THE COMMON LAW TRUST USED AS A GUARANTEE TOOL IN COMPARISON WITH EQUIVALENT INSTRUMENTS OF THE NEW BRAZILIAN CIVIL PROCEDURE CODE

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ABSTRACT: This article aims to demonstrate the functionalities of the trust as an authentic legal transaction and fundamental in the constitution of guarantee of the most varied types of business, through the comparison with the instruments used in Brazilian law. For this purpose, this article beginning with the accurate definition of the common law trust, describing its peculiar characteristics, as well as its flexibility. It also presents an overview of trusts under the legal system of common law, where it distinguishes their structure and identifies their main guarantee purposes. Moreover, this article specifies that the common law trust, when used as a guarantee tool, is more efficient than the guarantee instruments permitted under Brazilian law. This is due to the slowness of the process to enforce the creditor's right which, even with the recent changes to the Civil Procedure Code, remains a challenge. Thus, it can be concluded that the Brazilian current structures are more limited and bureaucratic when compared to the common law trusts.

KEY WORDS: trust; common law; civil law; Brazilian law; legal guarantee tools.

I. Introduction

The trust is a fundamental notion of English Law, and is regarded as the main creation of equity, becoming today an instrument widely sought by both legal systems (civil and common law) because of its adaptability to the most varied situations of life human.

In Brazil, a fiduciary law has not yet been established[1]. However, we observe that its use occurs through the transfer of assets to some country that legally allows the constitution of the institute. Above all, among the various purposes for which the trust is used globally, it is a prominent instrument in the constitution of guarantees in international business.

In this way, we aim with this article to demonstrate the functionalities of the trust as an authentic and fundamental legal business in the constitution of guarantee of the most varied types of business, in short comparison with the instruments used in Brazilian law.

We will achieve the result that the common law trust, when used as a guarantee tool, is more efficient than the guarantee instruments allowed under Brazilian law. This is due

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to the slowness of the process to enforce the creditor's right which, with the recent changes to the Civil Procedure Code, remains a challenge.

II. The concept and the structure of the trust

In general, the definition of the trust can to be withdraw of the understanding of its constitutive structure. In these terms, we consider that the trust is a legal relationship created by the settlor, which transfers assets or rights to a trustee to administer for the benefit of the beneficiary. It is important to note that the legal ownership of the assets, objects of the trust, is effectively transferred to the trustee (s)[2].

It should be emphasized that such transfer is due to the "trust" that the settlor deposits in the trustee. Therefore, there is an obstacle brought on this right of property of the trustee, this barrier, of moral and ethical order[3]. In this way, the trustee must administer such assets for the benefit of others. The acts of the depositary and the extent of them depend on what is established by the trust deed[4].

The structure of trusts can be divided into objective and subjective. In this sense, the subjective structure of the trust indicates its subjects: the settlor, the trustee and the beneficiary. In turn, the objective structure of the trust translates into the articulation of its main characteristics.

WAI LAU explain: "*Trusts are ubiquitous among common law jurisdictions and Anglo-Saxon economies. They can be used to structure many aspects of modern socio-economic life: from marriage settlements to divorce settlements; from caring for young children to carrying out the wishes of testators; from securitizing assets to organizing insolvencies; and from investing mutual funds to divesting real estate holdings*"[5].

Such practicality is undoubtedly of fundamental importance for the scope of the international legal praxis.

In this line, the subjects involved in the trust form the basic structure of the institute. However, although its subjective elements point to the existence of three subjects, a trust can be fully structured by two main parts, for example, settlor, also can to be the beneficiary of the trust, or to be the trustee itself.

From this basic structure, the trust provides the possibility of numerous variants in relation to the powers and functions of each of the parties involved.

The settlor of a trust is the person who creates the trust. The settlor is a person who settles property on trust law for the benefit of beneficiaries.

PENNER clarifies: "*And just like any other transfer or creation once the act of transfer or creation is complete, the interest in the property belongs to the recipient, and that is*

[2] In this point MENNEL(2007), says: "*A trust arises when the owner of property separates the benefits from the burdens of ownership by giving them to different people*". *Cfr*. MENNEL, L. Robert. *Wills and Trusts in a Nutshell*. Minnesota: West Group, 2007, p. 186.

[3] *See* DAVID, René. *Os Grandes Sistemas do Direito Contemporâneo*. São Paulo: Martins Fontes, 2002, p. 398.

[4] *See* FREIRE E ALMEIDA, Verônica Scriptore. *A Implementação do Instituto dos Trusts no Direito Brasileiro*. (2016, Vol. I (683f) e Vol. II (703f). Tese (Doutorado em Direito - Área de especialização em Ciências Jurídico-Económicas). Faculdade de Direito da Universidade de Coimbra, Portugal, 2016.

[5] *See* WAI LAU, Ming. T*he Economic Structure of Trusts — Towards a Property-based Approach*. New York: Oxford University Press, 2011, p. 1.

the end of it as far as the transferor is concerned. Thus the settlor cannot think of the trust property as still really his. He cannot get is back, for he is legally out of the picture[6]".

In sequence, it should be noted that the settlor may be a natural or collective person[7], and in this context, the settlor must have the generic capacity necessary to practice the acts concerning the constitution of the trust: the transfer of assets to the trustee and the unequivocal statement of intent to establish the trust.

It should be noted here that when organizing a trust, the settlor may choose to retain some powers and / or rights in relation to the administration of the trust, without being a beneficiary or a trustee.

In this line, how much more powers and rights the settlor maintains over the trust, the greater will be its tax liability in relation to it. Therefore, many settlors may prefer to keep little or no influence on the trust.

The trustee is the person who, in the trust relationship, owns and administers the trust property for the benefit of another. In this sense, the trustee acquires the legal ownership of trust assets, originally designated by "*legal ownership*".

In fact, to third parties, the trustee becomes the true owner of the assets or rights in trust. However, the trustee can not enjoy such property, and must administer it for the benefit of the beneficiaries of the trust, following strictly the clauses inserted in the trust instrument.

In general terms, the trustee can be any person, singular or collective, and must be able to exercise their rights and duties.

The beneficiary of the trust, also referred to as "cestui que trust", is the person who will receive the benefits of the trust. The benefits of the trust can to be conferred by the settlor to one or more beneficiaries. Also, when establishing a trust, the settlor can choose to indicate purposes to be fulfilled or charitable trusts, without indicating any specific beneficiary.

In sequence, chosen the beneficiaries and pointed out the benefits, usually, right after the trust is created the beneficiaries are informed of the existence of the trust by the trustee. Once informed, each beneficiary can express their acceptance in writing, through a formal document. In practice, however, the acceptance of the beneficiary is presumed.

Among the many aspects that the flexibility of trusts manifests, one is certainly the possibility of designating the beneficiaries and their participation in the benefits. Therefore, the settlor can stipulate the value of the benefits, the initial and final period, impose suspensive or resolving conditions.

In this context, the beneficiaries have the active legitimacy to enforce the terms of the trust. An important aspect concerning the equitable ownership (beneficiary) in the trust is that, in most cases, their interest is linked to the trust fund.

The fund can contain nearly any asset imaginable, such as bonds, stocks, cash, property or other types of financial assets[8].

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[6] *See* PENNER, J. E. *The Law of Trusts*. Fifth Edition, Londres: Oxford University Press, 2010, p. 18.

[7] *See* MENNEL, L. Robert. *Wills and Trusts in a Nutshell*. Minnesota: West Group, 2007, p. 217; MARTIN, Jill E. *Modern Equity*. Fifteenth Edition. London: Sweet & Maxwell, 1997, p. 73.

[8] WAI LAU (2011) explains: "*A fund is a pool of assets, the composition of which changes from time to time*". *Cfr.* WAI LAU, Ming. *The Economic Structure of Trusts — Towards a Property-based Approach.* New York: Oxford University Press, 2011, p. 128.

Typically, the trustee has a power to change the content of that fund, which is considered one of the management acts, with a view to making the fund productive for the benefit of the beneficiaries. In these terms, as a rule, the beneficiary does not have a certain right to any of the specific assets of the fund, and there is an equitable right to the fund itself[9].

This is a relevant issue when we think of the important need to ensure that the fund is used for the purposes for which it was set up. This is undoubtedly a fundamental point of comparison with the guarantee instruments existing in the Brazilian law. It´s because, once in trust, the assets or rights can not to serve as collateral for matters other than the purposes of the trust itself.

It should be added that beneficiaries may donate, sell or dispose of their beneficial interests, provided that it relates to their own fair interests in the trust property, and not to the interests of other beneficiaries[10].

In order to be valid, a trust must contain certain elements and meet certain legal requirements.

A trust may be created by an express declaration of trust, and it is an indispensable requirement for the valid constitution of the express trusts[11].

The "trust res" may be real or personal and the trustee has the legal title[12]. In this line, the money and investments held in a trust are also called "capital" or "fund." Therefore, they can produce income, such as savings interest or stock dividends. Equally, land and income from buildings can generate income. In the same way, assets can be sold and then produce gains for the trust.

For this purpose, REUTLINGER explains: "*Any recognized and transferable property interest will suffice, although it must be in existence before the trust can come into being*"[13].

Finally, a trust is created when a settlor transfers the property to a trustee to hold it for the benefit of one or more beneficiaries[14]. It is important to bring into context the division of property rights between the trustee and the beneficiary.

As already indicated, the trustee acquires the legal ownership of trust assets, while the beneficiary acquires beneficial rights over the same property, to "equitable ownership". Still, we need to remember that when there are several trustees, they acquire the property

[9] *See* PENNER, J. E. *The Law of Trusts*. Seventh Edition. Londres: Oxford University Press, 2010, 28-29. Also WAI LAU (2011): "*In the case of a trust, the trustee usually has the power to sell trust assets; it is this crucial power that gives the trust assets the dynamic and fluctuating characteristics of a fund*". *See* WAI LAU, Ming. *The Economic Structure of Trusts — Towards a Property-based Approach.* New York: Oxford University Press, 2011, p. 129.

[10] *See* HAYTON, D.J. *The Law of Trusts*. London: Sweet e Maxwell, 1998, p. 156.

[11] According to s.9, do *Wills Act 1837*, *in verbis*: "*No will shall be valid unless—(a)it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and (b)it appears that the testator intended by his signature to give effect to the will; and (c)the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and (d)each witness either— (i)attests and signs the will; or (ii)acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary*". *Cfr.* UK. *Wills Act 1837*. Disponível em http://www.legislation.gov.uk/ukpga/Will4and1Vict/7/26/section/9. Acesso em: 14.12.2011.

[12] *See* REUTLINGER, Mark. *Wills, Trusts, and Estates, Essential Terms and Concepts*.Second Edition, New York: Aspen Publishers, 1998, p. 214.

[13] *See* REUTLINGER, Mark. *Wills, Trusts, and Estates, Essential Terms and Concepts*. Second Edition, New York: Aspen Publishers, 1998, p. 158.

[14] *See* MATTEI, Ugo; HANSMANN, Henry. *The functions of trust law: a comparative legal and economic*. New York University Law Review, p. 434-479, 1998, p. 438.

as *joint tenants*. In this way, in the death of a trustee the property is automatically transferred to the others, and never to their successors[15].

The transfer of the trust property to the trustee form a separate patrimony, unable to be reached by the trustee, the settlor or the beneficiary creditors. As already pointed out, such equity may only be eventually reached by debts of the trust itself.

III. The trust and its compatibility with the Brazilian law.

The compatibility of common law trusts can be achieved by considering that the dichotomous nature of property is not strange to the civil law tradition. In fact, dualistic property already existed in the history of the classical Roman period, like the "dote" or the "*peculium castrense"* institute[16].

It is emphasized that, under the Middle Ages, a distinct concept of property was developed, as opposed to the exclusivism of the Romanists. Under feudalism, the superposition of domains of different densities, parallel to one another, was admitted. The dominium directum that belonged to the lord and the dominium utile, pertinent to the vassal, was distinguished.

In this sequence, the concept of exclusive property resurfaced after the French revolution, which abolished the privileges of the nobility. In addition, we must not forget the distinction between dominion and possession, by which the real rights over a property can be conveniently divided[17].

SALOMÃO NETO clarifies, at this point, that in addition to institutes such as that of the enfiteuse, Roman law was for a long time marked by the duality of property rights, and that historical circumstances of a conjunctural nature, and not any incompatibility of a juridical nature, removed the duality of property rights / ownership of grassroots systems[18].

In the same framework of analysis, we can not fail to mention here, that there are antecedents comparable to the trust in the Roman Law as the emphyteusis, the *fiducia cum amico*, the *fiducia cum creditore* and the *fideicomisso.*

In the Brazilian law, the emphyteusis preserves the same characteristics of the Roman Empire era. Emphyteusis is a right derived from assignment or descent, on productive real estate. The emphyteuth can exercise, strictly and perpetually over the real state, all the powers of the domain, upon payment to the "*landlord*" of an annual "rent". In the

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[15] *See* MARTIN, Jill E. *Modern Equity*. Fifteenth Edition. London: Sweet & Maxwell, 1997, p. 492.

[16] Clarifies BOLGÁR (1953), *in verbis:* "*This exhibits a long and flexible evolution of property rights in response to current social needs in the romanic as well as in the english legal system, which cannot in reason be expunged by authoritarian efforts, however pretentious, to oversimplify the concept of property in terms of autonomous, absolute, abstract power, such as appear in the Corpus Iuris Civilis of Justinian and code civil of Napoleón. The premise takes the nominalistic abstraction for the norm". See* BOLGÁR, Vera. *Why No Trusts in the Civil Law?.* In: The American Journal of Comparative Law, v. 2, n. 2 *(Spring, 1953),* p. (204-206.

[17] Clarifies, BOLGÁR (1953), *in verbis:* "*Moreover, as Levy has demonstrated, during the vulgarization of Roman Law, the case law of the provinces, governed by social and economic rather than legal considerations, progressively operated with unconcern for traditional niceties. Gone were the strict analytical distinctions of classical jurisprudence; iura in re aliena, servitus, ususfructus were considered to be varieties of dominium, which lost the sense of exclusive title. Forms of co-existing ownership developed: the corporation-bound property of the collegium, the emphyteusis on the imperial domain, and the bona materna shared by the surviving father and his children. The words possessio and dominiun were indifferently used to describe legal ownership or factual control; either might indifferently used to describe legal ownership or aius in re aliena, as well as actual enjoyment*". *See* BOLGÁR, Vera. *Why No Trusts in the Civil Law?.* In: The American Journal of Comparative Law, v. 2, n. 2 (Spring, 1953), p. (206.

[18] *See* SALOMÃO NETO, Eduardo. O Trust e o Direito Brasileiro. São Paulo: LTR, 1996, p. 69.

emphyteuse, the emphyteuth has the use, enjoyment and restricted disposition of the property[19].

The emphyteusis was prohibited in the Brazilian Civil Code of 2002, under the argument that it is harmful to the free circulation of wealth. The new Brazilian Civil Code, with the scope of extinguishing them, gradually began to treat them in the transitional provisions, subordinating the emphyteusis, still existing, to the provisions of the previous Civil Code (1916)[20].

We should also point out that the Roman law already knew the fiduciary business. The Roman fiduciary is built through a real assignment, usually of property, limited by a fiduciary pact, in which the transferee must return the full ownership of the property to the assignor. The manifestations of fiducia in the Roman Law were separated into two groups: *fiducia cum amico* and *fiducia cum creditore*[21].

The "*fiducia cum amigo*" was just a trust agreement in which the fiduciary alienated his property to a friend, with the condition that the property returns when random circumstances ends, many similar to those that gave rise to the *use*, such as the risk of perishing in war, travel, or loss due to political events[22].

In turn, the *fiducia cum creditore* had a guarantee character. The debtor sold his assets to the creditor under the condition of recovering them if, within a certain period, he made the payment of the debt. The *fiducia cum creditore* was one of the first forms of the guarantee´s right[23].

After all, the depositor/debtor in the case of fiducia only had access to an *actio in personam*.

Such institutions were abolished by Justinian and, in consequence, have not been adopted within the framework of Roman law[24].

In this sense, therefore, they were not adopted by the Brazilian Civil Code of 1916. However, in 1965 (Law n. 4,728 / 65) before the need to establish some structure that would provide assurance to the business (capital market), was introduced, in the Brazilian legal system, the fiduciary alienation in guarantee.

In fact, the Legal certainty has always been a concern of rights (*civil and common law*), because the guarantee of rights emerged in a credit development phase, where the guarantees for this become indispensable in the existing legal system. In this sense, although the *fiducia cum amico* and *fiducia cum creditore* have disappeared, new contractual forms of guarantee have arisen in *civil law* systems, such as pledge, mortgage and fiduciary alienation.

[19] *See* DINIZ, Maria Helena. *Curso de Direito Civil Brasileiro - Direito das Coisas.* Volume 4. São Paulo: Saraiva, 2008, p. 365.
[20] *See* VENOSA, Silvio de Salvo. *Direito Civil - Direitos Reais*. Volume V. 8ª Edição. São Paulo: Atlas, 2008, p. 405-406; PEREIRA, Caio Mario da Silva Pereira. *Instituições de Direito Civil -Direitos Reais*. Volume IV. 19ª Edição. Rio de Janeiro: Forense, 2005, p. 251-272.
[21] *See* PAIS DE VASCONCELOS, Pedro. *Contratos Atípicos*. Coimbra: Almedina, 2009, p. 267.
[22] *See* LIMA, Otto de Souza. *Negócio Fiduciário*. Faculdade de Direito da Universidade de São Paulo, 1959, p. 95-101.
[23] *See* WALD, Arnoldo. *Algumas considerações a respeito da utilização do "trust" no Direito brasileiro.* Revista dos Tribunais, São Paulo, v. 34, n. 99, p. 105-120, julho-set, 1995, p. 108.
[24] *See* CHALHUB, Melhim Namem. *Negócio Fiduciário*. São Paulo: Renovar, 2009, p. 13.

However, we will show that the common law trust used as a guarantee tool is more efficient than the guarantee instruments allowed under the Brazilian law. This is due to the slowness of the process to enforce the creditor's right, which still with the recent changes to the *Civil Procedure Code*, remains a challenge.

IV. The *trust* as a guarantee tool

Among the various purposes of trusts, our goal in this article is to highlight their use as a form of guarantee, within the scope of financial institutions and business[25]. Indeed, the relevance of this type of trust is observed mainly in the commercial and financial contexts.

In the form of a guarantee, the settlor assigns the legal title of various assets to the trustee in order to guarantee an obligation to him. Once all the requirements are met, the trustee will transfer the assets back to the settlor.

On the other hand, if at the end of the guaranteed obligation, the settlor is in default, the trustee is allowed to sell such assets. It is worth mentioning that the amount that exceeds the payment of the obligation, must necessarily be returned to the settlor.

Economically, the trust here comes to replace the pledge, with the advantage of not necessarily implying the expropriation of the debtor.

One type of trust often used is the so-called quistclose trust. Here, the trust has as main purpose the constitution of guarantees.

When an asset is given to someone for a specific purpose and that person, for whatever reason, deviates from this purpose, the transferor may take back the asset[26]. In other words, the "debtor" undertakes, in accordance with the trust instrument, to segregate the assets borrowed from its private assets, which therefore form a trust property. Moreover, he undertakes to use the loan of a particular and previously combined.[27].

This is one way of performing secured loans. Often comes in a business transaction where a person borrows a sum of money (or other things of value) to another person only for a specific purpose. If the purpose is not, for whatever reason, carried out, the person who received the money is legally obliged to return the money to the "creditor" instead of using it for any other purpose.

Similarly, commercial practice often causes the bank deposit of a certain sum of money in order to continue certain operations, in order to ensure the fulfillment of obligations.

In this case, the legal structure of the trust reassures the creditor that the debtor is temporarily deprived of the possession of the property or rights which constitutes his guarantee and assures both parties that the object of the guarantee is not capable of being executed by third parties, whether they are creditors of the debtor, the financial institution or the creditor himself.

In addition, insofar as the collateral function is accompanied by the trustee's management function, the trust can serve to provide excellent returns.

[25] *See* VAZ TOMÉ, Maria João; CAMPOS, Diogo Leite de. *A Propriedade Fiduciária (Trust), Estudo para a sua Consagração no Direito Português*. Coimbra: Almedina, 1999, p. 313.

[26] *See* HAYTON, David. *Economic and Financial Analysis of Commercial and Private Trusts in the United Kingdom,* p. 02.

[27] *See* NATHAN, Barrie Lawrence. *In Defence of The Primary Trust: Quistclose Revisited*. Trusts & Trustees, United Kingdom, v. 18, n. 2, february 2012, p. 126.

The key reason for the choice of trust use is the security that the lender can recover the money not used by the other party, if it becomes insolvent. Thus, if the debtor is insolvent, the lender's money is refundable and not available to pay other creditors of the debtor.

In this context, finally, if the trust fails because the purpose of the trust is not achieved, a resulting trust will arise, and the assets will revert to the person who originally advanced the claim, and the person holding the assets will be treated as a trustee.

Under the Brazilian legislation, it is possible to achieve some effects similar to those of trusts created for guarantee purposes through *fiduciary alienation*. From the economic and legal point of view, it is a useful tool to guarantee the fulfillment of an obligation[28].

By way of introduction, WALD defines the fiduciary alienation as a legal transaction in which one party alienates the property to the (fiduciary) financier, until the contract expires for payment or non-performance. In brief comparative analysis, VAZ TOMÉ and CAMPOS, explain that in fiduciary alienation, the transfer of property serves solely and exclusively for the purpose of securing a debt, while in trust it is also objected to the administration of the property of the fiduciary[29].

In addition, CHALHUB adds that the "trust" element is unnecessary to the realization of the fiduciary alienation contract, since the law always protects the "settlor" against any kind of abuse[30].

In Brazil, the fiduciary alienation of movable assets was introduced by the article 66 of the Law n. 4,728 / 1965, with changes included by the Law 10.931, of 2004. In turn, the Law n. 9,514 / 1997 introduced the fiduciary alienation in relation to the real estate.

In this sequence, it may be constituted, under Brazilian law, two species of fiduciary property of movable property for guarantee purposes [31].

First, and with general application, the fiduciary property is provided by the Article 1361, of the Brazilian Civil Code, in these terms: "*"Fiduciary property is considered to be the resolvable property of non-fungible thing that the debtor, with scope of guarantee, transfers to the creditor*".

The fiduciary alienation of fungible thing and the fiduciary assignment of rights over movable property, as well as of securities in general, are legally based on article 66B of the Law n. 4,728 / 65 (Article included by the Law 10.931 of August 2, 2004)[32]. In this case, the fiduciary property serves, exclusively, to guarantee credits constituted within the scope of the financial and capital market, as well as of the fiscal and social security.

In any case, the fiduciary alienation contract of movable property is the title constituting the fiduciary property. In these terms, the fiduciary property constituted is a property limited by the restrictions that it suffers in its content, considered the purpose for which it was created, having its duration linked to the scope of the business[33].

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[28] *See* ASSUMPÇÃO, Márcio Calil; CHALHUB, Melhim Namem. *A propriedade fiduciária e a recuperação de empresas*. Revista do Advogado, São Paulo, Ano XXIX, Nº 105, p. 135-141, Set de 2009.

[29] *See* VAZ TOMÉ, Maria João; CAMPOS, Diogo Leite de. *A Propriedade Fiduciária (Trust), Estudo para a sua Consagração no Direito Português*. Coimbra: Almedina, 1999, p. (200.

[30] *See* CHALHUB, Melhim Namem. *Negócio Fiduciário*. São Paulo: Renovar, 2009, p.132.

[31] *See* PEREIRA, Caio Mario da Silva Pereira. *Instituições de Direito Civil - Direitos Reais*. Volume IV. 19ª Edição. Rio de Janeiro: Forense, 2005, p. 421-440.

[32] *See* MONTEIRO, Washington de Barros. *Curso de Direito Civil - Direito das Coisas*. 37ª Edição. São Paulo: Saraiva, 2003, p. 246-248.

[33] *See* VENOSA, Silvio de Salvo. *Direito Civil - Direitos Reais*. Volume V. 8ª Edição. São Paulo: Atlas, 2008, p. 393.

In both cases, the debtor retains possession of the alienated asset, the property being acquired by the creditor resolvable and encumbered with a charge[34].

Once the payment is made, the effects of the condition agreed upon in the fiduciary alienation agreement will be automatically changed, reverting ownership of the property to the patrimony of the debtor fiduciary (Civil Code, Article 1.359) [35].

On the other hand, if the debt is due, and it is not paid, the creditor is obliged to sell, judicially or extrajudicially, the thing to third parties. The sale can only be made after the consolidation of the property in the creditor, which occurs after five days of the execution of the injunction of search and seizure of the property[36]. In this way, the process is slower than when using the trust to for garantee purposes.

In turn, the fiduciary alienation of real property aims, mainly, the promotion to the commerce of real property with parceled payment.

Unlike the mortgage, which is a real right over something else, it is a real right over something own. In short, the possession is unfolded, the creditor-fiduciary being indirectly held, and the debtor-fiduciary with the direct possession of the property.

In the case of real property, for the hypothesis of non-payment of the financing, it is up to the official of the competent real estate registry, the notification steps for payment of delinquent debt; if this is not paid, the officer must certify this fact and promote the necessary settlements for the consolidation of property in name of the creditor-fiduciary.

According to article 27 of the Law n. 9,514 / 97, the creditor must promote two judicial auctions, and the second is only necessary if in the first one is offered a lower value to the property. Finally, the creditor must surrender to the debtor the remaining amount, after deduction of the debt and the expenses incurred.

The lawsuits arising from the fiduciary disposition of real estate are basically: the one that gives the creditor-fiduciary the reintegration of possession, once it has not paid the debit; and, on the other hand, the action of obligation against the creditor-fiduciary, who refuses to give discharge to the debtor, after the payment of their debts.

Finally, similar to the trust, in the fiduciary alienation in guarantees the creditor of the movable or real property will not be reached in the case of bankruptcy of the debtor-fiduciante. Likewise, fiduciary property does not aggregate the bankruptcy of the creditor-fiduciary[37].

In turn the pledge, is a real right of guarantee that usually falls on moving things which are held by the creditor in order to avoid the destruction or diversion of encumbered assets.

In special cases, the pledge may fall on real estate for accession, such as the machines fixed on the ground (industrial pledge), and the harvest (agricultural pledge). The pledge may be legal or conventional, and must necessarily be followed by the tradition of the goods given in guarantee to the creditor.

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[34] *See* DANTZGER, Afranio Carlos Camargo. *Alienação fiduciária de coisa imóvel.* Revista Forense, Rio de Janeiro, v. 416, Ano 108, p. 3-42, julho-dezembro de 2012, p. 3-14.

[35] *See* CHALHUB, Melhim Namem. *Negócio Fiduciário*. São Paulo: Renovar, 2009, p. 172.

[36] *See* Art. 56, § 1º,da Lei nº 10.931, de 02 de Agosto de 2004 (BRASIL) – Lei que dispõe sobre o patrimônio de afetação de incorporações imobiliárias, Letra de Crédito Imobiliário, Cédula de Crédito Imobiliário, Cédula de Crédito Bancário.

[37] *See* Articles 19, § 3º, and 119, number IX, of the Bankruptcy Law n. 11,101 of February 9, 2005..

Mortgage is the real right of guarantee that the creditor exercises over the real estate price of the property, in the event that the guaranteed debt is not paid at the specified time. The property is held by the debtor in the debit grace period, ie, until the maturity of this and the execution of the property.

Finally, "anticrese" is a real right of guarantee, an accessory to a credit right that is the main one - being linked to a property whose income can serve to repay the debt or pay interest on capital. The "anticrese" creditor enjoys the property until payment of the debt. Here there is no right to sell the property to obtain payment of the debt. However, the creditor has the right to retain the thing, and enjoy the income it until the full repayment of its debt.

For CAMPOS, traditional guarantees suffer serious limitations. In the case of a pledge, for example, dispossession is required, in addition to the prohibition of commission agreement. For the author, the obligation on the creditor to sell the thing and pay for the result of the sale entails serious inconveniences, as well as for the debtor[38].

Thus, unlike the trusts established for guarantee purposes, where the assets or rights are already in the name of the trustee, and when the debt is due, the trustee may appropriate the asset or sell it. It is therefore more flexible and agile for the purposes for which it was set up, in addition to avoiding expenses with court fees, and the real devaluation of the property.

Also, another difference observed is that the secured creditor has the right to appropriate the fruits of the pledged thing that is in its power (Civil Code, Art. 1433, V). We must remember, in the trust struture, that the trustee can not appropriate the income of the trust property, unless a clause authorizes it.

V. Final Remarks

In order to realize the right of the creditor, in the legal instruments of guarantee provided by the Brazilian law, the rules established in civil procedural law must be observed.

The new Code of Civil Procedure (Law n. 13,105 of 2015) establishes norms that seek to speed up the process in comparison with previous legislation.

For example, for the filing of the search and seizure action in the case of fiduciary alienation in guarantee of movable assets (an instrument widely used in the Brazilian law), it is fundamental that the debtor defaults. In this sense, it will now be considered valid citation by registered letter, not requiring that the signature be performed by the debtor himself.

In fact, this amendment has the purpose of making the citation by registered letter faster, according to the new article 248 of the Code of Civil Procedure (previously, it was required that the signature was from the debtor itself, making it difficult to cite this modality, and consequently the constitution of the debtor). Thus, after the constitution of the debtor in default, it is possible to propose the search and seizure action, only after the sale of the asset occurs.

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[38] *See* CAMPOS, Diogo Leite de. *A Alienação em Garantia*. Revista Doutrinária, Instituto Ítalo-Brasileiro de Direito Privado e Agrário Comparado. Rio de Janeiro: Lúmen Juris, p. 63-77, 2000, p. 64.

Another interesting change that is highlighted in the new Code of Civil Procedure concerns the urgent care procedure, which can be carried out during forensic holidays (article 214, II and 215, III). Clearly, this change allows the processes to be distributed and analyzed during the recess, giving greater speed.

However, as we know, the whole process must be followed. Therefore, in order to grant the injunction, the basic requirements of the initial petition, the requirements of urgency orders and other requirements should be present. In this way, very different from what happens in the trust, where the asset is already consolidated in the name of the trustee. Clearly, this prevents the delay of the process from making the business unfeasible, since when the sale of the property is authorized, it may already be in a poor state of repair and devaluation, not reaching enough value to repay the damages of the creditor.

We can see from the basic structure of the trust that it is a legal instrument adaptable to the most different types of business, arousing a great practical interest, opportune to the various sectors of the economy.

In fact, although the trust is an institute typically linked to the common law system, in recent decades it has become more important, not only in countries of English law tradition or that have suffered their influence directly, but mainly in countries of civil law origin. This is, in large part, made possible by the movement of goods, capital, services and persons, with the concomitant increase in the number of transactions, involving the need to provision of guarantees.

For all that analyzed, and because of the innumerable advantages of introducing the institute, we defend the implementation of the trust in the Brazilian Law[39].

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[39] The present working paper is based on our Doctoral Thesis, presented to the Faculty of Law of the University of Coimbra (Feb 2016), in Portugal, approved unanimously by the eight members of the Doctoral Jury, conferring the title of PhD in Law, Area of specialization in Legal and Economic Sciences.
In this sense, we invite you to read: FREIRE E ALMEIDA, Verônica Scriptore. *A Implementação do Instituto dos Trusts no Direito Brasileiro*. (2016, Vol. I (683f) e Vol. II (703f). Tese (Doutorado em Direito - Área de especialização em Ciências Jurídico-Económicas). Faculdade de Direito da Universidade de Coimbra, Portugal, 2016.

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