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## Italy: Trust and the Italian Legal System: Why Menu Matters

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# TRUST AND THE ITALIAN LEGAL SYSTEM: WHY MENU MATTERS

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## I. INTRODUCTION

The Italian legal system is undergoing a development process involving the traditional pillars of its legal framework. In addition to the law of contracts, usually accustomed to dealing with new legal tools autonomously developed by the contracting parties and generally circulating from other legal systems, other significant areas of law have been remarkably interested: for example, family law, succession law, bankruptcy law, and the law of obligations, in particular rules providing for debtor’s liability and creditor’s rights.<sup>1</sup> This phenomenon has prompted a re-evaluation of the approach to fundamental concepts as well as the limits traditionally

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1. *See, for example*, Directive 2002/47/EC on financial collateral arrangements, entitling the collateral-taker, should an enforcement event occur, to realize the collateral by appropriation (Directive, art. 4, 2002 O.J. (L168) 43. The text of the directive is also available at <http://eur-lex.europa.eu/>). The Directive has been implemented in Italy through the Legislative Decree 170/2004: this provision, and in particular art. 4 of the same, introduced a remarkable exception to art. 2744 of the Italian Civil Code which prohibits any form of the collateral’s appropriation by the creditor.

perceived as absolute (for example, the rule on the universal liability of the debtor set forth in article 2740 of the Italian Civil Code, that nowadays suffers so many exceptions that its prescriptive value of intangible provision has been weakened).<sup>2</sup> The change seems mainly due—directly or indirectly—to the entrance of the “trust” on the Italian scene: this occurrence induced several reactions, in particular by Italian lawmakers, who aimed at offering new and workable alternatives to trust. Although the debate within the Italian arena did not exclusively focus on this legal instrument and was enriched by suggestions coming from different sources (for example, Italian society, as well as European Institutions), nevertheless the increasing recourse to trust undoubtedly played a major role in the process of the reconsideration of traditional legal categories and the drafting new legal tools.<sup>3</sup> In this sense, it can be said that the Italian legal menu,<sup>4</sup> which used to offer potential customers a list of traditional

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2. *See, for example*, Tribunal of Reggio Emilia, ord. of 14 May 2007, according to which such prescription would be deprived of its function, in Guida al diritto, 2007, n. 26, 50, commented by G. Finocchiaro.

3. The comparative literature grants specific attention to phenomena of circulation of models, legal transplants, legal irritants, legal flows and other events inducing reactions and change in the recipient country. Among the many contributions, *see, for example*, ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (Univ. Press of Virginia 1974) (the work has then been followed by other essays by the same author, developing the theory introduced therein); RODOLFO SACCO, *INTRODUZIONE AL DIRITTO COMPARATO* (5th ed., Utet 1992) (focusing attention on the circulation of models and highlighting two determining factors: force and prestige); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, 61 *MOD. L. REV.* 11 (1998) (arguing that legal irritants explain the transfer of legal rules from one country to another better than legal transplants: while a transplant would induce either rejection or acceptance of the alien organ, to the contrary, when a foreign rule is imposed on a domestic culture, it is not transplanted into another organism, but rather works as a fundamental irritation which triggers a whole series of new and unexpected events); MAURIZIO LUPOI, *SISTEMI GIURIDICI COMPARATI. TRACCIA DI UN CORSO* 60 (ESI 2001) (defining as legal flow any element of a legal system operating in another system and introducing a situation of imbalance in the latter). *See also*, recently, Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 *THEORETICAL INQ. L.* 723 (2009).

4. The title of the present work evokes the essay of Ian Ayres, *Menus Matter*, 73 *U. CHI. L. REV.* 3 (2006) (holding that lawmakers can affect contractual equilibria by regulating contractual menus, assuming that a menu is

dishes, has been enriched in order to take into account the preferences of parties with heterogeneous tastes.<sup>5</sup>

## II. TRUST AND THE ITALIAN LEGAL SYSTEM

Italy was the first country to ratify the Hague Convention on the Law Applicable to Trusts and on their Recognition,<sup>6</sup> through Law no. 364, of 16 October 1989, which came into force on January 1, 1992 (“Convention”).<sup>7</sup>

Although there had been precedents dealing with trusts, the most significant case law—and the related attempts by the legislative formant<sup>8</sup> to create competitive alternatives—occurred after the implementation in Italy of the Convention.<sup>9</sup>

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a contractual offer that empowers the offeree to accept more than one type of contract, and highlighting that the menu can consist of two simultaneous offers that private parties make to each other and/or of offers that the state makes to potential contractors themselves) in order to highlight how the Italian legal sphere has been enriched with new legal instruments developed by private parties and/or introduced by Italian lawmakers.

5. The offer has therefore been amended, revisiting traditional recipes and/or adding new dishes to traditional ones like in the case of a menu listing at the same time homemade cannelloni, cardamom-flavoured ragù and shrimp-tempura. On food and recipes as a metaphor of legal systems, *see in particular* Olivier Moréteau, *Mare Nostrum as the Cauldron of Western Legal Traditions: Stirring the Broth, Making Sense of Legal Gumbo Whilst Understanding Contamination*, 4 J. CIV. L. STUD. 515 (2011).

6. The Hague, Convention on the Law Applicable to Trusts and on their Recognition, July 1, 1985 [hereinafter Hague Trust Convention], *available at* [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=59](http://www.hcch.net/index_en.php?act=conventions.text&cid=59) (last visited Feb. 20, 2014).

7. *See generally* Antonio Gambaro, *Trust* in DIGESTO DISCIPLINE PRIVATISTICHE, SEZ. CIVILE, TURIN, XIX at 449 et seq. (1999).

8. *See in particular* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1 (1991) and Sacco, *Legal Formants: A Dynamic Approach to Comparative Law II*, 39 AM. J. COMP. L. 343.

9. It has been noted that a significant contribution to the Italian reflection over trusts was given by the enactment of the Law of the Republic of San Marino of 17 March 2005, no. 37, on trust. Though the legal system of San Marino and Italy are different (for example, because a main source of law in San Marino is *ius commune*), the above-mentioned legislative provision is the first of a civil law country drafted in Italian and providing for trust. *See generally* Enrica Senini, *La nuova Legislazione della Repubblica di San Marino sul Trust*, 7:3 TRUSTS 368 (2006).

Court rulings on trusts before such event generally either: (i) denied recognition of the latter on the basis of the assumed irreconcilable conflict between trusts and mandatory rules of the Italian legal system (for example, the concept of double-ownership allegedly related to trust against the uniqueness of the ownership right as set forth in art. 832 of the Italian Civil Code (hereinafter “C.C.”); the *numerus clausus* of the *iura in re aliena*, and the limits imposed by article 2740 C.C. about debtor’s liability (which, in paragraph 2, prevents any form of asset-segregation unless expressly admitted by law); or (ii) recognized only limited effects to trusts as long as they may be lead back, by analogy, to similar provisions of the Italian law.<sup>10</sup>

On the contrary, countries which ratified the Convention are obliged to recognize the legal effects of trusts subject to the law of a trust-country.

However, it has to be noted that the definition of trust under the Convention does not match that pertaining to the English common law.<sup>11</sup> Pursuant to article 2, paragraph 1 of the former, trust includes “the 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.”<sup>12</sup>

Rather than properly defining trust, the Convention therefore opts in favor of a functional approach by depicting the characteristics of phenomena not necessarily falling under the concept of “trust” as developed in the English legal system. In addition, while English law recognizes both constructive and resulting trusts, the Convention applies only to voluntary trusts.

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10. See, for example, Tribunal of Oristano, 15 Maggio 1956, FORO ITALIANO, 1956, I, 1019; Tribunal of Casale Monferrato, decr. 13 Aprile 1984, II RIV. NOT., 243 (1985).

11. With reference to trust within the common law system, see generally GERAIN THOMAS & ALASTAIR HUDSON, THE LAW OF TRUSTS (Oxford Univ. Press 2004); Geoffrey C. CHESHIRE, IL CONCETTO DEL TRUST SECONDO LA COMMON LAW INGLESE (Diego Corapi intro., G. Giappichelli 1998).

12. Hague Trust Convention, *supra* note 6.

Second, the relationship between the trust fund and the trustee is described by the Convention in terms of “control”, with no further legal qualification. However, article 2, paragraph 2 of the same provides a guideline requiring a trust for the purposes of the Convention to have the following characteristics:

(a) the assets constitute a separate fund and are not a part of the trustee’s own estate;

(b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

(c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.<sup>13</sup>

Consequently, legal relationships meeting the requirements set forth by the Convention will be recognized in Italy as “trusts”, although under English law they would fall within different legal categories. For this reason Professor Maurizio Lupoi refers to trust pursuant to the Convention in terms of “shapeless trust”.<sup>14</sup>

During the last twenty years, following the implementation of the Convention, Italian courts faced an increasing number of cases involving recognition of trusts, thus developing substantial body of case law.<sup>15</sup>

For example, in 1997 the Tribunal of Lucca ruled about a succession dispute grounded on the alleged nullity of a will providing for the appointment of a fiduciary executor who should

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13. Hague Trust Convention, *supra* note 6.

14. MAURIZIO LUPOI, TRUSTS 425 et seq. (Giuffrè 1997); LUPOI, TRUSTS: A COMPARATIVE STUDY (Simon Dix trans., Cambridge Univ. Press 2000).

15. For a survey of Italian case-law on trusts, *see in particular*: *La Giurisprudenza Italiana sui Trust* in TRUSTS: OPINIONI A CONFRONTO 207-96 (E. Barla De Guglielmi ed., IPSOA 2006) (reporting several contributions of judges and law professors highlighting that: (i) trusts and, in particular, “domestic trusts” have become part of the Italian legal framework; (ii) trusts are broadly applied within the field of corporate law, real estate law, bankruptcy law and family law; (iii) Italian judges tend to disregard trusts when there is a clear evidence of the abusive recourse to the trust-scheme, while, in opposite cases, tend to grant full recognition to such scheme and its effects).

have managed the hereditary asset on behalf of the daughter of the *de cuius*. The daughter claimed the will should be declared null. To the contrary, the Tribunal affirmed the full legitimacy and validity of the latter, arguing that the legal relationship depicted therein amounted to a trust, thus qualifying the fiduciary executor as trustee and the daughter of the *de cuius* as beneficiary;<sup>16</sup> in addition, the judge held that the trust-scheme ought to be recognized and applied even within successions governed by Italian law. Then, in two decisions in 2000 involving the purchase of immovables, both the Tribunal of Bologna and Tribunal of Chieti ruled in favor of registration of the purchase carried out by the trustee in his specific capacity.<sup>17</sup> A different approach has been taken by the Tribunal of Velletri,<sup>18</sup> according to which the so-called “domestic trust” (namely, a trust in which the sole foreign element is the governing law), although not falling within the provisions of the Convention and therefore not recognizable under the latter, nevertheless is enforceable in Italy pursuant to article 1322 C.C. Such a provision grants parties the right to create atypical contracts provided that they are aimed at satisfying interests worthy of legal protection. With reference to such an approach, it has to be highlighted that sometimes a tendency to assimilate trust to contracts may be inferred, although, as is known, the law of trusts and the law of contracts are different.<sup>19</sup>

The Tribunal of Milan has, for example, approved a voluntary separation agreement providing for the creation of a trust aimed to protect the interests of the minor child of the parties;<sup>20</sup> the Tribunal of Parma has approved a pre-bankruptcy agreement submitted by a

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16. Tribunal of Lucca, judgment of 23 September 1997, FORO ITALIANO 2007 (1998).

17. Tribunal of Bologna, decr. of 18 April 2000, TRUSTS 372 (2000); Trib. of Chieti, ord. of 10 March 2000, *id.*

18. Tribunal of Velletri, ord. of 7 March 2005, TRUSTS 407 (2005).

19. See Michele Graziadei, *Trusts in Italian law: a matter of property or of obligation?*, in Italian national Reports to the XVth International Congress of comparative law 189 (Milan, 1998).

20. Tribunal of Milan, decr. of 23 February 2005, RIV. NOT. 851 (2005); Tribunal of Parma, judgment of 3 March 2005, *id.*

limited company, providing for the immovable assets owned by the company's director to be included in a trust fund, together with the appointment of the judicial executor of the agreement as trustee.<sup>21</sup>

In spite of such an increase in judicial recognition of trusts, perplexities arose, especially among scholars. In particular, whilst a significant part of the Italian doctrine argues in favour of trusts, deeming that they have become part of the Italian scenario, other authors show a more critical approach, highlighting the unsolved conflicts between trusts and the Italian legal system. The issue nowadays seems overtaken by recent and significant

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21. The Italian case law on trusts is quite substantial (LF: in the sense of large quantity); for a comprehensive collection *see* LA GIURISPRUDENZA ITALIANA SUI TRUSTS (4th ed., IPSOA 2011) (collecting judgments on trusts up to 2011). Among the recent decisions of the Italian Supreme Court, *see, for example*, Cass. civ. Sez. VI - 1, Ord. of 18 July 2013, n. 17621 (ruling about a conflict of competence between two Tribunals originated by the plaintiff's request to be entitled to allot some assets within a trust fund on behalf of her minor children); Cass. civ. Sez. I, judg. of 26 July 2013, n. 18138 and Cass. civ. Sez. I, judg. of 11 July 2013, n. 17208 and Cass. civ. Sez. I, judg. of 30 May 2013, n. 13659 (not specifically addressing trust issues, but assuming the existence of a trust for a company's liquidation purposes); Cass. civ. Labor Section, judg. of 3 December 2012, n. 21607 (not specifically addressing trust issues, but assuming the existence of a trust created by the employer); Cass. civ. Plenary Session, Ord. of 15 March 2012, n. 4132 (affirming Italian jurisdiction in a succession dispute involving three trusts created by the *de cuius* during his life); Cass. civ. Sez. II, judg. of 22 December 2011, n. 28363 (pointing out the specific featuring elements of trusts in order to reject the claimant's recourse). For a judgment specifically addressing the issue at hand, *see* Cass. civ. Sez. I, judg. of 13 June 2008, n. 16022. The controversy at issue involved the case of former husband and wife (both Italian citizens, but residing in England) who entered into a divorce agreement setting forth a trust. The trust fund involved an apartment to be managed on behalf of their minor children and both former spouses were appointed as joint-trustees. The agreement granted the gratuitous right of habitation to the mother and expressly provided for the duty to rent the apartment should the mother move elsewhere. When the mother had to move to Italy with the children for professional reasons, the apartment was not rented and nobody took care of it. The former husband then brought a civil suit in the Tribunal of Milan petitioning for the judicial substitution of the ex-wife and the appointment of a new trustee. The Italian judge deemed the trust subject to English law in compliance with art. 7 of the Convention, and substituted both the plaintiff and the defendant, alleging breach of the trustee's duties by both, and appointed two new joint-trustees. The Milan Court of Appeal affirmed the decision. The Supreme Court affirmed, too, disregarding the pleas of both parties and agreeing with the reasoning of the lower court.

developments; however, it is a notable aspect of the Italian experience with particular reference to the doctrinal formant.

The debate mainly focused on the “domestic trust”; namely, a trust in which the sole foreign element is the governing law, while all the other elements call for the application of the Italian law.<sup>22</sup>

Pursuant to a minority doctrine, internal trusts are irreconcilable both with the provisions of the Convention (in particular, with art. 13) and those of the Italian system, specifically with the above-mentioned article 2740, paragraph 2 C.C., requiring exceptions to the rule on debtor’s liability to be introduced only through an express legislative provision, whilst the Convention does not have such an effect.<sup>23</sup> Namely, since the Convention provides for conflict of law rules, it is prevented from introducing uniform rules of substantial law and therefore cannot have the effect to allow recognition or creation of new categories of trusts, such as the “domestic” one.<sup>24</sup> To further support the negative approach to domestic trust, reference has traditionally been made

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22. Literature on recognition of trusts in Italy, and in particular of the domestic trust, is really copious. With reference to this issue, *see specifically* Maurizio Lupoi, *I trust nel diritto civile* in TRATTATO DI DIRITTO CIVILE 263 et seq. (Rodolfo Sacco dir., Utet 2004) (summing up arguments on behalf and against the recognition of domestic trusts and concluding in favor of its positive recognition under the Convention). *See also infra*, note 25.

23. *See, for example*, Gerardo Broggin, *Il trust nel diritto internazionale privato italiano* in I TRUSTS IN ITALIA OGGI 11 (Ilaria Beneventi ed., Giuffrè 1996); Gerardo Broggin, *Trust e fiducia nel diritto internazionale privato*, EUROPA E DIRITTO PRIVATO 410 (1998); Francesco Gazzoni, *Tentativo dell'impossibile (osservazioni di un giurista non vivente su trust e trascrizione)*, RIV. NOT. 11 (2001); Francesco Gazzoni, *In Italia tutto è permesso, anche quel che è vietato (lettera aperta a Maurizio Lupoi sul trust e su altre bagattelle)*, RIV. NOT. 1247 (2001); Carlo Castronovo, *Trust e diritto civile italiano*, VITA NOT. 1323 (1998); Luca Ragazzini, *Trust interno e ordinamento giuridico italiano*, RIV. NOT. 279 (1999); Vincenzo Mariconda, *Contrastanti decisioni sul trust interno: nuovi interventi a favore, ma sono nettamente prevalenti gli argomenti contro l'ammissibilità*, CORRIERE GIUR. 76 et seq. (2004); ARNALDO MORACE PINELLI, *ATTI DI DESTINAZIONE, TRUST E RESPONSABILITÀ DEL DEBITORE* 121 et seq. (Giuffrè 2007).

24. *See, for example*, Salvatore Mazzamuto, *Il trust nell'ordinamento italiano dopo la Convenzione dell'Aja*, VITA NOT. 754 (1998) (stating that recognition of internal trust would not be allowed under the Convention because its conflict of law rules provide for recognition of foreign trusts).

to the *numerus clausus* of *iura in re aliena* and the uniqueness of the right of ownership.

According to the prevalent doctrine, domestic trusts shall be recognized in Italy, as well as any other trust under the Convention, namely because: (i) article 6 of the Convention grants the settlor freedom to choose the governing law of trust (although within the limit set forth by article 2 of the same); (ii) the Convention does not require the trust to include foreign elements in addition to the governing law;<sup>25</sup> and, (iii) article 13 of the same<sup>26</sup> must be interpreted as allowing judges to assess *quam in concreto*, on a case-by-case basis, the real purposes of the specific trust at stake. Article 13 would therefore leave judges a sort of residual power of control for those cases in which the recourse to trust appears merely instrumental.<sup>27</sup> Consequently, internal trust

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25. Pursuant to art. 11 of the Convention, a trust created in compliance with the law chosen by the settlor will have to be recognized as well as any other trust under the same Convention. In addition, art. 11 draws a distinction between necessary and further effects of the recognition of the shapeless trust. The necessary effects amount to segregation and the entitlement of the trustee to act on behalf of the trust and appear in this capacity before a court and/or any other public authority; further effects occur in so far as the governing law of the trust requires or provides for them. In particular:

a) that personal creditors of the trustee shall have no recourse against the trust assets; b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy; c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death; d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets (Hague Trust Convention, *supra* note 6, at art. 11, para. 2).

26. Hague Trust Convention, *supra* note 6, at art. 13:

No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.

27. Favorable to the recognition of domestic trust, for example, is Umberto Morello, *Fiducia e trust: due esperienze a confronto* in FIDUCIA, TRUST, MANDATO ED AGENCY 97 et seq. (Giuffrè 1991); Alessia Busato, *La figura del trust negli ordinamenti di common law e di diritto continentale*, II RIV. DIR. CIV. 341 (1992); Paulo Piccoli, *Possibilità operative del trust nell'ordinamento italiano. L'operatività del trustee dopo la Convenzione dell'Aja*, RIV. NOT. 66 (1995); Nicolò Lipari, *Fiducia statica e trusts* in I TRUSTS IN ITALIA OGGI 75 (Ilaria Beneventi ed., Giuffrè 1996); Maurizio Lupoi, *Lettera a un notaio*

shall be deemed in compliance with both the Convention and the relevant national provisions, and therefore deserve to be fully recognized within the Italian legal system.

Italian Courts adopted heterogeneous approaches: besides judgments denying recognition of internal trust, there are several decisions allowing it.<sup>28</sup> However, the judicial denial of trusts does

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*curioso di trusts*, RIV. NOT. 348 (1996); Paulo Piccoli & Nicola Raiti, *Atto di costituzione di trust*, RIV. NOT. 236 (1996); Raffaele Lener & Giovanni B. Bisogni, *Omologa di prestito obbligazionario*, LE SOCIETÀ 586 (1997); Micol-Eloise D'Orio, *Un trust a garanzia di un prestito obbligazionario. Percorsi e tendenze nella dottrina sui trusts*, in II GIUR. COMM. 239 (1998); Pasquale Amati & Paulo Piccoli, *Trascritto un immobile in trust*, NOT. 593 (1999); ALESSANDRO DE DONATO, VALENTINA DE DONATO & MAURIZIO D'ERRICO, TRUST CONVENZIONALE. LINEAMENTI DI TEORIA E PRATICA 80 et seq. (Stamperia Nazionale 1999); Francesco Di Ciommo, *Per una teoria negoziale del trust (ovvero perché non possiamo farne a meno)*, CORRIERE GIUR. 786 (1999); Paulo Piccoli, *Il trust: questo (sempre meno) sconosciuto*, CORRIERE GIUR. 391 (1996); Alexandra Braun, *Trusts interni*, RIV. DIR. CIV., 577 et seq. (2000); Stefano di Buttà, *Effetti diretti della Convenzione dell'Aja nell'ordinamento italiano*, TRUSTS E ATTIVITÀ FIDUCIARIE 557 (2000); NICOLA CANESSA, I TRUSTS INTERNI. AMMISSIBILITÀ DEL TRUST E APPLICAZIONI PRATICHE NELL'ORDINAMENTO ITALIANO 3 et seq., 17 et seq. (Il Sole 24 Ore 2001); Sergio M. Carbone, *Autonomia privata, scelta della legge regolatrice del trust e riconoscimento dei suoi effetti nella Convenzione dell'Aja del 1985*, TRUSTS E ATTIVITÀ FIDUCIARIE 145 (2000); Augusto Chizzini, *Revoca del trustee e legittimazione all'azione possessoria*, TRUSTS E ATTIVITÀ FIDUCIARIE 47 (2000); Giovanni Iudica, *Trust e stock option*, TRUSTS E ATTIVITÀ FIDUCIARIE 511 (2000); Riccardo Luzzatto, *Legge applicabile e riconoscimento di trusts secondo la Convenzione dell'Aja*, TRUST 14 (2000); Luigi F. Riso, *Il libro degli eventi del trust*, TRUST 127 (2000); Lorenzo Salvatore, *Il trend favorevole all'operatività del trust in Italia: esame ragionato di alcuni trusts compatibili in un'ottica notarile*, CONTRATTO E IMPRESA 644 (2000); SAVERIO BARTOLI, IL TRUST, 597 (Giuffrè 2001); Maurizio Lupoi, *Lettera ad un notaio conoscitore dei trust*, RIV. NOT. 1159 (2001); LUPOI, TRUSTS (2d ed., Giuffrè 2001); Luigi F. Riso, *Dibattito sulla legge regolatrice del trust e ruolo del notaio*, TRUSTS E ATTIVITÀ FIDUCIARIE 333 et seq. (2001); Antonio Gambaro, *Un argomento a due gobbe in tema di trascrizione del trustee in base alla Convenzione dell'Aja*, I RIV. DIR. CIV. 919 (2002); Francesco Di Ciommo, *Ammissibilità del trust interno e giustificazione causale dell'effetto traslativo*, FORO ITALIANO 1295 (2004); LUPOI, I TRUST NEL DIRITTO CIVILE, *supra* note 22. On behalf of the positive recognition of the domestic trust, see the study published by the Consiglio Nazionale del Notariato, approved on February 10, 2006: Daniele Muritano & Luigi F. Riso, *Il trust: diritto interno e Convenzione dell'Aja. Ruolo e responsabilità del notaio*, available at [www.notariato.it](http://www.notariato.it). Recently, on behalf of internal trust, see also Lucilla Gatt, *Il trust c.d. interno: una questione ancora aperta*, 3 NOT. 280 (2011).

28. See, for example, *supra* note 15.

not seem due to a rejection of trust *ex se*, but rather to the abusive use of the trust scheme: for example, when a substantial reason for segregation of the assets is absent and the recourse to trust and its effects is neither supported nor justified by a worthwhile purpose.<sup>29</sup>

Regardless, trusts undoubtedly are present and operate within the Italian arena, thus testifying to their success and appeal in fulfilling the parties' needs in different areas of law:<sup>30</sup> in fact, they have been utilized within family relationships (both during the marriage and in case of separation and divorce), for succession and will purposes, and within business context (both in the on-going activity phase and in the event of insolvency, in particular with reference to bankruptcy—or alternative to bankruptcy—proceedings<sup>31</sup>).

With specific regard to the relationship between trusts and bankruptcy issues, a significant contribution has been made by Law of 27 January 2012, n. 3—in particular articles 6-14—providing for cases of over-indebtedness not subject to current bankruptcy proceedings, and allowing the debtor to enter into a debt-reorganization agreement with creditors on the basis of a plan

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29. See, *inter alia*, Lorenzo Salvatore, *Atto di Destinazione e Crisi di Impresa: Strumento a Tutela o contro le Procedure Concorsuali?*, 5 RIV. NOT. 1085 (2012) (further highlighting the need to draw a distinction between: (i) the act establishing a trust, which is neutral in itself and therefore cannot be held *ex se* unlawful, and (ii) the specific acts of disposition of the trust assets, which are subject to a case by case assessment).

30. See, for example, Maurizio Lupoi, *Il Contratto di Affidamento Fiduciario*, 3 RIV. NOT. 513 (2012). See also Elisabetta Corapi, *Sul Trust Interno Autodichiarato*, 6 BANCA, BORSA, TITOLI DI CREDITO 801 (2010) (commenting on the judgment of Tribunal of Cagliari, of 4 August 2008 and highlighting that the trend of the financial market toward the internationalization of law, the increasing value of *lex mercatoria*, and the phenomenon of forum-shopping, fostered the recourse to trust within the Italian legal system).

31. For an in-depth comparative analysis of trust within the business context, see *in particular* COMMERCIAL TRUSTS IN EUROPEAN PRIVATE LAW (Michele Graziadei, Ugo Mattei & Lionel Smith eds., Cambridge Univ. Press 2005). The book is part of the COMMON CORE OF EUROPEAN PRIVATE LAW series and includes contributions from several countries. The Italian contributors to the case studies are Professor Antonio Gambaro and Professor Michele Graziadei.

aimed at ensuring the regular payment of creditors not taking part in the plan. The plan may provide for collaterals, liquidation of certain assets and—for the purposes of the present analysis—the fiduciary entrustment (“*affidamento fiduciario*”) of the debtor’s estate to a trustee (“*fiduciario*”) for purposes of liquidation, preservation, and distribution of the proceeds among creditors. In particular, it has been noted that the above mentioned agreement, which has been referred to in terms of “*contratto di affidamento fiduciario*”, would be the civilian alternative to trusts<sup>32</sup>: accordingly, that would mark a notable development in the relationships between trusts and the Italian legal framework, as well as other previous legislative attempts to provide for an Italian response to issues usually dealt with by means of a trust, although the outcome of such previous attempts did not always seem to gain the same success.

### III. THE REACTION OF ITALIAN LAWMAKERS: ARTICLE 2645-TER OF THE CODICE CIVILE....

The reaction of Italian lawmakers to the increasing recourse to trusts by private parties, together with the increasing demand for new tools able to meet the heterogeneous needs of Italian society (for example within family, business, succession context), ended up with the introduction in the Italian Civil Code of new provisions aimed to operate as alternatives to trusts and, moreover, governed by Italian law.

In particular, in 2005 the Civil Code was amended by the insertion of article 2645-ter C.C., which allows the registration in public records of acts in public form whereby immovable goods and/or registered movable goods are destined, up to ninety years or up to the duration of the life of the natural person beneficiary, to fulfill protection-deserving interests, referring to people with a disability, to public administrations, or to other legal entities or

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32. Lupoi, *Il Contratto di Affidamento Fiduciario*, *supra* note 30.

natural persons in compliance with article 1322, paragraph 2 C.C.<sup>33</sup> The registration makes the bond effective toward third parties.<sup>34</sup> The relevant goods and their fruits can be used only to achieve the specifically stated aim, and they can be seized only for debts incurred for such aim.

This provision has been inserted in the sixth book of the Code, generally dealing with protection of rights, and in particular in the section providing for registration of acts and their effects toward third parties. Pursuant to article 2645-ter C.C., parties are entitled to register acts aimed at fulfilling interest worthy of legal protection. Namely, it is allowed to create a bond of purpose upon certain kind of goods—i.e., registered movables or immovables—preventing any action by third parties against them. Article 2645-ter therefore disregards article 2740 C.C. on a debtor's liability because it introduces, as a consequence of an express legislative provision, a limit to the general asset-liability of the debtor.

Although included in a set of provisions dealing with registration formalities, this article provides for certain substantial aspects, too.

In particular, it seems to introduce a new category of separate assets in addition to the other cases already provided for in the civil code: (i) inheritance with benefit of inventory; (ii) bankruptcy assets; (iii) the so-called “*fondo patrimoniale*” as set forth in articles 169 and following (a separate asset of goods bound to fulfill family's needs); and (iv) the company's separate assets for a

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33. Art. 1322 C.C. provides for parties' autonomy and its second paragraph entitles the creation of atypical contracts to the extent that such contracts pursue “protection-deserving interests”. This assessment will be carried out on an *ex-post* basis by the judge and, according to the dominant doctrine, it ends up verifying whether the atypical contract is lawful or not. *See infra* note 45.

34. Although a notable portion of Italian scholars argues that the registration has a constitutive effect, because, absent it, the bond would not exist (as well as the constitutive effect of the mortgage's registration), the majority opinion deems that the registration allows enforceability of the bond against third parties. According to the latter opinion, therefore, the origin of the bond will be the act providing for the bond, its purpose, duration, etc. For an overview of this debate *see* Andrea Ghironi, *La Destinazione di Beni ad uno Scopo nel Prisma dell'Art. 2645ter c.c.*, 5 Riv. NOT. 1085 (2011), in particular paragraph 4.

specific deal pursuant to article 2447-bis C.C. However, the provision was quite incomplete and gave rise to criticism and uncertainties, especially among scholars.

Before dealing with this issue, it seems appropriate to briefly address a traditional legal instrument set forth in the Civil Code in order to meet the needs of married couples and their children: the above-mentioned “*fondo patrimoniale*”, as provided for by article 167 and following.<sup>35</sup>

Pursuant to the same, the spouses, through a public act, a third party, or even by will, are entitled to designate registered movables, immovables and/or negotiable instruments to fulfill the needs of the family. The fund can even be created during the marriage and, absent different provisions, the ownership of the involved assets belongs to both spouses. In particular, the natural or civil fruits of such assets will be used for the family’s needs. The involved goods can neither be sold nor can be subject to pledge, encumbrance or any other lien unless agreed to by both spouses and, in the event of minor children, without the previous authorization of the competent Tribunal. Creditors cannot seize the assets and/or their fruits if they knew that the relevant debts were incurred for needs different than those of the family.<sup>36</sup>

Accordingly, such a legal instrument represents a form of segregation of assets explicitly allowed by Italian lawmakers.

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35. See generally Luca Domenici, *Il fondo patrimoniale: negozio di protezione dei beni familiari*, 5 NOT. 549 et seq. (2011); Andrea Fusaro, *Commento all’art. 167 c.c.*, in DELLA FAMIGLIA, I, ARTT. 74 - 176 C.C. at 1048 (Luigi Balestra ed., Utet 2010), part of the COMMENTARIO DEL CODICE CIVILE series (Enrico Gabrielli dir.).

36. Art. 170 C.C. deals with the relationship between creditors and the legal instrument at stake by providing for three categories of debts: (1) debts incurred to fulfill the family’s needs; (2) debts incurred to fulfill interests outside the family’s needs, when such circumstance is unknown to the creditor; and (3) debts incurred to fulfill interests outside the family’s needs, when such circumstance is known to the creditor. Only the first two categories of debts entitle the enforcement against the assets of the fund. On the relationship between the “*fondo patrimoniale*” and creditors, see generally ARNALDO MORACE PINELLI, *INTERESSE DELLA FAMIGLIA E TUTELA DEI CREDITORI* (Giuffrè 2003).

Nevertheless, so far it has had limited application.<sup>37</sup> Moreover, two elements currently seem to further limit its development: on one side, the competition of alternative instruments—in particular trusts—coupling a broader flexibility and range of application together with a more efficient segregation effect and, on the other side, the judicial approach aimed to increase the cases in which credit enforcement against the assets of the fund is allowed, thanks to an extensive construction of the concept of “debts incurred for the needs of the family.”<sup>38</sup> In addition, as a consequence of the black letter of article 167 and following, and of its specific insertion in the section aimed to provide for the patrimonial regime of spouses, the present legal instrument applies only to married couples.<sup>39</sup>

A possible Italian response to the limits of this kind of legal tool has therefore been identified in article 2645-ter C.C., which, because of its wording, can be also used by unmarried couples in order to provide for their interests, both between partners and/or on behalf of their children.<sup>40</sup>

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37. See, for example, Giovanni Gabrielli, *Patrimonio familiare e fondo patrimoniale*, in 32 ENCICLOPEDIA DEL DIRITTO 293-95 (Giuffrè 1982); Tommaso Auletta, *Il fondo patrimoniale* in IL CODICE CIVILE. COMMENTARIO 15 et seq. (Piero Schlesinger ed., Giuffrè 1992); Biagio Grasso, *Il regime in generale e il fondo patrimoniale* in 3 TRATTATO DI DIRITTO PRIVATO 420 (Pietro Rescigno ed., Utet 1996).

38. The judicial disfavour seems due in part to the fear of a fraudulent use of such instrument against the creditors' legitimate expectations and in part to a cultural heritage more favourable to creditor's rights. In particular, courts rendering decisions about “*fondo patrimoniale*” mostly ruled on the application to the same of the paulian action, both ordinary and within bankruptcy proceedings. See in particular Francesco Gazzoni, *Tentativo dell'impossibile*, supra note 23; Andrea Ferrari, *Fondo patrimoniale e debiti erariali o d'impresa*, 3 FAM. DIR. 303 (2011); Tommaso Auletta, *Riflessioni sul fondo patrimoniale*, 5 FAMIGLIA, PERSONE, SUCCESSIONI 326 (2012).

39. See, for example, GIACOMO OBERTO, I REGIMI PATRIMONIALI DELLA FAMIGLIA DI FATTO (Giuffrè 1991) and Oberto, *Famiglia di fatto e convivenze: tutela dei soggetti interessati e regolamentazione dei rapporti patrimoniali in vista della successione*, FAMIGLIA E DIRITTO 661 (2006).

40. See generally Barbara Mastropietro, *L'Atto di Destinazione tra Codice Civile Italiano e Modelli Europei di Articolazione del Patrimonio*, 2 RIV. NOT. 319 (2012).

The broad wording of article 2645ter C.C. and its segregative effect can also be applied within the business context, especially for bankruptcy proceedings or other default proceedings (for example, pre-bankruptcy agreements, business-reorganization plans, etc.).<sup>41</sup>

However, as mentioned above, the wording of article 2645-ter C.C. and its insertion among provisions dealing with registration formalities combined to increase criticism and doubts about its proper meaning, function and range of application.<sup>42</sup>

The doctrinal debate mainly focused on the nature of such an article, namely whether it is aimed to provide only for the effects of the registration of the bond or whether it implies substantial aspects, too, thus providing for some featuring elements of the open-ended category of “acts of destination”. Following the second interpretation, article 2645-ter C.C. would therefore be the legislative recognition of such an open-ended category, in spite of its improper insertion and poor formulation.

Scholars adhering to the first opinion highlight that the substantial aspects introduced by the article (form and duration) are so limited as to prevent any further legal consequence of the article itself, but for the regulation of the public registration’s

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41. See, for example, Salvatore, *Atto di destinazione e crisi di impresa*, *supra* note 29.

42. See generally Francesco Gazzoni, *Osservazioni sull’art. 2645-ter c.c.*, II GIUSTIZIA CIVILE 165 et seq. (2006); Giovanni Gabrielli, *Vincoli di destinazione importanti separazione patrimoniale e pubblicità nei registri immobiliari*, RIV. DIR. CIV. 327 (2007); Gaetano Petrelli, *La trascrizione degli atti di destinazione*, RIV. DIR. CIV. 162 (2006), (criticizing the legislative trend of law reforming through inconsistent and piecemeal amendments to the civil code); Giuseppe Tucci, *Fiducie, trust e atti di destinazione ex art. 2645-ter c.c.* in 2 STUDI IN ONORE DI NICOLÒ LIPARI 2919, 2960 (Vincenzo Cuffaro & Giovanni di Rosa coords., Giffrè 2008) (stressing the obscurity of the legislative provision); Renato Clarizia, *L’art. 2645 ter e gli interessi meritevoli di tutela* in 1 STUDI IN ONORE DI GIORGIO CIAN 545 (Giovanni De Cristofaro & Stefano Delle Monache eds., CEDAM 2010); Arturo Picciotto, *Brevi note sull’art. 2645 ter: il trust e l’araba fenice*, CONTRATTO E IMPRESA 1317 (2006) (highlighting the low quality of the legislative intervention).

effects; and the insertion of the same among provisions dealing with registration formalities would confirm such interpretation.<sup>43</sup>

On the contrary, scholars following the second approach<sup>44</sup> argue that: (i) the specific mention of substantial aspects (like form, duration, kind of goods involved, beneficiaries and parties entitled to act on behalf and for the purposes of the bond), and (ii) the express reference to article 1322, paragraph 2 C.C. would therefore demonstrate legislative recognition of the open-ended category of acts of destination, entitling parties to fill the gap of such scarce legal framework with autonomous provisions to the extent that the relevant juridical act (even when unilateral) fulfills the judicial test set forth in article 1322, paragraph 2.<sup>45</sup>

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43. See, for example, Paola Manes, *La norma sulla trascrizione di atti di destinazione è, dunque, norma sugli effetti*, CONTRATTO E IMPRESA 626, 630 et seq. (2006) (highlighting that the new article has been inserted among those providing for registration formalities and their effects toward third parties). See also Raffaele Lenzi, *Le destinazioni atipiche e l'art. 2645 ter c.c.*, CONTRATTO E IMPRESA 229 et seq. (2007); Picciotto, *Brevi note sull'art. 2645 ter, supra* note 42, at 1318. Among the case law see, for example, Tribunal of Reggio Emilia, of 22 June 2012; Tribunal of Trieste, of 7 April 2006, RIV. NOT. 367 (2007).

44. See, for example, Lucilla Gatt, *Il trust c.d. interno: una questione ancora aperta*, 3 NOT. 280, 291 et seq. (2011) (highlighting, in contrast with the aforementioned opinion—see *supra* note 43 and the corresponding text—the proper choice of the lawmaker in setting forth the minimum legal requirements of the provision at stake and enhancing the role of each party's autonomy in tailoring such an instrument to the respective interests and expectations); Gazzoni, *Osservazioni sull'art. 2645-ter c.c.*, *supra* note 42, at 165; Mario Nuzzo, *Atto di destinazione e interessi meritevoli di tutela* in LA TRASCRIZIONE DELL'ATTO NEGOZIALE DI DESTINAZIONE. L'ART. 2645 TER DEL CODICE CIVILE 60 ( Bianca Mirzia ed., Giuffrè 2007); BIANCA MIRZIA, MAURIZIO D'ERRICO, ALESSANDRO DE DONATO & CONCETTA PRIORE, L'ATTO NOTARILE DI DESTINAZIONE. L'ART. 2645-TER DEL CODICE CIVILE (Giuffrè 2006); Bianca Mirzia, *Il nuovo art. 2645 ter c.c. Notazioni a margine di un provvedimento del giudice tavolare di Trieste*, II GIUSTIZIA CIVILE 189 (2006); Bianca Mirzia, *L'atto di destinazione: problemi applicativi*, RIV. NOT. 1176 (2006); Arnaldo Morace Pinelli, *Tipicità dell'atto di destinazione e alcuni aspetti della sua disciplina*, RIV. DIR. CIV. 451, 468 (2008); Giacomo Rojas Elgueta, *Il rapporto tra l'art. 2645-ter c.c. e l'art. 2740 c.c.: un'analisi economica della nuova disciplina*, BANCA, BORSA, TITOLI DI CREDITO 203 (2007); Giorgio Rispoli, *Riflessioni in tema di meritevolezza degli atti di destinazione*, 8-9 CORRIERE DI MERITO 806, 808 (2011); Mastropietro, *supra* note 40.

45. Initially, the test under art. 1322, para. 2 C.C. used to be interpreted in light of a super-eminent and overriding principle of public interest (see in particular EMILIO BETTI, *TEORIA GENERALE DEL NEGOZIO GIURIDICO* 191 et seq. (reprint, Edizioni Scientifiche Italiane 1994); subsequently this approach

A second main issue dealt with the proper meaning of “interests worthy of protection” as provided for by the article 2645-ter C.C. with regard to the purpose of the relevant bond.

According to a minority opinion, such a requirement and the reference to article 1322, paragraph 2 C.C. overlap, both requiring that the act and the relevant bond be lawful.<sup>46</sup> The wording of article 2345-ter C.C. would consequently be redundant because of the double reference to the lawfulness requirement. This approach has been criticized by those who deem that the reference to “interests worthy of protection” cannot be intended as a mere duplication of the lawfulness test under article 1322, paragraph 2 C.C.<sup>47</sup> However, scholars disagree about the proper meaning of this requirement.

According to a different opinion, the requirement implies a selection of interests: the bond under article 2345-ter C.C. may therefore operate only if aimed at pursuing high-value interests, for example, those encompassed in the Constitution (especially in its first part). Such interpretation lies on (and it is aimed to highlight) the value of the specific reference in the black letter of the article to people with a disability or public entities.<sup>48</sup> Adherents to the

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changed, and currently such provisions are interpreted as requiring the the contract be lawful. *See in particular* Giovanni B. Ferri, *Meritevolezza dell'interesse e utilità sociale*, II RIV. DIR. COMM. 81 (1971); Ferri, *Ancora in tema di meritevolezza dell'interesse*, I RIV. DIR. COMM. 1 (1979); Attilio Guarneri, *Meritevolezza dell'interesse e utilità sociale del contratto*, I RIV. DIR. CIV. 799 (1994); Vincenzo Roppo, *Il contratto* in 5 TRATTATO DI DIRITTO PRIVATO 402-03 (Giovanni Iudica & Paolo Zatti eds., Giuffrè 2001).

46. Gianfranco Palermo, *Configurazione dello scopo, opponibilità del vincolo, realizzazione dell'assetto di interessi* in LA TRASCRIZIONE DELL'ATTO NEGOZIALE DI DESTINAZIONE, *supra* note 44, at 77; Giuseppe Vettori, *Atto di destinazione e trascrizione. L'art. 2645ter*, LA TRASCRIZIONE DELL'ATTO NEGOZIALE DI DESTINAZIONE, *supra* note 44, at 176; Aurelio Gentili, *Destinazioni patrimoniali, trust e tutela del disponente* in LE NUOVE FORME DI ORGANIZZAZIONE DEL PATRIMONIO (Giovanni Doria ed., Giappichelli 2010); RISPOLI, *Riflessioni*, *supra* note 44, at 810 (arguing in favor of a full overlapping of the two tests).

47. *See infra* note 50 and the corresponding text.

48. Such an interpretation has been criticized by scholars adhering to the previous opinion insofar as it would require public notaries and officials of the

present approach, indeed, stress that such a reference has been generally neglected as the by-product of a previous draft of the article, later modified at the moment of its enactment, but not properly amended;<sup>49</sup> on the contrary, in their opinion, since this reference has been maintained in the currently-in-force version of the article, the same cannot be neglected or disregarded. Consequently, article 2645-ter C.C. may work as long as the relevant bond is intended to pursue a peculiar kind of interest, implying high-quality values of social solidarity.<sup>50</sup>

Finally, according to the majority opinion:<sup>51</sup> (i) the article at stake has recognized the category of “destination acts”, thus enhancing the role of each party’s autonomy in providing the content of such an atypical category;<sup>52</sup> (ii) reference to article 1322, paragraph 2 C.C. shall therefore be intended as the requirement to be met for the specific destination act to be legally enforceable; (iii) the mention of “interests worthy of protection” shall not be intended as a mere duplicate of the test set forth by article 1322, paragraph 2 C.C., but rather has to be interpreted as requiring that the bond is created to fulfill a qualified interest to be assessed *quam in concreto*; and (iv) finally, reference to people

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Register of immovables to assess whether the juridical act imposing the bond is aimed at pursuing worthwhile interests or not. For bibliographic references, see *supra* note 46.

49. This aspect has been specifically highlighted by Rispoli, *Riflessioni*, *supra* note 44, at 810.

50. See, for example, Gazzoni, *Osservazioni sull’art. 2645-ter*, *supra* note 42, at 165; Paolo Spada, *Conclusioni* to LA TRASCRIZIONE DELL’ATTO NEGOZIALE DI DESTINAZIONE, *supra* note 44, at 201, 203.

51. See generally Nuzzo, *Atto di destinazione e interessi meritevoli di tutela*, *supra* note 44, at 68; Rolando Quadri, *L’art. 2645-ter e la nuova disciplina degli atti di destinazione*, *CONTRATTO E IMPRESA* 1729 (2006); Petrelli, *La trascrizione degli atti di destinazione*, *supra* note 42, at 179.

52. See also Antonio Gambaro, *Appunti sulla Proprietà nell’Interesse Altrui*, 2 *TRUSTS* 169 (2007) (arguing that art. 2645-ter C.C. has officially marked the legislative recognition of “property on behalf of another party.” Accordingly, such a mechanism implies a distinction between the ownership in itself and the economic interest pertaining to a different party, so that the owner will have to exercise her right in order to pursue such interest and the relevant bond will be effective toward third parties.

with disabilities and/or public entities has an exemplificative but non-exhaustive role, since the wording of the article explicitly mentions, in addition to the those former, interests related to private parties as well. Consequently, the requirement of a qualified interest does not imply a selection among relevant and non-relevant public interests, but rather the need to verify the presence of a specific (and lawful) interest. Specifically, reference to the qualified interest is aimed at excluding cases in which the interest is lacking or is unlawful and, at the same time, to stress that the bond (and the consequent segregation effect) is not a value *ex se*.<sup>53</sup> Accordingly, courts should disregard bonds created merely to prevent enforcement of the creditor's rights, as well as those lacking interest or pursuing an unlawful result. Following such an approach, it has been argued that a bond in which the settlor is at the same time the beneficiary should not be recognized while a doubt still persists when the settlor is included among other beneficiaries (for example, when the bond created by the husband is aimed to fulfill the interests of the family members).<sup>54</sup>

Anyway, it has been highlighted that article 2645-ter C.C. might imply a new interpretation of the "*fiducia cum amico*" scheme: traditionally, in civil law systems, the fiduciary bond may be invoked only *inter partes* and cannot be enforced against third parties, leaving the former owner of the goods with the sole remedy to make a claim for compensation of damages in the event of breach of the fiduciary agreement by the counter-party. On the contrary, should the fiduciary agreement (and therefore the fiduciary bond over the relevant goods) be registered pursuant to article 2645-ter C.C., the fiduciary obligation and the consequent bond would be effective toward third parties.<sup>55</sup>

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53. *Id.*, *passim*.

54. *Id.*, *passim*.

55. *See, for example*, GIOVANNI IUDICA & PAOLO ZATTI, LINGUAGGIO E REGOLE DEL DIRITTO PRIVATO 345 (14th ed., CEDAM 2013); PAOLO ZATTI & VITTORIO COLUSSI, LINEAMENTI DI DIRITTO PRIVATO 477 (14th ed., CEDAM 2013).

On the other side, scholars who had adopted a critical approach to the recognition of trusts in Italy believe that article 2645-ter is the means by which to recognize and register trusts in Italy (even domestic ones) over registered movables and immovables since, in this case, the previous legislative gap has been filled.<sup>56</sup> However, it has to be noted that there was no need of such an article to recognize and register trusts in Italy because these effects are a direct consequence of the Convention, as mentioned above. Indeed, trusts were recognized and registered before the introduction of article 2645-ter C.C. In addition, it would be difficult to argue as to why internal trusts may be recognized insofar as they can be registered pursuant to article 2645-ter C.C. (and therefore to the extent that they include only registered movables or immovables), while internal trusts involving only movables goods (and therefore not subject to registration) may not. Such an assumption would create an unequal treatment difficult to be reconciled. Furthermore, trusts and article 2645-ter C.C. do not overlap, except in partial aspects, and therefore they remain different.<sup>57</sup> Accordingly, it would be improper to qualify article 2645-ter C.C. in terms of the legal framework granted by Italian lawmakers to internal trusts.

Namely, trusts show a broader range of application in terms of interests to be fulfilled; furthermore, they imply the presence of a trustee with all the powers and duties related to such a capacity, as well as all the features of the governing law, including the relevant remedies, too.

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56. For an overview of such an approach, *see generally* Valentina Bellomia, *La Tutela dei Bisogni della Famiglia tra Fondo Patrimoniale e Atto di Destinazione*, 2 DIR. FAM. 698 (2013).

57. For a comparison between trust and art. 2645-ter C.C., *see, for example*, AMELIA C. DILANDRO, TRUSTS E SEPARAZIONE PATRIMONIALE NEI RAPPORTI FAMILIARI E PERSONALI (Edizioni Scientifiche Italiane 2010) (highlighting the broader range of the application of trusts). *See also* Maurizio Lupoi, *Gli "Atti di Destinazione" nel Nuovo Art. 2645-ter Cod. Civ. Quale Frammento di Trust*, TRUSTS 169 (2006).

On the contrary, it may be true that article 2645-ter, since subject to Italian law, might appear more familiar to Italian parties and might raise less operative difficulties than having to deal with a foreign law, as in the case of trusts. However, this is not an argument which seems to have played a significant role within the Italian scenario since private parties, professional advisors and Italian judges did not give the impression of being discouraged by such alleged inconvenience, as testified to by the broad recourse to trusts and by their broad judicial recognition.<sup>58</sup>

However, article 2645-ter C.C., in spite of its incomplete formulation, seems to be a further opportunity offered to Italian parties when assessing which legal tool would better meet their needs: an additional item in the Italian menu (although the relevant recipe has not yet been definitively developed).<sup>59</sup>

#### IV. ....AND THE “*PATTO DI FAMIGLIA*”

The Italian menu has been also enriched with the introduction of article 768-bis–768-octies C.C., providing for the “*Patto di famiglia*”.<sup>60</sup>

“*Patto di famiglia*” (hereinafter “family agreement”) is a contract whereby the entrepreneur carrying on a business activity,

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58. In this regard, an important role is played by the business community together with private institutions like, for example, “Il Trust in Italia” (<http://www.il-trust-in-italia.it>), President Professor Maurizio Lupoi, promoting education on trusts through conferences, seminars and a specific post-graduate program, and hosting a worldwide web database on trusts. In addition, among the Italian law reviews, two deal specifically with trusts: TRUSTS AND ATTIVITÀ FIDUCIARIE and TRUSTS.

59. See Gambaro, *Appunti*, *supra* note 52 (noting that the law of trusts is the result of centuries of experience grounded on the property on behalf of another person. Similarly, with the introduction of art. 2645-ter C.C. being a recent event, the process of developing a proper set of rules and knowledge to deal with such new concept within the Italian legal system is only at the beginning).

60. The above-mentioned provisions have been introduced by art. 2 of Law 14 February 2006, n. 55. The insertion of the family agreement as a tool to provide for the family buy-out has been the Italian response to the guidelines of the European Institutions requiring State members to deal with such issue: see the Recommendation of the EU Commission 94/1069/EC of 7 February 1994, 1994 O. J. (L385), together with Communication of the EU Commissions of 28 March 1998, 1998 J.O. (C093) 2.

on his own or by means of a company, grants the business assets or the shares to the person who, among his descendants, appears more able to continue the family business. The grant may be in favor of more descendants, too. Pursuant to the contract, the grantee is bound to pay to the grantor's spouse and to the other descendants a sum equivalent to what they would be entitled to receive as forced heirs under article 536 C.C., should the grantor's succession occur at the date of the agreement. The sum received as the equivalent of the business assets or of the company's quotas would count as part of the overall quota of forced inheritance respectively owed to the spouse and to each descendant.<sup>61</sup>

Similarly, the goods received by the grantee under the family agreement will count as quota of the forced inheritance owed to the same. Should the value of the grant be higher than the amount to be paid as respective forced heirship, the exceeding part will be qualified as part of the disposable portion of the grantor's estate, and the grantee will be the beneficiary of this exceeding part.<sup>62</sup> The grant and the payment made as consequence of the family agreement will not be subject to collation or reduction.<sup>63</sup>

The aim of the family agreement is therefore the anticipation, by means of an *inter vivos* act, of the succession effects as defined and crystallized at the date of the agreement. This implies the risk of a possible sacrifice to the credit-rights of the other descendants should the value of the business assets or of the quotas assigned to the grantee be accrued at the death of the grantor, rather than at the date of the agreement. Vice versa, such anticipatory effect will

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61. Art. 768-*quater* C.C. The Italian civil code refers to this concept in term of "*quota di legittima*"; the Louisiana civil refers to "*legitimate portion*" or "*legitime*": see, for example, art. 1234 (*Reduction of donations exceeding disposable portions; calculation of legitime*) or Title II (*Of donations inter vivos and mortis causa*) – Chapter 1 (Louisiana Trust Code) – Subpart I (Arts. 1841-1847) dealing with "*The Legitime in Trust*". Please note that the legislative decree 154/2013 has repealed any residual distinction between natural children and legitimate children.

62. See, for example, IL PATTO DI FAMIGLIA (Ubaldo La Porta ed., Utet 2007).

63. Art. 768-*ter* C.C.

imply a sacrifice of the grantee's rights in the event the value of such goods at the death of the grantor is lower than the amount the grantee paid to the other descendants under the family agreement.<sup>64</sup>

The purpose of the agreement is therefore to fulfill the family buy-out. Such aim is perceived as very important within Italian society since the majority of Italian enterprises are small-medium ones, family-run, and therefore generally managed by the founder, together with members of his family.<sup>65</sup> Accordingly, the *intuitu personae* element and the proper management of the family buy-out through the identification of the descendant most capable of carrying on the family-business has always been one of the major concerns of Italian entrepreneurs, as well as the need to preserve the business value from any potential conflict among the family members. However, such an expectation mostly clashed with the right of each descendant to receive a quota of the non-disposable portion of the succession estate in those cases in which the relevant estate includes the ownership of a family-business and/or the family-run company. In order to balance these opposing interests, Italian lawmakers tried to reach a compromise through the family agreement mechanism. Accordingly, the elected descendant will be granted the family business, thus ensuring the positive outcome of the family buy-out, but, at the same time, he will have to pay-off the right of credits of the forced heirs,<sup>66</sup> thus ensuring compliance with the mandatory provisions of Italian law on *legitime*. The introduction of the family agreement induced several comments about its nature and legal effects. In particular, it has been pointed out that such legal instrument would be a multilateral contract,

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64. IL PATTO DI FAMIGLIA, *supra* note 62, *passim*.

65. See generally Paolo Manes, *Prime Considerazioni sul Patto di Famiglia nella Gestione del Passaggio Generazionale della Ricchezza Familiare*, 2 CONTRATTO E IMPRESA 539 (2006).

66. Such an obligation of payment has therefore been intended as counter-performance of the grant: see in particular Francesco Gazzoni, *Appunti e spunti in tema di patto di famiglia*, II GIUSTIZIA CIVILE 219, 221 (2006).

although it would not amount to a partnership or to an association agreement.<sup>67</sup> Accordingly, lack of adhesion by any of the descendant renders the agreement null.<sup>68</sup> In the opinion of some authors, in a such case the agreement would be valid, but not effective towards the non-adhering party, who will therefore be entitled to claim for collation,<sup>69</sup> while other authors deem the agreement as falling within the category of contracts in favour of third parties.<sup>70</sup>

With reference to this kind of legal instrument, the debate within the Italian arena mainly focused on its nature, the role of non-adhering descendants and the consequences of such non-adhesion, and on possible remedies and the proper relationship with mandatory succession provisions. The common opinion within the Italian sphere is that such a legal instrument encompasses interesting potentialities, but nevertheless needs to be improved—especially in its formulation.<sup>71</sup>

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67. *Id.*

68. IL PATTO DI FAMIGLIA. NEGOZIABILITÀ DEL DIRITTO SUCCESSORIO CON LA LEGGE 14 FEBBRAIO 2006, N. 55 at 244 (Bruno Inzitari ed., G. Giappichelli 2006); Federico Tassinari, *Il patto di Famiglia: Presupposti Soggettivi, Oggettivi e Requisiti Formali* in PATTI DI FAMIGLIA PER L'IMPRESA 150, 159 (Fondazione italiana per il notariato coord., Il Sole 24 Ore 2006); Andrea Zoppini, *L'Emersione della Categoria della Successione Anticipata (Note sul Patto di Famiglia)* in PATTI DI FAMIGLIA PER L'IMPRESA 277 (Fondazione italiana per il notariato coord., Il Sole 24 Ore 2006); Giuseppe Amadio, *Patto di Famiglia e Funzione Divisionale*, RIV. NOT. 867, 884 (2006); Nicola Di Mauro, *I Necessari Partecipanti al Patto di Famiglia*, FAMIGLIA PERSONE SOCIETÀ 534 (2006); G. BONILINI, MANUALE DI DIRITTO EREDITARIO E DELLE DONAZIONI 168 (4th ed., Utet 2006); Luigi Balestra, *Prime Osservazioni sul Patto di Famiglia*, II NUOVA GIUR. CIV. COMM. 376 (2006).

69. See in particular Giorgio Oppo, *Patto di Famiglia e Diritti della Famiglia*, 4 RIV. DIR. CIV. 441 (2006).

70. See, for example, Dario Restuccia, *Patto di famiglia e strumenti tradizionali di trasmissione della ricchezza* in PATTO DI FAMIGLIA 94 et seq., *supra* note 62.

71. A first legislative attempt was made during the draft of decree n. 70/2011 (the “development decree”, providing for incentives for the small-medium enterprises), then converted in Law 106 of 12 July 2011: a preliminary version of such text included provisions aimed to significantly amend the whole scheme of the “*patto di famiglia*”, both from the legal and tax perspective. However, in the enacted version of the above-mentioned decree, any reference to such reform has been erased. While some commentators deem it a “lost opportunity”, others believe that it grants more time for appropriate reflection

## V. CONCLUSIONS

Italian legal framework reveals a complex and heterogeneous set of different legal tools aimed at meeting the different needs of Italian society. In particular, rather than a list of dishes, the Italian menu seems to offer a list of ingredients—some traditional, other of recent creation or mostly unknown since not long ago, some autochthonous (although clearly inspired by other experiences), other imported—which can be combined by customers in light of their taste and preferences. However, the process is still developing and seems to demand greater confidence and some improvements. Nevertheless, a notable element of such a caldron is the on-going dialogue among the different formants, which is progressively changing the Italian scene. Accordingly, at the end of 2013 the words used by a scholar in 2004 to describe the reactions induced by trust within the Italian legal system appear still up-to-date:

It is impossible not to listen to Italian academics and practitioners discussing everything from the structuring of a trust to trustee liability and the beneficiary's remedies without reflecting that this was how things must have been in the late seventeenth and early eighteenth centuries in England. The difference, of course, is the twist given to Italian discussions by the fact that they are taking place against the backdrop of the modern sophisticated common law trust reaching into every corner of segregated private and public investment, asset securitisation, creditor security, and asset holding and management. The whole Italian trust scene is fascinating, and for the practitioners and academic involved evidently exciting.<sup>72</sup>

At that time, the author expressed disappointment for not having the opportunity to turn the page and see what was going to

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over the issue. See, for example, Roberto Siclari, *La Riforma Mancata del Patto di Famiglia: Occasione Persa o Viatico per una più Attenta Riflessione?*, 1 RIV. NOT. 17 (2012).

72. Donovan Waters, *The Hague Trust Convention Twenty Years On* in COMMERCIAL TRUSTS IN EUROPEAN PRIVATE LAW, *supra* note 31, at 56, 92.

happen in the “Mediterranean saga”.<sup>73</sup> In this sense, the Mediterranean saga goes on.

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73. *Id.*