# Title

It is all about 1066: Why the trust regimes of two seasoned offshore trust jurisdictions, Guernsey and Jersey, are not indigenous

# Text

The Crown dependencies of the Bailiwick of Jersey and the Bailiwick of Guernsey (hereinafter "the Channel Islands") were part of Normandy in 1066 when its ruler, William the Conqueror, invaded England and seized the English crown. Today, these two remnants of the Duchy of Normandy are not a part of the United Kingdom. (The UK, however, has assumed responsibility for their defense.) In 1204 mainland Normandy was taken from the English by the King of France. This ended 293 years of relative Norman independence from the French crown.

If one is to get a handle on why the Channel Islands acquired their trust regimes via legislation and osmosis (by osmosis I mean indirectly through long association with England and the English), rather than directly via England's courts of equity, one needs to appreciate that the institution of the trust as we know it evolved after the Norman Conquest in England but not in Normandy, an event that had set in motion an amalgamation in the former of two cultures, the Anglo-Saxon and the Norman-French. The institution of the trust is a juridical spin-off from that amalgamation. To this day France lacks a comparable equity-based trust jurisprudence. French jurists have perceived the English trust's divided-ownership feature as violating the civil law's Numerus Clausus principle, a topic we take up in §8.15.95 of *Loring and Rounds: A Trustee's Handbook* (2022), which section is reproduced in Appendix A below. Moreover, the visceral hesitancy of the French to embrace the English trust is said to have its roots in the French Revolution, divided property rights being perceived as a vestige of the feudal. France has yet to ratify the Hague Convention on the Law Applicable to Trusts and on Their Recognition. By contrast, as far back as 1928, Liechtenstein by statute injected the Massachusetts business trust, lock, stock, and barrel directly into its civil-law jurisprudence.

To be sure civil-law jurisdictions on the Continent have their trust analogs, but each tends to have some, but not all, of the functional bells and whistles of the equity-based Anglo-American trust. Take Germany's home-grown analog the *Treuhand*. That the Bundestag in the 1950s sent two delegations to the U.S. to investigate how a trusteed mutual fund is structured with an eye to coming up with a civil-law statutory analog of functional equivalence says it all. The *Treuhand*'s functional limitations are considered in §8.12.1 of *Loring and Rounds: A Trustee's Handbook* (2022), the relevant portion of which section is set forth in Appendix B below.

The Handbook is available for purchase at: https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP.

## Appendix A

# §8.15.95 Numerus Clausus: *The Trust Exception* [from *Loring and Rounds: A Trustee's Handbook* (2022), available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP].

In civil law jurisdictions, such as Germany, the *Numerus Clausus* or "closed number" principle is a formal, *i.e.*, statutory, proscription against private individuals and courts creating new forms of real property and new forms of tangible personal property. Only the legislatures may effectively engage in such activity.[1447] The civil-law contractual right, however, is a property form not captured by the proscription. As for property rights incident to civil-law trust analogs, these interests are generally more contractual in character than equitable.[1448] Civil-law trust analogs are discussed generally in §8.12.1 of this handbook.

In common law jurisdictions, no such formal *numerus clausus* principle operates. It has been suggested, however, that in them a *numerus clausus* principle operates informally. In the case of estates in land, for example, "there are five general types of present possessory interests: the fee simple absolute, the defeasible fee simple, the fee tail, the life estate, and the lease…In practice, courts enforce the *numerus clausus* principle strictly (although not of course by name) in the context of estates of land."[1449] In any case, the contractual right and the equitable right incident to a true trust relationship are two property forms that have not been captured by the common law's informal *numerus clausus* proscription, assuming one exists. Instead, these two forms comprise a lightly-regulated *numerus apertus* (open number) property regime. That a trust is *numerus-clausus* exempt in large part accounts for its practical utility. "Trusts are famously fluid; they may be created on whim to serve a nearly unlimited array of purposes."[1450]

## Appendix B

# §8.12.1 *Civil Law Alternatives to the Trust* [from *Loring and Rounds: A Trustee's Handbook*(2022), available for purchase at : https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP].

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***Treuhand.*** The *treuhand*, recognized in Germany, Austria, and Switzerland, is a creature of

[1447]"The term numerus clausus is used in Germany alongside *Typenzwang* and *Typenfixierung* (both meaning "fixation of types" of property); the principle is considered a substantive limitation on the definition of property in the code. *See* §854 BGB (defining property)…." Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1 n.6 (2000).

[1448]Yun-chien Chang & Henry E. Smith, *The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms*, 100 Iowa L. Rev. 2275, 2277 (2015).

[1449]Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1, 13 (2000).

[1450]Jake Calvert, *A Response to Democracy and Trusts*, 43 ACTEC L.J. 319, 322 (Winter 2018).

case law and has many of the limitations of a third-party beneficiary contract.[87] "By the treuhand, or mandat, the settlor (treugeber) transfers property to the fiduciary (treuhänder), and gives him instructions on its management and for whose benefit he holds the property."[88] A *treuhand* is not enforceable by the person for whom it has been established. Being a contract, it can only govern inter vivos relationships, and thus generally cannot be employed as an estate planning vehicle.[89] Finally, in the event of the fiduciary's insolvency, the *treuhand* assets become subject to the claims of his creditors, unless there is a statute that provides otherwise.[90] For how the *treuhand* is employed on the Continent in the mutual fund context, the reader is referred to Charles Rounds and Andreas Dehio.[91]

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[87]*See generally* §8.22 of this handbook (why do we need the trust when we have the corporation and the third party beneficiary contract?).

[88]Henry Christensen, III, *Foreign Trusts and Alternative Vehicles*, SH032 ALI-ABA 81, 95 (2002).

[89]*See generally* §8.22 of this handbook (why we need the trust when we have the corporation and the third party beneficiary contract).

[90]*Cf.* §8.3.1 of this handbook (trustee's personal creditors and the trustee's spouse).

[91]*Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U. J. L. & Bus. 473 (2007).