Essays

The Trust Experience in San Marino Between *Ius Commune* and International Models

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Abstract

San Marino trust law is embedded in a consolidated civil law tradition stretching back to the *ius commune* system of fiduciary instruments, thereby making it possible to trace, to a large extent, an itinerary related to common law trusts, and to challenge unwarranted allegations (now, fortunately, fading away) that trusts cannot be transplanted into civil law countries. San Marino has not confined itself to imitating other offshore legislation, but has drawn up a unique trust system reconciling the typical features of international models – thus embarking on the race to attract the trust business within its borders – with the peculiarities of its own system of sources. Hovering between the principles of confidence and patrimonial separation, the international models and *ius commune*, San Marino trust law proves to be the perfect combination of innovation and tradition, and longs to become a benchmark for the regulation of trusts established in civil law jurisdictions.

I. San Marino Trust Law and Its Interaction with the Hague Trust Convention

It has been fifteen years since San Marino adopted a written law on trusts (enforced by legge 17 March 2005 no 37, amended by legge March 2010 no 42). Just a few months earlier, San Marino had ratified the Hague Convention of 1 July 1985 on the law applicable to trusts and their recognition (hereinafter referred to as the Hague Convention),[1] that speeded up the process of internationalization of the Republic and contributed to dismissing its misrepresentation as 'an area escaping innovation due to a marginalization tantamount to isolation'.[2] Notwithstanding the enforcement of a domestic law, San Marino has not opted out of the Convention, as Art 3 of legge no 42 of 2010 overtly refers to it for purposes of identifying the governing law and recognizing foreign trusts. San Marino

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[1] Ratified with decreto consiliare 20 September 2004 no 119. In Italy, the Hague Trust Convention was ratified with legge 16 October 1989 no 364, which came into force on 1 January 1992.

[2] This way, R. Sacco, 'Introduzione al diritto comparato', in R. Sacco ed, *Trattato di diritto comparato* (Torino: UTET, 1997), 149. Unless specified otherwise, all texts in Italian have been translated by the authors.

lawmakers were astute enough to avoid restricting party autonomy to the extent of forcing its own trust model upon parties and preventing them from relying on structures governed by foreign laws. Accordingly, San Marino will continue recognizing trusts regulated, for example, by English or Jersey law.

However, the merits of San Marino legislation do not boil down to matters of choice of law or the interaction with the Hague Convention. The legislation of the tiny state offers much food for thought to scholars (especially those with a historical-comparative background) and professionals alike. San Marino trust law is embedded in a consolidated civilian tradition stretching back to the *ius commune* system of fiduciary instruments, thereby making it possible to trace, to a large extent, an itinerary related to common law trusts, and to challenge unwarranted allegations (now, fortunately fading away) that trusts cannot be transplanted into civil law countries. On its way to regulating trusts, San Marino has also accommodated many elements of the 'international' trust model, launched by the Jersey (Trusts) Law 1984 and adopted by several offshore jurisdictions.[3] Unlike other systems, San Marino has not duplicated Jersey law, but has drawn up a unique trust system reconciling the typical features of international models – thus embarking on a race to attract the trust business within its borders –[4] with the peculiarities of its own system of sources. San Marino is so aware of its uniqueness, that new legislation concerning a different institution, the fiduciary trusteeship (*affidamento fiduciario*), was passed with legge 1 March 2010 no 43, based on witty, albeit contested, scholarship.[5]

With San Marino being a country geographically and culturally very close to Italy, its trusts legislation may also provide Italian professionals with a valuable benchmark. Being the first law in the world on trusts written in Italian, legge no 42 of 2010 may facilitate the understanding of a number of trust issues, and be designated by Italian settlors as the law governing their trusts. There is no denying that the settlor's autonomy to choose the applicable law (Art 6 Hague Convention) may be directed at San Marino law, whose trust model is in line with the features laid down in Art 2 Hague Convention, amounting to a

[3] Jersey codified its own trust law, which is quite distinct from the traditional English model, not only because Jersey law is based on Norman-French customs and lacks an equity system comparable to the English one, but also because the codifiers sought to boost the offshore trust business already rooted in the island: P. Matthews, 'La legge sul trust a San Marino e il modello di trust internazionale' *Contratto e impresa*, 251 (2007). Many offshore jurisdictions drew inspiration from the Jersey (Trusts) Law 1984, such as Anguilla, Belize, Dubai, Grenada, Guernsey, Labuan, Malta, Mauritius, Nevis, Niue, Seychelles, St Kitts & Nevis, Turks & Caicos.

[4] R. Pardolesi, 'Destinazioni patrimoniali e trust "internazionale" ' *Rivista critica del diritto privato*, 215, 221 (2008) argues that trusts have triggered competition between legal systems, that do not communicate but compete to attract trust business within their boundaries.

[5] The leading theorist on the fiduciary trusteeship contract is M. Lupoi, *Il contratto di affidamento fiduciario* (Milano: Giuffrè, 2014). For strongly critical remarks, see A. Vicari, 'L'affidamento fiduciario quale contratto nominato: un'analisi realistica' *Contratti*, 357, 362 (2018), claiming that Lupoi's theory appears to be decontextualized from civil law categories, using them in a rhetorical and provocatively heretical way.

legal relationship 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.

II. The Centrality of *Ius Commune* in San Marino Legal System

It is impossible to understand San Marino trust law fully without framing it within the sources of law of the Republic. The articulation of San Marino sources of law is complex[6] but harmonious, and makes it possible for its law effectively to adapt to social changes. Formally, at the apex of the pyramid lies the *ius proprium*, ie the Statute and the *reformationes*, followed by local customs and *ius commune*.[7] This is true, however, from a hierarchical point of view, whereas, from the standpoint of the application of law, *ius commune* takes priority in regulating private relations, giving rise to a principle-based law, which is much more 'plastic' than a narrow legislation consisting of detailed rules.[8] San Marino has not codified private or commercial law, which, on the one hand, may emphasize judicial discretion and challenge legal certainty through discrepancies in judgments, but on the other, may ward off the danger of redundant legislation, which, on the contrary, is a distinguishing mark of the nearby Italian system.[9] It is true that every codification entails breaking with the past and laying down a self-standing text whose loopholes may not be filled through resort to other systems, not even scholarly opinions,[10] but the lack of a codification in San Marino has shown the merit of facilitating the assimilation of trusts, unlike what has happened in Italy.

Ius commune is the main source of San Marino private law. Once that *ius commune* ceased to be effective in Germany with the entry into force of the

[6] Contending that the San Marino legal system is based on a 'multiple regulatory competence': S. Caprioli, 'Satura lanx 30. Linee sammarinesi per lo studio del diritto comune' *Studi in onore di Pietro Rescigno* (Milano: Giuffrè, 1998), I, 221.

[7] Art 3 *bis* legge 8 July 1974 no 59, added by Art 4 legge costituzionale 26 February 2002 no 36, para 6, reads that 'customs and common law constitute an integrative source in the absence of legislative provisions'. Considering that the constitutional recognition of *ius commune* as a source of law is an 'epochal change': S. Caprioli, 'Per una lettura della Costituzione sammarinese riformata' *Giurisprudenza italiana*, 914, 917 (2004).

[8] L. Di Bona, 'Trust e affidamenti fiduciari nel confronto tra «modello» sammarinese e italiano' 5 *Cultura giuridica e diritto vivente*, 1, 6 (2018).

[9] ibid 9. Giudice delle Appellazioni, G. Astuti, 30 July 1963, *Giurisprudenza sammarinese*, I, 46 (1965), remarks that '*ius novum*, consisting of statutory law and subsequent local legislation, does not amount to a complete codification of private, civil, commercial and civil procedural law'. See also S. Caprioli, 'Il diritto comune nelle esperienze di San Marino' *Rivista internazionale di diritto comune*, 90 (1994), arguing that 'San Marino *ius commune* cannot be understood without referring to its contrary, ie the civil code'. On the failed attempt to codify San Marino private law, undertaken at the end of the nineteenth century, see C. Pecorella, 'Un codice mancato' 3(2) *Archivi per la storia*, 113 (1990).

[10] P. Peruzzi, *Appunti per le lezioni del corso di diritto Sammarinese* (Urbino: Quattroventi, 1998), 96.

BGB in 1900, San Marino remained the only state in Europe to preserve its force of law.[11] San Marino *ius commune* does not coincide with Justinian's law but with the law that in the Middle Ages developed across the most evolved systems of continental Europe, Italy in particular, under the influence of Roman law, canon law and customs, and that can be found 'in the writings of the most authoritative jurists and the decisions of the most renowned courts'.[12] San Marino lawyers are invited to consult the 'writers (...) of the XVI, XVII and XVIII centuries: that is, the time when *ius commune* was in its greatest splendor', prioritizing 'practical writers' over 'connoisseurs or theoreticians'.[13] *Ius commune* does not distinguish between practical and theoretical works.[14] The problem, however, is the absence of a modern academic thought and an authentic San Marino school of *ius commune*, which may interpret, as well as innovate the rules handed down by tradition.[15]

If the *lex posterior* criterion were to govern the succession of laws in time, the new legislation would abrogate the ancient *ius commune*, yet San Marino applies a different criterion, that is, the new legislation derogates from *ius commune*; put differently, it does not abrogate the previous rule but simply makes it inapplicable to the case at issue. When the new legislation is no longer applicable, *ius commune* becomes applicable again. The derogating rule does not determine abrogation but 'quiescence' of the derogated rule, which is intended to revive as soon as the former ceases to apply. The abrogation of *ius commune* can only result from an explicit provision in the new legislation.[16]

The foregoing may thus further the bold idea that European *ius commune* has not died out as a result of the coming into force of the codes, for these replaced *ius commune* only in matters explicitly regulated, whereas, in all the others, *ius commune* has survived the age of codification, insofar as it is in accordance with

[11] V. Scialoja, 'Nota a App. Roma 1 dicembre 1906' *Rivista di diritto internazionale*, 154 (1907), in a dispute concerning citizenship.

[12] Giudice delle Appellazioni, V. Scialoja, 12 August 1924, *Giurisprudenza sammarinese*, 18 (1924).

[13] G. Ramoino, *Le fonti del diritto privato Sammarinese* (San Marino: Arti Grafiche F. Della Balda, 1928), today in *Le fonti del diritto privato Sammarinese* (San Marino: Banca Agricola Commerciale, 2000), 19.

[14] P. Peruzzi, n 10 above, 149.

[15] On this matter see S. Caprioli, *La legislazione societaria sammarinese* (Rimini: Maggioli Editore, 1990), 13 and 28, claiming that 'in the dialogue between citizens, lawmakers and courts, the voice of scholarship resounds sporadically; its polyphony, which was one the key features of the historical common law, has died out'. See also V. Crescenzi, 'La rilevanza dell'opinione dei giuristi negli attuali ordinamenti di diritto comune: Andorra e San Marino' *Rivista di diritto civile*, 129, 148 (1995), contending that San Marino case law is now exclusively the one decided by the courts, as the other source, the academic one, which may well perform a practical, humble, and vital function of maintenance of the system, has failed.

[16] This happened, for instance, within family law, with the reform enacted with legge 26 April 1986 no 49, which expressly repealed 'all the rules (...) including the *ius commune* ones' at variance with the new legislation.

the general principles of the system.[17] Rules of different sources intertwine in the dense web of San Marino diachronic, multi-secular and stratified legal system, which academics and practitioners may find hard to disentangle,[18] all the more so if they come from a codified system such as the Italian one, in which lawyers seldom look at history and, when they do, do so without any perspective of normative value.

Ius commune feeds on historical memory and shared traditions. Yet, it is not obsolete law, nor a re-edition of Roman law modernized or common law handed down intact from the *Ancien Régime*.[19] That San Marino *ius commune* builds on collective conscience implies that

> deciding a case today as it would have been decided in the seventeenth century would distort its spirit and take away its value, and thinking that the relations between sovereign power, citizens and foreigners have stayed motionless, so discretion may be exercised in ways that in other countries would be arbitrary, would fail San Marino's historical conscience and its tradition of freedom.[20]

Drawing on that historical conscience, legal interpretation in San Marino becomes *interpretatio*, and it is no coincidence that this was widely practiced in the classical age of *ius commune* but later dismissed in the modern age of codification. *Interpretatio* is not merely cognizant of enunciations in their meaning (this was *exposition*) but is determinative 'of rules, given other rules'.[21] In this attitude may be found an extraordinary affinity of *ius commune* with English equity, which has always been understood as a jurisdiction of conscience, capable of transforming the core values of social coexistence into certain rules and

[17] This way M. Lupoi, *I trust nel diritto civile* (Torino: UTET, 2004), 197, arguing that 'throwing away a complex of wisdom and centuries of experience cannot be beneficial, not even when one wants to give an unequivocal and even forced signal of rupture with the previous age'. Critical comments by F. Treggiari, 'Trust e diritto comune a San Marino', in F. Treggiari et al, *Il trust nella nuova legislazione di San Marino* (Santarcangelo di Romagna: Maggioli Editore, 2005), 47, fn 28: 'if we agree that "matters" are neither the general areas of codified private law, nor the single institutions that are outlined there, but rather all the objects that can be linked to the titles of the books of the code (...), the room for a *directly positive* common law of trusts – and therefore for a *by-pass* common law of trusts – is drastically reduced'.

[18] S. Caprioli, n 15 above, 24. See also M. Simoncini, 'Abrogazione ed altre vicende delle norme nello stile della legislazione sammarinese' *Miscellanea dell'Istituto Giuridico Sammarinese*, 121 (1993); and, as regards the reform of company law, U. Santarelli, 'Cinque lezioni sul diritto comune delle società' *Miscellanea dell'Istituto Giuridico Sammarinese*, 36 (1991).

[19] A. Landi, *Note a margine di un recente convegno sul diritto comune vigente*, available at tinyurl.com/jyc9r474 (last visited 30 June 2021).

[20] Giudice delle Appellazioni, V. Scialoja, 12 August 1924, n 12 above.

[21] S. Caprioli, *Lineamenti dell'interpretazione* (San Marino: Banca agricola commerciale, 2008), 31. See also A. Landi, n 19 above, describing *ius commune* as 'a legal experience which, by continuous judicial interpretation, with its own sensitivity and that common conscience of which Jemolo spoke, still uses with profit the worthwhile normative product of a centuries-old system'.

adequate remedies, though constantly evolving and adapting to ever new situations, ultimately turning 'right' into 'legal'.[22]

It is precisely by relating to shared values that San Marino *ius commune*, kept up-to-date through the *interpretatio* determinative of rules, preserves the vibrancy that codifications, linked to a precise historical moment, have lost.[23] The absence in San Marino of a codification of private and commercial law, and of the relating straits of *analogia legis*, along with the possibility of drawing from the pool of *ius commune* principles, makes it possible for courts to decide cases with a due sense of proportionality and reasonableness, take account of the parties' interests and pursue substantial justice rather than formal legality.[24]

If these premises are correct, *ius commune* cannot be understood as an appendix or a compendium of the Statute or the *reformationes*, as subsidiary or supplementary law which should be applied only under exceptional circumstances, that is, where there is no legislation or the existing legislation is deficient. It is exactly the other way around; *ius commune* is the rule, while legislation is the exception, firstly, from a quantitative point of view, because of the greater number of *ius commune* rules, and secondly, because of *ius commune* being supplementary, as well as innovative of legislation in the regulation of private law institutions.[25] Even in the Italian republics of the Middle Ages, *ius commune* co-existed with the statutes, as a source that was formally subsidiary, but in reality very broadly regulative of anything that had been overlooked by the statutes, and at the same time innovative of the system.[26]

Ius commune does not only make up for deficient legislative texts; nor does it step in only when legislation neglects a case or dictates obscure provisions to be interpreted.[27] Even when legislation does cover a case, *ius commune* may operate concurrently with 'new' legislation in those areas that might be

[22] In this respect see M. Lupoi, 'English "Equity" and the Civil Law – A Tale of Two Worlds' *Trusts & Trustees*, 176, 180 (2020), remarking that the equity court was originally known as 'court of conscience', as the Chancellor 'purported to come to the aid of justice and did so in the manner that was the most becoming for a shepherd of souls: calling upon the *conscience* of the affected parties'.

[23] V. Pierfelici, 'I rapporti fiduciari in San Marino nella pratica notarile e giudiziaria' *Trusts*, 537, 544-545 (2015).

[24] L. Di Bona, n 8 above, 9. See also V. Pierfelici, 'La Corte per il trust a San Marino' *Trusts*, 5, 9 (2016), arguing that the San Marino Court for Trusts 'should not only be the guardian of the compliance of a given solution with law, but also implement the parties' intention through a just solution'.

[25] Giudice delle Appellazioni, G. Astuti, 30 July 1963, n 9 above. See also G. Guidi, *Le fonti scritte nella Repubblica di San Marino* (Torino: Giappichelli, 2004), 159, claiming that the relationship between *ius commune* and statutory law is based on competition and subsidiarity.

[26] V. Scialoja, 'Nota a App. Roma 1 dicembre 1906' n 11 above.

[27] For the application of *ius commune* on tort liability in the absence of legislative provisions on industrial property and unfair competition, see Giudice delle Appellazioni, G. Astuti, 20 September 1965, *Giurisprudenza sammarinese*, 150 (1964-1969); and, in matters of joint ownership, Commissario della legge G. Ramoino, 3 May 1965, *Giurisprudenza sammarinese*, 268 (1964-1969).

regulated by alternative institutions.[28]

III. Historical-Comparative Report of Trust and *Fiducia*, and the Impact of International Models

One of these areas is trusts, which, in San Marino, co-exist with the *ius commune* fiduciary institutions. The reasons underlying this co-existence are rooted in *ius commune*, across which one may trace an itinerary largely shared between the common law trust and the civil law *fiducia*.[29]

In the fourteenth century, while the English courts of equity recognized the legal value of the obligations undertaken by the trustee, continental European commentators developed a solid model of testamentary *fiducia*, whereby the fiduciary heir was instructed by the testator to pass on to the beneficiary what was bequeathed through succession. The *fiducia* reflected a genuine legal obligation, in keeping with the idea that the fiduciary, while being the owner of the assets, received them only to implement the program outlined by the testator. The fiduciary was understood as a '*nudus minister a commodo sed non a titulo*',[30] in that he obtained the title to the property but could not receive any advantage therefrom, and undertook the obligations of custody and retransfer, enforceable by the law. This mechanism made sure that the fiduciary's creditors could not have recourse against the assets transferred to him, thereby producing the ring-fencing effect which distinguishes the modern trust from fiduciary relationships of merely obligatory nature. In England too, trusts were subject to Roman influence, for most jurists sitting in the Court of Chancery studied Roman and canon law in continental universities.[31]

The divorce between trust and *fiducia* took place later, when the Pandectist school, dusting off the classical Roman fiduciary law, shamefully overlooked the *ius commune* contribution,[32] eventually handing over a construction of *fiducia*

[28] As highlighted by F. Treggiari, n 17 above, 44.

[29] See M. Graziadei, 'The Development of *Fiducia* in Italian and French Law from the 14th Century to the End of the *Ancien Régime*', in R. Helmholz and R. Zimmermann eds, *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin: Duncker und Humblot, 1998), 327; Id, 'La fiducia nella tarda età moderna. Le "confidenze" tra vincolo di coscienza e disciplina politica dei soggetti e dei beni', in P. Prodi ed, *La fiducia secondo i linguaggi del potere* (Bologna: il Mulino, 2008), 235; Id, 'Trust, confidenza, fiducia', in R.H. Helmholz and V. Piergiovanni eds, *Relations Between the* Ius Commune *and English Law* (Roma: Rubbettino, 2009), 223. Arguing that *trust* is 'part of a pan-European tradition': P.H. Glenn, 'The Historical Origins of the Trust', in A.M. Rabello ed, *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (Jerusalem: Hebrew University, 1997), 775.

[30] Baldo degli Ubaldi, *Commentaria in secundam Digesti veteris partem*, Venice, 1572, f. 192va-rb, in D. 22, 1, 3, 3; Id, *In sextum Codicis librum commentaria*, Venice, 1599, f. 146ra, in C. 6, 42, 12, n. 7.

[31] M. Lupoi, n 22 above, 178.

[32] M. Graziadei, 'Fiducia e trust in Italia', in M.L. Biccari ed, *Fiducia, Trusts, Affidamenti. Un percorso storico-comparatistico* (Urbino: Università degli Studi di Urbino, 2015), 362.

as an obligatory relationship between a settlor and a fiduciary.[33] This reflected in the weak notion of testamentary *fiducia* laid down in Art 627 Italian Civil Code (whereby the beneficiary is not given action to establish that the disposition of property upon death was actually made to his own advantage) and the common misconception that sees the fiduciary as a figurehead of the settlor; in a nutshell, a 'distrust in the trust'. On the contrary, the settlor of a trust definitively foregoes the ownership of his assets and transfers them to the trustee, and no obligatory relationship arises between them. As a consequence, the trustee is not an agent acting in the name or on behalf of the settlor, is liable only to the beneficiaries and, should he have doubts about the exercise of his powers, he could only turn to the judiciary. This explains why trusts are not, as a rule, revocable (not so the mandate: Art 1723 Italian Civil Code), and why trusts do not expire upon the death of the settlor or the trustee (not so the mandate: Art 1722 Italian Civil Code). These decisive remarks, on a historical-comparative and legal level, militate against equating trust with *fiducia* (which, according to leading authority, is a development of the mandate).[34]

The fiduciary element of the trust may not be dismissed, provided it is understood as 'confidence' (*affidamento*), which does not amount to the confidence placed by the settlor in the trustee, but to the 'commission of a right to the trustee so that he can advance certain interests or purposes either through or as a consequence of this right'.[35] Such confidence justifies the loss of ownership on the part of the settlor and the destination of the trustee's title to the beneficiaries' interests or a given purpose. Confidence gives normative content to the limitations of the trustee's proprietary position and makes him directly liable to the beneficiaries (and not to the settlor).[36]

[33] The fiduciary agreement is intended as 'a manifestation of intention through which one transfers to others a right of ownership in one's own name but in the interest, or also in the interest, of the transferor or a third party. The attribution of the assignee is full, but he undertakes a mandatory obligation in order to the destination or use of the asset transferred': C. Grassetti, 'Del negozio fiduciario e della sua ammissibilità nel nostro ordinamento giuridico' *Rivista del diritto commerciale*, 345, 363 (1936).

[34] M. Graziadei, n 32 above, 353, argues that the *fiducia* theory in Italy developed in parallel to the mandate theory. For some critical remarks on the conflation of the *fiducia* with the mandate, see L.E. Perriello, 'Unitarietà causale, proprietà confermata e tutela reale: verso una lettura rafforzata della fiducia' *Rassegna di diritto civile*, 421, 431 (2019), arguing that *fiducia* has a programmatic attitude, that is, 'the fiduciary is not a simple agent-manager, a mere executive appendage of the settlor, but the direct interpreter and implementer of the program, holding powers that are not exhaustively predetermined, but proportionate to the actual circumstances'. See also F. Alcaro, 'Il programma contrattuale: l'attività dell'affidatario fiduciario e i rapporti fra le parti', in F. Alcaro et al, *Contratti di convivenza e contratti di affidamento fiduciario quali espressioni di un diritto civile postmoderno* (Milano: I Quaderni della Fondazione Italiana del Notariato, 2017), 163.

[35] M. Lupoi, *Trusts* (Milano: Giuffrè, 2nd ed, 2001), 307. Similarly see Corte di Cassazione 25 February 2015 no 3886, *Vita notarile*, 386 (2015).

[36] The trustee's liability to beneficiaries is an essential element of trusts: see D. Waters, 'The Concept Called "the Trust" ' *Bulletin for International Fiscal Documentation*, 118, 124 (1999),

While the separation of trust and *fiducia* occurred in codified civil law systems, it did not take place in San Marino. The historical background of fiduciary instruments under *ius commune* has facilitated the introduction of trusts in San Marino much more than elsewhere. San Marino trust co-exists with the hereditary *fideicommissum*, which presents the fiduciary characteristics outlined above. This institution, although obsolete,[37] is still in force. When, in 1902, the Regent Captains asked Vittorio Scialoja for an opinion on the existing *fideicommissa*, the renowned scholar advised against their abolition, and the Council followed suit.[38] There seems little doubt that, in commercial practice, trusts attract larger fortunes compared to *ius commune* hereditary *fideicommissa*, because investors prefer relying on the extensive body of codified rules and remedies under legge no 42 of 2010. Yet, *ius commune* maintains its peculiar hermeneutic function even when parties enter into a trust agreement, for it may facilitate the interpretation of trust legislation, at least when it comes to general civil law notions, whereas the specific trust notions can only be drawn from the Hague Convention and the trust models in use in common law or mixed jurisdictions.[39]

As a consequence, the influence of the international models on San Marino trust law is considerable, including the express definition of what a trust is, rules on its duration, the trustee's powers and duties, and the guardian, the possibility of settling trusts without beneficiaries, thus making San Marino compete with other jurisdictions in the race to attract foreign capitals and investments. However, not all of the international models has been transplanted. For example, San Marino has decided to set up a trust register,[40] which is unusual in common law jurisdictions, because, unlike companies, the trust is not a legal person and publicity is not seen as an instrument for the protection of third parties but as 'a disgrace, a violation of privacy'.[41] The civil law imprint of the San Marino legal system has required many other adjustments in order to

arguing that '(f)rom the moment of the creation of the trust there must be an ability of the beneficiary to secure an accounting or, to put it another way, a power in the beneficiary to enforce the discharge of his duties'.

[37] V. Pierfelici, n 23 above, 538, remarks that recent practice knows no example of *fideicommissa*. 'The reasons are probably to be found in the progressive detachment of the practice from the categories of *ius commune* and concurrent imitation of Italian models, which are uncritically assumed to be identical to those of San Marino'.

[38] This episode is reported by F. Treggiari, n 17 above, 69, challenging G.B. Curti-Pasini and E. Ranza, *Principi elementari del diritto privato della Repubblica di S. Marino* (Bollate: Zappa, 1939), 58, who claim that the *fideicommissum* has not been abrogated.

[39] See F. Treggiari, n 17 above, 49 and M. Graziadei, 'Prima lettura delle disposizioni civilistiche contenute nella legge di San Marino sul trust', in F. Treggiari et al, *Il trust nella nuova legislazione di San Marino* n 17 above, 17.

[40] The register collects all the trust instruments governed by San Marino law and foreign trust having their seat in San Marino. See E. Montanari, 'La trasparenza dei titolari effettivi dei trust' *Trusts*, 310 (2015).

[41] P. Matthews, n 3 above, 254.

reconcile the trust with the system of fiduciary instruments handed down by *ius commune* and with the principle of patrimonial separation. The international model is not unique, but fragmented in the various identities of the legal systems that are inspired by it.

IV. The Confidence Principle in San Marino Trust Law: The Trustee's Powers and Duties, Self-Declared Trusts, Reserved Powers and the Guardian

The confidence principle, intended as commission of a given right to a fiduciary to advance a program beyond the settlor's control, inspires the notion of trust laid down in Art 2(1) of San Marino law, which focuses on the ownership 'of assets in the interest of one or more beneficiaries, or for a specific purpose'. Wisely, San Marino lawmakers have not replicated the controversial Art 2 Hague Convention, which understands the trust as the placement of assets under the 'control' of a trustee. By doing so, the Convention accepts the possibility that the settlor does not transfer rights but rather the 'control' of assets, thereby creating a mandatory relationship with the trustee, who would have to account for his actions to the settlor. Many 'fiduciary' relationships characterized by the direct protection of the settlor *vis-à-vis* the trustee, which have little to do with the traditional trust model,[42] in which the settlor's detachment is an essential element, are thus drawn into the scope of the

[42] M. Lupoi, n 35 above, 501. See also H. Kötz, 'The Hague Convention on the Law Applicable to Trusts and Their Recognition', in D. Hayton ed, *Modern International Developments in Trust Law* (London: Kluwer Law International, 1999), 37, 40, claiming that the conventional definition encompasses the relationships that in common law jurisdictions are known as 'trusts', but the Convention is also applicable to the institutions of many civil law countries where they are not known as trusts, despite performing similar functions. However, it is not sufficient for the institution at hand to be merely 'functionally analogous'; it must also be 'structurally similar', which requires that the assets constitute a distinct mass and are not part of the trustee's estate. These requirements are met, by way of example, by the *fideicomiso* of several Latin American legal systems and the Quebec *fiducie*. A.E. von Overbeck, 'Rapport explicatif/Explanatory Report' *Conference de La Haye de droit international privé – Hague Conference on Private International Law, Actes et documents de la Quinzième session – Proceedings of the Fifteenth Session*, II, § 26 (1985), mentions the analogous institutions of Egypt, Japan, Luxembourg and Poland. For critical comments see D. Hayton, 'International Recognition of Trusts', in D. Hayton ed, *The International Trust* (Bristol: Jordan, 3rd ed, 2011), 165; and Id, 'Reflections on The Hague Trusts Convention after 30 Years' *Journal of Private International Law*, 1, 8 (2016), taking the view that only with superficiality Art 2 Hague Convention can be construed as extending beyond proprietary relationships (ownership-management of assets) including agency relationships (agency-management of assets). He makes the example of an owner giving 'control' of his assets to an agent in his own interest. The agency or mandate relationship is not covered by the Convention because Arts 2 and 11 clearly provide that the assets in trust are in the name of the trustee and constitute a mass distinct from the rest of his assets. When, however, the assets are placed under the control of an agent, they remain in the settlor's name. Where title is not transferred to the trustee but remains with the settlor on whose behalf the trustee administers the assets with powers of representation, the trust is not covered by the Convention.

Convention. San Marino has not made the same mistake as the Convention; indeed, it has not even expressly referred to a fiduciary element when outlining the characteristics of the relationship,[43] thus avoiding any misunderstanding in the assimilation of the trust with a fiduciary agreement.

Under San Marino law, the powers and duties of a trustee are laid out in such a way as not to turn him into a fiduciary. Accordingly, the trustee 'exercises over the trust property all the powers belonging to the right-holder, except for the limitations resulting from the trust register' (Art 31(1)). The rule does not even give way to the widespread representation of the trust as a *patrimoine d'affectation*, which was a ruse of the French private law scholarship in the 1930s[44] to facilitate the approval of the foreign institution by the adverse continental jurists. This was quite a misrepresentation, for the trustee is not a mere custodian of assets according to the destination established by the settlor, but a full and exclusive owner, and has the same powers that a *dominus* would have in his own interest.[45] The trust fund is not a collection of 'things', but 'wealth'. The trustee can use, replace, transfer any objects of the trust, having to confer to the beneficiaries not this or that asset but their value.[46] The trustee has the power to perform all acts of ordinary and extraordinary administration as full and absolute owner of the trust fund, as well as active and passive procedural capacity. The 'open-ended' formulation of the trustee's powers is typical of modern trust legislation. The limitation of the trustee's powers to those expressly provided for in the trust instrument belonged in the past and sought to ensure maximum protection of the beneficiaries' rights, when wealth was predominantly non-financial and, therefore, not easy to dispose of. Modern trust laws, on the contrary, afford the trustee the widest management powers, outweighed by tight 'fiduciary' duties,[47] such as good faith and diligence (Art 20), independence (Art 23), impartiality (Art 24), confidentiality (Art 25) and information (Art 27). To enforce the trustee's obligations, San Marino law lays

[43] M. Graziadei, n 39 above, 21.

[44] P. Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscal et en droit international* (Paris: Rousseau & Cie, 1931), 39.

[45] M. Lupoi, 'Trust e vincoli di destinazione: qualcosa in comune?' *Trusts e attività fiduciarie*, 237, 240 (2019). Comparing the civil law representation of the trust as a destination to a program defined by the settlor with the common law representation of the trust as a gift to beneficiaries, see A. Vicari, 'La scelta della legge regolatrice dei trust: una questione di *Principia* beneficiari' *Trusts e attività fiduciarie*, 364, 369 (2011).

[46] Cf B. Rudden, 'Things as Thing and Things as Wealth' *Oxford Journal of Legal Studies*, 81 (1994). See also P. Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property', in L. Smith ed, *The Worlds of the Trust* (Cambridge: Cambridge University Press, 2013), 316, icastically noting that '(t)he trustee is (…) the *owner* of the trust assets in the most complete sense possible. The trustee is *not* an agent or a representative of the settlor or the beneficiaries. (…) (T)he trustee's ownership is no less than the ownership of a person who is not a trustee'.

[47] Cf J.H. Langbein, 'The Contractarian Basis of the Law of Trusts' *Yale Law Journal*, 625, 640 (1995), arguing that 'the substitution of fiduciary law for law restricting the powers of the trustee (is) a central event in the development of modern trust law'.

down a set of criminal sanctions (Art 57 ff), which may even include imprisonment.

However, San Marino trust law presents a few elements that appear to dilute the confidence principle. One of these is the possible coincidence of settlor and trustee (Art 2(2)). The so-called self-declared trust, in which the settlor acts as trustee, separating a subset of assets from his own general assets, invites suspicion from part of the Italian tax courts, because

> although it is called a trust, it does not have the same features; in fact, it lacks one of its typical features, ie the transfer by the settlor to third parties of the assets settled on trust.[48]

These conclusions appear to be hasty and ill-advised. The self-declared trust complies with the confidence principle, for the trustee undertakes fiduciary obligations towards third parties, who will then have the right to a diligent performance by the trustee. The unilateral declaration of trust falls within the scope of the Hague Convention, which does not discriminate as to the way in which the trust is settled and, once the self-declared trust is validly created, the issues concerning its governing law and its suitability for recognition are the same as those of an ordinary trust.[49]

Actually, what may hamper the confidence principle is the possibility for the settlor of reserving rights or powers to himself (Art 2(2)), which San Marino law does not restrict, thereby leaving the settlor a large amount of leeway. Another rule provides for the reservation of the power to revoke the trust (Art 14), which may be justified by the settlor's reluctance to lose control of the trust property permanently. Revocable trusts are unusual in England, while the offshore operators of the international trust tend to suggest to replace the power to revoke the trust with the power to appoint beneficiaries, including the settlor,

[48] Corte di Cassazione 24 February 2015 no 3735, *Notariato*, 207 (2015); Corte di Cassazione 24 February 2015 no 3737, *Foro italiano*, 1215 (2015); Corte di Cassazione 25 February 2015 no 3886, *Vita notarile*, 386 (2015). By contrast, contending that self-declared trusts may be fully recognized: Corte di Cassazione 26 October 2016 no 21614, *Trusts*, 66 (2017); recently, see Corte di Cassazione 7 June 2019 no 15456 and Corte di Cassazione 21 June 2019 no 16700, available at dejure.it.

[49] J. Harris, *The Hague Trusts Convention. Scope, Application and Preliminary Issues* (Oxford-Portland: Hart, 2002), 106; L. Tucker, N. Le Poidevin and J. Brightwell, *Lewin on Trusts* (London: Sweet & Maxwell, 19th ed, 2014), 528, claiming that it is 'inconceivable (…) that such trusts, which once created are no different from those created by transfer to a trustee, were intended to be excluded from the Convention'. In the Italian literature see M. Lupoi, *Istituzioni del diritto dei trust negli ordinamenti di origine e in Italia* (Padova: Kluwer, 3rd ed, 2016), 240-241, noting that not only does Art 2 Hague Convention not specify by whom the property must be placed under the control of the trustee, but by not requiring transfer to a trustee, Art 2 supports the inclusion of the self-declared trust within the scope of the Convention. Lupoi articulated a different, but doubtful, opinion in *Trusts* n 35 above, 504, arguing that the Convention requires that settlor and trustee be different parties, and the reference to the settlor in Art 2 was inserted at the request of the civil law delegates, whereas the common law ones took it for granted that trusts in which settlor and trustee coincide are covered by the Convention.

because financial administrations may re-qualify the trust and disown the transfer of property to the trustee, while trusts with the power to appoint beneficiaries are generally irrevocable, making it possible to preserve the integrity of the trust without depriving the settlor of the power to add beneficiaries.[50] Moreover, the power of the settlor to revoke the trust is a matter of concern in many common law jurisdictions because it conflicts with the Norman customary maxim '*donner et retenir ne vaut*'.[51]

The provision of reserved powers does not affect the existence or validity of a San Marino trust; it does not turn the settlor into a trustee, nor does it entail that a trustee acting in accordance with the reservation commits a breach of trust. The reservation is also permitted by the Hague Convention, whose Art 2(3) reads,

> the reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.[52]

The Convention does not provide any criteria for narrowing the boundaries of the reservation, that is, for establishing how far the settlor may go in determining his powers without clashing with the conventional notion of trust, being the legal relationship whereby assets are 'placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose' (Art 2). Nevertheless, Italian tax authorities insist on declaring the fiscal non-existence of trusts in which the settlor has reserved 'control over the trust assets to himself in such a way as to preclude the trustee from fully exercising his disposition powers' and in which 'the trustee's management and disposition powers, as established by the trust instrument or by law, are in some way limited or even simply conditioned by the settlor's intentions'.[53]

Italian courts too are very wary of trusts with wide-ranging reservations of powers and tend to deny their recognition (most cases concerned asset-protection

[50] D. Harris, 'No Such Thing as a Sham Trust' *Private Client Business*, 95, 98 (2004). Neglecting these arguments altogether and apodictically deeming trusts subject to later appointment of beneficiaries to be 'radically void or, at most, under development, in which no separation of assets takes effect until beneficiaries are named': D. Muritano, 'Il nuovo art. 2929-*bis* c.c.: quale futuro per la protezione del patrimonio familiare?' *Rivista di diritto bancario*, 1, 18 (2015).

[51] A. Dejardins, 'Recherche sur l'origine de la règle «donner et retenir ne vaut»' *Revue critique*, 207 (1868). Jersey law expressly reads that 'the rule *donner et retenir ne vaut* shall not apply to any question concerning the validity, effect or administration of a trust, or a transfer or other disposition of property to a trust' (Art 9(5)), thus providing for its abrogation.

[52] D. Waters, 'The Concept Called "the Trust" ' *Bulletin of International Fiscal Documentation*, 118, 120 (1999), contends that 'the Convention appears as reluctant as the present writer to say that a reserved power of control or disposition of the trust property, automatically makes the trust a "sham" '.

[53] Agenzia delle Entrate, Circolare no 61/E of 27 December 2010. Defining this document 'devoid of legal basis and indeed visibly (at odds) with the applicable rules': M. Lupoi, 'Il "controllo" in materia di trust, auto-dichiarato e non' *Trusts e attività fiduciarie*, 121, 127 (2020).

trusts settled to the detriment of creditors).[54] This way, however, they seem to turn a blind eye to the clear provisions of the Convention and the common law jurisdictions, where trusts are not invalidated simply because they contemplate retention of rights or powers or because the settlor has drawn up a letter of wishes, for courts focus on the conduct of the trustee, who could meet the settlor's requests based on a correct and independent determination. If the settlor has made a request and the trustee, in good faith and in the exercise of independent judgment, after considering all the circumstances of the case, has decided to grant that request, the trust is not sham.[55] This was also the view taken by San Marino Trust Court, which, after correctly refusing to narrow the concept of sham down to that of simulation,[56] held that

> the trustee must take into account the intention of the settlor, declared in the trust instrument or inferable from the provisions of the trust instrument or even subsequently expressed, obviously considering it not as a binding instruction, but as a manifestation of a desire, the fulfillment of which remains with the prudent appreciation of the trustee.[57]

Accordingly, the distinction does not lie in the amount of powers reserved,[58] but in whether the trustee attaches importance to the independence of the exercise of his powers, or if he routinely ignores the trust instrument considering himself to be a front man. When it comes to the reservation of the power to revoke the trust, a sham allegation may be raised where the trustee, knowing that the settlor could terminate the trust at any moment, considers himself to be a puppet of the settlor, slavishly following his instructions even if they are contrary to the interests of the beneficiaries or to the purpose of the trust.[59]

Cast in these terms, the reservation of powers may be reconciled with the confidence principle. In civil law systems, the risk of a court denying the recognition of a trust with reserved powers remains, but could be averted by providing for an additional office, the guardian of the trust, whose appointment,

[54] For an analysis of the Italian case-law see L.E. Perriello, *Lo* sham *trust nell'ordinamento giuridico italiano. Meritevolezza degli interessi e tecniche di tutela* (Napoli: Edizioni Scientifiche Italiane, 2017), 207.

[55] *Grupo Torras SA* v *Al Sabah* [2003] JRC 092; *Shalson* v *Russo* [2003] EWHC 1637 (Ch); *Charman* v *Charman* [2005] EWCA Civ 1606; *Kan Lai Kwan* v *Poon Lok To Otto* (2014) 7 HKCFAR 414. See also G. Thomas and A. Hudson, *The Law of Trusts* (Oxford: Oxford University Press, 2nd ed, 2010), 65.

[56] See L.E. Perriello, n 54 above, 212.

[57] Corte per il trust (Repubblica di San Marino) 5 December 2017, *Foro italiano*, 163 (2018).

[58] This way, instead, A. Braun, 'The Risk of "Misusing" Trusts: Some Lessons from the Italian Experience' *European Review of Private Law*, 1119 (2016), remarking that 'the fact that (the settlor) maintained some control over the assets transferred to the trustee, for instance, in the form of a right to live in the trust property, is not conclusive' (at 1132).

[59] G. Thomas and D. Hayton, 'Shams, Revocable Trusts and Retention of Control', in D. Hayton ed, *The International Trust* n 42 above, 604-605.

under San Marino law, is mandatory in purpose trusts and voluntary in trusts with beneficiaries (Art 52). The 'guardian' does not have a single legal meaning in the common law galaxy[60] and is differently referred to in the legislation as 'enforcer', 'protector', 'nominator', 'committee', etc. He may be chosen either from among the members of the settlor's family or his friends, so as to be the ideal interpreter of his and the beneficiaries' intentions, or from among persons with particular professional skills (which is more desirable because of the possible conflicts that could arise between the settlor and persons close to him and lead to a fall-out).[61] The guardian may be the settlor himself (even more so if the settlor can also act as trustee).[62] However, the office of guardian is incompatible with that of trustee. The controller must be differentiated from the controlled. Indeed, a guardian with too invasive powers over the trust management may be re-qualified in court as trustee, and take on the relating responsibilities.[63]

The guardian must oversee the proper administration of the trust fund. He is entitled to take action against the trustee in the event of default (Art 52(1)). Other powers attributable to the guardian include the appointment or revocation of trustees, beneficiaries or other guardians; the amendment of the law governing the trust; the veto on certain acts of the trustee (Art 52(5)). The guardian's consent affects the trustee's standing, removing an obstacle to the exercise of a given power, without prejudice to the trustee being sovereign in deciding whether or not to perform an act.[64] Indeed, Art 52(6) provides that the exercise of the above powers does not confer on the guardian the office of trustee. Nor should his consent exempt the trustee from liability, otherwise 'the very notion of trusteeship would be undermined and the trustee would become a sort of manager, in joint ownership with the guardian'.[65]

Unless the trust instrument provides otherwise, the powers of the guardian are fiduciary and not personal (Art 52(3)), meaning that their exercise may not be waived, must necessarily be directed to the benefit of the beneficiaries of the trust and not to the holder of the power, and be subject to judicial review.[66] The

[60] See, for instance, the Bahamian case *Rawson Trust Co* v *Perlman* [1990] 1 Butterworths OCM 31, for Justice Smith asserting that 'the term protector is not a term of art and is not known as such to our law'.

[61] E. Campbell et al, 'Protectors', in D. Hayton ed, *The International Trust* n 42 above, 196.

[62] M. Lupoi, 'Il "controllo" in materia di trust, auto-dichiarato e non' *Trusts e attività fiduciarie*, 121, 123 (2020). See also E. Campbell et al, n 61 above, 196, fn 8, deeming this to be the best way to ensure that the settlor retains some form of control over the trustee.

[63] M. Lupoi, n 35 above, 404.

[64] A. Di Sapio, 'Riflessioni su un provvedimento genovese' *Trusts e attività fiduciarie*, 639, 645 (2019). D. Hayton, P. Matthews and C. Mitchell, *Underhill and Hayton, Law of Trusts and Trustees* (London: LexisNexis, 19th ed, 2016), 58, note that the trustee must refuse to comply with orders of the guardian if he believes that they amount to a breach of his fiduciary duties or a breach of trust on the part of the trustee.

[65] M. Lupoi, n 35 above, 402.

[66] E. Campbell et al, n 61 above, 199. See also *Re Bird Charitable Trust and Bird Purpose Trust* [2008] JLR 1, where the Jersey court asserted its 'very wide powers to supervise and control'

'fiduciary' guardian[67] must, from time to time, with independence and due information, assess whether or not to exercise the power granted to him in accordance with the interests of the beneficiaries, never indulging the whims of the settlor or pursuing personal advantages.[68] This implies, for example, that the guardian may not appoint himself, or persons related to him by family or friendship, as trustee or beneficiary,[69] or direct the trustee to sell him trust property, which may amount to conflict of interests.

V. San Marino Trust as a Separate Patrimony, the Trustee's Liability and the Lack of Legal Personality

The confidence principle, and its many applications, is carved into San Marino trust model, where it co-exists with the principle of patrimonial separation, a purely civilian doctrine. The representation of the trust as a separate patrimony is typical of civil or mixed law systems,[70] and is central to the definition of 'trust' contained in the Draft Common Frame of Reference,[71] but it is not shared by pure common law models, which are not even familiar with the concept of patrimony.[72] The property settled on a common law trust does not constitute a

the exercise of fiduciary powers. Another interesting case discussed by the Jersey court was *The M Settlement* [2009] JRC 140, concerning a request by the settlor and guardian of a trust to pay his massive personal debts with trust money. Quite rightly, the trustee had refused on the ground that the settlor was an alcoholic and that the trust fund was in any case insufficient to prevent the settlor's bankruptcy, and the settlor, disappointed, had decided to exercise his fiduciary power to replace the trustee with a long-time friend. The court suspended the settlor/guardian's power and ordered that the trust be dissolved and the remainder be allocated to his children.

[67] It is accepted that nothing prevents certain powers of the guardian from being qualified as 'personal': M. Conaglen and E. Weaver, 'Protectors as Fiduciaries: Theory and Practice' *Trusts & Trustees*, 17, 20 (2012).

[68] On this point see D. Hayton, P. Matthews and C. Mitchell, n 64 above, 51. Cf also the following decisions: *Re Hay's Settlement Trusts* [1981] 3 All ER 786; *Re Manisty's Settlement* [1974] Ch 17; *Schmidt* v *Rosewood Trust Ltd* [2003] AC 709; *Centre Trustees Ltd* v *Pabst* [2009] JRC 109.

[69] Advocating for the fiduciary nature of the power to appoint and remove trustees: *Re Skeats Settlement* (1889) 42 Ch D 522; *Mettoy Pension Trustees* v *Evans* [1990] 1 WLR 1587; *Simpson Curtis Pension Trustees Ltd* v *Readson Ltd* [1994] OPLR 231.

[70] The Scottish mixed model, for example, exemplifies the tendency to 'patrimonialize' the trust: K. Reid, 'National Report for Scotland', in D.J. Hayton, S.C.J.J. Kortmann and H.L.E. Verhagen eds, *Principles of European Trust Law* (Den Haag-Deventer: Kluwer, 1999), 67; Id, 'Patrimony Not Equity: The Trust in Scotland' *European Review of Private Law*, 427 (2000); G. Gretton, 'Trust and Patrimony', in H. MacQueen ed, *Scots Law into the 21st Century* (Edinburgh: Sweet & Maxwell, 1996), 182; Id, 'Trusts Without Equity' *International & Comparative Law Quarterly*, 599 (2000).

[71] X. – 1: 202: 'the trust fund is to be regarded as a patrimony distinct from the personal patrimony of the trustee and any other patrimonies vested in or managed by the trustee'. For a commentary see A. Braun, 'Trusts in the Draft Common Frame of Reference: The "Best Solution" for Europe?' *Cambridge Law Journal*, 327 (2011).

[72] P. Matthews, n 3 above, 254, points out that the exemption of trust assets from the action of the trustee's personal creditors is not a consequence of trust law, but of the law on the enforcement of judgments and bankruptcy. See also M. Lupoi, 'Si fa presto a dire "trust" ' *Trusts e attività*

patrimony as might be understood, but a fund, made only of assets. Trust assets are not part of the trustee's patrimony (and his personal creditors cannot have access thereto), unlike trust liabilities, for which the trustee is personally liable, ie with his own patrimony,[73] without prejudice to his right to seek indemnity from the trust fund.[74] The trust fund is also made immune to claims for liabilities incurred by the trustee for purposes relating to the trust. By separating assets and not liabilities, the common law trust amounts to an 'asset partitioning tool'.[75] It is true that the trustee may agree to an exclusion of liability, so that the trust liabilities may be enforced against the trust fund,[76] but this agreement entitles the trust creditor to subrogation to the rights of the trustee, that is, the trust creditor does not have action when the trustee has exceeded his powers or committed a breach of trust.[77]

However, the San Marino legal system differs considerably from the traditional model, for it conceptualizes the trust as a separate patrimony composed of assets *and* liabilities. The doctrine of patrimonial separation is so entrenched in San Marino *ius commune* on fiduciary instruments,[78] that Art 1(j) defines the trust fund as a 'complex of assets in trust and the legal relations inherent to them', thereby including assets as well as liabilities. Art 12 states that the trust fund is separate from the trustee's personal property; it cannot be subject to claims

fiduciarie, 585, 586 (2017), holding that patrimonial separation 'must not be considered fundamental by the English since no one except Underhill mentions it'.

73 L. Smith, 'Trust and Patrimony' *Estates, Trusts and Pensions Journal*, 332, 338 (2009); D.J. Hayton and C. Mitchell, *Hayton & Marshall Commentary and Cases on the Law of Trusts and Equitable Remedies* (London: Sweet & Maxwell, 12nd ed, 2005), 693; J. Penner, *The Law of Trusts* (Oxford: Oxford University Press, 2006), 22.

74 'A trustee (a) is entitled to be reimbursed from the trust funds or (b) may pay out of the trust funds, expenses properly incurred by him when acting on behalf of the trust': s. 31(1) Trustee Act 2000. Defining this mechanism as 'clumsy and formalistic ritual (which serves) no functional purpose': R.H. Sitkoff, 'Trust Law as Fiduciary Governance plus Asset Partitioning', in L. Smith ed, *The Worlds of the Trust* n 46 above, 436. In fact, a different model is gaining currency in the United States, which considers the trustee as a representative of the trust property, thus allowing creditors to have direct recourse against the trust fund. The requirement for the exclusion of the trustee's personal liability is that he has disclosed his status to the third party and has not violated the law or the trust instrument. This trend brings trusts closer to corporations and has been enshrined in the Restatement (Second) of Trusts, the Uniform Probate Code and the Uniform Trust Code. On this matter, cf J.D. Johnston Jr, 'Developments in Contract Liability of Trusts and Trustees' *New York University Law Review*, 483 (1966); G.G. Bogert and G.T. Bogert, *The Law of Trusts & Trustees* (St. Paul-Minneapolis: Thomson/West, 1980), § 712; J. Dukeminier and S.M. Johanson, *Wills, Trusts and Estates* (New York: Aspen, 2000), 975; A. Gallarati, *Il trust come organizzazione complessa* (Milano: Giuffrè, 2010), 174-175, for a list of US states where the traditional English model based on the trustee's personal liability has been dismissed.

75 Arguing this way and comparing the common law trust with the San Marino trust based on patrimonial separation: A. Vicari, 'Country Reports: San Marino' *Columbia Journal of European Law Online*, 81, 91 (2012).

76 *Muir* v *City of Glasgow Bank* (1879) 4 App Cas 337.

77 L. Smith, n 73 above, 340-341. See also *Re Johnson* (1880) 15 Ch D 548; *Ex p Garland* (1804) 10 Ves 110; *Re Frith* [1902] 1 Ch 342; *Re British Power Traction and Lighting Co* [1910] 2 Ch 470.

78 F. Treggiari, 'Trust e diritto comune a San Marino' n 17 above, 63-64.

from the trustee's personal creditors, nor does it form part of the trustee's succession, matrimonial property or insolvency proceedings. This is a minimum effect of the recognition of the trust (Art 11(2) Hague Convention),[79] that is, if it is not provided for in the applicable law, the trust cannot be recognized; conversely, if it is provided for in the applicable law, the separating effect cannot then be questioned by the authorities of the state in which the trust takes effect. Strictly speaking, patrimonial separation is not an essential element of the trust under the governing laws, but an essential effect of its recognition in non-trust countries.

In line with the representation of San Marino trust as a separate patrimony, encompassing any legal relationships relating to the trust, whether active or passive, is the rule requiring that creditors for obligations undertaken by the trustee in his capacity as trustee be satisfied solely out of the trust fund (Art 47(1)). Accordingly, not only are the trust assets separated from the trustee's, but so also are the relating liabilities (the trust appears to be also a 'liability partitioning tool'). The trustee is liable to third parties only with the assets settled on trust, not with his own assets. The reason behind this is that the trustee holds a private law office and to this end he is the owner of the trust assets; just as he cannot enrich himself (Art 23), neither can he impoverish himself.[80] If he discharges the trust liabilities personally, he will have recourse against the trust fund, before any other creditors (Art 47(2)). Unlike the traditional model, wherein the trustee is personally liable for the trust liabilities, the San Marino model affords greater protection to the trustee and encourages those who are afraid of exposing their assets to loss, to take on the trustee office, bringing the trust closer to the organizations with legal personality.[81]

The comparison with legal persons should not, however, be over-emphasized. Legal personality may help consider the trust assets as distinct from the trustee's personal assets, as is envisaged for the organizations endowed with corporate personality, so that creditors can never claim the trustee's liability for debts incurred by reason of his office, while his personal creditors have no reason to attack the trust fund. In fact, when continental private law scholars began to come to terms with the trust, they took the view that '*la solution la plus efficace et la plus simple est de doter le trust de la personne morale*'.[82] In several common law jurisdictions, trusts can be used to carry out non-profit or business activities

[79] J. Harris, n 49 above, 317.

[80] A. Vicari, n 45 above, 373.

[81] A. Gallarati, '*Fiducie* v trust. Spunti per una riflessione sull'adozione dei modelli fiduciarî in diritto italiano' *Trusts e attività fiduciarie*, 238, 249 (2010). Discussing modern US trust law, R.H. Sitkoff, n 74 above, 436, remarks that 'because modern law sharply separates the property of the trustee personally from the property of the trust, the contemporary American trust is in function (though not in juridical form) an entity. Reifying the trust in expression is an embrace of substantive function over technical form'.

[82] 'The most effective and simple solution is to endow the trust with legal personality': P. Lepaulle, 'Review of Roberto Pasqual's *La Propriété dans le* Trust' *Revue internationale de droit comparé*, 377, 378 (1952).

(the so-called Massachusetts trust) as an alternative to corporations, they can go bankrupt or have legal standing.[83] In Italy, in addition to registering a trust as a charity,[84] it is possible to open a bank account in the name of a trust, register the sales entered into by the trustee, report trust incomes, and/or treat a trust as a legal person for the purposes of anti-money laundering legislation.[85]

These are, however, forms of fictitious and strictly instrumental personality, for the trust, *per se*, is not a legal person. There is no such thing as a trust that contracts, commits crimes, takes legal action or pays taxes.[86] Personalizing the trust means thwarting its particularities and conflating it with already known entities, while history has taught us that if individuals use trusts, it is because their goals could not be equally pursued through the law of contracts[87] or legal persons.[88]

VI. The Worthiness of the Trust Program

Hovering between the principles of confidence and patrimonial separation, the international models and *ius commune*, San Marino trust proves to be the perfect combination of innovation and tradition. Legge no 42 of 2010 longs to become a benchmark for the regulation of trusts established in civil law jurisdictions. The choice of San Marino law cannot, however, pander to trusts contrary to mandatory rules, public policy or good morals (Art 10(1)(a)) or simulated (Art 10(1)(e)). The legislation, therefore, requires a review of the 'worthiness' of the transaction. On the contrary, the Italian Supreme Court – which, it is hoped, San Marino courts will not follow – held that the Hague Convention

> has given recognition in our legal system, if we can say so, (to the trust), so it is not necessary for courts to determine from time to time whether the single

[83] G. Gretton, 'Up there in the *Begriffshimmel*?', in L. Smith ed, *The Worlds of the Trust* n 46 above, 529.

[84] N.D. Latrofa, 'Dal trust charitable al trust ente del Terzo settore' *Trusts e attività fiduciarie*, 27 (2020).

[85] A. Vicari, n 45 above, 376.

[86] D. Hayton, P. Matthews and C. Mitchell, n 64 above, 16.

[87] On the autonomy of contract law from trust law, from a law & economics perspective, see H. Hansmann and U. Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' *New York University Law Review*, 434 (1998).

[88] L. Smith, n 73 above, 354, contends that 'the "entification" of the trust spells, in the long run, the end of the law of trusts by assimilation'. See also G. Gretton, n 83 above, 530, claiming that 'to turn trusts into persons is to abolish the trust, while at the same time adding an extra item to the list of species of the genus "juristic person" '. Concurring A. Zoppini, 'Fondazioni e trusts (spunti per un confronto)', in I. Beneventi ed, *I trusts in Italia oggi* (Milano: Giuffrè, 1996), 147, who, while comparing foundations and trusts, states that 'it does not really facilitate the understanding of the institution to cast the trust as a "surrogate" for legal personality'.

trust complies with the requirements laid down in Art 1322 Civil Code,[89]

under which

> the parties can also make contracts that are not of the types that are particularly regulated, provided that they are directed to the realization of interests worthy of protection according to the legal order.[90]

A commentator followed suit, arguing that 'the very concept of "interests worthy of protection" is alien, incomprehensible and (...) antithetical' to the law of trusts.[91]

The Italian Supreme Court is probably concerned that the concept of trust 'worthiness' will end up providing courts with an argument for continuing to deny the recognition of trusts or artificially re-qualifying them according to categories of the *forum* that have little to do with trusts.[92] However, this concern is not justified, as the arguments that, years ago, the 'pre-comprehension' doctrine[93] used to hinder the transplant of trusts in civil law countries, were not based on their being 'unworthy' of legal protection but on the alleged splitting of the right of ownership in defiance of the *numerus clausus* of real rights[94] and on the

[89] Corte di Cassazione 19 April 2018 no 9637, *Trusts e attività fiduciarie*, 504 (2018).

[90] Translation by S. Beltramo ed, *The Italian Civil Code and Complementary Legislation* translated in 1969 by M. Beltramo, G.E. Longo and J.H. Merryman (New York: Thomson Reuters, 2012).

[91] M. Lupoi, 'I trust, i flussi giuridici e le fonti di produzione del diritto' *Trusts e attività fiduciarie*, 5, 9 (2019). Lupoi seems to have reconsidered the position he took in Id, n 35 above, 549: 'a trust chooses the interest to protect among several conflicting interests and (...) this choice, consistent with the idea that the legal system has of what is worthy and what is not, results in a selection of interests which is forbidden by our traditional legal instruments. (...) A domestic trust removes a legal relationship from national legislation because only in this way can the protection mentioned above be obtained; a removal which is not undue, but worthy as worthy is, in each case, the interest to protect'.

[92] This is the questionable view embraced by G. Petrelli, 'Trust interno, art. 2645 ter c.c. e «trust italiano»' *Rivista di diritto civile*, 167 (2016), claiming that, after the introduction of Art 2645 *ter* in the Italian Civil Code, Italy has become a fully-fledged trust country. As a consequence, a domestic trust could not escape the application of the new provision; most importantly, it can only concern immoveable or registered movable property and must have determined beneficiaries.

[93] Defined so by M. Lupoi, 'Le ragioni della proposta dottrinale del contratto di affidamento fiduciario' *Contratto e impresa*, 734, 735 (2017). Elsewhere, Lupoi complains about the ignorance of the average lawyer on trusts 'because he did not study it at university, no longer reads legal journals and does not attend refresher courses on the subject; and this also applies to the average judge, no matter whether civil, criminal or tax, whether of merit or legitimacy. Our Universities do not offer refresher courses on trusts and it's been years since the High Council of the Judiciary held courses on trusts; the same (or even more) can be said for the National Council of Lawyers, the National Council of Notaries and the National Council of Chartered Accountants and Accounting Experts': Id, n 45 above, 237.

[94] Cf F. Weiser, *Trusts on the Continent of Europe* (London: Sweet & Maxwell, 1936), 7; H. Motulsky, 'De l'impossibilité juridique de constituer un trust anglo-saxon sous l'empire de la loi française' *Revue critique de droit international privé*, 451 (1948); H. Battifol, 'Trusts – The Trust Problem as Seen by a French Lawyer' *Journal of Comparative Legislation and International Law*, 18 (1951); P. Hefti, 'Trusts and Their Treatment in the Civil Law' *American Journal of Comparative*

close-ended formulation of the limitations to patrimonial liability.[95] However, the Hague Convention itself makes room for the 'worthiness' of the program underlying the trust, by permitting contracting states to refuse recognition of a trust, the significant elements of which are more closely connected with non-trust countries (Art 13). This provision is embedded in a complex system of checks that makes the judicial review of trusts particularly tight, preventing the recognition in non-trust countries of trusts running counter to 'provisions (that) cannot be derogated from by voluntary act' (Art 15), 'provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws' (Art 16), and public policy (Art 18).

The only way to avoid an *interpretatio abrogans* of Art 13 is to construe it as a 'wrap-up' provision in the Hague Convention, preventing the recognition of trusts that do not fall short of Arts 15, 16 and 18, but still have repugnant consequences in the legal system.[96] This way, Art 13 may sanction situations in which the use of trusts in non-trust countries has taken place without any 'reasonable and legitimate justification',[97] or

> not according to reasonableness and/or *bona fide* and/or the protection

Law, 553 (1956); A. Gambaro, 'Problemi in materia di riconoscimento degli effetti dei *trusts* nei paesi di *civil law*' *Rivista di diritto civile*, 93 (1984). Recently, see F. Fimmanò, 'La Cassazione "ripudia" il trust concorsuale' *Fallimento*, 1156, 1169 (2014), contending that 'our right of ownership is intended in such a way that the owner holds all powers of enjoyment, management and disposal of property. The trust, generating a doubling of the right (dual ownership), or rather a dissociation between ownership and control, should be considered a kind of atypical real right. Since real rights are predetermined and recognized by the Civil Code (*numerus clausus*), the free formation of new conventional situations is not allowed'.

[95] C. Castronovo, 'Il trust e "sostiene Lupoi" ' *Europa e diritto privato*, 441, 447 (1998); G. Broggini, 'Il trust nel diritto internazionale privato italiano', in I. Beneventi ed, *I trusts in Italia oggi* n 88 above, 11; F. Gazzoni, '(Lettera aperta a Maurizio Lupoi sul trust e su altre bagatelle)' *Rivista del notariato*, 1247, 1251 (2001).

[96] Art 13 Hague Convention is the extreme remedy 'offered when, notwithstanding Arts 18, 16 and 15, the modalities or the purposes of the trust are found by the court to be repugnant to a legal system (not necessarily the forum) which is not familiar with that particular form of trust, but in which, nevertheless, the trust has its main effects: Art 13 prevents the risk that a trust may succeed in producing repugnant effects despite all the conventional defenses': M. Lupoi, n 35 above, 545. This opinion was endorsed by the Tribunal of Bologna, 1 October 2003, *Trusts e attività fiduciarie*, 67 (2004), which held that 'since the "domestic" trust cannot be considered invalid *ex se* due to the lack of foreign elements (…), nor to its contrast with overriding mandatory rules or public policy (safeguarded by Arts 15, 16, 18, which, however, concern the effects of a trust already recognized), the only possible and reasonable hermeneutical solution (unless we want to give Art 13 an *interpretatio abrogans* of Arts 6 and 11) is to consider the provision as a "closing rule of the Convention" (comparable to Art 1344 of the Civil Code), aiming to grasp cases which escape rules of a specific nature: in other words, Art 13 amounts to an extreme and exceptional remedy provided for cases in which the modalities and purposes of a trust, whose effects escape the provisions of Arts 15, 16 and 18, are in any case considered by a court to be repugnant to a legal system which does not know that particular form of trust, but in which, nevertheless, the agreement actually carries out its effects'.

[97] R. Luzzatto, '«Legge applicabile» e «riconoscimento» di trusts secondo la Convenzione dell'Aja del 1° luglio 1985' *Rivista di diritto internazionale privato e processuale*, 5, 20 (1999).

> of lawful interests, but with the sole aim of abusively removing the situation in which the trust operates from the law that would be applicable thereto according to the ordinary application of the rules of private international law.[98]

A trust governed by San Marino law, which does not present any program worthy of protection[99] and pursues the sole aim of putting assets out of the reach of creditors,[100] cannot be recognized in Italy, especially now that the Republic of San Marino has undertaken to make its economic and financial system more transparent and abolish the legal institutions which may be used to perpetrate fictitious interpositions and conceal the ownership of assets.[101]

[98] S.M. Carbone, 'Autonomia privata, scelta della legge regolatrice del trust e riconoscimento dei suoi effetti nella Convenzione dell'Aja del 1985' *Rivista di diritto internazionale privato e processuale*, 773, 782-783 (1999).

[99] San Marino's most dated case-law shows that fiduciary institutions must attain interests worthy of legal protection. See the decision of the Commissario della Legge 4 September 1936 in the civil case no 33 of 1936, unpublished but cited by V. Pierfelici, n 23 above, 537, fn 1, in a case wherein the testator had addressed to the universal heir 'a special recommendation or rather obligation never to abandon but always to help and assist in the best way possible his sister Ester who, due to illness, is incapable of earning a living'.

[100] Claiming that today the trust 'is a favorite legal coding device among the wealthy who wish to protect their assets from tax authorities and other creditors', see K. Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton and Oxford: Princeton University Press, 2019), 43. A purely asset-protection trust, which does not enunciate any program, may not be recognized in Italy.

[101] V. Pierfelici, n 23 above, 544, mentions significant reforms such as 'the abolition of bearer shares, savings accounts and bearer financial instruments, the revision of banking secrecy, the strengthening of control and vigilance instrument'. All these measures highlight how 'external confidentiality is protected and safeguarded, but is no longer functional to "hide", to "conceal", to create areas of opacity in which to shelter capitals of unlawful origin'. For a review of San Marino anti-money laundering legislation see E. Montanari, 'Antiriciclaggio nella legislazione della Repubblica di San Marino: adeguata verifica della clientela e identificazione del titolare effettivo' *Trusts e attività fiduciarie*, 164 (2015).