A new type of civil-law trust

THE THEORY BEHIND SAN MARINO TRUST LAW

By Andrea Vicari

ABSTRACT

- The introduction of the trust (or analogous institutions) into civil-law systems requires not only the translation of common-law rules into civil-law concepts but also a precise choice about the functions to be performed by these instruments.
- Since the introduction of the legal category of 'patrimony' (*patrimonie* or *Vermögen*) in civil law and the seminal studies of Pierre Lepaulle on the trust, many cases of introduction of the trust into civil law were influenced by the idea that the trust is a *patrimoine d'affectation* and that its function is the segregation of assets.
- San Marino has rejected these theories. It has instead looked to the history of civil law and focused on the fact that civilians were well acquainted with the use of structures analogous to the trust before the civil codes. These structures were used to allow the settlor to exercise complete control over the assets they settled.
- This function is very different from both that of segregating assets, as under the common-law trust, and also that of gifting over time, which English and Welsh lawyers consider characteristic of the trust.
- This innovative blend of common-law and civil-law elements makes San Marino trust law unique and means it perfectly suits the needs of civil-law settlors.

THE TRUST IN CIVIL LAW: THE INFLUENCE OF THE PATRIMONY

Since the beginning of the 20th century, trusts have attracted the interest of leading scholars in comparative law and they still continue to attract interest now.

Most of these studies focus on theoretical aspects of trusts, such as:

- What is a trust?
- Is the trust part of the law of property or part of the law of obligations?
- How can the common-law trust concept be translated into civil-law terms?
- Can a trust governed by a common-law system operate in a civil-law system without a law of trusts, when assets or the settlor or beneficiaries are located there?

The answers to these questions are often related.

Each of these answers also depends on the theoretical stance of the scholar; each scholar focuses on some given features of the common-law trust and emphasises them in their picture of the trust.

Scholars who consider the trust as part of the law of property – that is, a form of double or split ownership – and the beneficiary's legal position as a property right, tend to consider the trust incompatible with civil law.

Scholars who consider the trust a segregation of assets deny the beneficiaries have any property right in the trust assets and, under civil-law concepts, they represent the trust as a *patrimoine d'affectation* (a patrimony by appropriation – that is, ownerless or owned by the trustee), and affirm the possibility that the trust can operate in civil-law systems as such, since civil law is well acquainted with the *patrimoine d'affectation*. Scholars who treat the trust as a contract arrive at the same conclusion, as the civil law of contracts and obligation is considered flexible enough to frame the trust.

Until the end of the 20th century, this debate remained mainly academic. However, after the ratification of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, the debate became more practical. Framing the common-law trust in civil-law terms became a necessity when the recognition of trusts in civil-law countries became mandatory due to the ratification of the Hague Convention.

Furthermore, the entry into force of the Hague Convention inspired several civil-law countries to integrate the trust into their legal system.[1] This integration occurred in diverse ways. For example:

- Jersey, in 1984, enacted a statute introducing the common-law trust, with several innovations in several specific rules, but without any attempt to frame the trust in civil-law terms and without consideration of the relation of the trust to the remaining parts of the civil law then in force.
- Quebec, in 1994, introduced the *fiducie* in its *Civil Code*, under the form of *patrimoine d'affectation* – that is, an ownerless patrimony dedicated to a purpose, where the trustee is the administrator of property of another person, in a position not much different from that of the director of a company with legal personality.[2]
- France, in 2007 enacted the *fiducie* as an equivalent to the trust. Even in this case, the category of *patrimoine d'affectation* influenced the legislator. However, the French *fiducie* was not enacted as an ownerless patrimony, as in Quebec, but as a segregated patrimony owned by the trustee.[3]

Except for Jersey, where no consideration has been given to the relation of the trust law to civil-law categories and rules (later this generated several instances of conflict),[4] the remaining cases of introduction of the trust into civil-law jurisdictions have been influenced by the idea that the trust's function is the segregation of assets and its effect is the creation of a *patrimoine d'affectation*.

This idea is culturally dependent on the development by Pierre Lepaulle, at the beginning of the 20th century, of the theory that the trust should be represented as a *patrimoine d'affectation* according to civilian categories.[5]

In fact, as correctly expressed by Professor Cantin Cumyn, 'the idea that each country has of the *fiducie* or of the trust is shaped by more or less internal [doctrinal] factors'[6] and, therefore, these factors ended up 'determin[ing] the function that the *fiducie*, whether or not derived from the trust, is called upon to fulfil'.[7]

Therefore, it is self-evident that the functions of the trust in most civil-law systems are often ultimately determined by random factors.[8]

Having recognised that, the San Marino legislator, drafting the *Law of 1 March 2010, No.42* on trusts (the Trust Law),[9] which totally revised the trust law previously in force,[10] enacted after the ratification of the Hague Convention,[11]

1. M Cantin Cumyn, 'Reflection regarding the diversity of ways in which the trust has been received or adapted in civil law countries', in Re-*imagining the Trust: Trusts in Civil Law*, page 6

2. M Cantin Cumyn, '*Pourquoi définir la fiducie comme un patrimoine d'affectation?*', in *Cross-Examining Private Law* (2008), page 131; Y Emerich, 'The civil law trust: a modality of ownership or an interlude in ownership', in *The Worlds of the Trust* (2013), page 23

3. F Barrière, 'The French *fiducie*, or chaotic awaking of a sleeping beauty', in *Re-imagining the Trust: Trusts In Civil Law* (2012), page 222

4. For an example, see *Rahman* v *Chase Bank* [1991] JLR 103

5. P Lapaulle, *Traité Théorique et Pratique des Trusts* (Paris, 1932)

6. See Cantin Cumyn (footnote 2), page 9

7. See Cantin Cumyn (footnote 2), page 9

8. The legislative process giving shape to the French *fiducie* has been defined as 'chaotic' by F Barrière – see footnote 3

9. For a comment on the prior law, see P Panico, 'San Marino', *Trusts & Trustees* (2007), pages 500–502

10. *The Law of 17 March 2005, No.37*

11. The Hague Convention was brought into force in San Marino by the *Decree of 20 September 2004, No.119*

decided to avoid this trap and not to be influenced by the idea that the trust is mainly a segregation of assets.

THE CONCEPT OF THE TRUST: THE INFLUENCE OF COMMON-LAW TRADITION

While the *ius commune* had the trust-like institution of the *fideicommissum fiduciarium* or *confidentiale*, but not a concept called 'trust', the Trust Law introduced such a concept, clarifying that 'a trust exists when a person owns assets for the benefit of one or more beneficiaries, or for a particular purpose within the meaning of this Law'. The Trust Law, in article 2, makes clear that 'the fact that the settlor also holds the office of trustee, or reserves some rights or powers to himself, is not inconsistent with the existence of a trust'; that 'the settlor and the trustee may be beneficiaries of the trust, but the trustee cannot be the sole beneficiary of the trust'; and, finally, that 'the same trust instrument may create beneficiary trusts and purpose trusts'.

This basic description of a trust reflects the common-law tradition.

Even in relation to the permitted kinds of trust, the common-law experience, in its modern form expressed in most international laws of trust, was of inspiration: in fact, both purpose trusts and beneficiary trusts are allowed. Purpose trusts are allowed without any limitations.

CONTENTS OF THE TRUST DEED: THE INFLUENCE OF THE COMMON-LAW TRADITION

The trust instrument will contain the standard requirements of a common-law trust instrument:

- the intention of the settlor to create the trust;
- the identification of the trustee;
- the identification of the trust assets, or the criteria that enable them to be identified.

In the case of purpose trusts, the trust instrument will contain:

- the identification of a particular purpose, achievable and not contrary to mandatory laws, public order or good morals;
- the identification of a protector with the duty to ensure that the provisions contained in the trust instrument are observed, or the criteria that enable the protector to be identified.

In the case of beneficiary trusts, the trust instrument will contain:

- the identification of the beneficiaries, or the criteria that enable them to be identified, or the identification of the person who has the power to appoint them;
- the rules that ensure that there is a protector empowered to make a claim against the trustee in case of breach of trust if for any reason there are no beneficiaries in existence, and in the other cases provided for by law.

A BENEFICIARY TRUST WITHOUT BENEFICIARIES: THE EMERGENCE OF A NEW TYPE OF TRUST

A peculiarity of San Marino trust law, as compared to the trust laws in force in most common-law jurisdictions, is the possibility of settling assets into a trust without appointing any beneficiary.

In fact, not only can beneficiaries be appointed in the trust instrument regardless of the fact that they don't exist (e.g. 'the children of Paul', where Paul has no children at the time of the trust settlement), but it is also possible to settle assets into a trust with a trust deed that does not appoint any beneficiary but simply contains a power of appointment (i.e. 'the beneficiaries are to be appointed by Paul before the end of the trust period').

In this case, the Trust Law demands the appointment of a trust enforcer. There are two very important effects of this.

First of all, this rule ensures that trustee's duties are enforced during the life of the trust, even if no beneficiaries have been born yet. Delayed enforcement often means no recovery. Under San Marino law, in this case, an enforcer will ensure timely enforcement.

Second, the new Trust Law creates a new type of trust for beneficiaries, unreplicated in any other common-law trust legislation in the world.
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ascertainable person is intended to be benefited by the trust at the time of its creation. In this manner, the individuation, appointment and identification of any type of beneficiaries can be postponed, even in a trust for beneficiaries, up to the end of the trust period. Trust assets are segregated and the trustee is under a duty to manage them in order to preserve and increase them, and to distribute them to beneficiaries when they are appointed. The enforcer, meanwhile, will ensure that the trustee's duties are properly performed. This is a unique solution.

This is a peculiarity of San Marino law. Under English and Welsh law and the laws of jurisdictions influenced by it, any trust has to have appointed, identified or identifiable beneficiaries, unless the aim is to create a purpose trust;[12] or, from another perspective, the persons or objects intended to be benefited must be certain or ascertainable.[13] In fact, 'there must be someone in whose favour [a] court can decree performance'.[14]

Under the new San Marino Trust Law, this requirement is waived. A trust is valid and the trust's assets are segregated, without any resulting trust arising in favour of the settlor, even if no person is a certain or ascertainable beneficiary and even if the trust is not a purpose trust. Trustees' duties, as long as beneficiaries are absent, are enforced by the enforcer.

This is the first of several indications that, under the San Marino Trust Law, the trust has its own 'spirit'.

This peculiar spirit is determined by the frame of reference that inspired the San Marino legislator: the history of the civil law.

BACK TO THE FUTURE: THE HISTORICAL ROOTS OF THE SPIRIT OF THE NEW TYPE OF TRUST

San Marino is a civil-law country, probably the purest remaining: no civil code has ever been enacted and the *ius commune* is still at the basis of its legal system. In fact, in San Marino's law, save when a specific matter is governed by statute, *ius commune* applies. *Ius commune* is the common law that prevailed throughout Europe before the civil codes; it is rooted in Roman law but did not coincide with Roman law – on the one hand, because of the enactment of local legislation and, on the other, because of customary, as well as doctrinal developments, supported by the most important courts throughout the continent.

One institution under the *ius commune*, derived from the law of *fideicommissa*, was the fiduciary heir (*heres fiduciarius*).[15] Under Roman law, the heir or the legatee charged with a *fideicommissum* was entitled to retain one-quarter of the assets before handing them over: this was the *quarta*, also called the '*falcidia*' or '*trebellianica*'.[16] Even if some similarities with the common-law trust existed, the function and the structure of a *fideicommissum* were far from those of the trust, at least in its

12. *Re Wood* [1949] Ch 498
13. *Morice* v *Bishop of Durham* (1804) 9 Ves 399, at 405
14. *Knight* v *Knight* (1840) 3 Beav 148

15. R Zimmerman, '*Heres fiduciarius*, the rise and the fall of the testamentary executor', in *Trust and Treuhand in Historical Perspective* (1998) page 267; M Lupoi, 'The new law of San Marino on the "*affidamento fiduciario*"', in *Trust Law International* (2011)
16. The references are to the *Lex Falcidia* of 40BC and to a *senatus consultum* of 56AD

original family context, because the entitlement to the *quarta* could not be derogated by the will of the settlor and, therefore, the fiduciary was entitled to profit from the asset. This entitlement could not be removed. However, since medieval times, the Roman law rule was applied throughout continental Europe whenever an ordinary *fideicommissum* was concerned, but not when a fiduciary heir was appointed. Thus, the *ius commune* developed one institution where the fiduciary managed assets with the duty to allow beneficiaries to enjoy the property and to transfer the assets to them at the end of the period set by the settlor.

The fiduciary heir, like the trustee in a trust, was the owner of the assets and, like a trustee, could not retain any *commodum* – that is, any advantage from their office.

Thus, a European *ius commune* institution existed under which the party who received something, to be managed for a purpose or to benefit another party, had no beneficial claim to the assets they received and had to turn them over at the prescribed time or on the occurrence of a specified condition.

However, the fundamental function of this institution was different from that of the trust. The fiduciary heir, as well as the *fideicommissum*, did not serve to give a gift over time to beneficiaries, but rather as a tool to allow the settlor to exercise a 'dead hand' – a tool intended to provide the settlor with the ability to set an appropriation programme for the trust assets that could not be derogated by beneficiaries, who were bound by it – a programme aiming to restrain their entitlements, and not to enrich them.

This basic idea still underpins the expectation of most settlors domiciled in a civil-law country, and it provides the spirit of the new type of trust adopted in San Marino.

THE FUNCTION OF THE NEW TYPE OF TRUST: RESTRICTION OF THE BENEFICIARIES' ENTITLEMENTS

If, under San Marino law, a trust can be created without the appointment of any beneficiary, then there can be a settlement of assets into trust, segregation of them, and trustee's duties, but no 'gift' to anyone: no beneficiary needs to be enriched; no one needs to receive any right, action or entitlement in order to create a valid trust. Under San Marino law, in other words, the trust appears to be a pure instrument to imprint trust assets with a destination, an instrument enabling the settlor to impose their own will, expressed in the trust instrument, over the trust assets.

This was the function of the institution of *fideicommissa*, in particular that of *heres fiduciarius*, which inspired the San Marino legislator. This function is very different from the function of the trust under English and Welsh law. Under English and Welsh law, a trust functions as a 'gift over time' to beneficiaries – that is, an instrument to enrich them rather than to exercise a dead hand over them.[17]

Beneficiaries, under a trust, are often considered, by English and Welsh lawyers, as having a proprietary interest in the trust. They are so considered because they are enriched by settlement of assets into trust, as if this were a gift over time. The fact that they may be entitled to receive possession of the trust assets at a later stage, *vis-à-vis* the time of the settlement, explains the 'over time' element of the gift embodied in the trust.

This function of the trust emerges even in the case of a discretionary trust, where the class of object of powers can be represented, as a whole, as the donee. In fact, even under a discretionary trust, one can notice the gift-over-time idea underlying common-law trusts, especially under English and Welsh law. In these cases, 'you treat all the people put together as though they formed one person, for whose benefit the

17. As per Bernard Rudden: 'It may be suggested that the learning on "the three certainties" and on resulting trusts in courses on equity is made difficult by failure to stress that the normal private trust is essentially a gift, projected on the plane of time and so subjected to a management regime'. Recently, John Langbein subscribed to this view: see J Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce', 107 *Yale Law Journal* 165 (1997–1998). It is now an idea widely shared in the common-law world that the trust 'is a donative transfer to the beneficiaries, structured to permit the management of wealth': see Thomas P Gallanis, 'New Direction of American Trust Law', 97 *Iowa Law Review* 218, 218 (2011–2012)

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trustees were directed to apply the whole of a particular fund'.[18]

Several rules in English and Welsh law embody the idea that the trust is constructed as an instrument to complete a gift over time to beneficiaries – an instrument to enrich them, rather than anything else.

For example:

- The traditional rule, now abandoned, on the proprietary basis for the right of information of beneficiaries. Under English and Welsh law, for a long time, the beneficiary's right of information was attributed according to the gift-over-time idea of the trust. A beneficiary was entitled to inspect the trust documents and obtain information from them because, in some sense, they were the beneficiary's own. The beneficiary was considered the beneficial owner of the trust documents, as well as of the trust assets. Nowadays, the right to inspect trust documents is not, in rhetorical terms, based on the beneficiaries' ownership of trust assets,[19] but the scope of application of the rule is wider than before. All beneficiaries can get information about the management of the trust. This confirms the idea that the trust is considered a gift over time to all beneficiaries, regardless of whether they received a fixed interest in the trust property or not.
- The *Saunders* v *Vautier* rule, allowing all beneficiaries of any type of trust with beneficiaries, to terminate the trust and to obtain title to property when they are adult, of full capacity and they agree.[20]
- The rule against restrictions on alienation of beneficiaries' vested entitlement:[21] the beneficiary position, once vested and not contingent, is a beneficiary's property because of the gift of the settlor and, as for any property in which the beneficiary has full title, alienation cannot be restrained by the settlor.
- The rules under which beneficiaries may obtain a variation of trust when they are all adult and capable, and they all agree, as well as those rules under which they may request, and the judge may consent, to a variation of trust when they can show that it is in their best interest, even if they are not all adult and of full capacity.[22]

All such rules are modified in San Marino law, confirming further the idea that the trust, under San Marino law, does not have the function of a gift over time to beneficiaries, but is an instrument to impress the will of the settlor on the management and attribution of the trust assets – an instrument containing the programme for the management of the assets transferred to the trustee that can, but does not necessarily have to, immediately allocate entitlement to certain assets and the advantages deriving from them to one or more beneficiaries.

According to article 50.3 of the Trust Law, and only if the trust instrument does not provide otherwise, all the beneficiaries with fixed interests in the trust fund, or, if there are none, all the beneficiaries, may require the trustee to terminate

18. Romer J in *In Re Smith* [1928] Ch 915. As Paul Matthews put it, under the English model of trust, 'whatever the subject matter of the trust, it no longer belongs to the settlor or (obviously) the testator, and the decision whether to enjoy it or destroy it is no longer for him. Instead, it is ultimately a decision for those who benefit from the trust'. See P Matthews, 'The comparative importance of the rule in *Saunders* v *Vautier*,' *Law Quarterly Review* (2006), 266, 274. That is why beneficiaries are enriched by the creation of the trust.

19. As is well known to all readers, this position was abandoned in *Schmidt* v *Rosewood Trust Ltd* [2003] 2 AC 709

20. *Saunders* v *Vautier* [1841] EWHC Ch J82

21. *Brandon* v *Robinson* 18 Vesey Jun 429, 433–34, 34 Eng Rep 379, 381 (LC). This is because the beneficiary is considered as having received a gift of property that enriched them and, in trusts as in gifts, once a property is gifted it becomes the donee's property and their ownership cannot be restrained

22. *Variation of Trusts Act 1958*; article 47(1) *Trusts (Jersey) Law 1984*

the trust and transfer the trust assets to themselves or as they direct. Therefore, it is in the settlor's hands to decide whether beneficiaries can terminate the trust in advance. Beneficiaries are not considered automatically enriched by the creation of the trust. Trust assets are managed by the trustee under the settlor's programme. The beneficiaries' collective will cannot interfere with it in any manner.

According to article 50.2 of the Trust Law, and only if the trust instrument does not provide otherwise, a beneficiary may require the trustee to postpone the transfer of trust assets to him or her or to perform the transfer to a third party nominated by him or her. Therefore, the Trust Law places in the settlor's hands the decision as to whether beneficiaries can direct the distribution of the trust assets differently from the settlor's directions contained in the trust instrument, with regard to time or persons. This confirms the view that beneficiaries are not considered enriched with the trust property until they actually receive it, on distribution. Until such a moment occurs, they cannot deal with the trust property at all, if the settlor so establishes.

Under article 51.2, and only if the trust instrument does not otherwise provide, a beneficiary may alienate, give as a guarantee or otherwise dispose, in whole or in part, of his beneficial interest by instrument or instruments taking effect as against the trustee when he becomes aware of it or them, or, in the case of a beneficiary with a fixed interest not limited to his life, by will. Beneficiaries are not, therefore, enriched by the trust, if the settlor does not wish so and if the settlor restrains their rights. Their entitlement under a trust cannot be disposed of as they wish, if the settlor otherwise provided in the trust instrument. They can enjoy the entitlement, but this is not necessarily property that they can dispose of.

The idea that, under San Marino trust law, the trust does not have the function of a gift over time to beneficiaries, that they are not the beneficial owners of the trust assets, and that they are not enriched by the trust, if the settlor does not wish it to be so, also emerges from the rules about variation of trusts.

The trust instrument contains the will of the settlor in terms of the management and distribution of the trust assets. If beneficiaries can vary it, this means that assets are at the beneficiaries' disposal, and that they are enriched by them. Under San Marino law, the settlor can grant the power to vary the trust instrument to beneficiaries, but otherwise they do not have such entitlement under the Trust Law. The settlor can decide to attribute it to them and can decide to enrich them. According to article 13.1, a trust instrument may provide that the provisions contained in it or the governing law may be amended in the interest of the beneficiaries or to promote the purpose of the trust, and this power of amendment can be granted to the person chosen by the settlor. The settlor can decide not to grant such a power to beneficiaries and therefore the settlor can decide not to enrich them. In this case, beneficiaries cannot vary the trust, not even with the help of the judge. In fact, according to article 53.4, only the trustee may apply to the judge in order to be duly authorised to make those changes to the trust instrument that have become necessary or desirable. Beneficiaries are not entitled to appear before a judge attempting to obtain a variation of the trust deed, and so implicitly overruling the settlor's wish, the latter having explicitly chosen not to grant them such amending power.

Even the rules about the beneficiaries' right of information provide clear evidence that the trust, under San Marino law, does not have the function of a gift over time to beneficiaries, but rather that of a tool to impress the will of the settlor on the management and distribution of trust assets. According to article 49.1 of the Trust Law, and only if the trust instrument does not provide otherwise, every beneficiary with a fixed interest will have the right to inspect and take copies of the instruments and documents concerning their own rights.

Similarly, under article 27.2, and only if the trust instrument does not otherwise provide, the trustee of a beneficiary trust is under a duty to give every beneficiary with a fixed interest:

- notice of the existence of the trust, its name, the address of the trustee, and the provisions of the trust instrument that confer such interest;
- notice of all instruments or matters that amend or extinguish such interest;
- at the request of such a beneficiary, within an adequate period of time, an inventory limited to those trust assets in respect of which the beneficiary claims their interest, and an estimate of their market value comparable to the value claimed by the beneficiary.

The settlor's will, in the trust instrument, can remove such an entitlement.

The rules about breach of trust further indicate that San Marino trust law does not embrace the idea that the function of a trust is that of a gift over time to beneficiaries, but rather that of a tool to impose the will of the settlor on the management and distribution of trust assets.

Under the traditional English and Welsh or international trust laws, where trusts are viewed as a gift to beneficiaries, beneficiaries are always entitled to take legal action against the trustee in case of breach of trust. They are the beneficial owners of the trust property because the settlor, creating the trust, wished to enrich them. Therefore, they are entitled to enforce the trustee's fiduciary duties in case of breach.

Under San Marino law, it is the settlor who, in the trust instrument, can attribute or remove the entitlement of a beneficiary to take legal action against the trustee. In fact, according to article 42, and only in the absence of a contrary provision in the trust instrument, a trustee committing a breach of duty will be bound at the request of a beneficiary or of the protector to restore the loss caused to the trust fund, or to the beneficiary who makes the claim. Of course, a trust instrument cannot deprive at the same time all the beneficiaries and the protector of the right to take legal actions against the trustee. This entitlement has to be vested in at least one person. In fact, the settlor can exclude the entitlement of any beneficiary to take legal action against the trustee.

A final argument can be put forward to clarify the independence of the trust under the San Marino Trust Law from the idea of a trust as a gift.

Under English and Welsh law, which embodies the traditional idea that the function of the trust is that of a gift over time to beneficiaries, the judge is urged to find a donee (a trust beneficiary) in every case they can. Therefore, the tendency is to find a trust beneficiary even when the settlor did not want to have one. For example, under English and Welsh law, if the settlor attempted to create a purpose trust, where no beneficiary entitlement is expected to arise according to the settlor's will, but the implementation of the purpose does benefit individuals, the judge will characterise the trust as a beneficiary trust and attribute to those individuals all the rights of a beneficiary.[23]

Article 48.5 of San Marino's Trust Law makes it clear that persons who receive or may receive assets or benefits from a purpose trust will not be considered beneficiaries. Therefore, the settlor can characterise the trust as a purpose trust, depriving all individuals that can benefit from it of the beneficiaries' rights. No risk of re-characterisation may arise.

In substance, since there is no idea of a gift over time embodied in the San Marino Trust Law, the settlor can fully shape any element of that bundle of rights constituting the beneficiaries' legal position, because the trust is seen, under such a law, as an appropriation of segregated assets, to be managed under the settlor's programme indicated in the trust deed. It is an instrument to exercise the dead hand of the settlor, rather than enrich the beneficiaries.

THE TRUST FUND: LESSONS FROM THE CIVILIAN THEORY OF PATRIMONY

A further characteristic of the San Marino trust distances it from the existing common-law trust legislation. In a common-law trust, trust assets are

23. *Re Bowes* [1896] 1 Ch 507

> Under San Marino law, the trust fund is composed of both trust assets and liabilities, following the civil-law idea of patrimony

considered as a fund.[24] The fund is composed only of assets, not liabilities. As article 2 of the Hague Convention makes clear:

- the assets constitute a separate fund and are not a part of the trustee's own estate;
- title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee.

In this manner, trust assets are not part of the trustee's own estate, but trust liabilities can be.

In the common-law world,[25] the trustee can be bound by all obligations entered into as a trustee, even if the extent of their liability can vary.

With the breadth of their liability varying from one legal system to another, the trustee can limit their liability if the counterparty accepts a clause with such effect or if the counterparty is aware that the trustee is acting as such. In any case, the trustee may be liable to third parties in tort for damages created by the trust assets, e.g. environmental damage caused by assets settled into trust.[26]

Therefore, under common-law systems, the trust can be considered as an asset-partitioning tool,[27] not a liability-partitioning tool. Trust assets are out of reach of a trustee's creditors, but a trustee's assets are not always insulated against 'trust liabilities' toward third-party creditors.

The San Marino legislator, while not influenced by the theory of the patrimony in shaping the function of the trust, did not forget its utility.

Under San Marino law, the trust fund is composed of both trust assets and liabilities, following the civil-law idea of patrimony, which is not simply a fund composed of assets (article 1(J)).

This fund is composed of both assets and liabilities and they are transferred as such, all together, in all those cases where trustees are substituted (article 40(1)). In this manner, the trust assets and trustee's obligations are transferred all together to the new trustee, who will be substituted, as debtor, in all the obligations entered into, but not fully executed, by the former trustee. As a consequence, the former trustee is automatically substituted by the new one in all legal proceedings (article 40(4)).

At the termination of the trust, liabilities are transferred to beneficiaries, according to the share of assets they are entitled to receive (article 16(4)).

In a manner similar to the transfer of a going concern in business law, trust assets and liabilities transfer, under San Marino Law, together as such, in all cases where, under common law, only trust assets are transferred.

Furthermore, trust assets are totally independent from the trustee's own estate – not simply segregated from it. Under article 47(1) Trust Law, any person, not being a trustee, a beneficiary or a protector, having rights against a trustee as a result of obligations undertaken or acts carried out manifestly as trustee or due to acts or facts in that capacity, may satisfy their claim only out of the trust fund. In this manner, any liability incurred by the

24. B Rudden, 'Things as Thing and Things as Wealth, *Oxford Journal of Legal Studies* (1994), 81–97
25. *Muir* v *City of Glasgow Bank* (1879) 4 App Cas 337, 368; article 32 *Trust (Jersey) Law 1984*; for international developments, see P Panico, *International Trust Laws* (2010)
26. In US, see *Maine Shipyard* v *Lilley* 2000 ME 9
27. Henry Hansmann and Ugo Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis', 73 *NYU Legal Review* (1998), 434

trustee (in their capacity as trustee) is to be satisfied by the trust assets, never by the trustee's own assets, regardless of the fact that the third party knew that the trustee was acting as such or had a claim in tort arising from the trust assets. In this way, complete autonomy is created between the trust fund and the trustee's own estate – not just a simple separation or segregation.

CONCLUSIONS

The enactment of a trust law in a civil-law country requires full knowledge of the common-law world and, more than this, a full knowledge of the civil law, in its historical, as well as contemporary, forms. Only with such knowledge can a trust statute perfectly work in a civil-law context and satisfy the needs of settlors located in civil-law countries.

The idea (introduced by Pierre Lepaulle) that the trust is merely a *patrimonie d'affectation*, a segregation of assets, shall not blind civilians and prevent them from capturing the other functions of a trust.

Civilians were quite familiar with institutions analogous to the trust, but which had functions different from the trust, and none of them were used to create merely a *patrimonie d'affectation*, but rather to impose the settlor's will on the management and distribution of assets.

With this perspective clearly in mind, the San Marino legislator created a brand new model of trust. It is not simply a new trust law inspired by the several international trust laws enacted in recent years.

This new type of trust leaves to the settlor the power to completely decide the programme of appropriation of the trusts' assets, without being bound by any rule against it deriving from the English and Welsh idea that the function of a trust is to complete a gift over time to beneficiaries.

This new type of trust is inspired, in spirit, by the civilian tradition that knew an institution which was analogous to a common-law trust, but which pursued a function different from it, allowing the settlor to restrain the enrichment of beneficiaries. This spirit fits well with the needs of civilian settlors even in these modern days.

Civilians, in fact, are not at odds with trusts, but they are often at odds with the gift-over-time idea embodied in trusts governed by a trust law inspired by English and Welsh law: they are able to appreciate the value of segregation of their assets the value of drafting an appropriation programme for these assets, but they do not want to immediately enrich the beneficiaries.[28]

ANDREA VICARI TEP IS ONE OF THE DRAFTERS OF THE TRUST LAW OF THE REPUBLIC OF SAN MARINO. HE IS FOUNDING PARTNER OF VICARI & ASSOCIATI (MILAN AND PESARO, ITALY) AND FOUNDER OF STUDIO LEGALE E NOTARILE VICARI (REPUBLIC OF SAN MARINO). ANDREA IS A DOCTOR OF JURIDICAL SCIENCE (CORNELL), ITP CERT (HARVARD) AND A DOCTOR OF COMPARATIVE LAW

28. For further details on trust law in San Marino, see A Vicari, 'San Marino', in *Columbia Journal of European Law* 81 (2012); A Vicari, 'San Marino', in *International Trust Laws*