

The Hebrew University of Jerusalem

Syllabus

Trusts - 62582

Last update 13-09-2015

HU Credits: 4

Degree/Cycle: 1st degree (Bachelor)

Responsible Department: law

Academic year: 0

Semester: 1st Semester

Teaching Languages: English

Campus: Mt. Scopus

Course/Module Coordinator: Adam Hofri-Winogradow

Coordinator Email: adam.hofri@mail.huji.ac.il

Coordinator Office Hours: By email appointment

Teaching Staff:

Course/Module description:

Useful for any student preparing for a career in the lucrative private client sector, this seminar provides an in-depth survey of trusts law and practice, including cutting-edge trust models and drafting techniques using a large variety of domestic and international trust regimes. Students will acquire an understanding of the different types and contexts of trust practice, including the use of trusts to plan succession to a settlor's assets, to minimize the tax burden borne by an individual, family or estate, to shield assets from a settlor's creditors, to securitize debt, to structure complex transactions, to invest pooled funds, to pass control of a family business between generations and more. We will discuss the recent radical changes in trust law, from the reception of the trust in civil law and mixed legal systems through the weakening of beneficiaries' rights to receive information about the trust and enforce the trust, the exclusion of trustees' traditional duties and liabilities, and the development of new trust actors such as protectors and non-beneficiary enforcers. The course includes analysis of trust deeds using the trust regimes of the U.S., England and offshore jurisdictions.

Course/Module aims:

Participants will become acquainted with the different trust regimes in existence in different jurisdictions; will understand the extant competition between jurisdictions over non-resident clients and their assets, and how innovative trust regimes are used to draw such clients to particular jurisdictions; will familiarize themselves with the various contexts of trust practice; will understand the juristic challenges involved in incorporating the trust in legal systems which did not traditionally recognize it, and the strategies different jurisdictions worldwide have adopted and are adopting to cope with these challenges; will learn common trust drafting techniques; will familiarize themselves with the fundamentals of US federal trusts taxation; and will understand the international socio-economic ramifications of the use of trust regimes to escape obligations under other law.

Learning outcomes - On successful completion of this module, students should be able to:

1. understand the different trust regimes found in different jurisdictions, including U.S. jurisdictions, England, civil law jurisdictions, mixed legal systems and offshore jurisdictions
2. understand of the different types and contexts of trust practice
3. understand recent innovations in trust technique, from protectors, to non-beneficiary enforcers, to STAR and VISTA trusts, to the use of trust regimes by non-residents
4. understand U.S., U.K. and offshore trust documents, their structure and drafting techniques

5. understand basic principles of US trusts taxation

Attendance requirements(%):

5

Teaching arrangement and method of instruction: 12-13 lecture meetings, including discussion and trust deed analysis, followed by 1-2 meetings dedicated to student presentations.

Course/Module Content:

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Required Reading:

Trusts: Law and Practice
Adam Hofri-Winogradow
Fall 2015

Course Description:

Useful for any student preparing for a career in the lucrative private client sector, this course provides an in-depth survey of trusts law and practice, including cutting-edge trust models and drafting techniques using a large variety of domestic and international trust regimes. Students will acquire an understanding of the different types and contexts of trust practice, including the use of trusts to plan succession to a settlor's assets, to minimize the tax burden borne by an individual, family or estate, to shield assets from a settlor's creditors, to securitize debt, to structure complex transactions, to invest pooled funds, to pass control of a family business between generations and more. We will discuss the recent radical changes in trust law, from the reception of the trust in civil law and mixed legal systems through the

weakening of beneficiaries' rights to receive information about the trust and enforce the trust, the exclusion of trustees' traditional duties and liabilities, and the development of new trust actors such as protectors and non-beneficiary enforcers. The course includes analysis of trust deeds using the trust regimes of the U.S., England and offshore jurisdictions.

Prerequisites:

To take this course, students must have completed courses in contracts, torts, property, a basic course in taxation ("baby tax") and corporations. The course can be undertaken simultaneously with a basic course in decedents' estates, with a course in estate and gift taxation, with an estate planning seminar, and/or with a course in corporate taxation.

Grade Composition:

In-class participation: 5%

In-class presentation: 15%

Seminar paper: 80%.

[ובעברית: הרכב הציון: 5% השתתפות, 15% הרצאה בכיתה (רפראט), 80% עבודה סמינריונית.]

Textbooks and Treatises used in this Class

There is no one "text" we are going to read through. The readings are diverse. Still, the following books are fundamental (as recommended, rather than required, readings):

1. Graham Moffat, *Trusts Law: Text and Materials* (Cambridge University Press, 5th edn, 2009) [the best of the English student-oriented trusts textbooks; hereinafter "Moffat"] [Law Library: RS 1525]
2. David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (LexisNexis Butterworths, 18th Edn, 2010) [the leading English trusts treatise; hereinafter "Underhill and Hayton"] [Law Library has 17th edn]
3. Geraint Thomas and Thomas Hudson, *The Law of Trusts* (Oxford University Press, 2nd edn, 2010) [a recent English trusts treatise; hereinafter "Thomas & Hudson"] [Available in Law Library]
4. Austin Wakeman Scott, William Franklin Fratcher, Mark L. Ascher, Scott and Ascher on *Trusts* (5th edn, 2006-2010) [the leading U.S. trusts treatise; hereinafter "Scott & Ascher"] [Available in Law Library]
5. Charles E. Rounds, Jr. and Charles E. Rounds, III, *Loring and Rounds: a Trustee's Handbook* (Wolters Kluwer Law and Business, reissued annually) [a practitioner-oriented guide to US trust law; hereinafter "Loring and Rounds"; available in Law Library]
6. Donovan W.M. Waters, Mark Gillen, Lionel Smith, *Waters' Law of Trusts in Canada* (4th edn., 2012) [the leading Canadian trusts treatise; hereinafter "Waters"] [Available in Law Library]
7. Paolo Panico, *International Trust Laws* (Oxford U.P. 2010) [a comparative trusts treatise; hereinafter "Panico"] [Law Library: RS 1529]
8. James Wadham, *Willoughby's Misplaced Trust* (2nd edn., 2002) [an attempt to scare practitioners into taking their trust law duties seriously by listing all the grounds on which trusts and trustees may be attacked; hereinafter "Willoughby"]

Students may also be interested in the following article, which touches on many

themes raised throughout this seminar:

9. Adam Hofri-Winogradow, "The Stripping of the Trust: a Study in Legal Evolution", 65 *University of Toronto Law Journal* 1-47 (2015) and available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441709).

Syllabus:

Class 1, October 19, 2015.

Trust Basics: the structure of the trust relationship; classification of trusts; the rudiments of express trusts; the uses and functions of trusts.

No required reading.

Recommended reading [one of the following is enough]:

1. Scott & Ascher, §§ 2.1-2.2, 3.1-3.3
2. Waters, chapters 1-2
3. Moffat, chapter 1
4. Thomas & Hudson, chapter 1.

Class 2, October 26, 2015.

Classical Trusts Theory: the three certainties; the nature of beneficiaries' rights in the trust fund; the "beneficiary principle"; analysis of an English inter vivos trust deed.

Required reading:

1. *Paul v Constance* [1977] 1 WLR 527 (English High Court)
2. *In Re Falcone Estate*, 27 Pa. D. & C.3d 540 (Common Pleas Court of Northampton County, Pennsylvania, 1983)

Recommended reading:

1. *Hunter v. Moss* [1994] 1 WLR 452 [Eng.]
 2. *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 [Privy Council, appeal from New Zealand]
 3. *White v Shortall* 68 [2006] NSWLR 650 [(enlightening!) 1st instance decision, New South Wales]
 4. *Paul Antle and Renee Marquis-Antle Spousal trust v. Her Majesty the Queen*, 2009 TCC 465, [1]-[59] (Tax Court of Canada)
- [one of the following is enough]*
5. Thomas & Hudson, 2.01-2.30 (certainty of intention), chapter 3 (certainty of subject matter), chapter 4 (certainty of objects), chapter 6 (beneficiary principle), chapter 7 (nature of beneficiary's interest)
 6. Scott & Ascher §§ 4.1-4.4 (certainty of intention), §§ 12, 13 (beneficiaries and their interests)
 7. Moffat, 4.1-4.2, 4.4 (certainties of intention and subject matter), 5.3 (certainty of objects), 5.4 (nature of beneficiary's interest), 5.5 (beneficiary principle)
 8. Panico, §§ 1.01-1.71

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9. Willoughby, chapter 3.
 10. Loring and Rounds, chapter 2 (property requirement).
 11. David Hayton, "Trusts in Private International Law" (2014) 366 *Recueil des Cours de l'Académie de droit international de la Haye*, Chap. I (pp 17-39)

Class 3, November 2, 2015.

U.S. Donative Trusts Practice - the Classical Tax Planning Focus: the federal taxation of trust income (subchapter J); introduction to federal wealth transfer taxation; the gift tax; the estate tax; the gross estate; the marital deduction; the federal transfer tax exemption; power of appointment trusts; QTIP trusts; QDOT trusts; the charitable deduction, charitable remainder and charitable lead trusts; the generation skipping transfer tax; the "note sale".

Required reading:

1. Northern Trust Company, *Estate Planning: Strategic Wealth Transfers During Life and at Death*, pp. 7-44 [ignore information about tax and exemption rates; these have changed since the booklet was published]. [WWW]
2. Internal Revenue Code [IRC] §§ 1(e), 102, 641(a)-(b), 651-652, 671-678 [income taxation of trusts]
3. IRC §§ 2001, 2010, 2033, 2035-2042, 2044, 2055- 2056A [the estate tax]
4. IRC §§ 2501-2503, 2505, 2512-2514, 2522-2523 [the gift tax]
5. IRC §§ 2611-13, 2641-2642, 2652 [the generation skipping transfer tax]

Recommended reading:

1. Stephanie J. Willbanks, *Federal Taxation of Wealth Transfers*, 3rd Edition, 2012.
2. Boris Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts*, chapters 80-84 (income taxation in trust context), 120-137 (federal transfer taxation).

Class 4, November 9, 2015.

Analysis of two U.S. estate planning documents: a revocable trust and a will

Required reading:

1. *The Faith F. Campbell Living Trust* (executed 1997, South Carolina)
2. *The Last Will and Testament of Leona M. Helmsley* (executed 2005, New York)

Recommended reading:

[Recommended Readings 1 & 2 are a set of U.S. estate planning precedents by Northern Trust, a large U.S. trust company, exemplifying "formula-based planning", an approach which has for decades been popular among U.S. estate planning professionals for maximizing the benefit of the federal transfer tax exemption. The introduction of exemption portability in 2010 made formula-based planning less useful for most clients; see explanation in Recommended Reading 3.]

1. Northern Trust, Form 201, *Revocable Trust Agreement* (odd-numbered pages only: pp. 3, 5, etc.) [WWW]
2. Northern Trust, Form 110, *Will – Pour-Over* (odd-numbered pages only: pp. 3, 5,

etc.) [WWW]

3. Charles A. Redd, "Death of Formula-Based Estate Planning", *Trusts & Estates*, Sept. 10, 2014: <http://wealthmanagement.com/estate-planning/death-formula-based-estate-planning>.

Class 5, November 16, 2015.

Inserting Trusts into Civil Law and Mixed Legal Systems – Challenges and Innovations: "trusts without equity" and beneficiaries without rights in the trust assets (Scotland, Louisiana, South Africa, India, Sri Lanka, France, Japan, China, Korea, Taiwan, Latin American jurisdictions); the elimination of the requirement that title in trust assets be transferred to the trustee (China, Israel, South Africa); ownerless trust patrimonies (Québec, Uruguay, Czech Republic).

Required reading:

1. Code Civil [France] arts. 2011-2030 (Titre XIV: De la fiducie) [the original is at <http://www.legifrance.gouv.fr>; for an English translation of the original 2007 legislation, since amended in some respects, see Paul Matthews, "The French Fiducie: And Now for Something Completely Different?", 21(1) *Trust Law International* 17, 34-37 (2007).]
2. Code Civil [Québec] arts. 1260-1298 (Book Four: Property; Title Six: Certain Patrimonies by Appropriation; Chapter 2: The Trust). The official English version is available at: <http://tinyurl.com/d8qsept>.
3. George Gretton, "Trusts without Equity", (2000) 49 *International and Comparative Law Quarterly*, pp. 599-620.
4. Tony Honoré, "Trusts: The Inessentials", in Joshua Getzler (ed.) *Rationalizing Property, Equity and Trusts* (Butterworths: 2003) pp. 7-20.
5. Kenneth G.C. Reid, "Conceptualising the Chinese Trust: Some Thoughts from Europe", in *Towards a Chinese Civil Code: Historical and Comparative Perspectives* 209-231 (Remco van Rhee & Lei Chen eds., 2012). Also available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1763826.

Recommended reading:

1. Tony Honoré, "On fitting Trusts into Civil Law Jurisdictions", available at <http://users.ox.ac.uk/~alls0079/chinatrusts2.PDF>.
2. Lionel Smith, "Trust and Patrimony", (2008) 38 *Revue générale de droit* 379-403.
3. Lionel Smith, "Scottish Trusts in the Common Law" (2013) 17.3 *Edinburgh Law Review*. [SSRN]
4. Madeleine Cantin Cumyn, "Reflections Regarding the Diversity of Ways in which the Trust has been Received or Adapted in Civil Law Countries", in Lionel Smith (ed) *Re-imagining the Trust* (CUP 2012) 6-28.
5. אדם חפרי-וינוגרדוב, "דין הנאמנות בישראל: מאבני נגף לאבני חן?", עומד להתפרסם במשפטים, מה, המבוא ופרק א' למאמר.
6. Adam Hofri-Winogradow, *Zionist Settlers and the English Private Trust in Mandate Palestine*, 30 *Law and History Review* 813 (2012)
7. Donovan W.M. Waters, "The Future of the Trust from a Worldwide Perspective", in

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- David Hayton (ed) *The International Trust* (3rd edn., Jordans, 2011) 837-89.
8. François Barrière, 'The French Fiducie, or the Chaotic Awakening of a Sleeping Beauty' in Lionel Smith, ed, *Re-Imagining the Trust: Trusts in the Civil Law* (Cambridge, UK: Cambridge University Press, 2012) 222-257.
 9. François Barrière, 'The Security Fiducie in French Law' in Lionel Smith, ed, *The Worlds of the Trust* (Cambridge, UK: Cambridge University Press, 2013) 101-140.
 10. Blandine Mallet-Bricout, 'The Trustee: mainspring, or only a cog, in the French Fiducie?', in Lionel Smith, ed, *The Worlds of the Trust* (Cambridge, UK: Cambridge University Press, 2013) 141-166.
 11. Henry Hansmann & Ugo Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis', 73 *N.Y.U. L. Rev.* 434 (1998).
 12. Daniel Clarry, 'Fiduciary Ownership and Trusts in a Comparative Perspective' 63 *ICLQ* 901-933 (2014)
 13. Masayuki Tamaruya, 'Mixed Legal System from the Perspective of Japanese Trust Law', 74 *Comparative Law Journal* 237-255 (2013)
 14. Masayuki Tamaruya, 'Transformation of Trust Ideas in Japan: Drafting of the Trust Act 1922', 88 *Rikkyo Law Review* 97-114 (2013)

Class 6, November 23, 2015.

Trusts for Non-residents and the Conflict of Laws: the law applicable to the act launching the trust; the law applicable to the trust itself, under the Hague Convention on the Law Applicable to Trusts and on their Recognition; trust use by residents of non-trust jurisdictions (Italian trusts interni).

Required reading:

1. *Convention on the Law Applicable to Trusts and on their Recognition*, concluded 1 July 1985, entered into force 1 January 1992.
2. *Akers and others v Samba Financial Group* [2014] EWCA (Civ) 1516, [2015] Ch 451 (C.A.)

Recommended reading:

1. Thomas & Hudson, ch. 43, 44
2. Jonathan Harris, *The Hague Trusts Convention* (Hart Publishing, 2002)
3. *Actes et documents de la Quinzième session 8 au 20 octobre 1984, tome II, Trust – loi applicable et reconnaissance – Proceedings of the Fifteenth Session (1984), Volume II, Trusts – Applicable Law and Recognition* (The Hague: HCCH Publications, 1985)
4. Donovan W.M. Waters, 'The Hague Trusts Convention Twenty Years On', in Michele Graziadei, Ugo Mattei and Lionel Smith (eds), *Commercial Trusts in European Private Law* (2005), 56-97.
5. Alexandra Braun, 'Italy: The Trust Interno', in David Hayton (ed) *The International Trust* (3rd edn., Jordans, 2011) chapter 15.
6. Michele Graziadei, 'Recognition of Common Law Trusts in Civil Law Jurisdictions under the Hague Trusts Convention with Particular regard to the Italian Experience', in Lionel Smith (ed) *Re-imagining the Trust* (CUP 2012) 29-82.
7. Scott & Ascher, §§ 11.1.3-4, 44-46.

8. Waters, ch. 29.

9. David Hayton, "Trusts in Private International Law" (2014) 366 *Recueil des Cours de l'Académie de droit international de la Haye*, Chap. III (pp 58-97)

Class 7, November 30, 2015.

Exclusion of Trustees' Liabilities in Modern Trust Law: the duties trustees owe to beneficiaries; three approaches to clauses exempting trustees from liability to beneficiaries for the infringement of those duties; trustee liability to trust creditors; protector exemption clauses; distributive analysis; exemption clauses under legal regimes applicable to specialized contexts of trust use.

Distribution of List of Proposed Research Paper Topics

Required reading:

1. *Armitage v Nurse*, [1997] EWCA (Civ) 1279, [1998] Ch. 241 (C.A.)
2. *Master's Post-Trial Report, Mennen Family Trust Case* (Case No. 8432-ML), Delaware Court of Chancery (December 8, 2014)

Recommended reading:

1. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 *Yale L.J.* 929 (2005)
2. Melanie B. Leslie, *"Trusting Trustees, Fiduciary Duties and the Limits of Default Rules"*, 94 *Geo. L.J.* 67 (2005)
3. Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 *Cardozo L. Rev.* 2713 (2006)
4. David Horton, *Unconscionability in the Law of Trusts* 84 *Notre Dame Law Review* 1675 (2009).
5. Scott & Ascher, §§ 24.27-24.27.4.
6. *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13; [2012] 1 All E.R. 251 (PC (Gue))
7. Panico, chapter 7.
8. Law Commission for England and Wales, *Consultation Paper no. 171* (2002). [WWW]
9. Law Commission for England and Wales, *Report no. 301* (2006). [WWW]
10. New Zealand Law Commission, *Review of the Law of Trusts, 4th Issues Paper: the Duties, Office and Powers of a Trustee, Chapter 3* (2011). [Entire Review WWW] [Chapter 3 WWW]
11. New Zealand Law Commission, *Review of the Law of Trusts: Preferred Approach, Issues Paper No 31* (2012) 55-65.
12. New Zealand Law Commission, *Review of the Law of Trusts: a Trusts Act for New Zealand, Report no. 130* (August 2013) 93-101.
13. Scottish Law Commission, *REPORT ON TRUST LAW*, no. 239 (August 2014), chapter 12.
14. British Columbia Law Institute, *Exculpation Clauses in Trust Instruments, Consultation Paper No. 6* (2000) [WWW]
15. British Columbia Law Institute, *Exculpation Clauses in Trust Instruments, Report*

No. 17 (2002). [WWW]

16. Willoughby, chapters 6, 7, 8.

17. *In re Kornrich*, 19 Misc. 3d 663; 854 N.Y.S.2d 293 (Surr. Ct. 2008)

18. *Rafert v. Meyer*, 859 N.W.2d 332 (Neb. 2015)

Class 8, December 7, 2015.

The Decline of Beneficiaries' Rights and the Rise of Non-beneficiary Enforcers: the decline of beneficiaries' rights to information about the trust and to enforce the trust against trustees and others; non-beneficiary enforcers in charitable trusts; in non-charitable purpose trusts; and in "people trusts", as under the Cayman Islands' STAR trust regime.

Required reading:

1. *Schmidt v Rosewood Trust Ltd.* [2003] UKPC 26, [2003] 2 AC 709 (appeal taken from the Isle of Man)

2. *McDonald v Ellis* [2007] NSWSC 1068; (2008-09) 72 N.S.W.L.R. 605 (Supreme Court of New South Wales)

3. *Cayman Islands Trusts Law (as revised)*, ss. 95-109 (entitled "Special Trusts - Alternative Regime"). [WWW]

Recommended reading:

1. T.P. Gallanis, "The Trustee's Duty to Inform", 85 N.C. L. REV. 1595 (2007).

2. David Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 *Law Quarterly Review* 97.

3. Lionel Smith, *Access to Trust Information: Schmidt v. Rosewood Trust Ltd.*, 23 *ESTATES, TRUSTS & PENSIONS J.* 1 (2003)

4. Gavin Lightman, *The Trustees' Duty to Provide Information to Beneficiaries*, *PRIVATE CLIENT BUSINESS*, 2004, no. 1, 23.

5. Scott & Ascher, §§ 17.4-5.

6. Waters, 1119-1134.

7. Scottish Law Commission, *REPORT ON TRUST LAW*, no. 239 (August 2014), chapter 11.

8. New Zealand Law Commission, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, *Fourth Issues Paper* (2011), ch. 2. [WWW]

9. New Zealand Law Commission, *Review of the Law of Trusts: Preferred Approach*, *Issues Paper No 31* (2012) 65-71.

10. New Zealand Law Commission, *Review of the Law of Trusts: a Trusts Act for New Zealand*, *Report no. 130* (August 2013) 103-106.

11. David Hayton (ed) *The International Trust* (3rd Edn. 2011) ch. 9.

12. Panico, ch. 9, 12.159-12.195.

13. Thomas & Hudson, ch. 12, 42.A (STAR trusts)

14. *Breakspear v Ackland* [2009] Ch 32; [2008] 3 W.L.R. 698, [2008] 2 All E.R. (Comm.) 62 (Ch.)

15. Willoughby, chapter 12.

16. *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* [2007] WTLR 959 (the Guernsey Royal Court expanded the Court's *Schmidt* power to

protectors)

17. *In the Matter of HHH Employees Trust* [2012] JRC 127B (Jersey) (application for Schmidt disclosure against a settlor with extensive reserved powers; Court held to have power to make Schmidt orders against any persons undertaking a fiduciary role within the trust)

18. *Re an application for information about a trust*, 16 ITELR 85, [2013] SC (Bda) 16 Civ (Bermuda) (disclosure to contingent beneficiary ordered despite extensive "information control" provisions in the instrument) [decision upheld on appeal: [2013] CA (Bda) 8 Civ]

19. *In the Matter of the Y Trust* [2014] JRC027 (Jersey court would approach all applications relating to trust disclosure on the basis that its own primary Schmidt jurisdiction was invoked)

20. עמ"ה 55419-01-12 בנימין שטיינמץ נ' פקיד שומה גוש דן, ניתן 13.10.13.

Class 9, December 14, 2015.

Reservation of Powers and Control by Trust Settlers: reserved powers in trust instruments; offshore reserved-powers legislation; settlor-reserved powers under U.S. law; doctrines leading to invalidation.

Each student must choose a research topic by this date, and let me know

Required reading:

1. *Minwalla v Minwalla* [2004] EWHC 2823 (England, High Court)
2. *Re the AQ Revocable Trust* [2010] 13 ITELR 260 (Bermuda Supreme Court)

Recommended reading:

1. *A v A* [2007] EWHC 99 (Fam) [2009] WTLR 1 [note the discussion of the arguments made on the sham point by Mr. Moor being based on a misunderstanding of the law on point]
2. Panico, §§ 1.72-1.213.
3. David Hayton (ed) *The International Trust* (3rd Edn. 2011) ch. 10
4. Thomas & Hudson, §§ 2.31-2.54 and chapter 16.
5. Scott & Ascher, §§ 8.2, 16.5-16.7, 35.
6. *Restatement (Third) of Trusts* § 25, including comments and Reporter's Notes (2003)
7. *Antle v. The Queen*, 2010 FCA 280 (Canada, Federal Court of Appeal)
8. Willoughby, chapter 1.
9. Matthew Conaglen, "Sham Trusts", *Cambridge Law Journal* (2008) 67(1), 176-207
10. *R v Quillan* [2015] EWCA Crim 538 (England, Court of Appeal) [83]-[108]
11. *In the Matter of the Esteem Settlement* [2003] JRC 092, 2003 JLR 188, [2004] WTLR 1 (Jersey Royal Court)
12. *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 (England, High Court)
13. *Clayton v Clayton* [2015] NZCA 30 (New Zealand Court of Appeal) [1]-[116]

Class 10, December 21, 2015.

Trust Protectors: the Basics; The Powers Protectors are given; Fiduciary and Non-

Fiduciary Protectors; a Normative Evaluation; Cases; Protectors under U.S. Law.

Required reading:

1. *Garron Family Trust v The Queen*, 2009 TCC 450, paras 1-268 (Tax Court of Canada) [WWW]
2. *In the Matter of the Internine and the Intertraders Trusts*, [2005] JLR 236, paras 1-51 (Royal Court of Jersey)
3. *In the Matter of the Van Rooyen Family Trust* [2009] JLR 202 (&eq; *Centre Trustees Ltd v Van Rooyen* [2010] WTLR 17) (Royal Court of Jersey)

Recommended reading:

1. Andrew Holden, *Trust Protectors* (Jordans Publishing, 2011)
2. David Hayton (ed) *The International Trust* (3rd edn. 2011) ch. 4.
3. Panico, ch. 10.
4. Anthony Duckworth, "Protectors-Fish or Fowl?" (1996) 4 *Private Client Business* 169, 245, 328 [3 parts].]
5. Donovan W.M. Waters, *The Protector: New Wine in Old Bottles?*, in *TRENDS IN CONTEMPORARY TRUST LAW* 63 (A.J. Oakley ed., 1996).
6. Robert Flannigan, "Business Applications of the Express Trust", in Madeleine Cantin Cumyn (ed), *La fiducie face au trust dans les rapports d'affaires* (Bruylant, Bruxelles, 1999) 65, 72-84.
7. Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 *Cardozo L. Rev.* 2761 (2006).
8. Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 *Cardozo L. Rev.* 2807, 2807-12 (2006).
9. Scott & Ascher, § 16.7.
10. Alexander A. Bove, Jr. *Trust Protectors: A Practice Manual with Forms* (Juris, 2014)
11. Willoughby, chapter 10.
12. *IFG International v French*, [2013] WTLR 251 (Isle of Man) (limits of protector's right to be indemnified from the trust fund)
13. Michael M. Gordon, *Directed Trusts, Trust Protectors, Private Trust Companies and Other Bells and Whistles* [Lecture notes from 10th Annual International Estate Planning Institute March 13, 2014]

Class 11, December 28, 2015.

Asset Protection Trusts: in offshore jurisdictions; statutory norms protecting creditors (fraudulent conveyances laws in and out of bankruptcy); domestic APTs (DAPT's); the courts' response.

Required reading:

1. *Bahamas, Fraudulent Dispositions Act*, 1991. [WWW]
2. *Federal Trade Commission v Affordable Media LLC*, 179 F.3d 1228 (9th Cir. 1999): introduction, part I and part III of the opinion (including footnotes).
3. *In re Huber*, 2013 WL 2154218 Bkrtcy. W.D. Wash. May 17, 2013.

Recommended reading:

1. Bankruptcy Act 1986, §§ 284(1), 339, 340, 423, 357 (United Kingdom) [Entire Act WWW]
2. U.S.C., Title 11, §§ 547-548.
3. Uniform Voidable Transactions Act 2014, ss. 4-5 (a revised version of the Uniform Fraudulent Transfer Act, 1984).
4. Cook Islands International Trusts Act, 1984 (as amended), ss. 13A-13K.
5. Stewart Sterk, Asset Protection Trusts: Trust Law's Race to the Bottom?, 85 CORNELL L. REV. 1035 (2000)
6. John K. Eason, Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations, 52 FLA. L. REV. 41 (2000)
7. John K. Eason, Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection, 27 CARDOZO L. REV. 2621 (2005-2006)
8. Adam J. Hirsch, Fear Not the Asset Protection Trust, 27 CARDOZO L. REV. 2685 (2005-2006)
9. ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES (David G. Shaftel ed, updated through April 2014): <http://tinyurl.com/pa3dhmx>.
10. Thomas & Hudson, chapter 40.
11. Panico, 11.94-11.213.
12. Alastair Hudson, "Asset Protection Trusts", in David Hayton (ed) The International Trust (3rd edn., Jordans, 2011) chapter 6.
13. Willoughby, chapter 11.
14. Lawrence v. Goldberg, 279 F.3d 1294 (11th Cir. 2002)
15. In Re: Stephan Jay Lawrence, Debtor, 251 B.R. 630 (U.S. District Ct. for the Southern Dist. of Florida, 2000)
16. Bonnie Steiner, "Asset Protection Trusts: Do They Still Work?" - Powerpoint presentation.
17. Jonathan D. Blattmachr et al., Avoiding the Adverse Effects of Huber, Tr. & Est., July 2013, at 20.
18. Inga Ivsan, "Emerging Challenges in Asset Protection Planning", <http://swissprivatewealth.ch/full-text-article-emerging-challenges-asset-protection-planning/>.
19. Paul Matthews, "Asset Protection Trusts in English Law", in Francesco A Schurr (ed), Trusts in the Principality of Liechtenstein and Similar Jurisdictions (2015) 75-89
20. Karen Boxx, "Asset Protection Trusts in the United States: an Update", in Francesco A Schurr (ed), Trusts in the Principality of Liechtenstein and Similar Jurisdictions (2015) 91-100
21. IMO Daniel Kloiber Dynasty Trust, 98 A.3d 924 (Delaware Court of Chancery, 2014)
22. Ronald J. Mann, A Fresh Look at the State Asset Protection Statutes, 67 Vanderbilt Law Review 1741.
23. Battley v. Mortensen (In re Mortensen), 10 Alaska Bankr. Rep. 146 (Bankr. D. Alaska 2011)
24. Green v. Zukerkorn (In re Zukerkorn), 484 B.R. 182 (B.A.P. 9th Cir. 2012).
25. Jay A. Soled and Mitchell M. Gans, Asset Preservation and the Evolving Role of

Trusts in the Twenty-First Century, 72 Wash & Lee L. Rev. 257

Class 12, January 4, 2016.

Analysis of an offshore trust deed.

Class 13, January 11, 2016, and Class 14, January 18, 2016.

Student Presentations.

Final papers to be submitted to the secretariat (מזכירות) by April 18, 2015.

Learning Outcomes:

- a familiarity with the different trust regimes found in different jurisdictions, including U.S. jurisdictions, England, civil law jurisdictions, mixed legal systems and offshore jurisdictions*
- an understanding of the different types and contexts of trust practice*
- a familiarity with recent innovations in trust technique, from protectors, to non-beneficiary enforcers, to STAR and VISTA trusts, to the use of trust regimes by non-residents*
- a familiarity with U.S., U.K. and offshore trust documents, their structure and drafting techniques*

Additional Reading Material:

Trusts: Law and Practice

Adam Hofri-Winogradow

Fall 2015

Course Description:

Useful for any student preparing for a career in the lucrative private client sector, this course provides an in-depth survey of trusts law and practice, including cutting-edge trust models and drafting techniques using a large variety of domestic and international trust regimes. Students will acquire an understanding of the different types and contexts of trust practice, including the use of trusts to plan succession to a settlor's assets, to minimize the tax burden borne by an individual, family or estate, to shield assets from a settlor's creditors, to securitize debt, to structure complex transactions, to invest pooled funds, to pass control of a family business between generations and more. We will discuss the recent radical changes in trust law, from the reception of the trust in civil law and mixed legal systems through the weakening of beneficiaries' rights to receive information about the trust and enforce the trust, the exclusion of trustees' traditional duties and liabilities, and the development of new trust actors such as protectors and non-beneficiary enforcers. The course includes analysis of trust deeds using the trust regimes of the U.S., England and offshore jurisdictions.

Prerequisites:

To take this course, students must have completed courses in contracts, torts, property, a basic course in taxation ("baby tax") and corporations. The course can be undertaken simultaneously with a basic course in decedents' estates, with a

course in estate and gift taxation, with an estate planning seminar, and/or with a course in corporate taxation.

Grade Composition:

In-class participation: 5%

In-class presentation: 15%

Seminar paper: 80%.

[ובעברית: הרכב הציון: 5% השתתפות, 15% הרצאה בכיתה (רפרט), 80% עבודה סמינריונית.]

Textbooks and Treatises used in this Class

There is no one "text" we are going to read through. The readings are diverse. Still, the following books are fundamental (as recommended, rather than required, readings):

1. Graham Moffat, *Trusts Law: Text and Materials* (Cambridge University Press, 5th edn, 2009) [the best of the English student-oriented trusts textbooks; hereinafter "Moffat"] [Law Library: RS 1525]
2. David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (LexisNexis Butterworths, 18th Edn, 2010) [the leading English trusts treatise; hereinafter "Underhill and Hayton"] [Law Library has 17th edn]
3. Geraint Thomas and Thomas Hudson, *The Law of Trusts* (Oxford University Press, 2nd edn, 2010) [a recent English trusts treatise; hereinafter "Thomas & Hudson"] [Available in Law Library]
4. Austin Wakeman Scott, William Franklin Fratcher, Mark L. Ascher, Scott and Ascher on *Trusts* (5th edn, 2006-2010) [the leading U.S. trusts treatise; hereinafter "Scott & Ascher"] [Available in Law Library]
5. Charles E. Rounds, Jr. and Charles E. Rounds, III, *Loring and Rounds: a Trustee's Handbook* (Wolters Kluwer Law and Business, reissued annually) [a practitioner-oriented guide to US trust law; hereinafter "Loring and Rounds"; available in Law Library]
6. Donovan W.M. Waters, Mark Gillen, Lionel Smith, *Waters' Law of Trusts in Canada* (4th edn., 2012) [the leading Canadian trusts treatise; hereinafter "Waters"] [Available in Law Library]
7. Paolo Panico, *International Trust Laws* (Oxford U.P. 2010) [a comparative trusts treatise; hereinafter "Panico"] [Law Library: RS 1529]
8. James Wadham, *Willoughby's Misplaced Trust* (2nd edn., 2002) [an attempt to scare practitioners into taking their trust law duties seriously by listing all the grounds on which trusts and trustees may be attacked; hereinafter "Willoughby"]

Students may also be interested in the following article, which touches on many themes raised throughout this seminar:

9. Adam Hofri-Winogradow, "The Stripping of the Trust: a Study in Legal Evolution", 65 *University of Toronto Law Journal* 1-47 (2015) and available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441709.

Syllabus:

Class 1, October 19, 2015.

Trust Basics: the structure of the trust relationship; classification of trusts; the rudiments of express trusts; the uses and functions of trusts.
No required reading.

Recommended reading [one of the following is enough]:

1. *Scott & Ascher*, §§ 2.1-2.2, 3.1-3.3
2. *Waters*, chapters 1-2
3. *Moffat*, chapter 1
4. *Thomas & Hudson*, chapter 1.

Class 2, October 26, 2015.

Classical Trusts Theory: the three certainties; the nature of beneficiaries' rights in the trust fund; the "beneficiary principle"; analysis of an English inter vivos trust deed.

Required reading:

1. *Paul v Constance* [1977] 1 WLR 527 (English High Court)
2. *In Re Falcone Estate*, 27 Pa. D. & C.3d 540 (Common Pleas Court of Northampton County, Pennsylvania, 1983)

Recommended reading:

1. *Hunter v. Moss* [1994] 1 WLR 452 [Eng.]
 2. *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 [Privy Council, appeal from New Zealand]
 3. *White v Shortall* 68 [2006] NSWLR 650 [(enlightening!) 1st instance decision, New South Wales]
 4. *Paul Antle and Renee Marquis-Antle Spousal trust v. Her Majesty the Queen*, 2009 TCC 465, [1]-[59] (Tax Court of Canada)
- [one of the following is enough]*
5. *Thomas & Hudson*, 2.01-2.30 (certainty of intention), chapter 3 (certainty of subject matter), chapter 4 (certainty of objects), chapter 6 (beneficiary principle), chapter 7 (nature of beneficiary's interest)
 6. *Scott & Ascher* §§ 4.1-4.4 (certainty of intention), §§ 12, 13 (beneficiaries and their interests)
 7. *Moffat*, 4.1-4.2, 4.4 (certainties of intention and subject matter), 5.3 (certainty of objects), 5.4 (nature of beneficiary's interest), 5.5 (beneficiary principle)
 8. *Panico*, §§ 1.01-1.71
 9. *Willoughby*, chapter 3.
 10. *Loring and Rounds*, chapter 2 (property requirement).
 11. *David Hayton*, "Trusts in Private International Law" (2014) 366 *Recueil des Cours de l'Académie de droit international de la Haye*, Chap. I (pp 17-39)

Class 3, November 2, 2015.

U.S. Donative Trusts Practice - the Classical Tax Planning Focus: the federal taxation of trust income (subchapter J); introduction to federal wealth transfer taxation; the gift tax; the estate tax; the gross estate; the marital deduction; the federal transfer

tax exemption; power of appointment trusts; QTIP trusts; QDOT trusts; the charitable deduction, charitable remainder and charitable lead trusts; the generation skipping transfer tax; the "note sale".

Required reading:

1. Northern Trust Company, *Estate Planning: Strategic Wealth Transfers During Life and at Death*, pp. 7-44 [ignore information about tax and exemption rates; these have changed since the booklet was published]. [WWW]
2. Internal Revenue Code [IRC] §§ 1(e), 102, 641(a)-(b), 651-652, 671-678 [income taxation of trusts]
3. IRC §§ 2001, 2010, 2033, 2035-2042, 2044, 2055- 2056A [the estate tax]
4. IRC §§ 2501-2503, 2505, 2512-2514, 2522-2523 [the gift tax]
5. IRC §§ 2611-13, 2641-2642, 2652 [the generation skipping transfer tax]

Recommended reading:

1. Stephanie J. Willbanks, *Federal Taxation of Wealth Transfers*, 3rd Edition, 2012.
2. Boris Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts*, chapters 80-84 (income taxation in trust context), 120-137 (federal transfer taxation).

Class 4, November 9, 2015.

Analysis of two U.S. estate planning documents: a revocable trust and a will

Required reading:

1. The Faith F. Campbell Living Trust (executed 1997, South Carolina)
2. The Last Will and Testament of Leona M. Helmsley (executed 2005, New York)

Recommended reading:

[Recommended Readings 1 & 2 are a set of U.S. estate planning precedents by Northern Trust, a large U.S. trust company, exemplifying "formula-based planning", an approach which has for decades been popular among U.S. estate planning professionals for maximizing the benefit of the federal transfer tax exemption. The introduction of exemption portability in 2010 made formula-based planning less useful for most clients; see explanation in Recommended Reading 3.]

1. Northern Trust, Form 201, Revocable Trust Agreement (odd-numbered pages only: pp. 3, 5, etc.) [WWW]
2. Northern Trust, Form 110, Will - Pour-Over (odd-numbered pages only: pp. 3, 5, etc.) [WWW]
3. Charles A. Redd, "Death of Formula-Based Estate Planning", *Trusts & Estates*, Sept. 10, 2014: <http://wealthmanagement.com/estate-planning/death-formula-based-estate-planning>.

Class 5, November 16, 2015.

Inserting Trusts into Civil Law and Mixed Legal Systems – Challenges and Innovations: "trusts without equity" and beneficiaries without rights in the trust assets (Scotland, Louisiana, South Africa, India, Sri Lanka, France, Japan, China,

Korea, Taiwan, Latin American jurisdictions); the elimination of the requirement that title in trust assets be transferred to the trustee (China, Israel, South Africa); ownerless trust patrimonies (Québec, Uruguay, Czech Republic).

Required reading:

1. Code Civil [France] arts. 2011-2030 (Titre XIV: De la fiducie) [the original is at <http://www.legifrance.gouv.fr>; for an English translation of the original 2007 legislation, since amended in some respects, see Paul Matthews, "The French Fiducie: And Now for Something Completely Different?", 21(1) *Trust Law International* 17, 34-37 (2007).]
2. Code Civil [Québec] arts. 1260-1298 (Book Four: Property; Title Six: Certain Patrimonies by Appropriation; Chapter 2: The Trust). The official English version is available at: <http://tinyurl.com/d8qsept>.
3. George Gretton, "Trusts without Equity", (2000) 49 *International and Comparative Law Quarterly*, pp. 599-620.
4. Tony Honoré, "Trusts: The Inessentials", in Joshua Getzler (ed.) *Rationalizing Property, Equity and Trusts* (Butterworths: 2003) pp. 7-20.
5. Kenneth G.C. Reid, "Conceptualising the Chinese Trust: Some Thoughts from Europe", in *Towards a Chinese Civil Code: Historical and Comparative Perspectives* 209-231 (Remco van Rhee & Lei Chen eds., 2012). Also available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1763826.

Recommended reading:

1. Tony Honoré, "On fitting Trusts into Civil Law Jurisdictions", available at <http://users.ox.ac.uk/~alls0079/chinatrusts2.PDF>.
2. Lionel Smith, "Trust and Patrimony", (2008) 38 *Revue générale de droit* 379-403.
3. Lionel Smith, "Scottish Trusts in the Common Law" (2013) 17.3 *Edinburgh Law Review*. [SSRN]
4. Madeleine Cantin Cumyn, "Reflections Regarding the Diversity of Ways in which the Trust has been Received or Adapted in Civil Law Countries", in Lionel Smith (ed) *Re-imagining the Trust* (CUP 2012) 6-28.
5. אדם חפרי-וינוגרדוב, "דין הנאמנות בישראל: מאבני נגף לאבני חן?", עומד להתפרסם במשפטים, מה, המבוא ופרק א' למאמר.
6. Adam Hofri-Winogradow, *Zionist Settlers and the English Private Trust in Mandate Palestine*, 30 *Law and History Review* 813 (2012)
7. Donovan W.M. Waters, "The Future of the Trust from a Worldwide Perspective", in David Hayton (ed) *The International Trust* (3rd edn., Jordans, 2011) 837-89.
8. François Barrière, 'The French Fiducie, or the Chaotic Awakening of a Sleeping Beauty' in Lionel Smith, ed, *Re-Imagining the Trust: Trusts in the Civil Law* (Cambridge, UK: Cambridge University Press, 2012) 222-257.
9. François Barrière, 'The Security Fiducie in French Law' in Lionel Smith, ed, *The Worlds of the Trust* (Cambridge, UK: Cambridge University Press, 2013) 101-140.
10. Blandine Mallet-Bricout, "The Trustee: mainspring, or only a cog, in the French Fiducie?", in Lionel Smith, ed, *The Worlds of the Trust* (Cambridge, UK: Cambridge University Press, 2013) 141-166.

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11. Henry Hansmann & Ugo Mattei, "The Functions of Trust Law: A Comparative Legal and Economic Analysis", 73 N.Y.U. L. Rev. 434 (1998).
 12. Daniel Clarry, "Fiduciary Ownership and Trusts in a Comparative Perspective" 63 ICLQ 901-933 (2014)
 13. Masayuki Tamaruya, "Mixed Legal System from the Perspective of Japanese Trust Law", 74 Comparative Law Journal 237-255 (2013)
 14. Masayuki Tamaruya, "Transformation of Trust Ideas in Japan: Drafting of the Trust Act 1922", 88 Rikkyo Law Review 97-114 (2013)

Class 6, November 23, 2015.

Trusts for Non-residents and the Conflict of Laws: the law applicable to the act launching the trust; the law applicable to the trust itself, under the Hague Convention on the Law Applicable to Trusts and on their Recognition; trust use by residents of non-trust jurisdictions (Italian trusts interni).

Required reading:

1. Convention on the Law Applicable to Trusts and on their Recognition, concluded 1 July 1985, entered into force 1 January 1992.
2. Akers and others v Samba Financial Group [2014] EWCA (Civ) 1516, [2015] Ch 451 (C.A.)

Recommended reading:

1. Thomas & Hudson, ch. 43, 44
2. Jonathan Harris, *The Hague Trusts Convention* (Hart Publishing, 2002)
3. Actes et documents de la Quinzième session 8 au 20 octobre 1984, tome II, Trust – loi applicable et reconnaissance – Proceedings of the Fifteenth Session (1984), Volume II, Trusts – Applicable Law and Recognition (The Hague: HCCH Publications, 1985)
4. Donovan W.M. Waters, "The Hague Trusts Convention Twenty Years On", in Michele Grazaidei, Ugo Mattei and Lionel Smith (eds), *Commercial Trusts in European Private Law* (2005), 56-97.
5. Alexandra Braun, "Italy: The Trust Interno", in David Hayton (ed) *The International Trust* (3rd edn., Jordans, 2011) chapter 15.
6. Michele Graziadei, "Recognition of Common Law Trusts in Civil Law Jurisdictions under the Hague Trusts Convention with Particular regard to the Italian Experience", in Lionel Smith (ed) *Re-imagining the Trust* (CUP 2012) 29-82.
7. Scott & Ascher, §§ 11.1.3-4, 44-46.
8. Waters, ch. 29.
9. David Hayton, "Trusts in Private International Law" (2014) 366 *Recueil des Cours de l'Académie de droit international de la Haye*, Chap. III (pp 58-97)

Class 7, November 30, 2015.

Exclusion of Trustees' Liabilities in Modern Trust Law: the duties trustees owe to beneficiaries; three approaches to clauses exempting trustees from liability to beneficiaries for the infringement of those duties; trustee liability to trust creditors; protector exemption clauses; distributive analysis; exemption clauses under legal

regimes applicable to specialized contexts of trust use.

Distribution of List of Proposed Research Paper Topics

Required reading:

1. *Armitage v Nurse*, [1997] EWCA (Civ) 1279, [1998] Ch. 241 (C.A.)
2. *Master's Post-Trial Report, Mennen Family Trust Case* (Case No. 8432-ML), Delaware Court of Chancery (December 8, 2014)

Recommended reading:

1. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929 (2005)
2. Melanie B. Leslie, *"Trusting Trustees, Fiduciary Duties and the Limits of Default Rules"*, 94 Geo. L.J. 67 (2005)
3. Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 Cardozo L. Rev. 2713 (2006)
4. David Horton, *Unconscionability in the Law of Trusts* 84 Notre Dame Law Review 1675 (2009).
5. Scott & Ascher, §§ 24.27-24.27.4.
6. *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13; [2012] 1 All E.R. 251 (PC (Gue))
7. Panico, chapter 7.
8. Law Commission for England and Wales, *Consultation Paper no. 171* (2002). [WWW]
9. Law Commission for England and Wales, *Report no. 301* (2006). [WWW]
10. New Zealand Law Commission, *Review of the Law of Trusts, 4th Issues Paper: the Duties, Office and Powers of a Trustee, Chapter 3* (2011). [Entire Review WWW] [Chapter 3 WWW]
11. New Zealand Law Commission, *Review of the Law of Trusts: Preferred Approach, Issues Paper No 31* (2012) 55-65.
12. New Zealand Law Commission, *Review of the Law of Trusts: a Trusts Act for New Zealand, Report no. 130* (August 2013) 93-101.
13. Scottish Law Commission, *REPORT ON TRUST LAW*, no. 239 (August 2014), chapter 12.
14. British Columbia Law Institute, *Exculpation Clauses in Trust Instruments, Consultation Paper No. 6* (2000) [WWW]
15. British Columbia Law Institute, *Exculpation Clauses in Trust Instruments, Report No. 17* (2002). [WWW]
16. Willoughby, chapters 6, 7, 8.
17. *In re Kornrich*, 19 Misc. 3d 663; 854 N.Y.S.2d 293 (Surr. Ct. 2008)
18. *Rafert v. Meyer*, 859 N.W.2d 332 (Neb. 2015)

Class 8, December 7, 2015.

The Decline of Beneficiaries' Rights and the Rise of Non-beneficiary Enforcers: the decline of beneficiaries' rights to information about the trust and to enforce the trust against trustees and others; non-beneficiary enforcers in charitable trusts; in

non-charitable purpose trusts; and in "people trusts", as under the Cayman Islands' STAR trust regime.

Required reading:

1. *Schmidt v Rosewood Trust Ltd.* [2003] UKPC 26, [2003] 2 AC 709 (appeal taken from the Isle of Man)
2. *McDonald v Ellis* [2007] NSWSC 1068; (2008-09) 72 N.S.W.L.R. 605 (Supreme Court of New South Wales)
3. Cayman Islands Trusts Law (as revised), ss. 95-109 (entitled "Special Trusts – Alternative Regime"). [WWW]

Recommended reading:

1. T.P. Gallanis, "The Trustee's Duty to Inform", 85 N.C. L. REV. 1595 (2007).
2. David Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 Law Quarterly Review 97.
3. Lionel Smith, Access to Trust Information: *Schmidt v. Rosewood Trust Ltd.*, 23 ESTATES, TRUSTS & PENSIONS J. 1 (2003)
4. Gavin Lightman, The Trustees' Duty to Provide Information to Beneficiaries, PRIVATE CLIENT BUSINESS, 2004, no. 1, 23.
5. Scott & Ascher, §§ 17.4-5.
6. Waters, 1119-1134.
7. Scottish Law Commission, REPORT ON TRUST LAW, no. 239 (August 2014), chapter 11.
8. New Zealand Law Commission, The Duties, Office and Powers of a Trustee: Review of the Law of Trusts, Fourth Issues Paper (2011), ch. 2. [WWW]
9. New Zealand Law Commission, Review of the Law of Trusts: Preferred Approach, Issues Paper No 31 (2012) 65-71.
10. New Zealand Law Commission, Review of the Law of Trusts: a Trusts Act for New Zealand, Report no. 130 (August 2013) 103-106.
11. David Hayton (ed) *The International Trust* (3rd Edn. 2011) ch. 9.
12. Panico, ch. 9, 12.159-12.195.
13. Thomas & Hudson, ch. 12, 42.A (STAR trusts)
14. *Breakspear v Ackland* [2009] Ch 32; [2008] 3 W.L.R. 698, [2008] 2 All E.R. (Comm.) 62 (Ch.)
15. Willoughby, chapter 12.
16. *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* [2007] WTLR 959 (the Guernsey Royal Court expanded the Court's *Schmidt* power to protectors)
17. *In the Matter of HHH Employees Trust* [2012] JRC 127B (Jersey) (application for *Schmidt* disclosure against a settlor with extensive reserved powers; Court held to have power to make *Schmidt* orders against any persons undertaking a fiduciary role within the trust)
18. *Re an application for information about a trust*, 16 ITELR 85, [2013] SC (Bda) 16 Civ (Bermuda) (disclosure to contingent beneficiary ordered despite extensive "information control" provisions in the instrument) [decision upheld on appeal: [2013] CA (Bda) 8 Civ]

19. *In the Matter of the Y Trust* [2014] JRC027 (Jersey court would approach all applications relating to trust disclosure on the basis that its own primary Schmidt jurisdiction was invoked)

20. עמ"ה 55419-01-12 בנימין שטינמץ נ' פקיד שומה גוש דן, ניתן 13.10.13.

Class 9, December 14, 2015.

Reservation of Powers and Control by Trust Settlers: reserved powers in trust instruments; offshore reserved-powers legislation; settlor-reserved powers under U.S. law; doctrines leading to invalidation.

Each student must choose a research topic by this date, and let me know

Required reading:

1. *Minwalla v Minwalla* [2004] EWHC 2823 (England, High Court)
2. *Re the AQ Revocable Trust* [2010] 13 ITELR 260 (Bermuda Supreme Court)

Recommended reading:

1. *A v A* [2007] EWHC 99 (Fam) [2009] WTLR 1 [note the discussion of the arguments made on the sham point by Mr. Moor being based on a misunderstanding of the law on point]
2. Panico, §§ 1.72-1.213.
3. David Hayton (ed) *The International Trust* (3rd Edn. 2011) ch. 10
4. Thomas & Hudson, §§ 2.31-2.54 and chapter 16.
5. Scott & Ascher, §§ 8.2, 16.5-16.7, 35.
6. *Restatement (Third) of Trusts* § 25, including comments and Reporter's Notes (2003)
7. *Antle v. The Queen*, 2010 FCA 280 (Canada, Federal Court of Appeal)
8. Willoughby, chapter 1.
9. Matthew Conaglen, "Sham Trusts", *Cambridge Law Journal* (2008) 67(1), 176-207
10. *R v Quillan* [2015] EWCA Crim 538 (England, Court of Appeal) [83]-[108]
11. *In the Matter of the Esteem Settlement* [2003] JRC 092, 2003 JLR 188, [2004] WTLR 1 (Jersey Royal Court)
12. *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 (England, High Court)
13. *Clayton v Clayton* [2015] NZCA 30 (New Zealand Court of Appeal) [1]-[116]

Class 10, December 21, 2015.

Trust Protectors: the Basics; The Powers Protectors are given; Fiduciary and Non-Fiduciary Protectors; a Normative Evaluation; Cases; Protectors under U.S. Law.

Required reading:

1. *Garron Family Trust v The Queen*, 2009 TCC 450, paras 1-268 (Tax Court of Canada) [WWW]
2. *In the Matter of the Internine and the Intertraders Trusts*, [2005] JLR 236, paras 1-51 (Royal Court of Jersey)
3. *In the Matter of the Van Rooyen Family Trust* [2009] JLR 202 (&eq; *Centre Trustees Ltd v Van Rooyen* [2010] WTLR 17) (Royal Court of Jersey)

Recommended reading:

1. Andrew Holden, *Trust Protectors* (Jordans Publishing, 2011)
2. David Hayton (ed) *The International Trust* (3rd edn. 2011) ch. 4.
3. Panico, ch. 10.
4. Anthony Duckworth, "Protectors-Fish or Fowl?" (1996) 4 *Private Client Business* 169, 245, 328 [3 parts].]
5. Donovan W.M. Waters, *The Protector: New Wine in Old Bottles?*, in *TRENDS IN CONTEMPORARY TRUST LAW* 63 (A.J. Oakley ed., 1996).
6. Robert Flannigan, "Business Applications of the Express Trust", in Madeleine Cantin Cumyn (ed), *La fiducie face au trust dans les rapports d'affaires* (Bruylant, Bruxelles, 1999) 65, 72-84.
7. Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 *Cardozo L. Rev.* 2761 (2006).
8. Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 *Cardozo L. Rev.* 2807, 2807-12 (2006).
9. Scott & Ascher, § 16.7.
10. Alexander A. Bove, Jr. *Trust Protectors: A Practice Manual with Forms* (Juris, 2014)
11. Willoughby, chapter 10.
12. *IFG International v French*, [2013] WTLR 251 (Isle of Man) (limits of protector's right to be indemnified from the trust fund)
13. Michael M. Gordon, *Directed Trusts, Trust Protectors, Private Trust Companies and Other Bells and Whistles* [Lecture notes from 10th Annual International Estate Planning Institute March 13, 2014]

Class 11, December 28, 2015.

Asset Protection Trusts: in offshore jurisdictions; statutory norms protecting creditors (fraudulent conveyances laws in and out of bankruptcy); domestic APTs (DAPT's); the courts' response.

Required reading:

1. Bahamas, *Fraudulent Dispositions Act*, 1991. [WWW]
2. *Federal Trade Commission v Affordable Media LLC*, 179 F.3d 1228 (9th Cir. 1999): introduction, part I and part III of the opinion (including footnotes).
3. *In re Huber*, 2013 WL 2154218 Bkrcty. W.D. Wash. May 17, 2013.

Recommended reading:

1. *Bankruptcy Act 1986*, §§ 284(1), 339, 340, 423, 357 (United Kingdom) [Entire Act WWW]
2. U.S.C., Title 11, §§ 547-548.
3. *Uniform Voidable Transactions Act 2014*, ss. 4-5 (a revised version of the *Uniform Fraudulent Transfer Act*, 1984).
4. *Cook Islands International Trusts Act*, 1984 (as amended), ss. 13A-13K.
5. Stewart Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 *CORNELL L. REV.* 1035 (2000)

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6. John K. Eason, *Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations*, 52 FLA. L. REV. 41 (2000)
 7. John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621 (2005-2006)
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 16. Bonnie Steiner, "Asset Protection Trusts: Do They Still Work?" – Powerpoint presentation.
 17. Jonathan D. Blattmachr et al., *Avoiding the Adverse Effects of Huber, Tr. & Est.*, July 2013, at 20.
 18. Inga Ivsan, "Emerging Challenges in Asset Protection Planning", <http://swissprivatewealth.ch/full-text-article-emerging-challenges-asset-protection-planning/>.
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 21. *IMO Daniel Kloiber Dynasty Trust*, 98 A.3d 924 (Delaware Court of Chancery, 2014)
 22. Ronald J. Mann, *A Fresh Look at the State Asset Protection Statutes*, 67 Vanderbilt Law Review 1741.
 23. *Battley v. Mortensen (In re Mortensen)*, 10 Alaska Bankr. Rep. 146 (Bankr. D. Alaska 2011)
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 25. Jay A. Soled and Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 Wash & Lee L. Rev. 257

Class 12, January 4, 2016.

Analysis of an offshore trust deed.

Class 13, January 11, 2016, and Class 14, January 18, 2016.

Student Presentations.

Final papers to be submitted to the secretariat (מזכירות) by April 18, 2015.

Learning Outcomes:

- *a familiarity with the different trust regimes found in different jurisdictions, including U.S. jurisdictions, England, civil law jurisdictions, mixed legal systems and offshore jurisdictions*
- *an understanding of the different types and contexts of trust practice*
- *a familiarity with recent innovations in trust technique, from protectors, to non-beneficiary enforcers, to STAR and VISTA trusts, to the use of trust regimes by non-residents*
- *a familiarity with U.S., U.K. and offshore trust documents, their structure and drafting techniques*

Course/Module evaluation:

End of year written/oral examination 0 %
Presentation 15 %
Participation in Tutorials 0 %
Project work 80 %
Assignments 0 %
Reports 0 %
Research project 0 %
Quizzes 0 %
Other 5 %
in-class participation

Additional information:

Open for 3rd year LLB students (having studied Corporate Law during their 2nd year or simultaneously with the seminar, and Tax Law simultaneously with the seminar), for LLM students, for doctoral students, as well as for those enrolled on the Faculty's international LLM programs.