

The Luxembourgish “Fiducie” and the Georgian “Trust” (Terminological Peculiarities)

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Abstract

The world has been constantly developing throughout the centuries. However, the pace of changes has been almost doubled during the last decades. The process of globalization has comprised the whole world. Its orientation on the tendency of penetration, internationalization and rapid development has changed the contours of different spheres of life. The given paper studies innovative processes of the European legal sphere. It is oriented on the discussion of the formation of the Luxembourgish (capitalistic) “fiducie” and the Georgian (“almost” capitalistic) “საკუთრების მონდობა” under the influence of Anglo-American “trust”. The original form of “trust” appeared at the end of the Middle Ages – in the epoch, when the real estate was the principle form of wealth. In the beginning of the 19th century, the given institution emerged in the American business sphere and stipulated the appearance of “trust-like” mechanisms throughout the world. Hence, the implementation of these devices was contradicted by the traditions of continental law-governed countries - the duality of ownership seemed almost unacceptable to the “rigid” European jurisdictions. Despite such circumstances, during the recent decades, the process of globalization has facilitated the popularization of the utilization of the institution of “trust”. Its alternatives appeared in capitalistic and “almost” capitalistic countries in different forms and variations. Development of these variations and their terminological nomination is an urgent issue and the major focus of the given research.

1. Introduction

The globe has been constantly developing throughout the centuries. However, the pace of changes has been increased during the last decades. The process of globalization comprised the whole world. Its orientation on the tendency of penetration, internationalization and rapid development changed the contours of different spheres of life. Innovative processes appeared in the European legal sphere and throughout the globe.

Nowadays, scholars pay more and more attention to the implementation of the European alternatives of Anglo-American “trust”, which originated at the end of the Middle Ages – in the epoch, when the real estate was the principle form of wealth. However, the historical data specifies, that the early trust relationships existed even in the ancient times.

2. From the History of Trust Relationships

In 1790 B.C. the Code of Hammurabi presented “rules of law governing business conduct, or fiduciary considerations, for the behavior of agents (employees) entrusted with property” (Atherton S. C., Blodgett M. S., Atherton Ch. A., 2011). The roots of the fiduciary principles are vividly seen even in the Old and New Testaments:

“Exodus 22:6-14 states the laws of guardianship, whereby the level of responsibility for any loss varies in relation to whether the custodian is being paid or has use of the item under care” (Silber, K., 2011).

“Luke 16:1-13 is about a steward who, expecting to be fired, curries favor with his master’s debtors by allowing them to repay less than their full debts” (Silber, K., 2011). This is a parable, which has been interpreted as an illustration of a precept against serving two masters.

The relationships similar to “trust” were met in Roman law. During the 1st- 3rd centuries A.D. Roman legal system recognized **fiducia contracts** under which an individual held property in safekeeping or acted on another individual’s behalf. The law acknowledged three major types of devices: “**fiducia cum amico (contracta)**”, “**fiducia cum creditore**”, “**fideicommissum**”. The first represented the safe custody, the second was the form of proprietary security, while the third was used during testamentary relationships.

The term “**fideicommissum**” originated from the “past part. of **fideicommittere** to bequeath in trust” (Fideicommissum). It implied the obligation of transference. This obligation “was not created by words of legally

binding force (*civilia verba*), but by words of request (*precativa*), such as “*fideicommitto*”, “*peto*”, “*volo dari*”, and the like” (Smith W., 1875).

In contrast to “*fideicommissum*”, “*fiducia cum amico contracta*” was not a testamentary disposition. It was regarded as “a simple agreement concluded between *fiduciant* (settlor) and *fiduciarius* (*amicus* – a friend acting as a “trustee”). A *fiduciant* transferred his estate to the *fiduciarius* who was obliged to use it according to the terms of the agreement and subsequently to give it back to the fiduciant” (Stec P., 2003). “*Fiducia cum amico*” was a mere safe custody, which ensured the management of the ownership of Roman citizens, who travelled abroad. In certain cases, it served the purposes of a hire and a loan.

The third type of a trust-like device of Roman law was “*fiducia cum creditore*”. It was used to secure a loan. Under “*fiducia cum creditore contracta*” a “*fiduciant* (secured debtor) transferred *dominium* (full ownership) to *fiduciary* (secured creditor) on condition that fiduciary would transfer it back when the debt was paid” (Mangatchev I. P., 2009). Initially, Roman law did not obligate the trustee to act according to the agreement and the settlor was not legally protected. However, the later Roman law gave some degree of protection to *fiduciant*, “who could also reacquire ownership of his estate by a peculiar form of *usucapio* called *usureceptio fiduciae causa*” (Stec P., 2003).

Supposedly, the data of the Code of Hammurabi, the Old and New Testaments and Romanian law revealed the necessity of the creation of the “real trust”, which actually originated in the English Common law during the Middle Ages. This irreplaceable institution derived from a system employed in that era known as “*use of land*” or “*uses*”. The history of the emergence of “trust” states, that during knights’ lengthy absence, their estates needed protection and preservation. For that reason, each knight transferred his legal ownership to a third party (a close friend) under a special agreement – the estate ought to be transferred back upon the knight’s return. This transfer empowered the transferee to manage the “acquired” ownership and to enforce the rights of the estate against all parties while the owner was away. However, in certain cases, when the transferors came back, they found difficulties in returning their legal rights. The legal disputes between “acting administrators” and owners were resolved by the King. Later the King’s power was transferred to the Lord Chancellor. In the 15th century the function of resolving the disputes was delegated to the Lord Chancellor’s Court. The necessity of the creation of new legal norms emerged and the establishment of a new institution (which was later called a “*trust*”) was facilitated.

The legal mechanism of the early “trust” seems similar to the principle of the Roman “*fiducia cum amico contracta*”. Both institutions ensured the management of the ownership of persons, who travelled abroad. They were based on friendship – a transferee was “*amicus*” (a friend acting as a “trustee”). The legal relationships between a transferor and a transferee ended after the return of the former, because an estate was given back to the transferor. This fact clearly indicates, that the Roman law could play a significant role in the formation of the Common law “trust” mechanism.

However, the law of the Middle Ages was quite remote from the modern practice: “the primary purpose of the trust was to facilitate the transfer of freehold land within the family. The law governing the transmission of freehold land was deeply afflicted by feudal restrictions meant originally to concentrate landholdings for military and related advantages” (Langbein J. H., 1995). Entrusting the land to a trustee defeated feudal restrictions. Therefore, the “trust” enabled landowners to provision their wives and children. The beneficiaries lived on the land and managed it, while the trustees of these primary trusts were mere stakeholders with no serious powers of management: “the trustees’ duties were to permit the [beneficiary] to occupy the land and enjoy the rents and profits, to defend the title at law, and to convey the land as directed by the [beneficiary]” (Langbein J. H., 1995).

3. Contemporary Trust Relationships and Their European Modifications

Nowadays, a “trust” is generally defined as a juridical agreement under which a “settlor” (“grantor”) can transfer the property to a “trustee”, who has to exercise and manage it for the benefit of a “beneficiary” – an equitable and a beneficial owner of the property. “Trusts” can be created *inter vivos* or after the death of the settlor (the so-called “testamentary trust”).

The study of the development of the contemporary legal systems reveals that the “trust-like” devices have appeared in different European countries during the last decades. Their emergence was facilitated by the popularization of the American capital market, which established the so-called “business trust” in the beginning of the 19th century. The contemporary trust-like devices do not represent a faithful reflection of the original one. The given paper deals with the comparative analysis of the Luxembourgish “*fiducie*” (“trust”) and the Georgian “*საკუთრების მინდობა*” (*sakutrebis mindoba* – “trust”) via putting emphasis on the major similarities and differences of these newly created institutions.

It's a well-known fact, that the civil law countries are characterized by the lack of the concept of the duality of ownership. Therefore, it has been accepted, that the establishment of the institution of "trust" was almost impossible in Luxembourgish or in other continental law countries. However, on 19 July 1983 Luxembourg adopted the Grand-Ducal decree related to "*fiducie agreements*" of credit institutions, which was replaced by the Law of 27 July 2003 related to Trusts and Fiduciary Contracts. Therefore, the Law of 2003 presented the concept of "*fiducie*" ("trust") via giving the following definition of fiduciary relationships:

"The Luxembourgish *fiducie* is a contract whereby a person, the principle (or *fiduciant*) agrees with another person, the *fiducie* (the agent or *fiduciaire*), that, subject to the obligations set forth by the parties, the *fiducie* becomes the owner of assets which shall form a *fiducie* estate" (Partsch T., Houet. J., 2012).

A fiduciary contract is usually created in a written form. It indicates to the transfer of ownership and responsibilities of "*fiduciaire*". The latter cannot be an individual. It can only be represented by the legal entity: "a credit institution, an investment firm, an investment company with variable or fixed share capital, a securitisation company, a fiduciary representative acting in the context of a securitisation transaction, a management company of common funds or of securitisation funds, a pension fund, an insurance or reinsurance undertaking or a national or international public body operating in the financial sphere" (Law of 27th July 2003). The Luxembourgish law recognizes the existence of a foreign agent too. It can be represented by the entity subject to regulatory supervision, located in the EU or EEA (the European Economic Area).

A fiduciary relationship is usually established for the purpose of the creation of the so-called "*patrimoine fiduciaire*" (*fiducie* estate), which is separated from the personal estate of the agent. The "*fiduciaire*" has the obligation to keep accountings for the personal estate separate from the accountings for "*patrimoine fiduciaire*". The Luxembourgish law recognizes the following types of "*fiducie*":

- The so-called "*fiducie-gestion*" - under this agreement, "*fiduciant*" transfers capital or assigns assets to "*fiduciaire*", which manages them for a definite period of time. During this period "*fiduciaire*" deposits "cash in appropriate currencies, purchase and sale securities, takes stakes in companies, exercises all the rights attached to the assets..." (Partsch T., Houet. J., 2012). The transactions are carried out at the risk of the principle. The creation of "*fiducie-gestion*" aims at the efficient management of the transferor's fortune. However, after the completion of the planned period, an agent returns the entrusted assets to the "*fiduciant*" or the person selected by him/her;
- The so-called "*fiducie-libéralité*" - under this agreement, the principle transfers assets to the agent, who is responsible for their management for a certain period of time (in cases of a testament or a donation). "During the *fiducie*, the income generated by the assets can be capitalized or transferred either to the principle, or to a third party. On termination the agent will provide the assets to the final beneficiary" (Partsch T., Houet. J., 2012);
- The so-called "*fiducie-sûreté*" - this type of an agreement is used for security purposes. "*Fiduciant*" assigns the legal title of assets to "*fiduciaire*" for securing his/her obligations towards it. After the fulfillment of obligations, the assets are transferred back.

Therefore, a study of the Luxembourgish Law reveals the similarities and differences of the Luxembourgish "fiducie" and the Anglo-American "trust". Major differences between these legal institutions can be presented in the following way:

1. The "trust" divides trustor's ownership into the property of a trustee and the property of a beneficiary - an equitable interest, while "*fiducie*" divides and at the same time, separates the trust property from a trustee's individual property. Therefore, the Luxembourgish law discusses a trust property ("*patrimoine fiduciaire*") and a trustee's individual property as two separate units;
2. The creation of a "trust" requires a trustor's intent presented orally or in a written form. For the creation of a "*fiducie*", a "*fiduciant*" enters into a written contract with a "*fiduciaire*";
3. The "trust" can be subject to a *mortis causa deed*, while only one type of "*fiducie*" - "*fiducie-libéralité*" - deals with the cases of a testament or a donation. All the other fiduciary contracts are created *inter vivos*.

During the end of the 20th century and in the beginning of the 21st century, the modifications of the institution of "trust" appeared in many civil law jurisdictions. Among them is the Republic of Georgia. At the end of the 20th century Georgia adopted a new civil code, which significantly differed from the Soviet legislation (for several decades Georgia had been governed by the Soviet law). The newly established civil code included new concepts and terminological units indicating to the modernization of Georgia's legislation. One of the newly appeared Georgian institutions was "*საკუთრების მინდობა*" (*sakutrebis mindoba*), which has been regarded as a modification of Anglo-American

"trust". A precise study of the Georgian "საკუთრების მინდობა" reveals some similarities with its Common Law "predecessor".

Articles 724-729 of "The Civil Code of Georgia" present the essence of "trust" and the parties participating in trust relationships: a "trustor" (საკუთრების მიმწოდობი /sakutrebis mimndobi) and a "trustee" (მინდობილი მესაკუთრე / mindobili mesakutre):

- "საკუთრების მიმწოდობი" is a person or a legal entity which creates a "trust". At the same time, it is a person or a legal entity which is a beneficial owner of the property;
- "მინდობილი მესაკუთრე" is a person or a legal entity which holds legal title to the trust property.

Trust relationships take a form of a "trust contract" (საკუთრების მინდობის ხელშეკრულება/ sakutrebis mindobis khelshkruleba). Under this agreement the principle (trustor) transfers the property to the trustee, who accepts and manages it in compliance with the principle's interests (The Civil Code of Georgia, 2002). The specificity of the Georgian "საკუთრების მინდობა" presents the right of ownership in a "split" form: some rights of the owner – the management and the disposition of the property – belong to one person (trustee), while other rights – receiving income and profit from the exploitation of the property – belong to another (trustor) (The Commentary of the Civil Code of Georgia, 2001). The motive of a "trust contract" can be the owner's wish to delegate the authorities of management for the purpose of making profit from the exploitation of the property. In any case, the ownership must be entrusted in accordance with the trustor's interest. This interest may imply: making profit, increasing the property, managing and maintaining the ownership, etc.

A precise study of Georgia's Civil Code reveals, that a trust contract must be created only in a written form. Oral trusts are unacceptable. The ownership is usually managed by the trustee at the risk and expense of the "trustor". In terms with third persons, a trustee enjoys the owner's rights:

1. "The trustee is bound to manage the property held in trust in his own name, but at the expense and risk of the trustor;
2. The trustee enjoys the owner's entitlement in relation with third persons. If the trustee, contrary to the interests of the trustor, is not acting in the same good faith as in managing his own affairs, he (she) will be obligated to compensate the damage thereby arisen" (The Civil Code of Georgia, 2002).

Although the Georgian law acknowledges only *inter vivos* trust contracts, some peculiarities of trust relationships are detected during "testate succession". According to Article 1383 of "The Civil Code of Georgia": "a testator may bind an heir to perform some obligations at the expense of the estate in favor of one or more persons" (The Civil Code of Georgia, 2002). The given testamentary obligation is called a "legacy" ("legati" - *legati*), while a person performing it, is denoted by the term "legatee" ("legatari" - *legatari*). The objects of the legacy may comprise:

- "transfer of things from the estate to the recipient of the legacy - into ownership, for use or for other right in rem;
- purchase and transfer of a thing, which is not included in the estate;
- performance of a specific work;
- service, etc." (The Civil Code of Georgia, 2002).

Therefore, the study of the new Civil Code of Georgia reveals the similarities and differences of the Georgian "საკუთრების მინდობა" and the Anglo-American "trust". The major differences between these legal institutions can be presented in the following way:

1. The creation of a "trust" requires a trustor's intent presented orally or in a written form, while for the creation of "საკუთრების მინდობა", a trustor ("საკუთრების მიმწოდობი") enters into a written and notarized contract with a trustee ("მინდობილი მესაკუთრე");
2. The Anglo-American "trust" can be subject to a *mortis causa deed*, while the Georgian "საკუთრების მინდობა" is never subject to it. Moreover, the Georgian legal system is not familiar with the concept of a "testamentary trust". However, some peculiarities of trust relationships are detected during the "testate succession";
3. The "trust" nominates beneficial owners of the property ("beneficiaries") or simply implies the delegation of authorities in behalf of the "trustor" himself (herself). "საკუთრების მინდობა" considers only a simple delegation of authorities of management in behalf of "საკუთრების მიმწოდობი" and underlines the fact, that the Georgian legal system identifies the concept of "trustor" with the concept of "beneficiary". Moreover, the term "beneficiary" has no Georgian equivalents.

4. Conclusions

Finally, all the above mentioned enables us to conclude, that nowadays, trust-like devices are detected in capitalistic and "almost" capitalistic civil law jurisdictions. A precise study of the Luxembourgish "*fiducie*" and the Georgian "*საკუთრების მინდობა*" reveals the following regularities:

- The Anglo-American "trust" consists of three major elements: the owner of the property ("trustor"), the transferee ("trustee") and the beneficial owner of the property ("beneficiary"). The Georgian and Luxembourgish legal systems identify the concept of "trustor" with the concept of "beneficiary". Therefore, the term "beneficiary" has no Luxembourgish and Georgian equivalents;
- The creation of Anglo-American "trust" requires a trustor's intent presented orally or in a written form, while for the creation of "*fiducie*" and "*საკუთრების მინდობა*", a trustor enters into a written contract with a trustee (the Luxembourgish "*fiduciaire*"; the Georgian "*მინდობილი მესაკუთრე*"). The oral forms are not recognized by the Luxembourgish and Georgian legislations;
- The Luxembourgish law recognizes the following types of "*fiducie*": "*fiducie-gestion*", "*fiducie-libéralité*" and "*fiducie-sûreté*". The Georgian law is not familiar with such categorization of "trust-like" devices;
- The Anglo-American "trust" can be subject to a *mortis causa deed*, while only one type of the Luxembourgish "*fiducie*" - "*fiducie-libéralité*" – deals with the cases of a testament or a donation. All the other fiduciary contracts are created *inter vivos*. The same can be said about the Georgian "*საკუთრების მინდობა*". "The Georgian Civil Code" recognizes only some peculiarities of trust relationships during the "testate succession".

Therefore, the Luxembourgish and Georgian laws have already indirectly allowed mechanisms similar to the Anglo-American "trust". However, it's obvious, that the resulting instruments do not present a faithful reflection of the original model. Further researches in the field of the development of "trust-like" mechanisms throughout Europe will fulfill the picture of the expansion of the utilization of "trust" and vividly depict the impact of globalization on the legal spheres of different countries. Therefore, the given study may play an important role in the solution of one of the most urgent problems of today's world.

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