Trust and Fiduciary Ownership in Russia

Anton Rudokvas*

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E-mail: rudokvas.A@jurfak.spb.ru

Abstract

One of the main features of trust in common law is that the constitution of a trust affects a division of ownership in the thing or fund between the powers of management (including in certain cases of alienation) vested in the trustee and the rights of enjoyment vested in the beneficiary. From this point of view, it is not really difficult to find in the Russian civilian tradition (as in the Imperial times and as in the Soviet law) historical foundations for implementation of a trust like construction. On December 24, 1993, a Presidential Decree No. 2296 on "Fiduciary Ownership (Trust)" was issued, introducing the institution of trust in the Russian Federation. However, this attempt to implement trust soon failed. An entrusted administration of property became a functional surrogate of trust in the modern Russian law. In 2015, President Putin again announced the implementation of trusts in Russia. It became a great challenge for the Russian civilian doctrine, which traditionally stated the incompatibility of trusts with a manner of legal thinking proper to a civil lawyer. But one can conclude that the Germanic doctrine of fiduciary ownership, the concept of protection of the creditor in obligation under the tort law, and the other figures applicable from the 'tool-box' of the European civilian tradition could be brought together to create a model of fiduciary ownership, which would be comparable with the classical English trust in some of the latter's important features.

Key Words: Trust, Fiduciary Ownership, Fiducia, Divided Ownership, Fiduciary Legal Transaction

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I. Historical Premises for Implementation of Trusts in Russia

One of the main features of trust in common law is that the constitution of a trust affects a division of ownership in the thing or fund between the powers of management (including in certain cases alienation) vested in the trustee and the rights of enjoyment vested in the beneficiary.[1] From this point of view, it is not really difficult to find in the Russian civilian tradition historical foundations for implementation of a trust like construction. Following the Prussian Civil Code and the General Civil Code of Austria, the Statute - Book of the Russian Empire of 1832 explicitly reflected the divided ownership concept, providing that ownership could be "complete" or "incomplete."[2] Those real rights, which were mostly voluminous in their content but different from the unified right of ownership, were deemed as "incomplete" ownership. Therefore, a French theory on "partition" of the right of ownership, ascending to the doctrines of the medieval glossators,[3] comfortably lied on this gratifying soil in the minds of the Russian legislators and judges. Despite the expansion of Pandectism to the Russian universities, the unitary concept of ownership was not really deeply rooted in Russia, and therefore, the practice from time to time generated different constructions in a certain way similar to a trust.[4] A new stage of this process started after the Revolution of 1917.

In the foreign literature, it is sometimes stated that "trust" had been borrowed by Soviet law with the aim of organizing the state economy. A Hungarian historian of law, Gábor Hamza, wrote that

> 'Trust' has been for decades a species ("pool") of industrial economic organization(s) in State ownership (in Russian: *gosudarstvennajasobstvennost*) in the former Soviet Union as well as in most socialist States, both in Central and Eastern Europe and outside Europe. The first act (law) on

1. WILLIAM WARWICK BUCKLAND & ARNOLD DUNCAN MCNAIR, ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE 176 (2d ed., F.H. Lawson rev. ed. 1952).
2. *See generally* Anton Rudokvas, *The Impact of Austrian Civil Code (ABGB) of 1811 on the Concept of Ownership in Russia*, *in* 200 JAHRE ABGB ASSTRAHLUNGEN. DIE BEDEUTUNG DER KODIFIKATION FÜR ANDERE STAATEN UND ANDERE RECHTSKULTUREN [200 YEARS OF ABGB BROADCASTING. THE MEANING OF THE CODIFICATION FOR OTHER STATES AND OTHER LEGAL CULTURES] 239-50 (M. Geistlinger et. al. eds., 2011).
3. Bran Akkermans, *Concurrence of Ownership and Limited Property Rights*, 2 EUROPEAN REV. PRIV. L. 259, 266 (2010).
4. Rudokvas, *supra* note 2, at 249.

> trust in the Soviet Union was promulgated on June 29, 1927. This act (law) constituted the legal basis of the activity of State-run industrial trusts (i.e. State owned enterprises) for decades.[5]

But this statement is a real misunderstanding. The fact is that the Communist Revolution of 1917 resulted in nationalization of all industrial enterprises and in state monopoly to own the means of production. Therefore, the Soviet State became the owner of all economic resources in the country. But the State, as a political organization, is not an economic one. That is why it cannot produce anything.

For this reason, the Soviet State had created a multitude of economic organizations and provided them with the necessary material resources: buildings, machines, equipment, raw materials, fuel, and money. In fact, every state economic organization acquired some rights with regard to its share of state property. But the legal nature of these rights provoked huge discussions.[6]

On the one hand, economic organizations of the USSR had the rights of possession and the use and disposal of the property, which was given to them by the State. On the other hand, the rights of use and disposal of the economic organizations were restricted. They might use the means of production, but not their own products, which were designed exclusively for sale, usually in strict conformity with planned distribution. Moreover, even the means of production were not used at the producer's discretion, but according to planned tasks and by an established regime. The same tasks and regime determined the limits of the power of disposal accorded to state economic organizations with respect to money, products, and unnecessary or inactive pieces of equipment.

The State could use and dispose of everything that economic organization had in possession. Everything at the disposal of economic organization could be used by the State without restriction. By reasoning this way and following the post-glossators' ideas, some Soviet scholars tried to introduce the concept of divided ownership, simultaneously attributing different rights to the State and its economic organizations. But they faced strong resistance, supported by

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5. GÁBOR HAMZA, *Different Forms of Ownership with Particular Regard to the Ownership in the Russian Federation*, *in* A TRUST BEVEZETÉSE MAGYARORSZÁGON ÉS A NEMZETKOZI GYAKORLAT: VALOGATOTT TANULMANYOK A STEP HUNGARY 2014. 2015. ÉS 2016. EVI KONFERENCIAJAN ELHANGZOTT ELOADASOK ALAPJAN [INTRODUCTION OF THE TRUST IN HUNGARY AND THE INTERNATIONAL PRACTICE: SELECTED STUDIES BASED ON THE LECTURES HELD ON THE CONFERENCES OF STEP HUNGARY IN THE YEARS 2014, 2015 AND 2016] 204 (Ákos Menyhei & István Sándor eds., 2017)

6. Olympiad S. Ioffe, *Soviet Law and Roman Law*, 62 B.U. L. Rev. 701, 720 (1982).

reference to the post-glossators themselves, because "divided owners" within the meaning used by the post-glossators depended on one another. The Soviet State, however, was in no way dependent. It had power to withdraw from its economic organization any property at any time.

In such circumstances, some Soviet civil lawyers attempted to employ the construction of fiduciary ownership by regarding the Soviet State as a settlor and the state enterprise as a fiduciary. But in providing its economic organizations with necessary property, the Soviet State simply distributed state property among its own organizations with no intention of making them real or conditional owners.[7]

Besides, and it was even more important from the ideological point of view, the concept of "divided ownership" (including fiduciary ownership) prejudiced the concept of unity of the state property fund. But in the Soviet doctrine, the latter had been identified with the public property, belonging to the Soviet nation exclusively. Meanwhile, the exclusive ownership of the Soviet nation to the means of production had been highly appreciated in the Communist ideology as the most significant achievement of socialism. Because the concept of fiduciary ownership could not be reconciled with the circumstances, it too was rejected by the Soviet doctrine.

This protracted discussion finally reached its conclusion in 1961 when the Fundamentals of Civil Law for the USSR and the Republics were adopted. Here, the property rights of economic organizations were denominated the rights of "operative administration." The relevant provision, as revised in 1981, explains this terminology as follows: "Property allotted to state… organizations is in the operative administration of these organizations, which exercise the rights of possession, use and disposal of the property within legal limits and according to the goals of their activity, planned tasks and the purpose of the property."[8]

The famous Soviet civil lawyer, Olympiad S. Ioffe who later immigrated to the United States, noticed apropos:

> Were there not the words 'according to the goals of their activity, planned tasks and the purpose of the property,' the rights of state organizations would conform exactly to the Roman concept of ownership; without these words, operative administration would be nothing other than the powers of possession, use and disposal

7. *Id.* at 720.
8. *Id.* at 721.

> 'within the limits set by law.' Yet, these same words demonstrate the incompatibility of operative administration with total domination of a thing, the dependence of operative administration on goals, tasks and purposes imposed by the state, and, consequently, the failure of the right of operative administration to coincide with the right of ownership.[9]

Thus the construction of the "right of operative administration" was created, which is now well-known in the Russian legal order.[10] In the existing Civil Code, this right is included in the list of limited real rights (*iura in re aliena*), which is included in Article 216 of this Code. There are different types of "operative administration," and the type that contains mostly a full power to the object of this right was named by the Russian legislator as "economic domain" (*chozijstvennoe vedenije* in Russian),[11] This new limited real right was understood as a right of a state or a municipal enterprise or institution to use and administrate property given to it by the owner, but under the limits established by the law and by the purpose of its organization, which is absolutely different from the right of ownership. In its logic, this scheme refers to the *peculium* of Roman law. On the other hand, it is evidently similar in its structure to the fiduciary ownership.

It was not surprising that when in the 1990s, the debates about the eventual implementation of trust in the Russian legal order began, some Russian lawyers insisted that the right of operative administration could become an effective substitute of trust in Russia.[12] An original expression of this idea evidently became the fact that from 1997, the law provided a possibility of creating big non-commercial organizations denominated by the legislator "state corporations" on the base of state property. The state corporations do not have membership under the law, and their capital is not divided in stocks or shares. Different from the other state enterprises and institutions, the state corporations did not obtain

9. *Id.* at 721.

10. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 296 (Russ.) ("1. A treasury enterprise and also an institution with respect to property secured to it exercises, within the limits established by a statute, in accordance with the purposes of its activity, with tasks from the owner, and the designation of the property the rights of possession, use and disposition of it. 2. The owner of property secured to a treasury enterprise or institution has the right to take property that is excess, unused, or used not for its designation and to dispose of it at his own discretion.").

11. Civil Code art. 296 (Russ.) ("A state or municipal unitary enterprise to which property belongs by right of economic domain possesses, uses, and disposes of this property within the limits defined in accordance with the present Code.").

12. Yevgeny Timofeev, *Российская правовая система породнилась с англо-американской*, [Russian Legal System became related with that Anglo-American] KOMMERS. (Jan. 19, 1994), http://kommersant.ru/doc/69006 (last visited May 6, 2017).

the right of "operative administration" or "economic domain" to the state property transferred to them, but they are recognized as its owners. At the same time, the given property continued to be regarded as the property belonging to the Russian Federation, meaning that formation or an organization of a part of state property as a complex are reserved for a special purpose. Therefore, the Russian civil lawyers often criticize this construction as contradicting to the unitary ownership concept because one could not explain it otherwise than through the prism of the divided ownership concept.[13]

But in the course of transition into a market economy after the destruction of the USSR, an idea was formed in order to transfer a real English "trust" in the Russian legal order. From the legal dogmatic point of view, the proposal has been based on the statement that when the "trust" comes to enforcement of the beneficiary's rights in case of litigation, English law gives a more efficient protection of the beneficiary than Romanistic legal systems because if property is transferred to a trustee, the latter becomes the full owner under the civil law and the beneficiary's interests can be protected only within the frame of general contractual liability.

On the contrary, in the common law tradition complemented by equity in the case of trust, the beneficial owner not only can compel the trustee by way of an injunction to use the property in trust in the best interests of the beneficiary, but also can trace the object of trust to third parties in case of breach of trust. Besides, the beneficiary can protect the object of trust from the creditors of the trustee.[14]

II. A First Attempt for Implementation of Trusts in Russian Federation

On December 24, 1993, a Presidential Decree No. 2296 on "Fiduciary Ownership (Trust)"[15] was issued, introducing the institution of trust in Russia.

The Presidential Decree had quite a limited scope, as it was intended to apply only to assignment of shares in enterprises that were undergoing privatization.

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13. *See* Mikhail Kleandrov, *The State Corporations' Right of Ownership: Some Problems*, *in* REAL RIGHTS: SYSTEM, CONTENT, ACQUISITION 30-38 (D. Tuzov ed., 2008).
14. GIUDITTA CORDERO MOSS, LECTURES ON COMPARATIVE LAW OF CONTRACTS 31 (2004).
15. *Указ Президента Российской Федерации от 24.12.1993 № 2296 "О доверительной собственности (трасте)"* [*Presidential Decree of 24.12.1993 N 2296 "On Trust (Trust)"*], http://www.consultant.ru/document/cons_doc_LAW_2948/ (last visited May 6, 2017).

The Decree's idea was that shares of such enterprises could be assigned to a trustee who should acquire full ownership of those shares with the obligation to administer such shares in the best interest of the settlor. At a determined date, the trust should expire, and ownership of the shares should return back to the settlor or pass to a third party.

Giuditta Cordero Moss, a comparative lawyer, noticed this mechanism of temporary assignment of shares that was elaborated in a period where Russian industry was relatively in bad shape, and the state was not willing to sell them at too low prices. To increase the value of industry and consequently obtain satisfactory compensation for its privatization, the state was willing to slow down the process of sale of enterprises and improve the operations and financial situations of the enterprises before starting privatization. However, the Russian state did not have funds to improve the state of its industry.[16]

One of the proposed solutions was to have the state obtain a substantial loan by a consortium of Russian banks and in exchange, assign the shares of some state enterprises as security. The banks would then administrate the companies of which they held the shares in security. After a certain period, it could be decided whether the loan was to be repaid or whether the banks could retain full ownership of the shares held as security. But the whole construction looks like *fiducia cum creditore* of the Roman law, and not as the English trust because the Presidential Decree did not provide any special remedies to protect the interest of the beneficiary, except the contractual responsibility of the trustee.[17]

However, an objection could be opposed here. The Decree admitted constitution of trust only at a fixed date and provided that after the termination of contract regarding constitution of trust on all the property, all the property and non-property rights which formed the object of this contract are passing to the settlor or to his successors (heirs) unless otherwise is provided by the contract. If one has will, he could understand this rule in the sense of the so-called Germanic fiducia,[18] in which at the expiration of trust, the right of

16. Moss, *supra* note 14, at 32.

17. *Id.* at 33.

18. It is necessary to underline the difference between the Germanic law and the German law. If the latter was and is the law of Germany – a national legal order, the term 'Germanic law' designates the private law of different European nations of Germanic origin, which existed in Medieval times as customary law. In course of the so called 'reception of Roman law' in Western Europe, it had been partly replaced by Roman law and Canon law which played a role of the 'common law' (*ius commune*) of the continental Europe until the end of the epoch of codifications. The latter in its turn substituted the application of Roman law, Canon law, and Germanic law for the national civil codes. But up to the triumph of codifications, the Germanic law remained in a certain way a rival of the civilian tradition based on the Roman law in Europe. *See, e.g.*, FRANZ WIEACKER, HISTORY OF PRIVATE LAW IN EUROPE: WITH

ownership automatically (*ipso iure*) returns to the settlor and the beneficiary of the trust.[19]

Under such approach, there was no need to provide special remedies of the settlor-beneficiary because after becoming the owner again, he could claim the object of the trust from any third party. Besides, the property in trust was explicitly protected under this Decree against the claims of the trustee's creditors in case of its bankruptcy.

But the Decree was something more than a measure to solve the temporary financial problems of the Russian state because in its first article, it confirmed the transplantation of the fiduciary ownership (trust) in the Russian legal order, and in the last one, it stated that the restriction of the use of trust exclusively to the enterprises under privatization was to be valid only until the entry into force of the new Civil Code that would expand the trust's scope of application.

But the main centers of legal expertise in Russia heavily opposed the adoption of the trust as a fiduciary ownership, expressing a contrary opinion regarding the viability of trust in Russia. This dominant opinion played a substantial role that the drafters of the new Russian Civil Code finally rejected the insertion of the "fiduciary ownership" into the text of the Code. Instead, the Civil Code offered the construction of "entrusted administration," which is an administration of another person's property in the interests of a beneficiary without becoming the owner of it.

It is not clear whether the entry into force of the Civil Code has automatically abrogated the Decree on trust or whether the decree continues to be in force in the limited scope described in it. The dominating doctrine in Russia, however, states that in connection with the adoption of the Civil Code that regulates the relationships of "entrusted administration" in Chapter 53 (articles 1012 – 1026 CC RF), the Presidential Decree about "trust" had lost its legal force.

III. Entrusted Administration of Property and Fiduciary Legal Transactions in Contemporary Russia

The situation of the entrusted administration may arise either through the prescription of a statute or under a contract between the owner and the entrusted administrator. For example, the owner may, for compensation, entrust the administrator to use his securities to receive income. The entrusted administrator has the power to possess, use, and even dispose of the property. His legal

PARTICULAR REFERENCE TO GERMANY 509 (Tony Weir trans., 1995).

19. LUIGI CARIOTA FERRARA, I NEGOZI FIDUCIARI: TRASFERIMENTO CESSIONE E GIRATA A SCOPO DI MANDATO E DI GARANZIA. PROCESSO FIDUCIARIO 10 (1933).

position is protected by the same remedies that protect the owner's position. He may also perform operations with this property in his own name, but not for his own benefits.

In order to exclude assimilation of the characteristics of the fiduciary ownership by the entrusted administration, the Civil Code provides special rules where the transfer of property into entrusted administration does not lead to the transfer of the right of ownership to the entrusted administrator and that the entrusted administration should exist no longer than 5 years unless otherwise provided by law.

The entrusted administrator is deemed to be entitled only to exercise powers belonging to the owner who is the settlor of the entrusted administration. From the doctrinal point of view, this construction is explained by an authoritative Russian civil lawyer in this way: "[T]he transfer by the owner of a part or even all his legal powers to another person, including to a manager, does not lead to the loss of the right of ownership because this right is not limited to these legal powers."[20]

But the negative attitude of the Russian doctrine to the institution of trust and its devotion, instead, to the palliative measures (such as the institution of entrusted administration) could be better understood through another quotation by the same author. He concluded his text about the trust and entrusted administration with such phrase:

> From a practical prospective, borrowing the trust concept in the absence of the common law system of equity leads to a lack of control over the trustee's relations with the settlor who, among other things, acts as a beneficiary. It is clear, then, that negative consequences could result from a broad application of the trust concept, which was designed for the more efficient management of state and municipal property through the transfer thereof to private persons.[21]

The negative attitude to trusts had its impact also on the fate of the Roman law constructions *fiducia cum creditore* and *fiducia cum amico* in Russia.

Up until the recent time, the jurisprudence of courts regarded them almost

20. Yevgeny Sukhanov, *The Concept of Ownership in Current Russian Law*, VI JURIDICA INT'L 102, 106 (2001).
21. *Id.* at 106.

always as simulated transactions in circumvention of law,[22] but the lawyers of banks were trying to prove acceptability of these constructions under the Russian law. However, in the judgment of N5-КГ13-113 in October 29, 2013, [23] the Supreme Court of Russia unexpectedly took another position. In resolution of a case concerning validity of the *fiducia cum creditore*, it declared that the list of specific guaranties to secure a right to performance is not closed.

Therefore, the parties of a loan contract basing themselves on the freedom of contract principle have right to provide, as a proprietary security for the performance of the obligation, the sale of immovable property under the condition that passing of ownership to the immovable property could depend on the performance by the debtor (borrower) of its duties under the loan contract, and the monetary loan is, at the same time, the price under the contract of sale.

It is not difficult to understand that this legal position not only recognized an admissibility of the transfer of ownership aimed to provide proprietary security, but also acknowledged it as the Germanic fiducia in which the realization of the resolutive condition or the expiration of the time period leads automatically a return of the right of ownership to the settlor.

This construction is not really dangerous as applied to immovable property because according to the dominating jurisprudence of courts, the absence of registration of this burden in the official register makes it impossible to oppose it to a third party acting in good faith.

However, the subtlety of the Supreme Court's position remained inaccessible to the lower courts, and they are usually interpreting this construction as a Roman law fiducia always neglecting the possibility to claim an immovable from a third party. Therefore, such form of proprietary security is used as a rule in the relations between natural persons who are not burdened by knowledge of law. It is denominated in the advocates' slang "pseudo-hypothec," and regarded by many of them as a legalized fraud.[24] Such unfortunate fate of the fiduciary ownership in the jurisprudence of courts doesn't increase the number of champions of trust among Russian lawyers.

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22. Ekaterina R. Usmanova, *Fiduciary Nature of Title Security*, ZAKON 151 (2016).
23. Судебная коллегия по гражданским делам Верховного Суда Российской Федерации [The Judicial Board for Civil Cases of the Supreme Court of the Russian Federation], Определение Верховного суда Российской Федерации [Ruling of the Supreme Court of the Russian Federation], No. 5-КГ13-113, http://vsrf.ru/stor_pdf.php?id=566074 (last visited May 6, 2017).
24. Alexandr Petrenko*, How Not to be Deceived in Pseudo-Hypothec*, NOTARY OF ST. PETERSBURG 14 (2014).

IV. A New Start of Trusts in Russia?

Despite the skeptical attitude of the dominant doctrine to trusts, the idea recently revived.

On March 25, 2015, during a meeting with the members of the Russian Government, President Vladimir Putin unexpectedly proclaimed:

> We are creating organizations that were not provided before in the Russian legislation. These are trusts, including also the so-called irrevocable trusts, when a citizen transfers his property to a manager company and from this moment at bottom of fact he ceases to be its owner. It is practically an innovation and we did not have it in our legislation before.[25]

He thinks it would contribute to a creation of a favorable climate for economic activity under our jurisdiction.[26]

At the same time, Siluanov, the Minister of Finances, informed his view that there were plans of optimization of the legislation concerning the irrevocable trusts' taxation. He made the information more precise: "We are speaking about the tax-free income which is not shared by the settlors who do not have rights to dispose and administrate the property in trust, but would participate in obtaining of the correspondent assets in the time of liquidation of the trust."[27]

While explaining the motive of the Government to return to the idea of implementing trusts in Russia, Alexej Uljukaev, the Minister of Economic Development during this time, referred to two causes:

> If we say our jurisdiction ought to be attractive for the business and for natural persons, it must provide different legal constructions. It is the main reason. The second one is that the novel is connected with the new statutes about foreign companies under control and about the amnesty of capital, about the declaration of assets and funds of the people.[28]

25. Kira Latukhina, *Путин поддержал предложения по амнистии капиталов* [*Putin Supported the Proposal for the Amnesty of Capital*], RG.RU (Mar. 25, 2015, 7:08 PM), http://rg.ru/2015/03/25/kapitali-site.html (last visited May 6, 2017).
26. *Id.*
27. *Id.*
28. *Id.*

The fact is that the main scheme of legalization of property by the majority of the Russian businessmen is connected with international trusts. In course of many years, they preferred to invest their capitals in trusts under foreign jurisdictions and to keep control through them over their property in Russia. But the statute about foreign companies under control, which was promulgated in 2014, actually deprived the sense of existence of these international trusts, suppressing the use of foreign jurisdictions for hiding the real owners and evading taxes. Because of this statute, beneficiaries of not only foreign companies, but also of the structures deprived of legal personality (that is of the trusts) should disclose information about the structure of ownership, declare income, and pay unshared income taxes, such as the income of irrevocable trusts under foreign jurisdictions.[29]

Ijia Trunin, the Director of the Tax, Customs, and Tariff Policy Department in the Ministry of Finances of Russia, commented:

> Disclose of information about the trusts' settlors is a global practice. At the end of October 2014, it took place in Berlin a Global Forum for transparency and exchange of tax information. There, Russia had been recognized adequate to the criteria of transparency established by G-20. But one of the criteria which is still lacking for Russia – disclose by tax residents of those trusts for which they are beneficiaries.[30]

According to Trunin, in case of implementation of all these criteria, Russia can become a participant of the global automatical exchange of information system from 2018, which is now in course of elaboration. One of the main features of trusts under the common law jurisdictions is the compulsory registration's absence, which encourages the hiding of trust beneficiaries. But in other jurisdictions, the state officials know all the beneficiaries of their trusts. Besides, it became problematical already now for the Russian businessmen to transfer an international trust to another jurisdiction because they are normally treated with fear.[31]

Thus, businessmen who are residents of Russia have an alternative: they can cease to be residents of Russia or they can return capitals in Russia by disclosing themselves as beneficiaries of trusts. In exchange for return of capitals in Russia, the business required from the government implementation of trusts in the Russian legal order exists because it wanted to benefit from other

29. Helena Zubova, *Подорванное доверие: как бизнес готовится раскрыть трасты* [*Disrupted Confidence: How Business is Going to Disclose Trusts*], FORBES (Jan. 20, 2015), https://news.mail.ru/politics/20781919/?idc=1 (last visited May 6, 2017).
30. *Id.*
31. *Id.*

advantages of this legal construction that are not connected with hiding of the beneficiaries. Besides, the business insists on creation of a favorable tax regime for the Russian trusts comparable with that of offshore jurisdictions.

Because the requirements of business entered in critical conflict with the position of the community of lawyers, the draft of the statute about trusts is in the process of preparation now, which is probably in the bosom of the Ministry of Economic Development without publication of its text and without consultations with the Council for codification attached to the President of the Russian Federation. Therefore, now, it is impossible to say something concrete about the details of the trust's construction in this draft.[32]

V. The Challenge of Description (Translation) of 'Trust' in Civil Law Terms

The description or translation of "trust" in civil law terms should be a great challenge for a Russian lawyer taking into consideration the legal literature of authority, which unanimously states the attempt of implementation of the concept of "trust" in the Russian legal order to be "the influence of absolutely alien Anglo-American approaches."[33] Therefore, the institute of trust is treated not as a bridge, but as an abyss between common and civil law jurisdictions. Acknowledgment of the evident fact of borrowing the idea of trust in a few civil law systems is always accompanied in the dominating doctrine by the conclusion that this legal transplant results only in the trust like devices, more or less similar to the true English trust in their aim but absolutely different in the core structure.

Argumentation to prove this thesis is based upon the cornerstone of inadmissibility for the civil law doctrinal mind of splitting of the right of ownership into different segments attributed to different persons because this absolute right is supposed to be indivisible, and on the other hand, the splitting of the right of ownership in common law is regarded as the main presupposition for the trust construction's existence in the English legal system.

While criticizing the relatively recent attempts of the trust's implementation in the civil law jurisdictions, Russian civil lawyers are normally characterizing

32. Anghelica Ghenkel, *Зачем нужны трасты в России* [*Whom Trusts Could Serve to in Russia*], FINANZ.RU (Apr. 24, 2015, 11:55 AM), http://www.finanz.ru/novosti/fondy/zachem-nuzhny-trasty-v-rossii-1000597434 (last visited May 6, 2017).

33. Sukhanov, *supra* note 20, at 106.

all the fruits of such experiments only as surrogate devices of "trust." In their opinion, the promoters of the civil law "trusts" are to blame for the omission of this concept's basic feature that consists of splitting the right of ownership under "trust" into the "legal title" under the common law and the "equitable title" under the equity, which would be impossible in the civil law legal thinking. In other words, they believe that the construction of "trust" is inevitably connected not only with the rights of ownership splitting, but also with the dualistic nature of the English law where common law and equity coexist in a manner comparable in a certain way with that of the *ius civile* and *ius honorarium* in the Roman law. A practical outcome of such reasoning finally manifests itself in neglect even to seek a common core structure for the description of a quantity of tools applied in civil law jurisdictions for the substitution of the institute of "trust."

VI. General Principles' Manifestation in Trust and Their Universality

On the other hand, if one compares a definition of trust given by a civil lawyer outside Russia, it is not hard to find it given in a very abstract and general way, deprived of any common law specific requisites and potentially applicable in the same manner for the both jurisdictions competing for leadership in the Western legal tradition.

For example, an Italian author Luigi Cariota Ferrara, quoting his German colleague, Klausing, provides a definition of "trust" as a "general principle for application of law in those cases where equity requires or suggest an allowance of the interests of other persons in front of the formally legitimate position of the title holder."[34]

But under such conceptual framework, "trust" ought to be identified *mutatis mutandis* with the principle of good faith and inadmissibility of the abuse of right because the general clauses in the civil law systems also serve to exclude those situations where formal legitimacy could collide head on the moral justice, fairness, and equity in the broad and non-technical sense of these terms.

It seems that a special meaning attributed to equity as a technical term in English law doesn't provide an obstacle for assimilation of "trust" with the general clauses of civil law. English authors Buckland and McNair in their

34. CARIOTA FERRARA, *supra* note 19, at 33.

famous book, *Roman Law and Common Law: A Comparison in Outline*, stressed that:

> In all systems of law, at all stages except the most primitive, there is a constant conflict between two methods of interpretation, the strict and the 'equitable,' sometimes expressed as being between *verba* and *voluntas*, which is not quite the same. There is both in Roman and in English law a steady tendency towards the triumph of the 'equitable' doctrine. But in our [English] system, equity has passed from the vague to the precise, 'from a sort of arbitrary fairness into a legal system of ameliorated law.'[35]

At the same time, the quoted authors were accentuating the fact that in the early history of English equity, there were no equity courts, but the common law courts held themselves free to apply equitable principles.[36] On the other hand, they were speaking of "much the same nature" of the Roman *Edictum Perpetuum* and the English "modern equity since the Judicature Act, though it came into existence by what was practically legislation."[37] But for these English writers, the state of things was the same as in the early English law, as after the Judicature Act's improvement, and also in Roman law after the *Edictum Perpetuum* became fixed early in the second century A.D. because there have "always been equitable interpretations quite independent" of the equitable rules somehow institutionalized already. Moreover, "the juristic *interpretatio* went on and was applied to edictal rules as to all others."[38]

This retrospective analysis proves that from a technical point of view, equity can find its institutionalization in different ways and is capable to bore new concepts, being once improved by arbitrary fairness of judges that tend to be consolidated finally at the legislative level. After all fruits of such consolidation when in their turn become objects of critical examination *ad hoc* through the prism of equity as an idea, the process results from time to time in their amendments and corrections due to the same arbitrary fairness of courts applying the general principles as the general clauses. Resuming this discourse, one could say that the equitable origin of "trust" in English law as such does not provide an obstacle for its implementation in the civil law.

35. BUCKLAND & MCNAIR, *supra* note 1, at XVIII.
36. *Id.*
37. *Id.*
38. *Id.*

VII. Functional Substitutes of Trust in Civil Law

A more serious problem is its incompatibility with the civil law conceptual framework, which looks really different from that of the common law.

The problem could be turned explicitly into two questions:

1) Is the concept of "trust" inevitably connected with the concept of splitting the right of ownership into segments ascribed to different titleholders or is it conceptualized in another scheme of legal dogmatic?

2) Is the concept of splitting the right of ownership into segments ascribed to different titleholders enough alien for the civil law legal thinking to block the implementation of "trust?"

It seems that the principle feature of the above quoted definition of "trust," formulated by Klausing and then repeated by Cariota Ferrara, consists of stressing such characteristic of "trust" as the possibility for the beneficiary to trace the property unlawfully alienated by the trustee to a third party unless the last one was acting in good faith. From the point of view of the legal dogmatic, the beneficiary's entitlement to tracing property to a third party supposes existence of his legal relation not only with the trustee, but *erga omnes,* that is, with unlimited circle of third parties. The most intriguing in this scheme is that in the framework of the classical civilian tradition, the beneficiary *prima facie* should be entitled only to claim the trustee under the Law of Obligations.

Certainly, the recognition of the coexistence of two independent absolute legal relations *erga omnes* in connection with the same property, that is, one of the trustee as the owner and the second one of the beneficiary, may lead to the conclusion that both these persons are owners. At the same time, taking into consideration the difference of legal powers granted to them under the settlement of trust would result in the acknowledgement of splitting the right of ownership between them. Such manner of thinking would be natural as applied to the common law, ascending in its basic concepts of property law to the Germanic idea of *Gewere*.

But it is worth noting that the manner of thinking described above is not the only possible one; there are alternatives.

For example, the construction "right to right" is well-known, ascending to the Roman law notion of *res incorporales* as objects of rights. Its practical manifestation reveals itself *inter alia* in granting to the creditor in obligation of

the protection *erga omnes* under tort law. This doctrine supposes also an existence of absolute legal relation of the creditor in obligation with the unlimited circle of the third parties.

An analogous idea of protecting the creditor in obligation under the tort law developed in France where

> [S]tarting from the second half of the 19th century, the protection under the tort law is recognized to be granted for the creditor in obligation against the third person – contributory infringer of the contract. In particular, it is applied against a third person who by acquisition from a seller already obliged to another buyer under another contract of sale contributed in such way to the breach of this contract (Trib. Boulogne, April 15, 1897). At the beginning of the 20th century, another buyer was recognized to be liable for damages caused by his acquisition in bad faith from a person obliged to sell the same thing to another person under the option agreement (App. Toulouse, July 15, 1918; App. Bordeaux, August 19, 1934).[39]

Starting from the 1970s, the Italian jurisprudence also progressively expanded the protection, under tort law, the rights of creditor in obligation, which had been reserved in former times only to absolute rights. "The creditor whose right is prejudiced by a third person has claim for damages against the latter, and if possible, for specific performance. So the rights *in personam* became property rights protected against anybody, where in the old days, only the real rights were."[40]

By the way of argumentation, it leads to the conclusion that if the given legal order knew as a primary remedy under the tortious liability the claim for compensation of losses *in natura* (if it is practically possible), that is, the claim for restitution of the same property lost due to the unlawful act, a beneficiary as a victim under the tort law could successfully file his suit against a third person who had consciously acquired the property unlawfully alienated by the trustee.

It had been this construction which the German civil law doctrine created as a remedy for the first buyer against the second one acting in a situation of "double purchase" where the seller obliged to transfer the same thing to two different persons under two independent contracts of sale really transferred the possession and the right of ownership to the second buyer, who at the moment

39. Franco Ferrari, *Tipicità e Atipicità del Fatto Illecito. I Contrapposti Modelli Francese e Tedesco*, *in* ATLANTE DI DIRITTO PRIVATO COMPARATO 155-58 (Francesco Galgano ed., 5th ed. 2011).

40. *Id.* at 164-65.

of conclusion of contract knew about the existence of the first buyer.[41]

In a comparative law literature, Rodolfo Sacco already noticed a resemblance of this mechanism, obviously indebted to the general clauses with the "constructive trust" recognized for the same situation with the same results by the English law.[42]

On the other hand, an eventual generalization of such approach would lead to the revival of the old concept, *ius ad rem*, which was born in the Medieval Canon law[43] and then found its proper place in the early codifications of the Law of Reason, particularly, in the Civil Code of Prussia (ALR). The *ius ad rem* in its juridical nature stands between the personal right (*ius in personam*) and the real right (*ius in rem*) as *genus tertius*.

As such, it was neglected by the Pandect law as something incompatible with the system of law, but it really never died. It was kindred to the idea of the *actio in rem scripta* of the Roman law that was essentially incarnated in the modern rental obligations burdening immovable property as to the concept of "relative ownership," which is still under intensive discussion in different civil law doctrines[44] mostly (but not only) in connection with the description of the legal nature of the *possessio ad usucapionem*,[45] which is protected by a remedy comparable with the *actio in rem Publiciana* of Roman law. Therefore, it seems that a return of private law doctrinal development paved as far back as in the times of the *ius commune* and *usus modernus Pandectarum* and in the first natural law codifications, but then abandoned due to the expansion of the Pandectistic legal thinking,[46] could contribute to the creation of the 'conceptual framework' to fall trust into the pattern of the civil law dogmatic. Therefore, it merits attention that even the English doctrine in those times trended to assimilate the English trust with the above-mentioned civil law's construction of *ius ad rem*.[47]

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41. *Id.* at 163.
42. ROBERTO SACCO, RELAZIONE DI SINTESI, IN VENDITA E TRASFERIMENTO DELLA PROPRIETA NELLA PROSPETTIVA STORICO-COMPARATISTICA. ATTI DEL CONGRESSO INTERNAZIONALE PISA-VIAREGGIO-LUCCA 17-21 APRILE 1990, at 876-77 (L. Vacca ed., 1991).
43. Emilio Bussi, *La Formazione dei Dogmi di Diritto Privato nel Diritto Comune (Diritti reali e Diritti di obbligazione)*, 58 DE GRUYTER 252, 252-66 (1937).
44. *E.g.,* Jakob Stagl, *Il Trasferimento Della Proprietà di Beni Mobili*, RASSEGNA DI DIRITTO Civile, Feb. 2015, at 641,661 (2015).
45. *Cf. e.g.,* BUCKLAND & MCNAIR, *supra* note 1, at 64.
46. See more in general about the conflict between the Pandect law doctrine and the previously formed civilian tradition; *e.g.,* Helmut Coing, *German 'Pandektistik' in Its Relationship to the Former 'Ius Commune,'* 37 AM. J. COMP. L. 9, 9-15 (1989).
47. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 86 (Walter Wheeler Cook ed., 1919).

VIII. The Concept of Segregated Property: A Bridge or Abyss for Trust's Implementation in Civil Law?

But even if one assumes that the concept of "divided ownership" have to be regarded the only possible form of translation of "trust" in the civil law terms, it should not lead to the unfavorable conclusion of its total incompatibility with the civil law.

The point consists not only in the fact that the "divided ownership" concept had been flourishing from the epoch of the medieval *ius commune* until the early codifications of the modern times. It seems that the understanding of the legal reality produced by this manner of thinking is still influential in the civil law doctrines of French origin, despite the poor reflection of this fact in the minds of the representatives of such doctrines and of the comparative lawyers.

It is well known that in the European civilian tradition since old times, there are two competing modes of description of the correlation between the right of ownership and the limited real rights. One of them, ascending to the Medieval Germanic *Gewere*, is the "divided ownership" concept, which considers the establishment of limited real rights as something similar to the segregation of an orange segments from the fruit, thus, logically supposing a partial forfeiture by the owner of his rights when he had endowed a third person to a limited real right to his thing. For example, the limited real rights were nothing more than "the splinters of ownership, which had become independent" from the point of view of Otto von Gierke, the latest patriarchy of the Germanic legal scholarship.[48]

This doctrine is concerned with the divided or fragmented ownership concept. The same Gierke wrote on the subject: The ancient Germanic law had been based on the concept of unified ownership of things, but granted its diverse modifications. It could be defined as a right of ownership with inconstant content (*wandelbarer Eigentumsbegriff*), which means its incompatibility as with the Roman concept of ownership, as with the modern one. Besides the hereditable right of ownership, there exists also a lifelong one; along with that perpetual there exists also another one created temporarily or under a resolutive condition; in addition to the actual one there is also another - prospective - right of ownership under a suspensive condition (*anwartschaftliches*).[49] Here, a right of ownership constrained, limited, and burdened confronts equally with the right of ownership free, full, and unlimited. Thus, this legal order allowed combination in the framework established by it of more than one right of ownership in the same thing. As far as the rights to possess, to dispose, and to

48. OTTO GIERKE, DEUTSCHES PRIVATRECHT II: SACHENRECHT 359 (1905).
49. *Id.* at 351

use the thing concerned, they are reciprocally restraining and alternately consolidating themselves. More of the unification of whole real ownership in one's hands always takes place only in moveable property. But ownership in immovables is divided from the very beginning between several persons and is always inclined to a more progressive atomization (*Zerlegung*) due to the cross rights of associations and individuals. Under family law, an individual right of ownership faced with a prospective right of ownership of family members under the law of community individual property is bounded and limited by the communal right and by condominium. By operation of the power of the King or of another sovereign, the latter's supremacy restrains in other way the right of an immediate owner of immovable property.[50]

On the contrary, under the Pandect law, the endowment of a third person by a real right means creation of a quantitatively new right, existing in parallel with the right of ownership as its supplement but having an overlapping dimension with it. Thus, in the framework of the unitary concept of ownership ascending to the Pandectistic manner of thinking, the owner never loses any of his powers until the total lapse of the right of ownership. But he is authorized to the exercise of his powers only in so far as their exercise could not block the exercise of the limited real rights to his thing. Only in such scheme, the well-known metaphor of the 'elasticity' of the right of ownership (*ius recadentiae*) gains its logical base.

Due to such understanding of the legal nature of ownership by Pandect law, "German law deviates from the Roman law principle of *nulli res sua servit*" today, enabling concurrence of ownership and limited real rights in the same hands.[51]

But in France and in the civil law systems affiliated with France, the situation is more complicated. The abolition of the feudal system in France after the Revolution resulted in the declaration of an absolute and unitary concept of ownership in the Code Civil and in the doctrine. On the other hand, the French doctrine, at the same time, understands the correlation between ownership and property rights on another person's thing under the model known as *démembrement* in French, which translates at best, as subtraction. Under this model, a combination of the rights of the owner is understood as a combination of parts of the right of ownership, one or more of which can be transferred to another person.

The abolition of the pre-revolutionary concept of fragmented ownership resulted in conceptualization of these subtracted elements as something other than ownership: as limited real rights (*iura in re aliena*). But this doctrine was

50. *Id.* at 352.
51. Akkermans, *supra* note 3, at 262.

really inspired by the ideas of the Medieval Glossators who, in their turn, were making a synthesis between the *dominium* of Roman law and the Germanic *Gewere* and really thinking in the categories of fragmentation, that is, divided ownership. Therefore, "usually a right of ownership that has been burdened with a limited property right is referred to as a bare ownership to signify that some of the rights contained in it have been transferred to another person in the form of a property right other than ownership."[52]

After all, one has to agree with the opinion that, despite its declaration about the absolute and unitary ownership, the French doctrine in its core, which is in the Law of Property, is much closer to English law than to German law based on the doctrines of Pandectism. Moreover, the concurrence of the two approaches described above in course of the private law harmonization in Europe resulted nowadays in the dominance of the French one. As the Dutch author, Bram Akkermans, states:

In general, the leading opinion seems to be that a limited property right contains certain powers of the right of ownership that are temporarily in the hands of another person. When ownership and limited property rights are combined, the powers contained in the limited property right return to the owner and the property right ends to exist through a merger with the powers of the right of ownership.[53]

IX. Conclusion

A summary of this overview should lead to the conclusion that on the level of the core structure, an abyss between the common law and the civil law manners of thinking about the Law of Property does not exist, and one could put them together for the purpose of implementation of the construction of "trust" in civil law.

Certainly, it is unpredictable if the Civil law can do better, but it probably can do the same as the English law did through its self-re-conceptualization standing on its own historical background and already existed and existing doctrines.

The principle way would be to accept as a standard the 'fiduciary ownership' according to the Germanic law model that is the so-called 'fiducia of the Germanic type.' It is well known that there are two constructions of the fiducia that exist, which is Roman fiducia and Germanic fiducia. In the Roman

52. *Id.* at 265.
53. *Id.*

construction, those who acquire property under the fiduciary contract acquire the full ownership because the fiduciary obligation is basically binding only under the Law of Obligations, and therefore, it cannot be opposed to third persons. Therefore, if a fiduciary violates his obligations by alienation of property to a third person, instead of its restitution to the settlor, the acquisition of the third person is valid and the settlor has nothing to take to court except damages from the perfidious fiduciary.[54]

On the contrary, according to the Germanic construction, the legal power of the fiduciary is limited by a resolutive condition, and therefore, it is limited not under the Law of Obligations, but under the Law of Things (Property Law). The content of the condition can be diverse depending of the constitutional act and its aims. But some conditions are always to be found, such as the conditions where the fiduciary's right is to return to the settlor in case of infringement by the fiduciary of its obligations and in case of its disposition of the property contrary to the defined aim. There is also a condition that provides the return of the right to the settlor in case of the fiduciary's death or insolvency.[55]

With the occurrence of the condition, the settlor and his heirs would claim the property not only from the heirs of the fiduciary who entered in possession of it or from the person which acquired it in bad faith from the perfidious fiduciary, but also from the bankruptcy commissioner who has included it in the bankrupt estate.[56]

So, in contrast to the Roman fiducia in which the fiduciary obtained an unlimited legal power under Property Law and the aim with which the right was transferred to him operated only indirectly through the binding relation between the settlor and the fiduciary, under the Germanic law, the fiduciary obtained the right under the resolutive condition and therefore the determination of the aim exercised its limiting influence directly in the sphere of the fiduciary's legal power. Therefore, any use or alienation of property by the fiduciary, which was contrary to the aim, was really ineffective because it provoked a return of the property to the settlor or his heirs, and by prejudice to the third person who acquired it.[57]

Certainly, the Roman fiducia accompanied by the protection of obligations under the law of torts would finally result in the same practical effect in regard of third persons as the Germanic fiducia provides. In this context, however, there is a lack of an important characteristic of Germanic fiducia, which is the

54. CARIOTA FERRARA, *supra* note 11, at 10.
55. *Id.* at 11.
56. *Id.* at 12.
57. *Id.* at 10.

predominance of the settlor's right over the rights of the fiduciary's creditors in case of the latter's bankruptcy. Under these aspects, the transplantation of the Germanic fiducia in the given legal order seems more acceptable.

Such construction results in partition of the right of ownership between the settlor and the fiduciary because the latter holds all the powers to use and dispose the property that belong to the owner, but under the limits established by the fiduciary agreement. On the other hand, the settlor's right of ownership transforms itself in a revocable ownership that is in an expectation that with expiration of the fiduciary's right of ownership or of the same right of his successors, the settlor's right of ownership will reacquire its full plenitude with return to him of the powers, belonging previously to the fiduciary. The settlor undoubtedly reserves the power to dispose of the thing, but supposing that its buyer acquires only the same expectation of return of the plenitude of this right with the occurrence of the resolutive condition.

It seems that the settlor's legal position in the Germanic fiducia would be absolutely comparable to that of the 'nude owner,' the plenitude of whose right is diminished due to the constitution to the object of his right of the minor real rights with a wide content, which (as in case of *emphyteusis*) strongly limit the powers of use of the owner. It is worth noting in the given context, that, for example in Italy, even today the correspondence between ownership and the same *emphyteusis*, is still understood under the theory of ownership fragmented and then divided between the nude owner and the *emphyteuta*. The roots of the theory are ascending to the doctrines of the medieval glossators. In the framework of this scheme, the *emphyteusis* is presented as a form of ownership, *dominium utile*, opposed to the right of the nude owner, understood as *dominium directum*.[58]

The same concept applied to the Germanic fiducia would result in the creation of the civil law construction corresponding in its basic features to the common law trust. But it would be better to integrate it also in the context of doctrine formed under the influence of the more recent dogmatic of the Law of Property with its devotion to the generally recognized unity of the right of ownership.

The historical experience of civil law can also serve for this purpose. The § 357 of the Austrian General Civil Code of 1811 (ABGB) provided a definition of the divided ownership applicable for reconciliation between the concept of the unity of this right and the idea of its division between the two persons.

58. FRANCESCO GALGANO, DIRITTO PRIVATO 167 (15th ed. 2010).

> If the same person has the right to the essence of the thing and the right to its usages, the right of ownership is complete and undivided (*ungetheilt*). But in case one person has only the right to the essence of the thing, but there is another one, that, having the right to the essence of the same thing, has in addition an exclusive right to its usages, the right of ownership is divided and incomplete with regard to both of them. The first one is entitled the 'over'-owner (*Obereigenthümer*), and the latter – the 'under'-owner (*Nutzungseigenthümer*).[59]

The subtlety of the quoted definition consists of the fact that on the one hand, it promoted the divided ownership concept, but on the other hand, conserved the unity of this right providing the common ownership *sui generis* of the 'over'-owner and the 'under'-owner in the essence of the same thing. Therefore, the same thing representing the object of the indivisible common ownership of both persons under the aspect of the relations of belonging was exclusively at the disposal of the 'under'-owner under the aspect of its use and disposition of it within the limits established by the act that constituted these relations.

It seems that the same scheme applied in the Germanic fiducia would conciliate it with the dominant doctrine of civil law having its origin in Pandect law.

But it is worth noting that the conciliation of the Germanic fiducia's legal construction with the dominant doctrine achieved in the described scheme of the recognition of the common ownership *sui generis* of the 'over'-owner and the 'under'-owner would evidently deprive the continental trust constructed in such way of some important and attractive characteristics of this institute under the aspect of the tax law and the law of succession, which permits today to use international trusts on the one hand for optimization of taxation and on the other hand for evasion of application of imperative norms concerning the "legitime" – that is a portion of inheritance, reserved for some categories of heirs according to statutory provisions.

But one can conclude that the Germanic doctrine of fiduciary ownership, the concept of protection of the creditor in obligation under the tort law, and the other figures applicable from the 'tool-box' of the European civilian tradition could be brought together to create a model of fiduciary ownership, which would be comparable with the classical English trust in some of the latter's important features.[60]

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59. Anton Rudokvas, *supra* note 2.
60. There is a multitude of challenges of practical life to respond to which the creation of a trust could become an optimal choice. Due to their multiplicity and diversity, they cannot be fully described in this article aimed at focusing on doctrinal issues. But there is perfect description of those practical needs for which trust is applied in a civil law jurisdiction that absorbed this

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institution, as Italy did. *See* RAFFAELLA SARRO, LE RISPOSTE DEL TRUST. IL TRUST SPIEGATO IN PAROLE SEMPLICI E TRAMITE ESPERIENZE DI VITA (2010).

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