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Speaking the same language: de invoering van de Anglo-Amerikaanse trust in het Nederlandse recht

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Summary

SPEAKING THE SAME LANGUAGE

The introduction of the Anglo-American trust into the Dutch legal system

This study involves an account of the trust under Anglo-American and Curaçaoan law and the possibilities of introducing the trust into the Dutch legal system.

The following summarises the substantive chapters of this thesis.

Chapter 2

Chapter 2 sets out the trust under Anglo-American law, covering in detail the history and the operation of the trust, in particular the 'private express' trust and the so-called 'powers' under Anglo-American law.

The concept of trusts has developed under Anglo-American law and has its origin in medieval English real property law. Today, trusts are one of the most widely applied devices. It is commonly used as a valuable device in corporate, finance and estate planning practices.

Trusts can be used for different purposes. It is therefore difficult to give a neat definition of the trust. In general, the trust could be best described as follows:

1. a proprietary relationship that is constituted such that a fiduciary relationship arises by operation of law by virtue of:
 - a. statute;
 - b. an expressed intention of the 'trustor' or 'settlor';
 - c. the jurisdiction of the court; or
 - d. inferring certain specific circumstances or behaviours;
2. involving the ownership of one or more assets, the so-called 'trust fund';
3. administered by the trustee based on the imposition of an equitable obligation;
4. for the benefit of either a beneficiary or for a specific purpose; and
5. the beneficiary or the person capable of enforcing the trust could exercise rights and have remedies to his disposal against the trustee or a third party in relation to the 'trust fund'.

A trust can be created under different circumstances. As such, trusts could be established by the intention of a settlor (*express trusts*), by statute (*statutory trusts*), or by a wide variety of circumstances or behaviours (*resulting and constructive trusts*).

The most common trust category is the 'private express' trust. The 'private express' trust comes into existence by the settlor – who is the absolute owner of the trust property – either by transferring the legal title of the trust property to another person who is to be the trustee (*transfer in trust*) or by declaring himself to be trustee of the property (*declaration of trust*). The creation of the trust results in the imposition of equitable obligations for the trustee and the duty to administer the trust property for the beneficiaries or for a purpose. After the trust is established, the trustee in his capacity as trustee is the absolute owner of the trust property and the settlor is in principle no longer involved in the trust in his capacity as settlor.

The 'private express' trust can be created at two separate occasions. It can be created during the life of the settlor (*inter vivos trust*), or by disposition of the testator's will (*testamentary trust*). Beneficiaries may have proprietary claims against the trust fund (*fixed trust*) or have a bare expectation until the trustee exercises his discretion (*discretionary trust*). The moment the trust assets are entrusted to the trustee, a *proprietary* trust relationship arises by operation of law and thus also creates a fiduciary relationship between the trustee and a (potential) beneficiary from which various rights, powers and obligations arise. In this context, the trustee acquires a 'legal interest' that relates to his duties and powers regarding the trust property, which implies that he can perform acts that are reserved for the owner of an asset. The beneficiary on the other hand acquires an 'equitable interest', which refers to the beneficiary's right within the trust law to oblige the trustee – who acts as the rightful owner of the trust property – to exercise the rights he has acquired in order to manage the trust fund, in accordance with the duties or obligations arising from the trust law and the terms of the trust deed.

In addition to the creation of the 'private express' trust, trusts can also be established for charitable purposes (*charitable trusts*). Although both the 'private express' trust and the 'charitable' trust fall into the category of 'express trust' and have many similarities, the 'charitable' trust – unlike the 'private express' trust – has no beneficiaries and is public in nature.

Finally, the so-called 'powers', which are fundamental to the Anglo-American trust law (and constitute a very underexposed topic in the Dutch legal literature), play an important role in the creation of the trust. Powers in trust law can be described as granted discretionary powers that extend to acts of management and disposition in respect of the trust assets. Like the trust, powers can be divided into various categories. These include discretionary powers granted to perform acts of management with respect to the trust assets (*administrative powers*) or discretionary powers granted in order to perform acts of disposition (*dispositive powers*). The most common 'dispositive' power

is the so-called 'power of appointment', whereby the transferee obtains a discretionary power to appoint persons who become beneficiaries of an asset to which the power relates. The 'discretionary' trust under Anglo-American law is an example of a combination of an 'express' trust with a special 'power of appointment', where the trustee is granted a discretionary power to designate beneficiaries chosen from a group of potential beneficiaries compiled by the settlor.

Chapter 3

Chapter 3 reviews the trust under Curaçaoan law, first setting out the background of the constitutional structure within the Dutch Kingdom and Curaçaoan civil law in general. It then discusses the operation of the Curaçaoan trust and the fundamental problems currently impeding it.

Curaçao is the first country within the Dutch Kingdom to introduce the trust (under the Landsverordening Trust) in its Civil Code (Title 3.6 BWC) as of 1 January 2012. Curaçaoan trust law is based in principle on Anglo-American law and is partly inspired by the Hague Trust Convention and the 'European Principles of Trust Law'.

Like the Anglo-American trust, the Curaçaoan trust has many applications in practice. For the definition of the trust in Curaçaoan law, the Curaçaoan legislator has followed Article 2 of the Hague Trust Convention and describes the trust as:

"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."

Unlike the Anglo-American trust, the Curaçaoan legislator have only chosen for the introduction of the 'express' trust. The reason for this is that – unlike the other trust categories in Anglo-American law – the 'express' trust is better suited to a continental legal system.

Under Curaçaoan trust law, the trust may be constituted for the benefit of a number of (potential) beneficiaries, or for a specific purpose. Like the Anglo-American trust, the trust is constituted by the settlor – who under Curaçaoan trust law is also the absolute owner of the trust property – either by transferring the legal title of the trust property to another person who is to be the trustee (*transfer in trust*) or by declaring himself to be trustee of the property (*declaration of trust*).

Under Curaçaoan law, trusts can also be established at two separate occasions. It can be created during the life of the settlor (*inter vivos trust*), or by disposition of the testator's will (*testamentary trust*). Beneficiaries may immediately upon creation of the trust have proprietary claims against the trust

fund (*fixed trust*) or have a bare expectation and therefore no fixed share in the trust fund (*discretionary trust*).

Upon the valid creation of the Curaçaoan trust – as in Anglo-American law – a *proprietary* trust relationship arises by operation of law and thus also creates a fiduciary relationship between the trustee and the (potential) beneficiary from which various rights, powers and obligations arise. As a result of the creation of the trust, the (potential) beneficiary acquires a bundle of rights and legal claims vis-à-vis the trust fund on the basis of which they can ensure that the trustee performs the duties and obligations he has acquired from the trust deed and which arise under Curaçaoan trust law.

Furthermore, the legislature has introduced the role of protector into the Curaçaoan trust law. The protector's role is to supervise the trustee(s) in the management of the trust. Under the Curaçaoan trust law, the protector may not also hold the position of trustee.

An important element of Curaçaoan trust law involves the possibility given by law to the settlor to grant various powers to himself, a trustee, beneficiary or a third party in the administration of the trust. This can be done under the law or pursuant to the provisions of the trust deed. Examples include the power to amend the trust deed, the power to appoint a beneficiary or the power to appoint, suspend, replace or dismiss a trustee or a protector.

The Curaçaoan legislature was progressive in introducing the trust into the Curaçaoan legal system. However, there are currently many bottlenecks in the current Curaçaoan trust legislation with the result that the operation of the Curaçaoan trust and its application in legal practice are hampered. These include qualification problems based on the current definition of the Curaçaoan trust, the absence of a legal basis for the declaration of trust, the lack of provisions in the law of succession regarding the testamentary trust and possible disadvantage to creditors if an enterprise or share in a partnership is placed in a trust. There are also currently a number of shortcomings regarding the beneficiary's or protector's proprietary claim in the event of a breach of trust, the lack of protection of successive bona fide purchasers in the event of a 'breach of trust', as well as shortcomings in the disclosure of the trustee's power of disposition. To date, the aforementioned deficiencies preventing the optimal functioning of the Curaçaoan trust – including also other deficiencies discussed in detail further in Chapter 3 – have not been remedied by the Curaçaoan legislature.

Chapter 4

The first part of Chapter 4 presents and reviews the discussions about the Curaçaoan trust that have taken place in the Curaçaoan legal literature as well as the views of various authors on this topic. These views are then scrutinised and contrasted with my own.

Given the fact that the Curaçaoan legislator has not improved or revised the current shortcomings to date, the second part of chapter 4 presents a number of practical solutions to improve the operation of the Curaçaoan trust in legal practice.

Chapter 5

Chapter 5 discusses developments regarding the introduction of trusts, their current status and options for the introduction of trusts in the Netherlands. Here, the main arguments for and against the introduction of trusts, as presented in Dutch legal literature and explanatory notes, are briefly outlined once more.

Due to the complex language and verbatim translation from Anglo-American (trust) law – Dutch legal literature and explanatory notes have introduced misconceptions in the debate about the introduction of the trust in the Netherlands, which have not contributed to a better understanding of the trust. Examples include the designation of ‘tracing’ as a right, the classification of the beneficiary’s right as a limited property right and the designation of this very right as economic ownership.

The question at hand is to what extent the trust can be introduced into the Dutch legal system. In answering this question, the principle of ‘concordantie’ entrenched in the Statute of the Dutch Kingdom is taken into account first. Then, the Curaçaoan trust model – after the repairs based on the solutions proposed in chapter 4 – may serve as an example format for the Dutch law, since Curaçao has an almost identical civil law legislation to the Netherlands. After all, there is no need to reinvent the wheel in this particular case.

Dutch law – unlike Curaçaoan law – currently has two statutory restrictions, the fiduciary prohibition under Art. 3:84(3) of the Civil Code and the forced heirship provision in law of succession. Here, solutions in the form of several statutory regulations are proposed for both restrictions in order to remove roadblocks and pave the way for the introduction of a future trust law in the Netherlands.

