

Francesco A Schurr (ed) *Trusts in the Principality of Liechtenstein and Similar Jurisdictions. Aspects of Wealth Protection, Beneficiaries' Rights and International Law* (Dike Verlag, Nomos Verlag, facultas.wuv Verlag 2014) 236 pages

BY ISTVÁN SÁNDOR

Upon entry into force of the new Civil Code, the fiduciary asset management contract became a living institution in Hungarian law. As regards a new type of contract, its foreign legal regulation and practise always deserves particular attention, since results and experiences abroad may have a significant effect on the Hungarian application of the given legal institution. Among civil law jurisdictions, Liechtenstein – where the institution of trust was first introduced in 1926¹ – is noteworthy. It may be particularly interesting for Hungarian lawyers to review the changes and problems arising in connection with a traditional trust system. The recently published study, edited by Professor Francesco A. Schurr,² provides excellent material in this respect. The book includes the edited version of the presentations given at the last two conferences of the scientific course of lectures held annually by the Department of Company, Foundation and Trust Law of the University of Liechtenstein. The studies are divided into four parts. The first part deals with general questions concerning the trust law (General Views of Trust Law), the second part focuses on aspects of the protection of assets (Wealth Protection), the third part analyses the rights of the beneficiaries (Beneficiaries' Rights), while the fourth part examines aspects of international and comparative law (Issues of International and Comparative Law).

In the first study, Professor Francesco A. Schurr analyses details of the historical evaluation of trusts in Liechtenstein,³ then he examines the most important questions related to trusts.⁴ The introduction of the trust in Liechtenstein – which is a pioneer among the European countries with continental legal systems – the motivation of which was for pragmatic reasons. The regulation of Liechtenstein was considered a novelty in a legal system built mostly on a German and Austrian basis, since – in contrast to the *Treuhand* – it gave rise to an in rem legal relation as well (not only a contractual one) between the settlor (*Treugeber*) and the trustee (*Treuhänder*). As a result, the trust became the alternative of the

¹ Personen- und Gesellschaftsrecht (1926, PGR), and Gesetz über das Treuunternehmen (10. April 1928).

² Francesco A Schurr (ed.), *Trusts in the Principality of Liechtenstein and Similar Jurisdictions. Aspects of Wealth Protection, Beneficiaries' Rights and International Law*. Schriften des Zentrums für liechtensteinisches Recht (ZLR) and der Universität Zürich. DikeVerlag Zürich/St. Gallen, NomosVerlag Baden-Baden, facultas.wuv Verlag Wien, 2014. 236 p.

³ Professor Francesco A. Schurr is the Chair of The Department of Company, Foundation and Trust Law in University of Liechtenstein (Vaduz).

⁴ The trust was regulated by the Personen- und Gesellschaftsrecht 1926, art. 897–932.

private foundation in the business sector. The enactment of the Hague Convention⁵ by Liechtenstein on the 1st of April 2006 contributed to the implementation of the institution of the trust.

The trust law of Liechtenstein contains much more elements of rights in rem than elements of contractual law. As a result, upon the establishment of the trust (*express trust*, that is, trust established by the intention of the parties), the settlor and the trustee do not need to conclude a contract, it is sufficient to assign the assets with this purpose in writing. With regard to the application of the trust in Hungary, it is also important to note that the rules of the obligation are relevant. Thus trusts established for more than twelve months have to be registered with an authentic registry, if the trustee is resident or has its seat in Liechtenstein, while it is sufficient to deposit the document establishing the trust. The description of the trust, the date and duration of its establishment, the name, address – or seat in case of a legal person – of the trustee are indicated in the registry.

There is no limit to duration concerning the establishment of trusts under Liechtenstein law, and it is possible to establish a trust for private purposes. However, it cannot serve exclusively the private interest of the settlor. In case of a trust established for a certain purpose, the court (*Landgericht*) is entitled to supervise the trustee in order to observe the fulfilment of his obligations. The liability of trustees is regulated similarly to the English regulation concerning the breach of obligations, and aspects of accessory liability may arise regarding third parties (participants).

The beneficiary is at the centre of the legal relationship of the trust. Upon designation of the beneficiary, the trustee has to manage the assets in a way that serves the interests of the beneficiary. Its rules are laid down in the founding document, which are interpreted by the principle defined in the law of inheritance, applied to the interpretation of the testaments (*Andeutungstheorie*). The beneficiary is only entitled to receive information from the trustee. However, the beneficiary cannot give instructions to the trustee and the rule of *Saunders v Vautier*⁶ cannot be applied, that is, the trust cannot be terminated unilaterally. Tracing is also possible under Liechtenstein law, and the beneficiary is entitled to submit a claim before the court in order to enforce the trust. Professor Schurr declares that the position of the beneficiary is less significant than in English law. It should be noted that this characteristic is very similar to the Hungarian regulation.

The trustee is designated in the document founding the trust. If the trustee does not accept his appointment, the court is entitled to designate a person. According to article 897 of the *Personen und Gesellschaftsrecht* (PGR), the trustee is obliged to manage the assets that may be enforced by a judicial procedure. In addition, the trustee has to fulfil his function in a way so as to avoid competition and if it is necessary, he may employ third persons.

As a general rule, after establishing the trust, the settlor has no power over the managed assets, since – according to a general rule – the trust is irrevocable. However this rule is dispositive; the settlor has the opportunity to stipulate the right of unilateral revocation. The settlor is not entitled to modify the founding document of the trust. The role of the courts is to register and supervise the trusts.

⁵ The Hague Convention on the Law Applicable to Trusts and on their recognition of 1 July 1985.

⁶ (1841), Cr. & Ph. 240; 4 Beav 115.

The study of Prince Michael von und zu Liechtenstein (the president of *Industrie- und Finanzkontor of Liechtenstein*) reviews the possible structure of wealth protection of Liechtenstein. The author declares that there are significant dangers affecting private assets after the global economic crisis. The protection of assets is neither the privilege of the rich, nor a question of tax and financial crimes, however it is a financial secret, that is to say, it is a question of liberty that belongs to everyone. The trust provides an adequate opportunity to develop a structure in which the assets of the family can be protected, supervised and enlarged.

Mandeep Lakhan examines the question of anonymity in his study. The researcher of the King's College of London emphasizes that transparency and anonymity are two aspects that are relevant together. According to the international trends of the past years, transparency is coming into the limelight (e.g. FATF Recommendations). Against this background, the possible introduction of trust registration generated serious professional debate in New Zealand. It was, however, rejected on the basis of traditions.

The second chapter of the book concentrates on questions regarding wealth protection. The essay of attorney Stefan Wenaweser reviews the legal practice of Liechtenstein. In case of trusts established under the jurisdiction of Liechtenstein, there is a possibility of flexible asset protection, even by trusts established for private purposes. In addition, there is a limited possibility to enforce foreign judicial awards. The author analyses in detail references of trusts in international private law, laying particular emphasis on the Convention of the recognition and enforcement of foreign arbitral awards⁷ that was ratified by Liechtenstein on the 7th of July 2011 and came into effect on the 5th of October. According to the regulation, *forum rei sitae* does not exist in case of reference to the beneficiaries, as well as concerning the discretionary trust, since it cannot be determined whether the possible beneficiaries benefit from the managed assets. In addition, provisional measures (free standing injunction)⁸ are not possible, since it belongs to the competence of the Liechtenstein courts. Furthermore, preliminary taking of evidence (pre-trial discovery) cannot be applied, either. Liechtenstein put into force new arbitral rules on the 1st of November 2010, which basically follow the Austrian example. Thus, the regulations of the UNCITRAL model also increase the protection of trust assets.

Paul Matthew, professor of law from London, examines the questions of wealth protection in English law. The protection of creditors realised by *actio Pauliana* was already known in Roman law, by which the action against a third person acquiring assets gratuitously or in bad faith from the debtor who impaired the creditor was possible. In comparison, the protection of creditors was interpreted much more broadly in English law, since it covered not only donation and it was relevant not only in case of the insolvency of the debtor. The notion of sham is also broader than simulation in civil law. To a certain extent, it corresponds to the so-called designer legislation, which aims to establish a legal environment in which the creditor's possibilities of law enforcement are more limited. For example, in the law of Jersey, it is only possible to submit claims against the trust on a basis of succession or community property law, but it is not possible on a commercial basis. This is well exemplified on the Cook Islands by the two South Orange Grove cases⁹ that showed

⁷ Convention of the recognition and enforcement of foreign arbitral awards (New York, 10th of June, 1958) was promulgated in Hungary by Decree Law No. 25 of 1962.

⁸ Also known as *Mareva*, or *freezing injunction*.

⁹ No 1 (1995) 15 TLI 41 and No (1996) 1 OFLR 3, Cook Islands CA.

the limited possibilities of creditors in a short (two year-long) period for submitting claims. This form of wealth protection, however, is typical in legal systems of offshore countries. This kind of regulation does not exist in England.

In her study, Karen Boxx – professor of Law at the University of Washington – summarises regulation in states of the United States of America. According to a general characteristic of North American regulation, it is possible to provide protection of the trust assets against the creditors of the beneficiaries, unless the settlor is one of the beneficiaries (so-called self-settled trust). The trust serving wealth protection was first introduced in Alaska. Today this is possible by regulation in fourteen states, while the other states prefer the traditional solution. As a general characteristic of the scheme, it can be applied only in case of an irrevocable trust (except for Oklahoma) and it provides the settlor (trustor) with only limited competence. Accordingly, the settlor can benefit from the managed assets only to a minimal extent. However, some states allow him to have a veto concerning payments or to have the right to change the person of the trustee or protector. After the establishment of the trust, the states prescribe different deadlines for the creditors to contest the trust, e.g. it is two years in Nevada, five years in Virginia and three years in Utah. There are different conditions concerning the creditors, however. For example, as a general rule, child maintenance payment can be enforced against the trust according to a federal requirement. The legislation of Delaware, Hawaii and Missouri etc. allows the ex-wife to enforce the maintenance obligation, while New Hampshire, Rhode Island and Utah provide the possibility to enforce a non-contractual liability. There are significant differences concerning the maximum duration of the trust. Oklahoma, for example, does not insist on the prohibition of the trust for an indefinite duration (the Rule against Perpetuities does not exist), while Alaska, Utah, Wyoming and Colorado maximize the duration of the trust in a thousand years, Delaware in 110 years (if real estate is included among the trust assets), Nevada in 365 years and Tennessee in 360 years. Upon revision of the Hungarian regulation, it should be taken into account that, for example, according to the requirements of Alaska, the trust can be established only if the settlor is solvent on the date of the establishment. The change of the financial situation of the settlor does not affect the claims of the creditors.

Corrado Malberti, professor of law at the University of Luxemburg, discusses the regulation of Luxemburg in his writing. The first regulation was the Grand Duchy Order on the fiduciary agency approved on the 22nd of December, followed by the Regulation of the 19th of July 1983 on the fiduciary contracts, which was the first trust-like act. The modifications of the year 1988 modernised the regulation, enabling, for example, the contract-like regulation of the *post mortem mandatum*. An act which was adopted on the 27th of July 2003 on trusts, fiduciary contracts and real estate properties. The regulation is supplemented by the ratification of the Hague Convention by which the trusts established abroad are also recognised.

Three forms of the fiduciary contracts are known in practice. In case of the *fiducie-gestion*, the settlor transfers his assets to a financial institution. This method has the advantage that the managed assets constitute separated assets from the wealth of the trustee, thus his creditors cannot assert claims against them. In case of the *fiducie-sûreté*, the settlor transfers the assets to the trustee especially for safeguard purposes; this contractual legal relation is mostly bilateral. In case of the *fiducie-liberalité*, the trustee assigns the assets transferred by the settlor to a third party beneficiary. Under the laws of Luxemburg, this latter arrangement corresponds to a typical tripartite legal relation. This raises an interesting problem concerning the position of the beneficiary, since upon the death of the settlor, the trustee – that can only be a financial institution – is allowed to inform only the inheritors of

the settlor – not the beneficiary – of the bank secrets relating to the assets managed. As a result, the beneficiary is not informed about the assets that belong to him, and thus he cannot act in order to enforce his rights.

The third part of the book deals with the rights held by the beneficiary. Professor Francesco A. Schurr presents in detail the regulation of Liechtenstein. According to Schurr, the rights of the beneficiaries should be regulated as broadly as possible, basically by mandatory rules. The beneficiary is the proprietor in a commercial sense. Thus, for example, the dispositive rule of PGR – stating that the trustee must inform the settlor first and inform the beneficiary only after the death of the settlor – runs the risk that the trust is not going to be recognised in other countries as a trust.

The English and Caribbean laws are analysed by David Hayton. The professor points out in relation to the discretionary trust that the beneficiaries have the right to information regarding the managed assets. This information, however, does not necessarily cover every aspect. It was declared in the case of *Schmidt v Rosewood Trust Ltd*¹⁰ that the beneficiary must first prove his appropriate interest in order to be able to read the documentation of the trust. The so-called Red Cross trust is a special form of the discretionary trust, when one of the discretionary beneficiaries is the local Red Cross office and the settlor authorises the trustee to designate the person of other beneficiaries from time to time. The so-called black hole trust¹¹ is similar, where the settlor designates the person of the beneficiary, for example, by appointing the winner of the hundred metre sprint of the last Olympic Games before the expiration of the one 125 year duration and the trustee chooses other beneficiaries of his own choice.

Stewart E. Sterk, professor of Cardozo Law School of New York, analyses the beneficiary's rights to information. According to the general rules of the American Uniform Trust Code (sec. 813), the trustee must inform every identifiable beneficiary about the existence of the trust and their right to request a copy of the establishing document of the trust. This rule of the UTC is basically dispositive and accordingly, the modification of the year 2014 of the UTC enables states to decide whether the rule below concerning information should be mandatory or dispositive. As a result, however, about half of the states allowed the settlor to rewrite the rules of the obligation of the trustee to give the information of the trustee and establish a so-called "quiet-trust". This may raise basic problems. For example, in the case of a discretionary trust, the trustee can barely determine the extent of the assignment for the beneficiary if he does not check the financial situation of the beneficiary.

The fourth chapter discusses topics of international law and comparative law. Tony Angelo, professor of Victoria University of Wellington, analyses the generation trust and the supervision of trustees in his study. The writing presents details of the evaluation of trust law in New Zealand, which is built on three important acts (Trustee Act 1956, Charitable Trusts Act 1957, Charities Act 2005). The act of 1956, providing general rules, had one significant modification. In addition to reviewing its preparatory works, the author presents the characteristics of the trust, requirements concerning the trustee, the operation of decision-making, financial consequences, investment policies etc.

¹⁰ (2003) W.L.R. 1442. See to this case: J. D. Davies: Integrity of Trusteeship. The Law Quarterly Review 120 (2004) 1–7.

¹¹ It is often identified with the Red Cross trust, or it is called *blind trust* or *limping trust*.

Hans Rainer Künzle, professor of Zürich, examines the Swiss and Liechtenstein trust in his study. The author points to the fact that the trust has no regulation in Switzerland, thus the trust does not exist there in a classical sense. The judicial practice, however, breaks down the trust into legal institutions known in Swiss law and interprets them this way on the basis of the so-called Harrison case.¹² After analysing famous cases, the author reflects on the significance of the Act on the international private law of 1989, which first regulated the trust in Switzerland and on the Hague Convention, which was applicable from the 1st of July 2007 in the country. According to the Swiss law, a domestic trust cannot be established. However, similarly to the Italian practice, there is a possibility to establish a trust on the basis of the legal regulation of a foreign country. With regard to the beneficiary, the possibility of tracing (*Spurfolgerrecht*), the right to information in general, and the right to information of inheritors are important. The author raises questions of principle, as to whether it is necessary for Switzerland to have own trust law or trust registry. In relation to regulation in Liechtenstein, he proposes regulation adjusted to the Anglo-Saxon rules, resulting in, for example, the strengthened rights of beneficiaries.

In the last essay of the book, professor Schurr examines the reform of regulation in Liechtenstein. Due to the Agreement on the European Economic Area (EEA Agreement) and the regulation of the European Free Trade Association (EFTA), article 905 of PGR was repealed. The previous regulation – prescribing a co-trustee in case of a foreign trustee – was in conflict with the principles of the European Union concerning the freedom of settlement and free flow of services. According to the modification, there is the possibility to establish an original Liechtenstein trust, where there is a Liechtenstein trustee, and there is another possibility to establish an artificial trust, where the trustee is a foreign person and where the trust is established by the Hague Convention, by applying the rules of Liechtenstein. This solution resulted in a dualist system that is still better than the need for professional asset management, which would have caused a complete break with the Anglo-Saxon model. It should be noted that the Hungarian legislator should be aware of the fact that Act XV of 2014 is difficult to apply and the evaluation of another multi-level structure for fiduciary asset management should be considered.

The study, providing several sources and references, draws attention to the most interesting problems relating to the trust and fiduciary asset management. These questions are important for Hungarian legal practice and some problems are also indicative for the Hungarian legislator. It is essential to follow international trends for those who are interested in fiduciary asset management and the trust, and the study presented here definitely provides essential help for them.

¹² BGE 96 II 88. See also Matthias Seiler: Trust und Treuhand im schweizerischen Recht unter besonderer Berücksichtigung der Rechtsstellung des Trustees. Dissertation. Schulthess Juristische Median AG, Zürich, 44 ff. Mark Eichner: Die Rechtsstellung von Treugebern und Begünstigten aus Trust und Treuhand. Unter besonderer Berücksichtigung des Haager Trust Übereinkommens und des Aussonderungsanspruchs. Helbing Lichtenhahn Verlag, 2007. 137 ff. and Victor Thurner: Grundfragen des Treuhandwesens. Wien, 1994. 139 ff.

LITERATURE

- Davies, J. D., 'Integrity of Trusteeship', (2004) 120 *The Law Quarterly Review* 1-7
- Eichner, M., *Die Rechtsstellung von Treugebern und Begünstigten aus Trust und Treuhand. Unter besonderer Berücksichtigung des Haager Trust Übereinkommens und des Aussonderungsanspruchs* (Helbing Lichtenhahn Verlag 2007)
- Seiler, M., *Trust und Treuhand im schweizerischen Recht unter besonderer Berücksichtigung der Rechtsstellung des Trustees* (Schultess Juristische Median AG. Zürich Dissertation. Schultess Juristische Median AG, Zürich 2004)
- Schurr F. A., *Trusts in the Principality of Liechtenstein and Similar Jurisdictions. Aspects of Wealth Protection, Beneficiaries' Rights and International Law* *Schriften des Zentrums für liechtensteinisches Recht (ZLR) an der Universität Zürich*, (Dike Verlag Zürich/St. Gallen, Nomos Verlag Baden-Baden, facultas.wuv Verlag Wien 2014)
- Thurner, V., *Grundfragen des Treuhandwesens* (Verlag Österreich Wien 1994)