

Swiss “*Fiducie*” vis-a-vis French “*Fiducie*” (Terminological “Coincidences”)

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Abstract

“Trust” has always been regarded as the sole possession of the common-law world. However, the popularity of this legal institution has greatly increased during the last decades. Nowadays, under the influence of the globalizing processes „trust-like devices” are appearing in many civil law jurisdictions or are under active consideration in the economic spheres of some countries. The given paper deals with the comparative analysis of the Swiss and French “fiducie”-s (contemporary trust-like mechanisms of Switzerland and France) via putting emphasis on the major similarities and differences of these institutions. The Swiss fiduciary transactions developed in 1893 in response to the practical necessity. Initially, these transactions aimed at the transference of ownership as security for a debt. However, in 1905 they were arranged for fiduciary management. Nowadays, the Swiss “fiducie” considers the transference of assets by a natural or a legal person to the fiduciary (another natural or legal person), who performs management tasks for the purpose of serving the creator’s or beneficiary’s interests. The Swiss law differentiates several forms of “fiducie” (“fiducie-gestion”, “fiducie-libéralité” and “fiducie-sûreté”), which have conceptual counterparts (“coincidences”) in the French legal system. Characterization of terminological and semantic “coincidences”, their separation and precise description – this is the major task of the given paper and one of the urgent questions of the contemporary legal studies.

1. Introduction

“Trust” has always been regarded as the sole possession of the common-law world. However, the popularity of this legal institution has greatly increased during the last decades. Nowadays, under the influence of the globalizing processes „trust-like devices” are appearing in many civil law jurisdictions or are under active consideration in the economic spheres of some countries.

The given paper deals with the comparative analysis of the Swiss and French “fiducie”-s (contemporary trust-like mechanisms of Switzerland and France) via putting emphasis on the major similarities and differences of these institutions.

2. “Fiducie” - the Swiss “Trust-like” Mechanism of the 21st Century

During the 20th century the Swiss law recognized “trust-like” device “*Treuhand*”, which considered three major elements: “*Treugeber*” (a settler), “*Treuhänder*”/“*Treuhaender*” (a trustee) and “*Begünstigter*” (a beneficiary). On 1 July 2007 Switzerland ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition and the era of the emergence of Swiss “fiducie” began. The prominent scholars L. Thevenoz and J. Dunand give us a precise description of this phenomenon: “Swiss law, like other legal systems, recognizes several institutions which tend to distinguish between the legal owner of an asset (the owner of an object, or holder of a receivable) and the beneficial owner. One such institution, which was not taken into account in the drafting of the Civil Code (1907) (1) or the Code of Obligations (1881, 1911), is the *fiducie* (in German, *Treuhand*)” (Thévenoz L., 1999).

It’s worth mentioning, that the existence of the Swiss “*Treuhand*” caused the controversy between the scholars of the 20th century. It seemed, that the emergence of the “fiducie” ended these debates. However, the 21st century brought “the wind of changes” in the Swiss legal and terminological systems. A. Peyrot described this phenomenon in the following way: “there is no such thing as a Swiss trust” (Peyrot A., 2013). If we take into consideration A. Peyrot’s words, than how can we interpret the “fiducie”? Can it be considered as the Swiss “trust” or an innovative “trust-like” mechanism of the 21st century?

It’s a well-known fact, that “a fiducie is a combination of legal transactions relating both to the law of obligations (it is a contract) and to the law of property (it is a disposition of property). The creator undertakes, by agreeing to a contract (the *convention de fiducie*), to transfer the full legal title to certain choses or rights (the fiduciary property), while the fiduciary undertakes to keep and manage ... and to restore the fiduciary property (either the original property or some

other property acquired through reinvestment of the proceeds from sale of the original property) on expiry of the agreement" (Thévenoz L., 1999). Therefore, the major elements of the Swiss fiduciary relationships can be presented in the following way:

Le fiduciaire (der Treugeber) – a natural or a legal person, which transfers the property;

- **Le fiduciaire** (der Treuhänder) – a transferee, the manager of the transferred property. In the majority of cases, "**fiduciaire**" works for "**fiduciant**". However, in certain cases, "**fiduciaire**" performs the managerial tasks for the benefit of a beneficiary.

A fiduciary relationship is usually established under the umbrella of the "unity of patrimony". "Swiss case law has explicitly rejected the notion of a division of ownership between an external title for the trustee and an internal title for the settler or third-party beneficiaries. The property belongs indivisibly to the trustee... the principle of "unity of patrimony" prevents the formation of a separated fund within the estate of the trustee" (Peyrot A., 2013). Moreover, the Swiss law recognizes the following types of "**fiducie**":

- The so-called "**fiducie-gestion**" (or *fiducia cum amico*) - a "**fiducie**", which is set up for the purposes of management;
- "**Fiducie-sûreté**" (or *fiducia cum creditore*) – it "is used to create a security interest over an asset for the benefit of the beneficiary, to which he acquires full legal title to be restored to the creator only after the latter's debt has been paid in full" (Thévenoz L., 1999);
- "**Fiducie-libéralité**"- it is usually considered as a special form of "**fiducie-gestion**", because it may be used to organize the devolution of the property over time. However, **fiducie-libéralité** "has not really established itself in practice, chiefly owing to limitations of which some are juridical (e.g. the regulations governing the reserved portion of patrimony) and others dogmatic (e.g. the notion of patrimoine) (Thévenoz L., 1999).

Therefore, the study of the Swiss Law reveals, that the innovative institution "**fiducie**" can be treated as a trust-like device, which shares some characteristics of the Anglo-American "trust", but differs from it. The major difference lies in the fact, that the Swiss case law explicitly rejects the notion of the division of ownership between an external title for the trustee and an internal title for the settler or third-party beneficiaries. However, the terminological study of the word "**fiducie**" enables us to suppose, that it derived from the Latin word "**fiducia**", which means "an act based on trust" (Fiducia).

3. "**Fiducie**" - the French "Trust-like" Mechanism of the 21st Century

"On 7 February 2007 the French Parliament adopted a new law instituting the "**fiducie**" as a creature of the French legal system. On 19 February 2007, President Jacques Chirac promulgated this new law: the **fiducie** proudly left the quotation marks, and became a reality" (Matthews P., 2007). This tailor-made institution drew upon "the Roman concept of *fiducia* and the experience of analogue institutions from other civil law jurisdictions such as Luxembourg, but also from the common law trust" (Koessler J., 2012). Article 2011 of the newly adopted law defined "**fiducie**" as: "a transaction by which one or several settlers transfer assets, rights or security interests, or a totality of assets or of security interests, present or future, to one or several fiduciaries who by maintaining them separately from their own patrimony, act in furtherance of a determined objective to the benefit of one or several beneficiaries" (Grimaldi M., 2011). The given definition clearly indicates to the major elements of entrusting relationships:

- Settler (**constituant**) – a legal entity, which creates a trust.
- Trustee (**fiduciaire**) – a restricted concept of the French law, which comprises credit institutions, insurance companies and advocates (including English solicitors and barristers, but not notaries). Fiduciaries have many rights and responsibilities. Hence, they can be removed if the interests of beneficiaries are in danger.
- **beneficiaries (bénéficiaires)** – it's a well-known fact, that "a **fiducie** is null and void if it is created with the sole intention of benefiting the beneficiary" (Staub A., 2007). Despite this fact, a concept of beneficiary exists. Moreover, "the **constituant** or the **fiduciaire** may be the beneficiary or one of the beneficiaries of a contract of **fiducie**" (Matthews P., 2007).

The law of 2007 was followed by the Law of 4 August 2008 and an order of 30 January of 2009, which brought some innovations in the world of the French "**fiducie**". Consequently, nowadays, a settler is represented by a natural person or a legal entity, a lawyer (**avocat**) is included in the list of possible fiduciaries and the maximum duration of "**fiducie**" is 99 years (instead of previously existed 33 years). It should also be noted, that "in France and Luxemburg the core of the concept of trust is *patrimony*" (Watanabe H.). Prof. H. Watanabe characterizes "*patrimony*" as a counterpart of the French "*patrimoine*" and gives the following description:

"Patrimony is a concept that represents the aggregate of an individual's property (the sum of his/her assets and liabilities). Every individual ... cannot have more than one patrimony. However, the beneficiary of a trust has a *special patrimony* which is segregated and independent from his/her patrimony in general terms. Such special patrimony is a trust property" (Watanabe H.).

It's worth mentioning, that the French legal reality does not present the term "patrimoine special". Hence, it distinguishes the term "*patrimoine d'affectation*", which "refers to the idea central to the contract of the *fiducie*, that a new patrimony has been created which is entirely separate both from that of its creator (the *constituant*) and from that of its owner (the *fiduciaire*) and is instead to be dedicated to (*affecté*) the purposes or persons who are the objects of the contract of *fiducie*" (Matthews P., 2007). The scholars present different translations of the phrase "*patrimoine d'affectation*" / "*patrimoine d'affectation autonome*", for instance, J. Koessler believes, that it means "an autonomous estate by appropriation" (Koessler J., 2012), while P. Matthews indicates, that it ought to be nominated as a "dedicated fund" (Matthews P., 2007). We believe, that "*patrimoine d'affectation*" must be translated as "estate by appropriation", because, terminologically, the English word "*appropriation*" corresponds to the French term "*affectation*".

Therefore, nowadays, "*fiducie*" can be regarded as a contract by which a natural person or a legal entity transfers assets to "*fiduciaire*", who holds and manages it for the benefit of one or more beneficiaries. This process can be called "a transfer for purpose", which causes losing of *constituant's* ownership rights and acquisition of a contractual right. Specific emphasis must be put on the fact, that "*fiducie*" stipulates the emergence of several important changes in the French legal reality:

1. it brings to the end the idea established by the Revolution of 1789, which indicates, that the ownership of property cannot be divided into various rights.
2. it facilitates the isolation of assets in an autonomous entity, which is kept separately from the estate of "*constituant*" i.e. the segregation of assets takes place;
3. it stipulates a temporary transfer of the property.

It's worth mentioning, that the French juridical world presents three types of "*fiducie*": "*fiducie-sûreté*", "*fiducie-gestion*" and "*fiducie-libéralité*". "The first one is applied for purpose of securing the performance of an obligation. The second one is an instrument of syndicated loans management" (Lyczkowska, K. (2010), while "in the *fiducie-libéralité* [fiduciary gift], the transfer of ownership is driven by the will of the settler to grant rights to a third-party by the intermediary of the fiduciary, who, in turn, will transfer to the third-party, donor or legatee, the assets which he shall have received" (Grimaldi M., 2011). It's worth mentioning, that in case of a "*fiducie-gestion*" "the wealth remains with the settler; in case of the *fiducie-libéralité*, it passes to the beneficiary; in case of the *fiducie-sûreté*, it is the beneficiary who is enriched by its amount, and not the fiduciary ownership which of course helps to ensure the payment of the debt but without adding any supplemental wealth" (Grimaldi M., 2011).

Therefore, the innovative French institution "*fiducie*" can be treated as a trust-like device, which shares some characteristics of Anglo-American "trust", but differs from it. Moreover, the terminological study of the word "*fiducie*" enables us to suppose, that it derived from the Latin word "*fiducia*", which means "an act based on trust" (Fiducia).

4. Analysis

All the above mentioned enables us to draw the following conclusions:

- In the 20th century the Swiss "trust-like" device was denoted by the term "**Treuhand**", which was accompanied by the following terminological units "**Treugeber**" (a settler), "**Treuhänder**" / "**Treuhaender**" (a trustee) and "**Begünstigter**" (a beneficiary). On 1 July 2007 Switzerland ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition. Therefore, the 21st century became the era of the emergence of Swiss "**fiducie**". This fact was followed by the certain terminological changes - "**der Treugeber**" turned into "**le fiduciant**", while "**der Treuhänder**" was replaced by "**le fiduciaire**". However, these alterations did not contradict to the parallel use of terms related to "*fiducie*" and "*Treuhand*". Direct indication of this fact could be found in D. Hayton's citation - "a 1995 conference of the Swiss Lawyers' Society revealed a consensus for... consolidating the features of the "*fiducie*" or "*Treuhand*", one of the Swiss trust-like legal structures" (Hayton D., 2002);
- The profound study of the French and 21st century Swiss "trust-like" devices reveals, that the French trusting relationships differentiate three major elements: a settler (*constituant*), a trustee (*fiduciaire*) and beneficiaries (*bénéficiaires*), while the Swiss law presents only "*fiduciant*" and "*fiduciaire*";
- The French law makes distinction between three major types of "**fiducie**" ("**fiducie-libéralité**", "**fiducie-gestion**", "**fiducie-sûreté**"), while the Swiss legal system differentiates only "**fiducie-gestion**" and "**fiducie-**

sûreté". However, it's worth mentioning, that in Switzerland "*fiducie-libéralité*" is usually considered as a special form of "*fiducie-gestion*", which has not established itself in practice. These facts directly indicate, that two quite distinctive languages - Swiss and French - share some legal terms (the so-called terminological "coincidences");

- The French "*fiducie*" and the Swiss "*fiducie*"/"*treuhand*" must be considered as the obligational models of the "*trust*". They represent "largely bilateral relationships between the settler and the trustee and trustees here typically do not have as much discretion as their English counterparts" (Lau M., 2011);
- A prominent difference between the French and Swiss laws can be vividly seen during the process of the property transference. In France the core of the concept of trust is patrimony ("*patrimoine*"). The Swiss case law explicitly rejects the notion of the division of ownership between an external title for the trustee and an internal title for the settler or third-party beneficiaries. Therefore, the transferred property belongs indivisibly to the trustee.

5. Conclusions

The above given comparative analysis reveals the major characteristics of the innovative French and Swiss "trust-like" devices. They do not represent an ideal reflection of the original model. However, we can freely speak about the tendency of the further improvement of "trust-like" mechanisms. Timely amendments to the civil codes will facilitate the reconstruction of the newly established institutions, while the above carried out comparative analyses of the French and Swiss "trust-like" devices will serve as a useful tool of these processes. They will facilitate the integration into the entire European legal sphere and will stipulate correct expansion of the "*trust*" beyond "the traditional geographical boundaries of the "trust-proper" (Thévenoz L., 2009).

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