# Foreign Trust in Finland
## Starting Points for Assessing English Trust's Legal Effects in Cross-border Cases

Tuulikki Mikkola

## 1 Introduction

English trusts, as legal arrangements, are unique compared to institutions known in the Finnish legal system. Even though trusts are not known in our legislation (including norms concerning private international law), they still cause legal questions especially concerning the enforcement and legal effects of a foreign trust. We have to address the legal effects of trusts from two perspectives. Firstly one can ask what the value of the trust property is as an asset for the person involved in the arrangement. This kind of a question may arise for instance in cases of insolvency or divorce. In former cases it is inevitable to define whether execution of trust property is allowed or whether it belongs to the bankruptcy estate. [1]In latter cases the result of dissolution of marital property system is depended on what kind of an owner status is given to a person who is a party in a foreign trust. Secondly, it is possible that a trust has a connection to Finland making it necessary to determine how the arrangement is enforced here. For instance, in cases where co-owners transfer property to Finland and that property has been administered abroad through a trust. Another example is a case where a distribution of an inheritance is carried out in Finland and there is a (foreign) will based on a trust.[2]

Starting point for the assessment of legal effects of foreign trusts and enforcing them must be the same in every situation: one should understand the basic idea and structure of a trust and the nature of the legal status of those involved in the arrangement. Hence, in this article I will ask how English trusts can really be understood. Why English believe that a trust is their most innovative contribution to international legal thought - and why its removal would paralyze the entire legal system?[3] My aim is to explain the structure of a trust, its modern functions and its place in the English legal system.[4] Since the arrangement is very difficult to define and therefore for me impossible in this chapter to provide an exhaustive explanation of the trust and its many uses, I hope to provide *enough* background information to lawyers finding themselves facing English trusts and wondering their legal effects. It is obvious that up to these days the trust concept has caused confusion in the minds of Finnish lawyers – at least in the minds of those who either want to conceptualize it with familiar concepts and/or who think that trusts are mostly created for circumventing the rights of creditors or other third parties, and thus trigger the

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1 The scope of my article does not cover questions concerning private international law rules concerning bankruptcy and execution, nor private international law rules concerning marital property or inheritance.

2 Mikkola, Tuulikki, *The Risks and Opportunities of Foreign Connections in Marriages: the Proprietary Rights of Spouses*, in Atkin, Bill (ed.), The International Survey of Family Law 2008, Jordan Publishing 2008 p. 77-105, p.100-101.

3 Matthews, Paul, *The Place of the Trust in English Law and in English Life*, Trusts and Trustees 2013 p. 242–254, p. 250.

4 Trusts are known in other legal systems, also outside of Anglo-American legal family. In this chapter I focus on English trusts as it is the original and most advanced trust concept. It is also a suitable measure of a proper trust.

application of ordre public – principle[5] or other rules protecting the interests of third parties. Confusion is unnecessary - however, the employment of comparative method necessary when trying truly understand the nature of trusts.

To grasp the basics and modern relevance of a trust, one should start from a little further. A brief outline of the history of English trusts helps to put the present law into context.

## 2 The History of Trusts

> "the characteristics of modern legal English are basically explained by the country´s legal and linguistic history.. This knowledge also enables avoidance of mistakes and misunderstandings: because of the peculiar history of English law, apparently identical terms can refer to totally divergent concepts in England and in continental Europe. On the other hand, English law contains many concepts that do not appear at all elsewhere and that are therefore incomprehensible for a foreigner."[6]

Historically trusts can be tracked down centuries backwards, but the question about how it was created has not been resolved.[7] This is fine with English, who does not have an urge to know the origins of the trust. The indefinite origin of the trust confuses lawyers from the continental legal systems, though, who want to conceptualize the institution and locate it under either the law of obligations or the law of property.[8]

In order to understand trusts, one should remember that England did not receive Roman law with the same volume like continental European countries.[9] There are many reasons for it. On the one hand, the feudal institute was strong. On the other hand, the universities' position was weak. Although Roman (and Canonical) law was taught in the universities, this did not have any strong impact on applied law as from the beginning lawyers were taught like apprentices in inns of courts. Law was created and developed in courts and at

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5 For ordre public as a fundamental principle of private international law *see i.e* Klami, Hannu Tapani – Kuisma, Eira, *Finnish Law as an Option. Private international law in Finland*, Kauppakaari, Helsinki 2000, p. 9 and Kahn-Freund, Otto, *General Problems of Private International Law*, Sijthoff & Noordhoff 1980, p. 282-287.

6 Mattila, Heikki E.S., *Comparative Legal Linguistics. Language of Law, Latin and Modern Lingua Francas*, Ashgate Publishing Limited 2013, p. 305.

7 Van Rhee, C.H., *Trusts, Trust-like Concepts and Ius Commune*, European Review of Private Law 2000, p. 453–462, p. 462: "It may be concluded that it is very likely that the origins of the trust concept cannot completely be traced. Whether these origins are Roman, Canonical or Germanic remains an unresolved question."

8 *See, e.g* Lupoi, Maurizio, *"Trust and Confidence"*, Law Quarterly Review 2009, p. 253–287.

9 For a historical overview on how continental legal thought influenced in England *see* Coing, Helmut, *Common Law of Europe: Historical Foundations*, in Cappelletti, M.(ed.), New Perspectives for a Common Law of Europe, Sijthoff p. 31–44 ja Wesel, Uwe, *Geschichte des Rechts: Von den Frühformen bis zur Gegenwart*, C.H. Beck, Munich 2006.

the beginning the law was not regulated as written norms and statutes. Law was practical, it was not based on conceptualization, and the function of the law was to decide cases, not theoretically construct law to a system. Same reasons that explain why trust was developed the way it is, also help to answer the question how the main essence of the trust institution has remained the same from the century to other, and how the functions of a trust have continuously increased and diversed in new societal and economic situations. Thus, although there is no specific information about the origins of the trust, it is clear that Roman law reception would probably have prevented development of the institution. As the influence of Roman law did not strongly reach the island, there was no need to systematize property issues either under the law of obligations or the law of property. These kinds of questions were never essential in England.

What is known about the origins of the trusts is that they started to develop in 12th century, when land ownership in England was based on a feudal system. In those days common law - as a body of legal rules applied by the King´s Courts – considered ownership as an undivided entity. This caused problems in situations where a landowner left England to fight in the crusades and conveyed the ownership of his land to a person who he trusted (a trustee) for his absence, on the understanding that the ownership would be conveyed back on his return. The purpose of the transfer was to ensure that for example feudal dues were paid and lands were taken care of. However, the person to whom the assets were temporarily conveyed did not always hand over the assets to the actual owner upon his return. The King´s Courts did not protect the original owner but considered the trustee as a legal owner who was under no obligation to return the assets to the crusader (in common law). The irritated crusader would petition the King, who then delegated the case to a Lord Chancellor who would decide a case according to his conscience.[10] The Chancellor considered that it was unconscionable not to return the assets and therefore considered the original owner as a true owner of the assets (in equity). Over time, the Lord Chancellor´s Court (the Court of Chancery) established this practice and it became known that in above mentioned cases it would find in favour of the returning crusader. The difference between the legal owner and the original owner (equitable title) stabilized. The possessor of the assets (who had the possession and control) was called a trustee and the one who benefited from the arrangement was called a beneficiary. Also a term "trust" developed as the name of the arrangement over time. [11]

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10 At this time, equity law was born. For jurisdiction of the King´s Courts and the development of the Chancellor justice *see* Mikkola, Tuulikki, *Oikeudellisen tiedon yhtenevyys ja sen esteet*, Suomalainen lakimiesyhdistys, Vammala 1999, p. 144–150, with footnotes. Also Haley, Michael – McMurtry, Lara, *Equity and Trusts*, Sweet & Maxwell, London 2006, p.1.

11 For the role that trust played in English legal system centuries ago *see* Seipp, David J., *Trust and Fiduciary Duty in the Early Common Law*, Boston University Law Review Vol. 91 (2011), p. 1011-1037.

A trust law, as it developed between the twelfth century and the sixteenth century, set a structure of modern law of trusts.[12] The outcome of this development was a legal institution, which essential element was and is a double ownership. When trying to decode the English trust and comparing it with our Finnish legal institutions, an understanding of the institution in its original form against the backdrop of equity and common law is required. It is also noteworthy that functioning of trusts is in many ways tied to cultural aspects of English legal system: those that separate it from other European countries. One should get acquainted with the mental processes behind legal actions and widen one´s perspective to questions like "what is the law and how to read the law in the English legal system" and "what are the legal actors and their relations there". In other words, also a trust law must be reflected against a conceptual structure and style of operation of the English legal system.[13] These cultural differences – among them the time-dimension the law has in England - explain on the one hand why and how trusts originated and on the other hand, the place of the modern trust in English law.

## 3 Key Elements of the Trust

Trusts are always linked to property: a person (the settlor) transfers the property subject to the trust to a trustee and names the beneficiaries. A settlor must have the intention of creating a segregated trust fund.[14] A trust can be created by an informal manner, not necessarily in writing, as long as the intention is clear.[15] In addition to being informal, it is flexible since in the trust the ownership of a thing can be split up between as many people and in as many different ways as the settlor of the trust wishes.[16]

Under the common law, once trust property is vested to a trustee, he/she is deemed to be the legal owner which means that he/she has a formal ownership of the property. Thus, the trustee must exercise his rights as an owner in accordance with the terms of the trust. The trustee is also under a fiduciary

12 *Seipp* 2011, p. 1011.

13 The significance of legal actors from the perspective of understanding a foreign legal system, *see* i.e Mattei, Ugo, *Basic Issues of Private Law Codification in Europe: Trusts*, Basic Jurist Frontiers 2001, "www.degruyter.com/dg/viewjournalissue/" p. 21. According to Mattei the application of the trust law requires special skills from English judges: "The complexity of the transactions that are performed by trust law require highly skillful and competent judges able to supervise them. This kind of judiciary is simply absent from most European countries belonging to the civil law."

14 Dalhuisen, Jan, *Dalhuisen on International Commercial, Financial and Trade Law*, Hart Publishing 2000, p. 401.

15 Clements, Richard – Abass, Ademola, *Equity and Trusts*, Oxford University Press 2011, p. 67. Also p. 75 where the authors explain the rule of three certainties: certainty of intention, certainty of subject matter and certainty of objects.

16 The trust property can be any sort of property. Note that beneficiary´s interest is capable of being disposed of like other interests in property. It may also become the subject matter of a trust.

duty to manage the property on behalf of a beneficiary (or beneficiaries).[17] A trustee is not allowed to put himself/herself into a situation where there might arise a conflict of interest between himself/herself and a beneficiary. In substance, fiduciary duties of a trustee and the remedies for breaking these duties create a safety net, obligatory by nature.[18]

From trustee´s legal ownership (legal management of the property) one can separate an equitable ownership of a beneficiary (beneficial enjoyment of the property). Equity does not dispute trustee´s legal ownership but recognises the beneficiary as the equitable owner who enjoys the benefits flowing from the property. The content and nature of beneficiaries' ownership is extraordinary since the property is under a control and management powers of a trustee. A beneficiary cannot dictate how trustee should exercise his powers or give any specific orders about legal transactions he/she should undertake concerning the property. On the other hand the beneficiary's proprietary rights mean that their legal position is very strong in respect of third parties. If a trustee mismanages the assets wrongfully to a third party, the beneficiary's rights in rem ensure that his/her interest to the assets continues to subsist despite of the transfer (except to bona fide purchasers for value). This is called the right to tracing.[19] The ownership of the beneficiary also includes the right to ensure – if necessary by court – that the settlor's purposes are enforced like it was meant when the trust arrangement was created.

Although the trust makes the trustee the legal owner of the assets, it is significant - in order to understand the institution and parties' rights and obligations – to grasp the idea that the trust is created always for the benefit of the beneficiary, not of the trustee. A corollary is that the trust property is a separate fund and is not part of the trustee´s estate.[20] However, the separation of property in this sense does not lead to legal personality of the trust and trustees are in the first instance always personally liable for all they do as trustees.[21]

A trust is a flexible and effective arrangement, and also a stable arrangement since a trustee is dispensable with a new trustee. The arrangement is like a ship in which the trustee is the captain. The ship remains the same with the same cargo although the captain changes. The ship is not liable for its captain's personal debts, nor the settlor's debts after the ship has been build, in other

17 Fiduciary duties are duties enforced by law and imposed on persons in certain relationships requiring them to act entirely in the interest of another, a beneficiary, and not in their own interest. *See Seipp* 2011 p. 1011.

18 For the content and legal consequences of breaking the obligations of fiduciary liability, *see* Mikkola, Tuulikki, *Fidusiaarivastuu*, Lapin yliopisto, Rovaniemi 2006, p. 41–48 and 54–66 and Clements – Abass 2011, p. 449-456. For case law where the fiduciary duty is examined in detail Bristol and West Building Society v Mothew [1998] Ch. 1, especially p. 18 (Millett LJ).

19 About conditions and restricitions of tracing *see* Mikkola, Tuulikki, *Trust*, Forum Iuris, Helsinki 2003, p. 58–59 and *Clements – Abass* 2011, p. 519-532.

20 *Matthews* 2013, p. 242-254.

21 Dalhuisen 2000, p. 394.

words after the property has been transferred to the trustee. Also in cases where a settlor creates a trust in favour of himself/herself as one of several beneficiaries or/and manage trust funds as a trustee, the separateness of the trust fund has to be respected.[22] The ship is never built to last forever though, since legally trusts have limited duration, except for charitable trusts (see chapter 4).

## 4 Spheres of Application of the Trust

> ”The slogan of modern comparative law – compare function rather than form – does not work for the trust. One cannot identify the function of the trust because there is no such function. The trust is functionally protean. Trusts are quasi-entails, quasi-usufructs, quasi-wills, quasi-corporations, quasi-securities over assets, schemes for collective investment, vehicles for the administration of bankruptcy, vehicles for bond issues, and so on and so forth. In software terminology, trusts are emulators.”[23]

It has been said that trusts follow English from the craddle to the grave. From the Anglo-American perspective this phrase is not an exaggeration.[24] The arrangement is employed throughout the legal field. The elasticity of the trust device makes it possible that it constantly adopts new uses in a wide variety of contexts.

In some situations trusts are imposed by operation of law (statutory trusts), for instance in cases of joint ownership of land. What follows is that possible disputes between joint owners, i.e. concerning usage of the property, are solved by the rules concerning trusts. There are also other compulsory trusts in English law. In the case somebody dying without making a will (intestate succession), a trust is created by operation of law. In these cases the personal representatives (appointed by a court) must gather in the deceased´s property, possibly to sell it and distribute it to the beneficiaries of the estate.[25] A third example of a compulsory trust is the case of personal insolvency when all the assets vest in the trustee for the benefit of the creditors. This enables the orderly collection and distribution of the assets for the benefit of the creditors.[26]

Another example where a trust arises without having been specifically founded by a settlor is a situation where someone is getting a benefit that is unjustified under the circumstances. In this case a court may decide that a

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22 Dalhuisen 2000, p. 395.

23 Gretton, George L., *Trusts without Equity*, International & Comparative Law Quarterly 2000 p. 599–620, p. 599.

24 Lepaulle, Pierre, *Les fonctions du “trust” et les institutions équivalentes en droit français*, Imprimerie moderne 1929, p. 47.

25 *Clements – Abass* 2011, p. 89. The authors explain the differences between a trust in an intestacy and other trusts.

26 *Matthews* 2013, p. 248.

constructive trust has to be created and order a person holding the assets to transfer them to the person who rightfully should have had them. A trust of this kind is called a constructive trust and it is used as an equitable remedy, to achieve just results in property disputes. It arises regardless of the intention of the property owner and those property rights it creates bind third parties (as is a case with all trusts).[27]

In most cases though, a trust is created voluntarily either during person´s life (by a trust deed) or after death in a will. The structure of a trust, separating management and enjoyment, make it a tempting device which is often utilized when transferring wealth within family members. The purpose of the trust might be to protect the property from the creditors of beneficiaries or to protect a certain spendthrift person who is unable to handle money in a sensible way. If it is known that the beneficiary lives extravagant and fickle life, the settlor can create a trust, which ensures that the beneficiary cannot liquidate the assets as soon as he gets hold of them. As a beneficiary he/she is taken care of under instructions given by the settlor in a trust deed.

Although trusts are usually associated with family-trusts, they are often used for commercial purposes too. For example, trusts founded for administration of property and investing rely on the split between management and enjoyment.[28] Trusts have several advantages in administration of assets that may make them more tempting when compared to other fundamental legal relationships, such as companies and contractual arrangements. Flexibility, efficiency and rapidity are often decisive factors in a business world and the trustee's control and decision-powers over the assets are valuable features. Also the trustee's fiduciary liability is a feature that makes trusts investor-friendly vehicles compared to trusts´ counterparts found in civil law systems.[29]

In addition, pension trusts are very popular in England. The idea of a pension trust is, as the name of the trust implies, to accumulate pension of employees. When employer transfers assets to a separate trust, he/she as a settlor is unable to use them for any other purposes than for the future pensions. Pension trusts accumulate huge amounts of capital resources, which make them key players in stock and capital markets and they are one of the reasons why London has such a powerful position in European fiscal markets.[30]

Besides the use for intra-family and commercial purposes, trusts also have a significant position in the world of charities. The trusts focused on charitable uses constitute their own ensemble because they have certain technical advantages compared to private trusts (not required to comply with the same

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27 For a constructive trust *see* Carl Zeiss Stiftung v Smith (No 2) (1969). Property rights of unmarried partners are also in some cases determined by the laws of trusts, *see* Harker, Stephen, *Matrimonial Conveyancing*, Sweet & Maxwell, London 2006, p. 149-176.

28 *Dalhuisen* 2000, p. 395.

29 For unit trusts *see* i.e Kam Fan Sin, *The Legal Nature of Unit Trusts*, Oxford University Press 1998.

30 For uses of trusts especially from the point of view of the administration of property, *see Mikkola* 2003, p. 93–115.

rules of certainty as private trusts) and they can last forever, unlike private trusts. In England organized charities have created "a third sector" alongside the services provided by private and public sector. The significance of this third sector for developing and producing different kind of services for the public good is remarkable. [31] Charitable trusts are usually wealthy institutions and because they hold large investments, they too are important players in the fiscal markets. The strong position of charitable trusts in English society has also an impact on to the legal development. For example, the fact that England opted out from the EU Regulation on wills and successions 2015 can be partly explained by risks supposedly created by the Regulation on functioning of the charity sector.[32]

## 5 Trusts in Finnish Law

Despite the Hague Convention of 1985 on the recognition of Trusts, many civil law jurisdictions in Europe still refuse not only to accept the introduction of the trust into national law, but even have problems in recognizing it as a valid concept for the purposes of private international law.[33] However, the convention is not intended to introduce the trust concept into domestic law but rather to establish common conflicts of law principles. The purpose of the convention is to assist non-trust states to cope fairly and effectively with trust issues raised in their jurisdiction, as David Hayton has written.[34]

As in most countries of Europe, there is no trust concept in Finnish law. Trusts have not even attracted a huge attention in Finland. The few articles published in Finnish are quite limited in scope and the focus has usually been in trusts used for discreditable purposes rather than good ones.[35] However, in a modern world private international law has to be founded on a respect for

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31 According to Matthews the strong position of charitable trusts in England can be explained by the lack of forced shares in intestate succession which has meant that the "culture of giving" appears quite strong in England compared to that of continental Europe, *see Matthews* 2013, p. 250.

32 *See Matthews* 2013, p. 250. In English legal system there is no clawback, as there is no forced heirship. For problems created by functioning of clawbacks (via applicable law), to i.e charitable gifts, *see The report of the European Union Committee of the House of Lords concerning the EU´s Regulation on Succession*, "www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf" (visited 12/2014), p. 26-27.

33 Banakas, Stathis, *Understanding Trusts: A Comparative View of Property Rights in Europe*, "www.indret.com/pdf/323_en.pdf" (visited 12/2014). Note that so far only a few European states have ratified the convention, "www.hcch.net/index_en.php?act=conventions.status&cid=59" (visited 12/2014).

34 Hayton, David, *The Hague Convention on the Law Applicable to Trusts and Their Recognition*, The International and Comparative Law Quarterly.Vol. 36 (1987) pp. 260-282, p. 260. For a discussion on the effect of the convention *see* i.e. "www.lawteacher.net/international-law/essays/how-successful-has-the-hague-convention-on-trusts-been-international-law-essay.php" (visited 12/2014).

35 *See e.g* Mikkola, Tuulikki, *Enforcement of Foreign Trusts in Finland*, The European Legal Forum1/2011 p. 33-37, p. 33.

foreign law and foreign legal concepts and institutions. Therefore also trusts deserve to be evaluated from a wider – and impartial - perspective.

Assessment of the legal effects of foreign trusts should always be based on an analyze of the structure of each trust which should be respected as far as possible within one´s legal system.[36] This is a point of departure in cases where a position must be taken on whether the status of a trustee or a beneficiary to a trust is an asset to be taken into account i.e. in the distribution of matrimonial property, and also in cases where the trust has a connection to Finland making it necessary to enforce it here.

Enforcement can only be partial as our concept of ownership cannot be split in an English way. In Finland ownership has been defined as a complete and exclusive right to an object. Ownership is undivided and it has three essential elements: the right of possession, the competence of the owner and the dynamic protection enjoyed by the owner. The right of possession means protected right to use the object. The owner´s competence means right to dispose of ownership with component parts the power of alienation, the power of credit and the power of inheritance. Also a certain level of dynamic protection is characteristic of the fully developed position of the owner. It has been deemed that only after securing protection of exchange can the assignee be called an owner.[37] Though, in assessing legal effects of a foreign trust at hand, one has to solve the dilemma who can be deemed *most* as an owner and compare the structure of a trust and the Finnish concept of ownership. Analogical solutions can be found for example from the Supreme Court´s decisions concerning artificial arrangements in recovery proceedings (Enforcement Code 4:14.1).[38] In this respect it is very important to emphasize that I do not mean that foreign trusts are artificial arrangements. Instead I mean that these cases may show how to separate components of ownership in different circumstances in order to locate the true owner.

Since trust´s split ownership as such would violate our mandatory principles of property law, we should apply the principle of comparative implementation: each trust is compared to national legal concepts with the one best matching the structure and purpose of the trust is chosen in each particular case. Restrictions of enforcement arise from our property law stipulating that secret ownership rights cannot be created that bind third parties and therefore an enforcement of a foreign trust must always adhere to the principle of transparency in property law. As the title to a trust property cannot be split, it is necessary to choose in whose name the property will be registered (or who will be construed as an owner in relation to third parties); is the owner the person in possession of the property or the person who is intended to ultimately benefit from it. This very crucial question should be answered on the basis of what the settlor has intended. Instead of applying automatic solutions in the

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36 For the principle of lex rei sitae, *see Klami – Kuisma* 2000 p. 19-20.

37 Kartio, Leena, *Property Law*, in Pöyhönen, J. (ed.), An Introduction to Finnish Law, Kauppakaari, Helsinki 2002 p. 211-244, p. 234-235.

38 For an English translation of the code visit "www.finlex.fi/fi/laki/kaannokset/2007/en20070705.pdf".

enforcement, the content of each trust and the rights of the parties should be examined in the light of a trust deed and applicable law, and in this way ascertain what the aim and the structure of the arrangement is.[39]

In other words, alternatives for the enforcement are found by analytically evaluating the arrangement through the elements related to legal institutions and proprietary rights of the parties in Finnish legal system. For example in cases of testamentary wills one must analyze which type of a will is most appropriate vehicle for the enforcement - depending on what is the closest equivalent of the trust device. Our national law (Code of Inheritance) knows different variations in respect of the extent of the rights received under a will. Comparative implementation of a foreign trust may be based on i.e. a will granting right to proceeds from the property. For living (inter vivos) trusts one good option for the enforcement is the contract made in favor of a third party.

In practice, foreign trusts have created interpretational problems also in respect of their taxation. From this point of view it has been very important that the Supreme Administrative Court has for the first time decided a case concerning trust´s taxation in 2013 (KHO 2013:51). In this case A's grandmother (settlor) had founded a trust in the United States in 1955. After grandmothers´ death the trust had become irreversible. In the first stage the trust had been shared in six parts on behalf of settlor´s children. A's father had been a beneficiary of one of these trusts. After A's father died in 1988 his beneficial interest had been divided among his children.

According to the trust deed the trust was discretionary by nature: there was a criterion which a beneficiary must satisfy in order get funds from the trust. Beneficiaries had to make an application for the funds and the trustee was able to decide whether the requirements defined in the trust deed were satisfied.[40] The Supreme Administrative Court ruled that A could not use owner's proprietary rights as trust's assets were not under his control and possession already when A's father died in 1988 because of the discretionary power of the trustee. Therefore the court decided that A could not be seen gaining the status of the owner until the transfer of the assets from the trust had actually happened. That is when the duty to pay tax for the assets received should start.

The argumentation the court gave was correct. The trustee had a control and management powers of the trust property. Beneficiaries had neither the right of possession, the competence nor the dynamic protection in respect of the funds before the funds were actually transferred to them. In the case it was shown that the discretionary nature of the trust was real as the trustee had rejected some of the applications. This naturally supported the conclusion that the beneficiary did not gain the status of the owner until the transfer of the possession had happened and he/she had the concrete control of the assets. Who was the owner was not a relevant question since the case concerned only

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39 *See Mikkola* 2011, p. 35-36.

40 Beneficiaries were able to get funds out of the trust only to cover their living-expenses and costs of their education. Beneficiaries had to apply for the funds and trustee could either accept or decline the application depending on their consideration of how the prerequisites for a funding were fulfilled in each case. Such trusts where the settlor has left the trustees wide discretion how to distribute trust´s assets are called discretionary trusts.

whether the beneficiary A had to pay tax for whole of the trust assets (from the trust creation in 1988) or not.

## 6 Conclusions

> ”It is like cricket. We understand not only the rules of cricket but also its spirit, and we are comfortable with both.”[41]

In order to understand a trust arrangement and assess its legal effects in cross-border cases, knowledge of a history of an English legal system is required. The courts of England have always had considerable authority and this has affected as well the epistemological and ontological basics of the system. Division between common law – equity was historically produced by the forms of action and as emphasized earlier, legal norms developed by equity, most importantly the legal rules concerning fiduciaries, have had a strong impact on trust law and are inseparable from the core of the trust concept. Because of the peculiar nature of the whole legal system, the trust has developed to an institution that defies easy definition. It has been described as an enigma: a concept and a process at the same time.[42] Trusts underline what Hannu Tapani Klami has written: “Law in comparative law is much more than a mere set of norms. It also includes valuations and application attitudes. Here one should not forget the meta-norms either: these are norms about the application of law (“instructions for use”) – norms about the interpretation of statutes and precedents and hierarchic relationships between different sources of law.”[43]

It is very important to grasp the trust institution in the light of the whole picture of a legal system as it is to be seen a cultural phenomenon of which there is a general knowledge not only amongst the better off. They appear all the time either formally or constructively and are in this way a part of an everyday life.[44] It has been said that each Anglo-American individual is a party of a trust or at least knows someone who is a trustee or a beneficiary of a trust. In England it is common to give ownership to a trustee and let go of the control of one´s own assets. During centuries English have learnt to trust on trusts. This is a part of a culture that cannot be deduced to a rule for lawyers to interpret. It is however, a part of the context we have to take in account when truly trying to understand the trust concept.

In the beginning I stated that it is not possible to comprehensively conceptualize the trust with the tools of our legal system. I do neither see it necessary. Indeed, cross-border trusts demand that one scrutinizes the trust at hand in order to find the most efficient way for enforcing it. It is possible that

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41 *Matthews* 2013, p. 245.

42 *Clements – Abass* 2011, p. 20. For an attempt at a definition, *see* Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 p. 705 (Lord Browne-Wilkinson).

43 Methodological Problems in European and Comparative Law, Helsinki 1994, p. 12.

44 *Dalhuisen* 2000, p. 395.

trusts in general may bring to minds of Finnish lawyers an image of an improper legal arrangement that gives opportunity to create artificial ownership of assets and avoid debtors. Nevertheless, the "trust-factoring" in some legal systems outside of England should not stigmatize the most original form of the arrangement as an inapproriate institution that would inevitably trigger the principle of ordre public. This, if something, would be inappropriate and against the whole idea of private international law and comparative law.