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## *RECOGNITION OF HEREDITARY TRUSTS IN COUNTRIES OF THE CONTINENTAL SYSTEM OF LAW*

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***Introduction:*** *the article is devoted to the analysis of the experience of recognition of hereditary trusts in countries of the continental system of law. The issue of property management and its transfer to heirs has always been topical both in theory and practice. In the modern society, characterized by growing complexity of economic relations, it is easy to imagine a situation in which institutions existing in one legal system do not coincide with those adopted in another legal system and at the same time are used by its subjects. This phenomenon characterizes the Anglo-American trust, which is becoming increasingly popular in countries with the continental system of law.* ***Purpose:*** *to analyze the use of trust as a mechanism of transfer of assets by inheritance, to consider the approaches of a number of countries belonging to the continental system of law to the recognition of hereditary trusts and their legal effects and also to explore the practice of establishing trusts.* ***Methods:*** *general scientific methods of analysis and synthesis, as well as methods specific to legal science, including historical and comparative methods, are used.* ***Results:*** *being an institute of the common law system, trust can be used by subjects of the continental system of law for different purposes, including the disposition of inheritance estate.* ***Conclusions:*** *prior to adoption of the Hague Convention on Trusts, courts of the continental law countries had tried to assimilate this institution with well-known legal structures, mainly, the contract. After the Hague Convention on Trusts came into force, the number of participants gradually increased, and courts of the member states of the Convention no longer needed to look for analogues of trusts in their domestic law. Due to the flexibility and advantages of the institution of trust, there is no doubt that its further use either by subjects of countries belonging to the continental system of law or in regard to property in these countries is in demand. Hopefully, the Russian legislator will not remain apart from the trends of the trust recognition and will adjust*

*the private international law of the Russian Federation by rules which would regulate the status and legal effects of the trust as an institution of the common law system.*

Keywords: trust; trustee; beneficiary; settler; recognition of trust; continental system of law; international treaties; national legislation; judicial practice; applicable law; conflict rules

## Information in Russian

## *ПРИЗНАНИЕ НАСЛЕДСТВЕННЫХ ТРАСТОВ В СТРАНАХ КОНТИНЕНТАЛЬНОЙ СИСТЕМЫ ПРАВА*

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***Введение:*** *статья посвящена анализу опыта признания наследственных трастов в странах континентальной системы права. Вопросы управления собственностью и ее передачи наследникам всегда были актуальными как для теории, так и на практике. В современном обществе, характеризуемом большим разнообразием экономических отношений, несложно представить ситуацию, при которой институты, предусмотренные одной правовой системой, не идеальны с принятым в другой и в то же время используются ее субъектами. Такая ситуация складывается и в отношении англо-американского траста, который приобретает все большую популярность в странах континентальной правовой системы.* ***Цель:*** *проанализировать использование траста как механизма передачи активов по наследству, рассмотреть подходы ряда стран континентальной системы права к признанию наследственных трастов и их правовых эффектов, а также исследовать практику по учреждению трастов.* ***Методы:*** *общенаучные методы анализа и синтеза, а также специальные юридико-отраслевые методы, в том числе исторический и сравнительно-правовой.* ***Результаты:*** *как институт общего права, траст может использоваться субъектами континентальной системы права для различных целей, в том числе для распоряжения наследственным имуществом.* ***Выводы:*** *до принятия Гаагской конвенции о трастах суды стран континентальной правовой системы старались ассимилировать данный институт с известными правовыми конструкциями, в основном с договором. После вступления в силу Гаагской конвенции о трастах число ее участников постепенно расширялось и судам стран – участниц Конвенции больше не было необходимости искать во внутреннем праве аналоги института траста. Благодаря гибкости и преимуществам, которыми обладает институт траста, потребность в его дальнейшем использовании как субъектами стран континентальной правовой системы, так и применительно к имуществу, находящемуся в данных странах, не вызывает сомнений. Стоит надеяться, что российский законодатель не останется в стороне от тенденции признания института*

*траста и дополнит международное частное право Российской Федерации нормами, которые бы урегулировали статус и правовые эффекты данного института общего права.*

Ключевые слова: траст; бенефициар; учредитель траста; признание траста; континентальная система права; международные договоры; национальное законодательство; судебная практика; применимое право; коллизионные нормы

## Introduction

The diverse purposes of using a trust, including its flexibility in regulation of inheritance questions, has led to the spread of that instrument around the world. As a result, courts of the continental system of law have encountered questions arising in the sphere of recognition and regulation of trusts. A problem which arises in connection with the recognition of inheritance trusts in countries of continental legal systems is foremost connected with the problem of the co-relation of the law applicable to the trust and the law applicable to relations of inheritance in accordance with law and a will. A law on inheritance determines whether the institute of trust can be used for organization of the inheritance together with legal instruments providing for disposition of property in the event of death. If a trust is established by a will as, for example, English law permits, then the formal and material validity of the trust is determined by an inheritance law. Thus, the law of inheritance determines the right of the testator with respect to disposition of property in the event of death providing for possible legal instruments and in certain cases limiting the freedom of the testator by the establishment of shares of obligatory heirs. However, this same institute of trust as a lasting legal relation between the trustee and beneficiaries with respect to property is not an inheritance institute and is not regulated by an inheritance law. In particular, such legal relations include the administration of the trust, the duties of the trustee, the rights of beneficiaries in the framework of a valid trust, rights of third persons, which do not differ as a whole depending on whether the trust was established inter vivos or on the event of death. If the trust is formally and materially valid then the legal relations arising in that connection are no longer regulated by the inheritance law but are determined in accordance with the law on trust established on the basis of special conflicts norms of lex fori. From this it follows that the situation when the law on trust and the law on inheritance are different legal orders is not excluded. In the present article, the authors propose to focus in more detail on the experience of recognition of inheritance trusts in countries of the continental system of law, analyzing for example the experience of such countries as France, Switzerland, England, Italy and Russia.

## Evolution of Approaches to Determination of the Legal Regime and Legal Effects of Inheritance Trusts

The recognition of the institute of trust in countries with a continental legal system did not take place immediately and followed its own path of development. Approximately from the nineteenth century French courts began to consider lawsuits relating to relations connected with trust. Initially, as a rule, courts recognized the validity of trusts while not giving them a legal qualification. Courts recognized the existence of the trust if it was proved by one of the parties in accordance with norms of a foreign law. In some decisions French courts considered trust as an institute of inheritance law, in others the trust was analyzed from the point of view of rights to a thing to property transferred to a trust. However in several decisions which have become anthological, the trust was considered as a contractual construction.

Thus, the Appellate Court of Paris on 10 January 1970 rendered a decision which has subsequently become known as L'affaire de Ganay [8, P. 128]. In accordance with the factual circumstances of the case, Madam de Ganay created a revocable trust in the U.S. Consulate in Paris. In accordance with the conditions of the trust she transferred to a trustee in the United States of America moveable property located in America with a value of approximately one million U.S. dollars. The trustee assumed the duty to effectuate payments to the founder of the trust for the length of her entire life and after her death to distribute the remaining property among members of her family specified as beneficiaries of the trust. After creation (founding) of the trust, Madam de Ganay prepared a will in which she revoked all earlier made dispositions with respect to her property. The French court thus needed to decide the following questions: was the trust created by Madam de Ganay valid; was the given trust revoked by her subsequent testamentary disposition.

In the decision of the Appellate Court of Paris the created trust was qualified as a contractual con-

struction. In connection with the fact that; such a contractual construction was complicated by a foreign element, the court applied the principle of autonomy of will of the parties with respect to establishment of the law applicable to the contract. As a result, the law of the United States was recognized as applicable since the declaration concerning creation of the trust was drawn up in the English language in the presence of the Consul of the United States of America. Therefore, creation of the trust was recognized as valid and it was necessary "to generate those consequences expected by the parties within the framework of autonomy of will". The court specified that if the rights of the beneficiaries of the trust harm the rights of the obligatory heirs, recognition of the trust can be called into question by French inheritance law, which norms concerning obligatory share in inheritance constitute public policy. In the examined case, there were no such persons; therefore, the trust was recognized to be in accordance with the public policy of France. With respect to the second question, the court established that the contractual nature of the trust did not allow equating it to testamentary dispositions, as a consequence of which the later drawn up will could not revoke the trust. Qualification of the trust as a contractual construction provoked criticism in scholarly circles. It was emphasized that an assimilation of the trust and contract deprives the first of its legal essence since a mixing of the legal institute and the grounds from which it emanates occurs.

We turn to a decision of the Cassational Court of France of 20 February 1996[1]. In accordance with the factual circumstances of the case, Madam Zieseniss created a revocable trust regulated by American law and designated herself its beneficiary. Her two sons, Christian and Charles, and likewise their children were designated as beneficiaries of the trust after her death. After several years, her son Christian died and Madam Zieseniss using her powers changed the conditions of the trust and excluded the daughters of Christian from the list of beneficiaries of the trust. After that she gave objects of art belonging to her to her son Charles and later by will designated him the heir of all free property not transferred to the trust. As a result, Charles received objects of art during the lifetime of his mother, he became a beneficiary of the trust *inter vivos*, and likewise a heir to the remaining property of his mother [9, p. 163-164]. Since the law applicable to inheritance law (the inheritance statute) was French law, norms on inheritance and obligatory share in inheritance came into operation: 1/3 to each of the two children and 1/3 in the quality of a share which was possible to freely dispose of. Charles received 2/3 of the property which exceeded his obligatory share in the inheritance (1/3) and encroached upon the rights of the remaining heirs. Therefore, the inherited property was subject to reduction in favor of the children of the deceased son of Madam Zieseniss.

The natural question arises – in which sequence is it necessary to reduce the property intended for Charles. An *inter vivos* trust occurred by which he was designated a beneficiary after the death of the founder of the trust – his mother, the gifting of objects of art and the testamentary disposition in which he was designated the beneficiary of the remaining property. Article 926 of the French Civil Code ("French Civil Code")[2] establishes that the size of a gift having taken place during the lifetime of the testator is subject to reduction after reduction of the size of the property distributed by testamentary disposition. If it is necessary to reduce a gift effectuated during life, then this is accomplished from the last act of gifting to the first.

The Cassational Court had to determine how to qualify an *inter vivos* trust, a beneficiary of which was designated as the son of the founder on the death of the founder. Such a trust was qualified by the court as a contract of indirect gift which came into force after the death of the donor (founder of the trust, Madame Zieseniss). Thus, in the opinion of the court, the trust (even though *inter vivos* in accordance with American law which regulated it) came into force from the moment of death of its founder. As a result, reduction of property comprising the trust fund needed to take place after reduction of the amount of the property transferred in accordance with testamentary disposition but before gifting of objects of graphic art since they took place earlier than the coming into force of the trust (and reduction of property, as noted earlier, is effectuated from the later gifting to the earlier). The amount of gifted property in the opinion of the court needed to be reduced in the interest of persons possessing a right to an obligatory share in inheritance.

As is evident, initially French judicial practice followed the path of requalifying the institute of trust into its own legal constructions by virtue of which, as an autonomous specific institute of common law entailing the fractionalization of right of ownership, the trust was not qualified. The development of Swiss court

[1] *Aff. Zieseniss*, Cour de Cassation, Chambre civile 1, du 20 février 1966, 93-19.855.

[2] *French* Civil Code (Code Napoleon) of 21.03.1804 (as amended and supplemented as of 01.09.2011). M.: Infotropik Media, 2012. P. 4-592.

practice with respect to trusts followed the same approximate path. Before introduction into force of the Law of Switzerland "On International Private Law" ("IPL of Switzerland")[1], the Federal Tribunal of Switzerland qualified the trust as a contract. In 1936 the trust was defined as a legal relation, analogous to the contract of commission [1. P. 52]. In subsequent decisions, the trust was examined as a combination of the contract of commission, transfer of property into trust management, a gift and contract for the benefit of a third party in that form in which these institutes are familiar to Swiss law. The Swiss court tried to preserve the validity of the trust not considering its essence during this since the fact of fractionalization of ownership into legal and beneficiary could be recognized as contradicting public policy. The court tried to assimilate the trust to constructions familiar to Swiss law.

As regards recognition of testamentary trusts and their effects in relation to obligatory shares in inheritance in Switzerland, as noted by the investigators [1, P. 55], in the event of harm to heirs having the right to an obligatory share in inheritance by means of creation of a testamentary trust, they have the right in a judicial proceeding to demand reduction of the amount of property transferred to the trust fund. A testator has the right to dispose only of that property which is in his free disposition i.e. not included in the part due to heirs as an obligatory inheritance share. The heirs deprived of inheritance also have the possibility to dispute the validity of a testamentary trust especially in relation to immoveable property located on the territory of Switzerland. This is connected with the fact that appointment of a foreigner as a trustee can generate complexity; he as a person having the title to ownership must appear in the land register but for thus authorization of the empowered agency of the respective canton is needed.

In Switzerland the Law on International Private Law in Article 86 establishes the general principle in accordance with which the law applicable to relations of inheritance is the law of the most recent place of residence of a person. The exception consists of inheritance of immoveable property which is determined by the law of *lex fori*. The law on inheritance regulates such questions as the type of property included in the inheritance mass; the circle of heirs and the size of their share, the circle of persons responsible for the debt of the testator; types of legal instruments which can be used for disposition of the inheritance. Thus, the law of inheritance determines whether a trust can be used for disposition of property forming part of the inheritance mass. If Swiss law is applicable to relations of inheritance, the internal norms of which are not familiar with the institute of trust and the trust is not among the *numerus clausus* methods of transfer of property including in the event of death (the law of Switzerland provides for only a will, inheritance contract and inheritance fund), then Swiss law will evaluate the validity of the created trust and disposition of property in accordance with its material norms. In such situation, disposition of inheritance property in the event of death with the help of a trust will be recognized as invalid.

As noted in foreign literature, "transformation of such an invalid disposition to an institute familiar to Swiss law is a complicated task" [10, P 42]. This is connected to the fact that Swiss law does not allow the possibility of designation of a third person for determining beneficiaries and their shares in the event of death of a testator. The creation of a discretionary trust in such a situation is invalid by its nature. If the creation of a discretionary trust is provided for in the event of death, then the separate provisions can be adapted to an institute of Swiss law. It pays to bear in mind that the form of the will must be in accordance with the law of the form of the testamentary disposition which is determined on the basis of the provisions of the Hague Convention on Conflicts of Laws Relating to Testamentary Dispositions of 1961[2] ("Hague Convention of 1961") (Article 93 of the IPL of Switzerland).

If the created trust is recognized as valid in accordance with the inheritance law, application of the clause on public policy and superimperative norms of Swiss law is possible in accordance with which obligatory heirs have the right to initiate a suit for lowering the amount of property which was disposed by the testator and return of part of the property to the inheritance mass (Article 522 of the Civil Code of Switzerland[3] (Civil Code of Switzerland)). If the inheritance law is English law, then the

[1] *Law* of Switzerland "On International Private Law" of 18.12.1987 (as in effect from 01.01.2011) // URL: http://www.wipo.int/wipolex/ru/text.jsp?file_id=270807 (last visited: 28.03.2016).

[2] *The* Hague Convention on Conflicts of Laws Relating to Testamentary Dispositions of 05.10.1961 // URL: http://www.lawrussia.ru/texts/legal_689/doc689a314x582.htm (date of last visit: 28.03.2016).

[3] *Civil* Code of Switzerland of 10.12.1907 (in the version of 15.04.2015) // URL: http://www.worldbiz.ru/-base/22198.php (date last visited 28.03.2016).

use of the institute of trust as an instrument for disposition of property in the event of death is possible. The formal and material validity of the trust in such situation is determined by the requirements of English law. The formal validity of such a will will be determined on the basis of the Hague Convention of 1961 which Great Britain ratified in 1963.

Article 1 of the Hague Convention of 1961 establishes a list of conflict links which determine in which cases a testamentary disposition is valid in form. Among such links, in particular, are the law of place of conclusion of the will; citizenship which the testator has either at the time when he made the disposition or at the time of his death; the place in which the testator had his domicile either at the time when he made the disposition or at the time of his death; if immoveables are involved – the place of its location; and some others. If the form of the will is regulated by English law, then in accordance with the Law on Wills (Wills Act) 1958 No. 6416/1958, the will must be concluded in written form, signed by the testator or other person in his presence or in accordance with his instruction, the signature must be located at the end of the will and be witnessed by two or more witnesses.

In exceptional cases, an equity court can depart from the formal requirements and recognize a trust whose conditions were not indicated in the will (secret trusts and semisecret trusts). If the testamentary trust is recognized as valid in accordance with English law applicable to inheritance relations, in some legal orders of the continental legal system, application is possible of supraimperative norms and clauses on public policy *lex fori* for defense of interests of obligatory heirs having a right to share in inheritance which a testator cannot freely dispose (for example the decision of the Cassational Court of France in the case L'affaire de Ganay of 10 January 1970 in France). The legal relations connected with administering and functioning of a trust when conditions for its validity are observed will be regulated by the law of trust determined in accordance with the provisions of the Hague Convention on the Law Applicable to Trusts and their Recognition 1985[1] ("Convention on Trusts) ratified by Great Britain in 1987. The legal order regulating inheritance relations and the legal order regulating trust may not coincide since the founder of the trust may not subordinate the testamentary trust to English law.

In distinction from Switzerland and England, Russian material and conflict norms are not familiar with the institute of trust. Russia did not sign and did not ratify the Convention on Trusts, internal conflicts norms do notexist at the resent time which would regulate the given institute. The question on recognition of a foreign trust in Russia likewise has not been considered by either the Supreme Arbitrazh Court of the RF or the Supreme Court of the RF; therefore at the present moment there does not exist any kind of notion as to how Russian court practice could decide a dispute connected with trust. Considering the fact that Russian entrepreneurs are more frequently searching for the most effective way to transfer assets to their heirs and are choosing a trust as an alternative method of organization of inheritance, the situation where the transfer of property to a trust can lead to conflict with Russian norms on mandatory share in inheritance cannot be excluded. If such a conflict arises, then it would be interesting to debate how a court in Russia can decide the conflict. We analyze the path that practice could take deciding a dispute connected with recognition of a trust *inter vivos*; then, we will consider questions arising from recognition of a trust created in the event of death.

In accordance with Article 1187(2) of the Civil Code of the Russian Federation (Civil Code of RF)[2] during determination of the legal nature of a trust *inter vivos*, a Russian court can turn to norms of foreign law. Given the fact that even in countries of the common law system there does not exist a single definition of trust, it is possible presumably to use a compromise variant of the concept given in Article 2 of the Convention on Trusts. The question which arises is can such a legal relation be recognized in Russia in accordance with which the founder of a trust transfers his legal title to specified property and the same property to a trust manager so that the latter possesses it in the interests of beneficiaries. In accordance with Article 1186 of the Civil Code of the RF application of foreign law in Russia is possible if a treaty of the

[1] *Convention* of 1 July 1985 on the Law Applicable to Trusts and their Recognition // Treaty Series. Volume 1664. New York: United Nations. 2000. P. 311-335.

[2] *Civil* Code of the Russian Federation (Part Three): Federal Law of the Russian Federation of 26.11.2001 No. 146-FZ (in the version of 09.03.2016) //Sobranie Zakonodatelstva RF. 2001. No.49. Article 4552.

RF, law of the RF, custom recognized in the RF points to its application. However, in accordance with Articles 1192 and 1193 of the Civil Code of the RF, application of foreign law must not affect norms of direct application (imperative norms) and contradict the public policy of the RF.

Imagine the situation where a trust is created in Jersey by a Russian citizen, the trust manager is also located in Jersey, the property transferred to the trust fund includes stock of various foreign and Russian companies, only one child of the founder of the trust is designated as the beneficiary. The given legal relation, without a doubt, is complicated by a foreign element. Russia is not a participant in the Hague Convention on Trusts; therefore, foreign law cannot be applied on the basis of a foreign treaty. Neither the Civil Code of the RF nor other laws contain conflict norms for determining the law applicable to trusts. In the opinion of some scholars, in this case, the legal relation must be regulated by the law with which it is the most closely connected [3, p. 199].

Such law must be the law specified in the act on creation of the trust although it might not always be appropriate (chosen law can also not be familiar with the institute of trust). Another approach exists in accordance with which the law applicable to the trust should be determined in accordance with Article 1203 of the Civil Code of the RF establishing the personal law of the organization not a juridical person in accordance with foreign law. The law of the country in which the given organization was founded [2, p. 41] is such law. Thus, the question concerning which conflict link to apply to a foreign trust inter vivos will be determined by the judge during examination of a concrete case.

As noted in literature, the question whether Russian persons can create a trust inter vivos requires clarification of a number of questions. First, it is necessary to determine whether Russian natural and juridical persons possess the legal capacity to create and be beneficiaries of foreign trusts. In accordance with Article 18 of the Civil Code of the Russian Federation, citizens have the right to conclude any transactions that do not contradict law and to participate in obligations, to have any property and personal nonproperty rights. As a result, the content of legal capacity presents the possibility to conclude transactions creating foreign trusts and also to be their beneficiaries. The creation of a trust falls under the category "any transactions not contradicting law" if the legal provisions of the RF are not violated. The right of a citizen to be a beneficiary of a trust is, accordingly, "the right to have other property rights" [2, p. 39]. The natural question arises can Russian citizens create "home trusts" which would be regulated by legislation of the RF if the definition of legal capacity given in the Civil Code of the RF is sufficiently broad. The absence of mention of some legal institute in itself does not mean that it cannot exist in a given country and contradicts existing legislation. However, as already mentioned above, the creation of "home trusts" in Russia is not possible because in accordance with Article 209 (4) of the Civil Code of the RF the owner can transfer property in trust management – however this does not entail the transfer of the right of ownership to trust management.

The following question which is necessary to determine during recognition of a trust in Russia is what kind of property can be transferred to a trust. The transfer of right to ownership is regulated by the law on the right to things; therefore, a complication in the first place arises with immoveable property to which, in accordance with Article 130 of the Civil Code of the RF, relate land plots, plots of subsoil and everything that is firmly attached to land i.e. objects the relocation of which is not possible without disproportionate harm to their purpose, including buildings, installations, objects of uncompleted construction, air and sea vessels subject to state registration, vessels of internal navigation, space objects. In the event the property indicated above is located on the territory of the RF, then it cannot be transferred into a trust [2, p. 41], since Russian law (Article 1213(2) Civil Code of the RF) applies which is not familiar with this institute.

However, in the event that the given property is located beyond the borders of the RF, the parties can subject the contract with respect to immoveables to any law; and in the absence of such agreement, the contract will be regulated by the law of the country with which it has the closest connection. As regards transfer of moveable property into a trust, then in accordance with Article 1210 of the Civil Code of the RF, the parties of a contract can during conclusion of the contract or subsequently choose by agreement among themselves the law applicable to their rights and duties in that contract. Thus, for recognition of the validity of transfer of moveable property to a trust, the founder and trustees must subject the contract to a law which recognizes the given institute.

Compliance with norms of Russian legislation during creation of testamentary trusts has principal significance since it is necessary to comply with the requirements presented

by Russian law if it constitutes an inheritance law. In accordance with Article 1224 of the Civil Code of the RF, relations concerning inheritance are determined by the law of the country where the testator has the most recent residence except for inheritance of immoveables which are subject to the law *lex rei sitae*. Russian legislation establishes that disposition of property in the event of death is possible only by conclusion of a will (Article 1118 Civil Code of the RF). If Russian law is the law of inheritance then a testamentary disposition containing the conditions of a trust will be recognized as invalid, in particular, if there is a discretionary trust as happened, for example, in Switzerland or as in the case of a fixed trust its separate provisions can be re-qualified as an institute familiar to Russian law. As evident from the above analysis, the possibility of recognition of foreign trusts in Russia is legally provided for; however, such trusts must not be in conflict with supraimperative norms and the fundamental principles of public policy. It is worth expressing the hope that Russia will soon become a participant in the Convention on Trusts that will assist in the appearance of conflict norms devoted to regulation of the given institute.

## Influence of the Hague Convention on Law Applicable to Trusts and Their Recognition on the Perception of Trusts in Legislation and Judicial Practice in Countries of the Continental System of Law

Italy was the first continental legal system to sign and ratify the Convention on Trusts. Before its ratification in Italy, trusts were considered to be an institute not compatible with the Italian legal system which classically considered the right of ownership as an absolute and indivisible right (Article 832 of the Civil Code of Italy ("Civil Code of Italy"))[1] except for *numerus clausus* rights coexisting with the right of ownership. Thus, the Italian courts did not recognize fractionalization of the right of ownership into legal and beneficiary. With the adoption of the Convention on Trusts, the institute of trust was introduced into the private international law of Italy and became recognized in the Italian legal system when the material elements of the trust connected with a foreign legal system are regulated by a law chosen by the founders under the condition that such trusts are in accordance with the requirements of the Convention on Trusts. In accordance with Article 13 of the Convention on Trusts, the possibility not to recognize trusts is preserved for State-participants if the material elements are connected with the state, the law of which is not familiar with the given institute. In connection with this, in Italian doctrine there is no unity in approaches to interpretation of this article. Initially in the literature the opinion was expressed that if an Italian citizen creates a trust with respect to stocks of an Italian company of which his children living in Italy become the beneficiaries, while designating an English trust manager and subjecting the trust to English law, such a trust would not be recognized in Italy [7, p. 655].

Further, court practice and doctrine confirmed that Italian trusts whose material elements are connected with Italy are recognized in Italy and can be regulated by foreign law [11, p.16], except for those cases where the trust and its legal effects contradict public policy, the trust is not in accordance with requirements of the Convention on Trusts, the purpose of the trust is protection of assets from creditors or the purpose is illegal. At present, trusts created in Italy are characterized not only by the fact that they are created with respect to Italian assets by founders – citizens of Italy in the interests of beneficiaries – citizens of Italy but by the fact that services of the managers rendered by companies are located in Italy or by autonomous Italian trustees. As evident, for more than a 20-year history, the institute of trust in Italy successfully developed and no longer is an alien construction in the Italian legal system.

Later, in 2007, the Convention on Trusts was signed and ratified by Switzerland. Introduction of the respective changes in the Law on International Private Law of Switzerland brought recognition by courts and other competent agencies of the validity of the trust as a specific legal institute in cases of observation of the requirements established by the Convention on Trusts. As was mentioned, during accession to the Convention on Trusts, Switzerland made stipulations with respect to the required form of a trust. In Switzerland, trusts created both in written and oral form are recognized. During examination of a case connected with trusts, courts no longer need to try to adapt this institute to a construction existing in Swiss law. As in the Italian approach to recognition of a trust whose material elements are connected with the legal order of a country not familiar with the given institute, the trust in accordance with Swiss

[1] Civil Code of Italy of 16.03.1942 (confirmed by Royal Edict No. 262 of 16.03.1942). URL: http://www.wipo.-int/wipolex/ru/details.jsp?id=2508 (date last viewed: 28.03.2016).

law nevertheless is subject to recognition. The law applicable to the trust will be determined in accordance with Article 7 of the Convention on Trusts. Consequently, in spite of the fact that the Convention on Trusts was called upon to regulate recognition of foreign trusts, in essence, it allowed recognition of "internal" trusts applying to them foreign law to which the trust is familiar.

In this way the problem of recognition of inter vivos trusts in Switzerland was fully resolved, in particular those which are directed at deciding inheritance and other family questions. Especially important, the problem of a register of the owner in the land registries, registries of vessels and planes was resolved. After ratification of the Convention on Trusts, in the event of transfer of property of trust, if this is required by legal norms on registration of rights, the name of the trust manager is noted in the respective register with the notation that such person possesses the property in the role of trust manager. As regards to the recognition of the legal effects of testamentary trusts, as indicated above, it is important to consider whether the applicable inheritance law allows such possibility. If the trust is recognized as valid by virtue of the fact that the institute of trust is familiar to the law applicable to inheritance relations, then the application of supraimperative norms or clauses on public policy of Switzerland is nevertheless possible. As a result, in the event of causing of harm to the rights of heirs in accordance with the law on obligatory share in inheritance, the property transferred to the trust can be proportionately reduced and distributed among such heirs (Article 522 of the Civil Code of Switzerland).

As applied to trusts created inter vivos, it is possible to confirm: in spite of the fact that the right of ownership in property transfers to the trustees into the trust fund and no longer comprises part of the inheritance mass, in Switzerland by virtue of the law applicable to relations of inheritance, it is possible to demand and obtain property into the inheritance mass for protection of the rights of obligatory heirs. Article 522 of the Civil Code of Switzerland mentioned earlier provides for a special suit – action en reduction, allowing the obligatory heirs which did not receive the share in property established by law to initiate a suit for reduction of property transferred to a trust, the amount which exceeds the share in free disposition of the testator. The suit can be filed against the trustees or the beneficiaries if there is distribution of capital of the trust fund among beneficiaries. At the same time, the effects of the trust can be limited in the framework of family relations including in the case of division of property in a divorce proceeding.

In a recent decision of the Supreme Court of Switzerland of 26 April 2012 in the matter of Rybolovlev v Rybolovleva, the court imposed arrest of property transferred to a trust, the founder of which was a husband, thus recognizing the right of the wife to a share of property transferred to the trust fund. As motivating the decision, the court alluded to Article 15 of the Convention on Trusts and also used the theory of lifting of the corporate veil. In doctrinal literature, it is well-foundly noted that application of Article 15 of the Convention on Trusts and more so the theory of lifting the corporate veil in the given situation is unacceptable since the regime of joint ownership of spouses can be changed in accordance with their agreement (which excludes the possibility of application of Article 15 of the Convention on Trusts) and the theory of lifting the corporate veil relates only to juridical persons, which the trust is not [6, p. 750]. Thus, as this example shows application and interpretation of any given provisions of the Convention on Trusts often receive mixed reviews and lead to uncertainty with respect to legal effects of a trust.

One of the first countries to sign the Convention on Trusts was France; however the given convention until this time has not been ratified despite the sufficiently long history of development of court practice with respect to trusts. This is connected in many ways with the fact that in France the classical theory of unity of property worked out by Charles Aubrey and Charles Rau in the beginning of the nineteenth century operates. However, in the course of time, an exception to this rule began to form legislatively, in particular, the possibility of creation of separate property by an individual entrepreneur (Entrepreuneur Individual à Responsabilité Limitée, Law of 15 June 2010). Several years earlier, the institute of fiduciary (fiducie) was also introduced, which in many ways resembles a trust – but has its own distinguishing characteristics.

First, the fiduciary, in accordance with Article 2012 of the Civil Code of France, is established by law or contract i.e. the fiduciary created by will of the parties will always be a contract; a trust is not a contract. Second, factually, property transferred to a managing-fiduciary, is not separate from the property of either the fiduciary or the founder of the fiduciary. In particular, paragraph 1 Article 2025 of the Civil Code of France establishes that creditors of the founder of the fiduciary have rights to the property transferred to fiduciary possession in cases where their rights have been violated. This article establishes that in cases of insufficiency

of fiduciary property, the property of the founder of the fiduciary is a general pledge [collateral] for all creditors. The basic distinction of the French fiduciary from a trust in which the property is transferred to a trust consists of a separate fund. Neither personal creditors of the founder nor personal creditors of the trust manager (especially if we are talking about a discretionary irrevocable trust) can make a claim against the latter, with insignificant exception (for example, if fault of the trustee is discovered with respect to the operation of the trust causing debts of the trust fund) [5, p. 28–33].

In spite of the signing of the Convention on Trusts and absence of ratification, as pointed out above, French courts over a long period of time continued to assimilate the trust into contractual constructions – contract of indirect gift. The situation changed with the momentous decision by the Cassational Court of France No. 840 of 13 September 2011 in the matter Belvédère[1]. In the framework of the given case, the question of recognition of the right of the trust manager to declare debt as a direct possessor of the bonds of the society *Belvédère* in favor of the holders of those bonds was examined. The society *Belvédère* was in bankruptcy proceedings in France and such right of a trust manager, the role which was played by *Bank of New York Mellon*, was not recognized, it being pointed out that the bank needed to present documents confirming the mandate for declaration from each holder of the bonds. The Cassational Court applied the law of New York in accordance with which bonds were realized and *Bank of New York Mellon* was designated as a trustee and also recognized the legal title of the trust manager to the bonds and, consequently, the right to declare the debt with regard to them in the framework of bankruptcy proceedings.

As noted in French doctrinal literature, direct recognition of trust by the Cassational Court of France became possible as a result of application of provisions of the Convention on Trusts externally before its ratification, however, in light of the fact that France officially signed the Convention on Trusts and consequently expressed its intention to apply the provisions therein with respect to trusts [4, p. 93] In that same year, however, before the court decision in the matter *Belvédère,* the Law of 29 July 2011 directed at the regulation of taxation of trusts having a connection with France (when the founder or the beneficiaries are residents of France or the property transferred to the trust is located on its territory) was adopted. In particular, henceforth a tax is applied to the property transferred to the trust fund up to 60% of the value of the property at the moment of death of the founder irrespective of whether property remains in the trust fund or is subject to distribution among beneficiaries.

Thus, in France the recognition and application of the institute continues to develop although, without doubt, it should be noted that it is unlikely judicial practice will go the path of impinging upon the interests of heirs having a right to an obligatory share, as applied both to testamentary and *inter vivos* trusts. The Netherlands, Lichtenstein, Luxembourg, Monaco, Malta and San Marino are countries of the continental system of law which have signed and ratified the Convention on Trusts. The formal duty to recognize a trust created in accordance with the requirements of the Convention on Trusts also exists in the enumerated countries.

The question of management of ownership and its transfer to heirs has always been topical both in theory and in practice. In contemporary society characterized by great variety of economic relations and the rising of multi-tiered international ties, it is not difficult to imagine the situation in which institutes provided by one legal system are not compatible with those adopted in another while at the same time they are used by the subjects thereof. Such a situation is arising with respect to the Anglo-American institute of trust which is acquiring more and more popularity in countries of the continental legal system. This has been caused by the fact that the concept of trust provides for the fractionalization of the right of ownership into legal ownership and equitable ownership which can belong to various juridical and physical persons. The trust managers (trustee) possess the legal right of ownership of the property transferred to the trust and manage it only in the interests of the beneficial owner of this property, possessing the right compulsorily to enforce compliance with the given obligations on the basis of the principles of the law of equity.

Precisely thanks to the fractionalization of the right of ownership, trusts allow the effective protection of assets since the legal title in things is transferred to the trust. Further, in connection with the fact that the legal

[1] *Arrêt* n 849 de la Cour de cassation, Chambre commerciale, financière et économique du septembre 2011 (10-25.633; 10-25.731; 10-25.908).

duty is placed on the trust for management of ownership exclusively in the interests of the beneficiaries of the trust, in recent times the creation of a trust is becoming all the more popular as a method of transfer of assets to heirs. With the help of a trust it is possible to transfer assets to specified persons in a specified proportion in accordance with the wishes of the founder of the trust and to deprive other heirs of the right to property. However, in connection with the fact that many countries of the continental system of law do not provide in their legislation for such a legal institute as a trust, the natural question arises whether the creation of a trust and transfer of property to the trust fund in a State with a continental system of law be recognized. The practical meaning of this question is that in the course of time a large number of assets can be transferred to a trust and the probability is great for the arising of both inheritance and other disputes connected with regulating family property relations. The present article permitted an analysis of the experience of countries of the continental system of law in deciding the given question which subsequently can be used in the law application practice of Russia.

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