"TREUHAND" AND "FIDUCIE" (TERMINOLOGICAL PROBLEMATICS)

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Abstract

Language and jurisprudence are deeply interconnected. The legal terminology of any language as well as the legal system itself is a result of "a historical evolution which did not happen on its own, as if in a vacuum, but in constant interchange with other legal languages and legal systems"[1].

Contemporary jurisprudence faces a lot of new opportunities and changes. Increasing globalization breaks down all the barriers via the "dédaublement du monde". It involves the reconstruction of all spheres of life. Within the framework of globalizing changes Europe is facing the tendency "to draw up a uniform law on the basis of work by experts in comparative law and to incorporate it in a multipartite treaty"[2]*.The creation of uniform legal system presupposes the change of terminological landscape. Therefore, the comparative study of juridical terms and suppositions regarding new translational tendencies acquire the greatest urgency.*

*The give paper deals with the study of the Swiss "trust-like mechanisms". The major emphasis is put on the actual problems emerged during the translation of terminological units related to such juridical institutions as the "**Fiducie**" and "**Treuhand**".*

Keywords: *fiducie, institution, Swiss, Treuhand, trust.*

1. Introduction

"Trust as a legal model developed by English courts over centuries and later refined in several jurisdictions based on the same legal tradition has been so successful that it serves both as an inspiration, a brand-name, and a benchmark"[1]. The "trust" considers the participation of three parties (a ***trustor***, a ***trustee***, a ***beneficiary***) and requires the separation of the ownership of property between two parties - a trustee receives a legal title, while a beneficiary acquires an equitable title.

The popularization of a trust instrument has been facilitated by its unique character stipulated by the duality of ownership inherent in the common law. The given duality "stems from a basic procedural dichotomy in Anglo-American law, between the bodies of common law and equity"[2]. The same dichotomy cannot be met in the civil law jurisdictions. However, majority of contemporary civil legal systems aspire to adopt entrusting regulations in order to "take away the labels" of non-trust jurisdictions. The given aspiration has been fuelled by certain conditions:

- the globalization of the legal practice has exhibited an overall tendency of unification and harmonization of legal systems of the world countries;
- "the dominance of U.S. and English law firms has promoted the use of trusts in complex transactions including non-trust jurisdictions and fuelled a broader worldwide circulation of Anglo-American legal concepts and instruments, increasing contacts of non-trust jurisdictions with trustees and trust assets"[3];
- the mass migration of the world population has stipulated the flow of trust property to the inhabitants of the non-trust states;
- the ratification of the Hague Convention on the Law Applicable to Trusts and on their Recognition by certain countries has increased the need of reconciliation of the Anglo-American trust with the principles of the civil law;
- "all mature legal systems have catered in various ways to the same needs that have promoted and informed the development of the common law trust: division between the economic value of assets and their holding and management; complex and flexible allocation of the economic value of assets among different beneficiaries or classes of beneficiaries; customization of the powers and duties of the managers to suit the purpose of the arrangement; etc."[4].

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[1] Mauro Bussani and Ugo Mattei, ed. *The Cambridge companion to comparative law*, (Cambridge: Cambridge University Press, 2012), 91.

[2] Konrad Zweigert and Hein Kötz, *An introduction to comparative law* (Oxford: Crarendon Press, 2011), 24.

[1] Luc Thévenoz, "Trusts: the rise of a global legal concept," in: *European private law: a handbook (volume II)*, ed. Bussani, Mauro et al. (Berne: Stämpfli, 2014), 34.

[2] Michael Milo, Jan Smits, "Trusts in mixed legal systems: a challenge to comparative trust law," *European Review of Private Law* 3 (2000), 421.

[3] Luc Thévenoz, "Trusts: the rise of a global legal concept," in: *European private law: a handbook (volume II)*, ed. Bussani, Mauro et al. (Berne: Stämpfli, 2014), 27-28.

[4] Luc Thévenoz, "Trusts: the rise of a global legal concept," in: *European private law: a handbook (volume II)*, ed. Bussani, Mauro et al. (Berne: Stämpfli, 2014), 35.

2.1. Swiss law

Switzerland is one of those European countries, which aspires to the implementation of the common law "trust". It's worth mentioning, that "Swiss courts have been dealing with trusts since 1874 and the Swiss government authorized the settling of foreign business trusts since 1957"[5]. However, the English term "trust", which existed in Swiss legal domain conveyed quite non-English meaning. It denoted "a monopolized concern having subsidiary companies, which abandoning their individual economic existence, are fused together with the parent company to such a unity that its centralised management has a monopolistic control of the market"[6]. Besides the English word "*trust*", Swiss juridical system used such terminological units as *Treuhand, fiducia, fiducie, Fiduzia*. These lexical units denoted fiduciary relationships and depicted the existence of three state languages in Switzerland. E. Huber – the author of the paper "*Trust and "Treuhand" in Swiss law*" – directly indicated: "if we wish to speak about "trust" in Switzerland in the Anglo-American sense we translate the word into German with Treuhand, in French with Fiducie, in Italian with Fiducia… Speaking of the Treuhand we distinguish between the Treugeber (in English settler, in French fiduciant, in Italian fiduciante), the Treuhänder (in English trustee, in French fiduciaire, in Italian fiduciario) and the Begünstigter (in English beneficiary, in French beneficiaire, in Italian beneficiario)"[7]. Can we share E. Huber's viewpoint and identify the common law "*trust*" with *Treuhand, Fiducie* and *Fiducia*? The given paper makes an attempt to answer this question via making certain juridical-linguistic analysis.

2.2. Swiss Treuhand

Initially, the Swiss ***Treuhand/fiducie*** was considered as a modernization of the ancient Roman "fiducia". This Roman legal institution comprised two distinct acts: "a disposal, using the formalistic procedure of *mancipatio*, whereby the creator transfers to the fiduciary the ownership of the fiduciary property; and a distinct agreement, the *pactum fiduciae*, whereby the fiduciary undertakes to restore this property to the creator under certain conditions"[8]. It's difficult to identify the origin of the Swiss "fiducie". However, we can watch over its development after the ratification of the Hague Convention.

It's a well-known fact, that in 2007 Switzerland ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition of the 1st of July, 1985. The ratification of the Hague Convention has facilitated the introduction of certain significant provisions in the SPILA and SDCBA (*Swiss Private International Law Act* and *Swiss Debt Collection and Bankruptcy Act*). "In the latter legislation, a new provision specifies that trust assets constitute a separate fund independent from the trustee's own patrimony"[9]. The existence of a separate fund indicates to the notion of a segregated patrimony. However, despite this fact, the scholars express different ideas regarding the existence of *Trust law* in Switzerland. A. E. von Overbeck believes, that "there is no institution called "trust" in Swiss law, and until recently no other institution which could meet the conditions of the Principles"[10]. D.W. Wilson and C. L. Nagai express almost the same idea: "The Anglo-American trust has not (yet) found its way into the Swiss legislation: there is currently no Swiss substantial law on trust"[11]. Many scholars believe, that the Swiss "*fiducie (Treuhand)* is the nearest cousin of the trust"[12], while Hungarian scholar I. Sandor supposes that "in the laws of Switzerland, the Treuhand (*Fiduzia*) is the unique equivalent of the trust"[13]. Moreover, I. Sandor presents more precise description of Swiss fiduciary relationships:

"In case of the Treuhand, the settler (*Fiduziant, Treugeber*) transfers the property (*Treugut*) to the trustee (*Fiduziar, Treuhänder*). The Fiduziar acquires legal title to the property and undertakes a contractual obligation to use the property for the benefit of the settler or third parties, as instructed by the settler"[14].

According to the given definition, the major participants of Swiss entrusting relationships are:

[5] David W. Wilson and Caroline L. Nagai, "Country report: Switzerland." *The Columbia Journal of European Law Online* 18 (2012): 26, accessed November 30, 2015 http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf

[6] Erich Huber, "Trust and Treuhand in Swiss law," *The International and Comparative Law Quarterly* 1 (1952): 64.

[7] Erich Huber, "Trust and Treuhand in Swiss law," *The International and Comparative Law Quarterly* 1 (1952): 64.

[8] Luc Thévenoz and Jean-Philippe Dunand, "The Swiss fiducie: a subtle conceptual blend of contract and property," in: *Madeleine Cantin Cumyn. Fiducie face au trust dans les rapports d'affaires.* (Bruxelles: E. Bruylant, 1999), 326.

[9] David W. Wilson and Caroline L. Nagai, "Country report: Switzerland." *The Columbia Journal of European Law Online* 18 (2012): 27, accessed November 30, 2015 http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf

[10] A.E. von Overbeck, "National report from Switzerland," in: *Principles of European trust law, Law of business and finance*, ed. D.J. Hayton et al. (Kluwer Law International, 1999), 105.

[11] David W. Wilson and Caroline L. Nagai, "Country report: Switzerland." *The Columbia Journal of European Law Online* 18 (2012): 26, accessed November 30, 2015 http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf

[12] Luc Thévenoz, "Trusts: the rise of a global legal concept," in: *European private law: a handbook (volume II)*, ed. Bussani, Mauro et al. (Berne: Stämpfli, 2014), 33.

[13] István Sándor, *Fiduciary property management and the trust (Historical and comparative law analysis)*, (Bucharest: HVG-ORAC Publishing Ltd., 2015), 302.

[14] István Sándor, *Fiduciary property management and the trust (Historical and comparative law analysis)*, (Bucharest: HVG-ORAC Publishing Ltd., 2015), 302.

Fiduziant/Treugeber - a transferor;

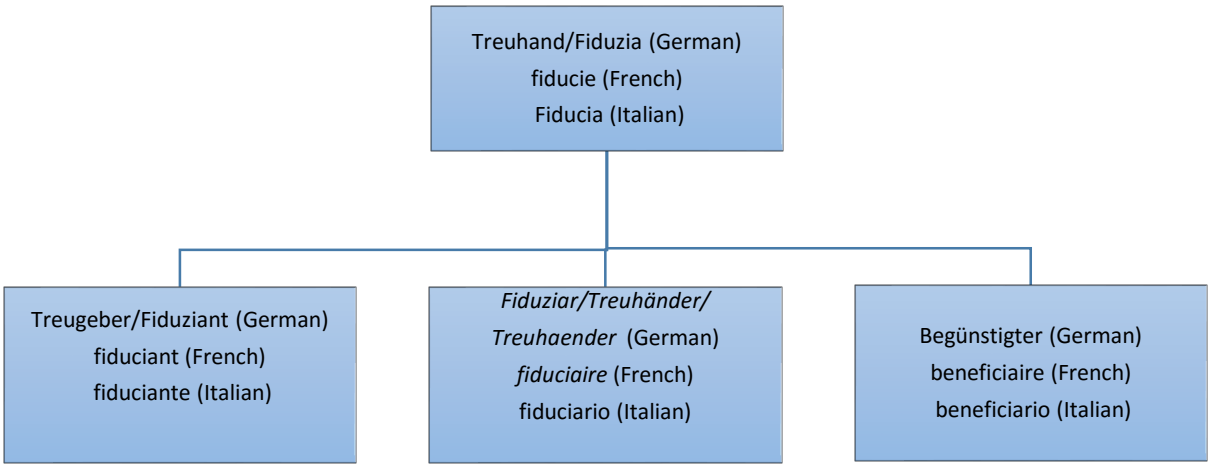
Fiduziar/ Treuhänder - a transferee;

Begünstigter – a beneficiary, who is presented by a settler or third parties.

It's worth mentioning, that H. Meyer uses the German term "*Treuhaender"* for denoting a "transferee". He states that the "*Treuhaender"* in Switzerland can never be in the same position as a trustee in England or in the United States. He is either more or less… For that reason *"Treuhaender"* should never be translated as *"trustee",* but rather as *"fiduciary"…*[15]. In certain cases, the given German terminological units can be substituted by their French equivalents, which are presented in Rapp's following definition:

"*Contrat par lequel une personne, le fiduciant, transfère un droit à une autre, le fiduciaire, qui s'oblige à en user selon les indications du fiduciant, en général à le retransférer dans certaines conditions*"[16].

Therefore, *Fiduziant/Treugeber* can be presented by the French term *fiduciant*, while *Fiduziar/Treuhänder* can be substituted by *fiduciaire*. Even the Treuhand is often designated by *fiducie* (*acte fiduciaire)* or *Fiduzia*. The given terminological equivalency can be presented in the following way:



The major disadvantage of the Swiss entrusting relationships lies in the fact, that:

- the *Treuhand* is based on the rules of mandate (mandat, Auftrag);
- in contrast to the common law trustee (transferee) the Swiss *Fiduziar/Treuhänder* acquires the full legal title on the transferred property;
- there is the lacking of the separation of the *Treuhander*'s own property;
- as a result of the *pactum fiduciae*, the *Fiduziant/Treugeber* becomes less protected and in cases of the insolvency "the beneficiary is not ranked above the other creditors"[17];
- "the fiduciant can give the fiduciary any instructions at any time, while normally the settler cannot interfere with the management or disposition of the trustee"[18].

These facts directly indicate that the Swiss entrusting relationships differ from the Anglo-American "*trust*". However, there is the possibility of the establishment of the original "*trust*" in those cases when a settler chooses the foreign law as a governing one.

2.3. Swiss foundation (fondation, Stiftung)

Some scholars believe, that the Swiss foundation (*Fondation, Stiftung*) can be regarded as an analogue of the common law "*trust*". Foundations (except ecclesiastical and family foundations) are usually registered in the "*register du commerce*". The so-called "*family foundations*" can be constituted by dedicating a patrimony to a particular family. According to Articles 355 ff. of the Swiss Civil Code:

"The family foundation which is a legal person and has the potential to continue indefinitely, allows the creation of a mass of property dedicated to the

[15] Hermine Herta Meyer, "Trusts in Swiss law," *The International and Comparative Law Quarterly* 1 (1952):318.

[16] A.E. von Overbeck, "National report from Switzerland," in: *Principles of European trust law, Law of business and finance*, ed. D.J. Hayton et al. (Kluwer Law International, 1999), 105.

[17] István Sándor, *Fiduciary property management and the trust (Historical and comparative law analysis)*, (Bucharest: HVG-ORAC Publishing Ltd., 2015), 303.

[18] A.E. von Overbeck, "National report from Switzerland," in: *Principles of European trust law, Law of business and finance*, ed. D.J. Hayton et al. (Kluwer Law International, 1999), 110.

payment of the costs involved in educating and setting up in life the members of a family, or providing them with subsistence"[19].

The Swiss foundations are mostly used for charitable, cultural or similar purposes, for instance, they comprise the dedication of the property to such specific intentions as the "maintenance of a building, the commemoration of an event, or the establishment of a profit-sharing plan for the employees of an enterprise", etc.[20]. Therefore, foundations function almost similarly to the Anglo-American "*charitable trusts*". However, they cannot be created for the benefit of a specified person. Moreover, "the foundation cannot easily be used for beneficiaries in the manner in which this is done by trust law. Swiss law has its own brand of rule against perpetuities. *Fidéicommis de famille* may not ne constituted (Article 335, 2 CC) and *substitution fidéicommisaire* is limited to one reversionary heir (Article 488 CCS)[21].

2.4. Terminological insights

A profound study of the contemporary Swiss ***Treuhand/fiducie*** and foundation (***Fondation, Stiftung)*** enables us to treat these institutions as the modern "*trust-like devices*", which do not represent the analogues of the Anglo-American "*trust*". In this case the scholars and especially, the linguists have to deal with a serious problem raised "by the need to name and discuss in English a number of legal transactions or institutions that are redolent of trust (e.g. "fiducia", "Treuhand"), but are governed by Austrian, Italian, German, Spanish law, etc. Could these transactions be described as "trusts", even though the concepts employed to analyse them had nothing or little in common with the building blocks of the law of trusts in common law jurisdiction?"[22].

Answering this urgent question demands the investigation of terminological units related to the modern European "trust-like devices". In case of the Swiss law the major emphasis must be put on the term "***Treuhand***", which is often significantly misinterpreted, for instance, "Routledge German Dictionary of Business, Commerce, and Finance" presents the following English equivalents of the German lexical units related to the "***Treuhand***":

"Treuhand – Trust;

Treuhänder – Trustee, fiduciary;

Treugeber – settlor, transferor, trustor (AmE)"[23].

It is also significant to pay attention to the equivalences, which are presented in the contemporary multilingual dictionaries. L. D. Egbert's "Multilingual Law Dictionary" (English-French-Spanish-German) comprises the following German counterparts of the English terms denoting the legal institution of *"trust"* and participants of the entrusting relationships:

"**trust**

Kartell (m); Trust (m); Treuhandverhältnis (n); Vertrauen (n).

trustee

Vermögensverwalter (m); Treuhänder (m)"[24].

"**beneficiary**

Begünstigter (m) (aus einem Versicherungsvertrag);

Empfänger (m) einer Erbschaft (f)"[25].

The existence of almost all the above mentioned equivalents makes obscure the essence of *„**Treuhand**"* and equalizes it with the Anglo-American *"trust"*. Some scholars have thoroughly discussed this question, for instance, Sh. A. Stark directly indicated, that the term *„**Treuhand**"* has a purely German origin: "the German word "*treu*" means true and implies faithful"[26]. Despite this fact "the word *Treuhand* is not a clear term in German, it cannot be exclusively described as a trust in English either"[27]. According to J. Rehahn and A. Grimm the term *„**Treuhand**"* must be translated as *„**German trust**"*[28]. We share the given scholars' ideas and believe, that according to the Swiss legal reality, the term *„**Treuhand***" must be translated as *"**Swiss trust**"*, while the English term *"trust"* can be equalized only with the German term *"trust*", which is presented in L. D. Egbert's "Multilingual Law Dictionary". Moreover, it is recommended to

[19] Lionel Smith, ed., *Re-imagining the trust: trusts in civil law*, (UK: Cambridge University Press, 2012), 17.

[20] Lionel Smith, ed., *Re-imagining the trust: trusts in civil law*, (UK: Cambridge University Press, 2012), 17.

[21] A.E. von Overbeck, "National report from Switzerland," in: *Principles of European trust law*, *Law of business and finance*, ed. D.J. Hayton et al. (Kluwer Law International, 1999), 109.

[22] Michele Graziadei, Ugo Mattei and lionel Smith, *Commercial trusts in European private law*, (Cambridge: Cambridge University Press, 2005), 53.

[23] *Routledge German Dictionary of Business, Commerce, and Finance: German-English/English-German*, (Psychology Press, 1997).

[24] Lawrence Deems Egbert and Fernando Morules-Macedo, *Multilingual Law Dictionary*, (Baden-Baden: A.W. Sijthoff-Alphen Aan Den Rijn Oceana Publications, 1979), 260.

[25] Lawrence Deems Egbert and Fernando Morules-Macedo, *Multilingual Law Dictionary*, (Baden-Baden: A.W. Sijthoff-Alphen Aan Den Rijn Oceana Publications, 1979), 37.

[26] Shelley A. Stark, *Hidden Treuhand: how corporations and individuals hide assets and money*, (Florida: Universal-Publishers Boca Raton, 2009), 1.

[27] Shelley A. Stark, *Hidden Treuhand: how corporations and individuals hide assets and money*, (Florida: Universal-Publishers Boca Raton, 2009), 3.

[28] Johannes Rehahn and Alexander Grimm, "Country report: Germany," *The Columbia Journal of European Law Online* 18 (2012), p. 94, accessed November 22, 2015 http://www.cjel.net/wp-content/uploads/2012/08/CJEL-Trust-Law-Final1.pdf

translate the "***Treugeber***" as the "*Swiss trustor/settlor*" and nominate the "***Begünstigter*** " as the "*Swiss beneficiary*".

The similar problems of interpretation occur in cases of the French terminological units, for instance, L. D. Egbert's "Multilingual Law Dictionary" presents the following French equivalents of the English terms denoting the legal institution "*trust*" and participants of entrusting relationships:

"trust

cartel (m); confiance (f); trust (m); fidéicommis (m)"[29];

"**beneficiary**

bénéficiaire (m)"[30].

The existence of almost all the above mentioned equivalents makes obscure the essence of "***fiducie***". However, we believe, that the equalization of the English term *"trust"* with the French word *"trust*" is the best way of the maintenance of the essence of the Anglo-American entrusting relationships. Moreover, it is preferable to denote the French term "***bénéficiaire***" with the word-combination **"***Swiss beneficiary***".**

3. Conclusions

Therefore, the juridical-economic study of the contemporary Swiss reality vividly reveals, that it has no single institution which performs all the functions performed by the common law "*trust"*. Even the "***Treuhand"*** - a prime example of fiduciary arrangements - is irreconcilable with the ***"trust",*** especially, in the following aspects:

- the lacking of the separation of the *Treuhander*'s own property;
- the acquisition of the full legal title on the transferred property by the *Fiduziar/Treuhänder*;
- the lacking of the full protection of the *Fiduziant/Treugeber* (as a result of the *pactum fiduciae*);
- the *fiduciant*'s right of giving the fiduciary any instructions at any time.

All the above mentioned directly indicates to the following prominent fact: the Swiss ***Treuhand/fiducie*** cannot be equalized with the Anglo-American "***trust"*** neither juridically, nor linguistically. Therefore, significant changes must be done in the terminological sphere in order to reflect the difference between the common law "***trust***" and Swiss "***Treuhand/fiducie***". We believe, that the term *„**Treuhand***" must be translated as *"**Swiss trust**",* while the English term *"**trust**"* can be equalized only with the German term *"trust*". Moreover, it is recommended to translate the "***Treugeber***" as the "*Swiss trustor/settlor*" and nominate the "***Begünstigter*** " as the "*Swiss beneficiary*". In case of the French terminological units the equalization of the English term *"**trust**"* with the French word *"trust*" is the best way of the maintenance of the essence of the Anglo-American entrusting relationships. It's also recommended to denote the French term "***bénéficiaire***" with the word-combination **"***Swiss beneficiary***".**

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[29] Lawrence Deems Egbert and Fernando Morules-Macedo, *Multilingual Law Dictionary*, (Baden-Baden: A.W. Sijthoff-Alphen Aan Den Rijn Oceana Publications, 1979), 260.

[30] Lawrence Deems Egbert and Fernando Morules-Macedo, *Multilingual Law Dictionary*, (Baden-Baden: A.W. Sijthoff-Alphen Aan Den Rijn Oceana Publications, 1979), 37.

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