The Trust as More Than A Common Law Creature

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I. INTRODUCTION

The trust is often characterized as a creature of the common law (albeit with exceptions).¹ In common law countries, the trust is one of the most utilized tools of succession because of its ease, flexibility, and informality.² In European civil law countries, however, the concept of the trust is foreign and viewed skeptically because of its lack of formality.³ Yet, a new European Succession Regulation mandates recognition and implementation of some form of trust to avoid litigation and violation of European Law.⁴

Although France and many other European civil law countries have traditionally been skeptical of trusts, they must now grapple with their meaning and implementation due to this new European Union (“EU”) regulation calling for the harmonization of succession laws.⁵ Under the 2012 EU Succession Regulation, one authority under one law must handle succession laws.⁶ The regulation requires mutual recognition of legal decisions on succession throughout the EU.⁷ Additionally, EU citizens can choose between the succession laws of their country of nationality and their

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¹ “Trusts are generally seen as a creation of English court of chancery, which later merged with the law courts in England.” M. Read Moore, *Tax and Estate Planning Issues for U.S. Clients Who Own Foreign Property*, SU036 ALI-ABA 395, 402 (2013). “In truth, foreign law has evolved a variety of legal arrangements that resemble the trust. A trust-like device—the fideicommissum—existed in Roman law. The English judges who developed the trust may have been influenced by the German treuhand. In Hindu law, one finds a trust-like device called benami. In Islamic law, one finds the waqf.” JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 400 (9th ed., 2013). See also Adam S. Hofri-Winograd, *The Stripping of the Trust: From Evolutionary Scripts to Distributive Results*, 75 OHIO ST. L.J. 529 (2014) (noting trust principles in civil law contexts).

² In the United States, FDIC Banking Data (which excludes all trusts for which trustee is not an institution in the Federal Reserve System) shows that there are 780,000 private and charitable trust accounts, totaling $860 billion. DUKEMINIER & SITKOFF, supra note 1, at 392-93. The average trust has $1.1 million in assets. Id. IRS data (which excludes all revocable trusts and some irrevocable trusts) shows that 2 million trust income tax returns were filed in 2011, which generated $86 billion in gross income. Id.

³ Bibaut, *infra* note 5.

⁴ Council Regulation 650/2012, 2012 O.J. (L 201) 107; see discussion *infra* Part III.A.2.


⁷ *Id.*
country of residence. Member states must also develop laws that harmonize their laws with those of other member states. This last requirement squarely implicates the trust.

Despite being a founding EU member, France, as a civil law system, still does not recognize the common law trust. The French Civil Code lacked any form of a trust until 2007, which saw the introduction of the fiducie. However, the fiducie has strict limitations that may not satisfy the harmonization goals of the European Regulation on Succession, even with the elimination of some of these restrictions since 2007.

This article proposes that the highly educated and specialized attorney known as the Notaire can facilitate the implementation of trust concepts in France. The Notaire can ensure that a fiducie created is legal and authentic under both French and European Union law and that it harmonizes with the common law on trusts in order to avoid litigation. The Notaire can also ease some of the frustrations experienced in France with the implementation of the fiducie, the device akin to the trust.

Accordingly, Part II of this article introduces the trust as it exists in the English and American law. Part III examines the European laws pressuring France to implement and recognize the trust, while Part IV discusses how France has implemented a trust-like device, the fiducie, and how the Notaire can assist in the implementation of trust concepts.

II. THE COMMON LAW TRUST

The trust stems from the English common law and its former colonies have adopted it, including the United States. Until recently, European
civil law countries, such as France, had not yet adopted the concept of a
trust because of the unique differences between the common and civil law
systems.20

A. The Trust Framework

The common law trust is a legal entity to hold, manage, and transfer
property.21 The trust concept is unique because it involves three parties—
the settlor, trustee, and beneficiary—and requires the bifurcation of
ownership of property between the trustee, who receives legal title, and the
beneficiary, who receives equitable title.22 The law on trusts in the United
States also addresses the creation of trusts, their incentives, and their
types.23

1. Creation of the Trust

There are several requirements for the creation of a trust in the United
States: intent to create it, a trust res, and ascertainable beneficiaries.24 In
some jurisdictions a writing is required, while other jurisdictions permit an
oral trust.25

The trust is a legal entity that holds property or other assets for the
settlor.26 The settlor appoints a trustee to manage the trust assets for the
benefit of the beneficiary.27 The trust instrument is a written document,
created by the settlor, containing the intended property that is transferable
to the intended beneficiary.28
The trust instrument typically outlines the duties of the trustee and how the trustee should administer the trust.\textsuperscript{29} Generally, the trustee is subject to fiduciary duties, under law or under the trust instrument itself, to act in accordance with the best interests of the beneficiary.\textsuperscript{30} The foremost fiduciary duties include loyalty, prudence, impartiality, and information.\textsuperscript{31} Loyalty requires a trustee to act in the beneficiary’s interest.\textsuperscript{32} Prudence requires the trustee to administer and invest the property in the trust as a prudent investor would under the circumstances of the trust.\textsuperscript{33} Impartiality requires the trustee to manage the trust objectively based on the best interests of the beneficiary, while the duty to information requires the trustee to provide an account of trust property and its management.\textsuperscript{34}

2. Types of Trusts

The settlor can establish one of several different types of trusts. For example, a testator can create a testamentary trust through a will, which is irrevocable because it is created only after the testator’s death.\textsuperscript{35} A testamentary trust is also called a “court trust” due to the fact that it is created by the order of the probate court when the court administers an estate.\textsuperscript{36} The probate court supervises the administration of the testamentary trust after the estate is closed in many state jurisdictions.\textsuperscript{37} Additionally, in many states, the trustee of a testamentary trust is under the court’s supervision.\textsuperscript{38}

During life, a settlor creates an \textit{inter vivos} trust either by: 1) a declaration of trust, in which the settlor declares that certain property be held in a trust for the benefit another, or 2) a deed of trust where the settlor transfers property to another as trustee.\textsuperscript{39} Unlike a testamentary trust, which the court manages, a revocable trust is not under this supervision unless a party to the trust brings a court action.\textsuperscript{40}

\begin{itemize}
  \item[29.] Id.
  \item[30.] Id.
  \item[31.] Id.
  \item[32.] Id.
  \item[33.] See Ryznar, supra note 22.
  \item[34.] Id.
  \item[35.] Id.; Jesse Dukeminier, Robert H. Sitkoff, & James Lindgren, Wills, Trusts, and Estates, 397 (8th ed., 2009).
  \item[36.] Lindgren, supra note 35, at 441.
  \item[37.] Id.
  \item[38.] Id.
  \item[39.] Ryznar, supra note 22.
  \item[40.] Lindgren, supra note 35, at 441.
\end{itemize}
A revocable trust allows the settlor certain rights to revoke the trust and is by definition an *inter vivos* trust. Although the right to revocation may be valuable because of its flexibility, the revocability of a trust can have adverse inheritance tax consequences. An irrevocable trust, on the other hand, can have tax advantages. Nonetheless, because of the unlimited marital tax deduction, a revocable trust is useful to spouses for planning purposes.

Additionally, discretionary trusts allow for greater asset protection for the beneficiary by preventing creditors from accessing the trust assets. This is accomplished by giving total discretion to the trustee over trust distributions. However, a discretionary trust will usually have minimum distribution standards for the support of the beneficiary and the trustee must not act in an “arbitrary” and “capricious” way.

Another type of trust allowing for greater asset protection is the spendthrift trust. The spendthrift trust is a type of trust that places restrictions on the beneficiary and the beneficiary’s creditors.

Trusts can be private, charitable, or business. The power of the trustee, the right of the beneficiary, and the duration of the trust all help determine the category of the trust.

Private trusts are created for the benefit of private individuals. The trustee of a private trust must make distributions as necessary to meet the needs of the beneficiary. Meanwhile, a charitable trust is created for the benefit of a charitable purpose, and offers tax advantages. Acceptable
charitable purposes include those deemed to be beneficial to the community, such as education or relief of poverty. Finally, a business trust is flexible, offers tax advantages, and can be created for almost any business venture with that particular goal of that business in mind. Entire businesses are organized as trusts.

3. Incentives of the Trust

The trust offers many benefits for settlors, including asset protection, tax advantages, and opportunities for estate planning. A trust is an efficient way to manage the property of a minor or of another family member that is inexperienced with financial matters. An inter vivos trust is especially useful when caring for someone incapacitated by a physical or mental disablement.

The trust has important roles in common law societies, for example serving as a substitute for probate transfers. The trust allows immediate transfer of property to the beneficiary upon death without probate, which saves both time and money. Additionally, the trust offers privacy because the terms of a trust are private while the terms of a will are not.

The trust also allows financial institutions and other businesses to mobilize assets quickly. The different types of trusts available and the flexibility they offer are also attractive features of the trust. These advantages offered by the trust are very attractive to businesses and financial institutions in both civil and common law countries, yet they have traditionally been available only in common law systems.

55. RESTATEMENT (THIRD) OF TRUSTS § 28 (2003); IND. CODE § 30-4-2-17 (2012).
56. Ryznar, supra note 22.
57. See DUKEMINIER, supra note 1, at 398.
58. See Ryznar, supra note 22.
60. See LINDGREN, supra note 35, at 439.
62. DUKEMINIER, supra note 1, at 466.
63. See Understanding Trusts, supra note 26.
64. See Bibaut, supra note 5.
65. See Ryznar, supra note 22.
66. See Bibaut, supra note 5. But see supra note 1.
B. A Certain Uniqueness of the Trust to the Common Law

Although the trust has significant benefits, many civil law systems, including France, are hesitant to introduce the trust or any trust-like instrument.67 This hesitancy stems from the fact that the trust is a common law concept and foreign to many civil law jurisdictions.68 Specifically, the absence of the trust in civil law is partly based on the fundamental differences between the civil and common legal traditions.69 Furthermore, forced heirship rights in France complicate the introduction of the trust.70 Finally, France does not recognize the divisibility of property.71 This article will consider these differences in turn next.

1. The Common and Civil Law Development

The legal concept of the trust arose in the case law of the common law English courts of equity.72 After trusts were established out of necessity and creativity in the Thirteenth Century, the courts of equity became involved when egregious cases occurred that were unconscionable to the chancellor, wherein a trustee used the trust property for his own benefit.73

Over centuries, American lawmakers codified trust law.74 Initial influences on trust law included the Restatements on Trusts and treatises.75 Codification occurred in each state, often guided by the Uniform Trust Code.76

In modern law, the trust maintains flexibility by the gaps left in statutes for judicial interpretation.77 In common law, pre-existing case law not intended to be an all-inclusive and comprehensive code stands as the basis for legislation and statutes.78 These statutes intentionally have “gap[s]” that should be filled by judges based on previous case law.79 Judicial interpretation, stare decisis, and case law are therefore characteristic

67. See id.
68. See discussion infra Part II.B.1.
69. See discussion infra Part II.B.1.
70. See discussion infra Part II.B.2.
73. DUKEMINIER, supra note 1, at 386.
74. Id. at 387.
75. Id.
76. Id.
77. Id.
78. Id.
79. Id.
features of the English common law tradition and to the development of the trust.80

However, in the civil law tradition, there is no rule of stare decisis and there is very limited judicial interpretation.81 The central foundation of the civil law is the notion that the legislator instead of the judge creates the law.82 In civil law countries, case law is subordinate to legislation.83 Civil law countries have a code that is a comprehensive collection of law, commonly divided into parts or “books.”84 This code is all-inclusive and intended to leave little room for judicial discretion.85

France is a classical civil law country with a comprehensive code.86 The French Civil Code is the classic model for many other civil codes.87 The primary sources of French law are constitutional law, statutes, regulations, general principles of custom, and the five Napoleonic Codes.88 Decisions by the court and judges are all secondary sources of law, and receive the same weight as decisions by foreign courts under similar legal system or opinions by academic writers.89 In France, the legal system is a way to organize society and personal conduct, and thus is interpreted to control personal conduct and decision-making in a much broader sense than law in the common law tradition.90 This broader interpretation and control of an individual’s conduct has greater ability to limit his freedom of contract by voiding or modifying an otherwise valid contract based solely on public policy interests.91

2. Forced Heirship Rights

Forced heirship rights at the time of a succession contribute to the difficulty of adopting the trust in French law.92 The forced heirship is defined by the French civil code93 as a reserved portion of the deceased’s estates guaranteed free of charges by the law to certain vesting heirs if they

80. CRUZ, supra note 77, at 103.
81. Id. at 29.
82. Id.
83. Id.
84. Id. at 48.
85. Id. at 67.
86. CRUZ, supra note 77, at 68.
87. Id.
88. Id. at 69.
89. Id.
90. Id. at 71.
91. See CRUZ, supra note 77, at 71 (stating that the role of the law is “to regulate people’s conduct, and these include many [laws] which cannot give rise to an action in the courts . . . .”).
93. CODE CIVIL [C. CIV.] art. 1094 (Fr.).
are called to the succession and they accept. In other words, the forced heirship is a portion of the estate that the deceased (de cujus) cannot deprive certain heirs, who are called “reserved heirs” (héritiers réservataires). The mechanism “aims to preserve family duty, to maintain properties in the family, and tends to keep certain equality between the children.”

The portion is defined by the law as public policy (ordre public).

If an individual disposes of a portion greater than that available, gifts or legacies are subject to the “clawback” rule (action en réduction), which mandates that these gifts can be returned or reduced to accommodate the “forced share.” The clawback rule is not automatic, but should be expressly claimed by the reserved heirs, by a notarial deed, at the time of the “opening of the succession” (ouverture de la succession) or by their creditors.

Since 2006, French law classifies réduction as a monetary claim, which does not entail the nullity of donations, but aims to bring all the fictitiously excessive lifetime gifts and bequests to the rate equal to the disposable portion (quotité disponible). Consequently, according to the forced heirship and clawback rules, the powers and rights of the trustee might be limited.

Another French legal limitation on the trust concept comes from the qualification of réduction, which is arguably the equivalent to a no-contest clause in American law. Réduction is a claim, but also is a way to contest the provisions of the trust. When a trust contains a no-contest

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94. See GUIDE, supra note 92, at 529.
95. See id.
97. See GUIDE, supra note 92, at 529.
98. See id.
99. See id.
101. CODE CIVIL [C. CIV.] art. 924 (Fr.).
102. See GUIDE, supra note 92, at 530.
103. “Such a clause provides that a beneficiary who contests the will shall take nothing, or a token amount, in lieu of the provisions made for the beneficiary in the will.” LINDGREN, supra note 35, at 198.
104. See GUIDE, supra note 92, at 530.
105. Id.
clause, the beneficiary who is also a reserved heir, however, may deprive
the beneficiary of any rights in the trust estate under French law using the
clawback rule.106 Although the action is void in France, American law may
have different results, and may require individual analysis of each case.107

Despite the disparities between the common law system and the civil
law system, the Anglo-American trust does frequently arise in France and
has legal effects at the time of a succession according to the current French
International Private Law (“PIL”) rules in matter of succession.108 This is
the case when a trust contains French real estates or French movable estates
and the settlor was domiciled in France.109 French practitioners have used
this method of adaptation in an attempt to translate trust law into French
law.110

Indeed, the French civil code only permits two ways of disposing of
property gratuitously: by inter vivos gift or by will.111 For instance, in
affaire Zieseniss,112 judges interpreted a revocable trust as an indirect inter
vivos gift.113 French law may also interpret the trustee as an estate executor
e(xécuter testamentaire).114 However, the powers of the French estate
executor are more limited than those of the trustee: the estate executor can
sell the deceased’ real estate only in the absence of reserved heirs.115

As a result, the analogy method for the trust encounters some limits
because assimilation of trust-like principles is made case by case and
depends on the interpretation of practitioners and judges.116 Above all, the
resulting interpretation may lead to a different result than the one initially
expected by common law trust principles.117

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106. Id.
107. “Under the civil code, an individual interested in estate planning can ask for an heir’s consent
to irrevocably waive the right to challenge violations of his reserved portion. This can be done by
written deed in the presence of two French notaires.” Id.
108. When a situation involves cross-border elements, French PIL currently applies the principle
of secession where the law of the last domicile of the deceased governs movables and the lex sitae
principle governs immovable. CODE CIVIL [C. CIV.] art. 3 (Fr.) “Immobles are governed by French
law even when owned by aliens.” GUIDE, supra note 92, at 531.
109. See GUIDE, supra note 92, at 531.
110. Id.
111. CODE CIVIL [C. CIV.] art. 893 (Fr.).
I, No. 93-19855 (Fr.) [hereinafter Cour de cassation 1996].
113. See id.
civ. I, No. 82-14003 (Fr.) [hereinafter Cour de cassation 1983].
115. CODE CIVIL [C. CIV.] art. 1030-1 (Fr.).
116. See Hansmann, supra note 21, at 441-42, 444, 449; see generally Bibaut, supra note 5.
117. See Bibaut, supra note 5.
3. Unity, Indivisibility, and Inalienability of Property Under French Law

The most important reason for the lack of a trust instrument under French law comes from the difficulty of transposing it into French property law. Article 544 of the Civil Code defines property ownership as “the right to enjoy and dispose of things in the most absolute manner, provided that in no way prohibited [sic] by the laws or regulations.”

French ownership is an absolute right by extension of the individual freedom. The French notion of ownership implicates three cumulative rights: the right to use property (usus), the right to enjoy it (fructus), and the right to exploit it (abusus). The right to dispose is an essential part of ownership, guaranteed by the Declaration of Human Rights and the Citizen of 1789, and allows individuals to have at their disposal the asset and to sell it.

The right of property enjoys an exclusive and unchanging characteristic that leads the owner of the estate to be the sole one. Furthermore, according to Aubry’s and Rau’s doctrine, the patrimony is a legal universality attached to one person (unicity) and is a set of rights or estates

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118. See id.
119. CODE CIVIL [C. CIV.] art. 554 (Fr).
120. See STEINER, supra note 71, at 383.
121. From the Latin “usus” meaning “to use.” The right to use the thing can be described as the right to use for its own exploitation. Usus, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/usus (last visited Oct. 12, 2014).
122. From the Latin “fructus” meaning “fruits, profits, enjoyments.” The right to enjoy the thing can be described as the collection of the fruits like rent collection and the performance of acts of administration. What is Fructus?, BLACK’S LAW DICTIONARY, http://thelawdictionary.org/fructus/ (last visited Oct. 12, 2014).
124. See STEINER, supra note 71, at 389.
125. “Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid.” Declaration of Human and Civic Rights of 26 August 1789, CONSEIL CONSTITUTIONNEL at art. 17 [Constitutional Court], http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000850274 (last visited Oct. 8, 2014). See also STEINER, supra note 71, at 390.
126. See STEINER, supra note 71, at 390.
127. See id. at 382-83.
128. See id. at 379-80.

In modern times, the doctrine of patrimoine was developed by Charles Aubry (1803-82) and Charles Frédéric Rau (1803-77), two law professors of the University of Strasbourg who later became judges at the Court of Cassation. In their 1873 course on French civil law, Aubry and Rau adopted a very subjective approach to patrimoine characterizing it as an indivisible legal entity (universalité de droit) attached to the person.

Id.
and obligations.\textsuperscript{129} For example, heirs inherit the universality of the deceased’s estates (\textit{transmission universelle}).\textsuperscript{130} Patrimony is the expression of the person, and consequently, only persons (natural or legal persons) own a patrimony.\textsuperscript{131} More precisely, all persons own one patrimony (even when debts are greater than assets) and every person only owns one patrimony, which makes it indivisible.\textsuperscript{132}

Unlike the American trust, French property law does not split ownership between legal ownership (owned by the trustee—the legal title) and beneficial ownership (equitable trustee) in a way that it is essential for the establishment of a trust.\textsuperscript{133} Indeed, when American trust law considers the trustee as the “legal owner,” there is no translation into French law because the doctrine of patrimony contradicts the trustee’s role of acting for the beneficiary.\textsuperscript{134} Finally, French land registration requires the owner of property to be clearly identified,\textsuperscript{135} making the registration difficult in the form of a trust.\textsuperscript{136}

\section*{III. INTRODUCTION OF THE FIDUCIE TO FRANCE}

France first introduced a trust-like legal device in February 2007 with the \textit{fiducie}, a major development in the implementation of the trust into its civil code,\textsuperscript{137} after the French Parliament’s three attempts to pass similar legislation in 1989, 1992, and 1995.\textsuperscript{138} Each time prior to 2007, the legislation failed due to suspicions that it would facilitate money laundering and tax evasion purposes.\textsuperscript{139}

The legislation may have succeeded in 2007 due to the need of French businesses to have some sort of trust-like device in order to remain competitive.\textsuperscript{140} More importantly, the development of European law requiring the harmonization of succession laws among member states\textsuperscript{141}
implicated the trust and prompted France to consider the issue.\textsuperscript{142} The European law is considered first.

\textit{A. The Legal Impetus for Trusts in France}

The Hague Convention on Law Applicable to Trusts and Their Recognition\textsuperscript{143} represented an initial international effort on trusts, but France did not ratify the Convention after signing.\textsuperscript{144} The significant impetus for France and other European civil law nations to consider trust law is the European Union Regulation on Succession, which requires harmonization of succession law across European member states, some of which recognize trusts.\textsuperscript{145}

\textit{1. The Hague Convention}

The first major international convention regarding the trust was the Hague Convention on Law Applicable to Trusts and Their Recognition.\textsuperscript{146} This international convention was created in 1985 specifically to resolve the problems created by the nonexistence of the trust under civil law and to introduce civil law countries to the legal concept of the trust.\textsuperscript{147}

Only countries with a common law tradition, like the United States, United Kingdom, Australia, and Canada, and a few civil law countries, including the Netherlands and Italy, have signed and ratified the Convention.\textsuperscript{148} France signed this Convention on July 1, 1985, but has since failed to ratify it.\textsuperscript{149}

Article 2 of the Convention defines the trust as:

For the purposes of this Convention, the term “trust” refers to the legal relationships created - \textit{inter vivos} or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics -

\begin{thebibliography}{1}
\bibitem{143} Hague Convention 1985, supra note 141.
\bibitem{144} INTERNATIONAL ESTATE PLANNING, supra note 41, at 489-90.
\bibitem{146} See INTERNATIONAL ESTATE PLANNING, supra note 41, at 489.
\bibitem{147} \textit{Id.}
\bibitem{148} \textit{Id.} at 489-90.
\bibitem{149} See Bibaut, supra note 5; KLUWER LAW INTERNATIONAL, INTRODUCTION TO FRENCH LAW 462 (George A. Berman & Etienne Picard eds., 2008).
\end{thebibliography}
The assets constitute a separate fund and are not a part of the trustee’s own estate;

title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

the trustee has the power and the duty, in respect of which he is accountable, to manage, employ[,] or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust. 150

The trust, as defined in this Convention, acted as a guide for civil law countries without a trust legal concept like France.151

French legislators are attentive to the ratification of the Hague Convention on trust recognition. 152 In 2009, when questioned about the ratification of the Hague Convention, the French Minister of Justice stated that

the introduction of the fiducie and its development should provide a favorable and attractive environment for the development of international operation funding. Final adoption is a prerequisite for the ratification of the Hague Convention. It will also assess appropriately the advantages and disadvantages of such ratification on the basis of an internal device with clearly defined edges.153

There is no forthcoming law related to the ratification of the International Convention, but the European law in progress may prompt France to decide to reform its domestic legislation.154

2. European Union Regulation on Succession

The most significant prompt for France to implement a trust or similar legal device comes from the European Union and the recently passed European Union regulation on succession.155 France is not only a member

151. Id.
152. See Bibaut, supra note 5; see also Steiner, supra note 71, at 388.
155. Id.
state of the EU, but was also a founding member state of the EU in 1952.\textsuperscript{156} The Regulation (“EU”) No 650/2012, of The European Parliament and of The Council of 4 July 2012, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance, enforcement of authentic instruments in matters of succession, and on the creation of a European Certificate of Succession, passed on July 4, 2012.\textsuperscript{157}

An EU regulation directly applies to all member states, which means that the regulation must be uniformly and completely implemented and effective in all member states for as long as that regulation remains in force.\textsuperscript{158} The member states of the EU must implement this new regulation by August 17, 2015, when the transitional period ends.\textsuperscript{159}

The European Union has enforcement devices mandating the implementation of EU regulations through the law of each member state in its treaties.\textsuperscript{160} Specifically, if a member state fails to implement or apply a regulation properly after the transitional period ends, then the European Commission may bring that member state before the Court of Justice.\textsuperscript{161} If the Court of Justice has found that the member state has violated a regulation, the Court of Justice will require the member state to change its laws to ensure compliance with that regulation.\textsuperscript{162} In addition, the Court of Justice may have unlimited jurisdiction to provide penalties for violating regulations depending on the specific regulation.\textsuperscript{163} Further, a member state can bring an action against another member state that violates the regulation or has in some other way failed to fulfill its obligations under EU law.\textsuperscript{164}

\begin{footnotesize}
\begin{enumerate}
\item See France, supra note 11.
\item See Successions, supra note 6.
\item See KLUWER LAW INTERNATIONAL, EUROPEAN UNION LAW: CASES 25 (Frank Emmert ed., 2000.) [hereinafter EU LAW: CASES].
\item See Successions, supra note 6.
\item See EU LAW: CASES, supra note 158, at 93-98.
\item See EU LAW: CASES, supra note 158, at 92-93.
\item See EU LAW: CASES, supra note 158, at 93-93.
\item Id. The major institutions of the EU consist of the European Council, which plans the political agenda of the EU, the EU legislative bodies, the Court of Justice of the EU, and the Court of Auditors. European Union Institutions and Other Bodies, EUROPA.EU, http://europa.eu/about-eu/institutions-bodies/index_en.htm (last visited Oct. 11, 2014). The EU legislative bodies are made up of the European Parliament, which is elected by the citizens of the EU and represents them, the Council of the EU, which is made up of representatives from each member state, and the European Commission that represents the interests of the EU as a whole European community. Id. Within these three legislative bodies, the European Commission is responsible for recommending new legislation, while the Council of the EU and the European Parliament must choose which legislation to adopt. Id. The European Commission is also required to ensure that the legislation is applied and implemented properly by each member state. Id.
\end{enumerate}
\end{footnotesize}
The EU Regulation on Successions rejects the principle of scission between movable and immovable property, traditionally recognized in France. The regulation instead provides for the unity of the succession law, retains the principle of one law applicable to the succession by determining the deceased’s habitual residence, and admits the profissio juris in favor of the national law only. The second principal contribution of the regulation is the creation of the European Certificate of Succession (“ECS”), which allows people to prove their status and rights as an heir, executor of a will, or administrator of an estate, with no additional legal formalities.

The EU regulation only applies to civil matters related to succession, namely estates of deceased persons, whether testate or interstate, and does not affect the law of each member state regarding tax, property, matrimonial regime, and family law. The EU regulation on successions expressly excludes trusts, but only concerning their creation, administration, and dissolution. Therefore, the exclusion of trusts is not absolute.


166. Id. at 4-5, 15.

167. Angelique Devaux, The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not?, 47 INT’L LAW. 229, 244-45 (2013).

The European Certificate of Succession (ECS) is the first European document that reduces the slow settlement of a cross-border succession. The ECS is framed to the status and the right of each heir or legatee, the attribution of specific assets, and the powers of some persons who executed a will or administered the estate, and then the grounds for non-recognition are very limited. The European lawmakers did not want to create a superior European act and exacted that ‘the use of the Certificate shall not be mandatory.’ But that is an illusion for the reason that this new document will become a key in the presence of cross-border succession situations; an ECS avoids the multiplication of documents and the long and expensive process of legalization. The ECS must be issued by a competent authority, which has the merit of not upsetting the already existing internal practice in the Member States. In this way, the succession court (Amtsgericht-Nachlassgericht) will continue to be the jurisdiction in Germany, such as the notary in Belgium and the Netherlands. ECS is an authenticated deed that ranks the need of the notaries in first place. The ECS circulates with its own effects on the basis of a standardized procedure and with autonomy.

Id.


170. See id. at 108,116.

171. Id. at 116-17.

172. Id. at 108.
When one creates a trust under foreign law, the law applicable to the succession under this regulation should apply to beneficiaries of a trust by determination of law or residence. Moreover, the term “heirs and legatees” was modified due to the proposal’s preference for the term “beneficiaries.” The semantic expansion would cover “heirs and legatees and persons entitled to a reserved share” and not exclude the trust beneficiaries. As a result, the application of the European instrument should take into account the institution of the trust.

The implementation of the European Union Regulation on Succession and its application to trusts poses a particular challenge regarding the French forced share. The question is how to coordinate the French forced heirship and trust after the EU regulation comes into effect in 2015.

The delicate challenge of public policy comes from the application of the forced share. Although the Charter of Fundamental Rights of the European Union does not protect the forced share, it is defined as a public policy rule in some member states’ domestic law, such as in France. Specifically, a large majority of the European member states limit the testator from disposing of his estate with complete freedom, instead forcing him to pass a portion of it to near relatives.

In light of the trend of family law’s harmonization in Europe, there is a strong argument to view the French forced share as international public policy. Managing the French forced share as an international public

Id.


175. See Commission Regulation 650/2012, supra note 169, at 112.

176. See id. at 108, 116-17.

177. See Devaux, supra note 167, at 240.


179. See Commission Regulation 650/2012, supra note 171, at 113; Devaux, supra note 169, at 239.

180. See Devaux, supra note 167, at 239; supra Part II.B.ii.

181. See id. at 239-40.


183. See Devaux, supra note 167, at 240-41.
policy ensures the application of the French rule to French estates, including those in a trust. 184 Nonetheless, the presence of a surviving spouse or at least descendants revives the conflict of laws between France and a European member state, or a third state, or a non-member state that applies a different rule, or a non-member state that does not recognize the rule. 185 As an example, due to the forced share in France, the testamentary trust of an American citizen-settlor with children is not fully enforceable if it provides that the French estate should pass to the surviving spouse as a beneficiary of the trust. 186

This article therefore suggests that the authority should only recognize the exception of public policy in “exceptional circumstances,” which is not the case of the forced share, and that the exception is opposed to the unity of the law considered as the primary goal of the Regulation. 187 Although there is controversy in France about the application of the forced share, this traditional notion of forced share must give way to the respect of the unity of the succession law provided by the EU regulation on succession. 188 Hence, the European legislation is a first step to facilitate the introduction of the trust under French law. 189

B. The Introduction of Trust Law in France through the Fiducie

France has traditionally been skeptical of introducing the trust to its legal system, but a renewed interest in the trust arose in the past few

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When questioned about the EU regulation draft on successions, the French Senate had precisely requested, in 2009, that the exception of forced share should be granted in the final document. Even if we suppose that French lobbying were the reason for the exception of the public policy’s insertion, since then, scholars and practitioners hardly defend the concept. Doctrine advocates that forced share has not lost its power because ‘it is a reflection of the family solidarity, it guarantees a minimum of equality between the children, and it protects the individual liberties of the heirs.’ Other scholars argue that the European regulation is a backdoor for French citizens to subvert the French rule by changing their citizenship. Finally, French notaries, at the time of their annual assembly in 2012, expressly called the Minister of Justice to rule in favor of forced share as a matter of international public policy. As of today, neither the French government nor the parliament have ruled in that way, but recently, Christiane Taubira, France’s Minister of Justice, has expressed that the legal device is not subject to any change (considering amount not reduced, nor abolished, nor extended to the international public policy as well).

Id.
184. See id.
185. Id. at 240.
186. Id. at 237-38.
187. See Commission Regulation 650/2012, supra note 169, at 113; Devaux, supra note 167, at 236.
188. See Devaux, supra note 167, at 236, 239.
189. See id. at 244.
decades, followed by a doctrinal movement\footnote{Different Doctorate theses have been published in France, including: FLORENCE METTETAL-FRESNEL, \textit{La fiducie comme technique de protection des majeurs en difficultés} (THESE PARIS II 1995); Y. LEQUETTE & SARAH GODECHOT, \textit{L’articulation du trust et du droit des successions} (PANTHEON-ASSAS PARIS II 2004). On the trust in France, see also François Barrière, \textit{La Fiducie Française Ou Le Reveil Chaotique D’Une, “Belle Au Bois Dormant,”} 58 MCGILL L. J. 847 (2012-2013).} to introduce a kind of trust-like legal device called the \textit{fiducie},\footnote{\textit{Fiducie} comes from the Latin word \textit{fiducia} meaning "trust." BLACK’S LAW DICTIONARY 658 (8th ed. 2004).} already well known in Roman law.\footnote{Yet, the idea of \textit{fiducie} was not unknown to French law. Inherited from Roman Law, \textit{fiducie}-like institutions in France can be traced back to the Crusades when lords wishing to have their domains managed while they were away would entrust them to others. During the 15th and 16th centuries, ‘\textit{substitutions fideicommissaires},’ whereby an owner’s assets were transferred to the charge of another person, with subsequent transmission to nominated heirs at the original owner’s death, were widely used by the gentry as a means of protecting their assets and passing them undepleted to the next generation. But all forms of ‘\textit{substitutions}’ were abolished during the 1789 Revolution and the 1804 Civil Code perpetuated this prohibition in art. 896, subject to a few exceptions.” STEINER, \textit{supra} note 71, at 388.} After several attempts in 1989, 1992, and 1995 failed due to the belief that a trust-like instrument would be used for the purposes of money laundering and tax evasion,\footnote{Bibaut, \textit{supra} note 5.} the Government Seminar on Enhancing the Appeal of France, held in February 2005, finally decided on an action plan to facilitate the development and relocation of activities in France.\footnote{The prospect of French ratification of this treaty [the Hague Trusts Convention] led business lawyers in France to favor not simply the recognition of foreign trusts, but also the creation of a French legal institution that could offer the same advantages. This resulted in a proposal by Ministry of Justice in Paris looking to the adoption of a new law. This proposal was in the end abandoned due to opposition from French fiscal authorities, and the proposal to ratify the Hague Convention has languished since then. This is unfortunate, since the lack of trust-like device in a country’s domestic law is an additional reason for joining a treaty which creates a category for dealing with trusts created under a foreign law. Adair Dyer, \textit{International Recognition and Adaptation of Trusts: The Influence of The Hague Convention}, 32 VAND. J. TRANSNAT’L L. 989, 1014 (1999).} This led to the introduction of the \textit{fiducie} by the Law No 2007-211 of 19 February 2007.\footnote{\textit{CODE CIVIL [C. CIV.]} art. 2011 (Fr.).}

Although the \textit{fiducie} was introduced to echo the Anglo-American trust, the French \textit{fiducie} is different from the common law instrument.\footnote{See Valerio Forti, \textit{Comparing American Trust and French Fiducie}, 17 COLUM. J. EUR. L. ONLINE 28, 30 (2011).} The civil code defines the \textit{fiducie} as

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194. “The objective is to create a transparent legal instrument to facilitate the development and relocation of activities in France and the improvement of corporate finance” translated from the French “\textit{L’objectif est de créer un instrument juridique transparent qui facilitera le développement et la relocalisation d’activités en France et l’amélioration des conditions de financement des entreprises}.” Press Kit, \textit{ENHANCING THE APPEAL OF FRANCE: A GOVERNMENT SEMINAR} 17 (Feb. 7, 2005), archives.gouvernement.fr/villepin/IMG/pdf/DP_attractivite_eng.pdf.

195. \textit{CODE CIVIL [C. CIV.]} art. 2011 (Fr.).


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the process by which one or more constituents (constituents) transfer property, rights or securities, or a combination of assets, rights or securities, present or future, to one or more trustees (fiduciaires), holding separate of their own heritage, act for a specific purpose for the benefit of one or more beneficiaries (beneficiaries).\footnote{197} 

Like the American trust, the French fiducie recognizes three major actors: a constituent (settlor), a fiduciary (trustee), and one or more beneficiaries,\footnote{198} but their conditions vary from those of the trust.\footnote{199} The constituent transfers property, rights, or securities to a fiduciary, who is in charge of realizing the objectives of the fiducie.\footnote{200} 

Prior to 2008, only legal persons subject to corporate tax were allowed to be a constituent because the government did not want to see fiducie as a tax-optimization strategy for natural persons.\footnote{201} Nevertheless, the reforming Law of 4 August 2008 and an Order of 30 January 2009 extended the constituent to any natural persons or legal persons regardless of their tax system.\footnote{202} To prevent tax fraud and money laundering, constituents and fiduciaries must be residents of the European community or a state or a territory that has signed a tax treaty with France containing a clause of administrative assistance.\footnote{203} 

While a trustee may be an individual or a corporation, a fiduciary can only be a banking, insurance, or financial professional, or an avocat\footnote{204} (attorney), whose role contributes to ensure protection for the constituent.\footnote{205} The law excludes Notaires from this function, but allows them to act as an advisor for drafting the fiducie, which is a written contract.\footnote{206} 

\footnotesize{197. CODE CIVIL [C. CIV.] art. 2011 (Fr.).} 
\footnotesize{198. Id. “A trust ordinarily involves at least three parties: the settlor, the trustee, and one or more beneficiaries. But three different persons are not necessary for a trust. One person can wear two hats, or sometimes even all three.” LINDGREN, supra note 35, at 547.} 
\footnotesize{200. Id.} 
\footnotesize{202. See Grimaldi, supra note 201, at 2.} 
\footnotesize{204. “Today the role of the avocat can be seen to be a dual one – a role of giving assistance and advice to clients and one of representing them before the courts – la plaidoirie.” WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 49 (1995).} 
\footnotesize{205. CODE CIVIL [C. CIV.] art. 2015 (Fr.); Bernard, supra note 203.} 
\footnotesize{206. CODE CIVIL [C. CIV.] arts. 2012, 2015, 2017 (Fr.). Unlike the American trust, “the law of trusts does not require a writing to create a valid trust. On the contrary, an inter vivos oral declaration of trust over personal property is enforceable.” See LINDGREN, supra note 35, at 588.}
one may consider Notaires as protectors (tiers protecteur) to ensure the execution of the fiducie, making them the fourth and optional actor.\footnote{207}

The French fiducie is strongly regulated, and there are several formalities where non-compliance results in nullity.\footnote{208} An individual must register the fiducie in the National Register of Trusts, implemented by the Minister of Budget.\footnote{209} Formalities are an essential difference between the French system and the common law one.\footnote{210}

The introduction of the fiducie breaks with Aubry’s and Rau’s traditional theory of the unicity of patrimoine because it creates a patrimony by appropriation (patrimoine d’affectation) distinct from that of the settlor.\footnote{211} The fiduciary can now be the holder of one or several fiduciary patrimonies that stand next to his own.\footnote{212} The fiduciary exclusively exercises the prerogatives attached to the property.\footnote{213} He is thus the sole qualified actor to undertake an action for the recovery of property against third parties,\footnote{214} to use the benefits of the assets (fructus), and to dispose of them (abusus) unless there is a restricted clause in the contract.\footnote{215}

The comparison with the traditional definition of patrimony has limits: The transfer is time-limited to ninety-nine years, (assets shall return to the constituent at the end of the contract) and the fiduciary powers are exercised for a specific purpose (transfer of assets, rights, or securities) to beneficiaries.\footnote{216}

The French legislator did not go through the logical consequences of patrimoine d’affectation, which would suggest that the fiduciary is solely...

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\item \footnote{207}{Code Civil [C. Civ.] art. 2017 (Fr.).}
\item \footnote{208}{Code Civil [C. Civ.] art. 2018 (Fr.). The fiducie contract must contain: 1) the property, rights or securities transferred. If future, they must be determinable; 2) The duration of the transfer, which may not exceed nine years after signing the contract; 3) The identity of the constituents; 4) The identity of the trustee; 5) The identity of the beneficiaries or, failing that, the rules for their appointment; 6) The mission of the trustee and the extent of their powers of administration and disposition. Id.}
\item \footnote{209}{Code Civil [C. Civ.] art. 2020 (Fr.).}
\item \footnote{210}{Common law trusts usually fail for lack of assets or beneficiaries. "Under traditional law, a trust cannot exist without trust property, often called the res. The res, however, need not be land or a hefty chunk of money. The trust res may be one dollar or one cent or it may be any interest in property that can be transferred." Lindgren, supra note 35, at 569.}
\item \footnote{211}{Code Civil [C. Civ.] art. 2011(citing Act 2007-211 of February 19, 2007 (not codified in the civil code) which states that assets and liabilities transferred as part of the transaction referred in article 2011 are patrimony by appropriation. "Transactions affecting the latter are the subject of an independent accounting in the trust.".)}
\item \footnote{212}{Code Civil [C. Civ.] art. 2011 (Fr.).}
\item \footnote{213}{Id.}
\item \footnote{214}{Code Civil [C. Civ.] art. 2023 (Fr.).}
\item \footnote{215}{Code Civil [C. Civ.] art. 2011 (Fr.); see Steiner, supra note 71, at 389-90.}
\item \footnote{216}{Code Civil [C. Civ.] art. 2018 (Fr.).}
\end{itemize}
responsible for the fiduciary debts like the American trustee.\textsuperscript{217} Indeed, Article 2025 of the French Civil Code provides that the constituent assets constitute the creditors’ security of fiduciary assets, unless otherwise agreed in the contract.\textsuperscript{218}

Unlike the law of trust, the fiducie has only two forms: 1) trust by way of security (fiducie sûreté), where the constituent-debtor transfers to the fiduciary properties, securities or rights for its debt to create security, and 2) management trust (fiducie gestion), where the transfer of assets is made in view of its management.\textsuperscript{219} In particular, the contract is void if the transfer of assets proceeds from a liberal intent to gratify a third party (beneficiary) through the fiduciary (fiducie libéralité).\textsuperscript{220} Any interested person may raise nullity by public policy,\textsuperscript{221} and the French administration heavily taxes the fraudulent legal vehicle.\textsuperscript{222}

The crucial difference between this approach and the common law trust is that “the purposes for which we can create [common law] trusts are as unlimited as our imagination.”\textsuperscript{223} The French legislator justified the restrictions on trust principles due to a fear of tax evasion.\textsuperscript{224} Moreover, there was a fear that the forced shared rules would be circumvented, consisting of a persistent distrust in the institution that takes away a portion of its interest.\textsuperscript{225} Furthermore, many think the Anglo-Saxon trust undermines the French rules of inheritance and donation, as determined by the French Cassation Court.\textsuperscript{226}

The French doctrine does not qualify the fiducie as a trust because of its prohibition of fiducie libéralité.\textsuperscript{227} However, fiducie libéralité would have

\begin{itemize}
\item \textsuperscript{217} See Steiner, supra note 71, at 387.
\item \textsuperscript{218} Code Civil [C. Civ.] art. 2025 (Fr.).
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Code Civil [C. Civ.] art. 2013 (Fr.).
\item \textsuperscript{221} Id.
\item \textsuperscript{222} C. CGI art 792 (Fr.) (taxation of 60%); C. CGI art 1729 (Fr.) (additional penalty of 80% in case of fraud).
\item \textsuperscript{223} Lindgren, supra note 35, at 543 (quoting Austin Wakeman Scott et al., Scott and Ascher on Trusts, § 1.1, at 4 (5th ed. 2006)).
\item \textsuperscript{224} See Steiner, supra note 71, at 388.
\item \textsuperscript{225} “This decision will prevent the trust from being used for the sole purpose of circumventing the rules on donations and estate devolopation.” Translated from the French “[c]ette décision permettra d’éviter que la fiducie soit utilisée dans le seul but de détourner les règles relatives aux libéralités et à la dévolution successorale[,]” Henri de Richemont, Rappport du Senat, at 48 (Oct. 11, 2006), http://www.senat.fr/rap/06-011/06-0111.pdf.
\item \textsuperscript{226} Cour de cassation 1e civ., 20 Mar. 1985, Bull. Civ. I, No. 103, at 93 (Fr.) (The use of foreign trust is fraudulent when the deceased’s intention is to avoid the mandatory rules of devolution) [hereinafter Cour de cassation 1985].
\item \textsuperscript{227} “Le paradoxe est que, au final, la fiducie du Code Civil n’est pas le trust, deux mécanismes étant fort dissemblables, tandis que les fonction assumées se rejoignent.” Arnaud Raynouard, La fiducie, nouvel outil de gestion et de sûreté, LA SEMAINE JURIDIQUE NOTARIALE ET IMMOBILIERE No 5, at 1063 (Feb. 5, 2010).
\end{itemize}
several advantages, such as to preserve assets and to guarantee the beneficiaries the same level of income, to postpone the consequences of the settlor’s death and joint ownership (indivision), and to encourage and regulate generational transfers of assets in order to avoid lavishness or mismanagement of certain heirs. Indeed, the implementation of the EU Regulation on Succession challenges the validity of the prohibition on fiducie libéralité based on the fear that people would use it to avoid the French forced share rules.

The European Regulation applies to Europeans and non-Europeans who own property in Europe, and thus, an American citizen-settlor who is a French resident can opt for American succession law to govern his succession, including those assets in a fiducie. Although the fiducie is a contract that may end by the death of the constituent, this is not an example of intent to avoid the French forced share because it is sanctioned directly by the EU Regulation, which advocates for the unity of succession, the choice of law, and the end of conflict of laws. In this manner, foreign law that ignores the forced share for descendants, such as American law, would legally apply to French assets. There is no current attempt to reform the French fiducie, but the argument relying on a fear of succession fraud may decrease in importance after the European regulation comes into force in August 2015, and France might consider an amendment to the existing French law because of the influence of the European law.

IV. The Role of the Notaire

Although the fiducie is not entirely common in France today, scholars predict it to increase in popularity. In an interview published in La Revue Lamy Droit Civil in 2013, French Senator Philippe Marini, the investigator of the fiducie introduction in France, noted, “the instrument is new.” An adaptation phase was necessary for both accounting and tax rules.

229. See supra Section III.A.2.
230. CODE CIVIL [C. CIV.] art. 2030 (Fr.), (“When terminated by the death of the constituent, fiduciary assets return to constituent succession.”).
231. CODE CIVIL [C. CIV.] art. 2029 (Fr.).
232. See supra Section III.A.2.
233. “Unlike the respect U.S. courts generally accord spousal inheritance rights, they generally resist enforcing forced heirship rights in property located in the United States. This judicial antipathy is rooted in the public policy of all U.S. states, other than Louisiana, that disfavor the concept of forced heirship.” GUIDE, supra note 92, at 92.
234. See supra Section III.A.2.
235. Stéphanie de Silguy, La Fiducie, une Réussite?, REVUE LAMY DROIT CIVIL, 2013/104 No 5106.
Furthermore, professionals and individuals did not automatically use [the] fiducie, but as the advantages are known, the use of it is likely to increase in the future.\(^{237}\)

According to the Association Française des fiduciaires (French association for fiduciaries), 60% of fiducie created are fiducie-sûretés and 40% are fiducie-gestion.\(^{238}\) The fiducie is more integrated to the security function (sûretés) because the properties, rights, or securities serve as guarantees, leaving the constituent inherant at risk of a possible default of the constituent or the fiduciary.\(^{239}\) However, a fiducie is an excellent tool for private wealth management and the protection of assets.\(^{240}\)

For instance, the instrument avoids the complicated and costly procedure of guardianship (tutelle)\(^{241}\) for the state, and since its introduction, several fiducies have been created to substitute disability measures (mesures d’incapacité).\(^{242}\) Avocats specialized in family law have been interested in the fiducie to protect vulnerable family members, but the fiduciary function is very expensive for avocats, who must be insured against the liabilities related to the management of fiduciary assets.\(^{243}\) Moreover, a conflict of interest may arise from being both a fiduciary and an avocat.\(^{244}\) Thus, few avocats have used the instrument.\(^{245}\)

The Notaire can promote fiducie as a wealth management instrument.\(^{246}\) A Notaire is a specialized lawyer with public authority who draws up authenticated contracts on behalf of clients.\(^{247}\) The Notaire operates in different various legal areas of law and taxation, including family law

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237. Id.
238. Id.
239. Id.
240. See discussion supra Part II.A.3.
241. “La tutelle des majeurs is the most restrictive of the two regimes. . . . The effect of this regime is that all acts of the adult are null from the moment of the order.” CHRISTIAN DADOMA & SUSAN FARRAN, FRENCH SUBSTANTIVE LAW, KEY ELEMENTS (1997).
243. Art. 123 of Decree 91-1197, November 27, 1991. Two types of insurance are required: Professional liability insurance and a financial guarantee – the minimum amount of guarantee should cover at least 5% of immovable assets and 20% of the properties, rights or securities. Id.
244. See Grimaldi, supra note 201, at 2.
247. See NOTAIRES DE FRANCE.FR, supra note 246; see also Margaret Ryzmar & Angelique Devaux, Au Revoir, Will Contests: Comp. Lessons for Preventing Will Contests, 14 NEV. L.J. 1, 15-16 (2013).
(adoption, marriage contracts, gifts between spouses, inter vivos distribution, wills and inheritance), property law, business law, rural law, and environmental law.248

The Minister of Justice appoints the Notaire by decree and the Notaire remains under the Minister’s continuing authority.249 This continuing authority is required because the Notaire acts on behalf of the state, and is responsible for authenticating contracts and other legal documents under French law.250 If a Notaire authenticates a document, then it is a guarantee of that document’s legality and authenticity.251

Notaires, thus, have a high degree of professional responsibility; they draw up authentic deeds on behalf of their clients by fixing their seals and signatures to such deeds, and such acts have the same legal status as a final judgment.252 Notaires are liable for the damage resulting from any error they commit while performing their roles.253 For that purpose, Notaires hold collective professional liability insurance, unlike the avocats whose professional insurance is personal.254

Apart from the traditional areas of practice, the role of the Notaire includes advising on wealth planning and asset transfers.255 The Notaire intervenes within the framework of an integrated approach of patrimony, ensuring long-term monitoring of clients that assures them of legal security.256 However, Notaires and their associates often develop additional expertise related to wealth management.257 For that reason, many Notaires choose to supplement their seven years of legal studies with a degree in wealth management.258

In fact, Notaires execute different instruments of estate planning that are similar to the fiducie and fiducie-libéralité, which puts them in the position to develop the concept of the fiducie. For example, the French Civil Code allows a transfer of properties (movable or immovable) to a

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248. See NOTAIRES DE FRANCE.FR, supra note 246.
249. Id.
250. Id.
251. Id.
252. Id.
254. See Marx, supra note 253, at 2.
256. See NOTAIRES DE FRANCE.FR, supra note 246.
258. See Marx, supra note 253, at 2. There are approximately some twenty degrees of this type offered by French law schools today. See, e.g., LLM Programs in France, LLMGUIDE, http://www.llm-guide.com/france/ (last visited Nov. 1, 2014).
French entity called Société Civile (or Société Civile Immobilière (“SCI”)) when composed of real estates) prior to the transfer of the company shares to beneficiaries (usually the descendants) by splitting the interests of the shares (démembrement de propriété) between usufructus (usufruit) and bare ownership (nue-propriété) through inter vivos gifts or bequests. Once the transfer has been completed, the usufructuary (usufruitier) retains political and financial powers. Compared with the fiducie, Société Civile is easier to implement due to the editorial flexibility of the statutes and the fewer formalities. Non-residents often create SCI to avoid French forced heirship law because current French PIL considers SCI shares to be moveable estates. The technique is void if the purpose is to disinherit children and the court views it as fraud.

Second, the Law of June 23, 2006 introduced a generation-skipping donation. This new type of donation allows the successor to appoint a successor of his choosing. The donor gives properties or rights to two or several subsequent beneficiaries named in advance by notarial deed. At the death of the first beneficiary, the given assets pass to the second beneficiary in their entirety (libéralité graduelle) or their residue (libéralité résiduelle). A legal fiction arises so that the second beneficiary receives the assets directly from the donor. Consequently, the assets are not included in the first beneficiary’s succession and enjoy a more favorable inheritance taxation calculated between the donor and second beneficiary linkage. The triangular mechanism is closed to fiducie-libéralité since it requires the presence of a donor (settlor) and a primary beneficiary who shall manage assets (trustee) for a second beneficiary.

259. “An SCI is a French business organization capable of owning real property. The organization is somewhat similar to a corporation, since it is under shareholder ownership and control, but is treated like a partnership for U.S. tax purposes.” Marx, supra note 253, at 3.
260. Id.
261. CODE CIVIL [C.civ.] art. 949 (Fr.).
262. See Marx, supra note 253, at 3.
266. See Inter Vivos Distribution and Generation-Skipping, supra note 265.
267. See Loi 2006-728, supra note 100.
268. Id.
269. Id.
270. CODE GÉNÉRAL DES IMPÔTS [CGI] art. 784 (Fr.); see Inter Vivos Distribution and Generation-Skipping, supra note 265.
271. See supra Part I.A.1.
system is limited by forced heirship.\footnote{272}{The civil code provides that in the presence of forced heirs, the charge shall only be supported by the disposable portion in case of \textit{libéralité graduelle}.\footnote{273}{And when the beneficiary is also a reserved heir, he may dispose of the assets to someone other than the second beneficiary in case of \textit{libéralité résiduelle}.\footnote{274}{Third, the Family Law Reform of 2006 also introduced a new type of authentic deed similar to the trust or \textit{fiducie}: \textit{Le Mandat à effet posthume} (posthumous mandate).\footnote{275}{The posthumous mandate is a legal act by which a person appoints another person (mandataire) to be responsible for managing all or part of his assets after his death, on behalf and in the interest of his heirs.\footnote{276}{This type of deed has advantages when heirs cannot manage the succession themselves because of disability or special management needs, like in a business.\footnote{277}{Moreover, the issue of reserved heirs does not limit the application of the mandate.\footnote{278}{Nonetheless, the instrument has other limits: the mandate cannot exceed a term of two years (extended one or more times by court decision), the existence of the mandate shall be motivated by a serious and legitimate reason not to be declared void and null, and, unlike a trustee, a mandataire is not the owner of the assets, he only has the duty to manage them without any right to give or sell.\footnote{279}{It is thus through various back doors that French law introduced, in its own way, the trust.\footnote{280}{These instruments are similar to trusts, but the French tools vary depending on the duration, functions, and powers, which differentiates them from Anglo-Saxon trusts.\footnote{281}{The \textit{Notaire} earns a central role in these different trust-like instruments because French law requires them to draw up the instruments.\footnote{282}{Regarding the implementation of the EU regulation on succession, the \textit{Notaire} will become the competent authority in France to issue the European Certificate of Succession (ECS).\footnote{283}{Thus, the \textit{Notaire} will practice foreign law and a new adaptation of foreign instruments, such as common law trusts.\footnote{284}{\textbf{272}}{See supra Part II.B.2.}\textbf{273}}{See CODE CIVIL[C. CIV] art. 1054 (Fr.).}\textbf{274}}{See CODE CIVIL[C. CIV] art. 1059 (Fr.).}\textbf{275}}{See CODE CIVIL[C. CIV] art. 812 (Fr.).}\textbf{276}}{Id.}\textbf{277}}{Id.}\textbf{278}}{See supra Part II.B.2.}\textbf{279}}{See CODE CIVIL[C. CIV] art. 812 (Fr.).}\textbf{280}}{See discussion supra Part III.B.}\textbf{281}}{See discussion supra Part III.B.}\textbf{282}}{See NOTAIRES DE FRANCE.FR, infra note 246.}\textbf{283}}{The European Certificate of Succession (ECS) is the first European document that reduces the slow settlement of a cross-border succession. The ECS is framed to the status and the right of each heir or legatee, the attribution of specific assets, and the powers of some persons who executed a will or
V. Conclusion

In the United States and England, in addition to being one of the most utilized business and commercial devices, the trust is a vital tool in estate planning for individuals. In continental European civil law countries, on the other hand, lawmakers view the concept of the trust with suspicion because of its lack of formality and opportunity for tax evasion.

However, a new European regulation mandates that civil law countries develop laws to harmonize their succession laws with those of other member states. As an EU member, France must recognize and implement some form of trust law in order to avoid litigation and violations of European Law.

The French civil code lacked any trust form until 2007 with the introduction of the *fiducie*. However, the *fiducie* had strict limitations that may have been invalid under the new European regulation. Since 2007, France has expanded its code relating to the *fiducie* and eliminated many restrictions on the operation of the *fiducie*.

The French *Notaire* can ensure that the *fiducie* created is legal and authentic under French and European Union law and that it functions as intended, similarly to the trust under common law. The *Notaire* can ensure that the *fiducie* meets the formalities required under French law. The *Notaire* can also prevent voidance of the liberal *fiducie* on public policy basis because the *Notaire* can guarantee that the *fiducie* has a mission, validating it under French law. In addition, the *Notaire* can ensure that the *fiducie* accomplishes the property transfer intended by the Settlor within that prescribed mission. The *Notaire* can further make sure that the *fiducie* agreement contains provisions calling for the same fiduciary duties mandated for trusts under common law. Finally, the *Notaire* can educate administered the estate, and then the grounds for non-recognition are very limited. Devaux, supra note 167, at 229 (citing Commission Regulation 650/2012, 2012 O.J. (L 201) 107 (EU)).

284. See id.
286. See Bibaut, supra note 5.
288. See supra Part III.A.2.
289. See Bibaut, supra note 5; Koessler, supra note 12.
290. See supra Part III.B.
291. See supra Part III.B.
292. See supra Part IV.
293. See supra Part IV.
294. See supra Part IV.
295. See supra Part IV.
296. See supra Part II.A.1.
those unfamiliar with the *fiducie* of its benefits, expanding the popularity of this new instrument in France.\textsuperscript{297}

Therefore, by allowing the *Notaire* to create a *fiducie* that acts like a common law trust but also properly takes into account the French Civil Code, the *fiducie* will avoid litigation at both the national and European level.\textsuperscript{298} Due to the *Notaire*’s high education and training, the *Notaire* is the preeminent legal entity to apply both French law and European Union law such that the *fiducie* is created and effectuated as intended.\textsuperscript{299}

\textsuperscript{297} See supra Part IV.

\textsuperscript{298} See supra Part III.A.2.

\textsuperscript{299} See supra Part IV.