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**"TRUST AS THE GREATEST AND MOST DISTINCTIVE
ACHIEVEMENT OF THE ENGLISH": CAN THE CIVIL LAW DO
BETTER?**

THE LATIN AMERICAN EXPERIENCE

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May 2015

The Latin American Fideicomiso is the functional equivalent of the American Trust. Despite the general influence of the Roman-German law and the French Civil Code over the so-called "Civil Law Countries," among which are most of the Latin American countries, the Fideicomiso arrived from the Anglo Saxon Trust and through United States influences.

We have not created a civil alternative solution. Instead, we have introduced a contract that reproduces the essential elements of the Trust in accordance obviously and harmonizing with the general rules of our civil system. It is called "Comercial Fiducia" in Colombia and Fideicomiso in most of the others Latin American countries. To simplify we use the expression Fideicomiso for all of them.

The modern Fideicomiso does not come from the Roman-German system nor from the French Civil Code influence

- Although Civil Codes from Latin America have a clear influence from this system, specially throughout the French Civil Code, there is not a word in it about *Fiducia* or *Fideicomiso* whatsoever.
- Some of the essential characteristics of the modern Latin American Fideicomiso were inconceivable under the Civil law system. In fact they are closer to the Trust structure.

Anglo-Saxon Trust Influence

- Behind the traditional notion of **property** (as an absolute right) nineteen (19) civil law countries (close to 600MM people) have adopted a new concept, either through the law, the jurisprudence or the doctrine.
- This new concept establishes that the **fiduciary property** is not absolute, it is temporary and limited:
 - (i) Temporary: At the end of the contract, the goods must always either be transferred to the beneficiary or be returned to the constituent. These goods can never remain in the fiduciary's patrimony.
 - (ii) Limited: The Fiduciary's powers or functions (as formal owner of these goods) are limited to the accomplishment of the goal set by the constituent.
- This concept has taken, in addition, the essential structural elements of the Trust:
 - (i) The independence and recognition of an "autonomous patrimony" (independent estate of assets). This is, for us, the most important consequence in practice of the "bifurcation" between the legal and equitable titles. Furthermore:
 - (ii) The responsibilities of the trustee are similar to those consecrated by the American doctrine set forth in the Restatement of the Law.
 - (iii) The Fiduciary's liabilities follow the American Jurisprudence.

The evidence from the Colombian Commercial Code

- Notion of Fideicomiso

"The commercial fiducia (fideicomiso) is a contract whereby a person, called a constituent or fideicomitente transfers one or more specified goods to another, called the fiduciary, who undertakes to manage or dispose of said goods to fulfill a specific purpose directed by the constituent for his benefit or for the benefit of a third person called the beneficiary (...)" (Article 1226 Commercial Code).

- Independence

"The goods subject to the Fideicomiso (trust) are not part of the overall security of the creditors of the Fiduciary (trustee) and only guarantee obligations assumed in fulfillment of the goal pursued." (Article 1227 Commercial Code).

"For all legal purposes, the fiduciary property shall be kept separate from other assets of the Fideicomiso and those that are part of other fiduciary business, and form an autonomous patrimony subject to the purpose set out by the constituent" (Article 1233 Commercial Code).

In the case of the United States, as has occurred in England, trusts traditionally facilitated the management of assets of wealthy families rather than been employed in business transactions.

The use of the commercial trust has recently risen in prominence in academic circles and practice in the United States, whereas in Latin America, the trust has always been used to structure business contracts and has rarely played a role in matters of probate or inheritance.



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Why the Latin American countries have developed in preference the commercial Fideicomiso?

Because:

- (i) We have statued the fideicomiso as a contract that is part of a Commercial Code, a Banking Law, or an independent law but, in general, it has a commercial nature.

Most part of the countries have “professionalized” the Trustee role. In the laws of those countries only the banks, the financial institutions or certain SPVs, all supervised and under the Control of the Financial authorities, could act as fiduciaries (trustees). Nor physical person can play this role.

In fact, if you put a commercial contract in the hands of a banker, he will develop some products to offer to the businessmen.

- (iii) The use in inheritance matters is less important, maybe because our systems recognize forced heirs and we do not possess the same flexibility of the Anglo Saxon people to freely dispose of the estate.

Some fiduciary products developed in Colombia:

- Singular or Individual Investment
- Investment Funds
- Pension Funds
- Mutual Funds
- Social Security Liabilities and Reserves
- Real Estate Funds
- Real Estate Development Projects
- Cash Flows and Goods Securitization
- Debenture Indenture
- Management and Payment in Infrastructure Projects
- Guaranty and Source of Payment. (Specially for the Government Projects)

The importance of this structure in Colombia:

The Fiduciary System is integrated by 26 Fiduciary Companies at this time.

At 31.12.2014, the total amount of goods handles by it was equivalent to the 47% of the Colombian's GDP (Gross Domestic Product).

THANK YOU!

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