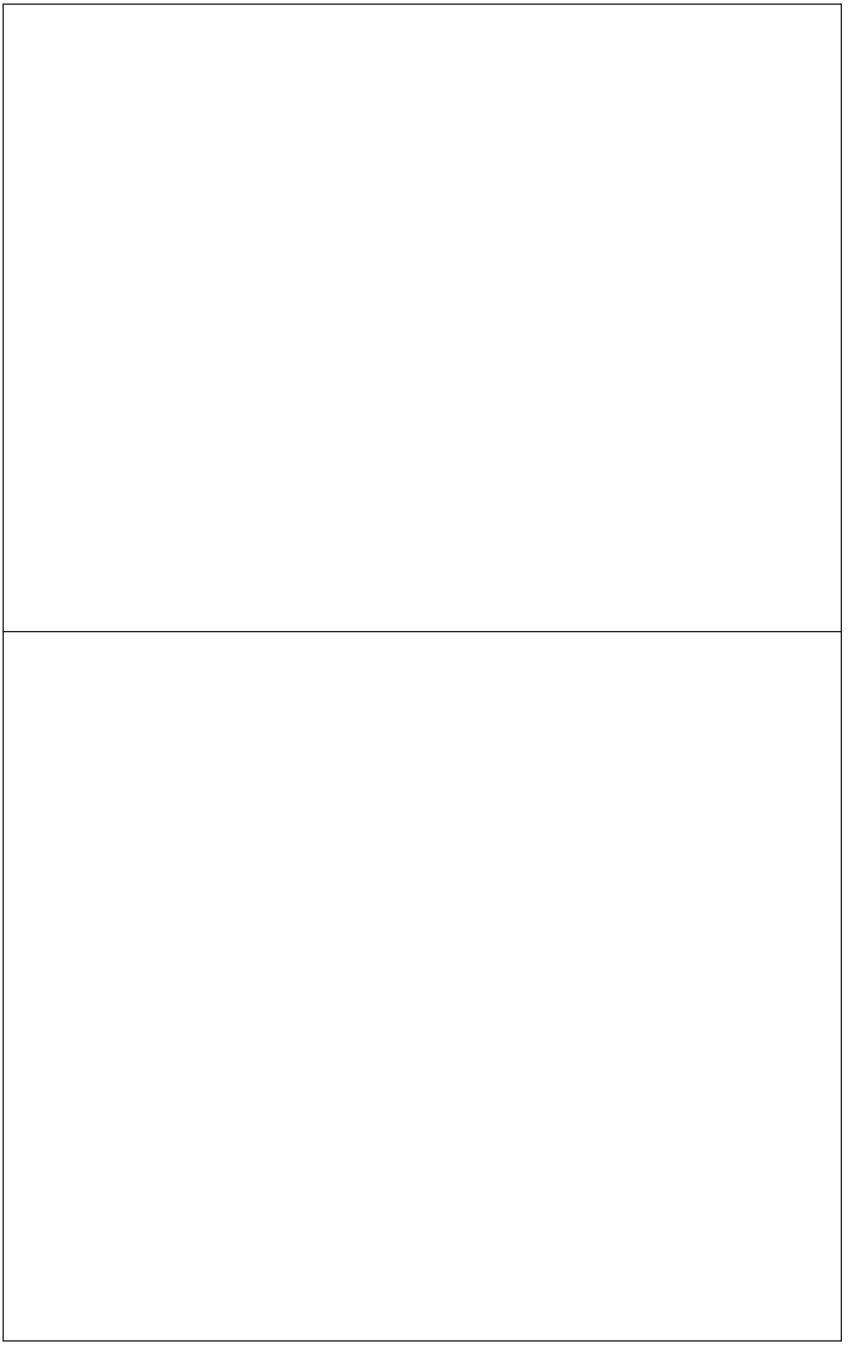
Walter | Medina | Scholz | Wabnitz (eds.)

The Israeli Legal System

An Introduction

Nomos



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Preface

The idea for this book was generated many years ago among the editors and within the German Israeli Lawyer's Association. The initial project was to come up with a brief "Introduction to the Law of Israel", written in German. After several attempts in this direction, we realized that a broader approach was necessary which also implied the, more or less, simultaneous publication of an English and a German version of the book. We are very grateful that it was possible to bring together a group of prominent authors who are all experts in their respective fields and, except for some authors in the international section of the book, insiders in the sense that they live and work in Israel at the most prestigious Law Faculties of the country. The project could not have been realized without their personal commitment and admirable discipline. We are very grateful to all of them.

The realization of the book would also not have been possible without the tireless and extremely competent help of many hands at the Chair for Public International Law and International Law at Ludwig-Maximilians-University Munich (LMU). We want to specifically thank *Stefan Schäferling* for the English native speaker check, which he did on almost all chapters. The editorial assistance of *Ingeborg Neber-Germeier* and *Kathrin Tremml* was invaluable, notably in the final phase of the preparation of the book. We are also very grateful to the Central Council of Jews in Germany for its support of the project. Finally, we want to thank the publishers C.H. Beck, Nomos and Hart for realizing the rather unconventional project of publishing simultaneously an introduction to a foreign legal system, both in English and in German.

Munich, Jerusalem, Dresden and Hof in December 2018,

Christian Walter
Barak Medina
Lothar Scholz
Heinz-Bernd Wabnitz

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§ 7 Law of Trusts

Adam Hofri-Winogradow

The law and use of trust-like forms has been common in Palestine for centuries: the different religious communities which have long vied for control of the area have each developed forms of ecclesiastical and charitable endowment. A principal such form is the Islamic waqf, which may be either private or charitable and was used in Ottoman Palestine by Muslims, Jews and Christians.[1] The present chapter will, however, focus on the use of Western-style private trusts in 20th and 21st century Palestine/Israel and on the current Israeli law governing express private trusts. 1

I. Socio-economic background: Jewish immigration to Palestine and the rise of a wealthy class in Israeli society

The use of western-style private trusts in Israel is a product of the increased Jewish immigration to Palestine during the early 20th Century. Law reports, court files, period newspapers and archival material from the 1930s and 40s show Zionist settlers in Palestine using such trusts frequently, energetically, and effectively for a great variety of purposes. Much, though by no means all, of the use of the common law trust and trust company by Zionist settlers in the Palestine of that time was focused on facilitating Zionist settlement in Palestine: private initiatives and official Zionist organs competed in funneling both Jews and Jewish funds from the Jewish diaspora to the site of the promised "national home".[2] Trusts were used to run the 2

1 See discussion in *Hofri-Winogradow*, Express Trusts in Israel/Palestine: a Pluralist Trusts Regime and its History, in: *Smith* (ed), Re-Imagining the Trust, 2012, 83 (83-92).

2 The British government, in a declaration made on November 2, 1917, and again in the text of the Mandate for Palestine and Transjordan, declared its favorable view "of the establishment in Palestine of a national home for the Jewish people": see *Bentwich*, The Mandates System, 1930, 137 (preamble).

Palestine Orchestra,[3] to register rights to apartments in the Land Registry[4] and for other landholding and land registration purposes.[5] Palestine's first unit trust, the Palestine Investment Association (PIA), was established in 1936 by Ernst Kahn, an immigrant from Germany.[6] Large-scale corporate trusteeship arrived in 1939, with the establishment of the trust subsidiary of the Anglo-Palestine Bank, A.P.B. Trust Company Ltd. The company "was established for the purpose of engaging in every description of trustee business [...] act[ing] as trustees for persons residing abroad who invest their capital here, as trustees for debenture holders, and undertak[ing] executorships under wills, etc. "[7] A few years later the company "reported good progress" in its business of acting "for people living in Great Britain, the Empire and America, who entrust it with management of their Palestine investments and business", as well as acting "for debtors" and "administer[ing] the trusteeship in the name of groups of banks which participate in joint loans."[8] Other trust companies were soon established.[9] A bespoke trust company, the Trust and Transfer Office "Ha'avara", was established in Tel-Aviv to administer the agreement reached in 1933 between Jewish businessmen, German-Jewish banks, representatives of the German Zionist movement and the German Wirtschaftsministerium to facilitate the immigration of German Jews and the transfer of their funds to Palestine despite the then German exchange controls.[10]

3 The uses made of trusts changed once the State of Israel was established in 1948. A key incentive for change was the heavy tax burden the young state, much like other post-world-war-II states, imposed on its residents. Given the then ambiguity regarding the positive status of express private trusts, described immediately below, many Israelis preferred, and still prefer, establishing trusts with foreign rather than Israeli trustees, governed by foreign law and with the trust assets deposited abroad. The trust regimes of offshore jurisdictions such as Jersey, Gibraltar and Panama, as

3 *Teplitz*, The Story of the Philharmonic Orchestra, 1992, 15-16; Palestine Post, "Reply to Musicians' Complaints," June 28, 1946, 3.

4 See the facts of CA 16-4/45 *Bracha Ben-Ya'acov & ors. v. Joseph Forer*, 2 Annotated Law Reports 628 (1945); *Ben-Shemesh*, On the Abolition of the Separate Registration of Buildings and Plants, 26 HaPraklit 1970, 403.

5 See the facts of CA 87/*50 Liebman v. Lifshitz*, 6 PD 57 (1952).

6 *Michaelis*, A Hundred Years of Banking and Money in Eretz-Yisrael, 91 Riv'on Le'Banka'ut 1984, 87; *Gelber,* New Homeland: Immigration and Absorption of Central European Jews, 1933-1948, 1990, 419-23.

7 Palestine Post, "A.P.B. Trust Company Established: £P.50,000 Fully Paid Share Capital," August 13, 1939, 7.

8 Palestine Post, "Local Deposits for Financing War: Anglo-Palestine Bank's 1943 Report," May 11, 1944, 2.

9 The Eretz Yisrael Discount Bank, a prominent privately owned bank, established its trust subsidiary in 1944: *Gross/Halevi/Kleiman/Sarnat* (eds.), Banker to an Emerging Nation: the History of Bank Leumi Le-Israel, 1977, 269.

10 For the history of the "Ha'avara" transfer operation, see *Feilchenfeld*, Five Years of Jewish Immigration from Germany and the Haavara-transfer, 1938; *Feilchenfeld/Michaelis*, Haavara-transfer nach Palästina und Einwanderung Deutscher Juden 1933-1939, 1972; *Pinner*, Vermogenstransfer nach Palästina, 1933-1939, in: *Tramer* (ed), In Zwei Welten: Siegfried Moses Zum Fünfundsiebzigsten Geburtstag, 1962, 133; *Gelber* 1990 (n 6), 26-35, 154-175; *Bondi*, Pinchas Rosen and his Time, 1990, 120, 247, 290;. *Rosenzweig*, The Economic Consequences of Zionism, 1989, 81-89; *Strauss*, Jewish Emigration from Germany, Nazi Policies and Jewish Responses (II), 26 Leo Baeck Institute Yearbook 1981, 343; *Gross et. al.* 1977 (n 9), 176-78. See further *Hofri-Winogradow*, The Legal Structure of the Ha'avara (Transfer) Agreement: Design and Operation, in: *Kreutzmueller* (ed.) National Economies (Volkswirtschaft): Racism and Economy in Europe Between the Wars (1918-1939), 2015, 97.

well as trusteeship services offered by professionals residing there, have proven enduringly popular with Israel's trust clientele.[11] Israelis now create trusts for the same purposes as trust users of other nations: succession planning, incapacity planning, tax planning, securing funds against creditors, holding funds or collateral for the duration of a project, transaction or loan, individual and collective investment, including by mutual (unit) and pension funds, managing company liquidation, charitable purposes and more. Israelis' use of trusts has been increasing as a result of the emergence and growth of a wealthy class in Israeli society: according to Credit Suisse, the Israeli population has in 2015 included more than 88,000 millionaires and 17 billionaires (both figures in dollar terms).[12]

II. Legal background: Trusts practice absent a positive law of private trusts

While western-style express private trusts have been used in Palestine/Israel since the 1930s, they were until 1979 used in a positive legal vacuum. Islamic waqfs were part of the positive law applicable in Palestine since the many centuries of Muslim rule. The British, who conquered Palestine in 1917/18 and governed it until 1948, transformed the Palestinian law of charitable trusts in two ways. First, they empowered the religious courts of the non-Muslim communities in Palestine to supervise the creation and administration of such trusts by community members according to the religious law of each community.[13] The religious courts of the Muslim community and of all twelve other legally recognized religious communities, including Jews, the Druze, Bahai's and nine varieties of Christians (but not including any Protestant or other post-Reformation churches) still enjoy this power today, as the British Mandate-era legislation in which it was granted is still in force in Israel. 4

Second, the British created a civil law of charitable trusts in Palestine by enacting a Charitable Trusts Ordinance.[14] Besides charity, the courts of British-controlled Palestine received and incorporated into its law the English device of the constructive trust, a remedy rather than an intentionally-created trust; the constructive trust has remained part of the law of Israel.[15] The British balked, however, at receiving the express private trust into the law of Palestine. When Mordechai Eliash, a lead- 5

11 *Hofri-Winogradow*, Trust Law in Israel: from Stumbling Blocks to Charms?, 45(2) Mishpatim 2015, 439, 463, fn 110.

12 Credit Suisse Research Institute, Global Wealth Databook 2015, available http://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=C26E3824-E868-56E0-CCA04D4BB9B9ADD5, 106, 112.

13 King's Order in Council on Palestine, 1922, Section 52 (Muslim Courts), Section 53(3) (Rabbinical Courts), Section 54(3) (Ecclesiastical Courts).

14 An Ordinance to Regulate Charitable Trusts Established Otherwise than in Conformity with Religious Law, no. 26 of 1924, in *Bentwich* (comp.), Legislation of Palestine, 1918-1925, 8 Journal of Comparative Legislation and International Law, 1926, 120.

15 See, e.g., CA 197/41 *Ahmad Mahmud Mustafa Nijm et al. v. Husni Jabr 'Ali Nijm et al.*, 2 Supreme Court Judgments 458, 463 (1941). For post-independence decisions see CA 87/50 *Liebman v. Lifshitz*, 6 PD 57, 98-99 (1952); CA 307/64 *Loan Company (in liquidation) v. Kadar, Ltd* 18(4) PD 483, 491 (1964); CA 283/67 *Trs. in Bankr. of Rafikh & Borkin's Assets v. State of Israel*, 22(1) PD 124, 133, 139-40 (1968); CA 400/67 *Howard v. Melamed*, 22 PD 100 (1968); CA 367/70 *Hochberg v. Shalgi*, 25(2) PD 149, 153-54, 160, 161-62 (1971); CA 448/79 *Bronstein v Bronstein*, 34(4) PD 714 (1980); CA 369/84 *Michael Beril v. Ran Bar Lev*, (Nevo e-database, decided June 1988). All decisions cited to the Nevo database have not been published in the PD series, which is now published only intermittently. They are all available at the aforementioned website.).

ing lawyer, asked the High Court of Justice to direct the Registrar of Land to register a transfer of land to trustees on a conventional family trust, the Court refused. Chief Justice McDonnell noted that while various Mandate-era Ordinances undeniably included references to the trust in contexts indicating that private, not charitable, trusts were meant,

> there is a presumption that the legislator does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or [...] beyond the immediate scope and object of the statute. [...] I do not think one can seriously hold, knowing the nature of the Legislation with which we are dealing, that the Legislature intended by a mere side-wind to introduce a new principle of law, such as the doctrine of private trusts, into Palestine.[16]

6 While the courts of 1940s Palestine repeatedly cited *Eliash* for the proposition that the English express private trust has not been received into the law of Palestine,[17] practitioners carried on using express private trusts for all the many purposes detailed above. Until the Israeli Trust Act came into force in 1980,[18] express private trusts were used in Palestine/Israel absent a foundation in positive law.

7 The protracted absence of express private trusts from Israeli positive law resulted in the appearance of ideas the Anglo-American legal tradition associates with trusts in other parts of Israel law. The Israeli Agency Act, which came into force as early as 1965, provides that agents owe a fiduciary duty to their principals, using the term "trust" (ne'emanut) to mean fiduciary duty.[19] The Act then lists several specific duties fiduciaries owe, saying that agents owe these duties as a matter of default law. The duties listed are to give the principal any and all information and documents pertinent to the agency,[20] account to the principal,[21] not serve as agent for multiple parties to the same matter absent the principals' consent,[22] not transact, as agent, vis-à-vis him or herself,[23] not receive benefits, actual or promised, in connection with the agency from any third parties absent the principal's consent,[24] not use information and documents received as a result of the agency against the principal,[25] and generally refrain from any conflicts between the principal's interests and those of the agent or a third party.[26] The Act also provides that agents hold all

16 HCJ 77/31 *Eliash v. The Director of Land*, 1 Palestine Law Reports 1932, 735. See full discussion in *Hofri-Winogradow*, Zionist Settlers and the English Private Trust in Mandate Palestine, 30(3) Law and History Review 2012, 813, 818-839.

17 See CC 125/43 *Malatzky v. Bawly*, Selected Cases of the District Courts (SCDC) 265 (1945); LC 20/45 *Albert Missri v. Itzhaq Raphael Eliashar*, SCDC 180, 182 (1946); and CA 16-24/45 *Bracha Ben-Ya'acov & ors. v. Joseph Forer*, 2 ALR 628 (1945); Estate Case 472/46 (Tel-Aviv) In Re Estate of Ya'acov Blum (unreported).

18 Trust Act 5739-1979, 941 Statutes, Aug. 3, 1979, 128 (hereinafter: 1979 Act). For the Act's entry into force, see ibid., section 46. An unofficial English translation of the Act, as promulgated in 1979, was published in 15 Isr. L. Rev. 1980, 418 ff.

19 Agency Act 5765-1965, 462 Statutes, July 23, 1965, 220, section 8.

20 Ibid., section 8(1).

21 Ibid.

22 Ibid., section 8(2).

23 Ibid., section 8(3).

24 Ibid., section 8(4).

25 Ibid., section 8(5).

26 Ibid.

assets they receive as a result of their agency on trust for the principal.[27] Such references to the trust, in a legal system then still lacking a positive law of express private trusts, lead to confusion: in his treatise on Israeli agency law, Aharon Barak noted that the last-mentioned section of the Agency Act renders agents constructive trustees, adding vaguely that the same section should not be construed as referring to "technical English trusteeship".[28] Another instance of trust-related ideas appearing, in the absence of a positive law of express private trusts, in other parts of Israeli law is the Supreme Court of Israel's well-known holding that breaching contractual parties can be made to disgorge the gains produced from the breach.[29] Under Anglo-American law, it is a fundamental distinction between contractual and fiduciary relationships that gains disgorgement is available against breaching trustees, as well as other breaching fiduciaries, but not against breaching contractual parties.[30]

8 The Israeli Trust Act of 1979 was preceded by statutory schemes governing specific contexts of trust use. Following the 1924 scheme governing charitable trusts, in 1961 the Knesset enacted a scheme governing unit (collective investment) trusts.[31] Early 1962 saw the beginning of the drafting effort which was to lead to the Act of 1979.[32]

9 Decades of trust practice absent a positive law of express private trusts made for a vague, unspecific understanding of the trust as a legal institution among the Israeli legal profession. The transformation of Israeli private law in a civilian direction during the 1960s and 1970s[33] also made the formulation of a statutory regime governing all trusts problematic, given the dominance of the Anglo-American paradigm in the trusts field. The 1979 Act reflects these challenges, as well as its embattled 17-year drafting history.[34] Here follows a description of its key features.

27 Ibid., section 10.

28 *Barak*, The Agency Act, 5725-1965, 1975, 423-24; and see much the same in the second edition of 1996: *Barak*, The Agency Act, 5725-1965, 2d ed. 1996, 1121-24.

29 Further Hearing 20/82 *Adras Bldg. Material v. Harlow & Jones*, 42(1) PD 221 (1988), translated in 3 Restitution Law Review 1995, 235. Note, however, Zamir's finding that Israeli courts almost never order disgorgement in non-fiduciary contractual cases: *Zamir*, Loss Aversion and the Marginality of the Disgorgement Interest, in: *Grunis*/*Rivlin/Karayanni* (eds), Shlomo Levin Book: Essays in Honour of Justice Shlomo Levin, 2013, 323 (in Hebrew).

30 See, e.g. *Markovits*, Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations, in: *Gold*/*Miller* (eds), Philosophical Foundations of Fiduciary Law, 2014, 209. And see my criticism of Markovits in: *Hofri-Winogradow*, Contract, Trust and Corporation: from Contrast to Convergence, 102 Iowa Law Review 2017, 1691.

31 Common Investment Trust Funds Act 5721-1961, 336 Statutes, Apr. 5, 1961, 84, since replaced by the Joint Investment Trust Law 5754-1994, 1480 Statutes, Aug. 23, 1994, 308.

32 See letter of January 29, 1962 by the then Minister of Justice, Dov Yosef, to Haim Cohn, Justice of the Israeli Supreme Court, appointing Cohn Chair of a Committee for Revising the Law Governing Endowments and Trusts: Israel State Archives, file GL-21329/1.

33 Manifest, for example, in the Contracts (General Part) Act 1973-5733, 694 Statutes, April 11, 1973, 118.

34 See discussion of this process in *Hofri* 2015 (n 11), 446-450, 499-501.

III. The Trust Act of 1979: Key features

1. A free-form (shapeless?) approach to trusts

10 The Israeli Trust regime under the Act of 1979 is a key example of the modern trend separating trusts from equity:[35] though equity is certainly present in the Israeli legal system,[36] equity and equitable rights are nowhere mentioned in the Act. The Act is silent regarding the nature of beneficiaries' rights under trusts. Nor does it provide a precise definition of the rights trustees acquire in the trust assets, resting content with a definition of the term "trust" as "a relationship to property by which a trustee is bound to hold the same or act in respect thereof, in the interest of a beneficiary or for some other purpose."[37] The Act does not require that in order for a trust to be constituted, title or ownership in the trust assets, or even control over those assets, be transferred to the trustee.[38] In omitting the requirement that trustees hold title or ownership in the trust assets, the Israeli Trust Act differs from the Anglo-American trusts tradition.[39] As a result, executors, administrators, guardians, bankers, trustees in bankruptcy, lawyers holding or using client funds and company liquidators are all trustees under the Israeli regime,[40] while the Anglo-American trusts tradition maintains a distinction between trusteeship and these other offices.[41] The Israeli trust regime was the world's first statutory trust regime not to require that trustees hold title or ownership in the trust assets. It has now been joined by seven other trust regimes that do not pose that requirement: the Chinese,[42] the Russian,[43] the Ukrainian[44] the Quebecois,[45] the Uruguayan,[46] the Czech,[47] the Lithuanian[48] and the South African.[49]

35 For this trend see *Gretton*, Trusts without Equity, 49 Int'l & Comp. L.Q. 2000, 599.
36 See, e.g., CA 189/95 *Bank Otzar Ha'hayal v. Aharonov*, 53(4) PD 199, 245-247 (1999).
37 1979 Act, section. 1.
38 This point used to be in contention: see *Weisman*, Shortcomings in the Trust Law, 15 Isr. L. Rev. 1979, 372, 372-73; *Kerem*, Trusts, 4th ed. 2004, 37-41, 100-103. It was decided by a string of Supreme Court decisions, including CA 2976/12 *Bar El v. Kaufman*, 10 (Nevo e-database, 23.11.2014); CA 5955/09 *Ya'acov Amster, Receiver, v. Marsha Tauber Tov*, 6 (Nevo e-database, 19.7.2011); CA 6406/03 *Endowment Trustees of the Sephardi Cmty. in the Holy City of Sephad & Meiron v. Kamus*, 6 (Nevo e-database, 16.6.2005); CA 1631/02 *Gorban et al. v. Tshuva Yitzchak Assoc. for Solving the Housing Shortage*, 9 (Nevo e-database, 31.7.2003).
39 See, e.g., in England: *Knight v. Knight*, (1840) 3 Beav 148, 173 (Eng.); *Milroy v. Lord*, (1862) 4 De GF&J 264, 274. In the U.S.: Restatement (Third) Of Trusts § 10(a-b) (2003); Unif. Trust Code § 401(1) (amended 2010).
40 *Kerem*, Trusts, 142-143.
41 See, e.g., Restatement (Third) Of Trusts § 5: "The following are not trusts: […] (b) decedents' estates; (c) guardianships and conservatorships; (d) receiverships and bankruptcy trusteeships; [...]".
42 Zhōngguó rénmín gònghéguó de xìntuō fǎ (中國人民共和國的信託法) [Trust Law of the People's Republic of China], (promulgated by Order No. 50, Apr. 28, 2001, effective Oct. 1, 2001) § 2 (China), translated in http://www.npc.gov.cn/englishnpc/Law/2007-12/10/content_.1383444.htm.
43 Grazhdanskii Kodeks Rossiiskoi Federatsii [Gk Rf] [Civil Code] art. 1012 (Russ.), translated in William E. Butler (ed. & trans.), Russian Civil Legislation (The Hague: Kluwer Law International, 1999) 484.
44 Civil Code of Ukraine, No. 435-IV of January 16, 2003, § 1032(1).
45 Civil Code of Québec, S.Q. 1991, c. 64, art. 1261 (Quebec).
46 Ley de Fideicomiso, No. 17.703, Octobre 27, 2003, 26.375 Diario Oficial [D.O.] 223-A (Uru.).
47 Občanský Zákoník 89/2012 Sb., §§ 1448-1474 (Czech).
48 Lietuvos Respublikos civilinis kodeksas, sections 4.106-110 (2000) (Lithuania).
49 Trust Property Control Act, 57 of 1988, § 1 sub voc. "trust" (S. Afr.).

Thus while trust settlors can under the 1979 Act transfer title in the trust assets to their trustees, they can also choose to keep the assets themselves, as in some types of German *treuhand* arrangements,[50] or transfer them directly to beneficiaries, as under the Dutch and South African *bewind*.[51] In the two latter cases, trustees have, despite not being owners of the trust assets, the powers necessary to fulfill their role. 11

A less successful feature of the 1979 Act is its containing two distinct trust regimes. One regime, contained in Chapter Two of the Act, applies only to "trusts created by an instrument of endowment," which, where not created by will or by beneficiary designation under an insurance policy, provident fund or pension plan, must be created by the settlor signing a trust instrument before a notary.[52] This use of notaries in the trust context is one of the most explicit civilianisms in the 1979 Act; it is common, for example, in current Italian "trust interno" practice.[53] 12

The other trust regime in the 1979 Act, contained in its Chapter One, mostly consists of provisions regarding trustees' duties and powers. These provisions apply to any fiduciary relationship involving property which the fiduciary must hold, use, or "act in respect of", however created, including trusts created by an instrument of endowment.[54] Unfortunately, many key provisions of the Act, necessary for the successful operation of any trust regime, appear in Chapter Two and thus do not, prima facie, apply to trusts not "created by an instrument of endowment", such as trusts created by contract, which section 2 expressly declares to be permissible and which are widespread in practice. These key provisions include, e.g., provisions governing the appointment of trustees,[55] their resignation and removal,[56] the modification and termination of trusts[57] and their revocability,[58] as well as provisions empowering the court to issue directions to the trustee[59] and allowing the settlor or another to add to the trust property.[60] 13

2. Unlimited trust duration

Because the 1979 Act is silent on the question of trust duration, Israeli law does not limit the duration of trusts created inter vivos. There is no rule against perpetuities in Israeli law, and perpetual trusts are allowed so long as created inter vivos. That this conclusion is not completely straightforward is due to two provisions of the Israeli Succession Act. One provides that gifts which are only to fall into the recipi- 14

50 For the German Unechte Treuhand see *Krimphove*, National Report for Germany, in: *Kortmann et al.* (eds.), Towards an EU Directive on Protected Funds, 2009, 115 (116-117).
51 For the Dutch bewind see *Kortmann/Verhagen*, National Report for the Netherlands, in: *Hayton et al* (eds.), Principles Of European Trust Law, 1999, 195 (199-200). For the South-African bewind see *Cameron/De Waal*, Honoré's South African Law of Trusts, 2002, 272-277.
52 Chapter Two contains sections 17-24. Trusts created by an instrument of endowment are defined in section 17(a).
53 For Italian trust practice, which is widespread despite Italy's not having a domestic trust regime, see *Braun*, Italy: the Trust Interno, in: *Hayton* (ed.), The International Trust, 3rd ed. 2011, 787.
54 Chapter One contains sections 1-16.
55 1979 Act, section 21.
56 Ibid., section 22.
57 Ibid., section 23.
58 Ibid., section 18(b).
59 Ibid., section 19.
60 Ibid., section 18(a).

ent's possession after the donor's death must be made by will.[61] The other provides that only persons alive on the intestate or testator's death or born within 300 days of his or her death are capable of receiving an inheritance.[62] An exception makes possible successive bequests to two takers, the second of whom needs only to be alive at the first taker's death, not at that of the testator.[63] These provisions do impose a durational limit on testamentary trusts under Israeli law. At first, they seem to imply some limits on the duration of inter vivos trusts as well, until one realizes that given a traditionally designed trust where the settlor transfers the trust assets to the trustee, the recipient of those assets for Succession Act purposes is the trustee, not the beneficiaries. Given this solution, there is no durational limit on inter vivos trusts under Israeli law.[64]

3. Self-settled spendthrift trusts as a default

15 A curious feature of the Israeli trust regime is that it offers extraordinarily strong "asset protection": perhaps the strongest creditor protection available anywhere. Section 20 of the 1979 Act provides that beneficiaries' rights under a trust created by an instrument of endowment may not be transferred, charged or attached. A court may transfer, charge or attach a beneficiary's entitlement under such a trust, absent an express exclusion of this statutory default spendthrift clause, only in order to satisfy maintenance, child support or taxes due from that beneficiary, or, "under special circumstances," in order to collect other debts due from him or her. Compare the U.S. Uniform Trust Code, which, while providing that spendthrift clauses are valid and enforceable – so long as they restrain both voluntary and involuntary alienation of a beneficiary's entitlement – does not include a default statutory spendthrift clause,[65] and, in listing exception creditors who may pierce an otherwise valid and enforceable spendthrift trust, omits the Israeli Act's vague "special circumstances" exception, but includes, along with spouses and children with support or maintenance orders and the U.S. and State governments, "a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust".[66] As the 1979 Act's default statutory spendthrift clause does not apply to contractually-created trusts, the rights of beneficiaries under such trusts may be transferred, charged and attached, unless the contract provides otherwise.

4. Protection of beneficiaries' entitlements from trustees' non-trust creditors

16 The Act of 1979 is, on its face, unclear regarding the extent to which beneficiaries' entitlements under trusts are protected from trustees' personal, non-trust creditors. If the latter can collect debts persons and entities serving as trustees owe them out of the trust property, beneficiaries' rights are precarious, and trusts may be little used. Under section 3(b), trust assets are only available for the satisfaction of

61 Succession Act, 5725-1965, 446 Statutes, 10 Feb. 1965, 65, section 8(b).
62 Ibid., section 3(a-b).
63 Ibid., section 42(c).
64 Supreme Court precedents acknowledge the inexistence of such a limit: CA 9, 181/74 *Insel v. Kugelmas*, 29(1) PD 663 (1974); CA 4660/94 *Attorney General v. Lishitzky*, 55(1) PD 88, 120 (2000).
65 Unif. Trust Code § 502.
66 Ibid., § 503.

"debts imposed thereon, or resulting from trust operations". This provision is itself unclear, since trust assets may, prima facie, be charged with, or attached to satisfy, debts persons and entities serving as trustees owe outside the trust context, thus "imposing" those debts on the trust property. Other sections deepen the confusion. Section 4 provides that where the trust assets include registrable rights, trustees may – but do not have to – register a caveat concerning the existence of the trust. Section 5 then provides that where such a caveat has been registered, "a trust is enforceable against everybody"; presumably this means that given a caveat, beneficiaries' entitlements will be ring-fenced against trustees' non-trust creditors. The section also provides, however, that where a caveat has not been registered, "a trust is enforceable against those who knew or should have known about it". This last provision leaves the resolution of contests between beneficiaries and trustees' non-trust creditors dependent on individual judges' ideas as to whether a given creditor should or should not have known of the existence of a trust even absent a registered caveat.

17 Such an unclear statutory text leaves space for judicial wavering. The Supreme Court has in the past construed section 5 to mean that absent a registered caveat, trustees' non-trust creditors who did not know and should not have known of the existence of a trust may overreach beneficiaries' entitlements under that trust.[67] In 2011, however, the Court reversed its position, holding in *Amster, Receiver v. Tauber Tov* that beneficiaries' entitlements are protected even against a non-trust creditor of the trustee who did not know, and should not have known, of the existence of the trust, and even though the trustee, who could have registered a caveat, chose not to do so and is currently in bankruptcy.[68] The result in *Amster* is about as reasonable a reading of the Act's confusing provisions as the Court's earlier, contrary, position: while the Court's older decisions were based on section 5, the *Amster* court focused on section 3(b) as the key statutory provision applicable to contests between trust beneficiaries and trustees' non-trust creditors. The current position is, of course, a significant comfort to beneficiaries of trusts governed by Israeli law, and may encourage use of the local trust regime.

IV. Proposed reforms in the draft civil code

18 As is well-known, Israel has long been in the throes of a recodification effort. The Draft Civil Code of Israel, in the works since the late 1970s, has in June 2011 passed the first of three obligatory readings in the Knesset.[69] The bill, since stalled, includes an overhaul of the 1979 Act, pruning it of its unconventional aspects and bringing it much closer to the Anglo-American trust tradition.[70] Under the bill, settling a trust under Israeli law will entail transferring title or ownership in the trust assets to the trustee.[71] Trust duration will be capped at 100 years from the trust's creation or, given a testamentary trust, from the settlor's death.[72] The two trust regimes in the current Act will be unified. Beneficiaries' entitlements will no

67 CA 654/82 *Mediterranean Car Agency v. Hayut*, 39(3) PD 803, 808-809 (1985); CA 371/89 *Ford v. Hayim Shechter Construction and Investment Corp. (in Liquidation)*, 46(1) PD 149 (1992).
68 CA 5955/09 *Ya'acov Amster, Receiver, v. Marsha Tauber Tov* 7-13 (Nevo e-database, 19.7.2011).
69 Civil Law Act, 5771-2011, 595 Bills, 15 June, 2011, 699.
70 Ibid., sections 563-593.
71 Ibid., section 563.
72 Ibid., section 588(b).

longer be immune from their creditors.[73] The draft Code also contains a more general provision which, when applied to the trust context, appears to mean that beneficiaries' entitlements under trusts are to be protected from persons who attach the trust assets, including trustees' non-trust creditors.[74] It is at present unclear whether the draft Code will ever be finally enacted, and if so, when. The text may also be changed before final enactment.

V. Evaluation

19 The current Israeli trust regime, as presented above, includes several unconventional features. The trust concept is defined so broadly as to bring many situations and offices within this concept which are not seen as trusts in other legal systems. The extent to which beneficiaries' entitlements under trust are protected from trustees' non-trust creditors, as well as the extent to which purchasers of trust assets may overreach beneficiaries' entitlements despite the sale having been a breach of trust, are unclear on the face of the statutory text. Much of the statutory detail may not apply to trusts created by contract which was not made before a notary.

20 On reflection, I believe that most of the changes proposed in the draft Civil Code are desirable. Trust duration should be capped, though given the current worldwide trend of allowing longer and longer-lasting trusts it may be that 150 years are a better limit than the 100 years proposed in the current bill. The 1979 Act's disapplication of much of the necessary detail to trusts created by contract other than before a notary should clearly be abolished. It is also probable that section 20 of the current Act and the *Amster* decision provide too much protection for beneficiaries' entitlements. Where the trust assets include registrable rights, registering a caveat disclosing the trust's existence should be mandatory, thus resolving much of the current problem regarding trustees' non-trust creditors. On the other hand, it may be that the current Act's broad definition of the trust concept should be retained: given that the Act contains, in section 13, the clearest, most forceful statement in the Israeli statute book of fiduciaries' fundamental duties of no conflict and no profit, the application of trust law to other kinds of fiduciaries, such as corporate directors and officers, executors, administrators, guardians, bankers and lawyers holding or using client funds, along with the more specific statutory regimes to which such office-holders are subject, may be beneficial. A further reason for retaining the broad definition of the trust is that most of the trust's potential for tax and creditor avoidance and evasion is dependent on settlors transferring the trust assets to their trustees. The availability of ways of creating trusts which do not involve such a transfer may therefore make possible a reduction in the use of trusts for such unsavory ends, especially if settlors are incentivized to use such alternative trust forms.

73 Ibid., section 582.
74 Ibid., section 512(a).

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