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The Evolution of Trust and Treuhand in the 20th Century

Common Law authors often complain that lawyers on the Continent are reluctant to make the effort to understand the trust concept. The same authors write about specific statutory forms of the trust's equivalent in the Germanic law family, the Treuhand, without quoting a single primary source: they treat the Testamentsvollstrecker, the testamentary executor who holds the powers of trustee, without reference to the German, Austrian, Swiss or Japanese Supreme Court or relevant doctrine in these countries. Must we conclude from this neglect that trust and Treuhand have drifted still further apart in this century?

One main problem both in understanding and in conceptualizing trust and Treuhand is that contractual and property elements seem strangely intertwined in them. A second problem has long been equally well known. There is a great variety – mainly in civil law systems – among institutions that are functionally equivalent to trust or Treuhand; they serve similar purposes, but the technicalities of their juridical construction differ. And indeed, three different answers to the question raised at the outset can be given depending on whether one considers the third party rela-


tionship (section I infra), the contractual relationship between trustee or Treuhän-
der and settlor/beneficiary\(^4\) or Treugeber (section II infra), or trust and Treuhand as embedded in a whole range of functionally equivalent institutions (section III infra).

I. The Third Party Relationship as Starting Point

1. Characterization and Key Problems

Traditionally, and in Germany up to this day, the third party relationship or the property aspects of trust and Treuhand have been considered the crucial one\(^5\). This starting point is not astonishing in a world where “fear and fraud” have been regarded as the parents of the trust\(^6\). The examples in which trusts became instruments to hide the real intentions and to circumvent prohibitions are numerous, mainly in former centuries\(^7\); the preponderance of this type of trust examples is characteristic of formalistic legal systems in which the doctrine of circumvention and – more generally – of an interest-based approach is weak\(^8\). In the terminology

\(^4\) In Anglo-American law, lawyers are accustomed to thinking of the settlor and the beneficiary as different persons, whereas on the continent the contrary is true. The split has to do with the most common field of application of trusts – in decedents’ estates – but the major tendencies in both systems can be explained without reference to this split. Therefore, whenever the term “settlor” is used hereinafter, unless specified otherwise it is meant to refer merely to a settlor who has established a trust – an inter vivos trust – for his own benefit.

\(^5\) For German speaking countries, see Siebert (n. 1) 2; as well as Siegbert Lammel, Die Haftung des Treuhänders aus Verwaltungsgeschäften – Zur Dogmatik des “Verwaltungshandelns” im Privatrecht, Frankfurt/M., 1972, p. 17; and in the last ten years: Joachim Gernhuber, Die fiduciariische Treuhand, Juristische Schulung 1988, 355; Martin Hessler, Treuhandgeschäft – Dogmatik und Wirklichkeit, AcP 196 (1996) 37; Rolf Watter, Die Treuhand im Schweizer Recht, Zeitschrift für Schweizerisches Recht 1995, 179, 219 - 236 (expert opinion for the Swiss Law Association [Schweizer Juristentag]) and even Coing (n. 1), who although stressing the importance of the contractual link (pp. 87 f.) treats the third party relationship in much more detail. Perhaps not surprisingly this is different when a practising lawyer describes problems of Treuhand: see Manfred Umlauf, Die Treuhand aus zivilrechtlicher Sicht, in: Apathy (n. 1) 36 - 45.

\(^6\) Attorney General v. Sands, Hard. 488 (491), 145 E.R. 563 (Exchequer, 1668); and, among the numerous citations of this dictum in legal literature, Bogert (n. 1) 7, n. 10. The main early regulation concerning the element of form which was intended to guarantee disclosure and ban “fraud” was therefore named the Statute of Frauds, 29 Car. II, ch. 3 (1676), see Scoles/Halbach (n. 1) 304 f.; a similar view was expressed in Germany by Friedrich Klausing, Fiduciariische Rechtsgeschäfte – einschließlich Sicherungssübereignung, in: Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes, Berlin, 1930, pp. 368, 370.

\(^7\) See Bogert (n. 1) 8 - 10; Grundmann (n. 1) 11 - 14; Paul Oertmann, Die Fiducia im römischen Privatrecht, Berlin, 1890, pp. 124 f., 135 - 146; Siebert (n. 1) 30, 34, 44 f.

\(^8\) Wolfgang Kunkel, Römische Rechtsgeschichte – eine Einführung, 12th ed., Köln/Wien, 1990, pp. 85, 87; Oertmann (n. 7) 118; Robert Schless, Mittelbare Stellvertretung und
of micro-economics, one would treat these examples as cases in which externalities were caused.

The main issues discussed in third party relationships in this century both in the Anglo-American system and in the doctrine of Treuhand have been: (1) whether and under which circumstances creditors of the trustee or Treuhänder can seize the trust property without consent of the settlor or Treugeber; (2) whether and to what extent the trustee or Treuhänder can convey title to trust property to a purchaser if this is contrary to the trust instrument; and (3) the question of the personal liability of the trustee⁹. The two questions mentioned first are the most characteristic.

2. Effects of the Anglo-American Trust against Third Parties

In the Anglo-American system - despite a very detailed doctrine and jurisprudence - the main rule is well settled and relatively simple. The equitable interest of the settlor is treated as if it were a property right. Therefore the settlor can trace the trust property if it is seized by a personal creditor of the trustee (i.e. for a debt incurred for the benefit of the trustee and not of the trust)¹⁰ and - in case of conveyance - against any third party who is not a bona fide purchaser for value¹¹. The exceptions to this rule have for long been regarded as insignificant and can be neglected here. What is crucial for the historical view is that the main rule was already well established at the beginning of this century¹², and therefore one can safely state that, as far as third party relationship goes, there has been no significant change in this century in the Anglo-American system. This report can therefore concentrate on Treuhand and its effects as to third parties. Here, significant change can be found.

3. Lesser Effects of the Treuhand against Third Parties

(a) The Victory in Theory of a Purely Contractual Concept

At the turn to the 20th century one of the two major trends in Germany sought to reach the same result as had been reached in Anglo-American law by reference to

Treuhand, Leipzig, 1931, p. 17; also: Scoles/Halbach (n. 1) 13; this explains the title of Austin Scott, The Trust as an Instrument of Law Reform, (1921/22) 31 Yale L.J. 457. It might even be that feudal systems survived longer precisely because of the flexibility of the trust and Treuhand device which took away some of their rigidity in a key area: see, for a more detailed exposition, the contribution in this volume by Karl Otto Scherner.

⁹ For the majority of these questions see (for Germany) Coing (n. 1) ch. VIII (especially 161 - 183); Siebert (n. 1) 149 - 182.

¹⁰ See Bogert (n. 1) § 32; Kötz (n. 1) 30; Scott/Fratcher/Ascher (n. 1) §§ 2, 459.

¹¹ See Bogert (n. 1) § 165; Scoles/Halbach (n. 1) 777 - 787 (with further material); Waters, Recueil des Cours 252 (1995) 277 f., 432 f.

¹² Bogert (n. 1) 115, n. 81.
Germanic, more specifically Langobardien, sources. The supporters of such a deutschrechtliche (Germanic) Treuhand, especially Alfred Schulzle, used the condition subsequent as a technical device to arrive at this result. He interpreted the sources to state that any conveyance of trust property from the settlor to the trustee must be considered to have taken place under the condition subsequent that the limits imposed by the fiduciary relationship should be respected. Any violation of these limits or seizure contrary to these limits would therefore render the conveyance void. However, the supporters of the opposite trend, the römischechtliche (Romanic) Treuhand, ultimately prevailed. It is true that the prevailing view would uphold an express stipulation of a condition subsequent—a result which could be justified at least for claims by pointing to §§ 161, 883, 2113, 2215 of the German Civil Code. An express stipulation was, however, necessary under this view and

13 For this tendency, the well-foundedness of its historical assumptions and the dispute about the two types of Treuhand, see in more detail the contribution to this volume by Sybille Hofer.

14 Developed by Alfred Schulzle, Die langobardische Treuhand und ihre Umbildung zur Testamentsvollstreckung, Breslau, 1895, pp. 76 - 88. Among the supporters of a similar solution in more recent years is Hans Schlosser, Außenwirkungen verfügungshindernder Abreden bei der rechtsgeschäftlichen Treuhand, NJW 1970, 681, 684 f.; for precursors and subsequent evolution of this theory, see Wolfgang Asmus, Dogmengeschichtliche Grundlagen der Treuhand—eine Untersuchung zur romanischen und germanischen Treuhandlehre, Frankfurt/M./Bern/Las Vegas, 1977, pp. 44 - 71, 152 - 246; Coing (n. 1) 47 - 50; Siebert (n. 1) 44 - 52, 213 - 232.


such a stipulation was not deduced from the mere fact that the aims of the fiduciary relationship had been established\(^\text{17}\). Schultze's ideas were therefore not given effect in most situations.

\((b)\) Some Traces of a Property Right Concept

The success of the trend which claimed inspiration in Roman law was not complete, however. One has not only to take account of the main issues discussed, i.e. the guidelines of discussion, but also of the results reached. There was a significant shift away from a concept that would treat the beneficial right in the trust property as a purely contractual one, a concept that had been taken for granted by Schultze's opponents.

The parameters of the discussion were fixed by Wolfgang Siebert. His monograph on Treuhand, probably the most important one in the first half of the 20\(^\text{th}\) century, did not describe the duties incurred by both parties mutually, but investigated whether and to which extent the different technical constructions of a Treuhand were appropriate to produce the results intended also with respect to a third party\(^\text{18}\). Later on, this question remained the most important one in discussion. In most cases it has been treated as determined by the question of how closely the beneficial interest could be considered a property or quasi-property right (quasidringliches Recht)\(^\text{19}\). Some authors have characterized the beneficial interest even


\(^{19}\) The terms used are de facto property (wirtschaftliches Eigentum) or quasi-property in most cases when discussing the right of personal creditors of the trustee to seize trust property: see RGZ 84, 214, 217; 127, 341, 344; 133, 84, 87; BGHZ 11, 37, 41; 61, 72, 76 f.; BGH WM 1969, 475; 1972, 383; Ulrich Huber, Die Rechtsstellung des Treugebers gegenüber Gläubigern und Rechtsnachfolgern des Treuhänders, Festschrift zum fünfzigjährigen Bestehen des Instituts für ausländisches und internationales Privat- und Wirtschaftsrecht der Universität Heidelberg, Heidelberg, 1967, 399, 411 f.; Gernhuber, Juristische Schulung 1988, 359; Scharrenberg (n. 16) 45 f. (but see also 121 f.); Hans Schuler, Die rechtsgeschäftliche Treuhand – ein Problem der Rechtsfortbildung (Korreferat), Juristische Schulung 1962, 50,
as a restricted right in rem\textsuperscript{20}. Relatively few condemn these terms and categories outright\textsuperscript{21}.

The same shift can be seen in the major attempt to have Treuhand regulated by statute in the first half of this century.

Already during the legislative process of the German Civil Code before 1900 the question was raised by the Second Commission (and answered negatively) whether the fiducia should be tailored to accord with § 392II of the German Commercial Code. In commercial sales commission cases the Commercial Code gives the settlor a right to trace trust property if it was seized by a personal creditor of the trustee (and possibly also against any third party who was not a bona fide purchaser for value).\textsuperscript{22} In the following years legislation was quite often called for\textsuperscript{23}, and both in 1912\textsuperscript{24} and in 1936\textsuperscript{25} the question was even discussed by the German

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\textsuperscript{23} See for this discussion: Asmus (n. 14) 283 - 288; Giseltraud Otten, Die Entwicklung der Treuhand im 19. Jahrhundert – die Ausbildung des Treuhandbegriffes des modernen Rechts, Göttingen/Zürich/Frankfurt, 1975, pp. 204 - 207; Schulzke, JHJ 43 (1901) 1, 19 f.


Trust and Treuhand in the 20th Century

Lawyers’ Association (Deutscher Juristentag). In all cases the expert opinion – as with almost all prior authors – advocated rules treating the beneficial interest as a kind of property right. Parliament did not react to the demand for change and later the possibility of change in the statute seemed obsolete. In the few cases, however, in which a specific statute on Treuhand actually was passed, as in Liechtenstein, the third party relationship was always the dominating point of discussion.

The same shift can nevertheless also be seen in the results reached for the Treuhand under German law – at least for the problem of seizure by personal creditors of the trustee. At the outset the solution of the German Supreme Court was as simple as under ordinary trust doctrine: a personal creditor of the trustee could not seize trust property properly ear-marked (and therefore distinguishable). This result was justified mainly because the possibility of seizure was considered a windfall for any personal creditor of the trustee. Despite this, the court later changed its mind, and made the protection of the beneficial right dependant on whether the trust property seized had been transferred from the settlor to the trustee directly rather than from a third party. This rule, however, nowadays constitutes only the


28 RGZ 45, 80, 83 - 87 and especially RGZ 79, 121, 122 f. (principle of certainty, Bestimmtheitsgrundsatz).

29 RGZ 45, 80, 84; 79, 121, 123; Coing (n. 1) 178; Heymann (n. 15) 531; Scharrenberg (n. 16) 9, 46; Gerhard Walter, Das Unmittelbarkeitsprinzip bei der fiduziärischen Treuhand, juristische Dissertation Tübingen, 1974, p. 65.

30 RGZ 84, 214, 217; 91, 12, 16; 127, 341, 344 f.; 133, 84, 87; 153, 366, 369 f.; 160, 52, 59; BGH NJW 1959, 1223, 1224; BGH WM 1964, 179; OLG Köln ZIP 1984, 473, 475; Friedmann, Verhandlungen des 36. Deutschen Juristentages 1930, vol. I, 862, coined the term Unmittelbarkeitsprinzip (principle of immediacy of transfer) used nowadays; many authors still follow this doctrine: Adolf Baumbach, Wolfgang Lauterbach, Jan Albers, Peter Hartmann, Zivilprozeßordnung – mit Gerichtsverfassungsgesetz und anderen Nebengesetzen, 54th ed., München, 1996, § 771 ZPO, no. 22; Dieter Liebich, Kurt Mathews, Treuhand und Treuhänder in Recht und Wirtschaft, 2nd ed., Berlin/Herne (New Wirtschaftsbriehe), 1983, pp. 152, 156 (but see also p. 24 f., 474); Hans-Christoph Maulbetsch, Beirat und Treuhand in der Publikumspersonengesellschaft, Bonn, 1984, p. 131; Rolf Serick, Eigentumsvorbehalt und Sicherungsübereignung, vol. II, Heidelberg, 1965, pp. 81 - 84. For further specification of the cases in which immediacy of transfer was found to exist (putting trust property into a
undoubtedly minimum protection granted to the settlor's beneficial interests. In the 1950s the Federal Supreme Court (Bundesgerichtshof), followed by virtually all commentators, extended the protection to those cases in which the trust relationship was evident to third parties, especially those involving bank accounts held in trust by a notary public or a lawyer. And in the scholarly literature this line of jurisprudence was generalized to all cases in which the trust relationship could clearly have been recognized by a third party. Many authors nowadays even return to the line of jurisprudence of the Reichsgericht at the beginning of this century and - for the reason given - advocate that the beneficial interest be protected whenever the trust property can be distinguished from other assets (principle of certainty).

Less far-reaching is the protection of the settlor against wrongful conveyances made by the trustee. In general, the standard for determining the existence of a bona fide purchase for value under German law is the absence of gross negligence (§ 932 of the German Civil Code). The standard applicable to acquisitions of trust property contrary to the trust instrument by conveyance to a third party is however different. The majority view, both in jurisprudence and in legal literature, is that the conveyance is void only if an intention to harm the settlor fraudulently can be imputed to the third party. This is not the case if the third party merely knew about the existence of the trust instrument, but did not induce the conveyance. One can

bank account) or not to exist (damages for injury of the trust property by a third party; substitution of parts property), see Grundmann (n. 1) 312 - 314.

31 BGH NJW 1954, 190 (especially 191); BGH v. 7. 4. 1959, NJW 1959, 1223, 1225; 1971, 559, 560; BGHZ 61, 72, 79 (implicitly); OLG Köln ZIP 1984, 473, 475; BayObLG NJW 1988, 1796, 1797 f.

32 Arwed Blomeyer, Zivilprozeßrecht – Vollstreckungsverfahren, Berlin / Heidelberg / New York, 1975, pp. 153 f.; Canaris (n. 19) 411 - 419; Gerhuber, Juristische Schulung 1988, 361; Maulbetsch (n. 30) 131 f. (shares in limited partnerships held in trust); see also Lammel (n. 5) 9 f.


s surely find good arguments in the legislative process before 1900 in favour of this position. In an analysis based upon a weighing of interests, however, considering later legislative measures (as for instance the Basic Law of 1949) would make it easier to support a standard that looks to mere knowledge. Any purchaser knowing of the breach of fiduciary duty would not acquire title. On rare occasions, the Supreme Court applied this standard implicitly by equating the standard of fraud with that of knowledge and even sometimes explicitly for cases in a corporate setting. Only few authors wish to adopt the gross negligence standard applied to the acquisition of property also in all cases involving the acquisition of trust property. The justification for restricting the protection of the settlor in this field can be found in the German Civil Code: Its § 137 provides that any stipulated restriction of the powers of conveyance does not operate against third parties.

4. Differences in Concept

If it is therefore true that, as far questions of results in third party relationships go, trust and Treuhand converge at least partially in result, it is difficult to say the same for questions of conceptualization. In Anglo-American law the trust may well have stemmed originally from a purely contractual relationship and it may be that the right was a contractual one in the beginning which was given effect by Chancery or other courts of Equity against both the trustee and a third party. Today, however, the division in the judiciary has largely disappeared and these origins no longer influence the doctrine in the sense that the beneficial right in a trust must be treated as different from any other (restricted) right in rem. In Anglo-American law no distinctions are made as to how far the protection of the beneficial interest extends, whereas the intensity of protection differs under the Germanic system from one problem to another. This statement already gives a hint of the reality if one asks what the main differences in conceptualization are: Anglo-American law, on the one hand, treats the third party relationship as if specific property or some other restricted right in rem were involved. The German Treuhand, on the other hand, bestows protection on third party relationships only if specific legislative po-

35 See B. Mugdan, Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, vol. II (Recht der Schuldverhältnisse), Berlin, 1899, pp. 1 f. (Motive, p. 2 ff.).
36 Grundmann (n. 1) 328 - 331; Huber (n. 19) 415; v. Kries (n. 17) 88 f., 91 f.
37 RG JW 1925, 1635; also BGHZ 12, 308, 319 f.; see also Huber (n. 19) 410 - 414; v. Kries (n. 17) 19 - 22, 88 f.
38 BGHZ 12, 308, 310, 319 f.
39 Kötz (n. 1) 140 f.; Reinhard/Erlinghagen, Juristische Schulung 1962, 46.
40 Bogert (n. 1) §§ 2, 6, 7; Waters, Recueil des Cours 252 (1995) 274 - 278.
41 For the questions treated here for Austria, see Umlauf (n. 5) 36 f., 61 - 66; for Switzerland, see Nickel-Schweizer (n. 33) 97 - 100; Watter, Zeitschrift für Schweizerisches Recht 1995, 219 - 236.
licies can be found in one field or the other. Whether the settlor and beneficiary enjoys protection therefore depends on the specific statutory rules in each field separately, as for instance § 43 of the German Bankruptcy Act which provides some protection also for contractual rights or § 137 of the German Civil Code which, to the contrary, renders any contractual restriction of the powers of conveyance inoperable against third parties. At the core of the question is always a process of weighing conflicting interests (of the settlor and the third party), taking as starting point the relative weight that Parliament has given to these interests in different areas of law. In 1990 the question has therefore been raised whether Treuhand should be regarded as a part of property law in which some key principles of this field do not necessarily apply, that is: where party autonomy as to the content of the right is permitted and where no numerus clausus exists. And later in the 1990s this has been carried still further by taking the characterization of the fiduciary relationship as a contractual one seriously. Under this view all third party effects (externalities) of the Treuhand are best characterized as third party effects of a contract, the contractual fiduciary relationship (Treuhandvertrag), which have been approved implicitly by the legislature.

II. The Fiduciary Relationship

1. The Crucial Importance of the Fiduciary Relationship and Key Problem Areas

Much more direct mutual influence between trust and Treuhand doctrine can be found in the fiduciary relationship, the contractual aspect or Treuhandvertrag. In the terminology of micro-economics one would speak in this area about synergy effect. In highly a-formalistic, interest-driven legal systems like those of Germany and especially the United States it is in this field that the more intriguing problems can be found today. It is therefore not astonishing that in Anglo-American treatises more attention is devoted to the discussion of the contractual relationship nowadays than to the third party relationship. The Restatement Third on Trusts, in its

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43 Wolfgang Wiegand, Die Entwicklung des Sachenrechts im Verhältnis zum Schuldrecht, AC 190 (1990) 112 (especially 131 - 135): "Obligatorisierung der dinglichen Rechte".

44 Grundmann (n. 1) ch. 7.

45 See for the United States: Bogert (n. 1) §§ 10 - 14, 16 (third party relationship only §§ 9, 14); Scolés/Halbach (n. 1) §§ 9 - 19 (third party relationship only in parts of § 10 and 12); Scott/Fratcher/Ascher (n. 1) §§ 89 - 163 and especially §§ 163A-260 (third party relationship only in §§ 74 - 88.2, 261 - 329); and for Great Britain: E. H. Burn, Maudsley and Burn's Trusts and Trustees – Cases and Materials, London/Dublin/Edinburgh, 1990 (three chapters out of those not dedicated to one specific type [16 ff.] treat the fiduciary relationship, only one the third party relationship); Graham Moffat/Michael Chesterman/John Dewar, Trusts
first and up till now only part, also treats only questions of the contractual relationship (prudent investor rule). The disputed and contradictory results in many recent cases in this area also show the increased importance of the contractual relationship. One need point only to the control premium cases, the (corporate) opportunity cases, the prudent investor rule, or competition clauses applied after termination of the relationship to appreciate the point. Other indicators of the increased importance of the contractual relationship in trust or Treuhand settings are to be found in economics: Where there is discussion in the law related branch of economics, the law and economics movement, about trust and Treuhand it has always and almost exclusively been about the contractual relationship. As a matter of fact, not only is there no equivalent to the so-called Agency Theory in the trust considered as a third party relationship, but Agency Theory has also become more and more one of the very few key discussion areas for law and economics. Moreover, if economic needs have driven the European Community to harmonization, certainly one of the two key areas in private law has been corporate and capital market law. Here, the most spectacular proposals and successes have often been related to fiduciary relationships which follow exactly the normal rules of the con-

Law – Text and Materials, London, 1988 (specific chapters, for instance chapters 10 and 19, only for the duty to administer, none for the third party relationship; and in the remaining chapters clear preponderance of the problems of the fiduciary relationship). The same can be stated for the comparative law article by Helmut Coing, Rechtsformen der privaten Vermögensverwaltung, insbesondere durch Banken in USA und Deutschland – zugleich ein Beitrag zur Frage der Übernahme des Trustrechts, AcP 167 (1967) 99, which deals almost exclusively with problems of the contractual relationship.


48 Quite explicitly Easterbrook/Fischel (n. 47) 17: “The corporation’s choice of governance mechanisms does not create substantial third-party effects . . .”.

tractual relationship in trust or Treuhand settings. The description of the problems of this relationship has often been somewhat harder for the Germanic law family, however, because the contractual, the fiduciary relationship is often discussed quite briefly at least for the traditional two-party Treuhand relationship. It is not surprising, as a result, that the main streams of influence today run from the Anglo-American system to the Germanic – some even call the phenomenon a reception of law\textsuperscript{50} – and from fiduciary relationships in the corporate setting to those in the traditional two-party Treuhand setting\textsuperscript{51}.

The main problem areas can easily be highlighted by describing the key elements of trust and Treuhand relationships: The trustee administers the assets for the benefit of the settlor\textsuperscript{52}. The shortest condensation of the two elements of this phenomenon can be found in the often used German term of Fremdverwaltung. Because the trustee works for the benefit of the settlor, the first question to arise involves distribution of assets. And as the trustee should make the decisions – otherwise there would be no relief for the settlor – and as on the other hand the person primarily interested, the settlor, might want, or deserve to have control mechanisms, there is, secondly, a decision-making-process question raised. The solutions adopted in both areas do not seem to fit easily under a common roof. There is, however, still consent that the basic rule should ensure that the interests of the trustee do not determine the solutions adopted\textsuperscript{53}. And complications always and only occur when interests of more than one settlor/beneficiary are involved. This leads to rules which vary in the different systems of law, i.e. the basic rule may be the same but the weighing of interests often leads to different results in different systems. Where there are specific differences, they are generally greater in the decision-making-process question than in the distribution-of-assets question.


\textsuperscript{51} For this second area, see III infra.

\textsuperscript{52} Franz Beyerle, Die Treuhand im Grundriss des deutschen Privatrechts, Weimar, 1932, p. 7; Scharrenberg (n. 16) 15; Shepherd (n. 1) 35 f. et passim.

\textsuperscript{53} Even the Chicago Law and Economics Movement which fosters solutions apparently contrary to this statement always stresses that these solutions allow enough gains for the trustees (in the corporate setting which they mainly address: for the managers or members of the board) to (over-)compensate the settlors/beneficiaries (the shareholders); see, for instance, for the insider dealing and corporate opportunity area, in which these questions first have played an important part: Henry Manne, Insider Trading and the Stock Market, New York, 1966, pp. 155 f.; Dennis Carlton, Daniel Fischel, The Regulation of Insider Trading, (1983) 35 Stanford Law Review 857, 870 f.; Easterbrook/Fischel (n. 47) 257 - 259; more in detail now: Kai Lahnmann, Insiderhandel – ökonomische Analyse eines ordnungspolitischen Dilemmas, Berlin, 1994, pp. 109 - 118.
2. The Distribution-of-Assets Question

The basic rule just described is particularly well established for values well enough defined to have become vested rights in a legal system, such as property, patents or titles. In this area appropriating trust assets is clearly forbidden to the trustee. Here even a meta-rule exists, designed to guarantee the effectiveness of the basic rule and requiring the trustee to segregate and ear-mark trust property. This rule is well settled. It is invariably one of the first rules stated in trust law in the Anglo-American legal system. It is, however, also beyond doubt in the Germanic legal system. Indeed, it has found its way into some of the general conditions and legislation in the universal bank area, probably the major player in Treuhand settings.

It is equally apparent in looking to the third party relationship: one duty owed by the trustee to the settlor is to make sure that his interests are best maintained in the third party relationship. Ear-marking may prove an effective device to this end.

The prohibition against appropriating trust property becomes more complicated once one defines values less narrowly, but rather functionally – something that seems virtually impossible in German-speaking literature, but which is done by

54 Restatement of the Law Second – Trusts 2d, as adopted and promulgated by the American Law Institute, 3 vols. and 2 appendices, St. Paul, 1959 and 1987 (Supplement 1995), § 179 (quoting about 60 decisions stating this rule since Restatement of the Law [First] of Torts, as adopted and promulgated by the American Law Institute, 4 vols., St. Paul, 1934, 1934, 1938, 1939); Bogert (n. 1) 359 - 362; Kötz (n. 1) 31; v. Kries (n. 17) 143; Scott/Fratch- er/Ashcer (n. 1) §§ 179 - 179.3 (quoting about 100 decisions). One of the most eloquent and impressive decisions justifying this rule still is Chapter House Circle v. Hartford National Bank & Trust Co., 186 A. 543, 547 - 549 (Connecticut 1936); see also Waters, Recueil des Cours 252 (1995) 113, 431 f.

55 Very explicitly: Klaus Mohr, Der Treuhänder des Bauherrenmodells, juristische Dissertations Hamburg, 1987, pp. 144 f.; often the rule is mentioned only en passant: Coing (n. 1) 142 f.; Harry Ebersbach, Handbuch des deutschen Stiftungsrechts, Göttingen, 1972, p. 179; Lammel (n. 5) 141 f.; Scharrenberg (n. 16) 129; and: BGH KTS 1961, 140, 141. The opposite view in Maulbetsch (n. 30) 131 can hardly be upheld.


57 Grundmann (n. 1) 345 - 347.

58 Here the definitions always are narrow and strict: see Coing (n. 1) 1 f.; Liebhich/Mathews (n. 30) 55 - 58; Bassenenge (n. 34) § 903 BGB, no. 33; Siebert (n. 1)102 f.; Leptien (n. 17) Vor § 164 BGB, nos. 58, 60; Hermann Dilcher; in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, 12th ed., Erstes Buch – Allgemeiner Teil – §§ 90 - 240, Berlin, 1980, Vor §§ 104 - 185 BGB, no. 59; Andreas v. Tuhr, Der Allgemeine Teil des Deutschen Bürgerlichen Rechts, vol. II, 2nd part, Berlin, 1957, pp. 185 f.
quite a few authors in Anglo-American literature. There the question is raised whether the rules of fiduciary relationships only apply to vested rights or also (and with identical content in principle) to valuable information\textsuperscript{59} and to valuable positions of influence and decision-making power\textsuperscript{60}.

At this point inevitably one has to discuss the foundations of the fiduciary duty or *Treupflicht*, the key duty in any trust or *Treuhand* relationship. There has been much discussion about this duty, but the elements of it remain rather diffuse. One has to keep in mind from the outset that the fiduciary duty of loyalty is defined in the relevant case law, at least in the core areas, as one which forbids the trustee to take any account of his own interests.\textsuperscript{61} Two questions are of major importance: the justification of such a fiduciary duty and the distinction between different types of fiduciary duties.

For the conceptualization and justification of the fiduciary duty, the two major steps were taken only in this century. (That involving the third party relationship was taken much earlier\textsuperscript{62}.) The first was taken in the 20s and 30s of this century.

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\textsuperscript{59} Shepherd (n. 1) 110, 113, 323 ff., especially 330; Robert Clark, Corporate Law, Boston/Toronto, 1986, p. 224, treats the taking of Corporate Opportunities under the title "Taking of Corporate Property" (but "in a nontechnical sense"). American jurisprudence is rich in this sense: see, among others, Carpenter, Felis & Winans v. U.S., 108 U.S. 316 (1988) ("Newspaper had property right in keeping information confidential... which was protected by statutes"); Ohio Oil v. Sharp, 135 F.2d 303, 306 - 307 (10\textsuperscript{th} Circuit 1943); for more material see Gareth Jones, Restitution of Benefits Obtained in Breach of Another's Confidence, (1970) 86 L.Q.R. 463, 464. Many decisions speak about "theft" or "stealing" of information: Harry Defler Corp. v. Kleeman, 243 N.Y.S. 2d 930, 934 (Appellate Division 1963); Meinhard v. Salmon, 164 N.E. 545, 547 (New York 1928). For historical parallels see Bernhard Pfister, Das technische 'Know How' als Vermögensrecht, München, 1974, pp. 34 - 36. There are, however, also quite a few statements to the contrary: Paul Finn, Fiduciary Obligations, Sydney/Melbourne/Brisbane/Perth, 1977, p. 132 ("... to call... information property is merely to add yet another consequence to a decision taken for reasons quite unrelated to property considerations"); Ernest Weinrib, The Fiduciary Obligation, (1975) 25 University of Toronto Law Journal 1, 11 - 13 (appropriation of corporate opportunities is not forbidden because of parallels to taking of property but instead for reasons of policy in favour of protecting entrepreneurship); E.I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 102 (1917) ("unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith").

\textsuperscript{60} For the same kind of presumption as for valuable information, see Shepherd (n. 1) 110 ("... powers of the sort we have described are in fact a species of property"); and quite a few court decisions (see Shepherd (n. 1) 113), the leading case being York v. Guaranty Trust, 143 F. 2d 503, especially 512 (2d. Circuit 1944).

\textsuperscript{61} See infra, n. 70.

\textsuperscript{62} Conceptualization for the third party relationship seems to have taken place in the 18\textsuperscript{th} century. For more detail see the contribution in this volume by M. Macnair. This chronological order is not astonishing, since flexibility in the third party relationship was the key element for the development of trust and *Treuhand* devices.
when it became established that fiduciary duties were completely distinct from other contractual duties – the leading case in the Anglo-American system being Cardozo’s decision in Salmon v. Meinhard63 and the key treatise in the German system being the one written by Alfred Hueck64.

The second step was taken after World War II and mainly in legal literature, where a search for a general justification of this more stringent rule in fiduciary relationships occurred. Even in the Anglo-American system a monograph led the way, something which is not astonishing given that a reasoned justification is a question of doctrine rather than of case law. For Shepherd two elements were decisive: that the trustee receives “powers”, i.e. valuable assets (which, as can be deduced from the examples given, include valuable information or positions of influence and decision-making power), and that the transfer of these powers be made under a proviso, i.e. that the powers be “encumbered”65. For the fiduciary duty in the German Treuhand it is more difficult to identify the leading monograph because it is a monograph on the analogous relationship in corporate settings, i.e. the trust relationship between the board and the shareholders or between a controlling shareholder and his co-shareholders. Wolfgang Zöllner finds the key element in the power to influence the legal position of another person, a power conveyed to the fiduciary by the legal system (not necessarily by the other party) within a (pre-) contractual relationship (or another equally individualized legal relationship)66. In

63 Meinhard v. Salmon, 164 N.E. 545, 546 (New York 1928): “Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”

64 Fiduciary duty has to be distinguished from the general duty of acting in good faith (§ 242 BGB): Alfred Hueck, Der Treuegedanke im modernen Privatrecht, München, 1947, pp. 12, 15 - 19; and before, but less explicit, Alfred Hueck, Der Treuegedanke im Recht der offenen Handelsgesellschaft, Festschrift für Rudolf Hübner, Jena, 1935, pp. 72, 74, 86 f.; later also the important treatises of: Marcus Lutter, Theorie der Mitgliedschaft – Prolegomena zu einem Allgemeinen Teil des Korporationsrechts, AcP 180 (1980) 84, 103 - 105, 122; Ernst-Joachim Mestmäcker, Verwaltung, Konzerngewalt und Rechte der Aktionäre – eine rechtsvergleichende Untersuchung nach deutschem Aktienrecht und dem Recht der Corporations in den Vereinigten Staaten, Karlsruhe, 1958, pp. 214 f.


66 Wolfgang Zöllner, Die Schranken mitgliedschaftlicher Stimmrechtmacht bei den privatrechtlichen Personenverbänden, München/Berlin, 1963, pp. 341 - 356 and especially pp. 343 and 342: “Dem Maß der Einwirkungsmöglichkeit ... und dementsprechend der Stärke des ... Anvertrauennüssens entspricht eine Pflicht zur Rücksichtnahme”, i.e. the fiduciary duty (of loyalty), whereby one has to consider that “die Betrachtung ... hier nicht von der Anvertrauung durch den Betroffenen aus[geht], sondern von der Einräumung durch die Rechtsordnung.” Forerunners of this idea are: Erich Fechner, Die Treuebindungen des Aktionärs – zugleich eine Untersuchung über das Verhältnis von Sittlichkeit, Recht und Treue, Weimar, 1942, pp. 76 f. (still invoking other elements as well); Ernst-Joachim Mestmäcker, Verwal-
essence both positions are identical because Shepherd also accepts the possibility that the proviso may be made by the legal system for the settlor and because both authors presuppose at least a (pre-)contractual relationship in which the trustee has received – again identical in essence – valuable positions (Shepherd) or the power to influence the legal status of the settlor (Zöllner). Zöllner’s line of ideas has become the prevailing view in Germany.\(^{67}\), Shepherd wrote for a less doctrinal system so that his theory attracted fewer followers (although it flows as an unnoticed undercurrent into main streams of case law). The examples he gives, however, are illuminating. They show that the mere holding of an influential position in a (pre-) contractual relationship does not justify the imposition of a duty of loyalty (Interessenwahrungspflicht) which would completely forbid the fiduciary to take his own interests into account: In adhesion contract cases, the enterprise clearly holds an influential position in a (pre-)contractual relationship and yet, it would be amazing if it was held to a fiduciary duty (of loyalty) as described above; the enterprise would be completely forbidden to take into account its own interests, i.e. it would have to further exclusively the interests of the other party. Therefore, it would not only be useless to formulate standard contract terms but even counterproductive. This is clearly not the law in either Germany or the Anglo-American legal systems which only try to restrict abuses of the enterprise’s opportunity to further its own interests.

A division between duties based on the interests of one party alone, excluding taking the interests of the other into account, and duties where the interests of both parties have to be weighed can be found also in settings which, unlike adhesion contract cases, have uniformly been characterized as fiduciary relationships. Indeed, both within fiduciary or trust relationships and within Treuhand relationships a key distinction between two types of duties is established. In Anglo-American law a distinction has become accepted between a duty of loyalty and a duty of care. The key difference is that the second duty, where the fiduciary only has to come up to a standard of sound business judgement, applies only in absence of any conflict.

of interests. It may be difficult to determine which cases are which. However, once a relevant conflict of interests has been detected it is well established that a more stringent rule applies. For the Treu pflicht the distinction between altruistic and egoistic powers (eigennützige und fremdnützige Befugnisse) has also become universally accepted and in the first case the fiduciary is completely forbidden to take into account his own interests.

The distinctions seem to coincide, but in fact do not. Both in cases of egoistic and in cases of altruistic powers conflicts of interests are possible. The business judgment rule therefore corresponds to what is called the prudent merchant’s standard under German law (the prerequisite of erforderliche Sorgfalt). It is a standard completely beyond the range of application of a fiduciary duty or Treu pflicht as distinct from a mere duty to act in good faith and not to breach contracts: The business judgment rule covers doing business where there are no possible conflicts of interest. Among the cases which do raise conflict of interest problems, there are some where decisions can be made by considering one’s own interests, although the interests of others have to be taken into account to some extent, and there are others where one’s own interests may not exercise any influence whatsoever. In the first setting it is asked by way of example whether a shareholder (who has the power to object) is obliged to accept a certain solution in a restructuring process of


70 Hueck, Festschrift für Hübner (n. 64) 72, 75 f.; already RGZ 121, 294, 296; as well as BGH WM 1972, 383 f.; today this is virtually undisputed: see Fischer (n. 69) § 105 HGB, no. 31b; Lutter ACP 180 (1980) 84, 93; Meismücker (n. 66) 214 f.; Ulmer (n. 69) § 705 BGB, no. 184; v. Gamm (n. 69) § 705 BGB, no. 17; Ernst Keßler, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Zweites Buch – Recht der Schuldverhältnisse – §§ 652 - 740, 12th ed., Berlin 1991, Vor § 705 BGB, no. 49.
the corporation. An example for the second setting occurs where a controlling shareholder appropriates a corporate opportunity that belongs to the corporation. Here it is only the interest of the corporation which is relevant, and no weighing of interests has to take place.

A third step would be to identify an element which clearly distinguishes the two types of duties, which are so distinct in legal effect. This element recently has been proposed to be added to those put forward by Shepherd and Zöllner. The type of fiduciary duty of loyalty that excludes the fiduciary from taking into account his own interests applies only and whenever the transfer of the valuable asset or the power of disposition to the trustee is gratuitous. Gratuitous promises often lead to rules based only on the interests of one of the two parties (the "donor") and are not the result of a process of weighing the interests of both parties.

In most distribution of assets questions it is easy to decide whether the assets were given for consideration or not. And it is therefore not astonishing that the rules can so easily be transposed from one country to another.

In the restructuring example the shareholder cannot be asked to disregard his own interests completely, because, by paying for the stock, he gave consideration for his power to take a proportional part in decisions. A complete disregard of his own interests can be required only if this person did not give any consideration for the asset to which the decision refers.

The trust or corporate opportunity doctrine can easily serve as an example. This doctrine is old in the Anglo-American legal system, even older than U.S.-American law itself: already in 1726 the appropriation of a trust opportunity by the trustee was held to be illicit because the trustee had not given any consideration for receiving this opportunity. The trust concept came to the fore later on also in corporate opportunity cases— with the sole difference that in corporate law cases it is more difficult to ascertain whether the fiduciary got the information gratuitously (in his role as a representative) or not (as an individual, independent of this role).

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71 See the famous Girmes case, BGHZ 129, 136.
72 For this idea see Grundmann (n. 1) ch. 5.
73 Kech v. Sandford, 25 E.R. 223 (1726). Many discussions of trusts take this decision as a starting point; see, for example, Weinrib, (1975) 25 University of Toronto Law Journal.
The controlling shareholder who gets information about an opportunity from the corporation has paid just as little as a manager or a member of the board. They are all completely compensated for what they invested (capital or work) by the agreed-upon returns (dividends or salary, bonus etc.). The aspect of gratuitous transfer is clearly the same; and even in the United States where many cases have been decided against the corporation\textsuperscript{75} it has never been suggested that weighing its interests against those of the management, control shareholder etc. would be appropriate in these cases\textsuperscript{76}. It has only been suggested that in the absence of any interests of the corporation, these persons might take the opportunity. And the key question is under what circumstances interests of the corporation can be considered to exist or not. In German law the necessity of this doctrine has been felt only recently because the most important types of trustees and fiduciaries economically speaking face an extensive prohibition against competing. When the doctrine began to influence German law, however, it was developed in strict parallelism to Anglo-American doctrine and jurisprudence\textsuperscript{77}. This not only shows the importance of gratuitous transfer for evaluating the acts of a whole range of different trustee-fiduciaries. It also demonstrates that in the distribution-of-assets question, where a clear and simple key principle can be applied, solutions are easily transposed from one legal order to the other. This is not astonishing. In principle the trustee has to ascertain the best solution for the settlor in the distribution-of-assets question. What is best is a question of applied economics and therefore does not radically change from one country to another in a today’s globalized economic world\textsuperscript{78}.

3. The Decision-Making-Process Question

The fiduciary’s duty not to take into account his own interests can be seen also in the legal rules for the decision making process. Under German law the result is relatively clear-cut: The settlor has the right to any information at any time about the trust property and its administration (§ 666 of the German Civil Code)\textsuperscript{79} and

\textsuperscript{75} See Pat Chew, Competing Interests in the Corporate Opportunity Doctrine, (1988/89) 67 North Carolina Law Review 435, 452, n. 53 (about 50% of the decisions in favour of the management, controlling shareholder etc.).

\textsuperscript{76} So far the only important opponents to this view, the Chicago School (see supra n. 54), have not had any influence on the case law in this respect.

\textsuperscript{77} See the first two monographs in this area: Polley (n. 71); Weisser (n. 67); and criticizing this fact: Thomas Paefgen, Die Geschäftschancenlehre – ein notwendiger Rechtsimport?, Die Aktiengesellschaft – Zeitschrift für das gesamte Aktienwesen 1993, 457 (especially 462 - 464).

\textsuperscript{78} Globalization leads to converging and often identical basic duties in the contractual relationship: Waters, Recueil des Cours 252 (1995) 408 - 410.

\textsuperscript{79} See BGHZ 41, 318, 320 f. The only exceptions are cases of abuse and cases in which the question does not directly concern trust affairs; Hans Hermann Seiler, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch – vol. III: Schuldrecht – Besonderer Teil – 2nd
may also issue any order regarding the trust property at any time (§ 665 of the German Civil Code)\(^\text{80}\). The model is one of an informed settlor who would have to suffer the economic consequences of his own decisions and who is therefore free to decide. In the absence of a directly pertinent order, the trustee makes the decisions autonomously.

This model cannot be found in trust doctrine. Neither with respect to the settlor’s right to information nor with respect to his right to give orders it is apparent. This may be due mainly to the fact that trusts normally involve three or more persons and on the side of the settlor at least two (settlor and beneficiary). Wherever this is true, the rule that the interests of the trustee have to be completely neglected cannot be applied fully because the interests of settlor(s) and beneficiary or beneficiaries have to be weighed. In two-party relationships, however, the rules for the decision making process under German law seem remarkably well-founded if one takes private autonomy seriously. This leaves open the question of how best to treat trust and Treuhand relationships involving a plurality of settlors and beneficiaries.

III. Trust, Corporation and the so-called Quasitreuhand

Traditional trust doctrine would seem incompatible with a number of the statements made so far because some of the examples given have not concerned trusts but other fiduciary relationships instead. The split between them has lost its importance in the contractual relationship, however, and was therefore rightly neglected in the section dedicated to it. The split has more to do with the third issue raised, in which the trust is seen as one institution among others, functionally equivalent. There are quite a few sub-questions to this question: among these, common law writers often focus on the question of whether the legal systems on the Continent do not rather tend to “personification” instead of emphasizing the trust’s inherent flexibility\(^\text{81}\). By comparing trust and corporation, however, they implicitly raise a second and perhaps even more fundamental question. This has to do with the number of settlors and beneficiaries. It asks whether there is only one, or more than one, and, in the event of the latter, whether these settlors or beneficiaries may even have structurally diverging interests.

\(^{80}\) See RGZ 106, 26, 31; BGH WM 1971, 158, 159 f.; 1984, 1443 f.; NJW 1991, 2139; Seiler (n. 79) § 665 BGB, no. 1, 14 f.; Thomas (n. 79) § 665 BGB, no. 3; Wittmann (n. 79) § 665 BGB, no. 1 - 3, 8.

1. Trust v. Personality or Flexibility v. Registration?

The trust has certainly survived both because of its flexibility and because it offers an alternative to registration and state control. The question raised may therefore be important in law reform on the Anglo-American side, but de lege lata it concerns mainly the legal systems on the Continent.

Under German law Hein Kötz has singled out three institutions which serve needs satisfied by the trust in the Anglo-American world: the Testamentsvollstreckung and Nacherbschaft, which are used to control succession to property for several legatees (and typically for many years), the Stiftung which serves to collect and administer funds for charitable purposes, and the general Treuhand by which an estate is administered for the benefit of one or more persons. The latter, the general Treuhand, is as open, flexible and exempt from any state control as the trust. The other forms, specifically regulated by the legislature, often are called Quasitreuhand. In most cases, however, they are not subject to registration and the fiduciary duty of loyalty is exactly the same as in general Treuhand relationships.

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82 For a change in trust law via statutory amendment, see the discussion in Waters, Recueil des Cours 252 (1995) 421 - 427.
83 Kötz (n. 1) 40 f., and for the different institutions in detail: 41 - 63 and 97 - 114; 63 - 69 and 114 - 120; 70 - 76 and 120 - 125.
84 There is in this area, however, as in any country with a highly developed capital market – a specific form of Treuhand as well, the Mutual Fund, which has been subject of harmonization in the Community: Council Directive of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (85/611/EEC), Official Journal 1985 L 375/19.
85 Friedmann, Verhandlungen des 36. Deutschen Juristentages 1930, vol. I, 827; and later, by way of example, v. Kries (n. 17) 50; Liebich/Mathews (n. 30) 48; for criticism, see Coing (n. 1) 97 f.
86 This is true for the Testamentsvollstreckung, which is specifically regulated, but otherwise – like any trust – subject to state control only insofar as a probate court can be invoked. This is also true for one of the two types of Stiftung, the unselbständige Stiftung regulated by §§ 525, 2194 BGB (see Kötz (n. 1) 114 - 120; and Coing (n. 1) 57 - 59; Schultze, JhJb 43 (1901) 32 - 35, 35 - 46). The only important exception is the incorporated type of Stiftung (regulated by §§ 80 - 88 BGB): it has to be registered, but constitutes only an alternative to the unselbständige Stiftung which allows the parties to opt against personal liability of the administrative body.
Therefore the split between general Treuhand and the specific forms of Treuhand (Quasitreuhand) regulated by the legislature is of prime importance only for the third party relationship. Here virtually all specific forms of Treuhand do not enjoy the restricted degree of protection of the general Treuhand, but rather a protection comparable to that of Anglo-American trusts: trust property can be traced and recovered if it is seized by a personal creditor of the trustee and – in the case of voluntary conveyance – against any third party who is not a bona fide purchaser for value.\(^\text{88}\)

The multitude of institutions therefore has less to do with the search for incorporation ("personification") and state control than with the desire to offer a specific regime, largely ius dispositivum, for each one of several important sub-tasks. In the contractual relationships the law has upheld in all regimes the same basic fiduciary duty of loyalty. In the third context, these specific regimes enjoy a level of protection Parliament did not wish to give to such an open institution as the general Treuhand, primarily to avoid a regime of "fear and fraud".\(^\text{89}\) The difference between Anglo-American trust and the Germanic family of institutions, ranging from the general Treuhand to the many specific forms of Treuhand, is therefore over-rated. One can even say that under German law the basic duty in the contractual relationship is virtually the same as in the Anglo-American trust and that the level of protection of the beneficial interest in the third party relationship is virtually the same both in the Anglo-American trust and in the forms of Treuhand specifically regulated by Parliament. The main difference is therefore that the German legislature wanted to pick the situations in which full protection in the third party relationship would be given. The general institution of Treuhand was therefore left at a somewhat lower level of protection, to be defined by doctrine and jurisprudence.

2. Unity or Pluralism of Interests
on the Side of the Settlor and Beneficiary

It makes an important difference in delineating the appropriate duty of loyalty whether there is a single settlor or several, who may even have structurally diver-

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\(^{88}\) See, for all important specific types of Treuhand regulated by the statute, Grundmann (n. 1) 33 ff.

\(^{89}\) The decisive argument in the legislative process against fullest possible protection was that otherwise general trust in the ownership of goods could be impaired: see Mugas (n. 35) 950 (Protokolle, p. 2310): "... der Kredit könne erheblich gestört werden, wenn die Gläubiger einer Person nicht mehr sicher seien."
giving interests. In the first case it is simple to deduce clear results from the principle that the self-interest of the trustee/Treuhand may play no part in trust administration. This is so because, where this obtains, no weighing process is necessary. This is true for the distribution of assets and in my view also for the decision making process. The same, however, is no longer true for a situation in which several settlors exist. Their interests have to be weighed and results of such weighing may be quite diverse.

An example dealing with the distribution of assets may be illuminating. As far as the fiduciary relationship (and not the third party relationship) goes, the board of a corporation is clearly subject to exactly the same type of duty of loyalty as the trustee is. Therefore, where corporate capital increases, the board must completely ignore its own interests. The result of weighing the interests of the shareholders (settlors) can, however, lead to a different result: German corporate law held the ratio of the respective shares almost sacrosanct and therefore contained a mandatory preemptive right which could be excluded only ad hoc and under very narrow circumstances\(^90\). In American corporate law the preemptive right is typically determined by the charter of each corporation\(^91\). The corporation may therefore choose whether it might seem more attractive to investors-shareholders to invest in a corporation where measures dealing with capital increase do not risk delay at the hands of a small shareholder who abuses his power. It may equally decide that this risk appears to be more important to potential shareholders than the risk that their stock will be diluted in a capital increase. The German legislature recently did rate the risk of abuse as more important than in former legislation: The pre-emptive right is no longer mandatory if the capital increase amounts to no more than 10 per cent of the stated capital and a price near the stock market price is paid (new § 186III of the German Stock Corporation Act).

Weighing interests of several settlors becomes even more difficult in questions involving the decision making process. A whole variety of results may be reached, the poles of which Hirshman has described as “voice” or “exit”. Nevertheless the underlying principle remains unchanged: The interests of the settlors alone must decide the question of which solution is to be chosen\(^92\). And if there is variety it is not only to be found between different legal systems but also within each of them. The model of the specific type of close corporations regulated in German law (Ge-

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\(^91\) Henn/Alexander (n. 68) 662; Merkt (n. 68) nos. 412 - 417.

sellschaft mit beschränker Haftung) would thus be one of extensive voice, the model of the mutual fund one of mere exit\textsuperscript{93}.

Is there then only divergence between trust and Treuhand where a plurality of settlors is involved? The answer may be that, contrary to what was said for third party relationships, the results may differ considerably, but that there remains a common strand in questions of conceptualization. The first point of convergence is that in both legal systems there are more and more authors who see that the basic rule remains the same whether there is only one settlor or more than one, who perhaps even have structurally diverging interests. Rules can and should be transposed from one scenario to the other\textsuperscript{94}. The second crucial point common to both legal systems is that more and more authors have sought to define those situations in which an absolute duty of loyalty exists. This has occurred not only in traditional Treuhand and trust cases but also in very complex corporate settings. They normally isolate situations in which a person did not give consideration for the assets or for a position of influence and decision making power. This again, has provoked very similar solutions in leading cases, for instance in the question of control premiums, the surplus a controlling shareholder can (and another shareholder cannot) earn when selling his stock. It is difficult to conclude that any consideration was given for the surplus (over the proportional price) because the investment in the beginning was exactly proportional. Both leading cases in the United States and the proposal for a Council Directive of the Community take this as main argument. They make sure that all shareholders are treated equally\textsuperscript{95}.

IV. Trust and Treuhand Irreconcilable?

Trust and Treuhand traditionally are seen as irreconcilable concepts. This is mainly due to a restricted viewpoint – often comparatists look primarily to the

\textsuperscript{93} See the summary in Grundmann (n. 1) 278 - 280.

\textsuperscript{94} The most important step in this field in Germany was taken when the Federal Supreme Court applied the fiduciary principle in a generally unmodified way also in the context of public stock corporations (Aktiengesellschaften) and here also among shareholders: BGHZ 103, 184 (esp. 194 f.); and again: BGH NJW 1992, 3167, 3171; very radical today is the Girms decision: BGHZ 129, 136. A theory for the transposition of the pertinent rules from one scenario to the other in: Grundmann (n. 1) 268 - 284, 421 - 481. In the United States one may point for instance to the important role the trust concept played when the corporate opportunity doctrine was developed.

third party relationship – and also to overestimating the fact that several different institutions serve trust purposes on the Continent.

Trust and *Treuhand* seem irreconcilable mainly in the third party relationship, and even here this appearance is true only in part: The results for the main questions are virtually identical as far as cases of trusts are concerned and those cases of *Treuhand* specifically regulated by statute. Only the “common law” *Treuhand* on the Continent offers less protection in third party relationships. The concepts, however, tend to differ more and more indeed, because the proprietary characterization of the beneficial interest is now universally accepted in the common law world whereas the contractual characterization of the beneficial interest has gained ground on the Continent.

In the contractual relationship the basic duty of loyalty is virtually identical – in both results and concept. It is still, however, equally disputed in common law and on the Continent, what elements justify a duty to neglect own interests completely. Such a duty exists only when the trustee/*Treuhänder* received the value transferred without giving consideration. The gratuitous nature of the transfer justifies that such a duty be imposed by the law. And this element can be tested also in more complex situations, namely relationships with a plurality of settlors.

It is this difference between cases where there is only one settlor and those where a plurality of settlors are present which counts more than the often mentioned difference between the flexibility of the common law trust and the more regulated and corporate type of relationship that exists on the Continent. In fact this difference creates structurally identical problems both in the common law and on the Continent: A plurality of settlors makes weighing of interests necessary. The results may therefore vary quite substantially in these cases. The basic duty of loyalty, however, is the same as it is in traditional trust and *Treuhand* cases when only one settlor is involved. This duty holds the trustee to a purely “altruistic” standard, i.e. he has to neglect his own interests completely. This is justified by the gratuitous nature of the transfer.