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# THE LAW OF TRUSTS IN RUSSIA

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In his famous study *Legal Transplants*, published in 1974, Alan Watson argued that the history of a legal system was to a great extent the history of borrowing from other systems, and that such "legal transplants" have been common since earliest recorded history. A successful transplant, like that of a human organ, would "grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system."[1] However, in an article published in the same year, Kahn-Freund warned that rules and institutions are not always transplantable, and that transplants which use "a pattern of law outside the environment of the organ" run the risk of rejection.[2] The opportunity to test these theories has arisen in relation to legal reform in Eastern Europe, where, at least in the initial stages of transformation, there has been extensive borrowing from western models.

It is hardly surprising that the draftsmen should look to comparative law in remodelling post-Soviet Russian civil law, especially in view of how much was required of them in a rapid time scale. The Russian draftsmen were much influenced by Western European Codes in refashioning the Civil Code itself. In more specific terms, fundamental reform of the law of ownership had been achieved as a priority of reform in 1990.[3] Related reforms took rather longer, however, and foreign models were considered for example in relation to the law on pledge,[4] and, some time later, the law on land registration.[5] In

1. At 27.
2. O Kahn-Freund, "Uses and Misuses of Comparative Law", 37 *Modern Law Review* 1974 No.1, 1-27, 27. See also H Collins, "Methods and Aims of Comparative Contract Law", 11 *Oxford Journal of Legal Studies* 1991 No.3, 396-406, 398.
3. Law "On Ownership in the RSFSR", *Vedomosti RSFSR* 1990 No.30 item 416, as amended by RF Law of 24 June 1992, *Vedomosti RF* 1992 No.34 item 1966.
4. See Law "On Rights in Security", *Vedomosti RF* 1992 No. 23 item 1239. See also W.E. Butler's account of the work of the Russian/Western team which produced the first draft of this law in "Foreign Legal Assistance in the CIS: Lessons from the Early Years", in *The Revival of Private Law in Central and Eastern Europe* (George Ginsburgs *et al.* eds), The Hague/Boston/London 1996, 500-501.
5. See text of RF Law of 21 July 1997 "On Registration of Rights to Immovable Property and Related Transactions", approved by the Duma on 9 July 1996, rejected by the Federation Council on 7 August 1996, and agreed by the Conciliation Commission on 24 December 1996, in which the influence of western models of land registration is apparent.

particular, the transfer of state assets on the grand scale required by the privatization program presented formidable conceptual problems. When privatization took place in the UK during the 1980s, for instance, it used existing and clearly defined company law structures together with institutions such as agency.[6] By contrast, in Russia it was initially unclear who was transferring what to whom in the privatization process, (following the disintegration of the Soviet Union, one major legal and logistic problem was to determine the ownership of assets previously controlled by government agencies now defunct). Moreover, existing legal structures proved seriously inadequate for the purpose: Russian company law was itself in its infancy. It was in relation to the privatization process that the Russian trust made one of its earliest appearances, and in doing so, attempted a legal transplant.

## 1. The Anglo-American Trust

At first sight, the Anglo-American law of trusts seems an unlikely model for transplant into the Russian context. Given the immaturity of Russian property law theory, the complexity of the trust might have seemed unwelcome. The Anglo-American trust has both a property law and contract aspect. Title to the trust assets is transferred from the settlor to the trustee, and the trustee alone deals with trust property. The trust deed imposes an obligation upon the trustee to act in such dealings for the benefit of certain persons, which may include the settlor and/or the trustee, and any one of the beneficiaries may enforce this obligation against the trustee. Ownership is said to be divided into the "legal" ownership of the trustee, and the "equitable" ownership of the beneficiary. As legal owner, the trustee is a fiduciary who is obliged to act solely in the interests of the beneficiaries. The trustee can be said to hold two separate types of "patrimony",[7] his own assets, and those of the trust, but the trust assets are unaffected by the insolvency of the trustee. The beneficiary's "equitable" ownership of the trust assets may be defended against third parties, except those who acquire from the trustee for value and in good faith. Precedent in the common law jurisdictions plays a major part in defining and circumscribing the parties' rights and obligations.[8]

6. See for example Electricity Act 1989 ss 65-74.
7. F. Sonneveldt, "The Trust – An Introduction", in *The Trust – Bridge or Abyss Between Common Law and Civil Law Jurisdictions* (F. Sonneveldt and H.L. van Mens, eds), Boston 1992, 5. For full discussion of the term "patrimony" meaning separate legal estate, see also G.L. Gretton, "Trust and Patrimony", in *Scots Law into the 21st Century* (H.L. MacQueen, ed.), Edinburgh 1996, 182-192.
8. For a compilation of classic definitions of the English trust see W.G. Hart, "What is a Trust?", 15 *Law Quarterly Review* 1899 No.59, 294-302.

In contrast, civilian systems, with the exception of Liechtenstein, do not, in general terms, recognize the trust.[9] Of course, "trust-like" devices do exist in civilian systems,[10] but they normally involve the transfer of title to the trustee. Both France and Germany, for example, allow that one person may hold property for the benefit of someone else, the *prête-nom*, or the *Treuhand*. However, in such cases the beneficiary has no more than a personal right against the "trustee", and so has no protection if he becomes insolvent or transfers the property to someone else.

The traditional uses of the Anglo-American trust are very different in context from that for which the Russian trust has originally been devised. One of the principal uses of the trust is as a means of providing for the settlor's family in a way which protects the family wealth from tax charge or the improvidence of the next generation. The flexibility of the trust means that it is also used widely in the commercial context. For example, creditors may attempt to make their debtors trustees in respect of goods which they have supplied, or the proceeds of sale of such goods. In company share holdings, many large institutions use the nominee trust, where the trustee is nominee for another party, for ease of dealing, or for concealment. In short, the "uses [of the trust] are as unlimited as the imagination of lawyers in taking account of the wishes of bankers and businessmen".[11] The trust is simply a device, in the same way as a contract is a device. It can be used for a bewildering variety of purposes.

## 2. The 1993 Decree on Fiduciary Ownership

The history of the trust in Post-Soviet Russia is a curious one. The term *trast* made its first appearance in a Russian Federation law of 1990 "On banks and banking activity in the RSFSR",[12] the legislation which provided the basis for private banking. The activities permitted to banks included, in Article 5(k), the power to "attract and invest assets and manage securities as commissioned by clients (trust [*trast*] operations)". The use of the term in this context was therefore very specific, and no doubt influenced by increased dealing

9. See K. Zweigert and H. Kötz, *Introduction to Comparative Law*, first ed., Oxford 1977, 275; V. Bolgar, "Why No Trusts in the Civil Law?", 2 *American Journal of Comparative Law* 1953 No.2 204-219; W. Wiegand, "The Reception of American Law in Europe", 39 *American Journal of Comparative Law* 1991 No.2, 229-248, 237.
10. See W.A. Wilson ed., *Trusts and Trust-like Devices*, London 1981.
11. A. Underhill and D. Hayton, *Law Relating to Trusts and Trustees*, fifteenth ed., London 1995, 28.
12. *Vedomosti RSFSR* 1990 No.27 item 327.

with foreign banking institutions, who normally operate trust corporations to hold and administer property on behalf of private and institutional clients.

The term *trast* next appeared in privatization legislation in 1992. The 1992 presidential decree, "On organizational measures for the transformation of state enterprises and associations of state enterprises into joint stock societies",[13] ordered shares in state enterprises to be transferred into trust ownership (*trast*) during the privatization process. No further detail was contained in the legislation about the form of such trusts. Despite the fact that the trust's structure and operating rules were uncertain, the term *trast* was taken for granted and used in the privatization legislation in the months to follow.[14]

A working group was, however, commissioned by the State Committee of the Russian Federation for the Administration of State Property, *Goskomimushchestvo*, in order to prepare more detailed legislation on trust ownership as well as a form of a trust contract which would transplant into the Russian context. The trust mechanism was seen as a way of retaining a degree of state control over key enterprises, while at the same time opening them up to more progressive management. After lengthy deliberation,[15] detail as to the structure of such trusts was provided in a further decree, dated 24 December 1993,[16] "On Fiduciary Ownership (the *trast*)". The preamble to the legislation decreed that the trust was being introduced "with the object of improving economic management during the period of economic reform and promoting institutional transformation". The trust structure thereby introduced followed the Anglo-American private law model.

Trusts were constituted by a contract between the trust founder [*uchreditel' trasta*] and the trustee [*doveritel'nyi sobstvennik*], for the benefit of a beneficiary. The trust founder conveyed ownership of the trust property to the trustee for a specified period, during which the trust assets were, however, immune from bankruptcy proceedings against the trustee. The trustee was placed under an obligation to use the property exclusively for the benefit of the beneficiary in accordance with the trust agreement. The beneficiary was entitled to the profits and income from the property, and the trustee was personally liable in the event of loss suffered due to its mismanagement or misappropriation. At the termination of the trust contract, the trust property reverted to the trust founder or its successors.

13. *Vedomosti RF* 1992 No.28 item 1657.
14. *E.g.*, Presidential Decree "On Measures for the Formation of a Federal System of Contracts", *Vedomosti RF* 1992 No.33 item 1930 (majority shareholdings in former state organizations to be transferred subject to trust agreements).
15. For an account see W.E. Butler, "Foreign Legal Assistance in the CIS", *op.cit.* note 4, 501-503.
16. *Sobranie aktov RF* 1994 No.1 item 6.

The decree revealed its particular short-term purpose towards the end, in Article 21-22:

> Until such time as the new Civil Code comes into force the only property which may be transferred into trust ownership is share-holdings in joint-stock companies established during the privatization of state enterprises, and held in Federal ownership according to the procedure set out in the Russian Federation privatization legislation; transfers into trust of such shareholdings shall be effected in conformity with the requirements of Article 4.2 and 9.1 of the Russian Federation law "On privatization of state and municipal enterprises", and it is exclusively the federal budget which is eligible to be the beneficiary of a trust.[17]

Thus the trust structure was introduced, not as part of a general reform of private law, but in order to solve one very specific public law problem. The idea was that the privatization process should be facilitated by the transfer of large shareholdings in former state enterprises to the stewardship of reliable institutions either indefinitely, or pending distribution of the shares into private ownership. These institutional trustees would use their position as shareholders to influence the management practices of the company itself. As an incentive to profitability, the trustee could be paid a fixed rate of remuneration and also a percentage of the dividend received.[18]

The state was the trust founder, and the "federal budget" the ultimate beneficiary, despite its lack of juristic personality, and so, in practical effect, the state was both trust founder and beneficiary. (Provision was also made in the model trust contract issued with the decree that ownership of the assets might be transferred to a Russian Federation member, in which case its budget became the beneficiary.) The type of trustees envisaged were institutions such as banks, investment funds, and insurance companies,[19] and indeed the Federal contract agency, *Roskontrakt*, turned out to be the largest of the trustee managers.[20] The function of the *trast* was thus primarily to provide a new management framework.

It was soon acknowledged that the transplant of the Anglo-American trust structure was unsuccessful. One writer compared it to the introduction of features of Buddhism or Islam into the Christian religion.[21] Another distin-

17. "On Fiduciary Ownership (the *trast*)", *Sobranie aktov RF* 1994 No.1 item 6.
18. W.E. Butler, "From Russia in Trust", *Clifford Chance: Russian and the Other States of the CIS Newsletter*, January-March 1994, 1-3, 2.
19. *Ibidem*.
20. A.V. Kriazhkov, "Doveritel'noe upravlenie imushchestva v Rossii: formirovanie instituta i sfery primeneniia", *Gosudarstvo i pravo* 1997 No.3, 22-31, 23.
21. See A.A. Riabov, "Trast v rossiiskom prave", *Gosudarstvo i pravo* 1996 No.9, 42-51.

guished commentator observed that Western economists, without understanding Russian law, were pressing the legislators into adopting concepts from Anglo-American law, which could not work in Russia, a pandectist system. He singled out the trust as an example of this trend.[22] The content of the trustee's fiduciary duty to the beneficiary in the donor legal systems is determined by considerations of good faith and equity. Equity compels the Anglo-American trustee to behave in a certain way, and to refrain from actions prejudicial to the beneficiary.[23] However, the concept of equity, which is the key to this structure, is alien to Russian law. Instead, the rights and obligations of the participants of the Russian *trast* had to be set out specifically for each case in the trust contract. In practical terms also, the arrangement seems not to have been a success. It is reported that the dividends raised from shares in trust management were disappointingly low, and that trust management had a tendency simply to "provide a cover for the old administrative methods of economic management".[24]

### 3. Civil Code Provisions on Trust

The new Civil Code of the Russian Federation recast the rules on trusts. The first part, which came into force on 1 January 1995,[25] contains general provisions. Article 209, on the content of the right of ownership, provides in paragraph 4 that the owner of property may transfer his property to the trust management [*doveritel'noe upravlenie*] of another. It is specifically provided, however, that a transfer into trust management does not involve a transfer of the right of ownership.[26] The borrowed term *trast* has been jettisoned in favor of Russian terminology. The trustee, or "trust owner", is replaced by a trust manager [*doveritel'nyi upravliaiushchii*]. The adjective translated as trust, *doveritel'nyi*, is in fact close in meaning to *doverennost'*, the noun used to denote the concept of power of attorney, and indeed the institution of trust management introduced by the code incorporates features of agency. In a similar vein, Article 5 of the 1996 amendments to the law "On Banks and Banking Activities in the RSFSR"[27] permits credit organizations to engage in trust management of client funds, [*doveritel'noe upravlenie*],

22. V.A. Dozortsev (of the Research Centre for Private Law and the Institute of Legislation and Comparative Law), "Problemy sovershenstvovania grazhdanskogo prava Rossiiskoi Federatsii pri perekhode k rynochnoi ekonomike", *Gosudarstvo i pravo* 1994 No.1, 30.
23. See, for example, G.T. Bogert, *Trusts*, sixth ed., St. Paul 1987 paras 153-165.
24. A.V. Kriazhkov, *op.cit.* note 20, 27.
25. *Sobranie zakonodatel'stva RF* 1994 No.32 item 3301.
26. RF Civil Code Article 209.4.
27. *Sobranie zakonodatel'stva RF* 1996 No.6 item 492.

rather than the trust operations [*doveritel'nye (trastovye) operatsii*] of the original 1990 legislation. But this is more than simply a change of terminology. The new style Russian law of trusts belongs more to the law of obligations than to the law of property.

The detailed provisions regulating the trust management of property are set out in Chapter 53 in the second part of the Civil Code, which came into force on 1 March 1996.[28] The Anglo-American concept of divided ownership has been abandoned in favor of a contractual arrangement with a manager, to whom ownership is not transferred.[29] While the trust founder retains ownership, the trust manager exercises the "powers of the owner"[30] with regard to the trust assets for the duration of the trust agreement and in so far as the agreement permits. Although the trust is revoked by the insolvency of the trust founder, for as long as the trust founder remains solvent, the trust property is immune from the claims of its creditors.[31] The trust property is, however, unaffected by claims made on the trust manager's estate. Article 1023 provides that the trust manager should receive a professional fee for its services, rather than having direct access to the income produced by the assets, as provided in leasing, economic control or operative management.[32]

This is primarily a commercial agreement: the trust manager must either be a business person [*predprinimatel'*] or a commercial organization. Private individuals or non-commercial organizations may act as trustees only in trusts arising by operation of law. Trust management arises by operation of law in the case of guardians or curators entrusted with the property of minors or of adults who are incapacitated (as a result of psychiatric disorder or alcohol abuse); executors of the estate of a deceased; and other individuals as provided by legislation.[33]

The trust structure introduced by the Civil Code is also broader in application than its 1993 predecessor. The 1993 Decree envisaged only one type of trust property, namely shareholdings in privatized companies. The Code provisions, on the other hand, are so framed as to apply to a wide range of property. While the assets enumerated in Article 1013 as being available to trust management are in the main commercial – enterprises, immovable property, securities, exclusive rights – there is also included "other prop-

28. *Sobranie zakonodatel'stva RF* 1996 No.5 item 410.
29. RF Civil Code Article 1012.1. This of course creates difficulties as to who is liable to tax on profits generated by the assets. For discussion of the tax implications see Riabov, *op.cit.* note 21, 49-50.
30. RF Civil Code Article 1020.1.
31. RF Civil Code Article 1018.2.
32. RF Civil Code Articles 606, 295, 296.
33. RF Civil Code Article 1026.

erty". It is of course arguable that an "*eiusdem generis*" rule should apply, in that this would indicate other assets of the same type. Holdings of cash on its own may not normally be subject to trust management. An exception is made to this rule for trust management arising by operation of law, which may involve cash. The Russian legal system is not therefore designed to accommodate the use of trusts as a means of long-term financial planning for families. (Charitable foundations are provided for separately in Chapter 5 on non-commercial organizations.[34])

Another difference as between the provisions of the 1993 Decree and the Code provisions is that under the 1993 decree, the trustee was required to manage the trust assets exclusively in the interests of the beneficiary. In other words, the decree followed the Anglo-American pattern of a three-cornered structure with trust founder, trust manager and beneficiary, although in practice the trust founder and beneficiary were typically the same. In contrast, the Code reflects the Russian reality by stating that the trust manager manages the property in the interests of the trust founder or a named third person.[35] In other words, this is expressly intended as a two-cornered arrangement, and there need not necessarily be a third party beneficiary.

The duties of the trust manager under the Civil Code are also framed rather differently from those of the trustee under the 1993 decree. The trustee was previously bound to act "in good conscience, not permitting his personal interests to conflict with those of the trust founder or the beneficiary" (Article 11). Chapter 53 of the Code leaves the arrangement less to chance. The parties enter into an agreement concerning the management of the property,[36] but in addition the trust manager's responsibilities are regulated fairly rigorously by the code provisions. In undertaking trust management, the trust manager receives remuneration, but must accept that extensive personal liability may arise with regard to transactions involving the entrusted assets. As under the 1993 Decree, the trust manager is liable to the beneficiary and/or the trust founder for losses sustained due to mismanagement of the property.[37] In other words, it must make good such losses out of the assets which it owns in its own individual capacity rather than from those which it holds as trust manager. In addition, like an undisclosed principal in agency, it incurs liability from its own assets if it fails to disclose to third parties that it is entering into transactions in the capacity of trust manager.[38] (In signing

34. See also Y. Demianczuk, "Charity Regulation in the Russian Federation", 35 *Columbia Journal of Transnational Law* 1997 No.2, 477-501.
35. RF Civil Code Article 1012.1.
36. RF Civil Code Article 1012.
37. RF Civil Code Article 1022.1.
38. RF Civil Code Article 1012.3.

documents, it is expected to make this clear, for example by adding "D U" to indicate trust manager after its normal signature.) Moreover, while debts arising from transactions involving trust assets are levied against those assets, in the event of a shortfall, the creditor may recover against the individual, as opposed to trust, assets of the trust manager and the trust founder, in that order.

The Code does not specify the exact nature of the trust manager's right with regard to the trust property. Article 216 which lists the rights over property other than ownership [*veshchnye prava*], does not include the right of trustees to trust assets, although admittedly the list is not stated as exhaustive. However, other factors would point to this being an obligation rather than a property right. The principal feature of property rights other than ownership, as stated in Article 216, is that the right may still be exercised over the asset when there is a change of ownership. It is provided expressly that the rights of economic control, of operative management, and of lease survive a transfer of ownership over the assets in question.[39] It is not stated expressly in the Code whether or not the right of trust management so survives. In the "Model contract on the institution of trust" issued in connection with the 1993 decree, specific provision was made in Article 3 for the transfer of ownership, allowing the trust to continue. According to one commentator, earlier drafts of Chapter 53 of the Code included such a provision, but the draftsmen removed it "as a definitive break with the past".[40] The legislator's intention was therefore that the trust manager's right should be exercised only during the ownership of the original trust founder.

A further indication that this is an obligation rather than a property right is that the Russian contract of trust management ceases on the insolvency of the trust founder.[41] In an English or American trust, by contrast, where the trustee has legal ownership over the trust assets and the beneficiary equitable ownership, the trust is normally unaffected by the insolvency either of the settlor or of the beneficiary. Trust management appears therefore to be a contractual arrangement between the trust manager and the present owner, by virtue of which power to administer the entrusted assets is assumed by the trust manager. It is more akin to a contract of agency specific to certain assets, rather than to a trust in the Anglo-American sense.

39. RF Civil Code Articles 300 and 617.
40. Iu.K. Tolstoi, *O chasti vtoroi Grazhdanskogo kodeksa RF, obshchii kommentarii*, St. Petersburg 1996, 20.
41. But see also Riabov, *op.cit.* note 21, in which he argues, in summary, that because for the period of trust management, the trust manager exercises the same rights of use over the property as the owner, this is a real (*veshchnoe*) right.

On the other hand, what distinguishes the Russian trust manager from an agent acting under power of attorney or other contract of agency[42] is that for the duration of the trust contract, which is admittedly revocable,[43] the manager has exclusive authority to act on the trust founder's behalf with regard to trust property. While the right of ownership remains with the trust founder, it is provided that property which is under the economic control or operative management of another organization may not be given out in trust management. The trust manager must not, however, mingle the entrusted assets with its own, and is obliged to maintain two separate sets of accounts, listing its own assets and the entrusted.[44]

Under the Code, the whole focus of the trust has changed. The new trust management does not transfer title to the trustee, as in the Anglo-American divided ownership framework or indeed in civilian "trust-like devices".[45] Given the influence of the Netherlands Civil Code as one of Western Europe's most recent, it is interesting that an analogy can perhaps be drawn between trust management and the Dutch *bewind*.[46] In the *bewind*, the assets are held subject to the administrative powers of the *bewindvoerder*, manager, which cannot be overruled by the trust founder's actions. But a major difference from the Russian trust management, however, is that, in the *bewind*, ownership vests in the beneficiary, not the original trust founder. What the draftsmen of the Code have used is no transplant. It is an institution formulated specifically for its role in the context of privatization. It remains to be seen whether Russian trust management is sufficiently flexible in legal terms to be used in more varied contexts.

## 4. Uses of Trust Management

### *4.1. Trust Management of Shares in Privatized Enterprises*

The original purpose of the *trast* as created by the presidential decree of 1993 was the management of shares in companies created during privatization. There is a continuing role in this context for trust management as governed by the Code provisions, and by later, more specific legislation.[47] Here trust

42. See RF Civil Code Chapters 51 and 52.
43. RF Civil Code Article 1024.
44. RF Civil Code Article 1018.
45. See note 10 *supra*.
46. See Netherlands Civil Code Book 3 Title 6.
47. Presidential Decree "On Procedures for Placing Blocks of Shares Reserved as Federal Property under Trust Management", *Sobranie zakonodatel'stva* 1995 No.41 item 3874; Presidential Decree "On the Transfer into Trust Management of Federally-Owned Shares in Privatized Companies", *Sobranie zakonodatel'stva RF* 1996 No.51 item 5764.

management is seen as an institution which allows private management of state assets and at the same time avoids the charge of asset-stripping.

The contracts for trust management of shareholdings are to be put out to competitive tender. Little is left to chance in that the conduct of the tender and the format of applications is specified in great detail by government regulation. A recent example of this type of arrangement can be seen in the government regulations laid down for tenders to manage shares in certain key enterprises in the coal industry.[48] The advantages of the tender procedure are obvious. The winner of the tender can expect to receive a regular management fee and a proportion of the dividend income produced by the shares under management. In return, and in order to win the tender, the chosen manager may undertake to make a payment to the federal budget, agree to pay off debts of the enterprise the shares of which it has taken, or in some other way assist the financial reorganization of the enterprise. The key consideration is that it should use its power as a manager of a major share holding to ensure that the company concerned adopts efficient working practices.

However, there is an important qualification in that the contract must contain specific provision prohibiting the trust manager from taking important decisions unilaterally. The trust manager must consult with the trust founder and obtain its written approval before voting on certain major questions, such as the reorganization or liquidation of the company, amendment of the foundation documents, alteration of the authorized capital, negotiation of any large-scale transaction, the company's participation in other organizations, the issuance of securities, or confirmation of the annual reports. Moreover, the trust manager may not dispose of the shares given to it to manage.[49] The manager's powers are thus restricted in a way which deprives it of decision-making powers on fundamental issues concerning the managed property. If trust management is circumscribed to this extent, it would seem that there remains little in this context to distinguish it from agency.

### *4.2. Trust Management of Shares by Financial-Industrial Groups*

Legislation was passed in 1993 to permit the creation of financial-industrial groups.[50] The intention was that such groups of enterprises and financial

48. Government Regulation "On the Introduction of Changes to the Government Regulation of the RF of 11 December 1996", *Sobranie zakonodatel'stva RF* 1997 No.20 item 2285.
49. "On the Transfer into Trust Management of Federally-Owned Shares in Privatized Companies", Article 3.
50. "On the Creation of Financial-Industrial Groups in the RF", *Sobranie aktov RF* 1993 No.49 item 4766.

institutions would combine to maximize tax advantages, investment opportunities and government aid. One gesture made to these groups was that state held shareholdings in the constituent enterprises were to be transferred into the trust management of the group. In fact, by 1996 such transfers had been made only twice.[51] A further decree in 1996 provides that this process is to be stepped up, and requires appropriate provision to be made for this each year in the federal budget.[52]

### *4.3. Investment Funds*

The concept of trust management recurs in relation to investment funds or "PIFs", as detailed in the Presidential Decree "On Additional Measures to Increase the Effectiveness of RF Investment Policy".[53] An investment fund is described rather puzzlingly in Article 1 as a "property complex", and it serves as a collective investment scheme or mutual fund. Like the Anglo-American trust, the fund itself does not have separate legal personality. The assets of such a fund are therefore managed in trust by a "managing company" which must be a commercial organization.[54] The fund is created by a group of investors committing investment assets into trust management in this way.[55]

The precise ownership framework of the investment fund is not made clear in the decree. Subject to its duty to deal with the assets exclusively in the interests of the investors, the manager enjoys the prerogatives normally attached to ownership, the powers of possession, use and disposal, and its powers extend to accrued assets. However, ownership is not transferred to the manager. If the managing company becomes insolvent, the investment fund assets may not be attached by the managing company's creditors.[56] The decree itself does not specify that the investors retain legal right of ownership of the assets, but this is understood if the decree is read in conjunction with Article 1012 of the Civil Code. Moreover, the investor retains the right to redeem his share from the manager at any time. On the other hand, if the investor retains ownership, this leaves open the question of what happens when an investor becomes insolvent. Article 1018 of the Civil Code provides

51. See "On Measures for the State Support for the Creation and Activity of a Financial-Industrial Group 'Interros'", *Sobranie zakonodatel'stva RF* 1994 No.27 item 2856; "On Measures for the Creation of a Financial-Industrial Group 'Mosnaft'", *Sobranie zakonodatel'stva RF* 1995 No.33 item 3362.
52. "On Measures to Promote the Creation and Activity of Financial-industrial Groups", *Sobranie zakonodatel'stva RF* 1996 No.15 item 1573.
53. *Sobranie zakonodatel'stva RF* 1995 No.31 item 3097.
54. *Ibidem*, Article 6.
55. *Ibidem*, Article 3.
56. *Ibidem*, Article 14.

that trust management is revoked in the event of the trust founder's insolvency. Presumably this would apply to an investor's individual share rather than to the fund as a whole. The position may seem relatively clear in relation to the fund's initial investors, who are both trust founders and beneficiaries in this trust arrangement. It is less so when we come to subsequent investors, since their contribution to the scheme may take the form of the purchase of a right to redeem a share in the capital value. Such an investor is a beneficiary, but cannot be regarded as a trust founder. The framework thus created is similar to that of an English unit trust.[57]

### *4.4. Pension Funds*

Private pension funds are permitted under the 1992 Presidential Decree " On Non-State Pension Funds".[58] This permits employers to set up pension funds by entrusting investment assets to the management of specialized companies. The companies are obliged to produce a minimum rate of return, and their efficiency in managing the fund's assets is subject to the supervision of a special inspectorate which licenses their activities.[59] It remains to be seen whether this arrangement creates sufficient distance between the employer and the fund assets. Despite the fact that in the United Kingdom the pension funds are held in trust entirely separate from the funds of the employer, the Maxwell case has shown us how readily powerful management figures within the company can pressure trustees into misapplying pension funds.

## 5. Conclusion

Studies of legal transplants have concluded that attempts by Western advisers to impose mature Western models upon post-Soviet legal systems have not always been helpful, and that legal culture "must essentially evolve and be accepted from within the society and its emerging social forces".[60] The

57. The English unit trust and investment trust should be distinguished. An investment trust is in fact a corporate body whose purpose is to make investments, typically in the shares of other companies. The shareholder in the investment trust company does not have a legal or equitable interest in the investments themselves. By contrast in the unit trust, the unitholder has an equitable right to the investments, and the value of his units can be calculated as the relevant proportion of the value of the investments held by the trust.
58. *Vedomosti RSFSR* 1992 No.39 item 2184.
59. Government Regulation "On the Regulations for the Licensing of the Activities of Non-State Pension Funds and Companies for the Management of the Assets of Non-State Pension Funds", *Sobranie zakonodatel'stva RF* 1995 No.33 item 3390.
60. See T.W. Waelde and J.L. Gunderson, "Legislative Reform in Transition Economies: Western Transplants – A Short-Cut to Social Market Economy Status", 43 *International and Comparative Law Quarterly* (1994) No 2, 347-378, 377.

Russian trust offers us an interesting illustration of this trend. The transplant of the Anglo-American trust has been rejected. The trust is a concept which depends for its coherence and consistency upon a framework lacking in Russian civil law. With Chapter 53 of the Civil Code, the Russians have substituted the *trast* with trust management, an institution which is, despite the title, specific in legal terms to the Russian context. This is not a trust in the form internationally recognized by the "Hague Convention on the Law Applicable to Trusts and on their recognition", Article 2 of which requires that title to the trust assets should stand in the name of the trustee. In functional terms also, Russian trust management has little in common with its Anglo-American equivalent. Without transfer of ownership between trust founder and trustee, the Russian trust management is a contractual arrangement rather than a property law construct. Trust management is not sufficiently flexible to extend to the variety of uses to which the Anglo-American trust is put, and the difference between agency and trust management is in some contexts largely one of degree. The transplant has been replaced by a construct which is in effect *sui generis*, in order to accommodate a commercial arrangement peculiar to post-communist transition.