

Univerzita Karlova v Praze  
Právnická fakulta

Disertační práce

## **Trusty a společnosti s variabilním kapitálem**

- abstrakt anglicky -

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### **Abstract in English**

This work deals with issues of trusts and open ended investment companies with regard to the legislation of countries with common law legal system.

Trusts are specific common law legal concepts which have no equivalent in legislation of countries with continental legal system. They are based on different features of ownership and on other specific legal concepts. Among these concepts for example belongs common law and equitable ownership or joint tenancy.

Trusts have evolved from the medieval concept called “uses”, therefore no legal definition of trusts is provided. Trust has no legal personality but neither is it just an obligation. Trust is used to be defined as “an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called beneficiaries) of whom he himself may be one and any one of them whom may enforce the obligation”.

The work explores division of trusts according to different criteria – private and public (charitable) trusts; express, resulting and constructive trusts; fixed and discretionary trusts, revocable and irrevocable trusts. Public (charitable) trusts are established for public charitable purposes, while private trusts pursue interests of a particular person. Fixed trusts are determined in the trust deed by well specified amounts of payments in favor of the beneficiary, while discretionary trusts provide the right of trustee to determine the extent of the payment or determine the beneficiary. In the case of revocable trusts the settlor is entitled to revoke the trust and to recover trust property, whereas in the case of irrevocable trusts transfer to the trust property is absolute.

Express trusts are the most typical trusts which are created by an explicit expression of the settlor’s intention. Declaration of trust shall contain certainty of intention, subject matter and beneficiary and shall be fully constituted (the property shall be transferred to the trustee). In case of absence of any of these requirements the intended trust shall not be established.

Secret trusts are created upon expression of settlor's intention, despite the transfer of property (ownership) seems to be absolute. Secret trusts are further divided into half secret trusts and fully secret trusts. In the case of fully secret trusts it is not known to third parties that transfer of property establishes a trust. In the case of half secret trusts it is clear that there is a trust, but it is not clear who is the beneficiary.

Resulting trusts are created as a legal presumption of the settler's intention. Beneficiary rights are vested in the settlor. There are two types of resulting trusts - automatic resulting and presumed resulting trust. Automatic resulting trust is an automatic consequence of a failure to effectively dispose of property. Specific type of automatic resulting trust is a quistclose trust, which is established due to inability to achieve the purpose for which certain asset (especially money) was granted. Presumed resulting trust is established as a rebuttable presumption that the donor did not intend the donee as a stranger to hold the beneficial interest in the property or is established in cases of co-financing of the property. Usually it is a trust arising in connection with financing of a home house or in connection with joint bank account which is hold in joint tenancy.

Purpose trusts are not established for advancement of specific person but in order to reach specific purpose. While non-charitable purpose trusts are generally void, charitable trusts are subject to specific supervision. The purpose of these charitable trusts can be changed using the Cy Press doctrine. To qualify as charitable trust it shall come within one of the following categories – for the relief of poverty, for the advancement of education, for the advancement of religion, for other purposes beneficial to the community.

Constructive trusts are created as a result of operation of law, usually in connection with violation of legal obligations or in connection with transfer of the title of the realty. While implied trusts are founded on the presumption of settlor's intention, constructive trusts are created regardless of such intention.

Unit trust constitutes a modern form of trusts arising in connection with collective investments. They are governed by the European Directive on collective investment as they are recognised as undertakings for collective investment in transferable securities. Unit trusts are subject to specific legal regulation and supervision of state authorities. Unit trusts issue units that are similar to the shares. The value of units is calculated as the current share of net trust property. The units are being offered for sale and purchased by Management Company. The company also identifies the investments which shall be preceded. The beneficiaries have no direct right to the property of the unit trust. Unit trusts (according to compliance with the European Directive) may be of a standard form or of a special form of undertaking for collective investment in transferable securities.

Within international law, trusts are regulated by the European Directive on undertakings for collective investment in transferable securities; in terms of private international law by the Hague Convention.

Open ended investment companies are very similar to unit trusts. Unlike unit trusts, they have the form of a company which has legal personality. Furthermore, unlike unit trusts, open ended investment companies do not issue units but shares. Investors are shareholders of the open ended investment company. This legal form is closer to the continental legal system and this is one of the reasons why they are preferred by continental investors.

The work also analyzes several similar legal concepts that have some characteristics of trusts. This includes an obligation or a power.

Further this works analyzes possibility of incorporation of trusts into legislation of countries with continental legal system. In particular it is shown that many countries were inspired by the trusts but the finally established concept is only trust-like concept. One of the most fundamental issues is to overcome the difference between legal and equitable ownership and creation of fiduciary obligations.

Finally the paper analyzes the new Civil Code, which introduces the Trust Fund (svěřenský fond). Although it is declared that the Civil Code was inspired by

the Quebec Civil Code, no trust is described, merely trust-like concept is established. Further the new Civil Code governs only cases similar to express trusts.

The author concludes that the new Civil Code disregards existing legal concepts and their possible employment. The legal concept of Trust Fund (svěřenský fond) represents insensitive incorporation of the Quebec Institute but not the trust. It would appear preferable to incorporate open ended investment companies regulation than the concept of trust which is based on no ownership feature (res nullius). Reflection of existing legal institutions would enable to implement the concept, which would be closer to the real trust. The new legislation appears to be problematic with the risk of its cancellation.