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DIFFERENT TYPES OF TRUST *LIKE REGULATIONS IN EASTERN EUROPE – A COMPARISON*

The *common law trust* as a legal institution is a unique concept. The *trust* as a legal institution evolved in England, and quickly gained influence in Commonwealth countries. As a consequence, *trust* law is largely consistent and unified by its case law in North America, Australia, New Zealand, Hong Kong, etc. In *civil law* countries, by contrast, *trust* schemes have been introduced on-demand as *civil law* economies find the need, albeit with similar legislation and functionality as applied in *common law* countries. In *civil law* countries and states where English economic and political influence was strong, the regulation of *trusts* was inevitable. The *trust* has been instituted, however, with specific legislation in mixed civil legal environments, such as Louisiana [1],

[1] D. W. GRUNING, *Reception of the Trust in Louisiana: the Case of Reynolds v. Reynolds*, in *Tulane Law Review* 57, 1982, p. 89 ss.; R. BATIZA, *Origins of Modern Codification of the Civil law: The French Experience and Its Implications for Louisiana Law*, in *Tulane Law Review* 56, 1982, p. 578 ss.; F.F. STONE, *Trusts in Louisiana*, in *The International and Comparative Law Quarterly* 1, 1952, p. 368 ss.; J.M. WISDOM, *A Trust Code for the Civil law, Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act*, in *Tulane Law Review* 13, 1938, p. 71 ss.; E.F. MARTIN, *Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code*, in 50 *Louisiana Law Review* 50/3, 1990, p. 508 ss.; A.M. HESS, G.G. BOGERT, G.T. BOGERT, *The Law of Trusts and Trustees. A Treatise Covering the Law Relating to Trusts and Allied Subjects Affecting Trust Creation and*

Québec[2], South Africa[3] and even in some Central and South American countries (Panama, Mexico, Chile, etc.).[4] By comparison, legal systems in

Administration with Forms, Thomson/West, Eagan, 2007[3], Vol. 1, p. 21 ss.; E.J. Chase, *Trusts*, in *Louisiana Civil law Treatise*, Vol. 11, Thomson Reuters, Danvers, 2009[2], 4 ss.

[2] M.C. Cumyn, *The Quebec Trust: A Civilian Institution with English Law Roots*, in J.M. Milo, J.M. Smits (a cura di), *Trusts in Mixed Legal Systems. Ars Aequi Libri*, Nijmegen, 2001, p. 73 ss.; Y. Caron, *The Trust in Quebec*, in *McGill Law Journal* 25, 1980, p. 422; M.C. Cumyn, *Reflections regarding the diversity of ways in which the trust has been received or adapted in civil law countries*, in L. Smith (a cura di), *Re-imagining the Trust. Trusts in Civil law*, p. 9; B.G. Smith, *Introduction to the Canadian Law of Trusts*, Butterworth & Co. (Canada) Ltd., Toronto, 1979, p. 154; A.H. Oosterhoff, R. Chambers, M. McInnes, L. Smith, *Oosterhoff on Trusts. Text, Commentary and Materials*, Thomson Canada Limited, Toronto, Ontario, 2004[6], p. 43 ss.; V. Mettarlin, *The Quebec Trust and the Civil law*, in *McGill LJ* 21, 1975; Kenneth G.C. Reid, *Patrimony not Equity: The Trust in Scotland*, in J.M. Milo, J.M. Smits (a cura di), *Trusts in Mixed Legal Systems. Ars Aequi Libri*, Nijmegen, 2001, p. 27; A. Fuglinszky, *A polgári jogi felelősség útjai (Paths of Civil Liability in Mixed Legal Systems) - Québec, Kanada*, in *ELTE Eötvös Kiadó Kft.*, Budapest, 2010, p. 88 ss.; M. Lupoi, *Trusts: A comparative study*, Cambridge University Press, Cambridge, 2000, p. 276.

[3] T. Honoré, *Obstacles to the Reception of Trust Law? The Examples of South Africa and Scotland*, in A.M. Rabello (a cura di), *Aequitas and Equity: Equity in Civil law and Mixed Jurisdictions*, Jerusalem, 1997, p. 799; M.J. de Waal, *Trust law*, in J.M. Smits (a cura di), *Elgar Encyclopedia of Comparative Law*, Edward Elgar, Cheltenham, Northampton, 2006, p. 43; E. Cameron, M.J. De Waal, B. Wunsh, P. Solomon, E. Kahn, *Honoré's South African Law of Trusts*, in *JUTA Law*, Lansdowne, 2002[5], p. 25; H. R. Hahlo, *The Trust in South Africa*, in *South African Law Journal* 78, 1961, p. 199; D. Shrand, *Trusts in South Africa*, in *Legal and Financial Publishing Company Co. (PTY.) Ltd.*, Cape Town, 1976, p. 14 ss.; W. Geach, J. Yeats, *Trusts. Law and Practice*, in *JUTA & Co Ltd.*, Wetton, 2007, p. 2 ss.; B. Beinart, *Trusts in Roman and Roman-Dutch Law*, in W.A. Wilson, *Trusts and Trust-Like Devices (United Kingdom Comparative Law Series,* Vol. 5), Chameleon Press Limited, London, 1981, p. 168 ss.; R.W. Lee, *Recent South African Statutes*, in *The Law Quarterly Review* CCIV, 1935, p. 586 ss.

[4] R.J. Alfaro, *The Trust and the Civil law with Special Reference to Panama*, in *Journal of Comparative Legislation and International Law* 33/3–4, 1951, p. 29; L. S.

Europe based on Roman law traditions have either conceived their own approach or completely rejected the institution of the *trust* as did Germany[5], Austria[6], Spain[7], Portugal etc. Some established customary practices without any legislative background of the fiduciary ownership transfer, such as Switzerland; some made use of private foundations, as in Austria and Belgium, while others, such as Liechtenstein, recognized the benefits of the *trust* and similar institutions, and established such systems in the early 20th century.[8] Ultimately, the economic demand for *trust* systems is obvious, particularly on the basis of its functionalities and legal regulations. In Asia, fol-

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Sánchez Vilella, *The Problems of Trust Legislation in Civil law Jurisdictions: The Law of Trusts in Puerto Rico*, in *Tulane Law Review* 19, 1945, p. 383 ss.; F. Matta, *Civil law and Common Law in the Legal Method of Puerto Rico*, in *American Journal of Comparative Law* 40, 1992, p. 789.

[5] J. Rehahn, A. Grimm, *Country Report: Germany*, in *The Columbia Journal of European Law Online*, Vol. 18.2, 2012, p. 100 ss.; V. Thurnher, *Grundfragen des Treuhandwesens. Juristische Schriftenreihe, Band 71,* Verlag Österreich, Wien, 1994, p. 33 ss.; D. Liebich, K. Mathews, *Treuhand und Treuhänder in Recht und Wirtschaft: ein Handbuch*, Verlag Neue Wirtschafts-Briefe, Herfle, Berlin, 1983², p. 32; H. Kötz, *Trust und Treuhand. Eine rechtsvergleichende Darstellung des anglo-amerikanischen Trust und funktionsverwandter Institute des deutschen Rechts*, Vandenhoeck & Ruprecht, Göttingen, 1963, p. 120 ss.; E.D. Graue, *Trust-Like Devices Under German Law*, in W.A. Wilson, *Trusts and Trust-Like Devices (United Kingdom Comparative Law Series,* Vol. 5*)*, Chameleon Press Limited, London, 1981. p. 72.

[6] H. Koziol, R. Welser, *Grundriss des bürgerlichen Rechts. Band II. Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht*, Manz, Wien, 2001[12], Vol. II, p. 120, Vol. I, p. 196.

[7] A. Borrás, C.C. Beilfuss, *National Report for Spain*, in D.J. Hayton, S.C.J.J. Kortmann, H.L.E. Verhagen (a cura di), *Principles of European Trust Law. Law of Business and Finance*, Vol. 1, Kluwer Law International – W. E. J. Tjeenk Willink, 1999, p. 159.

[8] F.A. Schurr, *A Comparative Introduction to the Trusts in the Principality of Liechtenstein*, in F.A. Schurr (a cura di), *Trusts in the Principality of Liechtenstein and Similar Jurisdictions: Aspects of Wealth Protection, Beneficiaries' Rights and International Law*, Vol. 4, *Schriften des Zentrums für Liechtensteinisches Recht (ZLR) an der Universität Zürich*, Dike Verlag, Zürich/St.Gallen, 2014, p. 15 ss.

lowing in Japan's footsteps, the People's Republic of China[9], South Korea[10] and Taiwan[11] each established legal backgrounds for property management in the late 20th century. In the early 21st century, legislation in European *civil law* systems followed suit: France, Luxembourg, Russia, Lithuania, Geor-

[9] L. Ho, *Trust law in China*, in L. Smith, *Re-imagining the trusts: trusts in civil law,* Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paolo, Delhi, Mexico City, 2012, p. 183 ss.; R.C. Behnes, *Schriften zum chinesischen Recht. Band 3. Der Trust in Chinesischen Recht: Eine Darstellung des chinesischen Trustgesetzes von 2001 vor dem Hintergrund des englischen Trustrechts und des Rechts der finanziarischen Treuhand in Deutschland*, Berlin, 2009, p. 62; Q.A. Ha, *The Reception of Trust in Different Legal Systems: some Lessons for Vietnam. A Comparative Study*, in *Schriftenreihe Finance, Insurance & Law*, Vol. 1, Verlag Dr. Kovač, Hamburg, 2008. p. 128; L. Ho, R. Lee, *Reception of the trust in Asia: An historical perspective*, in L. Ho, R. Lee, *Trust Law In Asian Civil law Jurisdictions. A Comparative Analysis*, Cambridge University Press, Cambridge, 2013. p. 18 ss.; L. Ho, *The Peoples's Republic of China*, in D. Hayton (a cura di), *The International Trust*, Jordan Publishing Limited, Bristol, 2011[3], p. 823; R. Lee, *Conceptualizing the Chinese Trust*, in *The International and Comparative Law Quarterly* 58/3, 2009, p. 659; Kenneth G.C. Reid, *Conceptualising the Chinese Trust: Some Thoughts from Europe*, University of Edinburgh School of Law, Working Paper Series No 2011/06, 2011, http://ssrn.com/abstract=1763826, p. 9; L. Ho, R. Lee, J. Jinping, *Trust law in China: a critical evaluation of its conceptual foundation*, in L. Ho, R. Lee, *Trust Law In Asian Civil law Jurisdictions. A Comparative Analysis*, Cambridge University Press, Cambridge, 2013, p. 46 ss.; R. Lee, *Convergence and divergence in the worlds of the trust: Duties and liabilities of trustees under the Chinese trust*, in L. Smith (a cura di), *The Worlds of the Trust*, Cambridge University Press, New York, 2013, p. 412 ss.

[10] *Trust* Act of Republic of Korea, Act No. 900 of 1961. L. Ho, R. Lee, *Reception of the trust in Asia: An historical perspective*, in L. Ho, R. Lee, *Trust Law In Asian Civil law Jurisdictions. A Comparative Analysis*, Cambridge University Press, Cambridge, 2013, p. 12 ss.; W. Ying-Chieh, *Trust law in South Korea: Developments and challenges*, in L. Ho, R. Lee, *Trust Law In Asian Civil law Jurisdictions. A Comparative Analysis*, Cambridge University Press, Cambridge, 2013, p. 46 ss.

[11] *Trust* Law of the Republic of China 1996, amended on 30 December 2009. L. Ho, R. Lee, *op. cit. (Reception)*, p. 12. For details of Taiwanese regulation, see W. Wen-Yeu, W. Chih-Cheng, S. Jer-Shenq, *Trust law in Taiwan: History, current features and future prospects*, in L. Ho, R. Rebecca, *Trust Law In Asian Civil law Jurisdictions. A Comparative Analysis*, Cambridge University Press, Cambridge, 2013, p. 63 ss.

gia, San Marino[12], Czech Republic, Romania, and Hungary all set up legal backgrounds for property management.[13]

I would like to give a short introduction below to the legislation of the *trust*-like legal devices applied in seven Eastern European countries: Russia, Ukraine, Lithuania, Georgia, Czech Republic, Romania and Hungary. The second part of the study provides a comparison of the most important features of regulation in these legal regimes.

The texts of the civil codes of the covered countries use different terminologies for property management and for the parties in the relationship. I will generally use Anglo-Saxon terms, such as *trust*, settlor, *trustee*, beneficiary and *trust* property, but of course this does not mean that the examined legal institutions are equal to the *trust*.

1. Russia.

The regulation concerning the *trust* was promulgated on 24 December 1993.[14] Pursuant to the regulation, a contract is concluded between

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[12] A. Vicari, *Country Report: San Marino*, in *The Columbia Journal of European Law Online*, Vol. 18.2, 2012, p. 82.

[13] It is also common practice in some countries to use the fiduciary transfer of ownership for purposes like the *trust*. For example, the institution of the *fiducia (powiernictwo)* exists in Poland. The establishment of the *fiducia* consists of two stages: firstly, the transfer of legal title to the fiduciary *(powiernik)*, and secondly, the activity of the fiduciary, who acts in the capacity of owner, but fulfils the obligations arising from the contract vis-á-vis the transferor. The *fiducia*'s scope of application is mainly related to investment companies, bank and financial activities. P. Stec, *Fiducia in an Emerging Economy*, in E. Cooke (a cura di), *Modern Studies in Property Law*, Vol. 1: *Property 2000*, Hart Publishing, Oxford–Portland–Oregon, 2001, p. 47. The situation is very similar for example to the legal regulation in Greece as well. P.J. Kozyris, C. Deliyianni-Dimitrakou, A. Valtoudis, *Commercial Trusts in Europe: The Greek Perspective*, in *Revue hellénique de droit international* 60, 2007, p. 208 ss. In connection with the regulation of the Treuhand see I. Sándor, *A bizalmi vagyonkezelés és a trust. Jogtörténeti és összehasonlító jogi elemzés (The fiduciary property management and the trust. Legal Historical and Comparative Law Analysis)*, in *HVG-ORAC Lap- és Könyvkiadó Kft*., Budapest, 2014, p. 250 ss.

[14] The term *trust (trast)* appeared in the Russian private banking sector in 1990, allowing banks to manage the investments and securities of their clients. See "On the banks and banking activities in the RSFSR", Vedomosti RSFSR 1990 No. 27. item 327. On "Fiduciary Ownership (the *trast*)", Sobranie aktov RF 1994 No.

the settlor of the *trust* (*uchreditel' trasta*) and the *trustee* (*doveritel'nyi sobstvennik*); the settlor transfers the property to the *trustee*, who manages the property for the benefit of the beneficiary. Property transferred in this manner was granted protection in the event of the *trustee*'s insolvency. This arrangement was drafted specifically for privatisation purposes; the state was the settlor, and the federal state treasury was the beneficiary. The *trustees* were institutions, e.g. banks, investment funds and insurance companies, which managed the shares of the converted state-owned companies for a fee.[15] The new Russian civil code substantially amended this legal instrument.

The first part of the Russian civil code entered into force on 1 January 1995.[16] Pursuant to Art. 209(4), legal title may be transferred to someone else for the purpose of property management (*doveritel'noe upravlenie*).[17] The second part of the Russian civil code entered into force on 1 March 1996. Chapter 53 regulates property management (*doveritel'noe upravlenie*).[18] Pursuant to Art. 1012 of the Russian civil code, under the agreement between the parties, one party (settlor) transfers the property to the other party (*trustee*) for a fixed period, and the other party undertakes to manage the property for the benefit of the settlor or a beneficiary designated by him. The transfer of property does

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1.item 6. Pursuant to the preamble, the introduction of the *trust* was necessitated by new forms of business administration and institutional reform related to economic reform. E. Reid, *The Law of Trusts in Russia*, in *Review of Central and East European Law* 24, 1998, p. 45 ss.

[15] The federal contracting agency, Roskontrakt, became the largest asset management organisation. E. Reid, *op. cit. (The Law of Trusts in Russia)*, p. 47. The subsequent application of the *trust* is related to privatisation in Russia. In 1992, a presidential regulation ordered the conversion of state-owned companies into companies limited by shares; their shares were to be managed under a *trust* arrangement.

[16] *Sobranie zakonodatel'stva RF* 1994 No. 32 item 3301.

[17] The earlier term "*trust* owner" was replaced with "*trust* manager" (*doveritel'nyi upravliaiushchii*), which is associated with agency, representation. E. Reid, *op. cit. (The Law of Trusts in Russia)*, p. 48.

[18] *Sobranie zakonodatel'stva RF* 1996 No. 5 item 410. See also I. Gvelesiani, *French "Fiducie" and Russian "ДОВЕРИТЕЛЬНОЕ УПРАВЛЕНИЕ ИМУЩЕСТВОМ" (Terminological Peculiarities)*, in *European Scientific Journal*, December 2013, Special edition, Vol. 4, p. 115 ss.

not extend to the transfer of legal title to the property.[19] Thus, under the new regulation, the settlor retains legal title to the *trust* property, while the *trustee* only acquires the right to manage the property. The *trustee* carries out his duties for remuneration, but is not entitled to profits from the *trust* property.

This contractual arrangement does not quite reach the level of the Anglo-Saxon *trust*, but it is more than a simple agency or mandate. Although the settlor may terminate the contract at any time, the *trustee* holds exclusive rights to manage the property. On the other hand, the *trustee* requires the prior written consent of the settlor for important decisions concerning the property, such as the cessation of the business association through the exercise of voting rights attached to shares included in the property, modification of its capital, decision on the amendment to the deed of foundation. The *trustee* must manage the property separately from his own property, and keep it on a separate account. This arrangement is mainly applied in Russia for the operation of investment funds and pension funds.[20]

The adoption of the Anglo-Saxon version of the *trust* was opposed by Russian jurists mainly on the grounds that it would have infringed the requirement of the indivisibility of ownership, and the law of equity (*spravedlivost'*) is similarly unknown in Russian law.[21]

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[19] Z.E. Benevolenskaya, *Trust Management as a Legal Form of Managing State Property in Russia*, in *Review of Central and East European Law* 35, 2010, p. 68 ss. Hamza draws a parallel between this arrangement and regulation in Louisiana. G. Hamza, *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján (Development of modern private law systems based on traditions of Roman law)*, Nemzeti Tankönyvkiadó, Budapest, 2002, p. 237; Id., *Origine e sviluppo degli ordinamenti giusprivatistici moderni in base alla tradizione del diritto romano*, Andavira editora, Santiago de Compostella, 2013, p. 494.

[20] E. Reid, *op. cit. (The Law of Trusts in Russia)*, p. 54 ss.

[21] Benevolenskaya notes that divided ownership had not been unknown in the context of Russia's legal history. She mainly cites the work of Anatolij Vasilievich Venediktov, *Gosudarstvennaia socialisticheskaia sobstvennost* (Izdatel'stvo AN SSS, Moskva, Leningrad, 1948). Z.E. Benevolenskaya, *Prospects for Trust in Russia: The Prospective as Seen from 2010 and 2011 Draft Amendments to Russian Civil Code*, in *Review of Central and Eastern European Law* 37/1, 2012, p. 41 ss.

2. Ukraine.

The private law of Ukraine is traditionally based on Roman law, with a strong influence of the French civil code.[22] The new civil code enacted on 1 January 2004 was strongly influenced by the German civil code (BGB). The new civil code regulates property management in Book V (The Right of Obligation), Section III (Separate Types of Obligations), Sub-section 1 (Contractual Obligations), Chapter 70 (Property Management).

According to the regulation, under the written property management agreement the settlor transfers the property to the manager (*trustee*) to be managed for a specific period of time. The *trustee* manages the property in the interest of the settler or a third person, a beneficiary.[23] The *trustee* is entitled to remuneration for his activity. The property can be almost anything; there is a restriction only in case of monetary funds and certain securities, which are allowed only when the legal relationship is established by law. The *trustee* can only be an enterprise and the property management agreement must be registered by the state. The managed property must be handled separately from the assets of the *trustee*.

3. Lithuania.

In the earlier civil code of Lithuania, in force from 1964, property management was regulated in relation to public property. The new civil code was enacted on 17 May of 1994 and came into force on 1 January 2000[24]; it introduced property *trust* law for the private sector as well. The regulation was essentially only renamed, but the substance of the legal arrangement remained the same.[25] The property *trust* law is an *in rem* right which is regulated in Book Four (Material Law), Part I (Things), Chapter VI (Right of *Trust*) of the Lithuanian civil code.

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[22] G. Hamza, *Entstehung und Entwicklung der modernen Privatrechtsordnungen und die römischrechtliche Tradition*, Eötvös Universitätsverlag, Budapest, 2009, p. 557; G. Hamza, *op. cit (Origine)*, p. 501.

[23] Art. 1029(1) of the Ukrainian civil code.

[24] *Lietuvos Respublikos civilinis kodeksas, LR CK.*

[25] S. Justas, *Problematics of Property Trust Law in Lithuania*, Mykolo Romerio Universitetas, Vilnius, 2011, p. 3.

The *trustee* right is an independent *in rem* right, with which the *trustee* is allowed to exercise practically the same rights as the owner.

4. Georgia.

Art. 724–729 of the Georgian civil code of 1997 regulate the legal institution that is similar to the *trust* (*sakutrebis mindoba*), which was shaped upon the influence of Anglo-Saxon law and the Roman law *fiducia*.[26] Property management is established by a written *trust* contract (*sakutrebis mindobis khelshekruleba*), under which the *trustee* (*mindobili mesakutre*) is obliged to manage the property for the benefit of the settlor (*sakutrebis mimndobi*); thus, this is not a tripartite relationship. The law allows the transfer of the legal title of the *trust* property, and pursuant to Art. 725(1), the *trustee* manages the property in his own name, at the cost and risk of the settlor. Profits from the property are also due to the settlor. As a general rule, the property management contract is gratuitous, but the parties may derogate from this rule. The *trustee* is liable toward third parties for duties relating to the *trust* property.[27] Provisions relating to agency provide the legal framework for the property management contract.

5. Romania.

In Romania, civil code No 511/2009 (amended by No 71/2011.), Art. 773–791 introduced the *fiducia*, a property management arrangement similar to the *trust*. The Romanian concept of the *fiducia* shows notable similarities to the French law of the *fiducie*.[28] The *fiducia* may be established by law

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[26] G. Hamza, *op. cit. (Entstehungen)*, p. 589.

[27] For detailed analysis of regulation, see I. Gvelesiani, The *Luxembourgish "Fiducie" and the Georgian "Trust" (Terminological Peculiarities)*, in *Mediterraneum Journal of Social Sciences*, Vol. 4, No 11, 2013, p. 126.

[28] In connection with the French regulation see F. Barrière, *The French fiducie, or the chaotic awakening of a sleeping beauty*, in L. Smith (a cura di), *Re-imagining the trusts: trusts in civil law*, Cambridge University Press, Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paolo, Delhi, Mexico City, 2012,

or a notarised contract. Hence, it may not be established by testament. Pursuant to Art. 773 of the Romanian civil code, one or more settlors (constituitori) transfer legal title or other rights to one or more *trustees* (fiduciari), who manage it for a specific purpose or for the benefit of the beneficiaries (beneficiari). The *trust* property constitutes property separate from the *trustee*'s own property. Under Romanian regulations, the position of *trustee* may only be filled by a credit institution, investment company, insurance or reinsurance company, notary or lawyer.[29]

The establishment of the *fiducia* must be reported to the competent tax authority within one month. The *fiducia* becomes effective vis-á-vis third parties once the deed of foundation has been registered (Electronic Archive of Security Interests in Personal Property). If the *trust* property includes real property, it must be registered in the land register. The maximum duration of the *fiducia* is 33 years.

6. Czech Republic.

The civil code of the Czech Republic (No. 89/2012.) in force as of 1 January 2014 also regulates property management. The regulation of the *trust* was introduced in a form of a *trust* fund (*svěřenský fond*). Legislators applied the concept of property without owner for drafting the regulation similar to the civil code of Québec.[30] Only *trust* funds set out in a Statute, which is a public instrument, are valid. The *trust* may be established by contract or testament. The *trust* may be declared for commercial, investment, private purposes or for public benefit.

Upon establishment of the *trust*, the settlor no longer holds legal title to the *trust* property, which will become property without owner, to be man-

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p. 227 ss.; J. Szemjonneck, *Die fiducie im französischen Code civil*, in *Zeitschrift für Europäisches Privatrecht* 3, 2010, p. 574 ss.

[29] See I. Gvelesiani, *Romanian "Fiducia" and Georgian "Trust" (Major Terminological Similarities and Differences)*, in *Challenges of Knowledge Society* 2013/3, p. 286 ss.

[30] In connection with the Québec rules of *trust* see Y. Caron, *op. cit.*, p. 428; M.C. Cumyn, *op. cit. (The Quebec Trust)*, p. 72.; Kenneth G.T. Reid, *op. cit. (Patrimony not Equity)*, p. 27.

aged by the *trustee* for the benefit of the beneficiaries.[31] Despite the fact that the property of the *trust* fund does not have a legal owner, the *trustee* is listed in some public registries. Accordingly, the purpose of the property and its status as a "*trust fund*" must be indicated in legal relationships relating to the property. Both the settlor and the beneficiary may exercise control over the *trust* property. In addition, the court may also order the *trustee* to take appropriate actions.

The *trustee* is appointed by the settlor, otherwise by the court. The *trustee* is required to accept the appointment, otherwise the *trust* cannot be established. The *trustee* can be a legal person only if it is an investment company operating according to Act No. 240/2013 on Investments Companies and Investment Funds. The settlor also designates the beneficiary, otherwise the settlor is deemed to be the beneficiary.

7. Hungary.

The new Hungarian Civil Code regulates the fiduciary asset management contract in Chapter XLII, within the scope of agency-type contracts.[32] The regulation was drawn up on the basis of the model of the *trust* in English law and that of the Treuhand in German law. The introduction of fiduciary asset management on a legislative level is warranted by contemporary, tangible demand in the economy. The Chief Codification Committee codified fiduciary property management under contract law, emphasising, however, its application of the legal instrument of the transfer of ownership, based on the *trust*-like model.[33] Under the rules of the new Hungarian Civil Code,

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[31] "The ownership of the assets of the *Trust* Fund shall be vested in its own name on account of the fund *trustee*, property in the *Trust* Fund is neither the property manager or property of the founder, or the property of the person to be filled from the *trust*". Czech civil code, Art. 1448.§ paragraph (3).

[32] In connection with the Hungarian regulation see I. Sándor, *op. cit. (A bizalmi)*, p. 379 ss.; G.B. Szabó, I. Illés, B. Kolozs, Á. Menyhei, I. Sándor, *A bizalmi vagyonkezelés*, in *HVG-ORAC Lap-és Könyvkiadó Kft*., Budapest, 2014, p. 84 ss.

[33] L. Vékás (a cura di), *Az új Polgári Törvénykönyv Bizottsági Javaslata magyarázatokkal*, in *Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft*., Budapest, 2012, p. 453.

the fiduciary asset management contract is an *in personam* legal instrument that implicitly carries substantial *in rem* effects.[34] The new Hungarian Civil Code sets out a contractual arrangement; its validity is bound to a written contract. The regulation is of a general scope; details are regulated in two separate pieces of legislation[35]: Act XV of 2014 on *Trustees* and the Regulation of Their Activity, and Government Decree No 87/2014 (III.20.) on certain rules concerning the financial security of fiduciary property management undertakings. As a general rule, regulation is dispositive; contracting is principally for consideration.

Under the fiduciary asset management contract, the *trustee* has the duty to manage the things, rights and claims transferred to his ownership by the settlor in his own name, for the benefit of the beneficiary, for which the settlor is obliged to pay a fee. If the settlor and *trustee* are one and the same person, fiduciary property management is established by the irrevocable unilateral declaration of the settlor set out in a public instrument. A legal relationship of property management settled by testament is established by the *trustee*'s acceptance of his appointment to such position, under the terms set out in the testament. Rules of the fiduciary asset management contract are applied as necessary to fiduciary property management estab-

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[34] Menyhárd qualifies the Hungarian regulation as an original, entirely new formation, which resembles the rules of the English *trust* much more than the German-Austrian Treuhand. A. Menyhárd, *A bizalmi vagyonkezelés szabályai az új Ptk.-ban (Rules of Fiduciary Property Management in the New Hungarian Civil Code)*, in R. Szakál (a cura di), *Tájékoztató füzetek*, p. 251. Based on professional presentations held in the Legal Division of the MKIK, *MKIK Szolgáltató Nonprofit Kft.*, Budapest, 2013. p. 144 ss. To the nature of the beneficiary's right in English law see P. Matthews, *From Obligation to Property and Back Again? The Future of the Non-Charitable Purpose Trust*, in D. Hayton (a cura di), *Extending the Boundaries of Trust and Similar Ring-fenced Funds*, Kluwer Law International, 2002, p. 206 ss.; P. Matthews, *The compatibility of the trust with the civil law notion of property*, in L. Smith (a cura di), *The Worlds of the Trust*, Cambridge University Press, 2013, p. 313 ss.

[35] For further commentary on the rules of the new Hungarian Civil Code relating to fiduciary property management, see G. Wellmann (a cura di), *Az új Ptk. magyarázata VI/IV. Kötelmi jog, Harmadik, Negyedik, Ötödik és Hatodik Rész* (*Explanation of the New Hungarian Civil Code VI/IV. Law of obligations, Part. Three, Four, Five and Six)*, in *HVG-ORAC Lap- és Könyvkiadó Kft.*, Budapest, 2013, p. 790 ss.

lished by a unilateral legal act. Rules of the agency contract are applicable as necessary to fiduciary property management.

The rights of the settlor extend to the definition of the settled property and the appointment of the *trustee*. This, however, is a bilateral legal act, as it also requires the acceptance of appointment by the *trustee*. The settlor transfers ownership, rights and claims or other negotiable goods to the *trustee*, and the settlor issues a declaration as to the manner of the management of the property. In the legal relationship of property management, it is also possible to set out other conditions, such as its duration (maximum 50 years), terms, right of unilateral termination, remuneration of the *trustee*, appointment of additional *trustees*, regulation of the delegation of other agents, and the beneficiary's right to transfer. The settlor reserves the right to remove the *trustee*, appoint a new *trustee*, replace the beneficiary, modify given parts of the settlor's declaration, and to determine or modify the duration of property management.

The settlor and the beneficiary may monitor the activity of the *trustee* falling within the scope of property management, but the costs of such monitoring are incurred by the settlor. It is a mandatory rule that the settlor may not instruct the *trustee*.

Under the contract, the *trustee* may not be the sole beneficiary. The settlor and the *trustee*, however, may be one and the same person. The *trustee* has the duty to provide information, manage the property as instructed in the declaration of the settlor, avoid conflicts of interest and manage the property separately from his own.

If the *trustee* is authorised to designate the beneficiary under the contract, the *trustee* has the right to determine the share of the beneficiary.

Due to stricter requirements arising from the fiduciary nature of the legal relationship, the *trustee* has the duty to act in utmost consideration of the interests of the beneficiary. The *trustee* has the duty to protect the *trust* property against foreseeable risks in a commercially reasonable manner.

The management of the property includes the exercise of rights arising from ownership, other rights and claims transferred to the *trustee*, and the fulfilment of obligations arising therefrom. The *trustee* may dispose of the assets belonging to the *trust* property under the conditions and within the limits sets out in the contract. If the *trustee* breaches his above obligations and illicitly transfers assets belonging to the *trust* property to a third party, the settlor and beneficiary have the right to reclaim these for the benefit of the *trust* property, if the third party did not purchase the assets in good

faith or for consideration.[36] This rule is applicable as necessary to the illicit encumbrance of the *trust* property.

The *trustee* is liable toward the settlor and beneficiary for the breach of his obligations in accordance with general rules of liability for damages. If the *trustee* carries out his duties gratuitously, rules of liability for damages are applicable to his breach of gratuitous contracts. The settlor and beneficiary may claim the management of any financial gain as part of the *trust* property, which was realised through the *trustee*'s breach of his obligations arising from property management.

The *trustee* is liable for the fulfilment of the undertaken obligations with the *trust* property. The *trustee* assumes unlimited liability with his own property for the satisfaction of claims arising from commitments charged to the *trust* property, if these cannot be satisfied from the *trust* property, and the other party was not and could not have been aware that the commitments of the *trustee* exceed the limits of the *trust* property.

If the settlor dies or ceases without a successor, and there are no other settlors to the *trust* property, the court may recall the *trustee* from his office upon request of the beneficiary, and simultaneously appoint another *trustee* if the *trustee* seriously breached the contract. Several beneficiaries may exercise such right jointly, provided any of them may request the court to terminate the appointment of the *trustee* and to appoint a new *trustee*. The court may not appoint a person as *trustee*, against whom all beneficiaries object.

Section 6:312 of the Civil Code sets out rules on the separation of property. The *trust* property constitutes property separate from the *trustee*'s own property and other property managed by him, which the *trustee* is obliged to register separately. The parties' derogation from this rule is void. Assets registered as property managed separately from the *trustee*'s own property and other property managed by him are deemed to fall within the scope of *trust* property until proven otherwise. Any assets substituting the managed assets, insurance indemnities, damages or other value, and profits thereon, constitute part of the *trust* property, whether registered or not. Assets not registered by the *trustee* as comprising part of the *trust* property are deemed to be the private property of the *trustee* until proven otherwise.

The spouse, life partner, personal creditors of the *trustee*, and creditors

[36] G. Kiss, I. Sándor, *A szerződések érvénytelensége* (*Invalidity of Contracts*), in *HVG-Orac Lap- és Könyvkiadó Kft.,* Budapest, 2014[2], p. 111 ss.

of other properties managed by the *trustee* may not lay claim to the assets of the *trust* property. The *trust* property does not constitute part of the *trustee*'s inheritance. The beneficiary and the settlor may take action against the spouse, life partner, personal creditors of the *trustee*, and creditors of other properties managed by the *trustee*, to secure the separation of the *trust* property.

The beneficiary has the right to legally enforce the fulfilment of the *trustee*'s obligations. Within this context, it is necessary to examine rights exercised by the beneficiary against the obligor in the case of civil third party beneficiary contracts.[37] The beneficiary has the right to claim the *trust* property and profits thereon, to receive information, while the *trustee* is entitled to remuneration and the reimbursement of his costs. Similarly to the settlor, the beneficiary does not have the right to instruct the *trustee*.

In terms of liability, the new Hungarian Civil Code does not allow the creditors of the settlor and *trustee* to assert claims for the *trust* property. The creditors of the beneficiary, however, may apply for execution of the property, notwithstanding that the distribution of the managed assets and profits thereon to the beneficiary is not due yet. This rule is modified by Act XV of 2014 to the extent that the creditors of the settlor may terminate the property management contract if the execution procedure launched against the settlor is unsuccessful, or does not produce any results within a foreseeable time. I wish to note that this rule is already drawing heavy criticism in Hungarian legal literature, as it ignores differences in time between the exercise of the right of termination and the insolvency of the settlor.

As a general rule, the *trustee* is liable with the *trust* property for the fulfilment of his obligations. However, the *trustee* assumes unlimited liability with his own property toward third parties if their claims cannot be satisfied from the *trust* property, and the third parties were not and could not have been aware that the commitments of the *trustee* exceed the limits of the *trust* property.

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[37] Under the rules of common law, in the case of third party beneficiary contracts, the beneficiary has no legal device to enforce the provision of the service set out in the contract. This rule has been regularly broken, for example, in the United States to grant increasingly more rights to the beneficiary. H. Hansmann, U. Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, in *73 New York University Law Review*, 1998, p. 451.

8. Comparison.

The most important features of the *trust* have been chosen for comparison. These viewpoints do not cover all the elements of *trust* regulation, but give a comprehensive picture of the similarities and differences in the rules of the researched countries.

8.1. Legal structure.

The legal structure of the *trust*-like devices in the seven reviewed countries is quite different. In Russia and Ukraine, this legal arrangement can be characterised as a mandate or agency contract.[38] In Georgia it is similar to an agency contract, but the *trustee* holds the property in his own name.[39] In Ukraine the agreement creates a contractual relationship, according to which the *trustee* is obliged to manage the property. In the Czech Republic the regulation resembles a separate and independent ownership of property, like the regulation in Québec[40]. The *trust* property is neither the property of the settlor, nor that of the *trustee*; the *trust* property must be vested in its own name on account (must be designated as a "*Trust Fund*"). The *trust* can be private or public. In Romania the French *fiducie* served as the model, therefore it is a contractual relationship with some property features because the *trustee* becomes owner of the managed assets.[41] In Lithuania the right of *trust* is an *in rem* right, which is quite peculiar because this right can exist alongside ownership.[42] In Hungary the German Treuhand served as the main model for legislators, but strong property rights were also in-

[38] Art. 1012 of the Russian civil code. We should note that the Russian civil code regulates the right of economic management, where the manager can be a state or municipal enterprise (Art. 294), and also the right of operation management (Art. 296.), which is possible for institutes, but these are non-profit legal entities (Art. 120). These rights are *in rem* rights, but the establishment of these is restricted to the public and non-profit sector. Art. 1029(1) of the Ukrainian civil code.

[39] Art. 725 of the Georgian civil code.

[40] Art. 1448(3) of the Czech civil code.

[41] Art. 773 of the Romanian civil code.

[42] Art. 4.106 of the Lithuanian civil code.

tegrated into the fiduciary asset management contract. Two legal acts are required: firstly, a contract, and secondly, the transfer of property.[43] But we have to emphasise that the Hungarian model has additional rules in connection with asset partitioning and tracing.

On the basis of the comparison, we may conclude that none of these countries adapted the Anglo-Saxon *trust*. In Russia the structure basically rests on the contract of mandate and agency. In Georgia it is also based on a contract, but the *trustee* becomes owner of the managed property, while in Ukraine, the settlor remains the owner. Romania followed the French regulation, and the Czech Republic adopted the Québec model. The Hungarian regulation is also based on contract law but property law regulations are also applied. The Lithuanian solution is unique because the right of *trust* is an *in rem* right.

8.2. Establishment.

Fiduciary property management in Russia requires a written *trust* contract, similarly to the Georgian law.[44] In Ukraine a written agreement is also needed for property management.[45] In the Czech Republic a testament or a contract in the form of a public instrument needed for the establishment of the *trust* relationship.[46] In Romania a public instrument is also required, but there, the *trust* may be established by law.[47] In Hungary a contract, a testament or a unilateral declaration may result a the fiduciary asset management legal relationship. A contract and a testament can only be made in written form, while the unilateral act is bound to a document authorized by a notary.[48] In Lithuania the right of *trust* may be established by law, administrative act, contract, will or court judgment.[49]

Upon comparison we may conclude that the written form is a requirement in all countries. The Russian, Ukrainian, Georgian and Romanian

[43] Art. 6:310 of the Hungarian civil code.
[44] Art. 1017 of the Russian civil code; Art. 727 of the Georgian civil code.
[45] Art. 1031(1) – (2) of the Ukrainian civil code.
[46] Art. 1452(3) of the Czech civil code.
[47] Art. 774(1) – (2) of the Romanian civil code.
[48] Art. 6:310(2) – 6:329(1) of the Hungarian civil code.
[49] Art. 4.108 of the Lithuanian civil code.

regulation allows only a contractual form, while the Czech, Lithuanian and Hungarian one permits a testament as well. The Hungarian regulation is unique in that the *trust* can be formed by a unilateral act as well. A public instrument is generally required in Romania, Ukraine and in the Czech Republic, but only in the case of the unilateral act under Hungarian law. The Russian and Georgian regulation does not have special requirements beyond the written form. Of course, in all countries there can be specific formal requirements if the transfer of the *trust* property must be registered with a public registry. Lithuania provides the widest ranging options to establish the right of *trust* not only in the form of a contract or a will, but this legal arrangement may be established by law, administrative act or court judgment as well.

8.3. Registration of the *trust*.

In Russia, Georgia and the Czech Republic, there are no special regulations relating to the registration of the *trust*. In Romania the *trust* agreement must be registered by the tax authority competent at the seat of the *trustee* within one month after its conclusion, and also with the national registry of the fiduciary management.[50] Registration is important for fiscal reasons and for validity as well. In Ukraine the property management agreement is also required to be registered.[51] In Hungary, regulation is twofold. In the case of a profit-orientated fiduciary management company, the *trustee* must be licensed and registered by the National Bank of Hungary. In the case of a non-profit-orientated (ad hoc) *trust*, the contract must be registered by the National Bank of Hungary.[52] We have to emphasise that the omission of the registration of the *trust* contract does not affect the legal validity of the contract, but it may cause fiscal disadvantages.

We may observe that the registration of the *trustee* and/or the *trust* deed is becoming a strengthening trend, usually in connection with the transfer of ownership. This may be a reason why registration is not required at all in Russia and Georgia, while some kind of registration is needed in Ukraine, Romania and in Hungary. In Romania the omission of registration results

[50] Art. 780 – 781 of the Romanian civil code.

[51] Art. 1031(2) of the Ukrainian civil code.

[52] Art. 11(1) – 19 of Act XV of 2014 on *Trustees* and the Regulation of Their Activity.

in the nullity of the *trust*. In Hungary this does not affect the validity of the *trust*, but has other legal consequences, although the *trustee* and the beneficiary must pay the relevant tax and stamp duty for the transfer.

8.4. Requirements of the settlor.

In Russia and Ukraine, the settlor or principal can only be the owner of the property.[53] There are exceptions in Russian law; in the case of guardianship, the guardian, in the case of inheritance, the testamentary executor can also dispose of others' property by establishing a *trust*.[54] In Lithuania the *trustor* can also be the owner of the property to be managed, or any other person who is vested with such right.[55] In Georgia, the Czech Republic, Romania and Hungary there are no specific regulations in connection with the settlor. Of course, these pieces of legislation apply general rules, and according to the *nemo plus iuris* principle, the transfer of the property will is not successful, unless the settlor is owner or at least has the right to dispose of the property.[56]

8.5. Ownership (title).

In Russia and Ukraine, the legal title remains with the settlor, which is a mandatory rule, and the *trustee* only has the right to manage the property[57]. In Georgia the settlor transfers the title of the *trust* property to the *trustee*, and manages the property in his/her own name, but the settlor remains the

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[53] Art. 1032(1) of the Ukrainian civil code. As an exception, when the property owner is a juvenile, an incapacitated person, minor, has limited civil capacity or his residence is unknown, the custodian or the guardianship authorities can be settlors as well. See Art. 1032(2) – (5) of the Ukrainian civil code.

[54] Art. 32 – 40 – 1026 of the Russian civil code. We should note that other grounds specified by law may also arise.

[55] Art. 6.957 of the Lithuanian civil code.

[56] *Nemo plus iuris ad alium tranferre potest, quam ipse haberet* (D. 13, 7, 18, 2) or alternatively: *nemo dat qoud non habet*. See A. Földi, G. Hamza, *A római jog története és institúciói*, in *History and Institutions of the Roman Law*, Nemzedékek Tudása Kiadó, Budapest, 2014[19], p. 319.

[57] Art. 1012(1) of the Russian civil code; Art. 1029(1) of the Ukrainian civil code.

ultimate beneficial owner.[58] In the Czech Republic neither the settlor, nor the *trustee* or the beneficiary are owners of the property; the property does not have an owner. If registration of the property is needed, it is registered in the name of the *trustee*, but as *trust* property.[59] In Romania the *trustee* becomes the owner, but must keep the property separate.[60] In Lithuania ownership remains with the *trustor* and the *trustee* acquires a special *in rem* right, the right of *trust*.[61] In Hungary the *trustee* must acquire full ownership, title – this is a mandatory rule.[62]

With regard to this aspect of regulation, four different structures exist in Eastern Europe. In Russia and Ukraine the settlor remains the legal owner of the *trust* property. These models resemble the simple contractual legal relationship more than the English *trust*. In Lithuania a special *in rem* right is established in relation to property management, where the *trustor* remains the owner. This regulation is very similar to the structure of the Dutch bewind, but in this case, the owner is the *trustee*, not the beneficiary. The Czech regulation follows the Québec model, which means that the *trustee* formally holds the legal title, but the *trust* property is an independent property without owner. In Georgia, Hungary and Romania the *trustee* is legally the owner of the property, but this property is separated from his/her own property – it is like a sub-property.

8.6. Requirements of the *trustee*.

In Georgia no special requirements apply to the *trustee*. In Russia, according to law, the *trustee* (*trust* administrator) can only be a businessman or commercial company, and only exceptionally may it not be a businessman or non-profit making organization.[63] A state body or local government

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[58] The English translation mentions that "the *trustor* transfers property to the *trustee*, who holds and manages it in accordance with the interest of the *trustor*" (Art. 724) and "the *trustee* shall be bound to manage the property held in *trust* in his own name, but at the risk of the *trustor*" (Art. 725).

[59] Art. 1450(1) of the Czech civil code.

[60] Art. 773 of the Romanian civil code.

[61] Art. 6.953(2) of the Lithuanian civil code.

[62] Art. 6:310(1) of the Hungarian civil code.

[63] If the *trustee* can be someone else under law, even in this case an institution is not allowed to be the *trustee*. Art. 1015 (1) – (2) of the Russian civil code.

or a sole enterprise unitarian enterprise are not allowed to be a *trustee*. The position of a *trustee* may only be filled by a businessman (*predprinimatel'*) or a commercial company. Natural persons may manage property only in the case of *trusts* established by law (e.g. guardianship, custodianship). The *trustee* is required to indicate his legal status, e.g. with the abbreviation "D U", on contracts relating to the *trust* property. In Ukraine the *trustee* can only be an enterprise. A state body and local government body can be a manager only if so stipulated by law. The beneficiary is not permitted to be the sole manager.[64] In Lithuania the *trustee* may be a natural or a legal person as well, and special legal regulation may be enacted to exclude persons from the position of *trustee*. The *trustee* may not be the sole beneficiary at the same time.[65] In the Czech Republic the *trustee* can be a natural person. The civil code stipulates that a legal person can be the *trustee* only if it is permitted by law. We are aware of such law only in connection with investment companies. The *trustee* may also be appointed by the court. The settlor may also be a *trustee*, but not the sole one.[66] In Romania only financial institutions, investment companies, financial investment companies, insurance companies, notaries and lawyers can be *trustees*.[67] In Hungary specific conditions must be met if the *trustee* is a profit-orientated business. If the *trust* relationship is not profit-orientated, any private person of legal age and any legal person can be a *trustee*. The act drafted in connection with the enforcement of rules set out in the new Hungarian Civil Code distinguish professional and ad hoc property management. Property management is defined as the professional use, possession and enjoyment of the property of someone else for remuneration, which serves the preservation of value and the generation of profit, where reasonably practicable. Thus, the *trustee* is defined as a business association dealing with the utilisation of someone else's property either on a professional or on an ad hoc basis.

An undertaking contracting on a regular basis for fiduciary property management at least twice annually, or for a property management fee in excess of one per cent of the value of the *trust* property on the date of the contract, or for any other financial gain[68], may carry out fiduciary property

[64] Art. 1033(1) – (3) of the Ukrainian civil code.
[65] Art. 6.958(1) – (3) of the Lithuanian civil code.
[66] Art. 1453(1) – (2) of the Czech civil code.
[67] Art. 776(1) – (3) of the Romanian civil code.
[68] Art. 3(1) of Act XV of 2014 on *Trustees* and the Regulation of Their Activity.

management in possession of the licence issued by the National Bank of Hungary prior to the start of such activity, such undertaking deemed to be a transparent organisation within the meaning of the Act on National Assets. The undertaking must be a limited liability company or private limited company with a registered office in the territory of Hungary, or the branch – registered in Hungary – of an undertaking based in another contracting state of the Agreement on the European Economic Area.

The fiduciary property management undertaking may not carry out activity other than property management, and its name must make reference to property management. The *trustee* must hold the licenses required for such activity. The fiduciary property management undertaking is required to fulfil strict staff and equipment requirements to receive the license of the National Bank of Hungary.[69]

The fiduciary property management undertaking has the burden of proving that it duly performed its fiduciary property management contracts in accordance with the statutory requirements, for the utmost benefit of its client, in particular.

The fiduciary property management undertaking is obliged to inform the future party to the contract of the risks defined by law prior to the conclusion of the property management contract. In addition, the fiduciary property management undertaking has the duty to provide information in writing, on a monthly basis. If no changes are made to the original information, it is sufficient to make reference to such fact in subsequent information. The fiduciary property management undertaking is required to maintain records on the fiduciary property management relationships to support the traceability of fiduciary property management, administrative controls and administrative assessments of property.[70]

We may observe that it is a trend to regulate the office of the *trustee* and require the fulfilment of special conditions to fulfil this position. It is especially important in cases where the *trust* management activity aims to be conducted on a business basis.

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[69] Art. 3(2) – (5) of Act XV of 2014 on *Trustees* and the Regulation of Their Activity.

[70] Art. 36 – 38 of Act XV of 2014 on *Trustees* and the Regulation of Their Activity.

8.7. The beneficiary.

In Russia and in Ukraine the *trustee* may not be the beneficiary, but there are no other special regulations relating to this topic.[71] In Lithuania the *trustee* may not be the sole beneficiary.[72] It is possible to establish the *trust* for personal purposes, and for private or public good as well.[73] In Georgia there are no specific regulations applicable to the position of the beneficiary. In the Czech Republic anybody can be a beneficiary, but nobody is allowed to appoint a beneficiary for his/her own profit.[74] It is possible to establish a *trust* for private purposes and also for public charitable purposes.[75] In Romania the settlor, the *trustee* or third person may all be beneficiaries.[76] In Hungary the *trustee* may not be the sole beneficiary, and the purpose *trust* is not regulated.[77]

Based on the above comparison, we may conclude the following. It is noteworthy that Czech regulations allow the establishment of a purpose *trust*, even a private purpose *trust*. In Russia the *trustee* may not be the beneficiary because of his contractual position. The Hungarian, Romanian, Georgian and Czech regulations are quite liberal in this regard because the *trustee* can be a beneficiary, but not the only one.

8.8. Managed property.

In Georgia, the Czech Republic, Romania, Hungary and Lithuania, there are no specific regulations applicable to the definition of the *trust* property; it can be movables, immovables, rights, claims and securities.[78] In

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[71] Art. 1015(3) of the Russian civil code; Art. 1033(3) – 1034(2) of the Ukrainian civil code.

[72] Art. 6.958 of the Lithuanian civil code.

[73] Art. 4.106(2) of the Lithuanian civil code.

[74] Art. 1458(2) of the Czech civil code.

[75] Art. 1449(2) – 1473(1) of the Czech civil code.

[76] Art. 777 of the Romanian civil code.

[77] Art. 6:311(4) of the Hungarian civil code.

[78] Art. 724 of the Georgian civil code; Art. 1448(1) of the Czech civil code; Art. 773 of the Romanian civil code; Art. 6:310(1) of the Hungarian civil code; Art. 6.956(1) of the Lithuanian civil code.

Russia the *trust* property can be assets, securities, any other rights or property, but not cash only and property under economic or operative management. In the case of securities, these can be pooled by several settlors.[79] In Ukraine monetary funds and some types of securities are excluded from the *trust* property.[80]

It is quite common that all kinds of rights can be objects of the *trust* property. Exceptions are regulated in Russian and Ukrainian regulation.

8.9. Asset partitioning.

In Russia the *trustee* must separate the managed property from his own property in legal relationships. According to the *trust* property, he must use the mark "D U" (*doveritel'nyi upravliaiushchii*, *trust* manager) to indicate to third parties that the transaction is connected to *trust* property. At the same time, the *trustee* must keep the *trust* property on a separate account.[81] In Ukraine the *trust* property must be separated from the settlor's and *trustee*'s property. The managed property must be registered with the manager's separate bank, and is subject to separate accounting.[82] In Georgia the managed property is in the ownership of the *trustee*, and the *trustee* enjoys the owner's position in relation to third persons. Furthermore, the *trustee* can be liable toward third persons.[83] In the Czech Republic the managed assets are absolutely separate from the property of the settlor, the *trustee* and the beneficiary.[84] In Romania, Hungary and Lithuania the *trustee* must also manage the managed property separately.[85]

As we can see, asset partitioning is resolved by law in all the studied regulations, except Georgia. On the other hand, the extent of asset partitioning can be judged upon the creditors' rights.

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[79] Art. 1013(1) – (3) of the Russian civil code.
[80] Art. 1030(2) – 1045 of the Ukrainian civil code.
[81] Art. 1012(3) – 1018(1) – 1018(2) of the Russian civil code.
[82] Art. 1030(3) of the Ukrainian civil code.
[83] Art. 725(2) – 728 of the Georgian civil code.
[84] Art. 1448(3) of the Czech civil code.
[85] Art. 786(2) of the Romanian civil code; Art. 6:312 of the Hungarian civil code; Art. 6.961 of the Lithuanian civil code.

8.10. Rights and obligations of the *trustee.*

In Russia the *trustee* is required to manage the *trust* asset, provide information, and is entitled to receive remuneration.[86] In Ukraine the *trustee* is entitled to manage, alienate and mortgage the *trust* property, but the latter two rights can be exercised only with the consent of the settlor. The *trustee* is entitled to remuneration. The *trustee* must act in person, except if a deputy can be entrusted under the management agreement or in urgent cases. The *trustee* is obliged to notify third persons that he is acting as property manager and not as an owner.[87] In Georgia the *trustee* must manage the property in good faith, as if he were managing his own affairs.[88] In the Czech Republic there is no specific regulation pertaining to the duties and rights of the *trustee*. The settlor, the beneficiary, an appointed third person (protector), or a public authority appointed by law may supervise the activity of the *trustee*. The settlor may at any time terminate the *trust* or remove the *trustee* and appoint another. The settlor may issue a letter of wishes, but may not directly instruct the *trustee*.[89] In Romania the *trustee* must inform the settlor. The settlor may appoint a third person (protector) to supervise his rights, and he is entitled to remuneration. The settlor may at any time initiate the removal of the *trustee* in court. Between the time of removal and the appointment of a new *trustee*, the court may appoint a temporary supervisor.[90] In Hungary the *trustee* is entitled to remuneration, if not otherwise stipulated. The settlor and the beneficiary only hold a right to information; they are not allowed to instruct the *trustee*. The settlor may at any time remove the *trustee*, and the beneficiary may apply for his removal in court.[91] In Lithuania, under the *trust*, the *trustee* exercises owner's rights over the *trust* property. The *trustee* must exercise his right in person, if not stipulated otherwise in the agreement. The *trustee* is entitled to protect the *trust* right

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[86] Art. 1020 of the Russian civil code.

[87] Art. 1037 – 1038 – 1041 – 1042 of the Ukrainian civil code.

[88] Art. 725 of the Georgian civil code.

[89] Art. 1463 – 1466 of the Czech civil code.

[90] Art. 783 – 784 – 788 of the Romanian civil code.

[91] Art. 6:317 – 320 of the civil code. Furthermore, there are several special requirements applicable to the *trustee* regulated in Act XV of 2014 on *Trustees* and the Regulation of Their Activity.

as in the case of the right of ownership. The *trustee* must report his activities to the *trustor* and the beneficiary at least once a year.[92]

It is quite common for the general rule to entitle the *trustee* to remuneration in all the examined legislations, except in Georgia. The *trustee* is generally obliged to inform the settlor and the beneficiary. The settlor may remove the *trustee*; under Romanian regulation, a court decision is needed for this. The Hungarian regulation also allows the beneficiary to remove the *trustee* by court decision. In countries, where the *trust* is based on a contractual relationship (Russia, Georgia), the settlor is allowed to instruct the *trustee*. This is forbidden in other jurisdictions; only a letter of wishes may be issued.

8.11. Liability of the *trustee.*

In Russia the *trustee* is not liable to third parties in the capacity of *trust* manager , but if he omits to give notification to them, he will be liable with his own property. Finally, the settlor must provide compensation for damages caused to third parties by the management of the *trust* property. The *trustee* is liable towards the beneficiary, except in the event of force majeure or losses caused by the beneficiary. In Ukraine the manager must act with due diligence and compensate the damages of the settlor and the beneficiary if he fails to do so. The *trustee* is liable toward third parties with his own property in limited cases, which will be discussed in connection with the creditors' position.[93] In Georgia the *trustee* is liable to the settlor and also to third persons; the settlor, however, must bear all costs and risks associated with the *trust* property. In the Czech Republic there is no special rule regarding the liability of the *trustee*, but general rules are applied. In Romania it must be assumed that the *trustee* is fully competent to dispose of the property to third parties. The *trustee* is liable to third parties only with the *trust* property. In Hungary the *trustee* must act as a prudent and reasonable businessman. The *trustee* is liable towards the settlor and the beneficiary in case of breaching his/her duties. In Lithuania the *trustee* must act in the interests of the *trustor* and the beneficiary, and he is liable for all

[92] Art. 6.963 – 6.964 of the Lithuanian civil code.
[93] Art. 1043(1) of the Ukrainian civil code.

the damages caused by the breach of his obligations. If the *trustee* oversteps his powers, he is personally liable for the caused damages.

Where the *trust* is operated under a mandate contract (Russia, Georgia), general rules are applied to the liability of the *trustee*. It is common that the *trustee* is liable to the settlor and the beneficiary. The liability of the *trustee* is more severe in Hungarian regulation.

8.12. Duration.

The *trust* relationship may last for maximum 5 years in Russia and Ukraine, except where the law permits a longer duration; in Lithuania it is maximum 20 years, also except where the law permits a longer duration; in Romania it is maximum 33 years, maximum 50 years in Hungary, maximum 100 years in the Czech Republic in the case of a private purpose *trust*, while in Georgia there is no time limitation. [94]

It is common that there is a time limitation to the *trust* relationship (with the exception of Georgia). We may observe that these time limitations are quite short in Russia, Lithuania, Romania and even in Hungary, compared with the international trends. If we consider that the *trust* very often functions as asset planning for longer periods of time, then the Russian and Ukrainian models are not suitable to achieve this purpose.

8.13. Creditors' position.

In connection with the creditors' position we have to take into consideration four different cases: the creditors of the settlor, the *trustee*, the beneficiary and the *trust* property itself. We have to take into account that there is no special regulation in Georgia pertaining to the position of the creditors.

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[94] Art. 1016(2) of the Russian civil code; Art. 1036(1) of the Ukrainian civil code; Art. 6.959(2) of the Lithuanian civil code; Art. 779b) of the Romanian civil code; Art. 6:326(3) of the Hungarian civil code; Art. 1460(1) of the Czech civil code.

a) Creditors of the settlor

In Russia, in case of the bankruptcy of the settlor, the *trust* contract must be terminated and the *trust* property is deemed to be part of the bankrupt settlor's property.[95] In Ukraine the creditors of the settlor may lay claims to the *trust* property only in two cases, even though the settlor remains the owner of the property. If the settlor goes bankrupt, the management agreement must be terminated and, here too, the *trust* property is deemed to be part of the settlor's property. In another case, the managed property is mortgaged before the property management relationship comes into being.[96] There is no definite regulation in connection with the rights of the settlor's creditors in the Czech civil code. In Lithuania, if the creditors of the settlor file a bankruptcy procedure against the settlor, the *trust* agreement is terminated and the managed property will be subject to the creditors' claims.[97] In Romania, creditors of the settlor may claim the *trust* property if they have guarantees in things or their claim originates before the establishment of the *trust* and the settlor is insolvent; in this case, the *trust* contract is terminated.[98] In Hungary the creditors of the settlor may claim the *trust* property if the settlor is under execution and his property does not cover his debts. In this case the creditor may terminate the *trust* relationship.

All the regulations provide some kind of immunity for the managed property and separate it from the settlor's assets. Furthermore, the creditors of the settlor may claim the *trust* property if the settlor is insolvent.

b) Creditors of the *trustee*

In Russia the wording of the civil code confirms that the creditors of the *trustee* are not allowed to lay claims against the *trust* property because it is separated from the *trustee*'s own assets.[99] Based on the fact that the *trustee* is not granted ownership, the creditors of the *trustee* may not demand compensation from the managed property under Ukrainian law. This aspect of regulation is very similar to the one in Lithuanian law. In Czech law, the sit-

[95] Art. 1018(2) of the Russian civil code.
[96] Art. 1040 of the Ukrainian civil code.
[97] Art. 6.961(2) of the Lithuanian civil code.
[98] Art. 786(1) of the Romanian civil code.
[99] Art. 1018(1) of the Russian civil code.

uation is the same, although for different reasons, because the *trustee* does not have ownership of the *trust* property, either. In Romania, even though the *trustee* is owner, his creditors are not allowed to take action against the *trust* property.[100] In Hungary it is also clear that the creditors, spouse or partner of the *trustee* may not lay claim against the *trust* property.[101]

Overall we may establish that the creditors of the *trustee* may generally not lay claims against the *trust* property.

c) Creditors of the beneficiary

There are no specific regulations in connection with the rights of beneficiaries' creditors to *trust* property in Russia, Ukraine and Lithuania. I think the reason is related to the fact that in these countries the philosophy of the regulation presupposes that the settlor is the beneficiary himself. In the Czech and Romanian regulations we cannot find any special rules on this. In Hungary the creditors of the beneficiary may claim the *trust* property only when the transfer of it or part of it is due to the beneficiary.[102]

In my opinion, lacking regulation of the position of beneficiaries' creditors may cause problems in practice. The Hungarian regulation is favourable from this point of view; it does not reveal deficiencies in this field. On the other hand, it is also advantageous if a discretionary *trust* is established.

d) Creditors of the *trust* property

We may assume that on the basis of a general rule regulated in all the examined legal regimes, the obligations arising in connection with the *trust* property have to be handled alone, independently from the parties' property. But there are different subsidiary rules as well. In Russia, if the *trust* property does not cover the debts, the *trustee* and the settlor are liable to third parties in the first and second stages, respectively. If the *trustee* transgresses his powers, first the *trustee*, then the settlor will be held liable to third parties, provided the *trustee* compensates the settlor for all the caused damages.[103] The Ukrainian and Lithuanian regulation is quite the same; the

[100] Art. 785 of the Romanian civil code.
[101] Art. 6:313 of the Hungarian civil code.
[102] Art. 6:314 of the Hungarian civil code.
[103] Art. 1022(2) – (3) of the Russian civil code.

trustee assumes secondary liability to third parties for debts exceeding the value of the *trust* property, and if he acts beyond the limits of his power, he must also provide compensation to the settlor for the damages. [104] In the Czech Republic the creditors of the *trust* property may sue for the *trust* property only if there is no special regulation relating to secondary liability. In Romania, in case of claims against the *trust* property, the settlor's or the *trustee*'s property may be litigated only if it is regulated in the *trust* contract. [105] In Hungary the creditors of the *trust* property may only lay claim to the *trust* property, unless the *trustee* transgresses his powers and the third persons did not know about it and with due diligence they did not have to know about it, either. In this case the *trustee* will be liable for claims by third parties with all of his property. [106]

It is worth mentioning that in Russia, Ukraine, Lithuania the creditors of the managed assets are in very favourable position because they can lay claims against the settlor and the *trustee* as well. In Hungary, regulation provides this possibility only against the *trustee* and only in case the third party acts with due diligence. In Romania and in the Czech Republic, such kind of mandatory rule does not exist, which can be quite disadvantageous for the creditors.

8.14. Tracing.

There are no special rules relating to tracing in Russian, Ukrainian, Lithuanian, Czech and Romanian *trust* laws. In Hungary both the settlor and the beneficiary have a right to demand third parties to restore the *trust* property in case the transaction from the *trust* property was not a purchase made in good faith. [107] In Lithuania and Russia the settlor remains the owner of the *trust* property, therefore the settlor has the right to reclaim, vindicate the property any time.

Among the compared jurisdictions, only the Hungarian law regulates the possibility of tracing for the benefit of the settlor and the beneficiary.

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[104] Art. 1043(2) – (3) of the Ukrainian civil code; Art. 6.965(3) – (4) of the Lithuanian civil code.

[105] Art. 786(2) of the Romanian civil code.

[106] Art. 6:318(3) of the Hungarian civil code.

[107] Art. 6:318(2) of the Hungarian civil code.

This rule is the special adaptation of the English regulation. Under this rule we may argue that the settlor and the beneficiary both have some kind of *in rem* right to the *trust* property.

8.15. Termination.

In Russia the *trust* relationship ceases in case of the death or liquidation of the beneficiary, refusal of the beneficiary to receive from the *trust* estate, the death or liquidation of the *trustee*, refusal of the *trustee* to manage the *trust* because of impossibility, termination by the settlor or with the settlor's bankruptcy. Termination must is bound to three months' notice. The *trust* property must be returned to the settlor, if not stipulated otherwise in the contract.[108] In Ukraine the property management agreement is terminated if all of the *trust* property is distributed, if any of the parties terminates it or the fixed period expires, or in case of the death or refusal by the beneficiary. The legal relationship also ceases if the *trustee* becomes legally incapacitated, missing or his legal capacity is restricted or the settlor goes bankrupt.[109] In Georgia, on the basis of the mandate contract, each party may terminate the contract according to the rules of mandate.[110] In the Czech Republic the *trust* ceases when the given period expires, if the purpose of the *trust* is fulfilled, or if the fulfilment of the purpose is impossible, it will be terminated by the court, but the court may replace it with other similar purposes; or it is terminated by the court. The settlor may at any time terminate it or appoint a new *trustee*.[111] In Romania, after the *trustee* accepted his office, the settlor is not allowed to modify or terminate the contract, except with the consent of the beneficiary or the court. The *trust* contract is terminated by expiration or the fulfilment of its purpose. The beneficiary may also waive his rights, which terminates the contract. The insolvency procedure or liquidation of the settlor also terminates the contract. After termination, the *trust* property must be transferred to the beneficiary, otherwise to the settlor.[112] In Lithuania the *trust* ceases in case of the death or liquidation of the

[108] Art. 1024 of the Russian civil code.
[109] Art. 1044(1) of the Ukrainian civil code.
[110] Ar. 729 of the Georgian civil code.
[111] Art. 1471 – 1473 of the Czech civil code.
[112] Art. 789 – 790 of the Romanian civil code.

beneficiary, or when the beneficiary waives the benefit received under the *trust* agreement. In the *trust* agreement the parties may derogate from these two rules. The *trust* also ceases if the *trustee* dies, becomes legally incapacitated, his legal capacity is limited or is untraceable or liquidated. The *trust* is also terminated if bankruptcy proceedings are launched against the *trustor*. The parties may withdraw the agreement if the *trustee* is not in the position to fulfil the agreement himself. The *trustor* may terminate the agreement at any time if he pays the remuneration of the *trustee*. In Hungary, fiduciary property management is terminated if no *trust* property is left; three months after resignation, if the *trustee* resigns from his position; on the termination date of the *trustee*'s engagement, if there is no *trustee* to manage the *trust* property for over three months; on the date of the settlor's death, if he was the sole beneficiary.[113]

Where the *trust* is based only on a contractual relationship, the death or liquidation of the *trustee* terminates the relationship (Russia, Georgia). In jurisdictions where the *trust* relationship contains more property elements, the *trusteeship* is an office, and if the *trustee* dies, this does not terminate the *trust*. It is quite common that the settlor may terminate the *trust* relationship (except under Romanian law). It is also quite common that the beneficiary may not terminate the *trust* (Saunders v Vautier rule is not applicable), except in Romania and in Hungary.

9. Closing remarks.

Several conclusions can be drawn on the basis of the comparison. Generally, I would point out that in all the above mentioned countries, asset management is based on a contractual relationship between the parties. From this point of view, the Russian, Ukrainian, Georgian models remain on the level of a contract, while the Lithuanian regulation creates an independent *in rem* right for the *trustee*. Under the Romanian and Hungarian solutions, the *trustee* is granted ownership, but asset partitioning is ensured as well, while the Czech law regulates the *trust* property as if it were an independent entity without owner. In my opinion, Hungarian regulation resembles the English *trust* the strongest, particularly if we take into account the

[113] Art. 6:326 of the Hungarian civil code.

possibility to establish it by last will and unilateral act, and item the settlor's and beneficiary's right of tracing.

If we think of the function of the *trust* as an instrument of asset planning, the short duration of the legal relationship can be a relevant obstacle. In Russia and Ukraine, and even in Lithuania, the permitted duration of the legal relationship does not seem to be adequate, while the Czech solution is most aligned to the international trends.

The other very important advantage of the English *trust* is its flexibility. In all the examined countries a written document required for the establishment of the legal relationship, which may limit willingness to establish fiduciary management. On the other hand, this is understandable in connection with a new legal instrument for documentation reasons and to ensure the protection of creditors. The elasticity of regulations can be criticized in countries, where rigorous requirements are applied to the *trustee*'s person, or the registration of the *trust* agreement is prescribed. In my opinion, this can be explained with the caution of the legislators, who would like to avoid the possibility of starting a new legal institution with abuses and scandals. I think that once this type of property management becomes a living component of these legal systems, together with the related experience, then these restrictions can be rethought.

In connection with the position of the parties' creditors, I think that most of the regulations are providing appropriate protection, maybe more than is desirable in some countries.

I hope that these *trust*-like devices will play an important role in the economies and societies of Eastern European countries and can fulfil the advantageous functions of the English *trust*.