

## GERMAN “TREUHAND” VIS-Á-VIS AUSTRIAN “TREUHAND” (TERMINOLOGICAL STUDY)

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### Abstract

The trust is an “equitable” concept, which was initially administered by the Court of Chancery. It historically developed in the English common law and gradually crept into some systems of civil law jurisdiction. However, the civil legislations have not fully acknowledged the common law mechanism and created approximate “counterparts” – the so-called trust-like mechanisms. The given paper makes an attempt to study innovative processes of the European legal system. It highlights the peculiarities of the “trust-like” mechanisms of the German and Austrian laws. The major emphasis is put on the terminological elements denoting different components of entrusting relationships. The investigation shows, that on the one hand, some Austrian terms (*Treuhand*, *Stiftung*, *Ermächtigungstreuhand*, etc.) coincide with the German lexical system and on the other hand, they are similar to the terms of the Roman law.

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**Keywords:** Law, terminology, Treuhand, trust, trust-like device

### Introduction

The trust is an “equitable” concept, which was initially administered by the Court of Chancery. It historically developed in the English common law and was based on the law of equity. However, the contemporary view-point states, that the “trust” is a legal device which is not exclusively found in common-law systems. “Numerous civil-law or mixed-law systems have institutions which although may not make use of the distinction between common law and Equity (which is unknown in these systems), perfectly reflect the legal structure of trusts created according to the traditional English model”<sup>51</sup>. Some scholars even believe, that there are links between the English trust and several institutions (*fiducia*, *fideicommissum*, *Treuhand*) of Continental law countries. “Maurizio Lupoi, for example, argues that the English Chancellors (without mentioning their sources) drew on a wealth of thirteenth- and fourteenth-century civil law authority in their development of the English trust. For this it is therefore not far-fetched to refer to these civil law institutions as being the “foundation” of the English trust”<sup>52</sup>.

The given paper does not aim at the determination of the origin of “trust”. It is focused on the comparative analysis of the terminological units related to the contemporary trust-like devices which are presented in the German and Austrian juridical systems. The major emphasis is put on the similarities and differences of these lexical units.

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<sup>51</sup> Lupoi, Maurizio, *Trusts: A comparative study*. Cambridge University press, 2000.

<sup>52</sup> Reimann, Mathias, and Zimmermann, Reihard, eds. *The Oxford Handbook of Comparative Law*. Oxford University press, 2008.

## Trust Relationships

“Trust is an element that has been approached in the last decades by many disciplines and through many and varied means”<sup>53</sup>. In the juridical system it is usually defined as “a particular legal relationship whereby property is transferred from one person to another, who controls it for the benefit of a third person, or for a special purpose”<sup>54</sup>. “A trust may also be defined as a right or (real and personal) property held by one party for the benefit of another”<sup>55</sup>.

A valid common-law trust considers the existence of the following compulsory elements:

- A trustor/settler – a creator of the trust;
- A beneficiary (also called *cestui que trust* (pl. *cestuis que trust*) – the holder of the equitable title;
- A trustee – a legal owner, who acts in the best interest of the beneficiary;
- A trust fund - the “trust property” the title to which passes to the trustee. It’s also worth mentioning, that “the trust fund is not part of the general assets of the trustee; thus it does not pass to his heirs in the event of the trustee’s death”<sup>56</sup>.

## The German “Treuhand”

Many scholars believe, that the German law does not have a specific concept that works as the Anglo-American “trust”. Fiduciary relationships exist only in the form of “*fiduziarische Treuhand*” (a fiduciary trust) - a construction by which an individual transfers the full right *in rem* to the other individual, who is obliged to deal with the assets in the manner specified by the contract. A trustee (*Treuhänder*) usually becomes a legal owner. However, he (she) can transfer the legal title to the third person, while the settlor/beneficiary (*Treugeber*) has only damages claims in those cases when the trustee violates the obligations. It means, that the “*fiduziarische Treuhand*” does not fully protect settlor’s rights. Therefore, the practical implementation of this construction seems quite risky.

However, the German legal system gives *Treugeber* an opportunity to make the safer agreement (the so-called *Ermächtigungstreuhand* - trust by authorization), “under which he (she) does not transfer the full right *in rem* to *Treuhänder*, but simply authorizes him (her) to manage or dispose of the assets in a specific manner. When the trustee exceeds his authorization the disposal of the assets is not valid ... no real separation of property takes place and the protection of the settlor is of minor importance because he is still the legal owner with all of his power”<sup>57</sup>.

The German law presents a concept of a foundation (*Stiftung*), that functions like a charitable trust. “In order to devote assets or patrimony to specific aims, a person can create a new legal entity, the *Stiftung*. The founder must declare such an intention in writing or by will (testamentary foundation), the *Stiftungsgeschäft* or endowment transaction”<sup>58</sup>. The given transaction consists of two parties:

<sup>53</sup> Zanini, Marco, Tulio, Trust within organizations of the New Economy. A cross-industrial Study. Dissertation Universität Magdeburg. Gabler Edition Wissenschaft, 2007.

<sup>54</sup> Sims, Vanessa, English law and terminology. Lingua Juris. Auflage, 2010.

<sup>55</sup> Haschka, Helmut, and Schmatzer, Hannes, Aspects of U.S. Business and Law. An English-language Survey with German-language Comments. Fachverlag der Wirtschaftsuniversität Wien. Service, 1990.

<sup>56</sup> Sims, Vanessa, English law and terminology. Lingua Juris. Auflage, 2010.

<sup>57</sup> Rehahn, Johannes, and Grimm, Alexander, Country report: Germany. The Columbia Journal of European Law Online, <http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf>

<sup>58</sup> Rehahn, Johannes, and Grimm, Alexander, Country report: Germany. The Columbia Journal of European Law Online, <http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf>

- a **founder**, which transfers a patrimony to the new legal entity and sets up rules of administration;
- a **foundation** – a newly-created legal entity, which administers assets, but is supervised by the Bundesland.

Moreover, the “*Stiftung*” can be created only with the permission of the “Bundesland”, or federal state, where a newly-created legal entity will have its seat. It’s worth mentioning, that “apart from the creation of a new legal entity, the trustor can also transfer the property to an already existing person with the declaration that the transferee must separate these assets from his own property and has to administer them on a continuing basis as the trustor has set it up”<sup>59</sup>. Such type of a transaction is nominated as “*Stiftungstreuhand*” or “*unselbständige Stiftung*” (foundation trust or dependent foundation).

Therefore, the relationship between the Anglo-American “trust” and “*fiduziarische Treuhand*” can be outlined 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 “*fiduziarische Treuhand*”, a trustor (*Treugeber*) enters into a written contract with a trustee (*Treuhänder*);
2. The Anglo-American “trust” can be subject to a *mortis causa deed*, while the German “*fiduziarische Treuhand*” is never subject to it;
3. The “trust” nominates beneficial owners of the property (“beneficiaries”) or simply implies the delegation of authorities in behalf of the “trustor” himself (herself). “*Fiduziarische Treuhand*” considers only a simple delegation of authorities of management in behalf of “*Treugeber*” and underlines the fact, that the German legal system identifies the concept of “trustor” with the concept of “beneficiary”;
4. In the German law “*Treuhänder*” can transfer the legal title to the third person, while the Anglo-American law does not consider such circumstances.

### The Austrian “Treuhand”

It’s a well-known fact, that the Austrian law does not present a concept similar to the Anglo-American “trust”. However, there is a possibility of setting up the so-called “*Treuhand*”, which has no legal status. Moreover, “The Treuhand is a civil contract which is not regulated in law, but is based on the general principle of the autonomy of the contracting parties (i.e. the ability of any person to enter into any contract which whomsoever they chose) and delimited by jurisprudence and doctrine”<sup>60</sup>. The Austrian “*Treuhand*” considers the participation of two major parties:

- “*Treuhänder*” – a person, who is authorized to exercise rights over property in his or her own name, on the basis of and in accordance with a binding agreement with another person. “*Treuhänder*” is a legal owner of the assets;
- “*Treugeber*” – another party, which maintains “economic ownership”.

The Austrian law distinguishes two types of “*Treuhand*”: the “*fiducia*” and the “*Ermächtigungstreuhand*”. “With the *Fiducia* most of the rights connected to the assets are transferred to the Treuhänder, whereas the *Ermächtigungstreuhand* only entails a transfer of certain rights connected to the assets such as the right to manage them”<sup>61</sup>.

“The Austrian Treuhand entails a form of split ownership: the Treuhänder is the legal owner of the assets, but the Treugeber maintains the “economic ownership” and may

<sup>59</sup> Westebbe, Achim, Die Stiftungstreuhand. Baden-Baden. Nomos, 1993

<sup>60</sup> Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Austria 2011: Phase 1: Legal and Regulatory Framework, OECD Publishing, 2011.

<sup>61</sup> Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Austria 2011: Phase 1: Legal and Regulatory Framework, OECD Publishing, 2011.

therefore, claim compensation for his or her property in certain circumstances, such as the Treuhänder's bankruptcy"<sup>62</sup>.

It's worth mentioning, that Austrian law presents the concept of foundations. "A foundation (*Stiftung*) is an organization intended to promote on a long-term (indefinite) basis a particular purpose (designated by the founder) through assets dedicated to that purpose. Austrian law allows for the creation of:

- public benefit foundations under the Federal Foundations and Funds Act (*BStFG*). These foundations can only be set up for charitable purposes. They may carry on a minor commercial activity to the extent that this activity supports the main purpose of the foundation; and
- private foundations under the Private Foundations Act (PSG). In such foundations, the founder dedicates property for private purposes devoid of any self-interest. There is a legal prohibition which prevents foundations from carrying on any commercial activity"<sup>63</sup>.

The Austrian "Treuhänder" can be created orally i.e. it may exist without any written record. The "Treuhänder" is usually concluded "between any two persons who have the necessary legal capacity to conclude to a contract. The *Treugeber* and the *Treuhänder* may choose to inform third parties of the legal arrangement between them (*offene Treuhand* or open *Treuhand*) or not (*verdeckte Treuhand* or hidden *Treuhand*)"<sup>64</sup>

Therefore, the study of the lexical units related to the Austrian "trust-like" device revealed, that on the one hand, some Austrian terms (*Treuhand*, *Stiftung*, *Ermächtigungstreuhänder*) coincide with the German lexical system and on the other hand, they are similar to the terms of the Roman law. It's a well-known fact, that "fiducia" was an integral part of Roman legal system. Generally, the Latin term "fiducia" means "the act based on the trust". However, the following abstract from "A Dictionary of Greek and Roman Antiquities" gives a more precise description of entrusting relationships: "If a man transferred his property to another, on condition that it should be restored to him, this contract was called **Fiducia**, and the person to whom the property was so transferred was said **fiduciam accipere** (Cic. *Top.* c10). A man might transfer his property to another for the sake of greater security in time of danger, or for other sufficient reason (Gaius, II.60)...trustee was bound to discharge his trust by restoring the thing: if he did not, he was liable to an **actio fiduciae** or **fiduciaria**, which was an **actio bonae fidei** (Cic.*de Off.* III.15, *ad Fam.* VII.12; **ut inter bonos bene agier oportet**). If the trustee was condemned in the action, the consequence was **infamia**"<sup>65</sup>.

Therefore, the relationship between the Anglo-American "trust" and Austrian "Treuhand" can be outlined in the following way:

1. The creation of both - "trust" and "Treuhand" - requires a trustor's intent presented orally or in a written form;
2. The Austrian law makes distinction between "*offene Treuhand*"(open *Treuhand*) and "*verdeckte Treuhand*" (hidden *Treuhand*), while the Anglo-American legal system does not present the similar distribution;

<sup>62</sup> Austria: Detailed Assessment Report on Anti-Money Laundering and Combating. International Monetary Fund. Staff Country Reports. International Monetary Fund Washington D.C., 2009.

<sup>63</sup> Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Austria 2011: Phase 1: Legal and Regulatory Framework, OECD Publishing, 2011.

<sup>64</sup> Austria: Detailed Assessment Report on Anti-Money Laundering and Combating. International Monetary Fund. Staff Country Reports. International Monetary Fund Washington D.C., 2009.

<sup>65</sup> Smith, William, A Dictionary of Greek and Roman Antiquities. London, 1875.

3. The Austrian law distinguishes two types of “Treuhand”: the “*fiducia*” and the “*Ermächtigungstreuhand*”. The Anglo-American legal system does not present the similar distribution;
4. The “trust” nominates beneficial owners of the property (“beneficiaries”) or simply implies the delegation of authorities in behalf of the “trustor” himself (herself). “*Treuhand*” considers only a simple delegation of authorities of management in behalf of “*Treugeber*” and underlines the fact, that the Austrian legal system identifies the concept of “trustor” with the concept of “beneficiary”.

## Conclusion

The comparative analysis of the German and Austrian “Treuhands” can be summarized via the following outcomes:

- The Austrian “*Treuhand*” must be presented orally or in a written form, while for the creation of “*fiduziarische Treuhand*”, a trustor (*Treugeber*) enters into a written contract with a trustee (*Treuhänder*);
- The Austrian and German “Treuhands” present similar components of entrusting relationships. The same can be said about terminological units related to them: a trustor (*Treugeber*) and a trustee (*Treuhänder*);
- Although the Austrian legal system equalizes the concepts “trustor” and “beneficiary”, the Austrian juridical language presents the term “*Begünstigter*” - an equivalent of the English “beneficiary”;
- The Austrian law distinguishes two types of “Treuhand”: the “*fiducia*” and the “*Ermächtigungstreuhand*”. The German legal system does not present the similar distribution. However, a special attention must be paid to the term “*Ermächtigungstreuhand*”. In the German law it denotes a separate agreement, which simply authorizes *Treuhänder* to manage or dispose of the assets in a specific manner. In the Austrian legal system “*Ermächtigungstreuhand*” is a type of *Treuhand*, which only entails a transfer of certain rights connected to the assets such as the right to manage them<sup>66</sup>. Therefore, the Austrian “*Ermächtigungstreuhand*” does not conceptually fully coincide with the German “*Ermächtigungstreuhand*”;
- The Austrian law makes distinction between “*offene Treuhand*” (open *Treuhand*) and “*verdeckte Treuhand*” (hidden *Treuhand*), while the German legal system does not present the similar “distributional components” and terms related to them;
- The German law presents the concepts of “*Stiftung*” (a foundation, that functions like a charitable trust) and “*Stiftungstreuhand*” (which considers the transfer of the property to an already existing person). The Austrian law unites both of these transactions under the term “*Stiftung*” and therefore, makes this lexical unit conceptually different from its German analogue.

Therefore, all the above mentioned enables us to conclude, that the German and Austrian laws have already allowed mechanisms similar to the Anglo-American “trust”. However, the resulting instruments present quite complex terminological systems. On the one hand, some Austrian terms (*Treuhand*, *Stiftung*, *Ermächtigungstreuhand*) coincide with the German lexical units and on the other hand, they are similar to the terms of the Roman law. We suppose, that the flow of time and interference of globalizing processes will change the legal landscape. Nowadays, Europe is facing the tendency “to draw up a uniform law on the

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<sup>66</sup> Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Austria 2011: Phase 1: Legal and Regulatory Framework, OECD Publishing, 2011.

basis of work by experts in comparative law and to incorporate it in a multipartite treaty which obligates the signatories, as a matter of international law, to adopt and apply the uniform law as their municipal law<sup>67</sup>. The creation of uniform legal system presupposes the change of terminological landscape. All the works dedicated to the comparative study of juridical terms acquire great urgency. We believe, that our work can be useful in this respect.

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<sup>67</sup> Zweigert, Konrad, and Kötz, Hein, An introduction to comparative law. Crarendon Press. Oxford, 2011.