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ORIGINAL PAPER

Problematics of Translation of Some Terms Related to "Treuhand"

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Abstract:
The ongoing globalizing processes and growing influence of the Anglo-American legal institutions have significant impact on the juridical and linguistic landscapes of the majority of the European countries. The tendency of rendering some concepts or institutions unique to the common law context sometimes results in difficulties related to their transmission, implementation and translation. The present paper deals with the German and Swiss ***Treuhand***-s (the "counterparts" of the common law ***trust***) and the major concepts related to these institutions. The main accent is put on the problems associated with the translation of the terms related to the German and Swiss ***trust-like devices / Treuhand***-s. The appropriate renaming oriented towards the determination of belongingness is presented as the best way of the solution of the problem of translation. The methodology of research relies on the onomasiological approach proposed by Vienna School of Terminology, Cabré's assumption regarding the three-fold nature of terms and Kyo Kageura's attitude towards the terminological space. The novelty of the research is the presentation of new lexical units (***Deutsche Treuhand, Deutscher Treugeber, Deutscher Treuhänder, Schweizerische Treuhand, Schweizerischer Treugeber***, etc.) and their English counterparts (***German trust German trustor / settlor***, ***German trustee***, ***Swiss trust Swiss trustor / settlor***, ***Swiss trustee***, etc.).

Keywords: *law, onomasiological approach*, *translation, Treuhand, trust, trust-like device*

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The General Introduction

"Terminology begins with the concept and aims to clearly delineate each concept" (Temmerman, 2000 : 4). These words of Eugen Wüster correspond to the basic principles of Vienna School of Terminology founded by him in the 20th century. It is noteworthy that Wüster's doctoral dissertation was considered as a pillar of the terminological studies that established the principles of systematizing work with terms. Those principles were oriented towards concepts and their standardization leading to the *General Terminology Theory (GTT).* This theory was focused on "specialized knowledge concepts for the description and organization of terminological information. Within this framework concepts were viewed as being separate from their linguistic designation (terms)" (Benítez, 2009 : 111). The major purpose of the *General Terminology Theory (GTT)* i.e. the traditional terminology "was to assign a new term to a new concept that appeared in a language. In the naming process, terminologists started from the concept, which they placed into a concept system, on the basis of which it had been defined before being named as a term (the onomasiological approach). Their main focus was on exploring the ways in which to make terminology as efficient and unambiguous as possible. They were adherents of monosymy (the precision of concepts) and univocity of term (absence of synonymy). Their objective was to achieve a standardization of terminology – a tool for reaching unambiguous and clear communication, independent of cultural differences" (Sageder, 2010: 125).

Supposedly, the main drawback of the *General Terminology Theory* was the proposition of the monosemic reference between concepts and terms. Accordingly, a term or a specialized language unit was characterized by its single-meaning relation with a concept designated by it. Polysemy and synonymy were excluded. This approach of the *General Terminology Theory* raised criticism of the proponents of the socioterminology proposed by Gaudin in the early 1990s. Pihkala argued that concept systems and definitions were not static in the specialized language and the polysemy as well as the synonymy were "inevitably presented in terminology and specialized texts, and the use of one term instead of another could reflect the knowledge, social and professional status of a group of users, as well as the power relationships between speakers" (Benítez, 2009 : 111).

It is noteworthy that the *General Terminology Theory* was discussed by Professor Cabré – an initiator of the *Integrated Theory of Terminology*. She described terms as well as terminological units as many-sided. Cabré used the image of the polyhedron to show the multidimensional nature of terms. She stated: "At the core of the knowledge field of terminology we, therefore, find the terminological unit seen as a polyhedron with three viewpoints: the cognitive (the concept), the linguistic (the term) and the communicative (the situation). These linguistic, cognitive and communicative units should be studied in a given discursive context, because they only acquire a meaning and function in discourse" (Moreira, 2019). Moreover, a "specialised discourse presents an organised structure of knowledge. This structure could be represented as a conceptual map formed by nodes of knowledge, which can be represented by different types of units of expression, and by relations between these nodes" (Castellvi, 2003 : 189). Besides describing the three-fold nature of terminological units, Cabré argued that terminology is a true scientific discipline. Her opinion was shared by Kageura, whose approach towards the study of terminology can be summarized in the following way:

"1. The concepts vocabulary and domain are required before the concept of terminology is consolidated. These concepts are extra-linguistic, so the existence of the concept terminology is supported by certain extra-linguistic factors.

2. The concept terminology is consolidated at the level of 'parole', and the proper theory of Terminology can obtain an independent status de jure, only providing that it is linked up with the concept 'domain' or some of its representations.

3. The concept of terminology precedes the concept of term: 'It is terminology, not individual terms, that corresponds more closely to the concept domain'… This means that if a lexical unit is to be recognized as a term, a terminological space for its placement should exist in advance. Thus, when treating terms as empirical objects (a quid facti point of view), we always presuppose the existence of the concept of terminology which belongs to the sphere of parole" (Sageder, 2010 : 132).

The above mentioned enables us to suppose that the concept-based designation can become an integral part of the process of translation. It may simultaneously rely on a comparative analysis of concepts in order to fully preserve and transpose into a target language the content of a legal information presented in a source term. Moreover, we believe that a successful translation or naming requires linguistic and legal comparative approaches as well as the awareness of legal settings in which the terms to be translated must be used - legal comparatists and legal translators / interpreters need to penetrate a linguistic surface of a legal system in order to grasp peculiarities in legal thinking and to understand legal constructs behind terms and phrasemes used in a foreign legal language (Ruusila & Lindroos, 2016 : 121).

In accordance to the above mentioned, our research relies on the onomasiological approach proposed by Vienna School of Terminology. At the same time, it considers Cabré's assumption regarding the three-fold nature of terminological units and Kageura's attitude towards a terminological space. As a result, we create a complex method of the study of the lexical units related to the contemporary German and Swiss ***trust-like devices / Treuhand***- s.

Before starting the discussion of the ***trust-like devices***, it is necessary to deal with the common law ***trust*** and its legal as well as linguistic peculiarities.

The Common Law *Trust*

The ***trust*** as a legal institution originated in common law of the Middle Ages. It can 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 the beneficiaries or cestuis que trust) of whom he may himself be one" (Thévenoz, 2009 : 6).

The contemporary ***trust*** is based on the duality of ownership: property resulting from a legal estate is divided into property of a trustee and an equitable interest – property of a beneficiary. More precisely, the ***trust*** can be characterized in the following way:

- the institution of the ***trust*** is deeply rooted in the English legal tradition and creates the relationship subject to the rules of equity. It divides a ***trustor***'s ownership into property of a ***trustee*** and property of a ***beneficiary*** (an equitable interest);
- a trust contract is usually created *inter vivos* or on death (the so-called ***testamentary trust***), orally or in a written form;
- the creation of the ***trust*** may serve charitable, protective, promotional and other purposes;

- the ordinary Anglo-American ***trust*** consists of three major elements / participants of entrusting relationships: a ***trustor*** - a person who creates the ***trust***; a ***trustee*** - a person or a legal entity that holds a legal title to ***trust property***; a ***beneficiary*** – a beneficial (or an equitable) owner of property. It is noteworthy that a ***trustor*** can also be a ***beneficiary***. In this case, the ***trust*** involves a simple delegation of responsibilities.

Germany's Treuhand

It is admitted that "nowhere in German law can one find any single institution which by itself performs all those functions for which common lawyer deploys the trust" (Kotz, 1999 : 85). Moreover, as Hungarian scholar Sandor believes, the German case law does not recognize the institution of the ***trust***, because it is incompatible with the dogmatic foundations of the German law. The ***trust*** does not even resemble the legal relationship of the ***Treuhand*** (Sándor, 2014 : 250) that has some features of entrusting and contractual relations. Würdinger mentions that "there is no typical trust contract; the content of the legal relation must be determined in accordance with the surrounding circumstances, and in particular the mandate upon which it is based. The Reichsgericht has already declared it fruitless to classify a contract as a trust contract and to try to decide a case upon that footing" (Würdinger, 1951 : 105).

Despite all the above-mentioned, the study of the contemporary German legal system reveals the existence of several ***trust-like devices*** that work differently, but perform functions similar to the ***trust***. Häcker directly indicates that "in some situations a person holds rights for the benefit of another, via a device described by the umbrella term *Treuhand*… A *Treuhand* arises only in a limited number of particular instances (scattered throughout the BGB and developed outside the statutory framework), each subject to its own specific rules and principles" (Häcker, 2009 : 39-40).

The ***Treuhand*** is usually flexible and exempt from a state control. It considers the transference of ownership based on ***Vertrauen*** (trust) and ***Treue*** (loyalty).

The ***Treuhand*** "is created by a transfer of assets to the *Treuhänder* coupled with a contractual agreement made between him and the transferor under which he assumes, normally in consideration of a fee, a contractual duty to manage the assets in a particular way for the benefit of the beneficiaries" (Kotz 1999, 89). In other words, the ***(fiduziarische) Treuhand*** is a fiduciary construction by which an individual transfers the full right *in rem* to another individual. Accordingly, the German entrusting relations consider the following major participants:

- ***Treugeber*** - an individual, which transfers the full right *in rem* to another individual, who is obliged to deal with assets in the manner specified by a contract;

- ***Treuhänder*** – an individual, who is obliged to deal with transferred assets inthe manner specified by a contract.

The ***Treuhand*** may exist without any written underpinning documents. It can be concluded between any two persons. Although in most cases the ***Treuhand*** represents a two-party relationship, it can include the third party relationships too.

It is also noteworthy that the ***Treugeber*** transfers his (her) juridical ownership to the ***Treuhänder***, but retains an economic ownership. Therefore, a transferee ***(Treuhänder)*** becomes a legal owner, whose duties are called fiduciary duties: "The *Treuhänder* acquires a full and unrestricted title to the Treuhand assets, whereas the

beneficiaries' interests are, at least in theory, merely the ordinary rights *in personam* of parties to a contract" (Kotz, 1999 : 93). Assets, which are kept by the ***Treuhänder*** under a fiduciary agreement, are separated from his / her private patrimony and form a separate fund, but only to a certain extent. All assets that are acquired in exchange for the original ***Treuhand*** property do not fall into a separate fund and are thus not protected against private creditors of the ***Treuhänder***. Accordingly, there is no "real subrogation" (Zachariasiewicz, 2003 : 46).

It is worth noteing that the ***Treuhänder*** can transfer a legal title to the third person, while the ***Treugeber*** has only damages claims in those cases, when a transferor violates obligations. It means that the ***fiduziarische Treuhand*** does not fully protect rights of the ***Treugeber***. Accordingly, a practical implementation of this construction seems quite risky.

Switzerland's Treuhand

The essence of the 20th century Swiss entrusting relations can be well-defined via the following citation: "The character of the fiduciary act lies in this that one of the contracting parties (the settler) creates a legal position for the other (trustee) which makes him unlimited owner of a right towards third persons, while he is obliged, under the contract with the settler, to exercise the transmitted right not at all, or only partially, or to retransmit it under certain supposition…" (Huber, 1952 : 65).

It is worth mentioning that initially the Swiss entrusting / fiduciary relations (the so-called ***Treuhand / fiducie***) were considered as the modernization of the ancient Roman ***fiducia*** that comprised two distinct acts:

- a disposal, using a formalistic procedure of *mancipatio*, whereby a creator transferred to a fiduciary an ownership of a fiduciary property;
- a distinct agreement, the so-called *pactum fiduciae*, whereby a fiduciary undertook to restore a fiduciary property to a creator under certain conditions (Thévenoz & Dunand, 1999 : 326).

It is difficult to identify the date of the origin of the Swiss ***fiducie***. However, it can be supposed that its development started in 2007, when Switzerland ratified the *Hague Convention on the Law Applicable to Trusts and on their Recognition* of 1 July 1985. The ratification of the convention facilitated the introduction of the certain significant provisions in the SPILA and SDCBA (*Swiss Private International Law Act* and *Swiss Debt Collection and Bankruptcy Act*). As a result, according to the Swiss legislation, a fiduciary relationship has usually been established under the umbrella of the "unity of patrimony". It is noteworthy that "Swiss case law has explicitly rejected the notion of a division of ownership between an external title for the trustee and an internal title for the settler or third-party beneficiaries. The property belongs indivisibly to the trustee... the principle of "unity of patrimony" prevents the formation of a separated fund within the estate of the trustee" (Peirot, 2013 : 42).

Despite the above mentioned, the scholars express different ideas regarding the existence of *Trust Law* in Switzerland. Overbeck believes that there is no institution called "trust" in Swiss law and there is no institution which can meet the conditions of the Principles (Overbeck, 1999 : 105). Wilson and 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" (Wilson & Nagai, 2012: 26).

Many researchers believe that the Swiss ***Treuhand / fiducie*** is the nearest cousin of the ***trust*** (Thévenoz, 2014 : 33), while Hungarian scholar Sandor supposes that in the

laws of Switzerland, the ***Treuhand / Fiduzia*** is a unique equivalent of the ***trust*** (Sandor, 2015 : 302). Moreover, this scholar presents a more precise description of the 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" (Sandor, 2015 : 302).

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

Fiduziant / Treugeber - a transferor;

Fiduziar / Treuhänder - a transferee;

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

In certain cases, the German terminological units related to the entrusting relationships can be substituted by their French equivalents that 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" (Overbeck, 1999 : 105).

Accordingly, the ***Fiduziant / Treugeber*** can be substituted by the French term ***fiduciant,*** the ***Fiduziar / Treuhänder*** - by the ***fiduciaire*** and the ***Treuhand*** - by ***fiducie*** (*acte fiduciaire)* or ***Fiduzia***.

The Terminological Insights

The study of the contemporary German and Swiss ***trust-like devices*** and their English counterparts leads to some terminological insights. In addition, the data presented in different dictionaries acquire the greatest importance, for instance, "Routledge German Dictionary of Business, Commerce, and Finance" indicates to the following English equivalents of the German lexical units related to the ***Treuhand***:

"Treuhand – Trust;

Treuhänder – Trustee, fiduciary;

Treugeber – Settlor, transferor, trustor (AmE)" (Routledge German Dictionary of Business, Commerce, and Finance: German-English/English-German, 1997 : 359).

The same data is presented in Haschka and Schmatzer's well-known book "Aspects of U.S. business and law (An English-language survey with German-language comments)". The book directly states that "the essential elements of a trust are:

- A trustor or settler (Treugeber).
- A beneficiary (Begünstigter).
- A trustee (Treuhänder).

A fund or corpus (zweckgebundere Vermögensmasse) the title to which passes to the trustee)" (Haschka & Schmatzer, 1990 : 167)

"Collins English-German Dictionary" presents the following German counterparts of the common law ***trust***:

- *"(law*, *finance*) Treuhand(schaft) *f*
- (= *property*) Treuhandeigentum *nt*
- (= *charitable fund*) Stiftung *f*" (Collins English-German Dictionary).

"Langenscheidt Almann Fachwörterbuch Kompakt Recht English" indicates to the following equivalency of German and English terms:

"Treugeber – m. settlor; donor; grantor of a trust.

Treuhand f – trust.

Treuhänder – m. trustee; trusted person; fiduciary" (Langenscheidt Alpmann Fachwörterbuch Kompakt Recht English, 2009 : 637).

The existence of the above mentioned equivalents makes obscure the essence of the ***Treuhand*** and equalizes it with the Anglo-American ***trust.*** Some scholars thoroughly discuss this question, for instance, Stark directly indicates that the term ***Treuhand*** has purely German origin: "the German word "*treu*" means true and implies faithful" (Stark, 2009 : 3). Despite this fact "the word *Treuhand* is not a clear term in German, it cannot be exclusively described as a trust in English either. For this reason, it is best to continue using the German word *Treuhand* because it has no equivalent in English" (Stark, 2009 : 3).

Rehahn and Grimm share Stark's idea and state: "German law is neither able to produce exactly the same effects as a trust in common law nor has it one specific concept that works as a trust… the German law does not know a homogeneous concept of a trust…" (Rehahn & Grimm, 2012 : 94). According to Rehahn and Grimm, the term ***Treuhand*** must be translated as the ***German trust***. The scholars believe that the usage of this word-combination will help with "eradication" of ambiguities during the process of translation. The same English equivalent (*German trust*) of the ***Treuhand*** is presented in the following passage of the book "Property law and economics": "Concerning the unitary ownership characteristic, society has created different kinds of ownership, which can be seen as forms of divided ownership, as the Treuhand (*German trust*) and fiducie-gestion (*French trust*)" (Hoofs, 2010 : 28).

Obviously, the ***German trust*** is the best English counterpart of the term ***Treuhand***. It may also be useful to translate the ***Treugeber*** as the ***German trustor / settlor***, the ***Treuhänder*** as the ***German trustee***, the ***Begünstigter*** as the ***German beneficiary*** and the ***Treuhandeigentum*** as the ***German trust property***. In this case, the results of renaming can be presented in the following way:

Table 1. The contemporary German terms of the German law and the proposed English equivalents.

Definition	**The German terms**	**The proposed English equivalents**
A legal institution	Treuhand	German trust
A transferor of the property	Treugeber	German trustor / settlor
A transferee	Treuhänder	German trustee
A person, who benefits from the exploitation	Begünstigter[18]	German beneficiary
An object of entrusting relationships	Treuhandeigentum	German trust property

The same method may be used in case of the Swiss linguistic landscape. The ***Swiss trust*** seems the best English counterpart of the term ***Treuhand***. Moreover, the lexical units

[18] It is noteworthy that in accordance to content of a contract, the ***Begünstigter*** may be presented by the ***Treugeber*** or the ***Treuhänder.***

Swiss trustor / settlor, ***Swiss trustee***, ***Swiss beneficiary*** and ***Swiss trust property*** can be created.

However, the study of Germany's and Switzerland's linguistic-juridical realities revealed the conceptual differences of the ***trust-like devices*** of these countries. German and Swiss ***Treuhand***-s have different essences. We believe that the appropriate renaming can prevent from ambiguity and misunderstanding. Accordingly, it is preferable to name the ***German trust-like device*** as the ***Deutsche Treuhand***. Moreover, the corresponding changes can be presented in the following way:

Table 2. The existed and proposed German terms.

Definition	**The existed German terms** **(German law)**	**The proposed German terms** **(German law)**
A legal institution	Treuhand	Deutsche Treuhand
A transferor of the property	Treugeber	Deutscher Treugeber
A transferee	Treuhänder	Deutscher Treuhänder
A person, who benefits from the exploitation of the trust property	Begünstigter	Deutscher Begünstigter
An object of entrusting relationships	Treuhandeigentum	Deutsches Treuhandei-gentum

The following table presents the final results of the renaming:

Table 3. The Proposed German terms and their English equivalents.

Definition	**The proposed German terms** **(German law)**	**The proposed English equivalents**
A legal institution	Deutsche Treuhand	German Trust
A transferor of the property	Deutscher Treugeber	German trustor / settlor
A transferee	Deutscher Treuhänder	German Trustee
A person, who benefits from the exploitation of the trust property	Deutscher Begünstigter	German Beneficiary
An object of entrusting relationships	Deutsches Treuhandeigentum	German trust property

It is worth mentioning that the study of the German and Swiss entrusting relationships reveals the following correlation of the terms denoting the elements of the German ***Treuhand*** and the Swiss ***trust-like mechanism***.

Table 4. The contemporary German terms of the German and Swiss laws.

Definition	**German law**	**Swiss law (German Version)**
A legal institution	Treuhand	Treuhand
A transferor of the property	Treugeber	Treugeber
A transferee	Treuhänder	Treuhänder
A person, who benefits from the exploitation of the trust property	Begünstigter	Begünstigter[19]

The table reveals that the terms presented in the German law coincide with the lexical units related to the Swiss ***trust-like mechanism***. This correlation seems impossible, because according to the above mentioned, Germany's and Switzerland's ***Treuhand***-s have different essences. The Swiss entrusting relations are oriented to the principle of the "unity of patrimony", which prevents the formation of a separated fund within an estate of a trustee. This principle is unacceptable to the German ***Treuhand***, which is oriented to the creation of a separate fund. Accordingly, for avoiding the terminological ambiguity, we propose the following correlation of the German terms related to Germany's and Switzerland's ***Treuhand*** -s:

Table 5. The correlation of the proposed German terms of the German and Swiss laws.

Definition	**German law**	**Swiss law (German Version)**
A legal institution	Deutsche Treuhand	Schweizerische Treuhand
A transferor of the property	Deutscher Treugeber	Schweizerischer Treugeber
A transferee	Deutscher Treuhänder	Schweizerischer Treuhänder
A person, who benefits from the exploitation of the trust property	Deutscher Begünstigter	Schweizerischer Begünstigter
	Deutsches Treuhandeigentum	Schweizerisches Treuhandeigentum

[19] It is noteworthy that in accordance to content of a contract, the ***Begünstigter*** may be presented by the ***Treugeber***.

Conclusions

Despite the existence of the significant differences between the common and civil legal traditions, there is the evident tendency of the convergence between these juridical regimes. This tendency is caused by the ongoing globalizing processes, global competitive atmosphere, growing influence of the Anglo-American legal institutions, increased role of a foreign investment, etc. One of the clear examples of the convergence is the existence of the "counterparts" of the common law ***trust*** in Germany's and Switzerland's juridical systems.

The paper presents the in-depth analysis of the peculiarities of the German and Swiss ***trust-like devices*** and discusses some ambiguities, which exist in the sphere of legal terminology. The certain propositions are made regarding the translation of some terminological units and renaming of several concepts related to the German and Swiss ***Treuhand***- s. We believe that the given renaming will "ease" the process of translation and will improve the existed conceptual incompatibility as well as ambiguity.

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