civil law countries do not think the same way about trusts, it might be wrong to generalize and group them in the same category when talking about this topic. [50]

Others think that the reason why trusts are not transferable to civil law is the difference between concepts of ownership or the inflexibility of our legal family. [51] Banakas believes, that there are three aspects of the institution, which prevent its existence on the continent. These are the numerus clausus of in rem rights, the publicity of in rem rights, and finally, the unity of ownership, meaning that there can be only one ownership right (although divisible), that is also unlimited in time. [52]

According to Bolgár, however, it is a mistake to say that civil law has always been inherently different from common law, and never accepted a concept similar in its principle to the dual ownership of trusts. She reasons, that there were several institutions in Roman law that strongly resembled this aspect of their later English counterpart. These similarities not only did not disappear throughout the Middle Ages but were only stopped by the Code Civil. To prove this statement, she brings up the case of countries that were not affected by the Code Napoleon. These states, such as Scotland or South Africa, have easily introduced trusts in their legal systems. [53] In the case of publicity and the numerous clausus of in rem rights, she establishes well-built reasoning on why they do not form a real obstacle in front of trusts, and that they can actually be "used" in a way to support a trust-like institution. [54] Finally, she also discusses institutions in the German and French law of her time, which were very similar to trusts functionally, and often more complex in how they tried to achieve the same results. [55]

Thus, at the end of her paper, she deems the aforementioned three reasons against adaptation factitious, hiding underlying attitudes that are against trusts. Examples of these viewpoints are an adherence to traditions and an aversion towards an alien institution. With regard to how these divergent perspectives on trusts and property appeared in the two legal families, she identifies two reasons. First, a jurisdictional difference. In England, the Court of Chancery often developed the legal system in the name of equity, and as a result, created a duality in the structure of law. As equity norms supplemented law in the general sense, so did the second, equitable form of ownership in the concrete case of property. On the other hand, continental jurists, who never experienced such a phenomenon in their respective legal systems, can only accept the strict and unitary framework of their civil codes, which sharply distinguishes in rem and in personam rights from each other. As a second reason, she mentions the different ideological approaches of the two legal families. On the continent, after the abolition of the feudal system and its complicated attitude towards property, the resulting hole was filled in by the norms of the Code Civil. It introduced the concept of absolute ownership, both simple and appealing to society, as it embodied individual liberty. This way of viewing property became equated with power, "symbolizing the increasingly mythical fiction of control, exclusive, unlimited, and inviolable". On the other hand, in England, such a step was not needed to "preserve civil liberty". [56]

[49] Ibid. 2014, 192. p.
[50] MAURIZIO LUPOI: The Civil Law Trust. In: *Vanderbilt Journal of Transnational Law* 1999/32/4. 969. p.
[51] SÁNDOR 2014, 191. p.
[52] Ibid. 2014, 192-193. p.
[53] VERA BOLGÁR: Why No Trusts in the Civil Law? In: *The American Journal of Comparative Law*, 1953/2/2, 204-208. pp.
[54] Ibid. 212-214. pp.
[55] Ibid. 215 – 217. pp.
[56] Ibid. 217-219. pp.

Bolgár had published her paper way before Watson shared his ideas about legal transplants, and also before the concept of legal cultures appeared in the discussion of this topic. However, in my opinion, the arguments of her analysis are important, as they prove that the differences between the English trusts and their versions in civil law, even today, may stem from fundamentally divergent views in the legal culture of the two legal families. It can be noticed while looking at our topic through the scope of her work, that all the theories mentioned at the beginning of this paper are more or less present in her reasoning. We could use the path dependence theory to explain the differences in the development of the two concepts of property, and it would make perfect sense. We could also see how Watson's ideas about the importance of the legal culture of the legislator played a role here and that it continues to play one even nowadays. Taking a look at the development of law in England, and the strictly dogmatic system of codified civil law on the continent, we could easily see that one of the reasons why attitudes against trusts persisted is the different approaches the legislators in the two systems took to satisfy the same need of their respective society.

Bolgár never said that our system is so similar, that we can just copy-paste trusts into our legal structure and it would work. She instead tried to analyse the existing institutions and norms in a way that justifies that we are already close to, and indeed were never far away from, having something very similar to trusts in our legal systems. We just fail to notice it because of our preconceptions.

There are many scholars who instead of rejecting the idea, were working on a way to transplant the institution, as they believed it to be one of the reasons for the economic success of Anglo-Saxon countries. [57] Some are of the opinion that if the legal background of the separation of assets is well-developed, it is enough if the beneficiary only has a contractual right towards the trustee. In short, these writers believe in the creation of a functionally similar, civil law version of trusts. [58] Looking back at our analysis of Bolgár's work, making this happen might be much easier than one would believe.

While there are many further standpoints or ideas that could be examined, I believe the main arguments of the two sides can be perfectly understood from these examples. The fact that there are already European countries who introduced trust-like structures in their legal systems shows, that it is possible for civil law jurists to touch the institution. As it was mentioned above, when transplanting, it is quintessential for legislators to pay attention to the legal culture of the system from which an institution is from. The same is true for their own country. The rules of equity and common law certainly created a framework of law that is nearly impossible to be fully replicated in Europe. However, I highly agree with the last opinion mentioned above. Even if it is true that in the strict sense of the word, a transplant is not possible, that does not also mean that a functionally similar version cannot be used as an important tool for European states, in our case, for Hungary.

5.2. The Hungarian version of trusts: fiduciary asset management contracts

According to John Minor Wisdom, there are three ways trusts could be transplanted into civil law systems. The first is a revision and extension of our roman law institutions to create a similar legal tool, the second is to introduce the regulations of trusts in a compatible way with our civil law norms, and the last is an open transplant of trusts together with all of its rules. [59] With fiduciary asset management contracts, Hungary created something which could be categorized as one following the second method. Fiduciary asset management is a new institution, regulated in a way that there can be long debates about the scope of some of its

[57] SÁNDOR 2014, 194. p.
[58] Ibid. 2014, 197. p.
[59] Ibid. 2014, 195. p.

aspects. While trying to preserve its common law characteristics, the legislator also paid attention to shaping the rules of trusts in a way that enables them to fit in the Hungarian system.

Naturally, a comprehensive comparison between trust and its Hungarian counterpart would take hundreds of pages. The goal of this paper is not to give an in-depth analysis of this question, but rather to provide a short summary of the theory and practice of legal transplants through the example of fiduciary asset management contracts. Keeping this in mind, I instead would like to take a narrower path and focus on only one aspect of the institution, which is the nature of the rights of the beneficiary toward the managed assets. It is undoubtedly one of, if not the most important questions we have to look at when we want to compare the regulations of any legal system's version of trust to the original.

Starting from a taxonomic point of view and looking at the placement of the fiduciary asset management contracts in Act V of 2013 on the Civil Code (hereinafter referred to as Ptk), we could already jump to some conclusions regarding the approach of the legislator. Fiduciary asset management contracts are placed under Title XVI about Engagement-Type Contracts in Book Six on the Law of Obligations. According to the Ministerial Statement of Reasons, the object of the legislator was to use the example of trusts and adopt its advantageous features to the characteristics of the Hungarian system. The newly created form of asset management is therefore based on a transfer of property. The principal conveys the ownership of the assets to the fiduciary, who has to manage them on the beneficiary's behalf. The structure created to accommodate the relationship between the parties is contractual. According to the statement of reasons, the dynamics of this institution resemble engagement-type contracts the most, hence the placement of this new contract type. Together with the mandatory rules of the Ptk, the provisions the parties include in their agreement are the ones that provide protection for the interests of the beneficiary. It is important to notice, however, that there is a bit more happening here than a simple contractual relationship.

Section 6:310 (1) of the Ptk expressly states that ownership of the assets is transferred by the principal to the fiduciary. With this, "one part" of the dual ownership of English trusts is undoubtedly present. Nonetheless, when we start to look for a similar, in rem right on the side of the beneficiary, unsurprisingly, we come to no avail. Section 6:318 (3) stipulates, that if the fiduciary breaks its contractual obligations, and "unlawfully transfers any part of the assets he manages to a third party, the principal and the beneficiary shall have the right to recover such asset and to have it reinstated among the managed assets". However, they can only practice this right "if the third party did not act in good faith or there was no pecuniary interest". From this provision, it would seem clear that the right of vindication of the beneficiary is only of contractual nature. [60] They cannot claim the assets for themselves, only to have them returned to the managed assets. At first glance, there is an agreement regarding this question in the relevant scholarship. [61] [62]

Taking another look at the beneficiary's situation, there are authors, who call their rights in-rem-like. [63][64] The right of the beneficiary (and the principal) to recover the assets based on Section 6:318 (3), according to B. Szabó et al., steps out of the boundaries of contractual law[65]. Sándor states, that this right in Hungarian law is exceptional compared to the legislation of other countries that have adopted trusts in their legal systems. He calls it a special adoption of the

[60] BORBÉLY ZOLTÁN: A magyar bizalmi vagyonkezelés és vagyonkezelő alapítvány megítélése a kedvezményezetti jogok érvényesülésének fényében. In: *Állam- és Jogtudomány* 2021/3. 39.p.
[61] Ibid. 2021, 40.p.
[62] MICZÁN PÉTER: A bizalmi vagyonkezelés megsértésével szerzett előny elvonásáról. In: *THEMIS* 2014/december. 257-258. pp.
[63] SÁNDOR ISTVÁN: A magyar bizalmi vagyonkezelés egyes külföldi országok szabályozásainak tükrében. In: *PRO PUBLICO BONO – Magyar Közigazgatás*, 2019/2. 77. pp.
[64] BODZÁSI, 2018. 29. p.
[65] B. SZABÓ, ILLÉS, KOLOZS, MENYHEI, SÁNDOR, 2014, 237. p.

right of tracing in English law, which, according to him, is one of the most important characteristics of trusts. He raises the idea, that through this right the beneficiary has in rem rights towards the fiduciary. [66] It is, however, not completely similar to the English tracing. For example, if the trustee or somebody else mixes an asset managed under the trust with his own assets, that creates a claim for the beneficiary on the whole of their assets up to the value of what has been lost. Since such a provision cannot be found in the Ptk, according to B. Szabó et al., it is up to the court practice to develop the boundaries of this right. [67] Unfortunately, ever since the publication of their work, there had been no relevant high-court decisions published on the topic.

6. Conclusion

With all this in mind, we could just close our paper, and say that the "second part" of the dual ownership is missing. The legal transplant of trusts into the Hungarian system was not successful, since even in this one analysed aspect, fiduciary asset management contracts are different compared to trusts. Yet, if we remember the ideas of the supporters mentioned above, one proposal can come to our mind in this situation. What if, instead of trying to force the completely alien characteristics of the English trust on ourselves, we try to create a functionally similar institution, that is as close to the original as possible? According to my opinion, the Hungarian legislator is on the right track to do just that. Should we consider it a problem, that it will probably never be the same? Definitely not. We only took a look at one of the aspects of fiduciary asset management contracts, and we already noticed that there is a place for debate, a room to grow. Over time, fiduciary asset management contracts will surely gain a more crystallized place in the Hungarian legal system, but we have to be patient. Institutions like this are always shaped by the ever-changing currents of economic life.

In 2021, there were only 9 fiduciaries practicing fiduciary asset management as a businesslike economic activity in the Hungarian National Bank's register of companies, out of which only 5 were active. [68] This number, the current state of family businesses in Hungary, and their unreadiness for a generational transfer shows, that fiduciary asset management is currently not that popular. But if we look at the fact that the change of regime in 1989 happened not so long ago, this shouldn't be a surprise. Looking back to our theoretical introduction, we could draw many conclusions from this situation.

Firstly, in the Hungarian legal culture, the effects of the socialist era might still be present. We could identify this fact as a critical juncture. Ever since then, there's simply not been enough time for a modern and welcoming economic culture to develop. While this is a brave statement that would require a whole new research to prove, it is an interesting idea to ponder about. Secondly, Watson may have been right in a sense. He may have been right about the importance of the legal culture of the legislator and scholars. Looking at their popularity, we may conclude, that it was not only the economy's need for a solution to their problems that played a role in the transplantation of trusts. International tendencies, the long and broad scholarship on the topic, and the observations of the legislator all had an important part.

Lastly, there is something that we not may or might, but can and should conclude. With fiduciary asset management contracts, we cannot see a full legal transplant in the strict meaning of the phrase. Instead, we have its functional sibling. What I hoped to achieve with this paper was that in the end, the reader would see the clear pattern. There was an identifiable need in Hungary for a stronger tool in asset management, the legislator looked at the most internationally popular solution to the problem, and tried to make it into an institution of our

[66] SÁNDOR 2019 78. p.
[67] B. SZABÓ, ILLÉS, KOLOZS, MENYHEI, SÁNDOR 2014, 237. p.
[68] LUKÁCS, HAJDU 2021, 224. p.

own. If somebody starts to conduct deeper research into the topic, they could see that trusts and fiduciary asset management contracts are not so different after all. I believe that the Hungarian legislator has taken the right steps with this institution, and I am curious to see its future in the upcoming years.

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