FRENCH "FIDUCIE", LATVIAN "TRUST" AND ROMANIAN "FIDUCIA" (CONCEPTUAL AND TERMINOLOGICAL DIFFERENCES)

FRANČU "FIDUCIE", LATVIEŠU "TRASTS" UN RUMĀŅU "FIDUCIA" (JĒDZIENISKĀS UN TERMINOLOĢISKĀS ATŠĶIRĪBAS)

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Abstract. *An "all-embracing" process of globalization stipulates the formation of today's globe. It enters different spheres of life and facilitates the uniformity of economy, law, politics, language and even, cultural life. In the framework of globalization, drastic changes can be seen in the legal systems of some European countries. The given research tries to answer the demands of the modern epoch. It describes the process of the emergence of the European modifications of "trust", singles out major concepts presented in the Latvian, Romanian and French trust mechanisms and underlines their significance in today's world. The given research is a presentation of the new outlook of the development of "trust-like" institutions of some European countries.*
Keywords*: fiducia, fiducie, globalization, Latvian, law, Romanian, trust.*
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Introduction

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 system and is oriented on the discussion of the formation of the French "fiducie", the Romanian "fiducia" and the Latvian "trust".

The terminological unit "trust" is used to denote an institution of Anglo-American law, which is almost irreplaceable in the cases when the real owner of the property must be substituted by the nominal one for carrying out civil relationships. The concept of "trust" originated in Common law during the Middle Ages. However, it has been constantly rejected by the European continental legal systems. The main obstacle laid in the fact, that the duality of ownership, which was presented in Anglo-American legal system, was almost unacceptable for the continental law-governed countries. Hence, in the recent decades, the

growing significance of the American capital markets facilitated the popularization of the utilization of "trust" and stipulated its insertion in some "rigid" European jurisdictions. The given research is dedicated to the study of the Latvian, French and Romanian trust-like mechanisms. The main emphasis is put on the conceptual and terminological similarities and differences, which is crucial for the determination of the recent development of the European legal sphere.

French "fiducie", Latvian "trust" and Romanian "fiducia"

A "trust" is a juridical instrument by which a "settler" ("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 settler ("testamentary trust").

The "original" trust appeared in English Common Law during the Middle Ages. Hence, a "business trust", which is also called a "Massachusetts trust" or a "common-law trust" originated in Massachusetts (in 1827) for circumventing restrictions imposed upon the corporate acquisition and development of the real estate for achieving a limited liability aspect of a corporation. A business trust differs from a corporation, because "it does not receive a charter from the state giving it legal recognition; it derives its status from the voluntary action of the individuals who form it" (2.). Similarly to the traditional "trust", a "business trust" endows a trustee with a legal title to the property to administer it for the advantage of beneficiaries. A special attention is usually paid to the written declaration of a trust, which specifies its terms, duration, trustee's duties and the interests of beneficiaries.

During the last decades, the importance of "business trusts" has been growing in the American capital markets, particularly, through pension and mutual funds.

A "mutual fund" is usually regarded as a certain type of an investment company, which pools money from many investors for investing it in bonds, stocks, securities and cash. There are different types of mutual funds, for instance, index funds, stock funds, bond funds, etc. Sometimes they have different investment objectives, strategies or even investment portfolio. The main peculiarity of a mutual fund lies in the fact, that "investors purchase shares in the mutual fund from the fund itself, or through a broker for the fund, and cannot purchase the shares from other investors on a secondary market, such as the New York Stock Exchange or Nasdaq Stock Market" (7). Moreover, the shares are "redeemable" – when the investors sell them to the fund or to a broker, who acts for the former.

In contrast to a "mutual fund", an ordinary "pension fund" is usually regarded as a pool of assets for paying the pensions of employees. It is funded and managed by the corporation whose employees are covered by the fund.

The growing importance of the American capital markets stipulated the emergence of institutions similar to "trust" in some European countries, for instance, the creation of "fiducie**"** was facilitated in the French law. It's worth mentioning, that the mixture of the Anglo-Saxon common law concept of "trust" and the rigid and formalistic system based on the codified civil law has led to many problems that have been widely debated by practitioners, commentators, legal scholars, etc. The main emphasis has been put on the following "obstacles" for the implementation of "trust" in the French reality:

- The first argument against the implementation is the absence of the duality of ownership. "The common law rules that give legal ownership to the trustee and provide equitable ownership to the trust beneficiary dismember the property. Such tradition does not exist in the civil law tradition" (3.);
- Another obstacle lies in the fact, "that to the extent that the trust would enable the settler to extract some assets of its patrimonie, its property assets, it would reduce the general possessory lien of the creditors, which is established by Article 2092 of the Civil Code" (2.);
- The assets held in the trust constitute a patrimoine d'affectation – a notion which is incompatible with the classic conception of the patrimoine attributed to the theory, which was formulated by Aubry and Rau. This theory consists of three clauses:
  "1. each person has a patrimoine;
  2. every patrimoine belongs to someone; and
  3. everyone has just one patrimoine.

By relying on the trust, however, the trustee owns, in essence, two petrimoines: his own as well as the patrimoine comprised of the assets held in trust" (3.).

Despite such objectives, the act, which gave birth to the institution similar to Anglo-American "trust", was approved on 19 February 2007. It established a new title in the Civil Code of France and aimed at the creation of the instrument based on the main characteristics of the U.S. original. Later, on 2 March 2010, France brought into effect its new fiduciary or trust law, which described fiduciary relationships in the following way:

"...fiduciary is an operation by which one or more constituants (settlors) transfer assets be they present or future, to one or more fiduciaries

(trustees) who keep them separate from their own assets and act in a pre-agreed way to benefit the beneficiaries" (1.).

The given definition clearly indicates to the main elements of trust relationships:

- ***constituant*** (a *settlor* – in the English language) – a legal entity, which creates a trust.
- ***fiduciary*** (a *trustee* – in the English Language) – an equitable owner of the property. The concept of "*fiduciary"* is very restricted in the French law. It comprises credit institutions, insurance companies and advocates (including English solicitors and barristers, but not notaries). Fiduciaries have many rights and responsibilities. They vary from trust to trust depending on their type. Hence, they can be removed if the interests of beneficiaries are in danger.
- ***beneficiary*** (a *beneficiary* – in the English language) – 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" (5.). Despite this fact a concept of beneficiary exists. Hence, it excludes individuals.

Therefore, a "fiducie" can be regarded as a contract by which a company transfers goods or rights to a person who holds and manages it for the benefit of one or more beneficiaries. A **constituant,** a **fiduciary** and a **beneficiary** are inseparable elements of trust relationships. In certain cases, a constituant and a fiduciary can represent the beneficiaries of a "fiducie", which is usually created by law or by contract. "The contract that sets it up must contain a certain amount of information and must be registered with the registre national des fiducies (a purposely set up national registry) and the service des impôts (the French Inland Revenue), as failure to so register the fiducie renders it null and void" (5.).

Specific emphasis must be put on the fact, that the "fiducie" stipulates the emergence of several important changes in the French legal reality:

1. it facilitates the isolation of goods in an autonomous entity, which is kept separately from the estate of constituant;
2. it enables a temporary transfer of the property;
3. 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.

Moreover, the main priority of the new law lies in the fact, that it allows fiduciaries to purchase the French assets in a similar way to the investment in English assets. Therefore, "it greatly simplifies the process for trusts based in English law derived jurisdictions including offshore trusts and pension funds" (1.).

One more peculiarity of the French law lies in the fact, that the "fiducie" ends on the death of the settler, while in the English law the trust is mainly set up for dealing with succession. Moreover, it cannot override the entrenched rights of protected heirs in the inheritance law of France. Only in certain cases - when a person has substantial wealth and no children or grandchildren with entrenched inheritance rights – the use of a trust structure for the management of a charitable estate is regarded as a reasonable step to take.

The study of the French "fiducie" reveals its peculiarities. Therefore, major differences between "trust" and "fiducie" can be presented in the following way:

The creation of a trust requires a trustor's intent presented orally or in a written form. "Fiducie" is created by law or by contract i.e. in a written form*;*

1. The "trust" can be subject to a mortis causa deed, while "fiducia" is never subject to it. Therefore, the French legal system is not familiar with the concept of a "testamentary trust";
2. "Fiducie" can only be used by companies, which are registered for corporation tax. Therefore, in contrast to the "trust", the French "trust-like" mechanism excludes individuals. Moreover, a *fiduciary* must be a financial institution, an insurance company, etc;
3. In contrast to the "trust", the French "fiducie" cannot be created only for the benefit of a beneficiary.

In the beginning of the 21st century a "trust-like" mechanism appeared in Latvia. However, it's worth mentioning, that fiduciary ownership and obligations were well known to the Latvian lawyers during the 20s-30s of the 20th century. "Following the traditions of the Senate decisions of the Tsar's Russia … Latvian Senate (the highest cassation court of the Latvian court system) recognized fiduciary ownership, and even fiduciary fledges in 1920-1930s" (4., 437). Moreover, fidei commissum (in the inheritance law) had been regulated by the Latvian Civil law till 1937.

Nowadays, after a long pause, fiduciary relationships are slowly returning to the court and commercial relations. Hence, they are not regulated by the Latvian written law. Fiducia is recognized only in the court practice.

"Trusts" have become very important even in Latvian capital markets (through pension funds) and commercial banks. According to the Law on Private Pension Funds, a trustee/an asset manager of the pension fund has to ensure the implementation of the investment strategy as approved in the pension plan, "settle accounts using monetary assets contributed to the fund, receive and transfer financial instruments and perform other transactions in the assets of the fund in conformity with requirements of

the law and the pension plans licensed by the Financial and Capital Market Commission" (4., 443).

It's worth mention, that trust operations performed by the Latvian commercial banks are based on the contract between the settler and the trustee. The former remains the legal owner of the trust assets. Hence, a valid contract is created in a written form and specifies several matters, for instance:

- "The scope of trust operations;
- Rights, obligations and liabilities of the contracting parties, especially which party brings responsibility for the market risks;
- The total amount of trust assets;
- Possible investment types and total amounts" (4., 437), etc.

The Latvian "trust" cannot be regarded as an alternative of a "will". However, in cases of funds, heirs are permitted "to succeed to a beneficiary's interest in the pension fund according to the Law on Private Pension Funds of 5 June 1997. In case of creating trust, inter vivos rules on forced heirship should be observed" (4., 443).

Therefore, the study of the Latvian "trust" reveals, that this institution has become very important in the Latvian court and commercial sphere. However, in cases of pension funds it deals even with inheritance rules.

In the beginning of the 21st century a "trust-like" mechanism appeared in the Romanian legal system. However, this process was preceded by a strong contradiction of Romania's major law mechanisms: the singleness of a person's patrimony and the lack of the concept of the duality of ownership. Despite such obstacles, the necessity of innovative processes and the influence of the American capital markets changed the "landscape" of Romanian legal system via implementing the institution of "fiducia" – a modification of "trust" - into the newly created Civil Code, which entered into force on 1 October 2011.

Article 773 of the New Civil Code defines "fiducia" as "the legal operation whereby one or more grantors (in Romanian *constituitori*) transfer(s) various patrimonial rights or a group of such patrimonial rights, present or future, to one or more trustees (in Romanian *fiduciari*), who administer those with a given purpose, to the benefit of one or more beneficiaries (in Romanian *beneficiari*). These rights constitute an autonomous patrimony, separate from other rights and obligations in the fiduciary's own patrimony" (6., 157). Therefore, fiducia is a legal relationship oriented on the transference of present and future rights. It consists of three major elements:

- A "***constituitori***" - a person or a legal entity which creates a "fiducia".

- A "***fiduciari***" - a person or a legal entity which holds legal title to the trust property. A "*fiduciari"* can be represented only by credit institutions, investment companies, insurance and reinsurance companies, investment management companies, public notaries and attorneys at law;
- A "***beneficiari***" – a beneficial owner of the property.

"Fiducia" must be expressly established by law or by authenticated contract. The contracting parties - a constituitori, a fiduciari and a beneficiari – make an agreement, which connects them by a common economic purpose. A fiducia is usually registered at the Electronic Archive of Security Interests in Personal Property. In order to be valid, it must explicitly state the following elements:

- "the rights subject to transfer;
- the duration of transfer (not to exceed 33 years);
- the identity of the grantor, trustee and beneficiary;
- the purpose of the fiducia;
- and the extent of the trustee's management and disposal powers" (8.).

Therefore, the study of the New Romanian Law reveals the similarities and differences of the Romanian "fiducia" and Anglo-American "trust". Therefore, major differences between these legal instruments can be listed in the following way:

1. "Trust" divides trustor's ownership into the property of a trustee and the property of a beneficiary – an equitable interest, while "fiducia" divides and at the same time, separates the trust property from a trustee's individual property. Therefore, the Romanian law discusses a trust property and a trustee's individual property as two separate units;
2. The creation of "trust" requires a trustor's intent presented orally or in a written form. For the creation of the "fiducia", a *constituitori* enters into a written and notarized contract with a *fiduciary;*
3. "Trust" can be subject to a mortis causa deed, while "fiducia" is never subject to it. Therefore, the Romanian legal system is not familiar with the concept of a "testamentary trust".

Conclusions and proposals

All the above-mentioned enables us to conclude, that the French "fiducie", the Latvian "trust" and the Romanian "fiducia" are European modifications of Anglo-American "trust". However, they do not represent a faithful reflection of the original model. This fact can be proved by the following description:

- Anglo-American “trust”, the French “fiducie”, the Romanian “fiducia” and the Latvian “trust” consist of three major elements: the owner of the property, the transferee and the beneficial owner of the property - “beneficiary”. However, the French “fiduciary” comprises only credit institutions, insurance companies and advocates, while the Romanian “fiduciari” can be represented by credit institutions, investment companies, insurance and reinsurance companies, investment management companies, public notaries and attorneys at law.
- Anglo-American “trust” can be subject to a mortis causa deed, while “fiducie” and “fiducia” are never subject to it. Therefore, the French and Romanian legal systems are not familiar with the concept of a “testamentary trust”, while the Latvian law deals with inheritance rules in cases of pension funds;
- The creation of Anglo-American “trust” requires a trustor’s intent presented orally or in a written form. However, the French, Latvian and Romanian laws tell nothing about oral trusts.

Despite such data, we suppose, that the ongoing processes of globalization will facilitate the improvement of trust-like devices throughout Europe. Moreover, further researches in the field of the development of “trust-like” mechanisms will fulfill the picture of the expansion of the utilization of “trust” and vividly depict the impact of globalization on the legal systems of different countries. Therefore, the given study can play an important role in the solution of one of the most urgent problems of today’s world – Anglo-American institution of “trust” and the results of its spread throughout Europe.

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Kopsavilkums

Pasaule ir nemitīgi attīstījusies. Tomēr pēdējo desmitgadu laikā pārmaiņu temps ir gandrīz dubultojies. Globalizācijas process ir aptvēris visu pasauli. Tā orientēšanās uz iekļaušanās un internacionalizācijas tendenci ir ieviesusi izmaiņas vairāku valstu tiesību sistēmu aprisēs.

Šajā darbā ir aplūkoti inovatīvie procesi Eiropas tiesību sistēmās. Turklāt tas piedāvā plašu pētījumu par anglo-amerikāņu „trust" un tā eiropiešu pārveidojumiem – franču "fiducie", rumāņu "fiducia" un latviešu "trasts". Šo institūtu salīdzinošā analīze atklāj, ka:

- anglo-amerikāņu "trust", franču "fiducie", rumāņu "fiducia" un latviešu "trasts" sastāv no trīs galvenajiem elementiem: īpašuma īpašnieka, pārņēmēja un labuma saņēmēja no īpašuma jeb beneficiara. Tomēr franču jēdziens "fiduciary" aptver tikai kredītinstitūcijas, apdrošināšanas un pārapdrošināšanas uzņēmumus un advokātus, kamēr rumāņu "fiduciari" var tikt attiecināts uz ieguldījumu sabiedrībām, kredītiestādēm, apdrošināšanas un pārapdrošināšanas uzņēmumiem, ieguldījumu pārvaldīšanas uzņēmumiem, notāriem un zvērinātajiem advokātiem.
- anglo-amerikāņu "trust" ir attiecināms uz *mortis causa*, savukārt ar jēdzieniem "fiducie" un "fiducia" tas nav iespējams. Franču un rumāņu tiesību sistēmās nav ieviests "testamentārā trasta" jēdziens, bet latviešu trastu tiesības paredz mantošanas tiesības lietās saistībā ar pensiju fondiem;
- anglo-amerikāņu „trust" uzticētāja nolūks ir jānoformulē mutiski vai rakstiski. Savukārt franču, latviešu un rumāņu likumos nekas nav minēts par mutisku trastu.

Ņemot vērā visu iepriekšminēto, jāsecina, ka Francijas, Latvijas un Rumānijas likumi jau ir netieši atļāvuši mehānismus, kuri ir līdzīgi anglo-amerikāņu „trust". Tomēr rezultātā šie radītie instrumenti būtiski atšķiras no oriģinālā modeļa. Tālāki pētījumi par trastu mehānismu attīstību Eiropā papildinās trastu izmantošanas izplatīšanās ainu un uzskatāmi attēlos globalizācijas ietekmi uz dažādu valstu tiesību sistēmām. Tādēļ šim pētījumam var būt būtiska loma risinājuma rašanai vienai no visaktuālākajām problēmām mūsdienu pasaulē – anglo-amerikāņu „trust" institūtam un tā izplatības rezultātiem visā Eiropā.