PART I

Chapter 2 In an obiter dictum in the Slis-Stroom case the Dutch Supreme Court introduced the legal construction of the trust account with separation of assets into Dutch law. This dictum has raised many questions. In the literature most attention has been focused on how the separation of assets can best be set up, but the range of application of the trust account with separation of assets has also been a topic of discussion.

The Slis-Stroom case led to rules for the notarial and legal professions which made it obligatory for notaries and lawyers to maintain legal entities (‘stichtingen’) for third-party accounts. For lawyers this obligation still applies. The professional rule for notaries has been replaced by a legal regulation of the general/universal trust account. In 2001 the Dutch Supreme Court ruled in the Koren q.q.-Tekstra q.q. case that this regulation also applies by analogy to special trust accounts held by notaries.

The most recent major positive law development concerning trust accounts was the judgment handed down in the ProCall case in 2003. In this judgment the Supreme Court limited the range of application of the trust account with separation of assets to professional groups with positions of trust in the community such as notaries, bailiffs, lawyers and accountants.

Chapter 3 Money is nearly always received and held in the form of bank deposits. According to the usual approach to claims, demand deposits constitute a claim on the bank where the account is held. The necessary intervention of a bank involved in holding funds in the form of a demand deposit means that in principle beneficiaries cannot make any proprietary claims on the money held for them by the bank. This is not a consequence of confusion in the true or spurious sense, but of the fact that

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1 According to the usual approach to current accounts no novation takes place. This means that a positive bank balance can consist of several claims. See Chapter 3, no. 33. For the sake of convenience we refer to a ‘claim’ rather than ‘claims’ against the bank.
the account is held in someone else’s name. The money is in the custodian’s bank account and this is – at least in principle – the decisive factor concerning entitlement to the balance under property law. In principle the money destined for the beneficiary which is held in a bank account is therefore recoverable by the account holder’s creditors. The reason why the beneficiary and the custodian place the money in a trust account held by the custodian rather than in the custodian’s ordinary bank account is to avoid this risk of recovery. This is the parties’ goal of the trust account. This goal can be attained with the help of various legal constructions. Regardless of its legal form, the protection which the beneficiary and the custodian aim to create with the help of a trust account can be characterized by the concept of the ‘separation of assets’. In other words, for the parties involved the goal of the trust account is the separation of assets.

In addition to the risk of recovery, depositing money with a custodian also involves the risk that the custodian might use the money for other purposes than those intended – the so-called custodial risk. In itself, the legal construction of the trust account only offers protection against the risk of recovery and not against custodial risks.

By using a trust account the beneficiary and the custodian aim to avoid the risk of the custodian’s creditors recovering their debts from the funds intended for the beneficiary. Use of a trust account may not have the additional goal of protecting the beneficiary against recovery by his or her own creditors. In spite of the use of a trust account, the funds deposited with the custodian must – possibly conditionally – be included in the recoverable assets of the beneficiary. In other words, a trust account may not lead to floating assets, i.e. assets which are not in any way subject to recovery.

Chapter 4 There are several forms of trust account. They can be distinguished on the basis of the identity of the account holder, the reason why a sum of money has been deposited with the holder of the trust account, and the group of beneficiaries served by the trust account.

Because the money being kept for the beneficiary has been deposited in the custodian’s bank account, at least in principle the custodian and not the beneficiary is the title holder of the money in its capacity as a claim against the bank. The intervention of a bank which is required for depositing money in an account thus results in an unintended separation between entitlement and interest. The entitlement to the claim belongs to the assets of one party, while the asset value is attributable to another. The intention of the parties is only to relinquish their power over the money. However, the holder of the trust account not only has power over the money, but is also entitled to it without any restrictions; not only the entitlement, but also the asset value – which is attributable to the beneficiary – is included in the custodian’s assets. In principle this imbalance must be corrected by law. The correction must consist of the beneficiary acquiring a position under property law regarding the claim, so that the asset value is not only attributable to him or her but is also included in his or her assets. In other words, the correction must lead to an appropriate distribution
of rights: the account holder has a right which gives him power over the funds in the account, while the assets of the beneficiary include a right which covers his interests in the asset value. The appropriate distribution of rights can be established on the basis of various legal constructions. All constructions aimed at realizing an appropriate distribution of rights lead to the separation of assets. In principle the aim to attain an appropriate distribution of rights means that any use of a trust account must lead to separation of assets with respect to the claim proceeding from the account. Therefore the point of departure must be that the range of application of separation of assets as regards trust accounts is universal. Neither the identity of the account holder, nor the reason why a sum of money has been deposited with the holder of a trust account, nor the group of beneficiaries for whose sake the trust account is held can provide justification for any exception to this principle. Since an account can only be regarded as a trust account – and thus as involving separation of assets – if the account is registered as being held on behalf of another party, the disclosure requirement does not stand in the way of attaching the separation of assets as a legal consequence to trust accounts either.

The justification for the separation of assets lies in an appropriate distribution of rights between the account holder and the beneficiary. It is also this ground for justification which defines the boundaries of the range of application of separation of assets, since separation of assets must be conditional on the asset value of the claim being attributable to a different party or parties than the account holder; in other words, the beneficiary must be a party other than the account holder. In relation to a trust account the term beneficiary is taken to mean: anyone who is entitled to claim payment of the balance or part of the balance of the trust account from the account holder.

The principle of a universal range of application for trust accounts with separation of assets is not too one-sidedly focused on strengthening the position of the beneficiary at the expense of the account holder’s other creditors. The creation of separation of assets is only the parties’ goal of the trust account. Separation of assets with regard to the claim proceeding from the trust account is also a way of effecting an appropriate distribution of rights. In determining the range of application of the trust account with separation of assets the important question is not whether the beneficiary must be protected against seizure of the funds by other creditors – the parties’ goal – but what should be regarded as an appropriate distribution of rights. The appropriate distribution of rights to which separation of assets leads is the societal goal of the trust account and constitutes the ground for justification of the universal range of application of the separation of assets associated with trust accounts.

The Actio Pauliana does not play any particular role in relation to trust accounts with separation of assets.
PART II

Part II focuses on the question of whether there should be special legislation for the trust account with separation of assets.

Chapter 5 Separation of assets can be realized on the basis of a property right, a legal entity, priority creditor status, or a ‘separate fund’.

The system of property rights is closed. This has two consequences. In the first place the closed nature of the system means that a claim to property can only be regarded as a property right if, on the basis of its inherent characteristics, it fits into one of the categories of property rights referred to in the legislation. Every property right has droit de suite. In other words, droit de suite is an essential consequence of the proprietary nature of a right. In the second place, the fact that the system of property rights is closed means that rights can only lead to droit de suite on the grounds of a legal provision. Moreover, the closed system of property rights goes hand in hand with a closed system of acquisition of property rights (cf. Art. 3:80).

In principle the system of legal entities is closed. This has two consequences. In the first place, the closed nature of the system means that a certain legal construction can only be regarded as a legal entity if, on the basis of its inherent characteristics, it fits into one of the categories of legal entities referred to in the legislation and if it has been set up in accordance with the requirements which apply. By virtue of Art 2:5 a legal entity, like a natural person, is an independent bearer of rights and duties. This is true of every legal entity. In other words, being an independent bearer of rights and duties is an essential legal consequence of being a legal entity. In the second place a closed system of legal entities means that an entity can only be an independent bearer of rights and duties on the grounds of a legal provision.

If there is a ‘concursus creditorum’, equality of creditors is the main rule (Article 3:277). The rules concerning priority creditor status constitute a closed system; priority exists only in the cases referred to in the legislation; see Article 3:278.

‘Separate funds’ do not constitute a legal category. The common characteristic of separate funds in terms of positive law is inaccessibility for purposes of recovery. The separate fund is inaccessible for debt collection by all or some of the title holder’s creditors. On the basis of this characteristic separate funds can be divided into two categories: separate funds in the narrow sense and separate funds in the broad sense. Separate funds in the narrow sense are completely inaccessible for purposes of recovery, while in the case of separate funds in the broad sense access is limited. By virtue of Article 3:276 a legal basis is required for both kinds of separate fund.

The capstone of the closed nature of the various systems consists of the requirements set by law for the foreseeability of the legal constructions/legal consequences which occur in these areas, also known as the ‘disclosure requirements’.

Chapter 6 The relationship between the holder of the trust account and the beneficiary is a fiduciary one. The theoretical construction in which the separation of assets with
respect to the claim proceeding from the trust account is underpinned by regarding it as a separate fund is closely related to the trust, an originally Anglo-American legal construction which also has a separate fund as one of its consequences. The construction of the trust account in which the claim constitutes a separate fund held by the account holder is referred to as the ‘trust construction’ of the trust account.

One of the elements in which Anglo-American law is fundamentally different from the continental private law systems is its division as positive law into Common Law and Equity. The Anglo-American trust owes its existence to this division. If Anglo-American trusts are classified according to the way they are created – which is the most customary classification – then four kinds of trust can be distinguished: express trusts, constructive trusts, resulting trusts and statutory trusts. In the first place the creation of a trust leads to the existence of an equitable interest for the benefit of the beneficiary. In terms of Dutch law, equitable interest in a trust can be seen as a restricted right or a right with droit de suite. In the second place the creation of a trust results in a separate fund. Trust assets are not recoverable by the trustee’s creditors. In principle a trust leads to complete inaccessibility for purposes of recovery and is thus a separate fund in the narrow sense. However, the trustee and a trust creditor may agree that the trust creditor’s claims may only be recovered from the trust assets. In that case inaccessibility for purposes of recovery is limited and the trust assets thus constitute a separate fund in the broad sense. In no circumstances does a beneficiary have recourse in respect of the trust assets.

Scottish law, which is known as a mixed legal system, does not divide positive law into Common Law and Equity. Nevertheless, a trust construction has also been developed in Scotland. Because positive law is not divided into two, the creation of a Scottish trust does not give rise to an equitable interest, or any similar entitlement, for the benefit of the beneficiary. However, the Scottish trust does lead to a separate fund. The characteristics of the separate fund of the Scottish trust are different from those of its Anglo-American equivalent. Because the beneficiaries in a Scottish trust are not granted an equitable interest or any similar entitlement, they have only a personal entitlement against the trustee. Their claim with respect to the trust assets is strengthened by the fact that they have recourse to the trust assets for that personal entitlement, with the exclusion of the private creditors. Not only the beneficiaries but also the trust creditors have recourse to the trust assets. The beneficiaries’ claims are ‘residual claims’.

If the legal relationships as a whole between the holder of a trust account and the party for which it is intended are set up like an Anglo-American trust, then in the first instance the trust account leads to a restricted right (or a right with droit de suite) on the part of the beneficiary to the funds to which the account holder has the title. If the trust account is set up like an Anglo-American trust, its second legal consequence is the creation of a separate fund in the narrow or broad sense. In no circumstances does the beneficiary of the trust account have recourse in respect of the claim. If the legal relationships as a whole between the holder of a trust account, the party who has supplied the funds in that account and the party for whom it is intended are set up in the same way as a Scottish trust, the trust account leads to a separate fund.
Only the ‘property creditors’ (cf. ‘trust creditors’) and the beneficiary have recourse to the funds in the trust account. The beneficiary’s claim is a residual claim.

If the funds in a trust account are regarded as a separate fund held by the account holder, then the trust account can be characterized as a Dutch manifestation of ‘the’ trust. Few authors have devoted explicit attention to the concrete realization of this trust-like construction. However, it is clear that those who have, have focused on the aspect of the separate fund, and not on the equitable interest to which the Anglo-American beneficiary is entitled. There is no consensus as to exactly how the separate fund should be defined. Steneker gives the most elaborate analysis of this point. His construction of the separate fund is almost identical to the construction of the separate fund to which the Scottish trust leads.

Whether the trust account with a separate fund is set up like an Anglo-American trust or like a Scottish trust, it should have a basis in legislation. The closed nature of the system of property rights means that a legal basis is required if a restricted right or right with droit de suite (cf. equitable interest) is to be created for the benefit of the beneficiary. By virtue of Article 3:276 a legal basis is required both for a separate fund in the narrow sense and a separate fund in the wide sense.

**Chapter 7** Various provisions in Dutch law reveal a preference for a different realization of fiduciary legal relationships. In the fiduciary relationships regulated by Dutch law the point of departure is usually that the beneficiary and not the fiduciary is the title holder. The construction of the trust account in which the beneficiary is the title holder of the funds in that account is referred to as the ‘administration construction’ of the trust account.

In the administration construction of the trust account the separation of assets is a consequence of the fact that the beneficiary and not the account holder is the title holder of the claim proceeding from the trust account. The entitlement of the beneficiary to the claim, the separation of assets, can be created in two ways (1st aspect). In the first place the account holder can be seen as the immediate representative of the beneficiary. The entitlement of the beneficiary to the claim is based on the fact that the beneficiary, and not the account holder, is the bank’s counterparty. The second possibility is that the beneficiary’s entitlement is a consequence of the – strictly speaking later – proprietary acquisition of the claim. When opening the account the account holder does not act as an immediate representative and the beneficiary does not become the bank’s counterparty. An important difference between these two possibilities is that in the first case the beneficiary becomes not only the bank’s creditor but also the bank’s debtor; in the second case this does not apply.

The legal realization of the separation of assets in the administration construction of the trust account (2nd aspect) with one pair of conditional beneficiaries or with several conditional or unconditional beneficiaries is not unequivocally clear. According to the Supreme Court in the Koren q.q./Tekstra q.q. case, a trust account with only one pair of conditional beneficiaries leads to the creation of a community between the two beneficiaries. However, this construction chosen by the Supreme Court has an undesirable result. The best realization of the administration construction of the
trust account with several conditional or unconditional beneficiaries entails the presence of a community. The beneficiaries are entitled to shares in the funds in the trust account. Each beneficiary has an undivided share in the funds in proportion to the amount kept in the trust account for his or her benefit. If the beneficiary’s claim to payment is conditional, then both his or her interest and his or her undivided share is also conditional.

In the administration construction of the trust account the account holder is exclusively authorized to manage the account (3rd aspect). In addition to the legal relationship between the beneficiary and the bank, in the administrative construction of the trust account there is also a relationship under the law of obligations between the beneficiary and the account holder (4th aspect). In most cases this takes the form of a mandate agreement entered into by the account holder and the beneficiary.

However the four aspects of the administration construction of the trust account are given shape, as a total concept it requires a new basis in legislation.

**PART III**

Part III discusses which legal construction would provide the best basis for a regulation of the trust account with separation of assets.

**Chapter 8** The separate fund construction is not a suitable point of departure for a legal regulation of the trust account with separation of assets. Separate funds do not constitute a legal category. Systematic classification of legal constructions regarded as ‘separate funds’ is therefore problematic.

The legal entity construction is not a suitable point of departure for a general legal regulation of the trust account with separation of assets either. The requirements for setting up legal entities cause too many dogmatic and practical problems.

The restricted rights construction is the most appropriate way to realize separation of assets with respect to the claim proceeding from the trust account. The restricted right is one of the core concepts in Dutch property law and is therefore easy to use. Moreover, it is only the restricted right construction that provides an adequate legal basis for the realization of an appropriate distribution of rights – the societal goal of the trust account and the justification of the virtually universal range of the separation of assets. In technical legal terms, neither the separate fund construction nor the legal entity construction leads to a *distribution* of rights; they only lead to separation of assets, the parties’ goal of the trust account. They only ensure that the funds in trust account are not actually recoverable by creditors, or only recoverable by certain creditors. In these constructions, unlike in the restrictive right construction, there is no recoverable right to the beneficiary’s claim as a counterpart to the non-existent or restricted availability of the funds for seizure.

The restricted-right construction can be applied in two ways. On the one hand an appropriate distribution of rights vis-à-vis the funds in the trust account can be attained by granting the beneficiary a restricted right. On the other hand, the benefici-
Summary

ciary may be regarded as the title holder of the claim, while a restricted right is granted to the account holder. It is on this second construction that the two existing legal regulations of the trust account are based.

The best way of obtaining separation of assets is to grant the beneficiary a restricted right to the claim to which the account holder is entitled as title holder. Because of its dogmatic and pragmatic advantages this construction is preferable to the construction on which the two present legal regulations are based. These regulations should be adapted to a newly formulated universal regulation based on the construction outlined above.

Chapter 9

The beneficiary’s restricted right should be defined in such a way that it results in an appropriate distribution of rights vis-à-vis the funds in the trust account. This means that the legal regulation of the trust account must ensure that the asset value of the claim is regarded as being completely included in the beneficiary’s assets. The legislator can achieve this goal by introducing a new restricted right, termed ‘right to a bank deposit’. The core of the proposed Trust Accounts Act (I) would consist of granting the beneficiary of the trust account a right to funds deposited in a bank account.

The primary meaning of the right to a bank deposit is that the beneficiary/holder of the restricted right is entitled to the maintenance of the sum deposited in the trust account for his or her benefit. It also covers the beneficiary’s right to payment of this sum by the account holder who is responsible for the beneficiary’s interest in the account if and as soon as the payment is due. The regulation is to be formulated in such a way that the sum covered by the right to a bank deposit corresponds by definition with the beneficiary’s interest in the asset value. In this way, on the one hand the asset value is completely included in the beneficiary’s assets, but on the other hand no more is included in those assets than is justified by the beneficiary’s interest in the claim. Because the core meaning of the right to a bank deposit is that the beneficiary is entitled to the maintenance of the sum deposited in the trust account for his or her benefit, this right also entails a passive obligation on the part of the account holder, namely that the account holder may not tamper with the sum of money deposited in the trust account for the benefit of the beneficiary. The right to a bank deposit is unlike most restricted rights in that its focus is on an obligation on the part of the account holder (the principal title holder) rather than on a set of powers granted to the party with the restricted right. For this reason the right to a bank deposit is referred to as a burden, so that this regulation is in line with the regulation of easements (Article 5:70ff.), in which the main focus is also on an obligation on the part of the principal title holder.

Chapter 10

An appropriate distribution of rights with respect to the claim proceeding from the trust account can also be realized by granting the beneficiary an ipso jure right of pledge to the claim. The core of the proposed Trust Accounts Act (II) entails a right of pledge being granted to the beneficiary of the trust account.
Because of the title of the account, the proposed right of pledge to the claim proceeding from a trust account is a public right of pledge. This right of pledge is more restricted than the right of pledge which can be attached to a claim by virtue of Article 3:227ff. The beneficiary only has the power to recover the funds in the trust account if the account holder has failed to meet his obligation to pay the beneficiary. Moreover, the beneficiary may recover only that portion of the funds in the trust account which corresponds to the amount of his or her claim for payment against the account holder, to the extent that this claim against the account holder is covered by the right of pledge.

Although at first sight it may seem a more obvious solution to make use of the already existing right of pledge for the trust account regulation, it would in fact be preferable to introduce Trust Accounts Act (I), in which the beneficiary is granted a right to a bank deposit. A serious practical drawback of the right-of-pledge construction is that the bank might be confronted with an unknown beneficiary. This is not the case in the right-to-a-bank-deposit construction. Moreover, in conceptual terms the right-to-a-bank-deposit construction fits in better with the justification of the separation of assets with respect to the funds in a trust account.

According to the future legislation recommended here, the beneficiary of a trust account will have a restricted right to funds kept in a bank account, and this right will be based on the claim which proceeds from that account.