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The Role of Offshore Jurisdictions in the Development of the International Trust

David Brownbill

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I. INTRODUCTION

The past twenty years have seen a vast amount of legislative activity on trust law in various offshore countries. Several countries—Belize, Dominica, Guernsey, Jersey, St. Vincent and the Grenadines, the Turks and Caicos Islands, and Samoa among them, while not formally codifying trust law, have adopted complete trust statutes offering a more or less comprehensive body of modern laws addressing all aspects of the trust relationship.[1]

Since the early 1960s, numerous other countries such as the Bahamas, Bermuda, the Cayman Islands, the Isle of Man, the British Virgin Islands, and Gibraltar have seen the steady adoption of England's Trustee Act 1925 with important variations. Several have also enacted the equivalent of England's Variation of Trusts Act 1958 and a smaller group has enacted the Trustee Investments Act 1961 and the Perpetuities and Accumulations Act 1964.[2] In the past ten or so years, these

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* Barrister, Gray's Inn, London; Editor, J. INT'L TR. & CORP. PLAN.

1. *See* Trusts Act, 1992 (Belize), *reprinted in* 2 INTERNATIONAL TRUST LAWS (John Glasson MA, LLM ed., 1992) D4-9; International Exempt Trust Act, 1997 (Dominica) reprinted in 1 WALTER H. DIAMOND et al., INTERNATIONAL TRUST LAWS AND ANALYSIS, DOM 107 (1998); Trusts Law, 1989 (Guernsey) (amended 1990), *reprinted in* 2 INTERNATIONAL TRUST LAWS, *supra*, at D12-3; Trusts Law, 1984 (Jersey) (amended 1989, 1991), *reprinted in* PAUL MATTHEWS & TERRY SOWDEN, THE JERSEY LAW OF TRUSTS 219 (3d ed. 1993); International Trusts Act, 1996 (St. Vincent) *reprinted in* DIAMOND, *supra*, at STV 126; Trusts Ordinance, 1990 (Turks & Caicos Is.), *reprinted in* PETER SPERO, ASSET PROTECTION: LEGAL PLANNING AND STRATEGIES, app. E (1993); International Trusts Act, 1987 (Samoa) *reprinted in* DIAMOND, *supra*, at SAM 101.

2. For example, England's Variation of Trusts Act 1958 applies in Gibraltar. *See* TOLLEY'S TAX HAVENS 217 (2d ed. 1993).

countries have adopted a highly targeted approach through the introduction of special legislation addressing specific issues, such as conflict of laws, fraudulent dispositions, purpose trusts, and perpetuities.[3]

This legislation creates a number of difficult policy issues and raises a host of technical challenges to many traditional or accepted constructs of trust law.

II. POLICY

The objects of offshore jurisdictions in promulgating modern trust laws are quite different than those that most onshore countries have had in mind when enacting more traditional trust legislation. Whereas statutory developments in the onshore jurisdictions are almost always a response to the needs of domestic users of trusts, offshore legislation has little or nothing to do with domestic needs. The primary, if not sole purpose of the legislation is to create or enhance international trust business in the particular country. Therefore, the political context of the legislation is quite the reverse of that in most onshore countries. Historically, the difficulty faced by reformers in securing any political interest in their legislative proposals and the necessary parliamentary time for their enactment have been major impediments to the development of the law in most onshore jurisdictions.

There tends not to be such difficulty in the offshore jurisdictions. The starting point is a combination of private sector pressure to enhance business opportunities and governmental desire to enhance employment and increase revenues. In such an environment, trust legislation will be high on the political agenda. At the same time, there is in most offshore centers relatively little domestic trust activity, so the need to protect the interests of beneficiaries under wholly domestic trusts will be minimal. Thus, not only will there be pressure for the legislation, but there will also be little if anything militating against it. Several jurisdictions have, in any case, adopted a "ring fencing" policy restricting the application of the new legislation. For example, see Bermuda's purpose trust

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3. *See* Trusts (Choice of Governing Law) Act, 1989 (Bah.), *reprinted in* 2 INTERNATIONAL TRUSTS LAWS, *supra* note 1, at D3-19; The Trusts (Special Provisions) Act, 1984 (Berm.), *reprinted in* LEWIS D. SOLOMON & LEWIS J. SARET, ASSET PROTECTION STRATEGIES: TAX AND LEGAL ASPECTS 416 (vol. 1 supp. 1999); Special Trusts (Alternative Regime) Law, 1997 (Cayman Is.), *reprinted in* 2 INTERNATIONAL TRUSTS LAWS, *supra* note 1, at D7-49; Recognition of Trusts Act, 1988 (Isle of Man), *reprinted in* SPERO, *supra* note 1, app. A at A-1; Trustee Ordinance, 1961 (Virgin Is.) (amended 1993), *reprinted in* THE TRIDENT GUIDE TO BRITISH VIRGIN ISLAND TRUSTS 11 (1994); Trustees Ordinance (Gib.), *reprinted in* 2 INTERNATIONAL TRUST LAWS, *supra* note 1, at D11-3.

law,[4] the Cayman Islands' STAR trusts legislation,[5] and Jersey's statutory trust law,[6] all of which exclude trusts of land situated in their respective countries. In addition, several statutes establish a creature known as the "international trust" to which is accorded all the benefits of the modern statute but from which residents or nationals of the country in question are excluded.[7] Even in these instances, the exclusion is more likely to reflect a desire to preserve a limited land supply or the local tax base rather than to protect local trusteeships.

Policy issues raised by modern offshore legislation extend well beyond the single question of economics. There is, on the one hand, the morality of some of the highly targeted "product" legislation and, on the other hand, the wider question of the proper employment of sovereign power. There can be no question that legislation that extends trust law to assist persons outside the jurisdiction to sidestep what would otherwise be a binding law raises difficult moral and comity issues. One wonders, for example, whether members of the respective legislatures fully appreciate the significance of some of the asset protection trust legislation enacted in recent years. Is it really defensible to have a system that precludes, as does most of the legislation in this field, a fraudulent conveyance challenge simply because the debtor was not aware of the creditor's claim at the date of the disposition that created the trust? Similarly, what is the justification for imposing upon creditors the criminal standard of proof of fraudulent intent when all other civil matters remain governed by the civil standard?

The moral issue becomes all the more acute when the legislation is of the ring-fenced variety. The Jersey anti-forced heirship law is a prime example.[8] Forced heirship is an integral part of the internal law of Jersey and applies to all local successions. It cannot be said, therefore, that Jersey's anti-forced heirship law is a reflection of a local policy that abhors forced heirship. It may be argued, however, that it is a question of degree, but even this argument is difficult to sustain as the new law is effective to override an equivalent law emanating from another jurisdiction. Perhaps Jersey's approach is simply pragmatic. Most other forced heirship laws go well beyond Jersey's domestic provisions and it would be difficult to impose a comparative test as a precondition for the application of the new law.

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4. *See* Trusts (Special Provisions) Act, 1989, § 16 (Berm.), *reprinted in* SOLOMON & SARET, *supra* note 3, at 416.

5. *See* Special Trusts (Alternative Regime) Law, 1997 (Cayman Is.), *supra* note 3.

6. *See* Trusts Law, 1984, art. 10, § 2(a)(iii) (Jersey), *reprinted in* MATTHEWS & SOWDEN, *supra* note 1.

7. *See, e.g.*, International Exempt Trust Act, 1997 (Dominica), *supra* note 1.

8. *See* Trusts Law, 1984, art. 8A(2)(b), (4)(b) (Jersey) (amended 1989, 1991), *reprinted in* MATTHEWS & SOWDEN, *supra* note 1.

It may be acceptable for a country to take the position that if a foreign country considers some aspect of its laws to be of such importance that the law should extend to the actions of its citizens or domiciliaries outside its immediate jurisdiction, it falls to that foreign country to prohibit such action and enforce that prohibition. However, it must be arguable that legislation intended solely to defeat some foreign law with no interest in the legislating country having no interest in the new law other than the generation of business, crosses the line—a possible example of this being the Cayman Islands Exempt Trust.[9] This, perhaps, is what distinguishes these laws from laws such as the United Kingdom's Protection of Trading Interests Act 1980 and similar laws passed in various other countries, promulgated in response to U.S. triple damages awards under its anti-trust legislation.[10]

A common jibe at much offshore legislation comes in the form of the "designer legislation" epithet. This complaint appears to combine a disapproval of legislation being used to create a commercial product rather than directly addressing some local difficulty, with a suspicion that the legislature is being made available to and for the benefit of essentially private and often foreign interests. None of this is new; it seems that the first designer legislation—or, at least, the first complaint about such legislation—was made in regard to Delaware's corporation law in 1967 in the article, *Law for Sale: A Study of the Delaware Corporation Law of 1967.*[11] The objections raised in this article are remarkably similar to those made in relation to offshore legislation: the law is drafted and the policy effectively set by a coterie of advisers, mostly representing the private interests of those who will profit from the legislation;[12] there is little or no effective legislative oversight; and the lawyers practicing in the field, including those involved in the drafting, have a disproportionate influence on the interpretation of the law in the courts.[13]

While there may well be real concerns regarding some of the morality or comity issues raised by some fraudulent disposition, forced heirship, and in earlier times, bank secrecy legislation, I see little in the "law for sale" argument. As the Delaware article shows, it is not a phenomenon limited to offshore centers. Witness the legislative competition among London, New York,

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9. Which, it is understood, was originally aimed at the United Kingdom's anti-avoidance tax legislation and was fairly swiftly countered. *See* Income and Corporation Taxes Act, 1988, ch. 1, §§ 739-46 (Eng.). It has since been employed, to questionable effect, for similar purposes against Canadian anti-avoidance rules. *See* Income Tax Act, R.S.C., ch. 1 (5th Supp.), §§ 94-95 (1985). Effective or not, amendments have been proposed in the 1999 Canadian Federal Budget to counter this as well.

10. *See* Protection of Trading Interests Act, 1980, ch. 11 (Eng.).

11. See Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861 (1969).

12. *See id.* at 863-65.

13. *See id.* at 870.

Paris, and Amsterdam for arbitration work.[14] Perhaps of more immediate relevance in this regard are the laws passed recently in Alaska and Delaware[15] relaxing the rules concerning settlor-interested settlements, which, of course, have been made for the express purpose of attracting business to those states.

III. LEGAL CONSEQUENCES

Rightly or wrongly, this gamut of legislation exists and the question arises as to whether this is the best way to develop the law.

Two rather different approaches to trust legislation were mentioned earlier: the all-encompassing, code-like statutes, and the more targeted "special provisions" laws.[16] Of course, looked at in terms of a series of interesting experiments, all of the new legislation can be said to be helpful—although I am not so sure that too many of the legislatures in question would be happy to be seen as a kind of legal laboratory. However, I would express a number of concerns regarding to the code-like statutes.

Almost all of these are based on the Trusts (Jersey) Law of 1984.[17] It was eminently sensible, if not essential, for a non-common law country like Jersey to enact comprehensive trust laws. It needed the law to answer as many questions as possible in order to provide a sounder basis for trusts in the island than had hitherto been available. For such a project, compromises were inevitable and risks had to be taken. It would be unfair not to say immediately that the adventure has been remarkably successful. However, apart from Guernsey, which adopted Jersey's innovation in modified form in 1989, this justification cannot be applied to the other countries that have since enacted variations on Jersey's original theme. Each is a common law jurisdiction and had the benefit of equity and the full history of trust law available to it. Was it wise in these places to restate, statutorily, the whole of trust law in this way? For several reasons, I would suggest not.

The notion behind these laws is that with everything written down in relatively simple, modern language everyone will know where they stand. This is patently untrue; these statutes, like statutes everywhere, can cause as many problems as they solve. I saw some statistics a few years ago which indicated that a remarkable proportion, possibly as high as ninety percent, of all civil litigation in England is concerned in whole or in part with statutory interpretation. This, of course, does not mean that one

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14. *See id.* at 861-88.

15. *See* ALASKA STAT. § 34.40.110 (Michie 1998); DEL. CODE ANN. tit. 12, §§ 3570-76 (Supp. 1998).

16. *See supra* notes 1-2 and accompanying text.

17. *See* Trusts Law, 1984 (amended 1989, 1991) (Jersey), *reprinted in* MATTHEWS & SOWDEN, *supra* note 1.

should not try, but it does suggest that circumspection is the order of the day and matters not in need of—or, perhaps, not suitable for—statutory reduction should be left alone.

What benefit has been gained in, say, the Turks and Caicos Islands (TCI) or Belize, by defining the word "trust" or, even less, "beneficiaries"? Section 3 of TCI's Trusts Ordinance 1990 provides:

> 3. A trust exists where a person (known as a trustee) holds or has vested in him or is deemed to hold or have vested in him property which did not form, or which has ceased to form, part of his own estate—
> (a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence; or
> (b) for any purpose which is not for the benefit only of the trustee; or
> (c) for such benefit as is mentioned in paragraph (a) and also for any such purpose as is mentioned in paragraph (b).[18]

The Belize definition[19] is almost identical except that it deals with purpose trusts differently in paragraph (b):

> (b) for any valid charitable or non-charitable purpose which is not for the benefit only of the trustee;[20]

There is nothing remarkable or offensive in these definitions. However, as always, one statutory definition begets another. Both statutes—as in almost all of the quasi-codes—contain a veritable dictionary of sub-definitions. The TCI law states:

> "beneficiary" means a person entitled to benefit under a trust or in whose favour a discretion to distribute property held on trust may be exercised;
> "settlor" means a person who provides trust property;
> "trust" includes -
> (a) the trust property; and
> (b) the rights, powers, duties, interests, relationships and obligations under a trust;
> "trust property" means the property for the time being held in trust;[21]

With this shorthand definition of a "beneficiary," the statutes have managed, unwittingly I would suggest, to equate trust beneficiaries and power beneficiaries, thereby dramatically enhancing the rights of mere objects of a power under these laws. In the modern offshore trust, the rights of such objects are fundamentally important, both in terms of taxation and in estate planning generally where much depends on the limited

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18. Trusts Ordinance, 1990, § 3 (Turks & Caicos Is.), *reprinted in* SPERO, *supra* note 1, app. E.

19. *See* Trusts Act, 1992, § 2 (Belize), *reprinted in* 2 INTERNATIONAL TRUST LAWS, *supra* note 1, at D4-9. Unlike the Belize Act, the TCI Ordinance prohibits trusts for purposes in relation to which there is no beneficiary (not being a charitable purpose). *See* Trusts Ordinance, 1990, § 12(2)(a)(iii) (Turks & Caicos Is.), *reprinted in* 2 INTERNATIONAL TRUST LAWS, *supra* note 1, at D18-3.

20. Trusts Act, 1992, § 2(b) (Belize), *reprinted in* 2 INTERNATIONAL TRUST LAWS, *supra* note 1, at D4-9.

21. *Id.* § 2(1).

entitlements of objects of powers. These definitions may prove to be exceptionally wide. In trusts that have powers to add persons to discretionary classes of beneficiaries, is the possibility that a person may be added sufficient to render him "a person . . . in whose favour a discretion to distribute property held on trust may be exercised."[22]

This could have dramatic tax and other consequences. The simple answer may be that until added, the discretion cannot be exercised. If this particular precondition excludes a person from the class until satisfied, what happens to other preconditions, such as an age qualification or a consent requirement? It may well turn on what is meant by the exercise of discretion.[23]

The definition of "settlor" in the TCI Ordinance is also of interest.[24] This definition is the same as in the original Jersey law and is also found in the Belize and other quasi-codes.[25] The word "provides" in the Jersey definition would seem to follow from a U.K. tax case in which it was held that the word implies an element of "bounty."[26] The case involved anti-avoidance provisions of impossibly wide import, that the court cut down to something sensible by importing the bounty requirement in all dispositions otherwise affected by the provisions.[27] This is hardly the normal meaning of "provide," and one wonders whether foreign courts will feel obliged to interpret the expression in the same way. If not, "settlor" may not be restricted to the person who made the beneficial disposition of the property to create the trust and might, perhaps, be extended to a trustee who appoints or advances property to another settlement. The St. Vincent International Trusts Act 1996 adopts a different approach and describes a "settlor" as "a person who makes a disposition of property on or to a trust" and contains a wide definition of "disposition."[28] Nowhere is there any reference to the making of a beneficial disposition. Is this implied by virtue of the disposition being "on or to a trust"? Under general property law, only the beneficial owner of assets can make a beneficial disposition of them upon trust.

The process does not stop there. In many of the quasi-codes, it was necessary to specify the nature of a beneficiary's interest and to define that interest. Taking the TCI Ordinance again, Section 2(1) states that:

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22. *Id.*

23. Consider Section 15(4) of the Perpetuities and Accumulations Act 1964 (England).

24. *See id.* § 2 ("'settlor' means a person who provides trust property").

25. *Compare id. with* Trusts Law, 1984 (Jersey), art. 1, *reprinted in* 2 INTERNATIONAL TRUST LAWS, *supra* note 1, at D15-3.

26. *See* Inland Revenue Comm'r v. Plummer, [1979] 3 All E.R. 775, 783-84 (H.L.).

27. *See id.*

28. International Trusts Act, 1996, § 3 (St. Vincent), *reprinted in* 2 DIAMOND, *supra* note 1, at STV 126.

> "interest of a beneficiary" means his interest under a trust and references to his interest have a corresponding meaning;[29]

and Section 11 provides that:

> The interest of a beneficiary is movable property and, subject to the terms of the trust, may be sold, pledged, charged, or otherwise dealt with in any manner applicable to such property.[30]

In England—and generally within the Commonwealth—the interest of a mere object of a power is not property capable of immediate assignment,[31] so that a voluntary assignment of any benefit that might accrue will not be enforced although a contract of assignment for value will be.[32] Has the TCI Ordinance (and similar quasi-codes) had the effect of promoting the mere *spes* of an object of a power to the status of property? Is the effect of Section 11 to give the object of a power an interest, presumably in the trust fund, that is capable of assignment? Perhaps Section 11 is to be read as, "[t]he interest, if any, of a beneficiary," but the tenor of the section does suggest an assumption that all beneficiaries have some interest.

The purpose of my comments is not to pick at these efforts, but to demonstrate that the all-encompassing approach is ill-advised. There is little doubt that the trust has become something of a barnacle-encrusted ship. Trust law has worked its way into a corner in several respects, and the new laws have succeeded in correcting much of this. But it is all too easy to throw the baby out with the bath water. A good example of this is found in the breach of trust provisions of several of the quasi-codes. Take Section 50 of the Belize Trusts Act 1992:

> (1) Subject to the provisions of this Act and to the terms of the trust, a trustee who commits or concurs in a breach of trust is liable for -
>
> (a) any loss or depreciation in value of the trust property resulting from the breach; and
>
> (b) any profit which would have accrued to the trust property had been no breach.
>
> (2) A trustee may not set off a profit accruing from one breach of trust against a loss or depreciation in value resulting from another.[33]

Although this succinct provision may be attractive, it raises a number of issues. First, it does not restate the key element of a trustee's liability—the duty to account as distinct from liability to pay damages for loss. Thus, under the Belize law, assets misappropriated by the trustee are treated as though they remain part of the trust fund, and the trustee is not liable for the accounting of the assets. Instead, the trustee is made liable for

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29. The Trusts Ordinance, 1990, § 2(1) (Turks & Caicos Is.), *reprinted in* SPERO, *supra* note 1.

30. *Id.* at § 11.

31. *See* In re Brooks' Settlement Trusts, [1939] 2 All E.R. 920, 924 (Ch.).

32. *See* In re Coleman, 39 Ch. D. 443 (1888).

33. Trusts Act, 1992, § 50(1), (2) (Belize), *reprinted in* 2 INTERNATIONAL TRUST LAWS, *supra* note 1, at D4-9.

the loss "resulting" from his breach so that every breach, whether positive or negative, is treated in the same way.

Take the classic example of the trustee who has no powers to delegate investment management but who puts funds in the hands of an investment manager and permits it to buy and sell investments at its discretion. The manager is highly regarded; it exercises all proper care and adopts proper investment policies. The market subsequently collapses, October 1987-style, and significant losses ensue on the portfolio. If the trustee, instead of delegating to the investment manager, had obtained and acted on its advice, the trustee would have made exactly the same investments as the investment manager and with the same loss ensuing. However, under the traditional duty to account, an improperly delegating trustee must account for the full amount of the funds paid to the investment manager. The position under the Belize—or any of the other quasi-codes adopting a similar rule[34]—will be different. A causative liability test appears to have been introduced under which it is likely that the loss on the investments will be found to have arisen by virtue of the market collapse, rather than the invalid delegation. This may be a good thing, but it represents a significant reduction in trustee responsibility.

Operating to the opposite effect is Section 50(2) of the Belize Act,[35] which seeks to prohibit setting off a loss on one breach of trust against a gain on another. This accurately reflects the general rule but misses the very helpful qualification to it found in *Bartlett v. Barclays Bank Trust Company Ltd. (No. 2)*,[36] whereby losses and gains stemming from the same transaction or policy can be offset. Interestingly, the TCI ordinance managed to catch this, but none of the quasi-codes appears to have done so.

IV. SOME WIDER ISSUES

Although the *Bartlett* case preceded the enactment of the original Jersey law, this example highlights a further difficulty with the quasi-code approach—subsequent judicial developments in the common law world will be lost to these jurisdictions, pending an amendment to the statute. It can be countered that this is the problem with statutory law generally, but the problem with the quasi-codes is that they are reducing to

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34. It is submitted that the mischief—if it is such—lies in the introduction of the causative element. Thus, even under the similar provisions in the TCI and Jersey statutes, the same will apply notwithstanding the express preservation in these laws of the old law. *See* The Trusts Ordinance, 1990, § 24 (Turks & Caicos Is.), *reprinted in* SPERO, *supra* note 1; Trusts Laws, 1984, art. 21 (Jersey) (amended 1989, 1991), *reprinted in* MATTHEWS & SOWDEN, *supra* note 1.

35. *See supra* note 41 and accompanying text.

36. *See* Bartlett v. Barclays Bank Trust Co. (No. 2), 2 [1980] All E.R. 92, 96 (Ch.).

statutory formulae rules and concepts that are unsuited to this treatment or that have yet to be fully worked out—hence their present uncertainty—and are all the more likely to receive judicial attention in future years.

The trust is a common law invention, the product of experience over many years. But the more it is reduced to legislation, the more formalistic it becomes, and the less able it will be to respond to new situations and challenges. The quasi-code approach—and, to a much lesser extent, the targeted approach—also results in a fragmenting of the trust law. The trust has benefited immensely from the relative uniformity of most general principles throughout the Commonwealth and other common law countries. This has enabled developments, in the form of judicial pronouncements, in one country to be freely adopted in others. With the imposition of the quasi-codes, the concern is that in the future there will exist a multiplicity of trust systems, many of which will be unable to contribute to, or benefit from, the general development of trust law.

This threat of formalistic reduction leads to another concern: the personification of the trust. While, colloquially, it is acceptable to speak in terms of "the" trust and of what is "in" it, and of transferring property "to it," it is essential to keep firmly in mind that a trust is not an entity but a relationship. We can all accept, as a matter of conveyancing simplicity, that a transfer "to the XYZ Trust" means a transfer to the trustees of that trust as the trustees thereof, but the gradual process of conceiving the trust as a thing does not, unfortunately, stop there. We now see legislation that speaks glibly of property being provided "to a trust," of property held "in a trust," and, even worse, of suing "the trust," of actions being brought against "the trust," and of the service of documents upon "a trust."[37] What these last examples are supposed to mean, I have no idea—although we saw in the Cook Islands, Orange Grove case that proceedings were in fact brought both in California and in the Cook Islands against "the trust."

The problem is twofold. First, lazy terminology leads to lazy thinking—a common example being in purpose trust legislation, where one often finds references to duties being owed to a "purpose." This is meaningless. There can be a duty to achieve or promote a purpose, but that duty must be owed, if at all, to a person capable of enforcing it. Several of the quasi-codes provide for "registered trusts." Of itself, this is not offensive and neither is it new,[38] but the concept has moved on to the extent that we now have a registered office of a trust—for example, in

37. International Trusts Act, 1984, § 19 (Cook Is.), *reprinted in* SPERO, *supra* note 1 (not a quasi code statute); The International Exempt Trust Act, 1997, § 41 (Dominica) *reprinted in* 1 DIAMOND, *supra* note 1.

38. Registration was, and remains, a requirement of the 1926 Liechtenstein trust law. *See* Personen und Gesellschaftsrecht (PGR), 20 Jan. 1926 (National Law Gazette, 1926/4).

the Cook Islands' International Trust Act and Dominica's International Exempt Trust Act.[39]

Secondly, this leads to, and is in part caused by, the reduction of the trust to a product. My objections here are not those of a sniffy purist remonstrating against the commercialization of a treasured concept. Far from it; my concern is that if we are not careful we will destroy the concept, and with it the substantial commercial and social opportunities it offers.

The problem with "product" thinking is very much linked to a further and final concern. This is the fear that there is a lack of appreciation for the awesome power of legislation. In theory, everything can be put right with legislation, but one must, first, be crystal clear as to whether anything is wrong and, second, be equally sure that the remedy is right and proper. A cavalier approach to legislative power, coupled with a "product" mentality, can be a dangerous mix. I end with a prime example of what can result from this—the St. Vincent statute. The desire for ever more attractive asset protection trust legislation appears to have given rise to the notion that solutions lie in ever shorter limitation periods. Unfortunately, in its enthusiasm for this approach, the legislature has decided to limit claims for breach of trust to two years *from the date of commission.*[40] Read literally, this will make it virtually impossible for any beneficiary to sue for breach of trust, as most breaches will be discovered well after this period. In an attempt to do justice in such cases, I suspect that the courts will find a great number of continuing breaches, continuing, that is, up to the date of discovery.

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39. *See* International Trusts Act, 1984, § 18 (Cook Is.), *reprinted in* SPERO, *supra* note 1; International Exempt Trust Act, 1997, § 41 (Dominica) *reprinted in* 1 DIAMOND, *supra* note 1, at DOM 119.

40. *See* International Trusts Act, 1996, § 42 (St. Vincent) *reprinted in* 2 DIAMOND, *supra* note 1, at STV 140.

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TOPIC V

The Recognition of Common Law Trusts and Their Adoptions in Civil Law Societies

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