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## SPECIFIC CHARACTERISTICS OF CONTRACTS AND AGREEMENTS CONCERNING BENEFICIARY PROPERTY

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### **Abstract**

The concept of “beneficial ownership” developed within the framework of equity law as a result of the evolution of trust-based legal relationships. It is a product of the “split” ownership model. The division of ownership into legal title (under common law) and beneficial title (under equity law) is rooted in the unique historical development of Anglo-American law. Within the trust framework, in accordance with the rules of equity, a beneficial owner acquires not only a personal (in personam) right against the trustee, but also a proprietary (in rem) right enforceable against third parties.

In contrast to Anglo-American jurisdictions, countries belonging to the continental (civil law) system recognize the absolute nature of ownership and define the derived limited real rights at the level of national civil legislation. In the civil law of these countries, the concept of “economic ownership” exists, which refers to the owner granting another person the right to use the property and to derive income from it.

**Keywords:** Beneficial ownership, beneficial ownership, economic ownership, common law, split ownership,

### **Introduction**

In civil legislation, there are contracts such as lease, annuity (rent), power of attorney, and representation, under which it is possible to derive benefits from property without the owner personally managing it. Unlike these contracts, a



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trust management contract of property mainly applies to the class of large property owners. It is well known that any contract is aimed at achieving certain objectives of the parties, satisfying their needs, and ensuring their interests. Therefore, each party strives to legally secure its rights and interests when determining the terms of a contract.

To achieve this, it is necessary to deeply understand the norms established in civil legislation for each specific type of contract and to apply them skillfully in practice. Contracts play an important role in the exercise of beneficiary property rights and serve as the primary means of managing and protecting these rights. Examples include lease agreements, trust management contracts, insurance contracts, and newly emerging escrow agreements.

According to Academician H.R. Rahmonqulov, the totality of the terms agreed upon and закрепed by the parties constitutes the content of a contract. Supporting this view, it should be noted that a contract encompasses the agreed terms and requirements between the parties, which determine the object of the contract as well as the rights and obligations of the parties. The Civil Code establishes that civil rights and obligations arise from the grounds provided by legislation, as well as from actions of individuals and legal entities which, although not expressly provided for by law, give rise to civil rights and obligations in accordance with the general principles and meaning of civil legislation. Contracts impose binding obligations on the parties who have entered into them. Unless otherwise provided by legislation or the contract, from the moment a third party expresses to the debtor its intention to exercise its rights under the contract, the parties may not modify or terminate the contract without the consent of the third party. The debtor has the right to raise against the third party the objections that could have been raised against the creditor.

If a third party refuses to exercise the right granted to it under the contract, the creditor may exercise this right, provided that this does not contradict legislation or the contract. In the United States, there exists the doctrine of the “Third-Party Beneficiary of a Contract,” under which third-party beneficiaries may have their own right of action to enforce the contract. According to this doctrine, there are two types of third-party beneficiaries:



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1. intended (or deliberate) beneficiaries;
  2. incidental beneficiaries.

A person who is not a party to the contract but directly benefits from it is considered an intended beneficiary. As is known, contracts impose rights and obligations on the parties who sign them. The contract must specify the name of the third party and indicate that the benefit conferred upon the beneficiary is irrevocable.

For example, a parent pays tuition fees for a child's education, enabling the child to study at a university. In this case, if the parent dies, the child, as a third-party beneficiary, retains the right to continue education. An incidental beneficiary is a natural or legal person who is not a party to the contract and was not contemplated by the contract, yet incidentally benefits from it. Such a third party does not acquire any legal rights under the contract. According to Clause 17 of Resolution No. 203 of the Plenum of the Supreme Economic Court of the Republic of Uzbekistan dated December 18, 2009, "On Certain Issues of Applying Civil Legislation Norms Regulating the Conclusion, Amendment, and Termination of Economic Contracts," if a contract is concluded in favor of a third party, then pursuant to Article 362 of the Civil Code, unless otherwise provided by law or the contract, once the third party declares its intention to exercise its right, the parties may not terminate or amend the contract without the consent of that third party.

At the same time, pursuant to Part Four of Article 235 of the Civil Code, "an obligation does not create duties for persons who did not participate in it as parties (third parties). Courts should take into account that if the terms of the contract do not affect the rights and obligations of third parties, only the parties involved are entitled to apply to the court with claims regarding the conclusion, amendment, or termination of the contract." If a partnership is regarded as a legal contractual arrangement (i.e., without separate legal personality), all partners, as well as any other individual exercising control over the partnership, should be identified as beneficial owners.

Owners possessing beneficiary property rights are characterized by their entitlement to income derived from the property or a share therein, proceeds from the sale of the property, or a portion of the generated income. It should be



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emphasized that civil-law contracts reflect contractual relations carried out between citizens of a country and the state in foreign or domestic affairs. Such contracts are typically concluded between the state and individuals, the state and enterprises, or individuals and financial institutions. Their purpose includes ensuring state financial payments, defining financial obligations of citizens, and regulating mutual relations between the state and citizens. Some of these contracts are formed within the taxation process, such as financial relations between the state and citizens. Through tax-related contracts, the state establishes specific conditions for citizens regarding the payment of financial obligations.

Civil-law contracts define the rights and obligations of citizens. They also encompass laws governing relations between the state and citizens, rights and obligations, as well as privileges granted by the state and duties imposed on citizens.

Contracts concerning beneficiary property are mainly concluded between the manager and the property owner (beneficiary) in the implementation of commercial or investment projects, property management, tax services, or other financial relations, and are subject to notarization.

Legal entities may exercise control over management on the basis of ownership individually or jointly with other shareholders, including through any contract, agreement, relationship, intermediary, or secondary party. Shareholders may cooperate to exercise control through formal or informal arrangements or by using nominee shareholders. Contracts may specify the following important points:

- financial obligations and tax rates, including which taxes the beneficiary (property owner) is required to pay and how tax rates are calculated;
- procedures and timeframes for financial settlements and services provided by tax authorities (the state);
- rules governing violations of legislation;
- relationships established through contracts between two or more parties.

One of the most commonly used contracts in the interests of beneficiary owners is the trust management contract of property. As noted by B. Topildiyev, the institution of trust management plays a significant role in introducing “complex



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assets” such as securities, funds, property rights, and enterprises into civil circulation and ensuring their effective use in market conditions. This requires the presence of specialists—managers with specific knowledge, skills, and competencies, as well as the establishment of professional management companies, which is one of today’s pressing issues.

In essence, the norms governing trust management of property as reflected in national legislation directly correspond to the concept of representation. Thus, the settlor of management grants the trustee (who may also be referred to as a representative) the right to manage specific property or, more precisely within a defined legal framework, to carry out certain legal or factual actions. Unlike representation, a trustee is required to manage the property in the interests of the settlor of management or the beneficiary designated by the settlor. In representation, legal actions in relation to property are performed in the name and at the expense of the principal. By contrast, a trustee enters into transactions concerning the property in his own name, while the profit obtained from such transactions belongs to the beneficiary.

Pursuant to Article 849 of the Civil Code, under a trust management agreement of property, one party (the settlor of management) transfers property to another party (the trustee) for trust management for a specified period, and the latter undertakes to manage the property in the interests of the settlor of management or a person designated by him (the beneficiary). In this context, the trustee is vested with authority to manage the property while acting in the interests of the beneficiary owner. At the same time, it is necessary to distinguish the trustee from other providers of legal services, such as representatives, intermediaries, and agents. Admittedly, the legal status of a trustee—particularly the ability to enter into civil-law contracts with third parties in connection with property management—resembles that of representatives, intermediaries, and agents.

However, despite certain similarities with mandate, intermediary, and representation agreements, a trust management agreement of property does not belong to the category of intermediary service contracts. Instead, it constitutes an independent type of civil-law contract that embodies specific obligations related to the provision of services. In managing property under a trust management agreement, the trustee, acting in the interests of the beneficiary, is



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entitled to perform any legal and practical actions, provided that no restrictions on specific actions are established by law or by the contract. At the same time, a trust management agreement is concluded freely at the discretion of the parties. For certain types of property transferred into trust management, legislation may establish different maximum terms for the validity of the contract. Any property owner is permitted to enter into a trust management relationship under a trust management agreement.

In Kazakhstan, the Astana International Financial Centre (AIFC), launched in 2018, operates as a global hub for business and finance in Kazakhstan and Central Asia. According to AIFC regulations, trusts must be legal entities and are managed by trustees (and executors, where necessary). The AIFC carries out licensed activities related to trust services. AIFC rules define the functions and duties of trustees, regulate the appointment and removal of management, and establish relevant restrictions. Ultimate Beneficial Owners (UBOs) of trusts must be disclosed to the AIFC registration authorities. Information on each UBO must include personal details and the date on which the person became or ceased to be a UBO. Trust-based relationships are fiduciary relationships in which the fiduciary has discretion, in principle, regarding the manner of performing their obligations. Examples of fiduciary relationships include those between an agent and a principal, as well as between a trustee and a beneficiary. Fiduciary relationships represent a very broad concept encompassing actions taken by one person in the interests of another. Similarly, trust-related relationships constitute a wide range of legal relationships involving actions carried out for the benefit of another person. Under the Companies Act 2006 of England, a director's duty of loyalty is reflected in the obligation to act in good faith in the interests of the company. The Act also imposes the following duties on directors:

to act within their powers;

to promote the success of the company;

to exercise independent judgment;

to apply reasonable care, skill, and diligence;

to avoid conflicts of interest and disclose transactions with interested parties;

For certain categories of property transferred into trust management, legislation may establish different periods of validity. For example, pursuant to Article 1131



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of the Civil Code, an executor of a will performs his duties for a reasonable period necessary to release the estate from debts and to enable all heirs to accept the inheritance. In any event, the specified period may not exceed one year from the opening of the will.

According to the FATF standards, financial institutions and other designated non-financial businesses and professions (DNFBPs) within the scope of the AML system are obliged to identify the ultimate beneficial owner of the legal entity, arrangement, or transaction in which they are involved. Thus, the identification and verification of beneficial ownership constitute a distinctive feature of the customer due diligence process for a wide range of financial and non-financial institutions and professional intermediaries, making them a valuable source of information for law enforcement authorities (Somare, 2017). Under German legislation, when a “new shell company” is established, nominee (straw) directors sign three preliminary documents that are forwarded to the company’s true owners (beneficial owners). The first is a waiver declaring that they will not initiate claims against the true owners or their companies. The second is a power of attorney ensuring that the nominee director transfers control over the company to the true owner. The third is an undated letter of resignation terminating the nominee director’s employment contract. As a result, the true owners of the company are able to remove their nominee directors at any time. In addition to these three documents, nominee directors also sign documents required for opening bank accounts or documents such as minutes of annual general meetings.

Another problematic issue related to trust management of property as a form of beneficial ownership is reflected in the provisions of the Civil Code governing the delegation of trust management to another person. In particular, Article 858 of the Civil Code provides that the consent of the settlor must be obtained and that the settlor must be notified when trust management is delegated to another person. However, the legal consequences of a trustee’s failure to follow this procedure—namely, transferring trust management to another person without notification—are not clearly articulated in the legislation. Such a legislative gap may lead to divergent interpretations and unresolved disputes in law enforcement practice.



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As a solution to this issue, it is proposed to supplement Article 858 of the Civil Code with a new third paragraph in the following wording, while renumbering the current third paragraph as the fourth: “Where a trustee transfers the management of property to another person, the trustee shall immediately notify the settlor thereof. Unless otherwise provided by law, the settlor may declare the termination of the trust management, provided that the settlor reimburses the trustee for expenses previously incurred and, where the trustee carries out such activity as an entrepreneurial activity, also compensates the actual damages incurred.” One of the most significant aspects of the trust management structure in relation to beneficial ownership is the issue of the trustee’s liability. Article 859 of the Civil Code establishes the circumstances under which a trustee bears liability, as well as the conditions and requirements for such liability. However, at present, the legislation does not clearly define the limits of liability for entities engaged in the trust management of financial resources, particularly banking institutions operating on the basis of Islamic finance, when acting as trustees. This legal uncertainty may give rise to the risk of substantial economic losses in the trust management activities of banks within Islamic finance relationships.

In order to address this problem, it would be appropriate to supplement Article 859 of the Civil Code with new sixth and seventh paragraphs as follows:

“The provisions set forth in this Article shall not apply to cases where a bank acts as a trustee under a contract, with the exception of paragraph three of this Article. A bank shall be liable for damages only if it is proven that such damages resulted from the bank’s actions exceeding the powers granted to it.”

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