THE LEGAL INSTITUTION OF THE TRUST IN THE ECONOMY AND LAW OF EASTERN EUROPEAN COUNTRIES

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Abstract

The Anglo-Saxon trust is a legal institution that can be characterised by a rich variety of types and can serve a wide range of social and business needs. The popularity of the trust is attributable to its flexible structure, which allows asset partitioning, the function of the trustee and tracing. Without the adoption of English law in some form, the rules of civil law systems do not permit two different forms of ownership of the same thing at the same time. Strong economic demand, however, has forced several civil law countries to introduce a trust-like legal arrangement.

The legal institutions drawn up in Russia, Georgia, Lithuania, Romania, the Czech Republic and Hungary, show varying degrees of similarity to the trust. The legal structures introduced include the contractual form, the right in rem, property without an owner and a contract with limited in rem effects. The rules of these legal vehicles differ from the trust in several ways. As a result, these institutions may fulfil the main functions of the trust to some extent, but they can approximate the trust only on a step-by-step basis to become real substitutes of the trust in the economy.

Keywords: Trust, fiduciary asset management, common law, civil law

Introduction

In the history of law, the English institution of the trust is one of the most original institutions in the field of private law. The research of this topic may provide value and substantial benefits for economic operators. A jurist who studies civil legal systems based on the traditions of Roman law applies the rules of property law and the principle of the *numerus clausus* of property rights and the unity of ownership. This is the reason why the Anglo-Saxon institution of the trust appears to be an alien, barely understandable concept in the theory of civil law. The contemporary importance of this study is related to recently adopted legislation in Eastern European countries, where unique trust-like devices have been introduced.

In Continental European laws, the regulation of institutions that resemble the English trust is quite difficult. As we may observe, there are different responses to this challenge. The function of the trust can be fulfilled by contractual legal arrangement or by the establishment of independent trustee rights, or even by introducing the model of property without an owner. With respect to the adoption of the trust, or of any modified instrument thereof, it helps to examine this institution with a functional approach.[68] We also have to take into account that

[68] Hansmann, Henry – Mattei, Ugo: *The Functions of Trust Law: A Comparative Legal and Economic Analysis*. 73 New York University Law Review 434 (1998). p. 435.

there are major efforts on an international level to approximate the rules of private law in the Anglo-Saxon and Continental European legal systems.[69]

The Main Functions of the English Trust

When dealing with the application of the modern trust, it is obviously necessary to take into account its special forms.[70] Its functions have changed very much during the last centuries. The trust was a legal arrangement that served the avoidance of feudal burdens and the establishment of family settlements. But according to the requirements of modern business today, it serves significantly different purposes. From this point of view, this study deals only with the express trust and leaves the rules of other types of trust, such as those of the constructive, implied trust etc., to be the subject matter of separate research.

The trust is a legal institution of the Anglo-Saxon legal system, characterised by a rich variety of trust types, which is capable of satisfying a wide range of social and business needs.[71] The trust can be established for family purposes, for example. such as the management of the property of the person creating the trust during his lifetime, or for the treatment, nursing of the settlor in case of his illness, and for his burial after death. This purpose can be extended to include the relatives of the settlor. Such specific function of the trust can be an arrangement to support the minor relative of the settlor or a mentally incompetent person, or a trust can be declared against spendthriftiness or for the provision of annuities. In addition to these goals, the trust is gaining much more relevance in the business sector. This legal arrangement can be useful for business transactions, for employees' pension trusts, the management of real property; it can be established to manage collateral in relation to the issue of securities, for the division of land and the sale of resulting lots, for pursuing business activity and the distribution of profits, the management of shares and securities (investment or unit trust), and for the exercise of shareholder rights etc.

One of the key motives for establishing a trust is to provide appropriate legal protection of property.[72] Different legal interests are defined with respect to the trust's purpose, including the protection of property against potential creditors[73], derogation from inheritance rules, or tax optimisation.[74] The arguments made against the trust principally underline its threat to the transparency of property ownership.

Hayton also lists many examples of the modern application of the trust. The establishment of family trusts is still possible, but their relevance has somewhat diminished in recent times.[75] The settlor can maintain control over family property for three or four

[69] For example, the Convention on the Law Applicable to Trusts and On Their Recognition (Hague Convention), adopted by the Hague Conference on Private International Law at its 15th Session, the Principles of European Trust Law, chapter X of the Draft Common Frame of Reference (DCFR) drawn up by the working group organised at the faculty of law at the University of Nijmegen, etc.

[70] Hudson, Alastair: *Understanding Equity & Trusts*. Routledge, London, New York, 2013[4]. p. 26.

[71] Fratcher, W. F.: *Trust*. International Encyclopedia of Comparative Law. Vol. VI. Trust and Property. J. C. B. Mohr (Paul Siebeck), Tübingen, 1973. p. 5 ff.

[72] Grundy, Milton – Briggs, John – Field, Joseph A.: *Asset Protection Trusts*. Key Haven Publications PLC, London, 1997[3]. p. 27.

[73] This applies predominantly to special purpose and discretionary trusts, as the creditors of the beneficiary may claim debt from the beneficiary's right to the trust property. See Lupoi, Maurizio: *Introduction. Trusts – Some observations from a Civil Law Perspective*. In Atherton, Rosalind F. (ed.): Estates, Taxes and Professional Ethics. Papers of the International Academy of Estate and Trust Law – 2002. Kluwer Law International, London, The Hague, New York, 2003. p. 6.

[74] Belle Antoine, Rose-Marie: *Trusts and Related Tax Issues in Offshore Financial Law*. Oxford University Press, New York, 2005. p. 16.

[75] In 2002, 90% of trusts were established for commercial purposes, and only 10% served the disposition of family property. Hayton, David: *English Trusts and Their Commercial Counterparts in Continental Europe*. In:

generations, and hence, maintain its efficiency. Hayton lists fifteen areas of application with respect to commercial purposes.[76]

The flexibility of the trust structure is attributable to the tripartite relationship between the settlor, the trustee and the beneficiary, which also has implications for the property. In my opinion, these specific legal advantages are asset partitioning, the office of the trustee and the possibility of tracing.[77] Asset partitioning ensures that the creditors of the settlor, the trustee and the beneficiary may have no, or only very limited options to lay claim against the trust property in exceptional cases. The office of the trustee differs from the mere contractual legal relationship, which can be terminated in case of the death of any parties. The possibility of tracing allows the beneficiary, and in some cases also the settlor, to claim back the trust property from third parties, who are not bona fide purchasers. Of course, there are other relevant characteristic features, such as the duration of the relationship, personal requirements applicable to the trustee, the right of survivorship if there are several trustees, the right of the termination of the settlor, the possibility of the private purpose trust etc., which may also influence the application of this institution for business purposes.

The Possible Adoption of the Trust in Civil Law

Without the adoption of English law in some form, the rules of legal systems built on the traditions of private law in civil law systems do not permit two different forms of ownership (legal title) to the same thing at the same time. With respect to the adoption of the trust, the question is whether regulation with a function similar to the arrangement of the legal and equitable title can be introduced in an environment of civil law, or a different legal institution is unfit to fulfil the role of the trust, thus the regulation of the trust is only possible through the adaptation of divided ownership. On the basis of views put forth in jurisprudence, substantial arguments are made in favour of both solutions.[78] However, experience suggests that legislators in several countries with civil law systems made efforts to introduce a trust-like legal arrangement without the duplication of ownership.

Continental European legal systems recognise neither the dual legal system (common law – equity), nor the divisibility of ownership under Anglo-Saxon law.[79] The *numerus clausus* of property rights also poses an obstacle to the adoption of the trust, as the parties lack free maneuvering room to establish new rights to things beyond what is permitted by law.[80] Bolgár argues that neither the principle of publicity, nor the numerus clausus of property rights should be an obstacle to the adoption of the trust in civil law systems.[81] Other authors share this view, because Anglo-Saxon law also regulates the *numerus clausus* of property rights, albeit in different cases.[82] The examples in Scotland and South Africa

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David Hayton (ed.): Extending the Boundaries of Trusts and Similar Ring-Fenced Funds. Kluwer Law International, The Hague, 2002. p. 33.

[76] Hayton: op. cit. p. 35 ff.

[77] Banakas, Stathis: *Understanding Trusts: A Comparative View of Property Rights in Europe*. InDret. Revista Para el analisis de derecho 1/2006. p. 4.

[78] Chalmers, James: *Ownership of Trust Property in Scotland and Louisiana*. In: Vernon Valentine Palmer – Elspeth Christie Reid: Mixed Jurisdiction Compared. Private Law in Louisiana and Scotland. Edinburgh University Press, Edinburgh, 2009. p. 137. Kötz, Hein: *Trust und Treuhand. Eine rechtsvergleichende Darstellung des anglo-amerikanischen Trust und funktionsverwandter Institute des deutschen Rechts*. Vandenhoeck & Ruprecht in Göttingen, 1963. p. 12.

[79] Hansmann – Mattei: *op. cit.* p. 441.

[80] Hansmann – Mattei: *op. cit.* 442.

[81] Bolgár, Vera: *Why No Trusts in the Civil Law?* The American Journal of Comparative Law 2 (1953). p. 214.

[82] Fusaro, Andrea: *The Numerus Clausus of Property Rights*. In: Elizabeth Cooke (ed.): Modern Studies in Property Law. Vol. 1. Property 2000. Hart Publishing, Oxford-Portland Oregon, 2001. p. 314. See also Ryan, K.

prove that the *numerus clausus* of property rights is not an obstacle to the adoption of the trust. In relation to the drafting of the legal background to the separation of property, the function of the trust may be fulfilled by a legal institution if the beneficiary only holds a right *in personam* against the trustee.[83]

Lupoi defines the essential components of the trust as follows. It is necessary to transfer the trust property to the trustee, or to establish the trust by unilateral representation. The separation of the trust property and the trustee's own property is also required. It is important that the settlor should not hold rights in relation to the trust property, and there should be beneficiaries or a purpose, and the fiduciary obligation of the trustee must be regulated.[84]

The adoption of the duality of ownership is not essential for the introduction of trust-like legal devices, operated with the main functions of the trust, in civil law systems.[85] In Mexico, Panama and Liechtenstein, for example, the entire legal environment was not changed for the introduction of trust-like legal arrangements. The Scottish version of the trust is the result of natural historical development. Originally, the English version of the trust was introduced in South Africa, but local legal practice substantially transformed it to enable adaptation to the institutions of civil law *(fideicommissum, stipulatio alteri)*. In other states, such as Louisiana and the province of Québec, the trust was also introduced by legislative means with less emphasis on the question of ownership.

Others, such as Honoré, do not consider it essential for the trustee to be the owner of the trust property in relation to the introduction, adoption of the trust. He maintains it is sufficient for the trustee to keep the property under his supervision and management; his legal title to the property is not essential. The trust may be owned by the trustee, beneficiary, a business association, or it may even have no owner. Honoré believes that the adoption of separate legislation on equity is similarly not essential for the introduction of the trust.[86] Gretton notes that although Honoré and Lupoi provide a detailed list of the essentials of the trust and of its concept, they do not list elements without which there is no trust. He points out that Fratcher's definition draws a sharp line between the trust and trust-like legal institutions by approaching divided ownership as a conceptual component.[87]

I think that the distinction between common law and equity played a crucial role in the development of the trust, but the lack thereof does not substantially affect the introduction of a trust-like legal arrangement. With respect to the legal approach to the trustee's position as an office in legal systems with uncodified laws, case law qualifies the trustee by analogy to the custodian or guardian, while systems with codified laws must enact separate laws in this regard.[88] In the case of the trustee, the separation of property is possible if the trustee is owner of his own and the trust property in a different capacity.[89] The separation of property is

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W.: *An Introduction to the Civil Law*. The Law Book Co. Ltd. of Austrolasia PTY Ltd., Brisbane, Sydney, Melbourne, 1962. p. 221.

[83] Verhagen, H. L. E.: *Trusts in the Civil Law: Making Use of the Experience of 'Mixed' Jurisdictions*. In: J. M. Milo – J. M. Smits (ed.): Trusts in Mixed Legal Systems. Ars Aequi Libri, Nijmegen, 2001. p. 103.

[84] Waal, Marius J. de: *Trust law*. In: Jan M. Smits (ed.): Elgar Encyclopedia of Comparative Law. Edward Elgar, Cheltenham, Northampton, 2006. p. 755.

[85] Honoré, Tony: *Obstacles to the Reception of Trust Law? The Examples of South Africa and Scotland*. In: Alfredo Mordechai Rabello (ed.): Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions. Jerusalem, 1997. p. 807.

[86] Honoré, Tony: *Trusts: The Inessentials*. http://users.ox.ac.uk/~alls0079/Burn.pdf. p. 5 ff.

[87] See Gretton, George: *Up there in the Begriffshimmel?* In Smith, Lionel (ed.): The Worlds of the Trust. Cambridge University Press, New York, 2013. p. 544.

[88] This is the case, for example, in Liechtenstein, Québec, Ethiopia, Puerto Rico, Israel. Honoré: *op. cit. (Obstacles)*. p. 808.

[89] Honoré: *op. cit. (Obstacles)*. p. 811.

not a novel device in civil law systems, either. The separation of property is one of the most important principles in company law. Honoré argues that with respect to the equivalent of the Anglo-Saxon trust in civil law, it may be appropriate to apply the model of guardianship and grant ownership to the beneficiary, and limit the right of the trustee to the management of the property.[90] To ensure the protection of the beneficiary, it could be possible to grant the option and provide protection to the beneficiary against third parties, in line with the decision passed in the Readfearn case (doctrine of notice)[91]. This could be further strengthened with the registration obligation.

The judicial supervision of the trust enables the provision of stricter rules in the interest of the beneficiaries or creditors, or, as the case may be, derogation from the provisions of the trust deed. The options for this have become wider since the application of the so-called cy-près doctrine. The authorities have no other options of intervention in the affairs of the managed trust, and no publicity or registration obligations apply, either.

Trust-like Legal Arrangements in Civil Law

I would like to summarise regulation in six Eastern European countries, where some kind of legal regulation resembling the trust has been introduced.

Russia

The term trust *(trast)* appeared in the Russian private banking sector in 1990[92], allowing banks to manage the investments and securities of their clients.[93] It was followed by other legal regulations until the codification of the private law in the middle of the 1990's.[94]

The first part of the Russian civil code entered into force on 1 January 1995[95]. Pursuant to Art. 209(4), legal title may be transferred to someone else for the purpose of property management (doveritel'noe upravlenie).[96] The second part of the Russian civil code entered into force on 1 March 1996. Chapter 53 regulates property management (doveritel'noe upravlenie).[97] Pursuant to Art. 1012 of the Russian civil code, under the agreement between the parties, one party (settlor) transfers the property to the other party (trustee) for a fixed period of time (maximum 5 years), and the other party undertakes to manage the property for the benefit of the settlor or a beneficiary designated by him. The transfer of property does not extend to the transfer of legal title to the property.[98] Thus, under the new regulation, the settlor retains legal title to the trust property, while the trustee only acquires the right to manage the property. The trustee carries out his duties for remuneration, but is not entitled to profits from the trust property. The position of trustee may only be filled

[90] The Dutch *bewind*, for example, is a such a legal scheme. Honoré: *op. cit. (Obstacles)*. p. 813.
[91] Wilson, W. A. – Duncan, A. G. M.: *Trusts, Trustees and Executors*. Scottish Universities Law Institute Ltd., W. Green, Edinburgh, 1995[2]. p. 4.
[92] "On the banks and banking activities in the RSFSR." Vedomosti RSFSR 1990 No. 27. item 327.
[93] Reid, Elspeth: *The Law of Trusts in Russia*. Review of Central and East European Law 24 (1998). p. 45.
[94] On Fiduciary Ownership (the *trast*). Sobranie aktov RF 1994 No. 1. item 6. Pursuant to the preamble, the introduction of the trust was necessitated by new forms of business administration and institutional reform related to economic reform. Reid: *op. cit.* p. 46. The federal contracting agency, Roskontrakt, became the largest asset management organisation. Reid: *op. cit.* p. 47.
[95] Sobranie zakonodatel'stva RF 1994 No. 32 item 3301.
[96] The earlier term "trust owner" was replaced with "trust manager" (doveritel'nyi upravliaiushchii), which is associated with agency, representation. Reid: *op. cit*. p. 48.
[97] Sobranie zakonodatel'stva RF 1996 No. 5 item 410.
[98] Benevolenskaya, Zlata E.: *Trust Management as a Legal Form of Managing State Property in Russia*. Review of Central and East European Law 35 (2010). p. 68 ff. Hamza draws a parallel between this arrangement and regulation in Louisiana. Hamza, Gábor: *Az europai maganjog fejlodese. A modern maganjogi rendszerek kialakulasa a romai jogi hagyomanyok alapján* (Development of modern private law systems based on traditions of Roman law). Nemzeti Tankönyvkiadó, Budapest, 2002. p. 237.

by a businessman (predprinimatel') or commercial company. Natural persons may manage property only in the case of trusts established by law (e.g. guardianship, custodianship). Property management includes assets and securities; the management of cash does not essentially fall within this scope. The trustee is required to indicate his legal status, e.g. with the abbreviation "D U", on contracts relating to the trust property. The property management contract has a maximum duration of five years.

This contractual arrangement does not quite reach the level of the Anglo-Saxon trust, but it is more than a simple agency or mandate. Although the settlor may terminate the contract at any time, the trustee holds exclusive rights to manage the property. It also varies from the arrangement of the Dutch bewind, as the legal owner is not the beneficiary, but the settlor.[99] On the other hand, the trustee requires the prior written consent of the settlor for important decisions concerning the property, such as the cessation of the business association through the exercise of voting rights attached to shares included in the property, modification of its capital, decision on the amendment to the deed of foundation. The trustee must manage the property separately from his own property, and keep it on a separate account. This arrangement is mainly applied in Russia for the operation of investment funds and pension funds.[100]

Georgia

Art. 724–729 of the Georgian civil code of 2002 regulate the legal institution that is similar to the trust (sakutrebis mindoba). Property management is established by a written trust contract (sakutrebis mindobis khelshekruleba), under which the trustee (mindobili mesakutre) is obliged to manage the property for the benefit of the settlor (sakutrebis mimndobi); thus, this is not a tripartite relationship. The settlor transfers the legal title of the trust property to the trustee, and pursuant to Art. 725(1), the trustee manages the property in his own name, but at the cost and risk of the settlor. Profits from the property are also due to the settlor. As a general rule, the property management contract is gratuitous, but the parties may derogate from this rule. The trustee is liable toward third parties for duties relating to the trust property.[101] Provisions relating to agency provide the legal framework for the property management contract.

Romania

In Romania, civil code No 71/2011. (Art. 773–791.) introduced the fiducia – a property management arrangement similar to the trust. The fiducia may be established by law or a notarised contract. Hence, it may not be established by testament. Pursuant to Art. 773 of the Romanian civil code, one or more settlors (constituitori) transfer legal title or other rights to one or more trustees (fiduciari), who manage it for a specific purpose or for the benefit of the beneficiaries (beneficiari). The trust property constitutes property separate from the trustee's own property. Under Romanian regulations, the position of trustee may only be filled by a credit institution, investment company, insurance or reinsurance company, notary or lawyer.[102]

The establishment of the fiducia must be reported to the competent tax authority within one month. The fiducia becomes effective vis-á-vis third parties once the deed of foundation has been registered (Electronic Archive of Security Interests in Personal

[99] Reid: *op. cit.* p. 52.
[100] Reid: *op. cit.*. p. 54 ff.
[101] For detailed analysis of regulation, see Gvelesiani, Irina: The *Luxembourgish "Fiducie" and the Georgian "Trust" (Terminological Peculiarities).* Mediterraneum Journal of Social Sciences Vol. 4. No 11 (2013). p. 126.
[102] See Gvelesiani, Irina: *Romanian "Fiducia" and Georgian "Trust" (Major Terminological Similarities and Differences).* Challenges of Knowledge Society 2013/3. p. 286 ff.

Property). If the trust property includes real property, it must be registered in the land register. The maximum duration of the fiducia is 33 years.

Czech Republic

The civil code of the Czech Republic (No. 89/2012.) in force as of 1 January 2014 also regulates property management. Legislators applied the concept of the civil code of Québec for drafting the regulation. Only trusts set out in a public instrument are valid. The trust may be established by contract or testament for maximum 100 years. The trust may be declared for commercial, investment, private purposes or for public benefit.

Upon establishment of the trust, the settlor no longer holds legal title to the trust property, which will become property without owner, to be managed by the trustee for the benefit of the beneficiaries.[103] Accordingly, the purpose of the property and its status as a "trust fund" must be indicated in legal relationships relating to the property. Both the settlor and the beneficiary may exercise control over the trust property. In addition, the court may also order the trustee to take appropriate actions.

The trustee is appointed by the settlor, otherwise by the court. The trustee is required to accept the appointment. A legal person can be the trustee only if it is an investment company or investment fund operating according to the Act on Investment Companies and Investment Funds (Act No. 240/2013). The settlor also designates the beneficiary, otherwise the settlor is deemed to be the beneficiary.

Lithuania

Under the earlier civil code of Lithuania in force from 1964, property management was regulated in relation to public property. The new civil code was enacted on 17 May 1994 and came into force on 1 January 2000[104], introducing property trust law for the private sector as well. The regulation was essentially only renamed, and the substance of the legal arrangement remained the same.[105] The property trust law grants an independent in rem right, which is regulated in Book Four (Material Law), Part I (Things), Chapter VI (Right of Trust) of the Lithuanian civil code. This means that the owners remain the same, while the trustee may exercise trustee rights, which is basically equal to the owner's rights over the trust property. The trustee must exercise his rights personally, if not stipulated otherwise in the agreement, and the legal relationship has a maximum duration of 20 years. The trustee is entitled to protect the trust right. similarly to the right of ownership. The trustee must report his activities to the trustor and the beneficiary at least once a year, which is very similar to ownership.

Hungary

The new Hungarian Civil Code regulates the fiduciary asset management contract in Chapter XLII, within the scope of agency-type contracts. The regulation was drawn up on the basis of the model of the trust in English law and that of the Treuhand in German law. The Chief Codification Committee codified fiduciary property management under contract law, emphasising, however, its application of the legal instrument of the transfer of ownership, based on the trust-like model. Under the rules of the new Hungarian Civil Code, the fiduciary

[103] "The ownership of the assets of the Trust Fund shall be vested in its own name on account of the fund trustee, property in the Trust Fund is neither the property manager or property of the founder, or the property of the person to be filled from the trust." Czech civil code, 1448. § paragraph (3).

[104] *Lietuvos Respublikos civilinis kodeksas, LR CK.*

[105] Justas Sakavičius: *Problematics of Property Trust Law in Lithuania*. Mykolo Romerio Universitetas. Vilnius, 2011. http://vddb.laba.lt/fedora/get/LT-eLABa-0001:E.02~2012~D_20120118_103532-96991/DS.005.1.01.ETD. p. 3.

asset management contract is an in personam legal instrument that implicitly carries substantial in rem effects. Furthermore the legal relationship may be established by unilateral declaration or by testament as well. The regulation is of a general scope; details are regulated in two separate pieces of legislation, as Act XV of 2014 on Trustees and the Regulation of Their Activity, and Government Decree No 87/2014 (III. 20.) on certain rules concerning the financial security of fiduciary property management undertakings.

The settlor transfers ownership, rights and claims or other negotiable goods to the trustee, and the settlor issues a declaration as to the manner of the management of the property. In the legal relationship of property management, it is also possible to set out other conditions, such as its duration (maximum 50 years), terms, right of unilateral termination, remuneration of the trustee, appointment of additional trustees, regulation of the delegation of other agents, and the beneficiary's right to transfer. The settlor reserves the right to discharge the trustee, appoint a new trustee, replace the beneficiary, modify given parts of the settlor's declaration, and to determine or modify the duration of property management.

The settlor may monitor the activity of the trustee falling within the scope of property management, but the costs of such monitoring are incurred by the settlor. It is a mandatory rule that the settlor may not instruct the trustee. As a general rule, the settlor designates the beneficiary, and the conditions that give rise to and terminate the rights of the beneficiary. The beneficiary may also be named by reference to a group of beneficiaries. The settlor may choose to pass on all or part of the trust property to himself, his successors or to designated third parties under certain circumstances or after a certain period of time. The declaration of the trustee as exclusive beneficiary is void.

The management of the property includes the exercise of rights arising from ownership, other rights and claims transferred to the trustee, and the fulfilment of obligations arising therefrom. The trustee may dispose of the assets belonging to the trust property under the conditions and within the limits sets out in the contract. If the trustee breaches his above obligations and illicitly transfers assets belonging to the trust property to a third party, the settlor and beneficiary have the right to reclaim these for the benefit of the trust property, if the third party did not purchase the assets in good faith or for consideration. This rule is applicable as necessary to the illicit encumbrance of the trust property.

The trustee has a duty to keep confidential any fact, information and other data he becomes aware of during his appointment as trustee or in relation thereto. Such obligation is without prejudice to the establishment of the trusteeship and remains in effect after the termination of fiduciary property management. The settlor and his successors may grant exemption from the confidentiality obligation. The trustee is liable toward the settlor and beneficiary for the breach of his obligations in accordance with general rules of liability for damages.

The trustee is liable for the fulfilment of the undertaken obligations with the trust property. The trustee assumes unlimited liability with his own property for the satisfaction of claims arising from commitments charged to the trust property, if these cannot be satisfied from the trust property, and the other party was not and could not have been aware that the commitments of the trustee exceed the limits of the trust property.

If the settlor dies or ceases without a successor, and there are no other settlors to the trust property, the court may recall the trustee from his office upon request of the beneficiary, and simultaneously appoint another trustee if the trustee seriously breached the contract.

The trust property constitutes property separate from the trustee's own property and other property managed by him, which the trustee is obliged to register separately. The parties' derogation from this rule is void. Assets registered as property managed separately from the trustee's own property and other property managed by him are deemed to fall within the scope of trust property until proven otherwise. Any assets substituting the managed

assets, insurance indemnities, damages or other value, and profits thereon, constitute part of the trust property, whether registered or not. Assets not registered by the trustee as comprising part of the trust property are deemed to be the private property of the trustee until proven otherwise. The spouse, life partner, personal creditors of the trustee, and creditors of other properties managed by the trustee may not lay claim to the assets of the trust property. The trust property does not constitute part of the trustee's inheritance. The beneficiary and the settlor may take action against the spouse, life partner, personal creditors of the trustee, and creditors of other properties managed by the trustee, to secure the separation of the trust property.

In terms of liability, the new Hungarian Civil Code does not allow the creditors of the settlor and trustee to assert claims for the trust property. The creditors of the beneficiary, however, may apply for execution of the property, notwithstanding that the distribution of the managed assets and profits thereon to the beneficiary is not due yet. This rule is modified by Act XV of 2014 to the extent that the creditors of the settlor may terminate the property management contract if the execution procedure launched against the settlor is unsuccessful, or does not produce any results within a foreseeable time. I wish to note that this rule is already drawing heavy criticism in Hungarian legal literature, as it ignores differences in time between the exercise of the right of termination and the insolvency of the settlor.

Some Comparative Aspects

The trust-like legal arrangements examined in the six Eastern European countries are quite different. In Russia, this legal arrangement can be characterised as a mandate or agency contract, and the same can be stated in connection with the regulations in Georgia with . In the Czech Republic, regulation allows separate and independent ownership of property, like the regulation in the province of Québec. The trust property is neither the property of the settlor, nor the trustee; the trust property must be vested in its own name, on account of the fund trustee (must be designated as a "Trust Fund"). In Romania the French fiducie served as the model, therefore the contractual relationship reveals some property features. In Lithuania, the right of trust is an in rem right, which is quite unique because this right can exist in parallel with ownership. In Hungary, the German Treuhand was the main model for legislators, but strong property rights were also drawn up in connection with the fiduciary asset management contract. Two legal acts are required: one is a contract and the other is the transfer of property. But we have to emphasise that the Hungarian model has additional rules in connection with asset partitioning and tracing.

On the basis of the comparison we may conclude that none of these countries adapted the Anglo-Saxon trust. In Russia and Georgia, the structure is basically that of the contract of mandate and agency, while Romania followed French regulation and the Czech Republic adopted the Québec model. Hungarian regulation is also based on contract law, but property law regulations are also applied, such as the right of tracing. The Lithuanian solution is unique because the right of trust is an in rem right.

The main question is whether these legal arrangements are appropriate to fulfil the economic functions existing in the case of the Anglo-Saxon trust? Asset partitioning is well worked out in the Czech, Romanian and the Hungarian laws, a legal instrument similar to tracing is regulated in the Hungarian act, while under the Russian and Georgian rules, the owner has in rem right against third parties. The office of the trustee is regulated in Czech, Romanian and Hungarian legislation, while in Russia and Georgia, the contractual legal relationship, and in Lithuania, the independent in rem right is not absolutely in compliance with this requirement.

I also would like to draw attention to the peculiarity of these regulations from the view of the person of the trustee. In Georgia and Lithuania, no relevant. special restrictions

apply to this position, while in Russia and in Romania, the position is mainly restricted to professionals. In the Czech Republic and in Hungary, regulation moves in two directions. In the Czech Republic a legal entity can be a trustee only if it is an investment company or a fund. In Hungary the trustee can be both a natural and legal person, but if the activity is conducted on a profit orientated basis, it can only be the latter. It is also very important to note that in Romania and in Hungary, the registration of the trust is mandatory.

The duration of the trust is maximum 5 years in Russia, 20 years in Lithuania, 33 years in Romania, 50 years in Hungary, 100 years in the Czech Republic, and there is no time limitation in Georgia. Generally there is a time limitation to a trust relationship (with the exception of Georgia). We may establish that these time limitations are quite short in Russia, Lithuania, Romania, and even in Hungary, compared with the international trends.

Finally, we should add that the trust is generally not allowed to be established for a purpose, except in the Czech Republic. If we observe the international trends, we can state that it is becoming quite common to establish trusts for private purposes.

Conclusion

On the basis of these findings, we have come to the conclusion that the regulations in the examined six countries only partly accommodate the Anglo-Saxon trust. The deficiencies in these legal regulations include restrictions applicable to the position of the trustee, the obligatory registration of the trust, the absence of asset partitioning, the too short duration of the legal relationship etc., which obstruct the path of using these legal vehicles to entirely fulfil the functions of the trust in the economy.

In my opinion, the underlying reason for this is the cautious approach of legislators. If we introduce new legislation without direct roots in the given legal system and in the economy, the possibility of abuses has to be considered. The historical development of the trust is in tight correlation with demand for the anonymity of the real owner, which is usually in violation of fiscal interests. When considering this aspect from a general point of view, it is understandable that legislators do not want to release this new legal arrangement in the economy like an unruly bronco. I suppose that the trust-like legal devices in these civil legal environments – where they have no antecedents in the economy – will gain ground step by step in the near future, which is in line with the demands of our globalized economy.

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