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The *European Review of Private Law* aims to stress the strong practical as well as academic importance of national private laws in integrating Europe, in the face of the current overwhelming emphasis placed on European Community Law. Cross border research will become increasingly important as cross border legal work develops. There is a need for a law review which focuses on legal developments within a broad European perspective, and which provides a platform for debate on the desirability of a unified private law in Europe, as a complement to economic, monetary and political union.

The *European Review of Private Law* will have an appeal across the academic/practitioner divide. By providing accessible and comparative surveys of legal developments in a number of countries, with summaries of articles and case notes in French, German and English, the Review will provide a valuable source of information for lawyers wishing to look for new ideas with which to tempt their courts to innovate in private law. The impact of European Community law has made national courts more receptive to importing new conceptual devices and legal techniques directly from foreign case law, not always waiting for the legislature to act.

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Style Guide

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The Italian Road to Trusts[1]

ALDO BERLINGUER*

Abstract: In Italy, there are still today no exhaustive systematic rules on trusts. Aspects of this institute, as developed in common-law jurisdictions, give rise to considerable practical difficulties, since they conflict with some linchpin tenets of the civil law tradition, including the general principle of the liability of the debtor, the conception of property as an absolute right and the limited number of rights *in rem,* the prohibition of succession agreements. Despite all this, large efforts have been recently made to introduce, in the Italian legal system, institutes that would perform at least some of the peculiar functions of trusts. This is not an isolated phenomenon but a tendency characterizing a growing number of other systems, including Luxembourg, Quebec, Uruguay, China, Republic of San Marino and, lastly, France. Such tendency is fostered by a number of reasons: EU Institutions have recently proved very pro-active towards trusts, inviting member states to introduce equivalent tools in their legislation. The growing competition among regulators for providing hospitable environments to investors has also pushed even the more conservative to innovate. A fit example of this can be found in the recent law on *fiducie* which has substantially transplanted in the French system a tool that closely resembles the trust. Following the introduction of this new, valuable instrument, large portions of the French system will be dramatically modified, including those areas of the law, as successions, that are not directly touched upon. A shift of perspective has thus occurred: from the idea, shared until today that the fundamental principles of civil law could only be derogated in specific and exceptional circumstances, to the awareness of their actual reduction to the *status* of ordinary rules. Comparing the new regulation governing the *fiducie* with the Italian surrogates of the trust, it appears quite obvious that such important modernization process has yet to be conceived in Italy, where a similar shift of perspective is still far to come.

Résumé: Encore aujourd'hui, en Italie, le système juridique ne règlemente pas, de manière systématique, le phénomène du *trust*. Certains aspects de cet institut, développés dans les pays de *common law*, contrastent avec les fondations primaires de la tradition civiliste, qui prévoit la responsabilité patrimoniale du débiteur, la conception de la propriété comme droit absolu, le nombre limité des droits réels, l'interdiction des pactes successoraux. Cependant, nombreux atteints ont étés faits pour introduire dans le système de droit Italien, des institutes qui puissent reproduire au moins certains effets du *trust*. Il ne s'agit pas d'un phénomène isolé mais d'une tendance partagée par d'autres systèmes, comme Luxembourg, Québec, Uruguay, China, République de San Marino, France. Cette tendance s'explique pour différentes raisons: elle à été encouragée par les institutions européennes, qui ont étés très actives en faveur de l'adoption des institutes comme le *trust*. La compétition croissante parmi les législateurs afin d'attraire des investissements a poussé même les plus conservatifs à innover. Emblématique est la récente introduction de l'institut de la fiducie en France: un institut qui ressemble au *trust*. Suite à l'introduction

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The author would like to thank Mr. Robert Bray and Ms. Carolina Cigognini for their precious collaboration.

[1] Report presented on 3 May 2006 to the Committee on Legal Affairs of the European Parliament on the state of trust in the Italian legal system. Other experts presented reports concerning France and the UK.

de cet important instrument, larges portions du droit français seront sensiblement modifies, y inclus certains secteurs qui ne sont pas directement touchés. Il en suis un important changement de perspective: à partir de l'idée, partagée jusqu'à aujourd'hui, que les principes fondamentales du droit continental puissent être dérogés seulement dans des circonstances spécifiques, vers la réduction des tels principes à des règles ordinaires. La comparaison entre les nouvelles règles françaises sur la fiducie et les subrogatifs italiens du *trust* montre que un tel procès de modernisation n'a pas encore été conçu en Italie, et une similaire change de perspective est encore loin.

Zusammenfassung: In Italien gibt es noch heute erschöpfende systematische Regeln zu Treuhandverhältnissen (sog. *trusts*). Die Erscheinung dieses rechtlichen Institutes, welches durch die Rechtssprechung des Common Law entwickelt wurde, führt zu beachtlichen praktischen Schwierigkeiten, da sie im Widerspruch zu einigen maßgeblichen Grundsätzen der Civil Law Tradition stehen, wozu der allgemeine Grundsatz des Schuldnerhaftung, die Idee des Eigentums als absolutes Recht sowie die begrenzten Anzahl der Sachenrechte, das Verbot Erbschaftsvertrages zählen. Trotz dieser Widersprüche wurden in letzter Zeit große Bemühungen gemacht, um innerhalb des italienischen Rechtssystems Rechtsinstitute einzuführen, die wenigstens einige der besonderen Funktionen der Treuhandverhältnisse einnehmen würden. Diese Entwicklung ist kein isolierte Erscheinung, sondern vielmehr eine Tendenz, die in einer wachsenden Anzahl von anderen Rechtssystemen, wie zum Beispiel in Luxemburg, Quebez, Uruguay, China, die Republik Sam Marino und schließlich auch Frankreich. Der wachsende Wettbewerb zwischen den Aufsichtsbehörden zur Schaffung einer für Investoren freundlichen Umgebung führte auch dazu, dass selbst die konservativen Strömungen zur Inovation bewegt wurden. Ein geeignetes Beispiel hierfür kann in dem jüngsten Gesetz zum *fiducie* gesehen werden, welches ein Institut in das französische System eingeführt hatte, das sehr dem Treuhandverhältnis (sog. *trust*) ähnelt. Nach der Einführung dieses neuen wertvollen Rechtsinstitutes werden große Teile des französischen Systems drastisch verändert werden müssen. Hierzu zählen auch die Rechtsgebiete, die wie das Erbrecht nur mittelbar betroffen sind. Ein Perspektivenwechsel ist somit eingetreten: Von der bis zum heutigen Tage geteilten Idee, dass man von fundamentalen Grundsätzen des Rechts nur in äußerst speziellen und außergewöhnlichen Situationen abweichen kann, bis hin zu der Erkenntnis ihrer eigentlichen Herabstufung auf den Status einfachgesetzlicher Regeln. Bei einem Vergleich der neuen Regeln im Bezug auf die *fiducie* mit den italienischen Ersatzinstrumenten der Treuhandverhältnisse (sog. *trust*) wird ziemlich deutlich, dass sich ein solch wichtiger Modernisierungsprozess in dem italienischen Recht noch entwickeln muss, wo ein ähnlicher Perspektivenwechsel bis jetzt ausgeblieben ist.

1. Introduction

In Italy, there are still today no exhaustive systematic rules on trusts. Instead, aspects of the trust as developed in common-law jurisdictions give rise to considerable practical difficulties, since they conflict with a number of general principles and rules of the Italian legal system.

The only relevant legislation in existence is that arising out of The Hague Convention of 1 July 1985, ratified in Italy by Law No 364 of 16 October 1989.[2]

[2] S. MAZZAMUTO, 'The Italian law of trust in the aftermath of the Hague Convention', *Europa e diritto privato* 1998, p 781; M. LUPOI, 'La Convenzione de L'Aja sul riconoscimento dei trust e i suoi

According to Art. 2 of the Convention (Art. 3 of Law No 364/89), the term *trust* refers to: 'the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose'.

This set of rules is the only useful indication to anyone wishing to use the trust in the Italian legal system.[3] However, such indications stem from the wording of an international convention that aims at facilitating the implementation and recognition of an institute originally conceived and elaborated in the common law. Such features are thus foreign in nature to the Italian system and explicitly contrary to some linchpin tenets of the civil law tradition, including the general principle of the liability of the debtor, the conception of property as an absolute right and the limited number of rights *in rem,* the prohibition of succession agreements.

That is why, along with the ratification of the Hague Convention, some civil law systems have adopted domestic rules tailored to creating a more organic and hospitable environment to the trust.[4] Some other, as Italy and France, are still in the process of finding a compromise, at the domestic level, between the widely perceived opportunity to broader utilize trusts and their will to preserve fundamental principles of private law. Although the intent is similar, different tools have been selected, as the Italian system is trying to provide at least some of the advantages of the trust by introducing *ad hoc* derogations to the afore mentioned principles in specific circumstances. Conversely, the French have gathered sufficient consensus to a more dramatic shift of perspective: towards the creation of a corresponding institute of domestic law (*l'opération fiducie*) that would perform some or all of the valuable functions of a trust.[5]

2. The Hague Convention and the Introduction of the Trust in Italy

The Hague Convention is entitled ' . . . on the law applicable to trusts and on their recognition' and this itself circumscribes the convention's scope: it deals with the choice of the applicable law and with rules on the recognition of trusts; it does not codify rules on trusts within the Italian legal system.

A trust is governed by the law chosen by the settlor (Art. 6).[6] The choice must be express or implied in the terms of the instrument creating or the writing

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effetti sul diritto italiano', in V. Rizzo (ed), *Diritto privato comunitario*, Edizioni scientifiche italiane, Naples 1997.

[3] M. LUPOI, 'I trust nel diritto civile', in R. Sacco (ed), *Trattato di diritto civile*, Turin 2004; A. BERLINGUER & D. PAPPADÀ, 'Trust e finanziamento di impresa', in A. Berlinguer (ed) *Finanziamento e internazionalizzazione di impresa*, Giappichelli, Turin 2007.

[4] See *infra,* para. 3.6

[5] See *infra,* para. 4.

[6] In particular that law governs: (a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee; (b) the rights and duties of trustees among themselves; (c) the right of trustees to delegate in whole or in part the discharge of their duties

evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case. Where the law chosen does not provide for trusts or the category of trust involved, the choice will not be effective and the trust will be governed by the law with which it is most closely connected, reference being made in particular to (Art. 7): (a) the place of administration of the trust designated by the settlor; (b) the *situs* of the assets of the trust; (c) the place of residence or business of the trustee; (d) the objects of the trust and the places where they are to be fulfilled.

Since the settlor can never choose Italian law as the applicable law - for if he did his choice would be ineffective -, trusts are governed in the Italian legal system by the applicable foreign law. Art. 11 of the Convention provides in fact that a trust created in accordance with such law is to be recognized as a trust. Such recognition implies, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.

Where there are actual foreign elements, there is no question: the trust is governed entirely by foreign law. The situation becomes more difficult where, in contrast, in lack of foreign elements, a foreign law is chosen. Art. 13 of the Convention provides, in fact, that no State is bound to recognize a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.

In any case, the Convention (Art. 15) does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those cannot be derogated from by voluntary act.[7]

2.1 Domestic Rules Conflicting with the Trust

As we know, the foundation of the institute of the trust is the confidence that the settlor places in the trustee.[8] This confidence is the basic principle holding the trust

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or the exercise of their powers; (d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets; (e) the powers of investment of trustees; (f) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust; (g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries; (h) the variation or termination of the trust; (i) the distribution of the trust assets; (j) the duty of trustees to account for their administration.

[7] In particular when such provisions relate to the following matters: (a) the protection of minors and incapable parties; (b) the personal and proprietary effects of marriage; (c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives; (d) the transfer of title to property and security interests in property; (e) the protection of creditors in matters of insolvency, and (f) the protection, in other respects, of third parties acting in good faith. If recognition of a trust is prevented by application of such provisions, the court is to try to give effect to the objects of the trust by other means.

[8] Arthur Underhill, in a definition that has received judicial approval (Green v Russel [1959] 2 QB 226, per Rower LJ p 241), defines the trust as, '*an equitable obligation, binding a person (who is called a*

deed, by which the settlor, the trustee and possibly a third party guarantor (*protector*) constitute the trust, define their respective roles, choose the applicable law and effect the transfer and the separation of the assets and rights vested in the trustee or defer that disposition to a subsequent act (*vesting deed*).[9]

The trust deed, to which the Hague Convention is applicable, is governed by the law chosen by the settlor. It does not constitute a legal entity in its own right, (as, for instance, a foundation does), but simply creates a separate asset which may be relied upon as against third parties, in particular personal creditors of the trustee and his heirs.[10]

In essence, the combination of two acts (*act vesting property* and the *trust deed*) gives rise to an - overall - unitary phenomenon which has two salient characteristics: the separation of the property within the assets of their formal owner and the fiduciary obligations necessary to dispose of that property in accordance with the constraints imposed upon it. Those two aspects are inseparably and harmoniously conjoined in the trust. The property is subject to a static constraint such that it is insulated from events affecting the assets of the owner and to a dynamic constraint designed to tie the property to a specified purpose. Thus, the formal owner of the property (the owner *at law*) enters into a fiduciary obligation whereby he may dispose of that property only in order to attain a predetermined purpose.[11]

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trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust*), of whom he may himself be one, and one of whom may enforce the obligation*'. D.J. HAYTON, *Underhill – Hayton: Law of trust and trustees*, Butterworths LexisNexis, London 1989.

9 D.J. HAYTON, *Underhill – Hayton: Law of trust and trustees*, Butterworths LexisNexis, London 2003; J.G. RIDDAL, *The law of trusts*, Butterworths LexisNexis, London 2002; J. LEWIN, *On trusts*, Sweet & Maxwell, London 2000; Underhill e Hayton (eds), *Law relating to trusts and trustees*, Butterworths LexisNexis, London 1995; D.J. HAYTON & MARSHALL, *Cases and Commentary on the law of trusts*, Sweet & Maxwell, London 1991; J.H. BAKER, *An introduction to English Legal History*, LexisNexis, London 1990; P. MATTHEWS, 'La collocazione del *trust* nel sistema legale: contratto o proprietà?', *Trusts e attività fiduciarie* 2004, p 522; F. DI CIOMMO, 'Struttura causale del negozio di trust ed ammissibilità del trust interno', *Trusts e attività fiduciarie* 2003, p 178; G. DE NOVA, 'Trust: negozio istitutivo e negozi dispositivi', *Trusts e attività fiduciarie* 2000, p 162.

10 P. ROTONDO & E. SENINI, 'Impignorabilità dei beni vincolati in trust da parte dei creditori del disponente', *Trusts e attività fiduciarie* 2005, p 181; G. TUCCI, 'Trust, concorso dei creditori e azione revocatoria' *Trusts e attività fiduciarie* 2003, p 24. See also the judgment of the Tribunale di Brescia 12 October 2004, *Trusts e attività fiduciarie* 2005 p 83, where it is held 'in a trust, the property placed in the fund is separated; it belongs to neither the settlor nor the trustee; it is therefore removed from, and cannot be attacked by, the creditors of either'.

11 D. HAYTON, 'The difficulties in impeaching trustee's exercise of discretionary functions', *Trust e attività fiduciarie* 2002, p 497; D.M. WATERS, 'The nature of the trust beneficiary's interest', 45 *Canadian Bar rev.* 1967, p 217. In Italy see P. PANICO, 'La funzione del trustee in Italia', in M. Dogliotti & A. Braun (eds), *Il trust nel diritto delle persone e della famiglia*, Giuffrè, Milan 2003; E. CORSO, 'I doveri del trustee nell'amministrazione del patrimonio fiduciario', in A. d'Angelo (ed.), *Amministratori fiduciari: di chi*, Giuffrè, Milan 2001.

Given the foregoing, it is well known that the aforementioned characteristics of the trust conflict with a number of Italian principles and legal rules which are regarded as not being susceptible of derogation. In particular, the segregation of the property and rights in the assets of the trustee is contrary to the general principle of the liability of the debtor set forth in article 2740 of Civil Code.[12] The trust also conflicts with article 458 of the Civil Code, on the prohibition of succession agreements although no formal agreement is signed between the settlor and the beneficiary.[13] Lastly, the limited number of rights *in rem* and of acts subject to transcription would preclude the possibility to render the trust effective towards third parties.[14]

Such obstacles may be overcome only by virtue of the application of the Hague Convention (and implementing Law No 364 of 16 October 1989), as mentioned. However, problems arise in the case of a purely internal trust governed by foreign law, given that, in such case, it may not be possible to derogate from mandatory rules of domestic law.

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[12] Civil Code, Art. 2740 *Liability affecting one's own property*. 'The debtor is liable with all his present and future property for the performance of his obligations. Limitations upon such liability are not allowed except in the cases set forth by the law'. *The Italian Civil Code*, translated by Beltramo, Longo, Oceana Publications, Inc. Dobbs Ferry, N.Y., Merryman, 2005. *Ex multis,* see P. MANES, '*Trust* e Art. 2740 c.c.: un problema finalmente risolto', *Contratto e impresa* 2002, p. 570; A. GAMBARO, 'Un argomento a due gobbe in tema di trascrizioni del *trustee* in base alla XV Convenzione de L'Aja', *Rivista di diritto civile* 2002, p 919, and 'Notarella in tema di trascrizione degli acquisti immobiliari del *trustee* ai sensi della XV Convenzione de L'Aja', *Rivista di diritto civile* 2002, p 257; F. GAZZONI, 'Il cammello, il leone, il fanciullo e la trascrizione del *trust*', *Rivista del notariato* 2002, p 1107, 'In Italia tutto è permesso, anche quel che è vietato (Lettera aperta a Maurizio Lupoi sul *trust* e su altre bagattelle)', *Rivista del notariato* 2001, p 1247, and 'Tentativo dell'impossibile (osservazioni di un giurista 'non vivente' su *trust* e trascrizione)', *Rivista del notariato* 2001, p 11; M. LUPOI, 'Lettera ad un notaio conoscitore di *trust*', *Rivista del notariato* 2001, p 1159*;* C. CASTRONOVO, 'Il *trust* e 'sostiene Lupoi'', *Europa e diritto privato* 1998, pp. 448-449. Tribunale di Belluno, 25 September 2002, *Trusts e attività fiduciarie* 2003, p 255; Tribunale di Santa Maria Capua Vetere, 14 July 1999, *Trusts e attività fiduciarie* 2000, p 251. In favour of allowing a domestic trust: Tribunale di Firenze, 2 July 2005, *Trusts e attività fiduciarie* 2006, p 89; Tribunale di Bologna, 1 October 2003, *Trusts e attività fiduciarie* 2004, p 67; Tribunale di Brescia, 12 October 2004, *Trusts e attività fiduciarie* 2005 p 83; Tribunale di Pisa, 22 December 2001, *Trusts e attività fiduciarie* 2002, p 241, up to the first ruling of the Tribunale di Lucca, 23 September 1997, *Foro Italiano* 1997, 2007. The position of the Tribunale di Velletri, 29 June 2005, *Trusts e attività fiduciarie* 2005, p 577, is odd in that it that denies the application of the Hague Convention to a domestic trust but admits the institution of a domestic trust as an 'atypical transaction worthy of protection considering the merit of the interest pursued within the meaning of arts 1322-1324 of the Civil Code'.

[13] Civil Code, Art. 458 *Prohibition of succession agreements.* 'Except for the provision of arts 768 *bis ff.*, any agreement by which one disposes of his own succession is void. Any act by which a person disposes of rights that can belong to him by a succession not yet opened, or renounces such rights, is equally void'.

[14] Civil Code, Art. 2645 *Other acts subject to transcription*. 'Any other act or provision that produces any of the effects of the contracts mentioned in Art. 2643, except when the law provides that transcription is not required or is required for different purposes'.

3. Italian Law Institutes that Resemble the Trust: The *Pactum Fiduciae*

Given the above, even the Italian legal system, grounded, as it is, on the Roman law tradition, provides for institutes founded on confidence (*fiducia*), although this latter concept has lost its original discretionary nature and taken on a form endorsed by the law.

Thus the Italian legal system provides for the so-called *negozio fiduciario*, which can be traced back to the Roman law *fiducia*, whereby the 'settlor' may transfer ownership of property to the fiduciary while compelling him to administer the property and transfer it either back to the 'settlor' or to a third party chosen by him.[15] The property is therefore encumbered with a legal obligation which is effective only *inter partes* in accordance with the general provision of article 1372 of the Civil Code.[16] Acquisitions made by third parties, whether acting *bona fide* or *mala fide*, will therefore not be affected, although they may give rise to a possible obligation to pay damages under article 2043 of the Civil Code where there was participation in the fiduciary's breach.[17] The *pactum fiduciae* may also provide that the obligation to transfer the property back should cover not only the property to which the agreement relates but also other property arising as a result of its administration.

In any event, the vesting deed cannot be categorized as a sale or a gift connected with the fiduciary agreement but as a transaction characterized by an external cause, conferred by the *pactum fiduciae*, by which the fiduciary undertakes to acquire, manage, and, where appropriate, re-transfer the goods.[18]

In sum, the *pactum fiduciae* is a legal institute grounded on *confidence* in which the property is not subject to any constraint of purpose effective against third parties: it therefore lacks the typical effect of the trust, that is, the segregation of the property within the assets of their owner.[19]

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[15] See, for example, L. SANTORO, *Il negozio fiduciario*, Giappichelli, Turin 2002.

[16] Civil Code, Art. 1372 *Effect of contract*. 'A contract has the force of law between the parties. It cannot be dissolved except by mutual consent or by a cause permitted by law. A contract does not produce effects with respect to third parties except in cases provided by law'. In the case of immovables, it will be possible, however, to transcribe, under Art. 2652 paragraph 1,2 of the Civil Code, the request for specific performance of the obligation to contract (under Art. 2932 of the Civil Code).

[17] Civil Code, Art. 2043 *Compensation for unlawful act.* 'Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages'.

[18] Consequently, neither is it possible to utilize the concept of a contract with obligations binding on the offeror only (Art. 1333 of the Civil Code) with an option on the part of the offeree to refuse it. The *pactum* does not constitute an act contrary to the transfer transaction and hence may be proved by testimony (under Art. 2722 of the Civil Code), but where the transfer is a conveyance of immovables, the *pactum,* too, must be in writing (Art. 1350 of the Civil Code).

[19] A slightly different scenario is that of the so-called *fiducia germanistica* in which the fiduciary may hold shares which, albeit bearing the name of the letter, remain, in the absence of a substantive act of transfer, the property of the settlor. In this case, it is clear that the confidence reposed confers on a person the entitlement to exercise a right which, however, is not transferred, remains in the hands of the settlor and is subject to no form of segregation. F. GAZZONI, *Manuale di diritto privato*, Edizioni Scientifiche italiane, Naples 2003.

3.1 The Mandate without Representation

Another legal institute, the mandate without representation (*mandato senza rappresentanza*) has effects in terms of segregation.[20] As provided by article 1707 of the Civil Code, the mandatory's creditors cannot enforce their rights on property acquired by the mandatory in his own name in carrying out the mandate provided, in the case of movables (Art. 1707, para. 1), that the mandate is evidenced by a writing bearing a certain date prior to the attachment of the property. This is because that property is only *temporarily* within the legal sphere of the mandatory, since the principal is entitled to bring an action *in rem* for its recovery: it is therefore considered that an automatic transfer occurs for the benefit of the principal. In any event, only rights acquired by third parties on account of *bona fide* possession are unaffected.

In the case of immovable's, the mandatory is bound to transfer them to the principal (Civil Code, Art. 1706, para. 2) but the agreement can be relied on as against the mandatory's creditors only if the act of transfer or the judicial claim pursuing it is registered before the property is attached.[21] Consequently, the segregation effect is much weaker and in any case there is no fiduciary obligation similar to the obligations which characterize a trust.

3.2 The Patrimonial Fund

There are instruments provided for by Italian legislation for the planning and disposal of one's estate in order to satisfy the requirements of family life and by way of succession. These include the patrimonial fund (*fondo patrimoniale*), the fiduciary substitution (*sostituzione fidecommissaria*), the testamentary executor (*esecutore testamentario*) and the acceptance of inheritance with the benefit of inventory (*accettazione con beneficio di inventario*).

The patrimonial fund (*fondo patrimoniale*) provided by article 167 of the Civil Code,[22] constitutes tied assets intended to meet the needs of the

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[20] See, among many, A. LUMINOSO, *Il mandato*, Utet, Turin 2000; V. PETRELLA, 'Mandato', in V. Cuffaro (ed), *I contratti*, Ipsoa, Milan 2005, pp. 607-635; F. ALCARO & R. TOMMASINI, *Mandato, fiducia e trust: esperienze a confronto*, Giuffrè, Milan 2003.

[21] Civil Code, Art. 1706 *Purchase by mandatory*. 'The principal can claim movables acquired for his account by the mandatory who has acted in his own name, without prejudice to the rights of third persons as a result of good faith possession. If the things acquired by the mandatory consist of immovables or movables inscribed in public registers, the mandatory is under an obligation to transfer such things to the principal. In case of non performance, the provisions relating to the enforcement of the obligation to enter into a contract apply'.

[22] Civil Code, Art. 167 *Constitution of a patrimonial fund*. 'Each spouse or both, by public act or a third party, even by will, can constitute a patrimonial fund destining specified property, whether immovable property or movable property inscribed in public registers or negotiable instruments, to meet the needs of the family. The constitution of patrimonial fund by an act *inter vivos*, made by a third party, is perfected by the acceptance of the spouses. The acceptance can be made by a subsequent public act. The constitution can be made even during the marriage. Negotiable instruments shall be

family through the income yielded by those assets (Civil Code, Art. 168, para. 2).[23]

Such a fund is set up by a married couple, separately or jointly, or by a third party. It may be constituted *inter vivos* or, in the case of a third party, also by will.[24] Unless the act constituting the fund expressly provides otherwise, the assets constituting the patrimonial fund cannot be alienated or mortgaged, or pledged or encumbered in any way except with the consent of both spouses and, if there are minor children, with the leave of the court, which is granted only in cases of necessity or evident usefulness (Civil Code, Art. 169).[25] Execution cannot be levied on the fund assets or its income for debts which the creditor knew to have been contracted for purposes other than the needs of the family (Civil Code, Art. 170).[26] The purpose of the fund comes to an end following the annulment of the marriage or divorce or, if there are no minor children, in the cases provided for in article 191 of the Civil Code with reference to the dissolution of the community of property.[27] Voluntary dissolution of the fund is also possible, at least if there are no minor children. If there are minor children, the fund continues in being until the last child attains the age of majority.

Obviously, here the assets are subject to a tied purpose and benefit of a certain degree of protection, but there is no effective fiduciary obligation to attain the predetermined aim.

3.3 The Fiduciary Substitution

Another instrument often akin to the trust is the fiduciary substitution (*sostituzione fidecommissaria*) as governed by article 692 of the Civil Code.[28] Fiduciary

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subjected to a lien by being converted into instruments in registered form with a notation of the lien in another adequate manner'.

[23] Civil Code, Art. 168 *Use and administration of the fund.* '[. . .] The fruits of the property constituting the patrimonial fund are used for the needs as regulated by the rules relating to the administration of common ownership'.

[24] P.G. DEMARCHI, *Fondo patrimoniale*, Giuffrè, Milan 2005; M. DOGLIOTTI, 'Il fondo patrimoniale', in M. Dogliotti e M. Sesta (eds), *Il diritto di famiglia*, Giappichelli, Turin 1999, pp. 575-596; T. AULETTA, *Il fondo patrimoniale*, Giuffrè, Milan 1992.

[25] Civil Code, Art. 169 *Alienation of property in the fund.* 'Unless expressly consented to in the act of constitution, the property in the patrimonial fund cannot be alienated or mortgaged, pledged or however encumbered except with the consent of both spouses and, if there are a minor children, with the authorization granted by the court , by a provision issued in chambers, only in cases of necessity or evident usefulness'.

[26] Civil Code, Art. 170 *Execution on property fund.* 'Execution on property in the fund and on its fruit cannot be levied for debts which the creditor knew to have been contracted for purposes other than the needs of the family'.

[27] Civil Code, Art. 191 *Dissolution of common ownership.*

[28] Civil Code, Art. 692 *Fiduciary substitution.* 'Each of the parents or of the other ascendants in the direct line or the spouse of an interdicted person can institute as heir respectively the child, descendant or spouse with the obligation to conserve and on his death to transfer the property,

substitution operates in relation to an interdicted person who is the testator's child, descendent or spouse and in favour of or the institution which has taken the care of such interdicted.[29] On the death of the interdicted person, the substitute succeeds directly to the testator. The law extends this treatment also to a minor who is in a condition of habitual mental infirmity, but only if the order of interdiction is given within two years of the day on which the minor attains the age of majority. During the substitution, the interdicted has only the enjoyment and unrestricted administration of the property and the right to represent the estate in legal proceedings, so much so that some of the rules relating to usufruct apply to him (Civil Code, Art. 693).[30] The instituted heir may also sell the property or mortgage it only where it is manifestly useful to do so and provided leave is obtained from the court. The interdicted's creditors may proceed only against the income of the property subject to substitution. It is therefore usual to speak of temporary or rescindable property: this is because the property is subject to a tied purpose which will be operative only if the interdiction is pronounced definitively and not revoked. In contrast, this institute lacks any fiduciary obligation to attain the predetermined purpose.

3.4 The Testamentary Executor and the Acceptance of an Inheritance with the Benefit of Inventory

A different case is that of the testamentary executor (*esecutore testamentario*) (Civil Code, Art. 700),[31] who, in common-law jurisdictions, often has the capacity of a trustee. This is where the testator appoints a person in his last will and testament

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even if constituting the forced share, in favour of the person or the institution that, under the vigilance of the guardian, have taken care of the said interdicted person. The same applies in the case of a minor, if he is in condition of habitual mental infirmity such as allows the presumption that a judgment declaring interdiction will be rendered within the period set forth in Art. 416. If there are more than one of the persons or institutions referred to in the first paragraph, the property is attributed proportionately to the time during which they have taken care of the interdicted person. The substitution is without effect in cases in which interdiction has been denied or the related proceedings are not initiated within two years from the day on which the minor habitually mentally infirm attains majority. It is likewise without effect in the case of revocation of interdiction or in regard to persons or institution that had violated their duties of support. In every other case a substitution is void'.

[29] See for all, G. AZZARITI, 'La sostituzione fedecommissaria', in P. Rescigno (ed), *Trattato di diritto privato,* Utet, Turin 1997, pp. 333-349.

[30] Civil Code, Art. 693 *Rights and obligations of instituted heir*. 'The instituted heir has the enjoyment and unrestricted administration of the property subject to substitution and can bring all actions concerning such property. He can also make any changes directed toward better utilization of the property. The rules applicable to the usufructuary extend, so far as applicable to the instituted heir'.

[31] Civil Code, Art. 700 *Power of appointment and substitution*. 'The testator can appoint one or more testamentary executors and, in case some or all will not or cannot accept, one or more others as substitutes for them. If more than one testamentary executor has been appointed, they shall act jointly, unless the testator has divided their functions among them or urgent provision for the conservation of property or rights of inheritance are involved. The testator can authorize the testamentary executor to substitute others for himself whenever he cannot continue in that capacity'.

to ensure that his wishes are correctly carried out. Such person administers the estate for a period not exceeding one year from the opening of the succession, after applying to the heirs for possession of the property.[32] The estate is administered in the executor's name but the administration has direct effects on the property making up the estate. A court's leave is necessary in order to carry out acts of extraordinary administration. The executor can also sell property and divide the proceeds up among the heirs, pay out legacies and set up foundations. The acts of the executor do not prevent the heir from renouncing his inheritance or from accepting it with the benefit of inventory (Civil Code, Art. 703(5)).[33]

In that case, the executor enters into possession of the property and can perform acts of ordinary or extraordinary administration (under the court's supervision). There is therefore no segregation of the property within the executor's assets since he never becomes the owner of the property.

Lastly, the trust has, in certain cases, been likened to acceptance of an inheritance with the benefit of inventory (*accettazione con beneficio di inventario*). Such institute is provided for in order to avoid the hazards attached to acquiring the capacity of heir, since the heir's liability will then be limited to the value of the deceased's assets.[34] Once the inventory has been completed the deceased's assets remain separate from those of the heir (Civil Code, Art. 490),[35] although it is not possible in every case to consider that there is a genuine effect of segregation of goods because the deceased's assets do not in fact become part of the heir's assets.

3.5 Assets Earmarked for a Specified Business Transaction

Recently, on the occasion of the wider reform of substantive and procedural company law,[36] the Italian legislature introduced a new device which is more reminiscent of

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[32] *Inter alios*, see V. CUFFARO, 'Gli esecutori testamentari', in P. Rescigno (ed), *Trattato di diritto privato,* Utet, Turin 1997, pp. 351-388.

[33] Civil Code, Art. 703 *Functions of the testamentary executor*. '[. . .] No act of the testamentary executor shall prejudice the right of the person called to renounce the inheritance or to accept it with benefit of inventory'.

[34] A. PALAZZO, *Le successioni*, Giuffrè, Milan 2000; P. LOREFICE, 'L'accettazione con beneficio di inventario', in P. Rescigno (ed), *Successioni e donazioni*, Cedam, Padua 1994, pp. 269-306.

[35] Civil Code, Art. 490 *Effects of benefit of inventory*. 'The effects of benefit of inventory consist in keeping the patrimony of the deceased distinct from that of the heir. Consequently: 1) the heir retains all the rights and obligations that he had against the deceased in the inheritance, including those that are extinguished by the death; 2) the heir is not bound to payment of inherited debts beyond the value of the property received; 3) the creditors of the inheritance and the legatees have preference in the heritable patrimony over the creditors of the heir. However they are not relieved from demanding the separation of property, according to the provisions of the next chapter, if they wish to conserve this preference even in case the heir forfeits the benefit of inventory or renounces it'.

[36] That reform took place as a result of Legislative Decrees Nos 5 and 6 of 17 January 2003. F. GALGANO, *Il nuovo diritto societario*, Cedam, Padua 2006; D. SANTOSUOSSO, *Il nuovo diritto societario: i principi della legge delega e le linee guida della riforma: decreti legislativi 5 e 6 del 2003*, Giuffrè, Milan 2003; *La riforma delle società*, M. Sandulli and V. Santoro (eds), Giappichelli, Turin 2003.

some characteristics of the trust: Civil Code, article 2477-*bis* '*Allocation of dedicated assets to specified business activities*'.[37]

As a result of this innovation, a company can dedicate part of its assets to the performance of a specific operation or can tie the earnings yielded by a specific business activity to the repayment of the funding received for that purpose. By this means, a company limited by shares may, without forming a separate company for the purpose, allocate a limited portion of its patrimony *exclusively to a specified business activity*, within the limit of 10 per cent of its own net assets (Art. 2447-*bis*(1)(a) and (2)). The consequence is that: (a) the liability of the company incurred in relation to the specific business activity is limited to the pool of business assets allocated to such activity to the exclusion of its other assets (Art. 2447-*quinquies*, para. 3);[38] (b) the assets dedicated to the specified business activity and the proceeds and income arising therefrom do not have to answer for the company's liabilities (Art. 2447-*quinquies,* para. 1).[39]

It should be noted that, whereas effect (b) is constant in relation to the dedicated assets, effect (a) can be excluded by providing expressly that the company will have unlimited liability in respect of the specified business activity (Art. 2447-*septies,* para. 4). In any case, provision (a) is effective only *vis-à-vis* creditors who are aware of the fact that the assets are tied to a particular purpose.

The precondition for the limitation of liability is that acts performed in relation to the specified business activity must expressly refer to the fact that the assets are tied to a particular purpose, because in the absence of such express reference, the company is liable without limitation for the obligations arising out of that business activity; furthermore, the liability of the company is always unlimited *vis-à-vis* involuntary creditors whose claims arise as a result of an unlawful act of the company even

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[37] Civil Code, Art. 2477-*bis Allocation of dedicated assets to specified business activities*. 'The company may: a) create one or more pools of business assets each of which is allocated in priority and exclusively to a specified business activity; b) agree in any agreement relating to the financing of a specified business activity shall be allocated in priority to repayment of all or any part of such financing. Except to the extent provided for under special law, dedicated assets constituted pursuant to a) above cannot be established in an agreement amount exceeding 10 per cent of the company's net assets and in any case cannot be established for the exercise of businesses pertaining to activities reserved by special laws'.

[38] Civil Code, Art. 2447-*quinquies Creditors' rights*. '[. . .] Except as provided otherwise in the resolution made pursuant to Art. 2447-*ter*, the liability of the company for the liabilities incurred in relations to the specified business activity is limited to the pool of business assets allocated to such activity. Notwithstanding the foregoing, the company shall in all events be liable without limitation for its unlawful acts'.

[39] Effect (a) brings the advantage of diversifying the risk attaching to the specified business activity; effect (b) makes it possible to tie the separated assets solely to the financial guarantee afforded by those who have lend to the company in relation to the specified business activity, thus making it unnecessary for the company to have recourse to traditional real or personal security.

if performed in pursuance of the specified business activity (Art. 2447-*quinquies,* para. 3).[40]

The assets are dedicated to the specified business activity by a resolution to that effect (Art. 2447-*ter*),[41] which must be deposited and registered in the companies register.[42] Once the specified business activity has been completed or becomes impossible to pursue or in the event that another reason for liquidating the assets tied in accordance with the resolution supervenes, a final report has to be prepared and deposited with the register of enterprises (Art. 2447-*novies*, para. 1).[43]

More specifically investors-oriented is the form of assets segregation created by an agreement between a company and an external financier which provides that all or part of the cash flows generated by the specified business activity are be allocated to the repayment of the financing (Art. 2447-*bis*, para. 1 (b), Art. 2447-*decies*).[44] In such

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[40] From this point of view, the greater flexibility of the separation of assets emerges as compared with the technique of forming a separate company for the purpose, not only on account of the economies in terms of organization for the company, but also because it enables detrimental effects on third parties which are attendant automatically upon the formation of a new company to be obviated. In particular, the device resulting from the reform is apt to afford better protection for involuntary creditors, which would suffer if the different technique of setting up a controlled company were to be used.

[41] Civil Code, art 2447-*ter Resolution constituting a dedicated asset*. 'The resolution by which a pool of business assets is allocated to a specified business activity, pursuant to letter a) first paragraph of Art. 2447-*bis*, shall set out: a) the business activity to which a pool of business assets is to be dedicated; b) the rights and assets comprised in such pool of business assets; c) an economic/financial plan demonstrating the suitability of the pool of business assets for the purpose of undertaking the business activity, the framework and the rules for their exploitation, the objectives to be achieved and any guarantees offered to third parties; d) any contributions to be made to third parties, and frameworks for the control on the management of allocation of profits and losses arising from the business activity; e) any issue of financial instruments for investing in the specific business activity, specifying the rights attached to such instruments; f) the appointment of any auditing firm for the auditing on the performance of the specific business activity when the company is not already subject to audit by an auditing firm and issues financial instruments related to the dedicated assets widely distributed among the public and offered to non professional investors; g) the reporting requirements applicable to the specified business activity. Except as otherwise provided in the by-laws, the resolution referred to in this article shall be adopted by the management board by an absolute majority of its members [. . .]'.

[42] Such resolution becomes effective if, within sixty days of registration, the company's creditors who were creditors before the registration of the resolution do not lodge an objection with the court (Civil Code Art. 2447-*quater Publicity for the creation of dedicated assets*).

[43] Civil Code Art. 2447-*novies Final report*. '[. . .] If there are still obligations which are not fully discharged, it is possible to request the liquidation of the business assets in accordance with the provisions on the liquidation of companies to the extent that they are compatible therewith'. F. GALGANO, *Diritto commerciale. Le società*, Zanichelli, Bologna 2005.

[44] Civil Code, Art. 2447-*decies Financing allocated to a specified business activity*. 'Any agreement relating to the financing of a specified business activity pursuant to letter b) of the first paragraph of Art. 2447-*bis*, may provide that all or part of the cash flows generated from that specified business activity shall be exclusively destined to the repayment of all or any part of such financing. [. . .] The revenues of the transaction shall constitute assets segregated from the other assets of the company, and from the assets relating to other financings entered into in accordance with the provisions of this

case, the separate assets segregated consist of the revenues of the transaction (Art. 2447 *decies*, para. 3), but a copy of the agreement must be filed with the register of enterprises and the company must adopt collection and accounting systems such that the revenues of the business activity may be separately identified at all times and held separately from the company's other assets (Art. 2447-*decies*, para. 3). The consequences are twofold: (a) the company's creditors, other than the financier, are not entitled to claim against the revenues and proceeds of the investments made pending repayment to the lender and (b) the financier's security is limited to the proceeds, fruits and investments and the financier is not entitled to claim against the remaining company assets (Art. 2447-*decies*, para. 4), except where the company becomes insolvent before the business is completed (Art. 2447-*decies*, para. 6).

The crux of the institution of *dedicated assets* is therefore the fact that the constraint of destination may be relied upon as against third parties, together with the rules on liability for the obligations entered into in order to realize the specified business activity for which the dedicated assets are intended. In essence, a joint-stock company may derogate from the general principle of universal financial liability laid down in article 2740 of the Civil Code so to create a specified kind of responsibility, because the separated assets may be claimed only by the privileged creditors. A degree of functional equivalence between this new device and the common-law trust is clear; indeed, the trust was expressly mentioned in the preparatory works of the legislative reform and also looked at as a model for any further application and development.[45] In particular, what is similar to the trust is fact that the tied destination of the assets may be relied on as against third parties, together with the resultant segregation of those assets.

3.6 Recent Developments: Moving Towards Domestic Rules on Trusts?

In the last few months,[46] the legislature has introduced in the Civil Code a new article 2645-*ter*. This new provision introduces an institute somewhat similar to the trust which allows for the transcription of 'dispositive acts' and makes the tie imposed on the destination of property capable of being relied on as against third parties.[47]

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article, provided that: a) a copy of the agreement is deposited with the register of enterprises; b) the company adopts collections and accounting system such that the revenues of the business activity may be separately identified at all times and are held separately from the other company's assets. [. . .] The insolvency of the company prevents the completion or the continuance of the transaction, the limitation set out in the above paragraph shall cease to apply and the lender will be able to claim in the insolvency for the amount owned to it less the amounts referred to in the third and fourth paragraph above [. . .]'.

[45] A. ZOPPINI, 'Appunti sul patrimonio separato della società per azioni' in A. Berlinguer (ed), *Finanziamento e internazionalizzazione di impresa*, Giappichelli, Turin 2007.

[46] Law No 51/2006 published in the *Gazzetta Ufficiale* of 28 February 2006.

[47] Civil Code, Art. 2645-*ter Transcription of acts of destination for the realization of interests worthy of protection referable to persons under a disability, public administrations or other bodies or natural*

At first sight, it seems a considerable innovation in the Italian legal system.[48] However, it is not clear whether the legislature intended to refer only to the case where a trustee declares himself to hold property on trust (where the settlor and the trustee are the same person), because article 2645-*ter* of the Civil Code seems to exclude the translative activity typical of the trust.[49] That is why some commentators have argued that the act of destination contemplated by the new provisions is just a fragment of a trust, since it lacks a number of ingredients of the trust, including the fiduciary obligations.[50] In the absence of a concomitant obligatory relationship, the act of destination is thus far removed from a trust and resembles the patrimonial fund.[51]

The first judicial ruling on article 2645-*ter* of the Civil Code held that the provision did not open the way to introducing Italian rules on trusts.[52] It was held that the article merely regulates the effects of specific acts (destination acts) and does not give rise to a new legal institute.

In any event, there are additional differences between a trust and a destination agreement within the meaning of article 2645-*ter* of the Civil Code in point of form, duration and the property which may be disposed of.[53] As regards the

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persons 'Acts resulting from public acts, by which immovable or movable property inscribed in public registers are allocated, for a period not exceeding ninety years or for the lifetime of the natural person who is the beneficiary, for the realization of interests worthy of protection referable to persons under a disability, public administrations or other bodies or natural persons within the meaning of Art. 1322 (2) may be transcribed in order that the constraint of purpose may be relied on as against third parties; the following, in addition to the contributor, may act for purposes of the realization of such interests: any other interested party also during the life of such contributor. The property conferred and its fruits allocated may be used solely for the accomplishment of the purpose and may be made the subject of execution, except for as provided in Art. 2915(1), only for the debts contracted for that aim'.

[48] Another innovation is the new legal institute called the family pact (*patto di famiglia*) as introduced by Law No. 55/2006 published in the *Gazzetta Ufficiale* of 1 March 2006 and provided for in the new Chapter V-*bis* (Arts 768-*bis* to 768-*octies*) of the Civil Code. A family agreement is a contract by which, compatibly with the provisions on family businesses and while respecting the different forms of companies, an entrepreneur transfers, in whole or in part, the business and the holder of participations in a company transfers, in whole or in part, his holdings to one or more descendants. In essence, the entrepreneur or the stockholder may decide in his lifetime which descendants should succeed to his business or shareholding. The purpose of this new legal institute is to guarantee the transfer of business activity during the owner's lifetime while preserving its stability and proper management.

[49] Disagrees on this G. DE NOVA, *Esegesi dell'Art. 2645 ter cod. civ.*, Milan, Notary Council, 19 June 2006.

[50] M. LUPOI, 'Gli 'atti di destinazione' nel nuovo Art. 2645-*ter* cod. civ. quale frammento di *trust*', *Trusts e attività fiduciarie* 2006, p 170. Other scholars assert that Art. 2645 *ter* of the Civil Code has nothing to do with trusts. See G. OBERTO, 'Atti di destinazione (Art. 2645 *ter* c.c. e *trust*: analogie e differenze)', *Contratto e impresa/Europa* 2007, I; F. GAZZONI, 'Osservazioni sull'Art. 2645 *ter*', *Giustizia civile* 2006, p 165.

[51] See n. 22, *supra*.

[52] Tribunale di Trieste, 7 April 2006, *Trusts e attività fiduciarie* 2006, p 417.

[53] See G. OBERTO, 'Atti di destinazione (Art. 2645 *ter* c.c. e *trust*: analogie e differenze)', *Contratto e impresa/Europa* 2007, I.

form, a destination act as provided for in article 2645-*ter* of the Civil Code has to be made in the form of an *atto pubblico* (under seal), whereas, in the case of a trust, a distinction has to be made between the document constituting the trust and the vesting deed (where there is not just a single document) in that the former has to be in writing and the latter in the form prescribed by the law indicated by the conflict-of-law rules. As far as the duration is concerned, article 2645-*ter* of the Civil Code provides that the duration cannot be more than ninety years or the life of the natural person who is the beneficiary; the duration of a trust is governed by the law chosen by the settlor (it may range from eighty years to one hundred and fifty years or may even exist in perpetuity, although there is the old rule of English law that a trust is null if a right does not vest within twenty-one years of a life or lives in being).

Lastly, with regard to the property to be disposed of, article 2645-*ter* of the Civil Code refers only to registered immovable or movable property, whereas in the case of a trust any kind of property may be disposed of.

4. Some Comparative Remarks: is France a Step Ahead?

As we have seen in the preceding chapters, large efforts have been made to introduce, in the Italian legal system, institutes that would perform some or all of the peculiar functions of trusts. This is not an isolated phenomenon but a tendency characterizing a growing number of other systems,[54] including Luxembourg,[55] Quebec,[56]

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[54] '[. . .] *Certains pays de tradition romano-germanique parviennent à un résultat equivalent à celui du* trust *avec la pratique, consacrée soit par la jurisprudence, soit par la loi, de la fiducie. On peut noter que l'Ecosse, le Liechtenstein, l'Afrique du Sud, l'Ethiopie, Israël, Puerto Rico, le Japon, ou encore la Russie, ont adopté un équivalent au* trust*, ainsi que – depuis déjà un certain nombre d'annés - plusiers pays d'Amerique du Sud* [. . .]'. P.MARTINI, Proposition de loi instituant la fiducie (8 February 2005, n. 178), French Senate. See also A. GAMBARO and M. GRAZIADEI, 'The case studies (Italy)' in M. Graziadei, U. Mattei & L. Smith (eds), Commercial trusts in European Private law, Cambridge university press, Cambridge 2005, p 156.

[55] Article 5 of law 27 July 2003, concerning trust and fiduciary contracts, defines a fiduciary contract that : '[. . .] *par lequel une personne, le fiduciant, convient avec une autre personne, le fiduciaire, que celui-ci, sous les obligations déterminées par les parties, devient propriétaire de biens formant un patrimoine fiduciaire* [. . .]'. In the Land Registry it is possible to register the title of *fiduciaire* or trustee (Art. 10) because '[. . .] *lorsqu'un acte transfère la propriété, constitue, transfère, modifie ou éteint un droit qui doit être transcrit sur un immeuble inclus dans un patrimoine fiduciaire ou un* trust *relevant de la Convention rélative à la loi applicable au* trust *et à sa reconnaissance, signée à la Haye le 1er juillet ou destiné à intégrer un tel patrimoine fiduciaire ou* trust*, la transcription s'accompagne respectivement de la mention 'fiduciaire' ou '*trustee'[. . .]'.

[56] Articles 1260 et seq. of the Civil Code of Québec define the institute of *fiducie* '[. . .] *un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer* [. . .]'. This Code has been in effect since 1 January 1994; prior to that, in the *Code Civil du Bas-Canada* the *fiducie* was limited to wills and gifts.

Uruguay,[57] China,[58] Republic of San Marino[59] and, lastly, France.

Such tendency is fostered by a number of reasons: EU Institutions have recently proved very pro-active towards trusts, inviting member states to introduce equivalent tools in their legislation.[60] At the global level, the growing competition among regulators for providing a more hospitable environment to investors has pushed even the more conservative to innovate. A fit example of this can be found in the general remarks accompanying the new law on *fiducie* in France,[61] where the importance of introducing the trust in France was explicitly stressed.[62]

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[57] Art. 1 of law 17.703 of 27 October 2003 regulates the '*Fideicomiso*' as '[. . .] *el negocio juridico por medio del cual se constituye la propriedad fiduciaria de un conjunto de derechos de propriedad o otros derechos reales o personales que son trasmittidos por el fideicomitente al fiduciario para que los administer o ejerza de confirmidad con las instrucciones contenidas en fideicomiso, en beneficio de una persona que es designada en el mismo, y la restituya al cumplimiento del plazo o condicio del fideicomitente o la transmita al beneficiario* [. . .]'.

[58] People's Republic of China has introduced since 1 October 2001, a law regulating the trust (PRC Trust Law).

[59] Recently, also the Republic of San Marino has promulgated the law of 17 March 2005 concerning the trust. Art. 2 reads: '[. . .] *si ha un* trust *quando un* trustee *è titolare di beni nell'interesse di uno o più beneficiari, o per uno scopo specifico. Non è incompatibile con l'esistenza di un* trust *la circostanza che il disponente ricopra l'ufficio di* trustee*, oppure si riservi alcune prerogative. Il disponente e il* trustee *possono essere beneficiari del* trust*, ma il* trustee *non può essere l'unico beneficiario del* trust*. Il medesimo atto istitutivo di* trust *può istituire* trust *con beneficiari e* trust *di scopo* [. . .]'. Art. 9 provides for the creation of a '*Registry of Republic of San Marino's* trust'. The notary or, in his absence, the trustee must deposit the deed of trust in this registry subject to a fine of € 2.000.

[60] The European Parliament has adopted (on 15 November 2001) a resolution on the approximation of the civil and commercial law of the Member States in many fields including trusts. See, O. J., 13 June 2002, C140/E541. The European Commission, instead, within the framework of the previous Merger Regulation (4064/89/CE) has published (on 2 May 2003) the '*Best practice guidelines for divestiture commitments in merger cases*' (IP/03/614) which provide a contract-type (the Standard trustee mandate) of trust for company mergers. See also, Council Regulation, n. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters; Regulation (EC) n. 805/2004 of 21 April 2004 creating a European enforcement order for uncontested claims; U. MATTEI, 'Should Europe codify trust?', in P. Birks and A. Pretto (eds), *Themes in Comparative Law. In Honour of Bernard Rudden*, Oxford U.P., Oxford 2002, p 235; D.J. HAYTON, *Principles of European Trust Law*, Kluwer Law International, The Hague Deventer 1999.

[61] Law n. 2007-211 of 19 February 2007. See A.PRÜM, 'L'arrivée annoucée de la fiducie', Revue de droit bancaire et financiet 2007, p.1.

[62] '[. . .] *L'ouverture des frontières a donné lieu à certaines délocalisations d'opérations économiques vers des pays plus attrayants d'un point de vue fiscal ou juridique. Au cours de ces dernières années, en effet, on a pu constater que les entreprises françaises, lorsque le besoin s'en faisait sentir, n'hésitaient pas à utiliser le mécanisme du* trust*, en effectuant, en toute légalité, leurs opérations juridiques dans les États connaissant l'institution. Ces délocalisations ne sont pas souhaitables économiquement, car des richesses quittent la France, parfois exclusivement à cause d'une lacune du système juridique* [. . .]'. Proposition de loi instituant la fiducie, proposée par Mr. Philipe Marini, Senat, 8 February 2005, n.178, session ordinaire 2004-2005.

However, despite any sound and pragmatic intention, it proves very complicated to harmonize the trust with the fundamental features of the civil law tradition.[63] That is why the Italian legislature insists in not mentioning the word trust while it introduces bites of such institute in the system, as it is, despite any contrary indication, the case of the new article 2645-*ter* of the Italian Civil Code. Similarly, the French Minister of Justice speaks about a trust *à la française,* as it should be perfectly compatible with the French law tradition.[64]

Given the foregoing, France has completed its very long and consuming legislative process on trusts, commenced in 1990, when bankers and notaries requested that the trust should become an integral part of the French system.[65] The new article 2011 of the *Code Civil* defines the *fiducie* as «*l'opération par laquelle un ou plusieurs constituants transfèrent des biens, des droits ou des sûretés, ou un ensemble de biens, de droits ou de sûretés, présents ou futurs, à un ou plusieurs fiduciaires qui, les tenant séparés de leur patrimoine propre, agissent dans un but déterminé au profit d'un ou plusieurs bénéficiaires*».[66] The rather a-technical word *opération* was meant to be as broad as possible, given that the *fiducie* can be provided by contract or according to specific law provisions.[67]

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[63] See. A. GAMBARO, 'Il '*trust*' in Italia e Francia', in P. Cendon (ed), *Scritti in onore di Rodolfo Sacco*, Giuffrè, Milano 1994, p 495.

[64] '[. . .] *S'agissant de l'institution d'une fiducie «à la française», une précision me paraît d'abord devoir être apportée: il ne s'agit pas de remédier à la carence du droit français en important «tel quel» le* trust *anglo-saxon. Une telle option n'est ni envisageable ni souhaitable, tant le* trust *est marqué par l'empreinte de la* common law*, système fort éloigné de notre droit, ce dernier puisant ses racines dans le droit romain* [. . .]'. Pascal Clément**,** Minister of Justice, at the Senatorial hearing of 17 October 2006.

[65] On 20 February 1992 the French Government presented a draft to the Parliament introducing the *fiducie*, but this law was not adopted, nor debated or discussed. A new plan was prepared by the French Government in 1996 but it wasn't submitted to the Parliament. This one aimed at resolving tax problems (i.e. to avoid that the transfers of ownership to *fiduciaires* be made only in order to evade inheritance taxes) proposing that only legal entities be titled to set up a *fiducie*. According to many, *fiducie* and trusts remain distinguished insofar as: '[. . .] *the structure of trust is profoundly linked to the development of equity jurisdiction in England and the duality of ownerships which resulted from it. Civil law countries do not know such duality of jurisdictions, since they never developed an equity jurisdiction* [. . .]'. M. GRIMALDI & F. BARRIèRE, 'Trust and *fiducie*', in A. Hartkamp et al. (eds), *Towards a European civil code*, Kluwer Law International, Nijmegen 2004, p 787.

[66] In the *Proposition de loi instituant la fiducie* of 8 February 2005, the definition of *fiducie* was slightly different*:* '[. . .] *un contrat par le quel un constituant transfère de droits de toute nature à une personne physique ou morale de nommée fiduciaire, à charge pour elle de les administrer ou d'en disposer au profit d'un ou plusieurs bénéficiaires conformément aux stipulation du contrat à des fins de gestion, de garantie ou de transmission à titre onéreux, exclusivement ou cumulativement* [. . .]'. On the point, see S. UGOLINI, 'Verso il riconoscimento del contratto di *fiducie* nel codice civile francese?', *Contratto e impresa/Europa* 2006, p 366. According to the author, the grandfathers of the *fiducie* are the '*mandat*' and the '*stipulation pour autri*', given that the *fiduciaire* is accountable for his actions to the *constituant* and the *bénéficiaire* is a third party in this '*opération*'.

[67] *Code Civil* article 2012 '*La fiducie est établie par la loi ou par contrat. Elle doit être expresse*'. Accordingly, Mr. Pascal Clément, at the Senatorial hearing of 17 October 2006, remarked

There are some limitations concerning the areas of application, the actors involved and the duration of this *opération*. The areas of donations and successions are excluded since the new article 2013 of the *Code Civil* sanctions with nullity (*nullitè d'orde public)* la *fiducie* in such domains.[68] Articles 2014 and 2015 limit the possibility to be *constituant*[69] and *fiduciaire* respectively to legal persons (according to the definition provided by the rules governing taxation of companies) and to banks, financial intermediaries and insurance companies.[70] Finally, the duration of the transfer is limited to maximum 33 years.[71]

The fiduciary contract must precisely indicate the assets (in term of rights or warranties upon them) transferred, the duration of the transfer, the identity of all the parties (*constituant, fiduciaire, bénéficiaire)* or the way in which they should be appointed, their task and powers of disposition and administration. The new rules remain instead silent on whether the *constituant* could also be the *fiduciaire* (addressing to himself the declaration of trust), while they make clear that the *constituant* (or the *fiduciaire*) and the *bénéficiaire* may coincide.[72] No specific provision requires that the contract be made in writing, although such requisite seems to be implicit given that the contract must be registered for taxation purposes.[73]

Such *opération* provides for the transfer of property which is restricted in its object: the *fiduciaire* must act in strict conformity with the contract of *fiducie*, remains accountable to the *constituant* and liable for the eventual breach of his/her fiduciary obligations (new article 2026 of the *Code Civil)*.[74]

The whole mechanism is therefore centred on a contract that has direct effects on realty as the assets transferred become part of a *patrimoine d'affectation* that

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that : '[. . .] *il est envisagé d'insérer les dispositions civiles de la fiducie dans le livre III du code civil, entre le disposition consacrées au mandate et celles qui sont relatives à la transaction*[. . .]'.

68 The new article 2013 of *Code Civil* provides that: '*Le contrat de fiducie est nul s'il procède d'une intention libérale au profit du bénéficiaire. Cette nullité est d'orde public*'. It is the so-called '*fiducie-libéralité*', excluded in order to respect the principle of '*reserve héréditaire*'.

69 It was at first debated whether the *constituant* could be a natural person but this was finally excluded by the *Ordonnance du 23 mars 2006*. '[. . .] *Admettre l'extension de la fiducie au profit des personnes physiques aurait pour conséquence de romper le juste équilibre apporté par cette réforme* [. . .]'. Mr. Pascal Clément, Minister of Justice, at the Senatorial hearing of 17 October 2006.

70 The drafters of the norm deemed appropriate to select only those entities that, for being subject to certain obligations of fairness and transparency imposed upon them by the law, appeared more reliable than others.

71 *Ex* Art. 2018 n. 2 of *Code Civil*.

72 *Code Civil* Art. 2016 '*Le constituant ou le fiduciaire peut être le bénéficiaire ou l'un des bénéficiaires du contrat de fiducie*'.

73 *Code Civil* Art. 2019 '*A peine de nullité, le contrat de fiducie et ses avenants sont enregistrés dans le delai d'un mois à compter de leur date au service des impôts du siège du fiduciaire or ou service des impôts des non-résidents si le fiduciaire n'est pas domicilié en France*'. According to Art. 2020 of the *Code Civil*, a new national register is created «*registre national de fiducies*».

74 *Code Civil* Art. 2022 '*Le contrat de fiducie définit les conditions dans lesquelles le fiduciaire rend compte de sa mission au constituant* [. . .]'.

remains segregated in the general patrimony of the *fiduciaire* and can be attacked, according to the new article 2025 of the *Code Civil*, only by creditors of obligations stemming from the administration of such assets.[75]

In sum, although the new institute is willingly conceived in contractual terms, as to generate as few derogations as possible to the fundamental principles of French civil law, the preparatory works of the bill have made it relatively clear: the new institute facely contradicts the lynch-pin tenet of French property law as it was affirmed in article 17 of the Declaration of human rights of 1789 and was later distilled in article 544 of the Code of 1804: «*la propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements*». Accordingly, article 545 of the *Code Civil*, referring to the holder of such absolute right, provides that «*nul ne peut être contraint de céder sa propriété, si ce n'est pour cause d'utilité publique, et moyennant une juste et préalable indemnité*».[76]

It follows that with the introduction of this new, valuable contract tool, large portions of the French system are dramatically modified, including those areas of the law, as successions, that are not directly addressed by the new set of norms but are indirectly concerned, given that the *patrimoine d'affectation* does not fall within the succession of the *fiduciaire* but eventually in that of the *constituant*. Similarly, an important derogation has been introduced to the general principle of debtor's liability, which implies the necessity to maintain his or her patrimony unitarian and indivisible, *vis-à-vis* his or her creditors.

In sum, as it was envisaged by the Minister of Justice, the French system has faced not merely a *maquillage* operation but a true process of modernization as a

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[75] *Code Civil* Art. 2025 '*Sans préjudice des droits des créanciers du constituant titulaires d'un droit de suite attaché à une sûreté publiée antérieurement au contrat de fiducie et hors les cas de fraude aux droits des créanciers du constituant, le patrimoine fiduciaire ne peut être saisi que par les titulaires de créances nées de la conservation ou de la gestion de ce patrimoine* [. . .]'.

[76] Today, '[. . .] *Avec le mécanisme de la fiducie, ce droit absolu connaît au contraire une double limitation. D'une part, le droit de propriété fiduciaire est limité dans sa substance. Des restrictions importantes sont en effet apportées aux prérogatives du fiduciaire, dans la mesure où celui-ci doit agir dans un 'but déterminé', défini par le constituant de la fiducie. Le fiduciaire ne saurait donc avoir des prérogatives identiques à celles d'un véritable propriétaire. Ses actes ne peuvent intervenir, sauf à engager sa responsabilité au regard du consituant ou du bénéficiaire que s'ils concourrent effectivement à la réalisation du but assigné par l'acte juridique créant la fiducie. En outre, il est envisageable que, malgré le transfert des biens ou droits au profit du fiduciaire, le constituant conserve, en vertu de l'acte de fiducie, un certain nombre de prérogatives sur ses ancennes possessions. Or, une telle situation est, en principe difficiliment conciliable avec la qualité de propriétaire d'un bien'. D'autre part, ce droit de propriété revêt nécessairement, dans le cadre de l'opération fiduciaire, un caractère temporaire. Le fiduciaire est en effet tenu de transférer la propriété du bien dètenu – soit au constituant lui-même, soit à un tiers bénéficiaire – à une date déterminée ou à l'issue d'un délai ou d'un évènement préalablement défini par l'acte consitutif de la fiducie. En ce sens, certains auteurs ont ainsi parlé de la 'propriété fiduciairie comme d'une 'propriété dégradée'* [. . .]'.

consequence of the new set of rules governing *fiducie*.[77] Time has thus come for a shift of perspective that moves from the idea, shared until today, that the afore mentioned fundamental principles of civil law could only be derogated in specific and exceptional circumstances, to the awareness of their actual reduction to the status of ordinary rules.

It is a shift of perspective that indeed seems necessary in order to provide full citizenship to an institute: the trust, still relatively unknown to the civil law tradition, until today only utilized through the provisions of the Hague Convention and now transformed into an instrument of domestic law.

Comparing the new regulation governing the *fiducie* with the Italian surrogates of the trust, it appears quite obvious that such important modernization process has yet to be conceived in Italy, where a similar shift of perspective is still far to come. It is thus desirable that the new French rules will constitute a model that the Italian legislature will look at with great attention, before proceeding with other partial and unsatisfactory reforms on trusts.

[77] Pascal Clément noted that '[. . .] *Il s'agit là d'une innovation majeure dans notre droit, qui était marqué, depuis le XIX siècle, par le principe de l'unité du patrimoine* [. . .]'.