The Development of "Trust-like" Mechanisms in Today's Bulgaria, the Czech Republic and Romania

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Abstract

Over recent decades the European legal system has undergone significant changes. Innovative and integrative processes of the globalized world have stipulated the emergence of some juridical and economic formations. This chapter is dedicated to the profound study of one of the most urgent questions of today's juridical world – the emergence and development of "trust-like" mechanisms in European countries such as: Bulgaria, the Czech Republic and Romania. It's a well-known fact, that after the Soviet era, some post-Soviet countries have been "enriched" with certain capitalistic institutions. The most prominent of them is the "trust" – a unique creature of Equity. The concept of "trust" originated in English Common law during the Middle Ages. It derived from a system employed in that era known as "use of land" or "uses". "Trust" considered the transference of the "trustor's" property to the "trustee" who managed it for the benefit of the so-called "beneficiaries". At the beginning of the 19th century, "trust" emerged in the business sphere of the USA, whilst at the end of the 20th century the growing world-wide importance of American capital markets stipulated the appearance of "trust-like" devices throughout Europe. Despite some contradictions, different modifications of "trust" have entered into Bulgarian, Czech and Romanian law. This chapter will study the evolution of these newly established institutions, and attempt to predict their influence on juridical processes and determine their role in the integration of the 21st century European juridical system. This research is based on theoretical data. Its outcomes will be useful for lawyers of different countries of the world.

Keywords: civil law, common law, mechanism, Post-Soviet countries, trust, trust-like device.

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Introduction

The historical roots of the European Union lie in the Second World War, while the 1950s are regarded as the starting point for building a peaceful Europe. Since its establishment the EU has become a "growing community", which has been enlarged year by year. The collapse of communism stipulated the emergence of "four freedoms" (movement of services, goods, people and money) across Europe, which facilitated the closer interconnectedness of the European countries. Their economic and juridical co-operation resulted in the emergence of some innovative institutions. Among them is the "trust" - a unique creature of Equity. The concept of "trust" originated in English Common law during the Middle Ages. It derived from a system employed in that era known as "use of land" or "uses". However, the medieval law was quite remote from the modern practice: "the primary purpose of the trust was to facilitate the transfer of freehold land within the family. The law governing the transmission of freehold land was deeply afflicted by feudal restrictions meant originally to concentrate landholdings for military and related advantages" (Langbein, 1995). Entrusting the land to a trustee defeated feudal restrictions. As a result, the "trust" enabled landowners to make provision for their wives and children. The beneficiaries lived on the land and managed it, while the trustees of these primary trusts were the mere stakeholders with no serious powers of management. During the following centuries the institution of "trust" underwent some changes. However, at the beginning of the 19th century, it emerged in the business sphere in the USA ("the first trust company was created in 1806 according to the recommendation of a financier and a politician A. Hamilton" (Zambakhidze, 2000)) and approximately, at the end of the 20th century the growing world-wide importance of American capital markets stipulated the appearance of "trust-like" devices throughout Europe. Despite some contradictions, different modifications of "trust" have entered into Bulgarian, Czech and Romanian law. This chapter will focus on the evolution of these newly established institutions, and will attempt to predict their influence on the juridical-economic processes and determine their role in the integration of the 21st century European juridical systems.

The Emergence and Development of the "Trust-Like" Mechanisms in Bulgaria

The appearance of the Bulgarian "trust-like" mechanism was evidenced in 2006, when Bulgaria adopted the Law on Financial Collateral Arrangements. It presented TTC (Title Transfer Collateral) as a transaction under which: "the collateral provider transfers the full ownership of financial collateral to the collateral taker in order to secure the performance of the relevant financial obligations" (Mangachev, 2009). The TTC is usually evidenced in writing. The parties of the collateral arrangements are presented by "public bodies, banks, insurance undertakings, investment brokers, and financial institutions. Generally, such collateral might be granted also by (or to) merchants (apart from individuals), provided that the other party to the collateral arrangement is a bank or any other of the above heavily regulated entities" (Saeva, n.d.). It means, that according to the Financial Collateral Arrangements Act of 2006, financial collateral can be granted to a merchant, who acts on behalf of one or more persons including a bondholder or holders of other forms of securitized debt or any of the other regulated institutions expressly listed in the law as possible *"collateral takers",* for instance, financial institutions, and banks. Moreover, financial collateral arrangements exist in two forms: the *"financial pledge"* and the *"collateral assignment".*

Generally speaking, the concept of *"pledge"* implies a security interest: "traditionally established over movables and receivables, as the valid creation of a pledge over a movable requires the delivery of the possession of the asset to the *pledgee* or a person nominated by the *pledgo*r and the *pledgee ("possessory pledge"*)" (Saeva, n.d.). It is worth mentioning, that the so-called *"non-possessory pledges"* also refer to movables, securities, and receivables. In other words, they do not require delivery of the possession of the asset to the creditor.

While speaking about the "*financial pledge*", we have to consider, that a collateral taker obtains a security interest in the relevant financial collateral: bonds, shares, and options. Although the title remains with a collateral provider, a collateral taker can establish a limited control or a form of the physical possession of the pledged assets. In contrast to the "*financial pledge"*, the "*collateral assignment*" "involves title transfer in financial collateral to the collateral taker, on terms that it or equivalent assets will be transferred back if and when the secured debts are discharged" (Saeva, n. d.).

Contemporary Bulgarian law recognizes one more transaction – a "*mortgage"* - a security interest in a real estate or a ship granted by the mortgagor (the owner) in favor of a mortgagee as a security for a debt (the possession of the property remains with the mortgagor). The law makes a distinction between a *"statutory mortgage"* and a *"contractual mortgage".* The former is created on the ground of the law, while the latter considers an agreement on the contractual basis. Therefore, a notarized form of a deed is created by a *"mortgagor"* and a *"mortgagee".*

Therefore, all the above mentioned indicates, that a *"mortgage*", a *"pledge*" and a *"collateral assignment"* can be regarded as local transactions regulated by Bulgarian law. Some Bulgarian scholars refer to the possibility of the involvement of a foreign *"security trustee"* in local transactions. This fact is rejected by other scholars, who believe, that the appointment of a foreign *"security trustee*" would not "be inconsistent with the accessory nature of Bulgarian law-collateral, as the creditors [should] be considered holders of the collateral both vis-à-vis the agent and the agent's creditors even without a formal transfer of the security interest to the creditor(s)" (Saeva, 2010).

In contrast to Bulgarian local transactions, the cross-border transactions or financing arrangements with an international component are usually governed by foreign law. The choice of a foreign legislation does not prevent the application of the overriding mandatory rules of Bulgarian law, for example, tax provisions, and antitrust. Moreover, in the cross-border transactions with the Bulgarian component, security interests are mainly created and perfected in the Republic of Bulgaria with the participation of a *"security trustee",* which is usually organized under a foreign law. In certain cases, the parties agree on the existence of a parallel debt in favor of a *"security trustee".* Therefore, the collateral held by the trustee secures the parallel debt as well as the claims of the lenders (other secured parties). The former is usually governed by an appropriate foreign law.

Therefore, the "*mortgage*" (a *"statutory mortgage"* and a *"contractual mortgage")* and *"financial collateral arrangements"* (a *"financial pledge"* and a *"collateral assignment")* can be freely regarded as modern "trust-like" devices. The "*collateral assignment*" involves title transfer in financial collateral to the collateral taker, while in case of a "*financial pledge*", the title remains with a collateral provider. In case of a "mortgage", the major functions are performed by a *"mortgagor"* and a *"mortgagee".*

The Emergence and Development of the "Trust-Like" Mechanism in the Czech Republic

Until recently the Czech courts did not recognize a trust instrument. However, on 1 January 2014 a new Civil Code came into effect in the Czech Republic. It introduced an entirely new concept of "trust fund", which was created according to the non-common law model of "trust" – the Quebec model.

According to the general definition: "a trust fund is an arrangement separating a certain part of property from the ownership of the fund founder for a specific purpose. A trust fund can be set up by concluding an agreement or upon the founder's death" (*Trust funds*, 2013). Trust funds consist of three parties - a ***founder,*** a ***trustee*** and a ***beneficiary***:

- **a founder** is a natural person or a legal entity, which sets up the trust. However, after transferring the property the founder loses ownership rights. Moreover, trust assets form part of a distinct autonomous ownership. No one has any rights towards it;
- **a trustee** is the manager of the assets. "The fundamental duty of the trustee is to manage the trust assets with the due care of a good *pater familias*: honestly, faithfully, prudently and ultimately with the highest regard for the purposes of the trust assets" (Gruna, 2014). In certain cases a trustee can be one of the beneficiaries;
- "**a beneficiary** is the person appointed by trust deed to benefit from the trust fund and must meet specified conditions" (*Trust funds*, 2013).

It's worth mentioning, that the Civil Code of the Czech Republic makes a distinction between simple and comprehensive types of trust. In the cases of simple trusts, the trustee is responsible for ensuring the nature and purpose of the trust assets. However, "comprehensive trusts give the trustees much broader powers, as they can manage and administer trust assets in any way they feel is necessary in order to preserve, enhance and indeed increase their value" (Gruna, 2014).

The Emergence and Development of the "Trust-Like" Mechanism in Romania

The New Romanian Civil Code entered into force on 1 October 2011. It introduced the institution of "fiducia" – a mechanism similar to some extent to the English Common Law "trust". The concept of "fiducia" had been transposed from the French legal provisions. However, it has been characterized by a number of specific peculiarities. In general, "fiducia" can be defined as "a legal operation whereby one or several settlers transfer real rights, receivables, security interests or other property rights or a set of such rights, whether present or future, to one or several trustees who are bound to exercise them for a predetermined purpose, for the benefit of one or several beneficiaries (*Trusts and administration of the property of others under the New Civil Code*, 2011).

Therefore, "fiducia" is a legal relationship oriented on the transference of present and future rights. It consists of three major elements:

- A "***constituitori***" (a settler) - a person or a legal entity which creates a "fiducia";
- A "***fiduciari***" (a trustee) - a person or a legal entity which holds legal title to the trust property. "In relation to third parties, the trustee will be deemed to have full proprietary rights over the patrimony (total assets and liabilities transferred through the fiducia)" (Giurgea, 2011). 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 beneficiary) – 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 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 a grantor, a trustee and a beneficiary;
- the purpose of the fiducia;
- and the extent of the trustee's management and disposal powers (*Trusts under Romania's new civil code*, 2012).

Analysis

All the above mentioned enables us to conclude, that the Romanian, Bulgarian and Czech "trust-like" devices came into being in the 21st century. They were introduced into the juridical systems of Bulgaria, Romania and the Czech Republic. The concept of "fiducia" was transposed from the French legal provisions, while the Czech "trust fund" was created according to the Quebec model. The non-common law origin of these mechanisms stipulated the emergence of their peculiarities. On the one hand, they have shared characteristics of the common law "trust", while on the other hand, they were enriched with civil law particularities. Therefore:

- Similar to the Anglo-American "trust", the Romanian and Czech "trust-like" mechanisms comprise three parties: a settler, a trustee and a beneficiary;
- In contrast with the Anglo-American "trust" (which divides trustor's ownership into the property of a trustee and the property of a beneficiary – an equitable interest), "fiducia" divides and at the same time, separates the trust property from a trustee's individual property. Therefore, trust assets and a trustee's individual property are discussed as two separate units. Different conditions are witnessed in Czech law, where the trust assets form part of a distinct autonomous ownership and no one has any rights towards them;
- The creation of the Anglo-American "trust" requires a settlor'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***, while the Czech trust fund can be set up by concluding an agreement or upon the founder's death;
- The Anglo-American "trust" can be subject to a *mortis causa* deed (the so-called "testamentary trust"). The same can be said about the Czech trust fund. However, the Romanian legal system is not familiar with the concept of a "testamentary trust". Therefore, a "*fiducia*" can be created only during the settlor's lifetime.

The discussion of the above mentioned peculiarities considers only the Romanian and Czech "trust-like" mechanisms. They stand closer to the common law "original" and naturally, stand apart from their Bulgarian "counterparts", which are presented only by the "*mortgage*" (a *"statutory mortgage"* and a *"contractual mortgage")* and *"financial collateral arrangements"* (a *"financial pledge"* and a *"collateral assignment").* These

transactions are made in the written form and represent a notarized form of the deed. The "*collateral assignment*" involves title transfer in financial collateral to the collateral taker, while in the case of a "*financial pledge*", the title remains with a collateral provider. A collateral taker can only establish a limited control or a form of the physical possession of the pledged assets. In case of a "mortgage", the major functions are performed by a *"mortgagor"* and a *"mortgagee".*

Conclusions

This chapter has focused on the detailed study of the Romanian, Czech and Bulgarian "trust-like" mechanisms. It is apparent, that the establishment of these innovative legal institutions was a reaction to the ongoing processes of globalization and internationalization. The recently increased mobility of capital, investors, lawyers and scholars turned the "trust" into a truly global phenomenon. As a result, this integral part of common law was transplanted into the civil law "soils". The above given comparative analysis reveals the major characteristics of the innovative Romanian, Czech and Bulgarian "trust-like" devices. They do not represent an ideal reflection of the original model. However, we can freely speak about the tendency of the further improvement of "trust-like" mechanisms. Timely amendments to the civil codes will facilitate the reconstruction of the newly established institutions, while this comparative analysis of the Romanian, Czech and Bulgarian "trust-like" devices will serve as a useful tool of these processes. They will facilitate integration into the EU legal sphere and will stipulate the correct expansion of the "trust" beyond "the traditional geographical boundaries of the "trust-proper" (Thévenoz, 2009). As a result, a major step will be made towards increasing the prosperity of the Romanian, Czech and Bulgarian juridical-economic systems.

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