The Swiss fiducie : a subtle conceptual blend of contract and property

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THE SWISS *FIDUCIE* : A SUBTLE CONCEPTUAL BLEND OF CONTRACT AND PROPERTY (*)

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SUMMARY

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I. – Introduction

Swiss law, like other legal systems, recognises several institutions which tend to distinguish between the legal owner of an asset (the owner of an object, or holder of a receivable) and the beneficial owner. One such institution, which was not taken into account in the drafting of the Civil Code (1907) (1) or the Code of Obligations (1881, 1911), is the *fiducie* (in German, *Treuhand*). Innovative commercial practices, sustained interest by legal authors, cautious but consistent courts' decisions, and eventually partial endorsements by the legislature all shape a legal institution which started its modern life just a century ago on the fringes of the codification of Swiss private law.

A *fiducie* is set up for purposes of management (*fiducie-gestion* or *fiducia cum amico*) when a natural or legal person, the creator (*le fiduciant, der Treugeber*), transfers to another natural or legal person, the fiduciary (*le fiduciaire, der Treuhänder*), the property of

(1) Except for art. 717 CC, which forbids fiduciary transfer of property without actual delivery (*Sicherungsübereignung*), a means of creating a collateral security on movable property which would evade the requirement that, for publicity purposes, the debtor cannot retain sole possession of the chose. *See* II B (b) below.

some assets to perform management tasks which principally serve the interests of the creator or occasionally some other beneficiary. A *fiducie-sûreté* (or *fiducia cum creditore*) is used to create a security interest over an asset for the benefit of the fiduciary, to which he acquires full legal title to be restored to the creator only after the latter's debt has been paid in full. The *fiducie-libéralité*, which may be used to organize the devolution of property over time, might be considered as a special form of *fiducie-gestion*. It has not really established itself in practice, chiefly owing to limitations of which some are juridical (e.g. the regulations governing the reserved portion of patrimony) and others dogmatic (e.g. the notion of *patrimoine*); and because it is possible to achieve the same ends by means of other legal institutions such as usufruct in favour of the surviving spouse, life annuities, conditional gift or bequest, reversionary heir or testamentary executor with an extended mandate or family foundation) (2).

Fiduciary transactions, which developed in response to practical necessity, had been recognised by the Federal Tribunal, the highest Swiss court, as far back as 1893 for transfer of ownership as security for a debt; (3) and in 1905 for fiduciary management (4). The Tribunal justified this recognition by reference to theoretical discussions of the 'fiduciary disposition' (*acte fiduciaire*) as a juridical act *sui generis*. The conditions in which it would be valid were much debated, especially with a view to distinguishing it from 'fictitious' transactions and fraudulent evasion of statutory provisions (5). Now that this theoretical controversy has more or less been decided, and the focus has shifted to juridical analysis of the effects, it is possible to speak with confidence of the *fiducie* as an institution (6).

It is also important to distinguish between the overall regulation of the *fiducie*, which developed over time through courts' decisions under the umbrella of a general codification of civil law, and specific regulations which have emerged from three particular statutes

(2) Cf. THÉVENOZ (1995), pp. 295ff.

(3) *ATF* 19 344, 347, *Triefus v. Drexler* (see also preceding note) and II. B below.

(4) *ATF* 31 II 105, *Grüring-Dutoit v. Kappeler*.

(5) On these questions cf. JÄGGI and GAUCH (1980), n^{os} 176ff.; REYMOND (1989), pp. 649ff.; Walter YUNG, « Simulation, fiducie et fraude à la loi », in *Mélanges Sauser-Hall*, Geneva, 1952, pp. 139ff., reprinted in *Etudes et articles*, Geneva, Georg, 1971, pp. 162ff.

(6) The notion of *acte fiduciaire* has historical and dogmatic implications which now appear out of date.

relating to investment funds (7), the collective management of authors' royalties (8) and fiduciary operations by banks (9).

II. – Principal areas of application

It is in the domain of commercial and business law that the *fiducie* is most generally applied in Switzerland. It is used either for management purpose (*fiducie-gestion*) or to create a security interest (*fiducie-sûreté*).

A. – Fiducie-gestion

(1) – *Fiduciary deposits*

Over the last few decades fiduciary deposits (*dépôts ou placements fiduciaires, Treuhandanlagen*) – meaning short-term lending of client funds on the interbank money market (Euromarket) (10) – have become a service to customers characteristic of Swiss banks, with the result that these deposits, which are treated as off-balance-sheet funds by the banks acting as fiduciaries, represent about one-fifth of the total balance-sheet funds of the Swiss banks (11).

This success is due to the numerous advantages which such operations offer both to the client, as creator, and the bank, as fiduciary (12). A fiduciary investment offers the client access to the short-term interbank lending market – which is (by definition) inaccessible to natural persons and to most undertakings – and it gives

(7) The federal law on investment funds (LFP) of 1 July 1966 has now been replaced by the law of 18 March 1994, which came into force on 1 January 1995 (*RS* 951.31). See II A (4) below. Investment funds are the functional equivalent of mutual funds and unit trusts, with a different legal structure based upon the *fiducie*.

(8) The federal law on copyright and attached rights, 9 October 1992 (LDA), came into force on 1 July 1993 1993 (*RS* 231.1). It replaced the law of 25 September 1940 on receipt of royalties. *See* II A 5) below.

(9) Arts. 16 et 37*b* of the federal law on banks and savings institutions (LB) were adopted on 16 December 1994 and came into force on 1 January 1997 (*RS* 952.0). *See* V B (1) below.

(10) The money market deals with short term fund lending with a maximal maturity of one year. Transactions on the Euromarket are characterized by the fact that the currency of the loan is not legal tender at the borrower's place of business. Fiduciary deposits are short term deposits of Swiss francs with another bank located outside Switzerland.

(11) *I.e.* 339 billion CHF of fiduciary deposits against 1782 billion CHF of total balance sheets for 394 banks, see *Banque Nationale Suisse*, press release on statistics to be published as *Les banques suisses 1997*, Zurich, BNS, Direction de la statistique, 1998.

(12) Cf. Thévenoz (1995), p. 288.

better returns than most other investments of similar duration and quality. By amalgamating investments from a number of different clients, the bank can constitute a sum which will allow it to obtain more favourable conditions. Moreover the client can avoid the 35 % withholding tax on all interest and dividends paid by companies located in Switzerland, because the interest is paid by a foreign debtor (a foreign bank, or a foreign branch of a Swiss bank). The bank acting as fiduciary must treat the operation as an off-balance-sheet item for which it bears neither the risk of insolvency of the foreign depository bank, nor the exchange risk, nor the transfer risk, and which makes no calls on its own funds. All those risks are born by the creator.

Fiduciary loans (or credits) are a variation, characterised by the fact that the creator himself designates the beneficiary of the loan – often an entity with which he has connections. It should be clearly understood that the duty of banks to avoid giving any active support to tax fraud (art. 8 of the Agreement on the Swiss bank's code of conduct with regard to the exercise of due diligence on the banks' duty of care of January 1998), and to examine the financial background of all complex, unusual or large-scale operations, have substantially reduced the practical importance of fiduciary loans.

(2) – *Fiduciary asset management*

Asset management, in the broadest sense of the term (private or institutional management) (13), one of the most important financial activities conducted in Switzerland, applies to a volume of assets valued at more than two thousand billion Swiss francs (14). The market is dominated by the banks, but there are also other intermediaries, both legal persons (finance companies, trust companies, etc.) and natural persons (individual managers, advocates, notaries, etc.) (15).

(13) « Asset management » is generally taken to mean the management of a portfolio of securities on a discretionary basis, but with due regard to the aims and limitations agreed with the client. For a legal analysis see esp. Alessandro BIZZOZERO, *Le contrat de gérance de fortune*, dissertation, Fribourg, [s.n.], 1992.

(14) Niklaus BLATTNER, Benedikt GRATZL and Tilo KAUFMAN, *Das Vermögensverwaltungsgeschäft der Banken in der Schweiz*, Berne, Haupt, 1996, p. 81.

(15) Alain B. LÉVY, « La gestion de fortune par un gérant indépendant », in *Journée 1996 de droit bancaire et financier*, Berne, Stämpfli, 1996, p. 99.

In principle, an asset administrator operates on the basis of a specific authority conferred on him by the legal owner of the assets which he manages. This means that he passes to the custodian bank, or the stockbroker, orders for investment or sale as an attorney-in-fact for his client (direct representation). For reasons of confidentiality (which have become virtually a dead letter today owing to the laws against money laundering) (16) some asset administrators take a fiduciary approach. They ask the client to assign ownership of the securities to them and then deposit them with a bank in their own name (but on behalf of the client, who is the beneficial owner). These deposits may be either individual (the manager opens a separate bank account for each of his clients) or global (omnibus accounts : the administrator combines the assets of several clients in a single bank account, though he must of course keep track of the assets appertaining to each individual). This fiduciary approach to asset management, which has never been the most common, is likely to lose still more of its importance now that asset administrators acting in a fiduciary capacity are considered to be securities dealers, and are thus subject to government licensing and supervision, extensive audits, and exceptionally onerous rules on their organisation and own funds (17).

(3) – *Nominee shareholder*

If a financial institution makes a private contractual arrangement by which he figures as shareholder on the register of names of a quoted company, but allows investors to obtain the financial benefit from these shares without being themselves registered as shareholders, then the institution is acting as a nominee. The quoted company will be aware of the nominee's position; generally, he is not allowed to exercise the normal voting rights of a shareholder. Other special methods (particularly statistical report-

(16) Cf. the new version (which came into force on 1 August 1994) of art. 305*ter* of the Swiss Penal Code (*RS* 311.0), imposing vigilance in financial operations; and the very recent federal law on money laundering (*RS* 955.0, 10 October 1997, came into force on 1 April 1998). See also various pronouncements by supervisory authorities such as the Federal Banking Commission, and the growing number of self-regulatory rules, in particular those in the Agreement on the Swiss bank's Code of conduct with regard to the exercise of due diligence on the duty of care of banks, of which a new version was adopted in January 1998.

(17) Arts. 10ff. of the federal law on stock exchanges and securities trading, of 24 March 1995 (*RS* 954.1).

ing) may ensure a degree of transparency vis-à-vis the quoted company.

There is some dispute over the correct way to describe these operations in legal terms. One recent author has suggested that the activities of SNOC (the Swiss Nominee Company) – which involve the endorsement in blank of registered shares in American companies, after which they can be publicly circulated as bearer securities – are not fiduciary in nature. What happens is that SNOC is registered as shareholder (formal legitimation), but there is a change in the ownership of the endorsed securities : the buyer becomes the shareholder in the material sense (material legitimation, legal ownership), although he cannot directly exercise the attached shareholder's rights (18). This has now given rise to the question whether the same conclusions apply to SEGA (19) services relating to Japanese shares (20) and to registered shares in Swiss companies (21).

(4) – *Investment funds*

Investment funds *(fonds de placement, Anlagefonds)* bulk reasonably large on the Swiss financial market : according to banking statistics, their net asset value as at end 1998 was about 107 billion Swiss francs (22). Article 2, para. 1 of the federal law on investment funds (23) describes them as consisting of 'payments made by investors in response to a public call for collective investment; it is generally managed by a management company on behalf of the investors, on a shared-risk basis'.

(18) Lorenzo OLGIATI, *Schweizerische Nominees im Aktienregister amerikanischer Publikumsgesellschaften*, dissertation, Zurich, Schulthess, 1995, esp. pp. 150ff.; dissenting opinions are mentioned in note 604. More recently : Urs KÜPFER, *Treuhänderische Unternehmensbeteiligung u.b.B. der Nominee-Eintragung bei schweizerischen Publikumsgesellschaften*, Basle, Helbing & Lichtenhahn, 1997.

(19) SEGA Schweizerische Effekten-Giro AG was set up by the Swiss banks as the central depository of securities issued by Swiss companies and public bodies, and to perform securities and cash settlement between its member financial intermediaries acting on behalf their clients or on their own behalf.

(20) Cf. REYMOND and REVACLIER (1985), pp. 431ff.

(21) Cf. Annex 3 for SEGA's terms and conditions as at 1.05.1995, reprinted in *BF98 – Réglementation et autoréglementation des banques, bourses, négociants*, investment funds *et marchés financiers en Suisse*, ed. by L. THÉVENOZ and U. ZULAUF, Zurich, Schulthess, 1998, documents 52-3c.

(22) FEDERAL BANKING COMMISSION, *Rapport de gestion 1998*, Bern, 1999, p. 241.

(23) *See* note 7 above.

Though the law never uses the word, it definitely intends that the relationship between the management company and the investors shall be fiduciary in nature (24). The revision of the law in 1994 merely confirmed the choice already evident in the law of 1966 – when, in fact, the fiduciary approach was selected in preference to the Anglo-American original model (investment trusts) (25), the corporate model (investment company) (26), or the contractual model whereby the participants become co-owners of the fund assets (27).

Participants have no rights of ownership over any securities or capital assets which may be bought with their investment contributions; the sole owner is the licensed management company, acting in its own name but in the interests of the participants. The latter have certain rights vis-à-vis the management company, but these are rights *in personam*, not *in rem* : they have a right to a share in the distributed income from the assets; to a share in the net balance in case of liquidation; and to have their share in the fund redeemed by the fund (right of exit). Here we have one characteristic of a *fiducie* : a legal owner (the management company) which manages the assets entrusted to it in the interests of, and on behalf of, the participants. However, there is a substantial difference between an investment fund and a *fiducie* under general Swiss law. Normally, the fiduciary is obliged to restore the same goods as were entrusted to him by the creator, or which he has acquired on his behalf. But if the investment fund is dissolved, or a participant wants his investment redeemed, the management company is not obliged to restore a part of the fund assets. It is obliged to pay out an amount representing the net asset value of the investor's share; if necessary, it must realise part of the investment in order to do so.

(24) Cf. THÉVENOZ (1995), pp. 279.

(25) « Trusts » in the English sense do not exist in Swiss domestic law. In *Harrison*, the Federal Tribunal found that a trust *inter vivos* unwisely created under Swiss law had to be analysed as a mix of a fiduciary contract, an agreement to transfer, a donation *mortis causa* and a contract conferring a right on a third party had, cf. *ATF* 96 II 79 (d), *JdT* 1971 I 329, discussed by Claude REYMOND, « Le trust et l'ordre juridique suisse », in *JdT* 1971 I p. 322, and Frank VISCHER, in *Annuaire suisse de droit international*, Zurich, XXVII (1971), pp. 237ff. This does not imply that foreign trusts are not recognized by Swiss private international law, cf. recently Pietro Paolo SUPINO, *Rechtsgestaltung mit Trust aus Schweizer Sicht*, Saint-Gall, Dike, 1994.

(26) This has tax disadvantages because it is subject to double taxation : first on company profits and then on the investor's dividend.

(27) Co-ownership of fund assets by participants would be more or less illusionary, since they could not (and in practice, ought not to) exercise any influence on day-to-day management; nor do they have the owner's defining right to dispose of the assets.

(5) – *Collective management of royalties*

Most authors of musical or literary works entrust the commercial exploitation of those works to licensed agencies. Under copyright law (28), the pecuniary rights of the authors of copyrighted works are subject to collective management. This management is done by various agencies. The contract whereby the author entrusts his rights to the agency (the management contract) is treated as a *mandat* (contract of agency) under Swiss law (29). However, it requires the author to transfer his pecuniary rights under a fiduciary arrangement (30). The agency, acting in its own name and on behalf of all its clients collectively, performs all legally necessary acts in order to manage those rights, and to that end it can also sue in courts. Because the author has alienated his pecuniary rights, he will be unable to exercise those rights directly for the duration of the contract (31).

B. – Fiducie-sûreté

This arrangement – a fiduciary transfer of assets as security for a debt – can be used in a number of ways, according to the desired object. It is subject to legal and fiscal constraints which vary with the nature of the assets in question (movable property, immoveable property, receivables and other rights) (32).

a) It is practically never used in connection with immoveable property. Potential users are discouraged by the tax implications, and tend to prefer one of the three types of land-based security offered by the Civil Code (hypothec, hypothecary certificate, and negotiable land charge, see art. 793 ff CC).

b) Swiss law does not acknowledge the concept of an hypothec on movable property except for ships, aircraft and livestock. Security

(28) *See* note 8 above.

(29) On the Swiss *mandat* as a general contractual type or a contract governing the provision of independent services without guaranteed results, *see* V A (1) below.

(30) For example the statutes of SUISA (= SUISse Auteurs), a co-operative agency for non-theatrical musical works, stipulate that « the agency contract will be granted only if the royalties are transferred to SUISA » (item 7.2 of the Statutes). SUISA receives these royalties 'in its own name » (item 4.6, sentence 1). Each author receives a share of the total product of the collective management of the royalties, in proportion to the gains made from his own work (cf. arts. 48 paras. 1 and 49 LDA).

(31) On this subject cf. Denis Barrelet and Willi Egloff, *Le nouveau droit d'auteur, Commentaire de la loi fédérale sur le droit d'auteur et les droits voisins*, Berne, Stämpfli, 1994, pp. 173ff.

(32) Cf. Thévenoz (1995), pp. 302ff.

can be given on movable assets if the pledgor relinquishes the object concerned (*principe du nantissement*, *Faustpfandprinzip*), or at least ceases to be its sole possessor (art. 884 para. 3 Civil Code). In rare cases, tangible assets can be alienated and serve as a guarantee under a fiduciary arrangement. Though this is acceptable as regards the internal relationship between the person giving the security (the creator) and the beneficiary (the fiduciary), its juridical effectiveness is greatly reduced by the fact that article 717 of the Civil Code specifies that it is not binding upon third parties (in particular, the creator's creditors) if the creator retains immediate possession of the object. A security interest which cannot be claimed in the debtor's bankruptcy is of no use! However, such transfers of ownership still have considerable importance with regard to certain paper securities where dispossession of the debtor is easily achieved (33) : for example, when a bank that is issuing or confirming a letter of credit becomes the owner, under a fiduciary arrangement, of bills of lading or other documents which are endorsed in its name. The same applies to guarantees for credits on real property insofar as banks now tend to demand a fiduciary transfer of the hypothecary certificate (34) in order to facilitate realisation of the lien they have thus obtained over the property which is serving as security for the loan (35).

c) The widest use of such transfers of ownership is in relation to the assignment of personal rights. In fact, such assignments have become one of the most common forms of credit in banking practice (36). This type of security, deriving from a fiduciary assignment of the borrower's existing or future commercial receivables, has largely replaced the practice of pledging the receivables. The success of this type of global assignment is mainly due to five factors, four of which are inherent and one circumstantial. Assignment, unlike pledging, does not require the document of acknowledgement of the debt (e.g. the contract) to be transferred to the beneficiary of the security. Because the beneficiary has full title to the receivable, he

(33) Cf. DE GOTTRAU (1997), pp. 196ff.

(34) Under arts. 842ff. CC, the hypothecary certificate is a paper security which incorporates both an amount owed by the named debtor and a lien on the property specified in the document.

(35) Cf. Markus F. VOLLENWEIDER, *Die Sicherungsübereignung von Schuldbriefen als Sicherungsmittel der Bank*, dissertation, Fribourg, Ed. Universitaires, 1995; Rolf BÄR, « Der indirekte Hypothekarkredit – Zur Sicherungsübereignung und Verpfändung von Schuldbriefen », in *Theorie und Praxis der Grundpfandrechte*, Berne, Stämpfli, 1996, pp. 105-32.

(36) Cf. THÉVENOZ (1995), pp. 306ff.; DE GOTTRAU (1997), pp. 221ff.

is in a more independent position vis-à-vis the original debtors for the assigned receivables. If the assignor goes bankrupt, the fiduciary creditor can collect the receivables and apply the proceeds against his due; if necessary, he can take legal action against each debtor under the receivables. He may also sell the chose to a third party, because the chose can be alienated independently from the guaranteed debt, and the security will persist even if the debt is extinguished, since the former is not ancillary to the latter. Finally, the treatment of these assignments in case law has been very generous (perhaps over-generous) : their validity is limited only by the rules which protect the assignor against excessive commitments (cf. art. 27 para. 2 CC). The Federal Tribunal held repeatedly that those limits are exceeded when the whole of the assignor's future receivables were assigned; but they would not be exceeded if he assigned all present and future receivables arising from his business activities (37).

III. – Structure of the *fiducie*

According to prevailing legal opinion in Switzerland, a *fiducie* is a combination of legal transactions relating both to the law of obligations (it is a contract) and to the law of property (it is a disposition of property).

The creator undertakes, by agreeing to a contract (the *convention de fiducie*), to transfer the full legal title to certain choses or rights (the fiduciary property), while the fiduciary undertakes to keep and manage them, and possibly even to them, in accordance with the objects and clauses of the agreement, and to restore the fiduciary property (either the original property or some other property acquired through reinvestment of the proceeds from sale of the original property) on expiry of the agreement. Fiduciary management can generally be terminated by either party. A *fiducie-sûreté* does not end until the debt that is secured by the fiduciary property has been repaid.

At the same time, or subsequently, the creator will implement the agreement by transferring (*acte de disposition* or *acte translatif de*

(37) *ATF* 112 II 433 c. 3, *JdT* 1987 I 162, 164 - 5, confirmed in the statement of *ATF* 113 II 163, 165.

droits) the fiduciary property – i.e. the movable or immovable property, personal rights, paper securities, rights of intellectual or industrial property, etc, named in the agreement – to the fiduciary, so that the latter acquires full legal title to them (38).

There has been much examination, in both courts' decisions and doctrine, of the 'fiduciary disposition' (*acte fiduciaire*), which is quite peculiar since it is binding *erga omnes*, but restricted *inter partes* by an agreement which is intended to limit its effects. This approach has exposed a sort of contradiction between the internal and the external relationship : the fiduciary has a power vis-à-vis third parties which exceeds the power necessary to manage the assets according to the creator's wishes. This examination was motivated by the need to define the fiduciary relationship in terms of the private law system, and in particular to three of the cardinal rules of civil law : a clear distinction between rights *in rem* and rights *in personam*; the principle that rights *in rem* are subject to a *numerus clausus*; and the principle of the unity of patrimony (*unité du patrimoine*). As we shall see, although these principles have never actually been abandoned, they have been whittled away by both case law and statute.

A. – Rights *in rem* and rights *in personam*

In a decision of 1905 which gave recognition to the fiduciary institution in Swiss civil law, the Federal Tribunal pronounced in favour of the theory of full transfer of legal title to the fiduciary (*Theorie des vollen Eigentumsüberganges*) (39). Consequently, from the legal point of view the transaction which creates the *fiducie* must be viewed on two parallel levels simultaneously : as regards rights *in rem*, it constitutes a full and complete transfer of such rights to the fiduciary, and this transfer is binding *erga omnes*; as regards the law of obligations, it is a contract which is necessary to the validity of the transfer but which by the same token limits the

(38) It is also possible for the fiduciary property to be transferred without consideration by a third party; or to be acquired by a third party using funds provided by the creator (indirect acquisition). As we shall see under V A (1) below, this is the only type of trust property which confers a right to preferential payment in case of bankruptcy under the rules for fiduciary management in ordinary law (art. 401 of the Code of Obligations).

(39) *ATF* 31 II 105.

use which the fiduciary can make of the transferred rights, and that limit is binding only *inter partes*.

Most authors have followed the Federal Tribunal in applying the *Theorie des vollen Rechtserwerbes durch den Treuhänder* (*Vollrechtstheorie*) – the theory that the rights *in rem* are fully transferred to the fiduciary (40). The Tribunal considers a fiduciary transfer of rights as a special form of disposition. The fiduciary has sole claim, in both the formal and the material sense, to the proprietary rights that have been transferred. Although, in fiduciary management, the fiduciary gains no direct advantage from the transferred rights, except possibly for his fees, this does nothing to attenuate his title to them, either vis-à-vis third parties (who can and must consider him as sole owner, creditor or shareholder) or vis-à-vis the creator (41).

Since the disposition constitutes a fully valid transfer, the creator no longer has any part in the proprietary rights he has transferred on a fiduciary basis. He has no further rights *in rem*; thus he cannot trace property in the hands of a third person, nor can he take action to establish title. The transferred goods are no longer part of his assets, though they do constitute a personal right for which the fiduciary is the debtor : the latter must restore the fiduciary property when the fiduciary relationship is terminated. The creator's creditors cannot enforce execution on the fiduciary property, but only on the contractual claim held by the creator against the fiduciary and compelling the restoration of the fiduciary property when the *fiducie* is extinguished.

If the creator's rights against the fiduciary are of a purely personal nature, the creator merely appears as a creditor of the fiduciary. He can require the latter to fulfil his obligations – if necessary by taking legal action – and he can recover damages if the fiduciary fails in those obligations.

Any legal system that distinguishes between the act (*e.g.* contract) giving rise to an obligation to transfer some asset(s) and the actual transfer (disposition) of the same must explain clearly how the two interact. A disposition is said to be abstract if its validity is independent of that of the title of acquisition which gave rise to

(40) Cf. e.g. JÄGGI and GLAUCH (1980), n[os] 188-200 and references there cited.
(41) REYMOND (1989), p. 653.

it. In Swiss law, dispositions of most rights and objects are causal in nature : their validity depends on the validity of the obligation which the transfer of rights is intended to execute. However, where the assignment of a receivable is concerned, the question remains undecided. The Federal Tribunal has reacted to the conflicting signals from courts' decisions by deciding that a fiduciary agreement is sufficient cause for the disposition of the goods on the basis of which the *fiducie* was constituted; in this the Tribunal has the almost unanimous support of the doctrine (42).

As already mentioned, many commentators have seen a contradiction in the idea of granting unlimited powers to the fiduciary by the act of disposal, only to restrict those powers immediately by means of the fiduciary agreement. The fiduciary relationship would seem to put the fiduciary in a privileged position where his powers exceed his rights. Both courts' decisoins and doctrine have pointed out (somewhat equivocally perhaps) that 'der Fiduziar kann mehr als er darf' (the fiduciary can do more than he ought to do) (43). This contradiction has been described in terms of 'excessive' or 'exorbitant' powers (*überschiessende Rechtsmacht*) : the powers conferred on the fiduciary are greater than is required to fulfil the financial object of the parties (44). One author even suggested that the intention to transfer full title to the fiduciary is simulated by the creator, and therefore that the disposition of fiduciary assets is ineffective because it relies upon an invalid cause (45).

We believe that it is inaccurate to see a contradiction between powers (relating to external relationships) and rights (relating to internal relationships), because it is often necessary to confer the most complete competence – viz. full ownership of the assets – in order to achieve the end sought by the parties. For example, in the case of fiduciary investments on the Euromarket, the fiduciary bank must acquire full title to the fiduciary property, because private individuals are not allowed to trade personally on the Euromarket : it consists of an international network of banking

(42) On this development see Ernst A. KRAMER, *Berner Kommentar, Das Obligationenrecht*, vol. VI/1/1, Berne, Stämpfli, 1986, no. 125 [*ad* art. 18 OR], p. IV/57.

(43) Cf. for the courts' decisions, *ATF* 119 II 326, 328, *JdT* 1995 II 87, 90; for the doctrine, Theo GUHL, *Das Schweizerische Obligationenrecht*, Zurich, Schulthess, 1991, p. 126.

(44) Cf. for the courts' decisions, *ATF* 71 II 167, 169; for the doctrine, GAUCH (1980), no. 189.

(45) Peter Jäggi's intervention at the Swiss Lawyers Society's conference on 5 September 1954, published in *Revue de droit suisse* 1954 II, pp. 536a ff.

establishments which deal only amongst themselves and are determined to avoid the need to settle accounts with the economic beneficiaries of the relevant deposits (46). The fiduciary structure was deliberately adopted by the legislator to organize the relationship between investment funds' management companies and participants, or between authors and collective agencies, precisely because an administrator, if he is to perform his task efficiently and competently, must be as independent as possible from the beneficial owners; and this independence cannot be guaranteed if the latter retain the ownership of the rights being managed.

More generally, it can be said that in the case of fiduciary management the fiduciary undertakes temporarily to exercise full legal powers over an asset which the creator entrusts to him for that purpose. Thus the fiduciary has both the power and the right to exercise full ownership, in his own name but on behalf of the beneficiary. He is forbidden only to appropriate the economic value of the fiduciary property (duty of loyalty). The same argument applies, *a fortiori*, to the *fiducie-sûreté*, in which the aim of the parties is precisely to give the fiduciary full title to the fiduciary property because this will constitute a better guarantee than other property-based securities. Here again, it is obviously possible for the fiduciary to act in breach of his commitments; but that possibility exists in all contractual relationships.

B. – Rights *in rem* and the principle of the *numerus clausus*

According to the principle of *numerus clausus* affecting rights *in rem*, only those rights which have been specified by the legislator may validly be constituted by the parties. It is generally admitted that this principle involves both the limitation of types of rights *in rem* (i.e. restriction of the number of such rights) and the determination of what these rights actually are (i.e. a statutory definition of their content) (47). It follows that a fiduciary relationship affecting a right *in rem* can involve only one of the forms listed in

(46) Cf. Claude Witz, « Un texte exemplaire : le règlement grand-ducal du 19 juillet 1983 relatif aux contrats fiduciaires des établissements de crédit », in *Droit et pratique du commerce international*, Paris, Feduci, vol. X (1984), p. 140.

(47) On this question cf. Forex (1987), n^{os} 152ff.

the law. Once this form has been selected, it must have the content defined in that same law.

As we have seen, both courts' decisions and doctrine hold that a *fiducie* involves full and complete transfer of the fiduciary property. Now ownership is one of the rights *in rem* which are recognised in law. It is generally conceived as a right which confers total and exclusive control over an object insofar as the general legal order allows. It includes the freedom to use, enjoy and dispose (materially and legally) of the object. Ownership gives the owner complete mastery over the object. When this mastery is exercised by more than one person (collective ownership, i.e. joint or co-ownership), each individual owner has the same rights over the object as all the others (48). Therefore, applying the principle of *numerus clausus* as the law now stands, it is not possible to construct a new kind of ownership which would be limited by a specific right *in rem* granted to the beneficiary to protect his position as beneficiary.

Courts' decisions (49) and (substantially) doctrine (50) agree that the fiduciary's ownership of the fiduciary property constitutes full ownership under articles 641ff. of the Civil Code – for which reason there has never been any attempt at a dogmatic definition of 'fiduciary ownership' in Swiss law. In particular, there has never been any overt acceptance of a type of dual ownership (as in Germany) which would distinguish between legal (formal) ownership and beneficial (material) ownership. Similarly, notions of 'relative', 'temporary', 'conditional' or 'mixed' ownership have consistently been rejected, as has the idea of attributing to the beneficiary a new, but limited right *in rem* : all these are contrary to the principle of *numerus clausus* (51).

C. – The principle of the unity of patrimony

A person's patrimony (*patrimoine, Vermögen*) may be defined as 'the total comprised by his assets, rights and liabilities both present and future' that can be valued in monetary terms (52). The prin-

(48) Cf. Paul-Henri Steinauer, « La propriété privée aujourd'hui », report to the Swiss Lawyers Society, *Revue de droit suisse*, Helbing & Lichtenhahn, 100 II (1981), p. 229.

(49) Cf. *ATF* 96 II 79, 93, *JdT* 1971 I 329, 342.

(50) Cf. Foex (1987), no. 333.

(51) Cf. Foex (1987), n^{os} 284 and 261ff., and Thévenoz (1995), pp. 337-8.

(52) Yves Rossier, « Etude comparée de certains aspects patrimoniaux de la fiducie », in *Revue de droit de McGill*, Montréal, 34 (1989), p. 879.

ciple of the unity of patrimony, which underlies all the Swiss codes but is never made explicit, prohibits any natural or legal person from subdividing his own patrimony into distinct subsets with each their own assets and the liabilities guaranted by those assets. Thus the liability of a debtor is entire and unlimited and will normally extend to the whole of his patrimony. Except in specific situations provided for by the law such as the incorporation of a limited liability company or the creation of a foundation (*fondation, Stiftung*) a patrimony cannot be considered autonomous, nor can it be allocated for a special purpose.

If this principle were to be rigorously applied it would mean that fiduciary property – of which the fiduciary has legal, but not beneficial, ownership – would be indivisible from his other assets, of which he has both legal and beneficial ownership. Generally speaking, there is no difference in law, in terms of ownership or title, between fiduciary property and personal property. The fiduciary's personal creditors are entitled to seize all his personal assets, including any which he may hold in a fiduciary capacity (53).

As for the creator, who has assigned the ownership of the fiduciary property and retains only a personal claim against the fiduciary, his claim for the restitution of the fiduciary property under the terms of the fiduciary agreement ought in principle to be treated like any other claim. Thus, if the fiduciary becomes bankrupt, the fiduciary property is considered as part of the patrimony in bankruptcy (54) and cannot, *in principle*, be set aside for the benefit of the creator (or the beneficiaries) who ranks equally with all other unsecured, unprivileged creditors (55). Because all the debts of a bankrupt are treated as cash debts, and the claims of the beneficiary against the fiduciary are not, in principle, guaranteed by any security, he is included in the same category as all the non-privileged creditors of the fiduciary (56).

In fact, both courts' decisions (applying the rules of the *mandat* to fiduciary management under ordinary law) and statute (the three special laws on trusts) have considerably attenuated the severity of these principles. The application of article 401 of the Code of

(53) Cf. REYMOND et REVALCIER (1985), p. 445.

(54) Art. 197 of the federal law on recovery of debts and bankruptcy, 11 April 1889, revised 16 December 1994 (LP, *RS* 281.1).

(55) Art. 242 LP.

(56) Which is the third class as defined in art. 219 para. 4 LP.

Obligations (57) to the ordinary *fiducie* opened a striking, albeit partial, breach by granting the beneficiary the right to withdraw from the patrimony in bankruptcy both securities and amounts owing to the fiduciary by third parties. With regard to investment funds, collective management of royalties and fiduciary operations of the banks, the relevant statutes explicitly provide for an automatic segregation of the fiduciary assets in favour of the creators and/or beneficiaries when the fiduciary is himself bankrupt. In all these three special kinds of *fiducie,* statutory law confirms that the fiduciary assets indeed constitute a 'fiduciary patrimony' conceptually and legally distinct from the fiduciary's own personal patrimony.

IV. – Historical sources

According to a widespread but debatable opinion, the structure of the *fiducie* in Swiss law is merely a modernisation of the structure of the ancient Roman *fiducia.* (58) In this view, the *fiducia* comprises two distinct acts : a disposal, using the formalistic procedure of *mancipatio*, whereby the creator transfers to the fiduciary the ownership of the fiduciary property; and a distinct agreement, the *pactum fiduciae*, whereby the fiduciary undertakes to restore this property to the creator under certain conditions. The only hold which the creator has over the fiduciary is a claim to restitution; the fiduciary has sole title to the fiduciary property, which becomes part of his personal estate. Modern *fiducie* would be the mere revival of Roman *fiducie.*

In his doctoral thesis, one of the authors of the present article (59) argues that the above conception is false. The *fiducia*

(57) To which we return below, *see* V A (1).

(58) Cf. François GUISAN, « La fiducie en droit suisse », in *La fiducie en droit moderne – Rapports préparatoires à la semaine internationale de droit*, vol. V, Paris, Association des juristes de langue française, 1938, p. 114 : « Generally speaking, Swiss doctrine has not advanced beyond the Roman *fiducie romaine*... because it is impossible to relinquish the formula of the Roman *fiducie*, a *complex* act : transfer of full title plus a *pactum fiduciae* »; p. 115 : « In *private law*, the *general* institution, under Swiss law, which governs the transfer of an asset to one person so that he can use it for the benefit of another person is the Roman *fiducia.* That is the only institution which is compatible with the classic definition of private property. »

(59) Cf. Jean-Philippe DUNAND, *Le transfert fiduciaire : « donner pour reprendre ». Mancipio dare ut remancipetur. Analyse historique et comparatiste de la fiducie-gestion*, doctoral dissertation in the Faculty of Law of the University of Geneva, under the supersision of Professor Bruno Schmidlin.

developed at a time when the fundamental principles of private law (the distinction between rights *in rem* and *in personam*; the absolute notion of ownership; the concept of the patrimony) were not yet clearly defined. The *fiducia* was in fact a single act of *mancipio dare ut remancipetur* (i.e. a legal power was transferred through *mancipatio* with a view to restitution at a later date) : in other words, a temporary transfer of legal title to an asset, with an ultimate aim in view. The duty of restitution was inherent in the *fiducia* and there was no need to spell it out in an attached agreement. The creator did not precisely have a claim to restitution, but he could sue the fiduciary through an *actio in personam* if the latter had not (according to the celebrated *actio fiduciae* quoted in several of Cicero's works) (60) acted honestly and without deceit, as one would expect in dealings among good men (*ut inter bonos bene agier oportet et [sine fraudatione]*).

The effect of the *mancipatio* was to transfer formal title to the fiduciary property to the fiduciary who then would exercise rights of ownership (or, to put it another way, acted as the owner) vis-à-vis third parties. The creator, stripped of his rights of ownership, nevertheless did not lose all legal power over the property. Numerous quotations from classical jurisconsults indicate that the creator retained a certain power of disposal over the fiduciary property, so long as the legal transaction he performed was compatible with the declared aim of the fiduciary transaction itself (*fiducia cum creditore* or *fiducia cum amico*). Otherwise it was assumed that the value of the fiduciary property was only deposited with the fiduciary : from the financial point of view it was still considered as part of the creator's patrimony; in some circumstances it could even be considered as a distinct element within the fiduciary's patrimony. The creator could be considered as the material (beneficial) owner of the fiduciary property.

Hence the theoretical concept of the *fiducie* in Swiss law does not derive directly from Roman sources, but from an erroneous interpretation of those sources by a number of German Pandectists in the latter half of the nineteenth century. Admittedly, they were correct in emphasising that an institution such as the *fiducia* could contribute usefully to modern German law. Indeed, the influence of

(60) E.g. *De officiis*, 3.17.70.

the Roman sources was decisive, because they proved that the concept of the *fiducia* was a historical and practical reality and could be used to support the creation of a modern equivalent. One aim of the research was to provide a juridical foundation for certain legal transactions – such as the provision of security by means of transfer or assignment – which otherwise might be considered fictitious and therefore ineffective. Many scholars wrote on the Roman sources, but most favourable attention was accorded to the theory of the fiduciary transaction (*fiduziarisches Geschäft*) as adduced by the Pandectist Ferdinand Regelsberger (61), because it harmonised with the great principles of the German Civil Code then in course of development. This theory was adopted in Switzerland at the beginning of the twentieth century (62). Thus the Roman *fiducia*, a product of the profoundly original genius of Roman legal thinking, was distorted by nineteenth-century German scholars, who forced it into a straitjacket of schematics, absolutes and abstractions.

V. – Rules governing fiduciary relationships in Swiss law

In order to understand the current rules governing the *fiducie* it is important to distinguish between trusts under ordinary law – which are subject to a series of courts' decisions and doctrinal interpretations of the general codification of private law (the Civil Code, the Code of Obligations and the law on recovery of debts and bankruptcy) – and the three specific statutory regimes of fiducie in banking, investment funds and collective management of royalties. Moreover, it is important to bear in mind that most fiduciary transactions, particularly in banking, make use of standardised contracts (general terms and conditions).

(61) Cf. Ferdinand REGELSBERGER, « Zwei Beiträge zur Lehre von der Cession », in *Archiv für die civilistische Praxis*, Heidelberg, Tübingen, 63 (1880), pp. 172-3.

(62) Initially in the fundamental decision of 1905 (*see* note 4 above) and then in the doctrine, cf. Pierre AEBY, « L'acte fiduciaire dans le système du droit civil suisse », in *Revue de droit suisse* 1912, pp. 149ff).

A. – THE *FIDUCIE* IN ORDINARY LAW

(1) – *Fiduciary management*

We have already discussed the principles developed in courts' decisions (from 1905 onward) to govern fiduciary arrangements. We shall now summarise the most important aspects of the legal rules that govern fiduciary management.

Before 1973, the Federal Tribunal had repeatedly declared that the fiduciary management (*fiducie-gestion*) agreement 'produces the effects of a *mandat*, or similar contract, between the parties'; (63) in 1973 the Tribunal declared that such agreements were subject to the rules governing the *mandat* (64). Some scholars took this to mean a *mandat ordinaire* or other, similar legal relationship; others saw it as contract *sui generis*. All, however, readily admitted that such relationships must be subject, either directly or by analogy, to most if not all legal rules governing *mandats*. (65) It should be explained that Swiss law defines a *mandat* (*Auftrag*) as a contract 'whereby the agent [*mandataire*] undertakes, under the terms of the agreement, to manage the business entrusted to him by the principal [*mandant*] or to render the service he has promised to perform'. Thus the *mandat* as defined in articles 394ff. of the Code of Obligations is much wider in scope than it is normally taken to be in other legal systems : it is a general type of contract relating to the independent performance of services without guaranteed results. Exercise of the *mandat* may be either gratuitous or remunerated. It may involve either direct or indirect juridical representation, but this is not obligatory; it may be confined to purely material activities (66).

Like all other Swiss contracts which are subject to the Code of Obligations, a fiduciary agreement can be entered into by any natural or legal person in enjoyment of civil rights. In principle, therefore, no limits are imposed on the nature of the creator (the *mandant*) and the fiduciary (the *mandataire*). There is no fixed form

(63) Cf. e.g. *ATF* 85 II 97, *JdT* 1960 I 142, 143.
(64) *ATF* 99 II 393, *JdT* 1974 I 588, 591/2, *Feras Anstalt v. Vallugano*.
(65) Cf. RAPP (1994), pp. 36-7 and references there cited.
(66) Cf. esp. Franz WERRO, *Le mandat et ses effets*, Fribourg, Ed. Universitaires, 1993.

for the fiduciary agreement (67). Like any other *mandat*, it can be revoked at any time by either the *mandant* or the *mandataire* (art. 404 para. 1 CO). The *mandat* will also be terminated 'by the death, incapacity or bankruptcy of either the *mandant* or the *mandataire*, unless otherwise agreed, or unless the nature of the business requires a different treatment' (art. 405 para. 1).

If the creator so requests, the fiduciary must 'at any time render him an account of his management and restore to him everything that he has received under this arrangement, by whatever right' (art. 400 para. 1). He is subject to the instructions of the creator (art. 397 para. 1) and must carry them out unless they are contrary to law or morality. He must faithfully and adequately fulfil his obligations to the creator (art. 398 CO). As owner of the fiduciary property, he may freely dispose of it to third parties; the creator has no say in the matter. If, by so doing, the fiduciary violates the obligations imposed on him by the fiduciary agreement, this does not, in principle, affect the validity of the disposal; but he may be financially and even criminally liable.

The creator may nominate one or more beneficiaries (68), though this is not part of the standard fiduciary arrangement under Swiss law, which usually ends when the fiduciary restores the fiduciary property to the creator. If the nomination is intended as a gift, it usually takes the form of a donation *inter vivos*, which must be couched in writing (art. 243 para. 1 CO) and must be signed by the creator as donor (art. 13 para. 1 CO); or of a *donatio mortis causa* which takes the standard form of such dispositions (arts. 245 para. 2 CO and 467ff. CC). It is also possible to grant the beneficiary a genuine claim against the fiduciary by means of a contract conferring rights on a third party (art. 112 para. 2 CO). The beneficiary may then obtain the right to all or part of the fiduciary income, and all or part of the fiduciary property itself. In this case he has the right to execute the fiduciary arrangement, and can seek compensation from the fiduciary for any damage caused by a failure on the latter's part to carry out his obligations faithfully and adequately (art. 398 CO).

(67) The agreement is usually couched in writing, for reasons of proof and also because tax legislation recognises fiduciary relationships (by taxing the trust capital and the capital and income as part of the income of the creator) if they are economically justified and based on a written agreement, and if the fiduciary's work is remunerated.

(68) Cf. THÉVENOZ (1995), pp. 345ff.

Although the courts have adopted the theoretical concept that the *fiducie* entails the integral transfer of rights to the fiduciary, their case-by-case interpretation of the various statutory dispositions has tended to protect the fiduciary assets – the main intention being to adapt the law to fit economic reality. The first relevant decision dates from 1952. The Federal Tribunal held that where there was more than one fiduciary, and one of these fiduciaries predeceased the others, his legal title over fiduciary property did not form part of his personal patrimony (though this would be required by the principle of the unity of patrimony), but would be added to the patrimony of his surviving co-fiduciaries (69). This decision is taken as the first step in the direction of recognising the existence of fiduciary assets as a separate item within the patrimony.

But the most fundamental decision was delivered in 1973 and concerned the application of art. 401 CO to fiduciary management. According to its marginal note, 'Transfer of rights acquired by the *mandataire*', this provision deals with receivables, securities and other movables acquired by the *mandataire* in his own name, but on behalf of the *mandant* (principal). Once the principal has fulfilled his obligations to the agent, he has a right of subrogation vis-à-vis the receivables (para. 1), which also exists in case of bankruptcy of the agent (para. 2); in the latter case the principal is also entitled to withdraw the securities and other choses from the estate in bankruptcy (para. 3). Until 1973 the Federal Tribunal had adhered strictly to the theory of integral transfer and had refused to grant the principal a right of withdrawal in case of bankruptcy. Its change of heart was expressed in the celebrated decision in *Feras Anstalt v. Banque Vallugano SA* : the Tribunal held that the creator could, under art. 401 CO, obtain the withdrawal of sums of money *acquired from third parties* (as opposed to monies or other assets transferred to the fiduciary by the creator himself, a restriction imposed by the text of art. 401) by the fiduciary bank, so long as these sums had been credited to a special account in the principal's name which had been kept separate from the other funds of the bank (70).

(69) *ATF* 78 II 445, *JdT* 1953 I 523, 530, *Boeckli v. Masse Meyer*.

(70) *ATF* 99 II 393, *JdT* 1974 I 588, 592/3. The fiduciary operations in question were fiduciary deposits on the Euromarket; *see* II A (1) above.

However, the scope of the *Vallugano* decision was somehow restricted by later ones. Thus, on the one hand, the Federal Tribunal has confirmed that art. 401 CO does not apply to fiduciary property or receivables conveyed by the creator himself to the fiduciary (71); on the other, it has specified that art. 401 cannot be invoked if the proceedings of the fiduciary transaction have been credited to the creator's general account (72). Moreover, the text of art. 401 CO itself declares that it does not apply to immoveable property. Finally, the Federal Tribunal has also declared that the creator's right of subrogation is not automatic : in the case of a receivable, it will not be effective unless the third-party debtor has been notified (73).

Nonetheless case law has sometimes tended to reinforce the effects of art. 401 CO. The text of the article is plain : the restitution to the creator of the fiduciary property is not automatic until the fiduciary agreement has been terminated. If the restitution applies to a receivable acquired by the fiduciary on the creator's behalf, art. 401 CO includes a form of legal assignment to the creator, but says nothing about the objections which the third-party debtor might bring against the debt before the assignment took place. However, a decision of the Federal Tribunal in 1980 (significantly, unpublished in the official records) has been interpreted to mean that if a third-party debtor (e.g. holder of funds invested by a bank acting in a fiduciary capacity on the Euromarket) knows, or ought to know, that his creditor is acting as a fiduciary, he cannot offset this debt against a debt owed to him by the fiduciary in another capacity (74). This idea has no statutory justification but has been accepted, in particular, by the Geneva Court of Justice (75) and by French courts (76). These decisions establish, in one particular context, the existence of fiduciary assets as an item distinct from the fiduciary's general patrimony, to which

(71) *ATF* 102 II 103, *Golay-Chapuis*, confirmed in *ATF* 117 II 429, *JdT* 1994 II 2.

(72) *ATF* 102 II 297, *JdT* 1978 II 67, 72/3, *Cevitch v. Masse Reiss.*

(73) *ATF* 112 III 90, *JdT* 1989 II 27, 29, *Banque Worms.*

(74) Decision of 8 July 1980, summarised in *La société anonyme suisse*, Zurich, 1981, pp. 67ff.

(75) Decision of 20 March 1992, summarised and discussed by André CUENDET, « Un arrêt genevois : rapports fiduciaires et bonne foi en affaires », in *L'expert-comptable suisse*, Zurich, 1993, pp. 100ff.

(76) Decision of the Paris Commercial Court, 1 October 1992, in *Juris-Classeur Périodique* (*JCP*) [*La Semaine juridique*] 1993 II 22005 (p. 76), confirmed by the Court of Appeal, 22 September 1994, in *JCP* 1995 II no. 22427 (pp. 176ff.), with a note by Michel VASSEUR, pp. 178ff.

the fiduciary's creditors have no access unless their claims relate to the fiduciary transactions.

Authors nevertheless continue to debate the applicability of art. 401 CO to the *fiducie*. Quite a few scholars still think the article does not cover the fiduciary relationship – which they consider to be, of necessity, a durable one : its scope is, they say, restricted to cases of indirect representation such as a buying commission, in which the *mandataire*'s ownership is brief and transitory. However, the majority opinion is that the distinction just drawn is artificial and that there is no reason why art. 401 should not apply to the *fiducie*, which some see as a type of indirect representation (77). Moreover, a growing number of scholars believe that an extensive interpretation of art. 401 CO would allow it to apply equally to property conveyed directly by the creator to the fiduciary (78). On the other hand, the above-mentioned criticisms of the applicability of art. 401 CO are supplemented by more theoretical objections : some authors fear that if this rule is applied to the *fiducie*, it will distort the nature of the latter and introduce fault lines into the fiduciary's right of ownership (79).

The Federal Tribunal is aware of this debate and has echoed it indirectly in a recent statement which fails to resolve the question whether the creator's right to privileged treatment in case of the fiduciary's bankruptcy, conferred by art. 401, ought to be restricted to fiduciary relationships of intentionally limited duration, excluding those which envisage a transfer of property for the duration of the *fiducie* (80).

(2) – *Fiducie-sûreté*

Since the agreement creating a *fiducie-sûreté* is intended principally to provide a security for the fiduciary, it cannot be described as a *mandat*, which by definition cannot be made prin-

(77) For a thorough examination of this debate see Jean-Luc Tschumy, *La revendication de droits de nature à soustraire un bien à l'exécution forcée*, dissertation, Lausanne, [s.n.], 1987, n^{os} 267-90, and the numerous references there cited.

(78) Cf.e.g. Watter (1995), n^{os} 107ff.

(79) Cf. e.g. Claude Reymond, « L'arrêt Feras Anstalt et consorts c. Vallugano SA et l'évolution de la jurisprudence du Tribunal fédéral sur l'acte fiduciaire », in *JdT* 1974 I pp. 596ff., 600, and Foex (1987), n^{os} 324-31.

(80) *ATF* 117 II 429, 430, *JdT* 1994 II 2; but this is attenuated by *ATF* 122 III 361 c.3a, Thévenoz (1995), p. 314. Cf. Tschumy (cf note 77 above) now. 378 and 392.

cipally for the benefit of the *mandataire*. Therefore the doctrine sees the *fiducie-sûreté* as a *sui generis* contract which is subject – to a limited extent and by analogy – to certain of the rules governing pledges of movable property. (81) In particular, all authors agree that art. 401 CO does not apply to the *fiducie-sûreté*, because if a creator has transferred ownership of property to the fiduciary to serve as guarantee for a debt, and the fiduciary subsequently becomes bankrupt, the creator cannot withdraw the relevant property from the patrimony in bankruptcy unless he has completely satisfied his creditor. In practice, banking establishments frequently make use of standardized contracts drafted by themselves within the general parameters set out in the Civil Code, the Code of Obligations and the law on recovery of debts. This applies in particular to the transfer of ownership of hypothecary certificates, and to the global assignment of receivables (82).

B. – Special rules governing fiduciary relationships

(1) – *Fiduciary operations by banks*

If Swiss banks, which are licensed and supervised by the Federal Banking Commission, perform fiduciary operations, these operations will of course be governed by ordinary laws (as explained above); but they have long been subject to additional, particular rules. There are fiscal and prudential rules to ensure that all fiduciary investments are made on the basis of a written contract, which often follows one of the standard forms prescribed by the Association of Swiss Bankers (83). The banks must enter the assets which they hold as trustees as off-balance-sheet items (84). If they deposit fiduciary moneys with another bank (85), they must also take the necessary measures to avert the risk of set off against their

(81) Cf. Bénédict Foex, *Le contrat de gage mobilier*, Basle, Helbing & Lichtenhahn, 1997, n^{os} 38ff.; Foex (1987), n^{os} 261ff.; Zobl (1982), n^{os} 1374ff. and 1556ff. Syst. Teil.

(82) Cf. de Gottrau (1997), pp. 204 and 237.

(83) Cf. the *Recommandations for fiduciary transactions* of 22 June 1993, by the Swiss Bankers Association, reprinted in *BF98* (cited at note 21), documents 45-8, 8a and 8b.

(84) Art. 25 para. 1 ch. 3.6 and 25c para. 1 ch. 4.4 of the ordinance on banks and savings institution's, 17 May 1972, version as of 2 December 1996.

(85) Fiduciary deposit, *see* II A (1) above.

own debts to the other bank (86). In fact, they are advised to obtain an explicit waiver of the other bank's right of set off.

It is clear that these rules all tend to separate the trust moneys held by banks from the banks' own assets and liabilities : those moneys constitute a separate asset which is used exclusively for the purposes laid down in the fiduciary agreement. These rules were reinforced by the addition, in December 1994, of two new articles (16 and 37b) to the Federal Banking Law which confer a privileged position on creators (or beneficiaries) of fiduciary operations in a bank's bankruptcy. This privilege now extends beyond what results from art. 401 of the Code of Obligations and from *Feras Anstalt v. Banque Vallugaro SA* (87); this was yet another contribution to the creation of a specific regime to govern fiduciary operations by banks. In fact, the Swiss parliament extended the regime for 'securities deposited' with banks so as to include 'movables, securities and receivables held in a fiduciary capacity by the banks on behalf of depositors' (art. 16 no. 2 LB). This implies that the receivers must, *ex officio*, make an automatic segregation (*Absonderung*) reserving the rights of the bank against the depositor.

(2) – *Investment funds*

The legal rules governing investment funds are set out in the Law on investment funds (LFP) (88). The investment fund consists of a collective set of investment contracts made between the management company, the custodian bank and each and every investor in a particular fund (cf. art. 6 LFP) : i.e. it is a set of investments bought with the money contributed by the relevant investors. Under art. 16 LFP, if the management company (i.e. the company which, as fiduciary, owns the securities of which the fund consists) becomes insolvent, the investments (securities, cash accounts, derivatives, etc.) will be automatically segregated from the patrimony in bankruptcy for the sole benefit of all investors as a class. The only debts which can be paid out of these assets are those

(86) This must be attested in the audit report : cf. art. 44(g) of the banking order; also section III (1) (b) «Measures aimed at avoiding the compensation risk », of circular ASB no.1079D; see note 83 above.

(87) *See* V A (1) above.

(88) *See* note 7 above.

which arose from the management of the fund (arts. 14 and 16 LFP). Thus the LFP has created a separate patrimony (i.e. separate from the patrimony in bankruptcy of the management company) which is set aside for a special purpose (it is used only for making collective investments). However, the protection thus granted to the investors does not endanger the rights of the administrator's other creditors, because the investment fund is clearly recognisable, as a distinct asset, in the accounts of the trust administrator.

VI. – An assessment of the current legal rules governing the *fiducie*

The Swiss *fiducie* is a judge-made creation which has gained considerably in importance since the 1950s – especially as regards financial services (fiduciary deposits with banks, investment funds) – with the assistance of a benevolent courts' decisions and a statutory consecration by the legislator in three specific domains. But there is still no specific law governing the *fiducie* as a general institution of Swiss private law. As one author remarks, what we find is a series of measures 'so thinly scattered amongst a heterogeneous mass of fragmentary rules that it is difficult to reconcile them in order to deduce a systematic or coherent set of legal rules' (89). However, the *fiducie* has continued to flourish despite this lack of coherence, which until recently provoked few complaints. But things have changed in the last few years. The opening of frontiers, the internationalisation of financial relationships, the globalisation of financial markets, have greatly stimulated competition between legal systems and threatened to reduce the attractiveness of the Swiss *fiducie*. The signing and implementation (where ratified) of the Hague Convention on the law of trusts and their recognition (HC) raises the question of how to situate the Swiss *fiducie* in relation to the Anglo-Saxon trust. Perhaps it is time to pension off the old concept of the *fiducie*, based as it is on a century-old theory of fiduciary transactions.

It is against this general background that the legal rules governing the *fiducie* have been excoriated by a whole series of scholars. In particular, they criticise the inadequate protection of fiduciary

(89) GIOVANOLI (1994), p. 192.

property vis-à-vis third parties, and the limitations on the fiduciary's independence from the beneficiary (90). These defects could doubtless be remedied by including new provisions in the Civil Code or the Code of Obligations (the *sedes materiae* is debatable, since the trust relates to both the law of property and the law of obligations) – or by passing a special statute. With regard to the law of property, it should be borne in mind that the principle of *numerus clausus* does not forbid the admission of a new right *in rem* : it merely requires such rights to be instituted by legislation. It might also be possible to insert into the Civil Code a new right *in rem* – for example, it could be conferred on the creator or beneficiary. But one hesitates to recommend that approach to a reform of such importance, knowing the slowness with which the mills of Swiss legislation tend to grind. This is probably why recent doctrine has tended to focus on the contractual aspect, because the principles of freedom and sanctity of contracts allow more flexible solutions than the *numerus clausus* applying to rights *in rem*, though lacking their opposability to third parties.

As for the regulation of the *fiducie* in ordinary law, the doctrine is firmly in favour of an extensive application of art. 401 CO – even, if necessary, *contra textum legis* – in order to increase the protection accorded to the creator or beneficiary (91). One of the authors of the present article has suggested that the parties might be allowed to depart from certain legal rules governing the *mandat* (arts. 397 and 404 CO) which the courts have hitherto considered imperative. While those statutory provisions allow the creator to revoke the *fiducie* or to impose new instructions on the fiduciary at any time, it should be open for the parties to displace those suppletive rules and enhance the fiduciary's independence from the creator to the extent desirable (92). If the parties were allowed to do so, as the legislator has provided for in the case of investment funds, it would be possible to create discretionary forms of fiduciary management. The success of the Anglo-Saxon trust outside its original homelands points up the need for some such arrangement.

(90) Cf. GIOVANOLI (1991), pp. 45ff.; GIOVANOLI (1994), pp. 189ff.; THÉVENOZ (1995), pp. 313ff.

(91) Cf. Heinrich HONSELL, « Treuhand und Trust in Schuldbetreibung und Konkurs », in *Recht, Zeitschrift für juristische Ausbildung und Praxis*, Bern, 3/1993, pp. 73ff.; WATTER (1995), pp. 222ff.

(92) Cf. THÉVENOZ (1995), pp. 339-45. Similar suggestion in WATTER (1995), n^os^ 77-86.

It would be quite possible for judges to push the general legal rules governing the *fiducie* in the suggested direction. It would mean that both scholars and the courts would have to make a conceptual adjustment to their understanding of the *fiducie* : i.e. they would have to accept that fiduciary property constitutes a separate patrimony (*patrimoine séparé, Sondervermögen*), distinct from the general patrimony of the fiduciary and set aside for the purposes determined by the fiduciary agreement. This separate patrimony, which has long been recognised in accountancy and tax law, ought to be recognised similarly in terms of property rights, matrimony, inheritance and enforced execution of debts. Although it has never been formalised, this conceptual quantum leap is actually at the heart of the three specific statutory regimes which the legislator has created for investment funds, fiduciary operations of banks and fiduciary management of copyrights.

While it is pleasant to acknowledge the creative contribution of the legislator in particular areas, it would be wrong to stop there. To impose a secure and coherent legal regime, and ensure equality of treatment and effective competition, we must now define the conditions, and the means, which will allow the *fiducie*, as a private-law institution, to benefit from the conceptual and practical progress which has already been accomplished in three specific of legislation.

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Abbreviations

ASB	Association suisse des banquiers (Swiss Banker's Association)
ATF	*Recueil officiel des arrêts du Tribunal fédéral suisse* (Official compendium of decisions of the Swiss Federal Tribunal), Lausanne
CC	Swiss Civil Code (*RS* 210)
HC	The Hague Convention on the law applicable to trusts and their recognition of 1 July 1985
CO	Swiss Code of Obligations (*RS* 220)
JdT	*Journal des Tribunaux*, Lausanne (provides the French translation of the Federal Tribunal's decisions officially published in German or Italian)
LB	Loi fédérale sur les banques et les caisses d'épargne (Federal law on banks and savings institutions), 8 November 1934 (*RS* 952.0)
LDA	Loi fédérale sur le droit d'auteur et les droits voisins (Federal law on copyright and associated rights), 9 October 1992 (*RS* 231.1)
LFP	Loi fédérale sur les fonds de placement (Federal law on investment funds), 18 March 1994 (*RS* 951.31)
LP	Loi fédérale sur la poursuite pour dettes et la faillite (Federal law on debt collection and bankruptcy), 11 April 1889 (*RS* 281.1)
RS	*Recueil systématique du droit fédéral*, Berne. The text of the laws which bear this reference may be accessed through the Internet (http://www.admin.ch/ch/f/RS/RS.html).