Report on the International Pallas Conference
"The Trust in Europe: Aspects of Fiscal and Private Law"
Nijmegen, 27 September 2002

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The conference held in Nijmegen on September 27, 2002 on the issue of "The Trust in Europe: Aspects of Fiscal and Private Law" was organised within the activities of the LLM. Pallas Programme and was chaired by Prof. Alégria Borrás (University of Barcelona).

The conference focused on the private an fiscal law aspects of trust. The morning session was devoted to private law issues, with the interventions of Prof. David Hayton (King's College, London) and Prof. Ken Reid (The Edinburgh Law School, Edinburgh). Prof. Hayton spoke of the common law trust concept and its reception in civil law jurisdictions, whereas Prof. Reid reported on the Scottish experience.

The afternoon session concentrated on tax law issues: Ms Joanna Wheeler of the International Bureau of Fiscal Documentation (Amsterdam) addressed taxation issues raised by trust in common law States, Prof. Frans Sonneveldt (Institute for Estate Planning, University of Utrecht) spoke of taxation and trusts in The Netherlands, whereas Dr. Marc Jülicher (of the Law Firm Flick Gocke Schaumburg in Bonn) reported on the German tax legal framework.

The morning lecturers evidenced that the recognition of the trust concept in both civil law an mixed systems raises complex legal questions. The common opinion of the learned speakers was that trust is an efficient and useful legal instrument for the purposes of assets' management. In particular, it is a versatile and flexible instrument, which can be employed for many different aims, both in family an in commercial contexts. Its versatility and flexibility should make it possible even for civil law and mixed legal systems to accommodate the trust concept to their own needs.

Prof. Reid explained that in all mixed systems the law of property is essentially civilian in character: however, many mixed systems developed autonomous trust (or trust-like) concepts. This may lead to the conclusion that, contrary to the most common explanations of the trust, the core element of this institution does not in fact lie on the divided ownership element, which is only known to common law systems.

According to the two lecturers the key of the trust concept is essentially given by the fact that the trustee owns the trust assets segregated from his private patrimony, and these cannot be attacked by the trustee's private creditors or

successors. In a trust there is one person (the trustee) but two patrimonies: the private patrimony of the trustee and the trust patrimony.

Furthermore, both Prof. Hayton and Prof. Reid insisted on the fact that the trust is not a contract: the settlor constitutes a trust autonomously and is in no contractual relation with the trustee (settlors and trustees have no rights against each other), whereas the trusteeship is a mere office and not a contractual position. However, it can be observed that a clear-cut negation of the contractual nature of the trust is mostly to be explained in the light of the meaning which the term contract has in common law jurisdictions, as opposed to civil law ones.

It was also submitted that the feature of secrecy, however important it may be in the Anglo-American practice, is by no means an essential element of trust: accordingly, civil law or mixed systems may decide to recognise trust-like arrangements, by imposing however stricter publicity requirements than those generally provided for in common law systems.

The afternoon session of the conference was reserved for issues of taxation, which are of paramount importance in the structuring of trusts.

A legal problem which is common to all systems which do not recognise the trust concept is, in the first place, that of qualifying the institution for taxation purposes. In order to avoid the threat of the use of trusts merely for minimising tax burdens, civil law legislators tend to use a broad qualification of trust or trust-like arrangements in order to close all possible loopholes.

As opposed to the private law approach of the morning session, which presented the trust as a neutral or, indeed, as a positive legal tool, the afternoon session evidenced that the trust is often perceived by the legislators as a device for tax avoidance: this has lead, for example in Germany, to the adoption of an extremely severe tax legislation which concerns any trust-like arrangements. This approach not only discourages, but rather renders the structuring of trusts *de facto* non-viable solutions in transactions which are linked to Germany.

Finally, the closing debate underlined that different approaches to the taxation of trusts in common law and civil law jurisdictions may give raise to intricate legal questions and may lead to unjust solutions (e.g. double taxation).