

Is there room for the trust in a civil law system? The French and Italian perspective.

‘English law does not readily fit into civilian pigeon-holes ...it does not follow that a system which has the trust must have an English pigeon-hole for it.’¹

The small family of mixed legal systems, which draw upon both common and civil law traditions, provides us with an interesting perspective for the purpose of comparative trust law². When faced with an assertion that there is no place for the trust in civil law, how does one explain the existence of the trust in these mixed jurisdictions? Surely, if these systems are able to accommodate the trust, civil law jurisdictions should, in principle, also be able to do so.

In this paper I shall, through the examination of two civil law jurisdictions – France and Italy, argue that there is room for the trust to be translated – not transplanted – into existing civil law institutions and practice. The extent to which this is the case and the most appropriate model for this introduction will be dependent on the dogmatic context of each such jurisdiction.

To do so I shall first seek a definition and determine the features of the ‘trust’ in comparative law terms, and outline the obstacles which must be surmounted in order to accommodate it into the civil law tradition (1). I shall then examine the French *fiducie*, a *sui generis* institution, which, whilst formed contractually, has significant trust-like structural features (2). Finally, I shall look at how Italy has set in motion a process which has seen the interplay between national law and

¹ George Gretton, ‘Trust and Patrimony’, in Hector MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W.A.Wilson* (W Greens 1996) 501

² Michael Milo and Jan Smits, ‘Trusts in Mixed Legal Systems: A Challenge to Comparative Trust Law’ [2000] 3 *European Review of Private Law* 421; H Hahlo, ‘The Trust in South African Law’ (1960) 2 *Inter American Law Review* 228; Kenneth Reid, ‘Patrimony not Equity: The Trust in Scotland’ [2000] 8 *European Review of Private Law* 427

foreign law transform trusts and has developed a thriving practice of 'internal' trusts (3).

I. Conceptual background

A) What is a trust?

The trust is undoubtedly an extremely versatile instrument which is suitable for a great variety of purposes, even leading some commentators to qualify it as a "universal fix-it"³. It is, however, difficult to detach these unique functional features from the social and legal context of a liberal society, in which the state largely gives way to the choices freely made by its citizens⁴.

Distinguishing the unique features of the English trust

"The trust does not have to be conceptualised within the framework of English Law. The trust presupposes neither equity nor divided ownership."⁵

When conceptualising the trust in a civil law system, one must decide which elements of the English trust are essential, and which are purely the byproduct of unique legal and social practices developed over the centuries.

The above quote is echoed by the works of Tony Honoré in his paper 'Trusts: The Inessentials'⁶, in which he argues that two such elements may be considered

³ Tony Honoré, 'On Fitting Trusts into Civil Law Jurisdictions' (Oxford Legal Studies Research Paper No. 27/2008) <<http://ssrn.com/abstract=1270179>> 4

⁴ Ibid.

⁵ George Gretton, 'Trusts without Equity' [2000] 49 *The International and Comparative Law Quarterly* 599

⁶ Tony Honoré, 'Trusts: The Inessentials' in Joshua Getzler (ed), *Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths 2003)

inessential for comparative purposes: the duality of ownership of trust assets (i) and equity (ii).

A comparative view confirms this. Indeed, South African trusts do not involve a strict separation as exists in English law, relying instead on a duality of estates⁷. The Scottish trust, which is deeply influenced by civil law, recognises the beneficiaries' interest as a personal right and not a property right⁸. Furthermore, it is clear that the relationship between equity and trusts is a product of England's unique history, and is but one way of achieving a segregation and protection of the trust assets⁹.

The trust in comparative law terms

Which elements are then essential to a trust? I would submit that the following elements may be deemed necessary structural components for an institution to be considered a trust in comparative law terms:

(i) the segregation of assets from the estate or patrimony of the trustee or settlor¹⁰, (ii) a trustee to administer the assets and hold such office¹¹, (iii) the

⁷ M de Waal, 'The Core Elements of the Trust' (2000) 117 South African Law Journal 548

⁸ Hiroyuki Watanabe, "'Trusts without Equity' and Prospects for the Introduction of Trusts into European Civil Law Systems" <<http://www.globalcoe-waseda-law-commerce.org/activity/pdf/23/20.pdf>> 187; *Inland Revenue v Clark's Trs* 1939 SC 11 (Scottish case)

⁹ Hiroyuki Watanabe, "'Trusts without Equity' and Prospects for the Introduction of Trusts into European Civil Law Systems" <<http://www.globalcoe-waseda-law-commerce.org/activity/pdf/23/20.pdf>> 196; De Waal MJ, 'In Search of a Model for the Introduction of the Trust into a Civilian Context'; (2001) 12 Stellenbosch Law Review 66

¹⁰ Tony Honoré, 'On Fitting Trusts into Civil Law Jurisdictions' (Oxford Legal Studies Research Paper No. 27/2008) <<http://ssrn.com/abstract=1270179>> 4

¹¹ Gregory S Alexander, 'The Dilution of the Trust' in Lionel Smith (ed), *The World of the Trust* (Cambridge University Press 2012) 2; David Hayton, 'The Distinctive Characteristics of the Trust in the Anglo-Saxon Law' in André Prüm, Claude Witz (eds), *Trust et fiducie: la convention de La Haye et la nouvelle législation luxembourgeoise* (Montchrestien 2005) 5

existence of beneficiaries or a purpose¹², (iv) a court or administrative authority with supervisory jurisdiction over the exercise of the trustee's rights¹³

I would argue that (i) is wherein lies the very core of a trust. This echoes the views of Hahlo, according to whom the characteristic feature of the trust is: "the separation between the control which ownership gives and the benefits of ownership", he later goes on to add that "in some guise or other trusts in this sense appear in every civilised system of law"¹⁴.

My focus will be on purely express trusts, as opposed to resulting or constructive trusts, which find well developed functional equivalents in civil law institutions such as those dealing with unjust enrichment¹⁵.

The Hague Convention trust

I shall explore in more substantive detail the Hague Convention on the Recognition of Trusts¹⁶ when looking at its impact on the Italian legal system. Of particular interest at this stage is the inherent duality of purpose which purveys the convention. On the one hand its objective, as evidenced by the General Reporter¹⁷ and the Special Commission¹⁸, was to explain to civil law practitioners what trusts are, or as the Australian delegate to the conference put it:

¹² Tony Honoré, 'On Fitting Trusts into Civil Law Jurisdictions' (Oxford Legal Studies Research Paper No. 27/2008) <<http://ssrn.com/abstract=1270179>> 4

¹³ Ibid.; De Waal MJ, 'In Search of a Model for the Introduction of the Trust into a Civilian Context'; (2001) 12 Stellenbosch Law Review 67

¹⁴ H Hahlo, 'The Trust in South African Law' (1960) 2 Inter American Law Review 228

¹⁵ Tony Honoré, 'On Fitting Trusts into Civil Law Jurisdictions' (Oxford Legal Studies Research Paper No. 27/2008) <<http://ssrn.com/abstract=1270179>> 3

¹⁶ Hague Convention on the Law Applicable to Trusts and on their Recognition [1984] <http://www.hcch.net/index_en.php?act=conventions.text&cid=59> (hereafter 'Hague Convention')

¹⁷ Conférence de la Haye de droit international privé, Actes et documents de la Quinzième session, 236 cited in Maurizio Lupoi, 'The Hague Convention, the civil law and the Italian experience' [2007] 21 Trust Law International 80

¹⁸ Rapport de la Commission spéciale, n. 9 – cited supra

“The aim of the article [defining a trust for the purposes of the Convention] is to give to lawyers and judges in civil law countries sufficient indications of what constitutes a trust.”¹⁹

On the other hand, it was also decided to include within the scope of the Convention institutions other than the common law trust which meet the criteria set out in the Convention due to their structural similarities²⁰. The product of this dichotomy, which is to be found in article 2, is what commentators have termed the ‘shapeless trust’²¹.

One notable departure from the English trust is the mere requirement that the trustee ‘control’ the assets, as opposed to the possession of legal title. Furthermore, this article embraces purpose trusts, which are generally void in English law²². Article 3 introduced two further requirements, namely that a trust must be created voluntarily (thus excluding trusts created by law) and must be evidenced in writing.

It should now be clear that the Hague Convention trust, although presenting structural similarities, does not correspond to the English-model trust²³. It does, however, meet the criteria which I have set out above for the essential features of a trust in comparative law, as reflected in Convention articles 2, 8(a) and 11²⁴.

¹⁹ Ibid. 153; Maurizio Lupoi, *Trusts: a Comparative Study* (Simon Dix (tr), Cambridge University Press 2010) 327

²⁰ Maurizio Lupoi, ‘The Hague Convention, the civil law and the Italian experience’ [2007] 21 *Trust Law International* 80

²¹ Maurizio Lupoi, ‘The Shapeless Trust’ [1995] 3 *Trust & Trustees* 15

²² *Leahy v Attorney-General for New South Wales* [1959] AC 457

²³ Maurizio Lupoi, *Trusts: a Comparative Study* (Simon Dix (tr), Cambridge University Press 2010) 331

²⁴ David Hayton, ‘The Distinctive Characteristics of the Trust in the Anglo-Saxon Law’ in André Prüm, Claude Witz (ed), *Trust et fiducie: la convention de La Haye et la nouvelle législation luxembourgeoise* (Montchrestien 2005) 9

B) Common obstacles to the reception of the trust concept in civil law jurisdictions

Much has been written about the obstacles which the trust would face when introduced in a civil law system²⁵. I shall look at these when examining each jurisdiction, for now, I propose to briefly outline the most oft-cited:

* autonomous and indivisible ownership²⁶

This principle defines property as an absolute right of enjoyment and disposition of things²⁷. It has its roots in the abolition of feudal burdens and is inextricably linked to historical factors²⁸.

* the *numerus clausus* (taxative enumeration) of property rights²⁹

²⁵ Stathis Banakas, 'Understanding Trusts: A Comparative View of Property Rights in Europe' [2006] 323 *InDret* 1; K W Ryan, 'The Reception of the Trust' [1961] 10 *The International and Comparative Law Quarterly* 265; Vera Bolgár, 'Why No Trusts in the Civil Law?' [1953] 2 *The American Journal of Comparative Law* 204; Henri Batiffol, 'Trusts - The Trust Problem as Seen by a French Lawyer' [1951] 33 *Journal of Comparative Legislation and International Law* 33

²⁶ Stathis Banakas, 'Understanding Trusts: A Comparative View of Property Rights in Europe' [2006] 323 *InDret* 1-9 <<http://ssrn.com/abstract=1400130>> 7; Vera Bolgár, 'Why No Trusts in the Civil Law?' [1953] 2 *The American Journal of Comparative Law* 210

²⁷ article 544, French Civil Code; article 2740, Italian Civil Code

²⁸ Vera Bolgár, 'Why No Trusts in the Civil Law?' [1953] 2 *The American Journal of Comparative Law* 210

²⁹ Stathis Banakas, 'Understanding Trusts: A Comparative View of Property Rights in Europe' [2006] 323 *InDret* 5; Henri Batiffol, 'Trusts - The Trust Problem as Seen by a French Lawyer' [1951] 33 *Journal of Comparative Legislation and International Law* 33

Two further obstacles may be cited: provisions on forced heirship³⁰ and the principle of publicity of property rights³¹.

II. France

"The human mind treats a new idea in the way that the human body treats a strange protein: it rejects it."³²

According to a leading French commentator, the Civil Code knows not of the trust³³. It can safely be said that this is no longer the case of French taxation law, which, as of July 2011, provides a definition of the trust (along with a 0.5% annual taxation rate)³⁴. This does not allow trusts to be created in French law but allows foreign trusts to be recognised as such, and thereafter taxed, where a territorial link is established.

In February 2007, the French Parliament introduced, under Chapter 14 of the Civil Code, the *fiducie*. This tailor-made legal institution, draws upon the Roman law concept of *fiducia* and the experience of analogue institutions from other civil law jurisdictions such as Luxembourg, but also from the common law trust³⁵.

³⁰ David Hayton, *The Law of Trusts* (4th ed, Sweet & Maxwell 2003) 9

³¹ Stathis Banakas, 'Understanding Trusts: A Comparative View of Property Rights in Europe' [2006] 323 *InDret* 6; See for eg. article 1130, French Civil Code

³² Sir Peter Medawar, *The Art of the Soluble* (Methuen & Co 1968)

³³ Bénédicte François, *Fiducie* (Dalloz 2011) 48

³⁴ article 792-0 bis, Code Général Des Impôts; Albin Chaumeille, 'Le trust en droit français' [2011] *Actualité Juridique Droit Immobilier* 679

³⁵ Yaell Emerich, 'The Conceptual Foundations of France's *Fiducie* Faced with the Trust of the Common Law: Between the Law of Contract and Property Law (Les Fondements Conceptuels de La *Fiducie* Française Face au Trust de La Common Law: Entre Droit Des Contrats et Droit Des Biens)' [2009] 1 *Revue Internationale de Droit Comparé* 50; Bénédicte François, *Fiducie* (Dalloz 2011) 5

I will look at this institution as opposed to other civilian practices such as tutorship, curatorship, agency or foundations, which fulfill some of the functions of the trust but are structurally dissimilar³⁶. By contrast, the fiducie has been described by both its proponents and by commentators as the closest institution to the trust in French law³⁷.

Article 2011 defines the fiducie as a contract under which a settlor transfers assets, rights or securities to a fiduciary (trustee), who, whilst segregating them from his own patrimony, acts in furtherance of a specific objective for the benefit of its beneficiaries (who may be the settlor himself)³⁸.

A) Between contract and trust: the fiducie – a hybrid institution

An autonomous estate for the fiduciary assets?

As mentioned above, one of the key appeals of the trust resides in the impermeability of the assets held by the trustee. How does the fiducie compare in this respect?

As article 2011 makes it clear, the fiducie is a transfer of ownership for a purpose. The assets will no longer be part of the settlor's patrimony and he will instead be granted a contractual right, thus losing all ownership rights. These assets will then enter a distinct pool of assets as part of the fiduciary's patrimony ('patrimoine d'affectation autonome', ie. an autonomous estate by appropriation). This segregation of assets is a welcome feature since, in theory, the creditors of the settlor or the fiduciary will be unable to seize or attach to these assets. It should, however, be noted that, per article 2025-2, debts arising in the course of

³⁶ David Hayton, *The Law of Trusts* (4th ed, Sweet & Maxwell 2003) 8

³⁷ Stéphane Prigent, 'Deuxième pas en fiducie' [2009] *Actualité Juridique Droit Immobilier* 421; Christian Larroumet, 'La loi du 19 février 2007 sur la fiducie(1)' [2007] *Recueil Dalloz* 1350

³⁸ article 2011, French Civil Code

the management of the fiduciary assets (or by fraud) are susceptible of being recoverable against these assets. The same will be true of a right of mortgage recorded prior to the execution of the fiducie contract (this may be broadly compared to a settlor's covenant for further assurance under English law)³⁹. The fiduciary's patrimoine is, therefore, not truly impenetrable.

* the failed proposal to create in rem rights over the fiducie

In 2009, a legislative proposal was put forward to change the fiducie in order to accommodate Islamic finance and to allow the creation of sukuk under French law⁴⁰ (one of the requirements being that the person in possession of a sukuk must have a property right in the underlying asset). This was fairly unproblematic in England, where a trust is used and the possessor of the sukuk instrument is granted equitable ownership over the assets. Article 16 of the law would have modified the fiducie so as to create a property right for the benefit of the beneficiary (a so-called 'economic property right'), which is distinct from the 'legal property'⁴¹.

This move was widely denounced by commentators as an attack on the very core of property rights⁴². Indeed, the resulting change would have meant that, in case of default by the fiduciary, the beneficiary (the possessor of the 'economic property') would have been able to apply to court to have the legal title

³⁹ Paul Matthews, 'The French fiducie: and now for something completely different?' [2007] 21 Trust Law International 21

⁴⁰ Loi no. 2009-1255 du 19 octobre 2009, tendant à favoriser l'accès au crédit des petites et moyennes entreprises et à améliorer le fonctionnement des marchés financiers

⁴¹ Laurent Aynès and Pierre Crocq, 'La fiducie préservée des audaces du législateur' [2009] Recueil Dalloz 2560

⁴² Ibid.

transferred to him. Unfortunately, this change was never implemented as the Constitutional Council struck down article 16 on procedural grounds⁴³.

In any case, despite the absence of real rights in the fiducie, the protections granted to the beneficiary are still more effective than a pure contractual arrangement⁴⁴, albeit a far cry from the protection offered by tracing or subrogation⁴⁵. The contractual roots of the fiducie should not be an obstacle to further reform in this area. Indeed, one may note that the Québec trust law provides neither settlor, fiduciary or beneficiary with any real rights over the trust⁴⁶.

Further key trust-like features

In several important ways, the fiducie can be seen to be closer to the trust idea than to the contractual realm⁴⁷. Firstly, title belongs to the fiduciary, just as it belongs to the trustee⁴⁸. Secondly the parties may not end the fiducie once the beneficiaries have accepted it without their consent⁴⁹ (or the court's⁵⁰), thus echoing the rule in *Saunders*⁵¹. Thirdly, the fiduciary is to account to the

⁴³ Décision no. 2009-589 DC du 14 oct. 2009 [Constitutional Council]

⁴⁴ article 2023, French Civil Code

⁴⁵ article 1406, French Civil Code; Paul Matthews, 'The French fiducie: and now for something completely different?' [2007] 21 *Trust Law International* 21

⁴⁶ Article 1261, Québec Civil Code

⁴⁷ Paul Matthews, 'The French fiducie: and now for something completely different?' [2007] 21 *Trust Law International* 20;

⁴⁸ Delphine Baudouin, 'Fiducie in French law' [2007] 2 *International Business Law Journal* 276

⁴⁹ article 2029, French Civil Code

⁵⁰ article 2028(2), French Civil Code

⁵¹ *Saunders v Vautier* [1841] EWHC Ch J82

beneficiaries⁵². Fourthly, the court is able to intervene in the affairs of the fiducie and to remove the fiduciary where this proves necessary (which goes to show that the position of fiduciary is truly an office)⁵³. Fifthly, just as with English trusts, pure purpose fiducies are void⁵⁴. Finally, the fiducie is limited in time (currently 99 years⁵⁵), echoing the prohibition on perpetuities⁵⁶.

Structural and functional limitations to the fiducie

Under strong pressure from the Finance Ministry, and in response to the general distrust expressed towards the fiducie, the legislature severely limited the scope of this new institution⁵⁷.

Under the 2007 legislation, only companies paying corporate tax in France were eligible to become settlors⁵⁸. This is no longer the case, as private individuals may now become settlors under the revised law⁵⁹. On the flip-side, the role of fiduciary is reserved to banking/financial institutions which are under the supervisory jurisdiction of the government (although legal practitioners can now also act as fiduciaries⁶⁰).

⁵² article 2022, French Civil Code

⁵³ article 2027, French Civil Code

⁵⁴ article 2018(5), French Civil Code

⁵⁵ article 2018(2), French Civil Code

⁵⁶ Perpetuities and Accumulations Act 2009: Chapter 18

⁵⁷ Christian Larroumet, 'La loi du 19 février 2007 sur la fiducie(1)' [2007] Recueil Dalloz 1353

⁵⁸ article 2014, French Civil Code

⁵⁹ As amended by: loi no. 2008-776 du 4 août 2008 de modernisation de l'économie [art. 18]

⁶⁰ Ibid.

A national register of all fiducie contracts was also created, so as to facilitate monitoring by the tax authorities⁶¹. Such a requirement, coupled with stringent requirements as to form, is repugnant to the informal nature of the trust⁶².

It should also be noted that the use of fiducies for the purpose of inheritance or donations (fiducie-libéralité) is expressly prohibited⁶³, and would be void as a matter of public policy. The result of this restriction is a functionally neutered fiducie.

B) The fiducie and the Hague Convention: a bridge towards the trust?

As we have seen, the fiducie cannot be said to be a trust in the common law sense, due to its functional limitations. It does, however, present strong structural similarities. Are these sufficient to enable it to meet the definition of a trust under the Convention?

Although France is one of the signatories of the Convention, it has, regrettably, not yet ratified it. Since the Convention is 'open' and, therefore, applies to the laws of any state (not just parties to the Convention), the fiducie may, provided it meets the definition set-out in article 2, be recognised as a trust in states party to the Convention. It can safely be said that the fiducie appears to meet all these

⁶¹ James Leavy, 'In France we trust' [2007] 26 *International Financial Law Review* 66

⁶² Claude Witz, 'La fiducie française face aux expériences étrangères et à la convention de La Haye relative au trust(1)' [2007] *Recueil Dalloz* 1371

⁶³ article 2013, French Civil Code; Paul Matthews, 'The French fiducie: and now for something completely different?' [2007] 21 *Trust Law International* 25

criteria⁶⁴, as well as those which I have set out above for the essential features of a trust in comparative terms⁶⁵.

It would appear that France seems unlikely to ratify the Convention in the near future and, instead, seems content to gradually bolster the fiducie as a competing institution⁶⁶.

III. Italy

"Man's mind stretched to a new idea never goes back to its original dimension."⁶⁷

Unlike France, Italy was one of the first countries to ratify the Hague Convention and can be said to have given effect to trusts since 1992⁶⁸. It is notable that the Italian legislature has never enacted provisions to domesticate the trust, and that much of this role has devolved to the Italian courts, which have granted the trust

⁶⁴ Bénédicte François, *Fiducie* (Dalloz 2011) at 48; Claude Witz, 'La fiducie française face aux expériences étrangères et à la convention de La Haye relative au trust(1)' [2007] *Recueil Dalloz* 1369

⁶⁵ See Part I.

⁶⁶ Claude Witz, 'La fiducie française face aux expériences étrangères et à la convention de La Haye relative au trust(1)' [2007] *Recueil Dalloz* 1374

⁶⁷ Oliver Wendell Holmes, *The Autocrat of the Breakfast Table* [1858] <www.gutenberg.org/dirs/etext96/aofbt10.txt> Chapter XI

⁶⁸ Law of 16 October 1989 n. 364 (in force: 1992)

“full citizenship” within the Italian legal system⁶⁹. In this part, I shall examine the concept of domestic trusts, trusts which are entirely Italian save for their choice of law, which may for example be that of England & Wales. I shall demonstrate that Italy has fully embraced the trust in spite of its civil law background and has gone beyond merely resolving the alleged incompatibilities which this entails.

A) Domestic trusts under the Hague Convention

Article 6 of the Convention sets out the principle that the trust will be governed by the law chosen by the settlor (expressly or impliedly). This choice of applicable law is not restricted by a condition of residency in a common law country, nor does it require that the trust contain foreign elements beyond the governing law⁷⁰.

Per article 5, this choice of a foreign governing law will suffice, subject to certain restrictions in this article, to bring into play the convention. Ratifying countries will then be under an obligation to recognise its effect under article 11.

Article 13 does enable the courts of a ratifying state to deny recognition to a trust when all its significant elements are more closely connected with a state whose legal system does not recognise the type of trust in question. In any case, this article does not prevent the existence of internal trusts, it merely provides the courts with the option of not recognising these⁷¹. Additional safeguards are also to be found in articles 12, 15 and 18.

⁶⁹ Alexandra Braun, ‘Italy’ in John Glasson, Geraint W. Thomas, *The International Trust* (2nd ed Jordans 2006) 405

⁷⁰ Andrew Paton and Rosanna Grosso, ‘The Hague Convention on the Law Applicable to Trusts and on Their Recognition: Implementation in Italy’ [1994] 43 *The International and Comparative Law Quarterly* 659

⁷¹ Benedetta Ubertazzi, ‘The trust in Spanish and Italian private international law: Part I’ [2006] 12 *Trusts & Trustees* 16

This is what lead Maurizio Lupoi, a leading Italian academic on the issue of trusts, to argue that there is nothing to prevent the creation of a trust in Italy governed by, for example, English law⁷². The resulting trust interni would be applicable so long as its provisions are not in violation of basic rules of Italian law (in such a case, it would be interpreted around these)⁷³.

It is undeniable that there has been considerable enthusiasm for the trust in Italy, spearheaded by a professional organisation (Associazione 'Il trust in Italia') which has helped promote the idea of the internal trust⁷⁴. Over the last 20 years, there have been numerous conferences, journals on trusts created, and hundreds of articles published⁷⁵. This pro-trust culture may be contrasted with the French attitude of open hostility towards the trust⁷⁶.

B) The reception of the internal trust: a dialectic approach

A blending of two legal cultures

Between 1992 and 2012, close to 200 judgements concerning foreign trusts have been delivered by Italian courts, the majority of which concerned internal trusts⁷⁷. It is now an established principle that one may set up a trust all elements of which are Italian except for the governing law.

⁷² Maurizio Lupoi, 'The Civil Law Trust' [1999] 32 *Vanderbilt Journal of Transnational Law*

⁷³ Benedetta Ubetazzi, 'The trust in Spanish and Italian private international law: Part I' [2006] 12 *Trusts & Trustees* 16

⁷⁴ Paolo Panico, 'Italy' [2007] 13 *Trusts & Trustees* 405

⁷⁵ Maurizio Lupoi, 'Italy: an independent approach to trusts in a Civil Law country' [2003] *Trusts & Trustees* 8

⁷⁶ Delphine Baudouin, 'Fiducie in French law' [2007] 2 *International Business Law Journal* 276

⁷⁷ Maurizio Lupoi, 'Country Report: Italy' [2012] 4 *The Columbia Journal of European Law* <http://www.cjel.net/online/18_2-lupoi/>

Despite the fact that the domestic trust is governed by foreign law, a majority of trust disputes have been resolved by Italian courts thanks to the widespread use of clauses conferring jurisdiction upon them⁷⁸. A good illustration of this is a case from 2004, in which the Court of First Instance of Florence applied the Variation of Trusts Act 1958 in order to allow a change of protector in a trust instrument lacking a provision to that effect⁷⁹. Similarly, the Court of Appeal of Milan has made express reference to the duty of care set out in the Trustee Act 2000⁸⁰.

Formalities are one area where the civil law tradition has been strongly integrated into trust practice and which contrasts with the general level of informality which is to be found in many common law jurisdictions⁸¹. Indeed, it appears that nearly all trusts are executed before a notary⁸². This is mainly due to the importance of the certainty of dates and signatures in Italian law. Furthermore, Italian deeds also set out the reasons why the settlor has decided to form a trust⁸³. The latter has resulted in a practice of justifying why the assets are being placed under foreign law as opposed to Italian rules⁸⁴.

This blending of the two legal cultures is undeniable, as Professor Lupoi has observed:

⁷⁸ Alexandra Braun, 'Italy' in John Glasson, Geraint W. Thomas, *The International Trust* (2nd ed Jordans 2006) 806

⁷⁹ Tribunale di Firenze, 7 July 2004 cited in Paolo Panico, 'Italy' [2007] 13 *Trusts & Trustees* 405

⁸⁰ Corte d'Appello di Milano, 20 July 2004 – cited supra

⁸¹ Alexandra Braun, 'Italy' in John Glasson, Geraint W. Thomas, *The International Trust* (2nd ed Jordans 2006) 805

⁸² Maurizio Lupoi, 'Country Report: Italy' [2012] 4 *The Columbia Journal of European Law* <http://www.cjel.net/online/18_2-lupoi/>

⁸³ *Ibid.*

⁸⁴ *Ibid.*

"The trust interno instruments are couched in terms that are understood by a civil practitioner and yet are in accord with the governing law of the trust, for instance English or Jersey law. Thus, they embody the civil law rendering of foreign rules."⁸⁵

The enthusiasm of the Italian legal profession and of its judiciary for these 'foreign' trusts may be explained by what certain commentators have described as the 'outdated' nature of the Italian Civil Code, which "[fails to protect] many legitimate interests"⁸⁶. It is principally these failings which would appear to have driven the adoption of the trust in Italy, and not the search for tax-planning or wealth management solutions⁸⁷. Indeed, these trusts are now being used in a wide variety of ways, including for family matters, and have consequently been described as having become "a tool in everyday life"⁸⁸.

Where a settlor has used the trust with the intention of avoiding the basic principles of Italian law, for example, in order to defeat the claims of creditors, the courts have been swift in placing the trust assets under distraint⁸⁹.

Overcoming conceptual and dogmatic obstacles

As mentioned above, this dialectic approach has allowed the courts to resolve number of conceptual incompatibilities between the trust and fundamental principles of the Italian civil law system⁹⁰.

⁸⁵ Maurizio Lupoi, 'The Civil Law Trust' [1999] 32 *Vanderbilt Journal of Transnational Law* 985

⁸⁶ Maurizio Lupoi, 'A civil law perspective on trusts and the Italian case' [2005] 11 *Trusts & Trustees* 23

⁸⁷ *Ibid.*

⁸⁸ Maurizio Lupoi, 'The Civil Law Trust' [1999] 32 *Vanderbilt Journal of Transnational Law* 988

⁸⁹ Tribunale di Milano, 20 October 2002, T & AF 2003, 265 – cited in Alexandra Braun, 'Italy' in John Glasson, Geraint W. Thomas, *The International Trust* (2nd ed Jordans 2006) 813

⁹⁰ Andrew Paton and Rosanna Grosso, 'The Hague Convention on the Law Applicable to Trusts and on Their Recognition: Implementation in Italy' [1994] 43 *The International and Comparative Law Quarterly* 656

One of the core features of the trust is to be found in the segregation of the trust assets from the personal assets of the trustee⁹¹. This may appear to conflict with the Italian Civil Code, which affirms, in article 2740, the unitary nature of ownership. The courts have resolved this issue by acknowledging the fundamental need for this feature in a trust as reflected by article 11 of the Convention, which thanks to the law of ratification supersedes the article in contention⁹². Furthermore, it is undeniable that the Italian law already recognises instances of segregated patrimonies, such as for example, in the areas of securitisation and pension funds⁹³.

Italy has a number of mandatory laws regulating the field of succession which may appear to conflict with the internal trust⁹⁴. Here again, the judiciary has resolved this conflict by holding that testamentary dispositions, which are contrary to the Italian rules of forced heirship, will not be void but may instead be affected by an action by the heirs for the trust assets to be 'reduced'⁹⁵.

The *numerus clausus* doctrine appears to present a considerable obstacle to the recognition of trusts governed by legal systems which distinguish between legal and equitable ownership. The courts have, nevertheless, held that trusts do not create a new type of property right, whereby ownership is split⁹⁶. Instead, the trust assets, along with the title, are simply transferred to the trustee, who is bound by duties of administration. Land registration, in accordance with the requirement of publicity of property rights, is paramount in order for a transfer to

⁹¹ See part I.

⁹² Alexandra Braun, 'Italy' in John Glasson, Geraint W. Thomas, *The International Trust* (2nd ed Jordans 2006) 810

⁹³ *Ibid.*

⁹⁴ Anthony Duckworth, 'Forced Heirship and the Trust' in John Glasson, Geraint W. Thomas, *The International Trust* (2nd ed Jordans 2006); *Ibid.*

⁹⁵ Alexandra Braun, 'Italy' in John Glasson, Geraint W. Thomas, *The International Trust* (2nd ed Jordans 2006) 813

⁹⁶ Tribunale di Bologna, *Guidice del Registro*, 16 June 2003, T & AF 2003, cited *ibid.*

be good against third parties, such as creditors. This may appear problematic, as the Civil Code does not include the trust as one of the acts capable of being registered⁹⁷. Notwithstanding, such a right is expressly provided for in the Convention⁹⁸, and has been enforced by courts when faced with opposition by Registrars⁹⁹.

Since 2007, Italy has had a comprehensive taxation regime for trusts¹⁰⁰. A number of proposals have also been put forward for a comprehensive Italian trust legislation, but so far, perhaps as a result of the success of the domestic trust, none of these have made any substantial progress¹⁰¹. An addition to the Civil Code in 2005, article 2645-ter, is, however, of particular interest¹⁰². It provides that 'registered assets' may be assigned, up to 90 years, to a specific purpose for the benefit of natural or legal persons¹⁰³. This purpose will be recorded on the land registry and any purchaser will be bound by this irrespective of notice. Furthermore, neither the assets nor the income derived therefrom may be subjected to claims by the creditors of whoever owns them. This is quite a remarkable departure from traditional civil law concepts and may, if expanded upon, form the underpinning for a home-grown Italian law of trusts¹⁰⁴.

Conclusion

⁹⁷ article 2643, Italian Civil Code

⁹⁸ article 12, Hague Convention

⁹⁹ Maurizio Lupoi, 'A civil law perspective on trusts and the Italian case' [2005] 11 *Trusts & Trustees* 14

¹⁰⁰ Budget Law of 2007 (Law of 27 December 2006 n. 296; Paolo Panico, 'Italy' [2007] 13 *Trusts & Trustees* 405

¹⁰¹ Paolo Panico, *ibid.*

¹⁰² Article 2645-ter, Italian Civil Code

¹⁰³ Alexandra Braun, 'Italy' in John Glasson, Geraint W. Thomas, *The International Trust* (2nd ed Jordans 2006) 822

¹⁰⁴ *Ibid.*

The English model trust presents unique functional and structural features, and, as we have seen, it is extremely hard to rival its flexibility in “one single comprehensive package”¹⁰⁵. Yet the blunt assertion that the trust is alien to civil law does not withstand scrutiny. If one is to adopt a core comparative definition of trusts centered around asset segregation, then it must be said that trusts are to be found in civil law.

Indeed, the two jurisdictions which we have looked at clearly illustrate that there is room for trusts in civil law, although how these are introduced and the extent of their functional similarity with the English trust will vary depending on the cultural, historical and political background of each jurisdiction.

Whilst Italy lacks a domestic trust law, it has taken advantage of the Hague Convention to develop a thriving local practice of using foreign law for Italian trusts. This effort, spearheaded by both doctrinal and jurisprudential support, has allowed the development of a consistent framework and the surmounting of the obstacles inherent in the civil law tradition. As a result of this process initiated nearly twenty years ago, these trusts can no longer be said to be ‘foreign’. A more accurate term would be ‘domesticated’ due to the distinctive features they have developed.

Whereas France has its *fiducie*, a *sui generis* institution introduced in 2007, which is structurally a trust in comparative law terms, it is, nonetheless, functionally neutered. Trusts can be based on civil institutions, as the examples of Panama and Quebec show¹⁰⁶, and it is to be hoped that the French *fiducie* represents such a first step and will, one day, play a similar role. In any case, recent reforms which have increased its flexibility both structurally and functionally are to be welcomed. In particular the decision, albeit unsuccessful, of the French legislature to

¹⁰⁵ Andrew Freeman, ‘Trusts in No-Trust Jurisdictions as seen by an American Practitioner’ [1983] 8 *International Legal Practitioner* 24

¹⁰⁶ De Waal MJ, ‘In Search of a Model for the Introduction of the Trust into a Civilian Context’; (2001) 12 *Stellenbosch Law Review* 82

introduce a concept of 'economic ownership' goes to show just how much the lines are blurring between civilian and common law traditions.

It should now be clear that one should not expect trusts to be transplanted wholesale into civil law but one may instead wish to see them translated and interplay with civil law institutions and practice. These two jurisdictions show us radically different models for the introduction of the trust into civil law systems. One may only hope that states will heed the call of the European Parliament, which in October 2001 called for a harmonisation of the laws of Member States – including in the area of trusts¹⁰⁷. Yet in doing so, one must not lose sight of the context in which trusts operate and one must be mindful of the fact that, as an eminent scholar concludes, the trust "...alters the balance of power between the state and the individual"¹⁰⁸.

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¹⁰⁸ Tony Honoré, 'On Fitting Trusts into Civil Law Jurisdictions' (Oxford Legal Studies Research Paper No. 27/2008) <<http://ssrn.com/abstract=1270179>> 4

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