

ROMANIAN “FIDUCIA” AND GEORGIAN “TRUST” (MAJOR TERMINOLOGICAL SIMILARITIES AND DIFFERENCES)

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Abstract

Globalization - a complex system of innovation, internationalization and rapidly growing interdependence - plays the greatest role in the formation of today's world. It enters different spheres of human life and stipulates the uniformity of economy, law, business and even, political life. In the framework of global processes, a lot of changes can be seen in the legal systems of European countries. The given paper discusses the formation of the Romanian “fiducia” and the Georgian “საკუთრების მონდობა” (sakutrebis mindoba – means “trust”) under the influence of Anglo-American “trust”. The term “trust” generally nominates an institution of Anglo-American law, which is irreplaceable in the cases when the real owner of the property must be substituted by the nominal one (trustee) for carrying out civil relationships. This concept originated in the English Common law, but has been constantly rejected by the European continental legal systems (Civil law). The main obstacle laid in the fact, that Anglo-American legal system was based on the duality of ownership, which was almost unacceptable for the continental law-governed countries. However, in the recent years, the growing importance of the American capital markets popularized the utilization of “trust” and stipulated its insertion in some “rigid” European jurisdictions. Moreover, some world countries have already indirectly allowed mechanisms similar to the “trust”. Among them are Romania and Georgia. The given research is dedicated to the precise description of the Romanian and Georgian “trust instruments”. It singles out major terminological units and underlines the fact that newly-established mechanisms have to undergo several stages for turning into faithful reflections of the original model of “trust”.

Keywords: globalization, fiducia, Georgian, Romanian, trust.

Introduction

The concept “globalization” has rapidly crept into the consciousness of contemporary society and has acquired different interpretations. According to Merriam-Webster dictionary: globalization means the development of an increasingly integrated global economy marked especially by free trade, free flow of capital, and the tapping of cheaper foreign labor markets¹. It is an inevitable phenomenon in human history that's been bringing the world closer through the exchange of goods and products, information, knowledge and culture². Globalization refers both to the compression of the world and the intensification of consciousness of the world as a whole³. The existence of competing definitions of global processes indicates to the complexity of the given phenomenon. Some scholars speak about globalization of economy and culture, while others indicate to the law or politics. However, according to the existed data, globalization can be regarded as a complex system of innovation, internationalization and rapidly growing interdependence, which plays the greatest role in the formation of today's world. It comprises almost all spheres of life and aims at the creation of the “boundless” globe.

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¹ Merriam-Webster dictionary. Accessed January 2, 2013, <http://www.merriam-webster.com/dictionary/globalization>.

² Globalization. Accessed January 3, 2013, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:23272496~pagePK:51123644~piPK:329829~theSitePK:29708,00.html>.

³ Malcolm Waters, Globalization, accessed January 12, 2013, books.google.ge/books?isbn=0415238544.

The given paper discusses globalization as an ongoing process, which changes the contours of law and creates new global legal mechanisms. One of them is the “trust” – a unique institution characterizing Anglo-American law, which occurred in response to the need to find solutions and to protect promises which had no binding affect, but which should have been compiled according to the equity principles: a good-faith and respecting one’s word⁴. The concept of “trust” originated in English Common law during the Middle Ages. It was defined as a fiduciary relationship in which a person, called a “trustee”, held title to the property for the benefit of another person. The agreement that established a “trust” consisted of three main elements: a “**grantor**” (also called a “**creator**”, a “**donor**” or a “**settler**”), a “**trustee**” and a “**beneficiary**”.

In the beginning of the 19th century, “trust” was established in the American business sphere. It acquired great significance, especially, through mutual and pension funds. The growing importance of its utilization in the American business law has influenced some European countries. However, the unique institution of “trust” has been constantly rejected by the continental legal systems (civil law). The main obstacle laid in the fact, that Anglo-American law was based on the duality of ownership, which was almost unacceptable for the continental law-governed countries.

The given research tries to answer the demands of the modern epoch. It describes the appearance of the European modifications of “trust”, singles out major concepts presented in the Romanian and Georgian “trust mechanisms” and underlines their importance in today’s globalized world. The given research is a presentation of the new outlook via relying on already existed small number of works, which are dedicated to the development of “trust-like” mechanisms of the world.

ROMANIAN “FIDUCIA” AND GEORGIAN “TRUST” – NEWLY ESTABLISHED MODIFICATIONS OF ANGLO-AMERICAN “TRUST”

The establishment of modifications of Anglo-American “trust” – this is a major challenge of today’s Europe. Many European countries are trying to answer the demands of modern epoch via establishing “trust-like” mechanisms in their legal systems and business spheres.

It’s worth mentioning, that the relationships similar to “trust” appeared in Roman law in the 1st-3rd centuries A.D. Under a fiduciary contract: one person (principle) transferred property to another (fiduciary) on the basis of a certain condition (*fidei fiduciae causa*), which obliged him (her) to use the property in accordance with the terms of the contract and to return it immediately after the emergence of the conditions specified in the contract⁵.

However, according to the historical data, the original form of trust appeared in the English Common law in 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. The given transference procedure preceded and at the same time, stipulated the emergence of today’s institution of “trust”, which is based on the duality of ownership (the property resulting from the legal estate is divided into

⁴ Luminița Tuleașcă, “The concept of the trust in Romanian law”. Accessed January 12, 2013, www.rebe.rau.ro/RePEc/rau/journal/SU11/REBE-SU11-A13.pdf.

⁵ Tariel Zambakhidze, “Trust (Historical Review)”, Samartali (2000): 59.

the property of a trustee and the equitable interest – the property of a beneficiary). A “trust instrument” (a trust contract) is usually created *inter vivos* or on death at the direction of an individual (such type of a trust is called a “testamentary trust”). He (she) obligates certain persons to use and to protect entrusted property for the benefit of others. Therefore, an ordinary Anglo-American “trust” consists of three main elements:

- A “*trustor*” - a person who creates the “trust” (also called a “creator”, a “grantor”, a “donor” or a “settler”).
- A “*trustee*” - a person or a legal entity which holds legal title to the trust property. Trustees have many rights and responsibilities. They vary from trust to trust depending on their type;
- A “*beneficiary*” – a beneficial (or equitable) owner of the property. It’s worth mentioning, that a “grantor” can be even a “beneficiary”. In this case, the “trust” involves a simple delegation of responsibilities.

Trusts are usually created orally or in a written form. An “oral trust” (a “parol trust”) presents the grantor’s spoken statement. It is an agreement formed between a grantor and a trustee without the usage of a written instrument. Generally, trusts of real property require a written form, while the trusts of personal property can be created orally⁶. In order to be valid, each trust has to meet three major certainties (the given requirement goes back to some words of Lord Langdale (1840)⁷):

1. The certainty of intention;
2. The certainty of subject-matter, which can be subdivided into:
 - a) The certainty of what property is to be held upon trust;
 - b) The certainty of the extent of the beneficial interest of each beneficiary;
3. The certainty of beneficiaries (in case of private trusts) or of objects (in case of non-charitable “purpose” trusts without human beneficiaries - i.e. trusts of imperfect obligation). This requirement does not apply to charitable trusts if there is a general charitable intention⁸.

Since the beginning of the 19th century the institution of trust has become popular in the American business sphere. It has offered several economic and legal advantages, especially, through mutual and pension funds. At the end of the 20th century, the process of globalization stipulated the “internationalization” of trust mechanism. The starting step of this process was the conclusion of the Hague Convention on the Law Applicable to Trusts and on their Recognition (1 July, 1985) and its ratification by 12 countries (March, 2011). The evolution of regulations of trust at the European level directly pointed to the tendencies of the inclusion of this institution into the national laws of the EU member states. Moreover, the adoption of the Hague Convention was an obvious starting point of the unification of the laws of the European countries. However, the implementation of the given institution into the civil law jurisdictions has met several obstacles, namely:

- The continental law countries have been characterized by the lack of the concept of the duality of ownership i.e. by the absence of the concept of property division in ownership by law (right enjoyed by the trustee) and ownership in equity (right

⁶ Oral trust law and legal definition. Accessed January 4, 2013, <http://definitions.uslegal.com/o/oral-trust/>.

⁷ The three certainties, Wiley Online Library. Accessed January 5, 2013, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1940.tb02728.x/pdf>.

⁸ The three certainties, Wiley Online Library. Accessed January 5, 2013, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1940.tb02728.x/pdf>.

enjoyed by the beneficiary) and, therefore, by the existence of the principle according to which there must be only one owner at the time⁹;

- The continental law countries have been characterized by the singleness of a person's patrimony: 1. each person has a patrimony; 2. each patrimony belongs to someone; 3. one person has only one patrimony¹⁰.

Despite such obstacles, legal systems of some European countries underwent the process of modernization, which stipulated the creation of several modifications of trust, for instance, the institution of "fiducia" appeared in the newly created Civil Code of Romania, which entered into force on 1 October 2011.

According to Article 773 of the New Civil Code, "fiducia" is 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 the other rights and obligations in the fiduciary's own patrimony¹¹. 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 "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 powers¹².

Therefore, a study of the New Romanian Law reveals the similarities and differences of the Romanian "fiducia" and Anglo-American "trust". Major differences between these legal institutions can be listed 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 "fiducia" divides and at the same time, separates the trust property from a trustee's individual property. Therefore, the

⁹ Luminița Tuleașcă, "The concept of the trust in Romanian law". Accessed January 12, 2013, www.rebe.rau.ro/RePEc/rau/journal/SU11/REBE-SU11-A13.pdf.

¹⁰ Valerio Forti, "Comparing American Trust and French Fiducie", *The Columbia Journal of European Law Online* (2011), accessed January 10, 2013, http://www.cjel.net/online/17_2-forti/.

¹¹ Luminița Tuleașcă, "The concept of the trust in Romanian law". Accessed January 12, 2013, www.rebe.rau.ro/RePEc/rau/journal/SU11/REBE-SU11-A13.pdf.

¹² Trusts under Romania's new civil code, fiducia. Accessed January 10, 2013, <http://www.hr.ro/digest/201203/digest.htm#contents0>.

Romanian law discusses a trust property 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 "fiducia", a *constitutori* enters into a written and notarized contract with a *fiduciary*;
3. the "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".

It's worth mentioning, that during the end of the 20th century and in the beginning of the 21st century, the modifications of the institution of "trust" appeared not only in the Romanian law, but in other 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 was enriched with new concepts and terminological units indicating to the modernization of Georgia's legislation. One of the newly appeared Georgian institutions was "საკუთრების მიწდობა" (sakutrebis mindoba), which has been regarded as a modification of Anglo-American "trust". However, a precise study of the Georgian "საკუთრების მიწდობა" reveals major differences from 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 მიმწდობი / sakutrebis mimndobi) and a "trustee" (მიწდობილი მესაკუთრე / mindobili mesakutre):

- "*საკუთრების მიმწდობი*" 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;
- "*მიწდობილი 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 მიწდობის ხელშეკრულება / sakutrebis mindobis khelshekruleba). Under this contract: the principle (trustor) transfers the property to the trustee, who accepts and manages it in compliance with the principle's interests¹³. The specificity of the Georgian "საკუთრების მიწდობა" 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)¹⁴. The motive of a "trust contract" can be the owner's wish to delegate the authorities of management ("to get rid of" the load of management) in order to 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 the Georgian 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;

¹³ The Civil Code of Georgia (Tbilisi: Bona Causa, 2002), 180.

¹⁴ The Commentary of the Civil Code of Georgia (Tbilisi: Samartali, 2001), 416-417.

2. The trustee enjoys the owner's entitlement in relations 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 arisen¹⁵.

A transferee is even entitled to make any kind of deal. However, he (she) has no legal rights to sell the property unless the agreement between the parties provides otherwise.

Therefore, a study of the new Civil Code of Georgia reveals the similarities and differences of the Georgian "საკუთრების მიწდობა" and 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 მიწდობა", a trustor ("საკუთრების მიმწდობი") enters into a written and notarized contract with a trustee ("მიწდობილი მესაკუთრე");
2. the Anglo-American "trust" can be subject to a mortis causa deed, while the Georgian "საკუთრების მიწდობა" is never subject to it. Moreover, the Georgian legal system is not familiar with the concept of a "testamentary trust";
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 მიწდობა" considers only a simple delegation of authorities of management in behalf of "საკუთრების მიმწდობი" 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.

Conclusions

All the above mentioned enables us to conclude, that today's global processes stipulate closer contacts of human societies and combine modes of living of their representatives. Globalization enters into different spheres of life: politics, economy, business, etc. It even changes the contours of law and creates new global legal institutions and norms. The given paper presented a study of Anglo-American "trust" and its European modifications – the Romanian "fiducia" and the Georgian "საკუთრების მიწდობა". A comparative analysis of these institutions revealed the following:

- the Anglo-American "trust" and the Romanian "fiducia" consist of three major elements: the owner of the property ("trustor"; "constitutori"), the transferee ("trustee"; "fiduciari") and the beneficial owner of the property ("beneficiary"; "beneficiari"). The Georgian legal system identifies the concept of "trustor" with the concept of "beneficiary". Therefore, the term "beneficiary" has no Georgian equivalents;
- The creation of "trust" requires a trustor's intent presented orally or in a written form, while for the creation of "fiducia" and "საკუთრების მიწდობა", a trustor enters into a written and notarized contract with a trustee ("მიწდობილი მესაკუთრე");
- The Anglo-American "trust" can be subject to a mortis causa deed, while the Romanian "fiducia" and the Georgian "საკუთრების მიწდობა" are never subject to it. Moreover, the Romanian and Georgian legal systems are not familiar with the concept of a "testamentary trust".

Therefore, the Romanian and Georgian laws have already indirectly allowed mechanisms similar to the Anglo-American "trust". However, it's obvious, that the resulting instruments do

¹⁵ The Civil Code of Georgia (Tbilisi: Bona Causa, 2012), 180.

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 urgent problems of today’s world.

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