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Can the Civil Law Do Better?

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Comparative law roundtable

Switzerland

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Fiducie, fiducia, Treuhand

- Beginning 1848, Switzerland morphs into a federal State
- Cantonal laws and cases reflect a variety of influences
- Roman *fiducia* received through German Pandects
- Fiducie challenged by creation of –
 - Supreme Court in 1874
 - Code of obligations in 1881
 - Civil Code in 1907





Early recognition by the Supreme Court

- sale of inventory or equipment for security purpose (debtor in possession)
 - later prohibited by Art. 884 (2) Civil Code, requiring transfer of possession for pledge of movable property
- 1905: assignment of claim for collection purpose



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Legal analysis

- Fiducie's foundations are purely contractual
 - cum amico = *fiducie-gestion*: mandate, Art. 394 ss Code of obligations
 - cum creditore – *fiducie-sûreté*: sui generis security contract
- Principal transfers full ownership to fiduciary (*Vollrechtstheorie*)
 - fiduciary is a fully empowered legal owner, subject to contractual obligations to its principal
 - Supreme Court rejects distinction between legal and beneficial ownership
- Principal's creditors cannot reach fiduciary assets
 - but principal's contractual claim for their return



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Fiducie-sûreté (for security purposes)

- Rock-solid foundations: ownership is best security
- Limited in scope by prohibition of debtor's retaining possession
 - Art. 717 & 884 (3) Civil Code
- Market standard for a handful of transactions
 - mortgage certificates
 - assignment of receivables



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Fiducie-gestion (for management purposes)

- Rocky start – 50 years of controversy whether fiducie = sham (*simulation*) whenever the fiduciary is acting as legal owner, but not for its own benefit
 - “did the principal really intend to transfer ownership?”
- Practice forged ahead despite legal controversy
- Fiducie-gestion covers a full range from standardised to one-off transactions
- Two weaknesses limit its expansion
 - no general ring fencing against creditors, heirs, spouse
 - no real independence of the fiduciary since principal can give binding instructions and terminate at any time (Art. 397, 404 CO)



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Statutory recognition of fiducie

- 1966 Act on Investment Funds
 - a fiduciary contract
 - enhanced by ring fencing in the bankruptcy of the manager
- 1995 revision to the 1934 Banking Act
 - provides insolvency protection of fiduciary assets in the bankruptcy of banks and securities dealers



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Summing up

- A fully mature institution of Swiss law
- Massively used for discrete transaction types
- Scope and development limited by
 - mandatory provisions in the law of mandate
 - lack of general recognition that assets form a ring-fenced fund
- Why never used as *fiducie-libéralité* ?



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Fiducie-libéralité ?

Why is fiducie never used for gratuitous dispositions to third parties?

- Art. 112 CO fully allows contracts for third party beneficiaries
- Acceptance by beneficiaries bars donor from revoking the donation
- Term and conditions precedent may be stipulated
- Doubtful validity if fiduciary can exercise discretion in distributions
- Assets do not form a protected fund

