LUISS

Corso di Laurea in Giurisprudenza

Cattedra Diritto Privato Comparato

THE ROLE OF THE TRUSTEE IN A COMMERCIAL CONTEXT

Chiar.ma Prof.ssa Barbara De Donno

Relatore

Chiar.ma Prof.ssa Livia Ventura

Correlatore

Ada Cicatiello - Matr.161863

Candidato

Anno Accademico 2023/2024

Introduction 1

CHAPTER I. Trusts in Commercial Contexts in the Common Law System 3

1. Trust in the Common Law System 3

1.1. The Evolution of Trust Practices over Time 3

1.2. Trust Compared to Company 9

1.3. Basics of Trusts: Establishing a Trust 11

1.4. Appeal of Trusts in Commerce in the Common Law System 16

1.5. Main Forms of Commercial Trusts 20

1.5.1 Trusts for investment purposes 20

1.5.2. Pension fund 22

1.5.3. Voting trusts.. 23

1.5.4. Asset protection trusts 24

1.6. Trustee Responsibilities and Powers: Aspects of Commercial Trust Management 28

1.7. Remedies for Breach of Trust: Emerging Liberalization in Contemporary Trust Law Cases 32

1.8. The Future of Trusts in a Global Context 36

CHAPTER II. Trusts and Trustees in a Global Context: Comparative Insights... 39

Section I 40

2.1. Trust in the International Context 40

2.1.1. The Appeal of a Global Framework for Trusts 40

2.1.2. Key Features of the Trust Structure 42

2.1.3. Categories of Trusts Covered by the Convention 44

2.1.4. Choice of Law 46

2.1.5. Recognition of Trusts 47

2.1.6. Trustees under the Hague Trusts Convention 48

Section II 52

2.2. The Spread of Trusts in the Italian Legal System 52

2.2.1. The experience with trusts created via the Hague Convention in Italy: the problem of domestic trust 52

2.2.2. Trustee and Comparable Legal Figures in Italian Law 60

2.2.3. The setting up of a trust 67

CHAPTER III. The Role of Domestic Trust in Italian Company law and Related Liability Issues 72

3.1. Integration of Trusts into Corporate Structures 72

3.2. Practical Applications of Domestic Trusts 75
3.2.1. Navigating Generational Transitions in Family Businesses: The Role of Trusts *75*
3.2.2. The Use of Trusts in Corporate Governance.. *81*
3.2.3. Trusts and Banking Relationships *83*
3.2.4. Trusts and Insolvency Procedures.. *85*
3.3 Trustee Obligations and Responsibilities in the Italian Context 90

Conclusions... 95

Bibliography.. 97

Jurisprudential References 102

Legislation and Official Documents 104

Introduction

In the Trustee We Trust

Trusts, long regarded as a keystone of the Anglo-Saxon legal tradition for wealth preservation and family asset management, have undergone a remarkable transformation. No longer confined to private estate planning, they have become dynamic tools shaping the landscape of modern commerce. This study delves into the profound impact of trusts on contemporary business operations, with a particular emphasis on the evolving role of trustees and the practical applications of this versatile legal framework.

In the contemporary commercial landscape, trusts have become indispensable instruments, offering businesses and financial institutions the flexibility necessary to navigate increasingly complex and dynamic markets. They play a crucial role in corporate finance, investment structures, and asset management, ensuring robust mechanisms for wealth protection, transparency, and risk mitigation. One of the most compelling advantages of trusts in commercial settings lies in their ability to protect assets while maintaining operational agility. Whether facilitating mergers, restructuring enterprises, or managing insolvency proceedings, trusts provide strong creditor protections and strategic asset distribution mechanisms that conventional corporate structures often struggle to achieve. Through the legal framework of trusts, ownership is effectively separated from control, ensuring business continuity, resilience, and financial stability even amidst economic uncertainties.

At the core of every trust is the trustee, a role that has evolved dramatically over recent decades. No longer merely a custodian of assets, the modern trustee is a pivotal figure in global financial markets, proficient at navigating complex economic landscapes, managing risk, and ensuring strict adherence to fiduciary duties. This transformation has led to the professionalization of trusteeship, elevating trust management into a highly specialized field that demands advanced financial expertise. Today’s trustees are not simply legal stewards but multifaceted professionals—investment managers, financial analysts, and corporate strategists—whose responsibilities extend far beyond traditional asset oversight. Their expertise commands recognition and compensation commensurate with the sophisticated nature of their role. As a result, trusteeship has shifted from a passive administrative function to an active, strategic position requiring sound judgment, regulatory acumen, and forward-thinking decision-making in an increasingly complex financial environment.

This study unfolds in three key phases, each designed to provide a comprehensive understanding of the trust's role in commercial transactions and its integration into the Italian legal system. It begins by exploring the trust from a common law perspective, outlining its fundamental characteristics, operational scope, and effectiveness in business and financial contexts. This foundation paves the way for a comparative analysis of international trust practices, with particular attention to how Italian legal doctrine and jurisprudence have influenced their application.

The second phase focuses on Italy's ratification of the Hague Trust Convention on the Law Applicable to Trusts and on Their Recognition, a milestone that formally introduced trusts into the country's legal framework. This development raises critical questions about the compatibility of trusts with Italy's civil law principles and the complexities involved in harmonizing them with domestic legal structures.

The final phase shifts to a practical examination, comparing trusts with existing Italian legal instruments such as fiduciary arrangements and segregated patrimonies under Article 2645-*ter* of the Italian Civil Code. By identifying key similarities and differences, this analysis highlights potential regulatory adaptations that could facilitate the broader adoption of trusts. The study then turns to real-world applications, assessing which trust structures function smoothly within the current regulatory landscape and which face legal and procedural barriers. Given that the recognition of trusts is often constrained by non-derogable legal principles, the findings underscore the necessity of targeted legislative reforms to ensure the effective use of trusts in Italy's evolving commercial environment.

Ultimately, this study is about reconciling legal tradition with modern business imperatives—bridging the gap between Italy's civil law foundations and the dynamic, trust-based structures that drive global commerce. By examining both legal and practical considerations, this research highlights how trusts can continue to serve as powerful instruments for asset protection, strategic investment, and sustained economic growth in an evolving financial landscape.

CHAPTER I. Trusts in Commercial Contexts in the Common Law System

SUMMARY: This chapter traces the evolution of trusts within the common law system, highlighting their transition from traditional tools for family wealth management to sophisticated instruments for addressing complex financial and investment needs in modern commercial contexts. Additionally, it examines the increasing complexity of the trustee's responsibilities and powers, particularly in commercial trusts, and the shift in legal remedies for breaches of trust toward equitable compensation.

1.Trust in the Common Law System – 1.1. The Evolution of Trust Practices over Time – 1.2. Trust Compared to Company – 1.3. Basics of Trusts: Establishing a Trust – 1.4. Appeal of Trusts in Commerce in the Common Law System – 1.5. Main Forms of Commercial Trusts – 1.6 Trustee Responsibilities and Powers: Aspects of Commercial Trust Management – 1.7. Remedies for Breach of Trust: Emerging Liberalization in Contemporary Trust Law Cases – 1.8. The Future of Trusts in a Global Context

1. Trust in the Common Law System

1.1. The Evolution of Trust Practices over Time

A private trust is a legal arrangement where the formal owner of assets (*the trustee*) holds those assets for the benefit of the beneficial owner (*the beneficiary*), with the trustee being required in equity to use all the powers that come with the formal ownership solely for the benefit of the beneficiaries. In *Akers v Samba Financial Group*[1], Lord Mance states that "*where a trust exists, the legal and beneficial interests are distinct, and what affects the former does not necessarily affect the latter*". The definition provided in Article 2 of the Hague Trust Convention on the Law Applicable to Trusts and on Their Recognition[2], which was incorporated into English law through the *Recognition of Trusts Act 1987*, aligns closely with the English common law concept of a trust. It describes an expressly created trust as "*the legal relationship created – inter vivos or on*

[1] See *Akers v Samba Financial Group* (2017) UKSC 6, at para. (51).

[2] The Convention allows both civil law and common law countries to recognize trusts that meet the requirements outlined in Article 2. See Article 2 of the Hague Convention on the Law Applicable to Trusts and on their Recognition.

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". However, while the Convention's definition is highly compatible with the English model and often overlaps with it, it is not a direct representation of the unique principles and doctrines that underpin the original trust concept as developed within the common law tradition, which will serve as a primary point of reference in this discussion.

The definitions given illustrate that trustees are not at liberty to manage trust assets according to their personal preferences; rather, they are bound by the terms of the trust to act specifically on behalf of elected beneficiaries or in pursuit of stipulated purposes. The trustee's authority is tied to the position they occupy[3], not to their personal ownership of the assets. This distinction is crucial in trust law, as emphasized by the Hague Trust Convention on the Law Applicable to Trusts and on Their Recognition, which states that trust assets "*are not part of the trustee's own estate*" [4]. This provision, often referred to as "*asset partitioning*" or "*ring-fencing*", ensures that trust assets are legally separated from the trustee's personal estate, protecting them from the trustee's personal liabilities. Therefore, unlike other rights holders who may hold assets for personal benefit, trustees operate in a fiduciary role, where they manage the assets not for personal gain but to fulfil obligations inherent to the trust arrangement.

The trust conceptual starting point is a confidence reposed in some other[5], that gives rise to moral obligations to which the courts have sought to develop legal equivalents. The historian and jurist F W Maitland regarded "*the development from century to century of the trust idea*" as "*the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence*", mainly because of its versatility[6].

The medieval precursor to the modern trust was referred to as *the use*, which arose in the 13th century, within England's feudal system of landholding. Under this system, tenants held legal title to land and received specific protections and privileges from their lords, conceded in exchange for loyalty and services. As feudalism's rigorous personal and hierarchical bonds began to decline, *the use* developed as a flexible tool to navigate

[3] Penner, J. E. (2020). *Property Rights: A Re-Examination*. Oxford University Press.
[4] Article 2 of the Hague Convention on the Law Applicable to Trusts and on Their Recognition.
[5] This phrase is from the sixteenth-century legal commentaries of Lord Chief Justice Coke.
[6] *Equity* (2nd edition, 1936), p.23 and *Selected Historical essays* (1936), p.129.

the loosening social structures, allowing tenants to shift control over land inheritance and designate future beneficiaries.

By transferring their land to a group of *feoffees* (the equivalent of today's trustees), tenants could appoint future beneficiaries, thereby sidestepping limitations on inheritance and ensuring their property passed to chosen heirs. This arrangement was particularly valuable in special circumstances: for example, crusaders would place their land in the hands of a trusted friend to protect their family's interests during long absences, while monks bound by vows of poverty could benefit from land held in trust without directly owning it. These transactions involving *the use of land* eventually gained legal recognition and protection through the Chancery jurisdiction. As Baker in *An Introduction to the History of English Law*[7] clarifies, "*The Chancery approached matters differently. In exercising his informal jurisdiction, the Chancellor was free from the rigid procedures under which inconveniences and injustices sheltered. (...) His court was a court of conscience in which defendants could be coerced into doing whatever good conscience required, given all the circumstances of the case"*. Out of this court's decisions emerged a body of law known as Equity.

Nevertheless, the term "*uses*" began to fade from English legal vocabulary following the enactment of the Statute of Uses in 1536 by Henry VIII, a landmark development in the history of trusts. This statute reshaped the legal landscape by mandating that beneficiaries of a *use* would hold not just equitable rights protected by Chancery, but full legal ownership. Through this mechanism, known as "*executing the use*," equitable rights were transformed into legal title, effectively diminishing the traditional role of trustees.

However, the Statute of Uses sparked widespread unrest, culminating in the Pilgrimage of Grace, a significant rebellion against Henry VIII's policies. In response, he enacted the Statute of Wills in 1540, introducing a groundbreaking shift in English property law by allowing land to be transferred through a will for the first time. This statute provided individuals with greater control over their estate planning and inheritance, reducing reliance on the use for these purposes.

---

[7] Baker, J. H., *An Introduction to the History of English Law*, 5th edn, 2019, p. 110.

Around this time, the term "*trust*" began to appear, referring to specific categories of *uses* that the Statute of Uses did not execute. This marked the early evolution of the modern trust, which retained a distinct legal identity and continued to develop in areas not affected by Henry VIII's legislation, ultimately shaping the unique characteristics of trusts today.

From the mid-18th century onward, the Industrial Revolution transformed wealth ownership, shifting emphasis from traditional landholding to industrial production, trade, and finance. This new economic landscape allowed individuals to hold wealth indirectly—through stocks, shares, bonds, and mortgages—rather than through direct land ownership. Unlike the noble estates of prior centuries, the wealth generated by the Industrial Revolution was largely investment-based.

The equitable trust proved ideally suited to this new form of wealth, particularly because of two exceptions in the Statute of Uses that excused it from execution in such contexts. The Statute did not apply to personal property, which encompassed most investment assets, and it exempted active trusts where active management—such as overseeing investments—was a key duty of the trustee. This flexibility allowed the trust to evolve as a powerful tool for the acquisition, management, and intergenerational transfer of investment-based wealth, bridging the gap between traditional landowning estates and the burgeoning industrial economy. In Mayo Adams Shattuck words[8]:

> "*The duty of the English trustee had transformed itself from the relatively restricted obligations related to care, custody and operation of family agricultural real estate and its appurtenances to the much more intricate task of trading in commercial and financial markets and to the attempted maintenance, through the life of the trust, of a value which had been stated to exist at the time of the opening inventory*."

Until the late 19th century, trusts fell exclusively under the jurisdiction of the Court of Chancery, where equitable principles guided their administration. This arrangement changed dramatically with the Judicature Act of 1873, which combined the common law courts and courts of equity, dissolving the longstanding division between them. This

[8] Shattuck, "*The Development of the Prudent Man Rule for Fiduciary Investment in the Twentieth Century*" (1951) 12 *Ohio State Law Journal* 491, at 491–492.

reform enabled both legal and equitable matters, including trusts, to be addressed within a single, integrated court system. Following this fusion of law and equity, trusts experienced a notable transformation, extending beyond their traditional domestic roles. As John Langbein aptly put it[9], trusts evolved into "*an instrument of commerce*", reflecting their growing use in business and financial contexts rather than solely for managing family assets or estates.

Trust law evolved from a medieval tool for managing and preserving family wealth into a versatile instrument for modern commerce and finance. Initially designed to shield the land from feudal restrictions and ensure its transfer across generations, trusts were rooted in safeguarding family estates. Over time, their role expanded significantly, particularly in response to the growing complexity of economic and social structures. Trusts now play a pivotal role in managing investments for family members, resolving disputes in cases of family breakdowns, supporting non-profit endeavours, and fostering business activities. Wealth management trusts, along with unit trusts, pension funds, intermediated securities, and client/customer trusts, each with a crucial role in supporting business activity, encourage ordinary people to invest their savings, at the same time providing essential capital for banks and companies to thrive. Client and customer trusts, specifically, give consumers the confidence to pay in advance for goods or services, knowing their funds are secure and they won't face losses[10]. Furthermore, in civil law jurisdictions, the trust concept has adapted to local legal systems, as seen with the Italian *trust interno*.

This shift towards the professionalization and commercialization of trusts has transformed trust management into a field run by individuals with advanced financial abilities. In contemporary practice, the role of a trustee frequently requires a level of expertise well beyond that of an ordinary individual. Modern trustees are often professionals, generally expecting fair compensation for their services. Accompanying this shift, the traditional notion that a trustee's investment powers should be limited to safeguard beneficiaries has evolved significantly. The restrictive list of authorized

---

[9] Langbein, *"The Secret Life of the Trust: The Trust as an Instrument of Commerce" 107 Yale Law Journal 929 (*1997).

[10] Zhang, R (2022) "*Principal Forms of Commercial Trusts in the UK and the Rethinking of Traditional Approaches"* 28 Trusts and Trustees 787.

investments set out in section 1 of the Trustee Act 1925 has been replaced by the broader "*general power of investment*" under section 3 of the Trustee Act 2000. This update grants trustees the freedom to invest in any type of asset as if they held personal ownership of the trust's assets, unless restricted by the trust instrument itself. This modernization in trust law reflects the increased complexity and sophistication required in trust management today, underscoring the adaptability of trust frameworks to meet modern economic demands.

While the applications of trusts have expanded significantly, their foundational principles continue to hold essential relevance in both modern private wealth management and sophisticated commercial arrangements. These core principles provide a stable framework that adapts to diverse contexts—from traditional family trusts to complex corporate structures—while preserving the integrity of the trust's original purpose. Professor Hanbury, writing in 1929, observed[11]:

> *"There is continuity throughout the whole history of equity. Equity is employed by the Property Acts of 1925 for new purposes, purposes possibly undreamed of by its early pioneers, but the root principles are the same."*

At the trust's core, the trustee is entrusted with a responsibility, either for the benefit of specified beneficiaries or to accomplish a particular objective. A trust can accommodate an unlimited number of beneficiaries or founders. The same flexibility extends to trustees – however, in some cases the number of trustees must not exceed four[12]. Trust property can consist of any type of estate or interest that is legally recognized under property law. Central to this arrangement is therefore a trust fund, set aside specifically for the execution of the trustee's duty. The trustee holds legal ownership of this fund, but their role is distinct from personal ownership: the fund is kept separate from their personal assets. Importantly, the trust continues uninterrupted regardless of the trustee's death, incapacity, resignation, or removal. Lastly, while the settlor establishes the trust, it is the beneficiaries who hold the legal right to enforce remedies against the trustee if necessary.

---

[11] Hanbury, H. G. (1929). Modern Equity. Oxford University Press.
[12] Trustee Act 1925, s 34(1).

1.2. Trust Compared to Company

To fully understand the nature of trusts, it is helpful to compare them with a prominent counterpart in asset management: the company. Trusts and companies share common ground in their core function of managing assets for the benefit of others—beneficiaries in the case of trusts and shareholders in the case of companies. However, they diverge significantly in both structure and operation.

While a trust is inherently flexible, adapting to changes in its legal and social environment, a company is more rigid, established mainly for profit-oriented business activities. Early unincorporated companies were often established through deeds of settlement rather than formal legal recognition, positioning directors as "*quasi-trustees*" over the company's assets. This arrangement encouraged an initial connection between directors and fiduciary duties like those expected of trustees, with directors managing assets on behalf of others. However, as commercial practices developed, the distinction between trustees and directors became clearer. Trustees, in the strict legal sense, were not formally recognized as distinct from directors until the 19^{th} century[13]. The advent of the company structure marked indeed a key evolution, introducing the concept of a distinct legal entity capable of owning property and entering contracts independently, removing the necessity for trustees in corporate asset management[14]. This development also established a clear distinction between shareholders, who are the company's owners, and directors, who act as its managers.

While both trustees and directors manage assets on behalf of others, their roles differ significantly due to distinct legal structures. Trustees hold legal ownership of trust property for the beneficiaries, managing these assets directly in accordance with the trust's terms. In contrast, directors manage company assets on behalf of shareholders, but without direct ownership[15]. This structural difference stems from the fact that a company has a separate legal personality, allowing it to own property, enter contracts, and litigate independently. A trust, however, is not a legal entity but rather a framework of assets and

[13] Sealy, L. S., "*The Director as Trustee*", Cambridge Law Journal.
[14] Through this separation, companies could reorganize operations and assign fiduciary responsibilities specifically to directors, aligning their roles with management rather than asset ownership.
[15] Shareholders hold shares in the company, which itself owns the assets.

fiduciary relationships that segregates assets from the trustee's personal property. In this system, the trustee acts as the legal face of the trust, holding and administering assets strictly for the benefit of beneficiaries.

Moreover, while both trustees and directors have fiduciary responsibilities, the nature of their roles differs. Trustees must act unanimously unless otherwise stipulated, and their primary duty is to preserve and protect the trust property, avoiding unnecessary risks. Trusts are legal arrangements where trustees are entrusted with the responsibility of preserving and managing the wealth of "*others for whom they should feel morally bound to provide"*[16]. Company directors, however, have a more discretionary role, assessing risks as part of their business judgment. In *Gramophone and Typewriter Ltd v Stanley*[17], Buckley LJ stated that "*The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals".* They are not required to avoid risks but to evaluate whether taking them will benefit the company. Companies therefore serve as vehicles for generating wealth, allowing individuals to invest their own capital into business ventures with the aim of creating financial growth. By pooling resources to fund an enterprise, shareholders seek to benefit from the success of the company, transforming their contributions into profitable returns. Additionally, directors can make decisions by majority vote, and liability rests on proving individual fault. Prudence is the watchword in both.

The differences between the trustee's cautious, risk-averse role and the director's entrepreneurial, risk-assessing role reflect the broader distinction between trusts and corporations. Furthermore, trusts offer exceptional advantages in commercial settings due to their flexibility. They allow institutions to design governance structures tailored to their specific needs, establish creditor protections in dealings with trustees, and control the distribution of capital and income by defining fixed or discretionary interests for beneficiaries. This flexibility makes trusts a valuable tool for complex asset management

[16] See Re *Witheley, Whiteley v Learoyd* (1886) 33 Ch D 347, 355.
[17] See *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89.

and distribution strategies, especially where traditional corporate structures may impose more rigid governance requirements[18].

1.3. Basics of Trusts: Establishing a Trust

The comparison between trusts and other legal forms typically arises when individuals or organizations are tasked with selecting the most appropriate legal structure to suit their objectives. Trusts can be established not only through the clear expression of intent by the trust's founder, but also in cases where the law imposes a trust, beyond voluntary creation - where the law deems it necessary to protect certain interests. This flexibility makes trusts a versatile tool in both personal and commercial legal frameworks, where the nature of the obligation can either be explicitly stated or inferred by the law to meet specific legal or ethical objectives.

In addition to the traditional classification of trusts as *express, implied, resulting, or constructive,* codified in s 53 of the Law of Property Act 1925, due to the central role of intention in trust law, trusts can be categorized based on the reason for their creation: they either arise intentionally or are imposed by law. *An intended trust* is created when a settlor, empowered by law, actively chooses to establish a trust and effectively exercises that power. In contrast, *an imposed trust* occurs when the law intervenes to address a legal issue, declaring that certain assets are held in trust for an individual. All *imposed trusts* are designed to benefit individuals, meaning they are always trusts for persons. On the other hand, *an intended trust* can be established either for the benefit of a specific individual - trust for persons - or for a particular purpose - trust for purposes -, such as charitable or non-charitable objectives.

In general, any individual who is over the age of 18 and possesses legal capacity - meaning they are not suffering from mental incapacity - can create an express trust over any property they have the legal right to dispose of. The creation of a trust can be *inter vivos* or testamentary[19]. There are many ways a settlor can create a trust: in writing, either formally by executing a trust instrument or in a will, or by letter or a written note; by

---

[18] DJ Hayton, "*The Uses of Trusts in the Commercial Context*" in A Kaplan (ed), *Trusts in Prime Jurisdictions*, 3rd edn (London, Globe Law and Business, 2010) 611, 623.
[19] When dealing with a will, the individual who establishes a trust is referred to as the *testator*.

words or conduct. However, the truly essential requirements for an intended and valid trust are commonly referred to as the "*three certainties*": *certainty of intention* (or words), *certainty of subject-matter*, and *certainty of objects*. These certainties ensure that the trust's purpose, the assets involved, and the beneficiaries are clearly defined, allowing the trustee to properly administer the trust in line with the settlor's intentions. The authority often cited for this requirement is Lord Langdale's dictum in *Knight v Knight*[20].

"*First, if the words are so used, that upon the whole, they ought to be construed as imperative".* The *"certainty of words"* pertains to the clear intention of the settlor to create a trust. It must be evident through the settlor's words or actions, that they intended to establish a trust. Importantly, there is no prescribed formula or specific set of words required: what matters is that the settlor's intention to create the trust is unmistakable and can be reasonably inferred from the circumstances. Precatory words[21] do not create a legal trust obligation; they only impose a moral responsibility on the recipient. However, whether a trust arises depends on the substance rather than the form of the language used. According to the maxim "*equity looks to the substance rather than the form",* when determining a person's intention, the court does not limit its analysis to the precise wording used. Instead, it considers the person's overall conduct and any other relevant factors[22]. The case of *Paul v Constance*[23] serves as a notable example of how informal words and actions can be sufficient to demonstrate an intention to create a trust. However,

---

[20] *"As a general rule, it has been laid down that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust. ... First, if the words are so used, that upon the whole, they ought to be construed as imperative; ... Secondly, if the subject of the recommendation or wish be certain; and, ... Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain".* See *Knight v Knight (1840*) 3 Beav 148, at 172.

[21] Precatory words are words of prayer or petition, such as "*hoping", "desiring", "requesting".*

[22] In *Comiskey v Bowring-Hanbury* (1905) AC 84, although precatory words were used, the testator also included "*a gift over in default of appointment".* This imposed a mandatory obligation. The court was able to find an intention to create a trust here as the settlor made it clear in the whole context of the will that a trust was intended by including instructions for the nieces to acquire a benefit in any event.

[23] In *Paul v Constance* [1977] 1 WLR 52, Mr. Constance had separated from his wife and was living with Mrs. Paul. He opened a bank account in his name alone, primarily to avoid any embarrassment since they were not married. Despite this, Constance repeatedly told Mrs. Paul that the money in the account was "as much yours as mine," and their joint bingo winnings were deposited into that account. The court found that these repeated declarations and actions were enough to establish Mr. Constance's intention to create a trust over the funds in the account for Mrs. Paul. However, it was acknowledged that this was a borderline case. As a result, the court awarded Mrs. Paul half of the funds in the account, with the other half going to Constance's wife. Had the case been clearer or less marginal, Mrs. Paul might have been awarded the entire sum.

in some commercial contexts, determining whether there is an intention to create a trust can be particularly contentious. In *Re Kayford Ltd* (in liquidation)[24], Kayford Ltd, a mail-order company, sought to protect customer funds when facing potential insolvency. Acting on advice, the company opened a "*Customers' Trust Deposit Account*" to hold advance payments from customers. Although the funds were initially placed in an existing account that wasn't labelled as a trust account, the company later renamed the account to reflect its intended trust status. When the company entered liquidation, the issue arose whether these funds belonged to the customers or the company's creditors. The court held that the customers were entitled to the remaining funds in the account. Megarry J emphasized that:

> *"There is no doubt about the so-called 'three certainties' of a trust. (...) As for the requisite certainty of words, it is well settled that a trust can be created without using the words 'trust' or 'confidence' or the like: the question is whether in substance a sufficient intention to create a trust has been manifested".*

"*Secondly, if the subject of the recommendation or wish be certain". "Certainty of subject-matter*" refers to the requirement that the trust property and each beneficiary's entitlement must be clearly defined for the trust to be valid. If the specific assets to be held on trust or the precise beneficial interests of the beneficiaries are uncertain[25], the trust will fail. The degree of certainty required differs depending on whether the property is tangible (such as physical goods or real estate) or intangible (like shares or intellectual property). Certainty of subject matter requires that tangible assets in a trust must be clearly identified, typically by segregating them from a larger pool. This principle was affirmed in *Re London Wine Co. (Shippers) Ltd*[26], where the court held that since the wine bottles in question were not separated from the company's overall stock, there was no certainty of subject matter, and the trust failed. However, intangible assets, such as shares[27], are treated differently. Provided they are of the same type or class, there is no need for

[24] See *Re Kayford Ltd* (in liquidation) [1975] 1 WLR 279.
[25] Even if the terms are not perfectly clear, the court can intervene when the beneficial interest in a trust can be objectively determined.
[26] See *Re London Wine Co. (Shippers) Ltd* (1986) PCC 21.
[27] However, shares are not always identical; for example, some shares may carry preferential voting rights or dividend privileges, which distinguishes them from others. In such cases, the distinction between different classes of shares means that segregation or precise identification may be necessary to ensure certainty of subject matter in a trust.

physical segregation. In *Hunter v Moss*[28], the court was tasked with determining whether the employer intended to create a trust and whether there was certainty of subject matter. The case involved 50 shares that the employer had purportedly set aside for an employee. The court found that there was indeed an intention to create a trust, and, as the shares were of the same class and indistinguishable from each other, there was no requirement for physical segregation of the shares. Therefore, the court held that the employee was entitled to the 50 shares, affirming that certainty of subject matter had been satisfied because the subject of the trust—the shares—were sufficiently identifiable despite the lack of specific separation. In some cases, even when trust assets are clearly identifiable, uncertainty about the beneficiaries' rights can render the trust invalid. An example is *Boyce v Boyce*[29], where a testator left two houses to trustees, with one to go to Maria and the other to Charlotte. The intention was for Maria to choose one house, and Charlotte would receive the remaining one. However, Maria passed away before making her selection, and as a result, it became impossible to determine which house Charlotte was meant to receive. The court ruled that the gift to Charlotte failed due to uncertainty, as the trust could not be executed without knowing which house Maria would have chosen. This case illustrates that a lack of clarity in the beneficiaries' rights, even when the trust assets are clear, can lead to the failure of a trust.

"Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain". "Certainty of objects" refers to the requirement that the beneficiaries of a trust must be clearly identifiable. The object of a trust may be an individual, a legal entity (such as a corporation), or a public or private purpose. The test for determining the certainty of objects varies depending on whether the trust is a fixed or discretionary trust. In all cases, for a trust to be valid, its object must be ascertainable, following the legal maxim *certum est quod certum reddi potest* (that is certain which can be made certain). In a fixed trust, the beneficiaries' interests are clearly specified by the terms of the trust, meaning each beneficiary is entitled to a specific portion of the trust property. The test for certainty of objects in a fixed trust is the *"class ascertainability" test,* which requires that a complete list of all beneficiaries be possible.

[28] See *Hunter v Moss* [1994] 1 WLR 452.
[29] See *Boyce v Boyce* (1849) 16 Sim 476.

In contrast, in a discretionary trust, the trustees have the authority to determine how much each beneficiary will receive, as the beneficiaries' interests are not predetermined. The test for certainty of objects in discretionary trusts is the *"individual ascertainability" test,* as established in *McPhail v Doulton*[30]. This case clarified that, for a discretionary trust to be valid, it is sufficient that it is possible to determine whether any given individual is or is not a member of the class of beneficiaries. Unlike a bare power or fiduciary power, the trustees are under a duty to exercise their discretion in distributing the trust property, making the trust's purpose crucial for guiding the trustees' decisions.

Equity looks to substance not form, which means that there are no strict formalities required for the creation of an express trust[31]. When formalities are necessary, it is not because they are inherent to the creation of the trust itself, but due to broader policy concerns, such as preventing fraud or ensuring clarity in transactions. The formal requirements under section 53(1) of the Law of Property Act 1925 and section 9 of the Wills Act 1837 are designed to prevent secret fraudulent dealings and to promote certainty by documenting transactions.

When a trust is declared *inter vivos*, there are generally no formal requirements. However, section 53(1)(b) of the Law of Property Act 1925 states that trusts involving land must be evidenced in writing to be enforceable. Additionally, under section 53(1)(c), any disposition of an equitable interest or existing trust must be made in writing and signed by the person making the disposition or their lawfully authorized agent. These provisions ensure that certain types of trusts and property transfers meet specific formal requirements for legal recognition.

In contrast, if a trust is not properly constituted, meaning that the necessary steps to vest the trust property in the trustee have not been taken, no valid trust exists. However, there are exceptions to these formalities. For example, the requirements under the *Law of Property Act 1925* do not apply to resulting, implied, or constructive trusts, and secret trusts are exempt from the formalities of the *Wills Act 1837*.

[30] See *McPhail v Doulton* (1970) 2 All ER 228.
[31] However, most trusts are in practice declared in writing.

Constituting a trust involves taking the necessary formal steps to make the trust legally binding and enforceable. This process can be achieved in two primary ways: by transfer or by declaration. In the first method, the settlor transfers the legal ownership of the trust property to the trustee, who then manages the assets on behalf of the beneficiaries. This transfer must adhere to any relevant legal formalities, particularly when it involves land, which must be documented in writing as required under section 53(1)(b) of the Law of Property Act 1925.

The second method of constituting a trust occurs when the settlor declares themselves as the trustee. In this case, the settlor retains legal ownership of the property but holds it in trust for the beneficiaries. While personal property generally does not require formalities for this declaration, trusts involving land must also comply with the written documentation requirement. These steps ensure that the trust operates with legal validity, allowing the trustee to fulfil their fiduciary responsibilities effectively.

In essence, the four fundamental elements of a trust—namely, trustee powers to manage and dispose of trust property, safeguarding of trust assets from the trustee's personal creditors, heirs, or spouses, well-defined beneficiary rights, and an embedded system of checks and balances—highlight the significance of establishing a well-structured trust relationship and underscore the fiduciary duties inherent in such an arrangement[32]. Such precision is indispensable for trustees, enabling them to manage assets effectively, fulfil their obligations, and meet the trust's objectives, all while protecting the beneficiaries' interests. Whether a trust is established by choice or imposed by law, these foundational principles make it a uniquely powerful tool for both asset management and protection, adaptable to diverse needs while ensuring fiduciary integrity.

1.4. Appeal of Trusts in Commerce in the Common Law System

> *"Most men, like spendthrift heirs, are apt to judge a little in hand better than a great deal to come; and so, for small matters in possession, part with greater ones in reversion."*

[32] Ho, Luisina (2013) '*Trusts: The Essentials*' in Smith, L. (ed.), *The Worlds of the Trust*, Cambridge University Press.

John Locke*, An Essay Concerning Human Understanding,* 1690

In the modern world, separating economic ownership from control has become a common strategy for effective asset management, as it allows for more professional and streamlined administration. To safely entrust their property to a third party, individuals need robust legal safeguards to protect their interests. These protections can take various forms, with companies being one of the most well-known examples of such structures.

Express trusts and fiduciary arrangements offer a flexible alternative to companies for managing assets, especially in commercial settings. Unlike companies, which are governed by formal requirements, trusts function with minimal procedural constraints, making them highly versatile. A commercial trust can be established with relative simplicity through a trust instrument that meets essential trust law criteria, including the "*three certainties*" (*i.e.* intention, subject matter, and objects), without the need for complex formalities. Furthermore, trustees are afforded a level of independence that is generally broader than that of company directors. Trust law indeed grants trustees greater discretion in governance and decision-making, enabling operations to be managed flexibly. This adaptability allows trusts to assist evolving business demands more effectively than the corporate model, which is bound by procedural rigidity. As Langbien notes[33]:

> "*The flexibility to eliminate governance procedures that are obligatory under the corporate form has been one great attraction of the trust form. For example, the trust instrument can be drafted to dispense with routine shareholder meetings.*"

As legal owners of trust property, trustees have significant authority vested in them, allowing them to make swift and effective decisions in response to economic shifts. However, unlike traditional personal trusts, commercial trusts require trustees to have a high level of expertise in asset management, as they operate in complex financial environments. The fiduciary duties rooted in the trust framework serve as essential checks on this authority, ensuring that trustees consistently act in the beneficiaries' best interests.

[33] JH Langbein, "*The Secret Life of the Trust: The Trust as an Instrument of Commerce*" (1997) 107 *Yale Law Journal* 165, 184.

As Lady Hale noted in *Stack v Dowden*[34], "*context is everything*" in the law, and the legal framework for domestic trusts differs significantly from that in the commercial arena. The legal framework governing commercial trusts emphasizes robust fiduciary obligations, particularly regarding trustee liability in cases of mismanagement or misappropriation. These protections are designed not only to safeguard beneficiaries' rights but also to preserve the integrity of trust property. The rules on trustee liability provide therefore a clear structure for holding trustees accountable and offer remedies for breaches, thereby reinforcing the trust's function as a secure and reliable instrument in commercial settings.

In English law, commercial trusts have evolved to provide both flexibility and security in managing relationships between individuals and assets, making them a preferred tool for safeguarding interests in commercial agreements. Unlike traditional trusts, which are often rooted in considerations of conscience, commercial trusts are primarily driven by practical necessity or regulatory requirements. In these contexts, trusts are employed by courts or through commercial practices to achieve specific economic objectives. They are commonly used to protect complex financial transactions, ensuring that assets involved in these agreements are secure. A distinctive feature of commercial trusts is that their provisions are frequently embedded directly into the contractual framework, reducing the need for equity to intervene. As a result, the responsibility of trustees to generate adequate returns for beneficiaries is typically addressed within the contract itself, offering an efficient and structured approach to managing such concerns. This contractual integration of trust principles allows for greater precision and predictability in fulfilling commercial objectives.

While trusts serve other important purposes, such as managing family assets and facilitating succession, their significance in the financial and commercial sectors is particularly evident in their recognition during bankruptcy proceedings. Regardless of the specific type or name of the commercial trust, the central feature of the transaction is that it ensures the property held by the titleholder is shielded from their private creditors. This separation means that, in the event of the trustee's bankruptcy, the trust property remains distinct from the assets available to satisfy the trustee's insolvency creditors. When

[34] See *Stack v Dowden* [2007] UKHL 17.

settlors transfer property to trustees, they relinquish ownership unless they retain the right to revoke the trust. Consequently, creditors of the settlor cannot lay claim to trust assets. Similarly, the property held in trust is protected from the personal creditors of the trustees, who are only entitled to pursue claims against the trustee's personal assets, further safeguarding the integrity of the trust structure.

As commercial trusts serve unique functions, particularly in safeguarding assets and managing complex financial transactions, the legal framework must evolve to provide clarity and structure for these scenarios. By developing specialized rules for different types of trusts, the courts ensure that trust law remains relevant and effective in addressing the evolving responsibilities and challenges faced by trustees in the commercial arena. As Lord Reed stated[35]:

> "*In particular, as Lord Browne-Wilkinson pointed out, commercial trusts, usually arising out of contractual relationships rather than the transfer of property by way of gift, differ in a number of respects from the more traditional trust. That is not to say that there is a categorical distinction between trusts in commercial and non-commercial relationships, or to assert that there are trusts to which the fundamental principles of equity do not apply. It is, on the other hand, to recognise that the duties and liabilities of trustees may depend, in some respects, on the terms of the trust in question and the relationship between the relevant parties (cf Kelly v Cooper [1993] AC 205, 214–215)*".

The higher courts increasingly recognize the distinction between traditional trusts and commercial trusts, adapting and evolving traditional trust principles to fit the complexities of a commercial context. This recognition underscores the need for distinct rules tailored to the specific demands of commercial trusts, which often involve more advanced roles for trustees and other involved parties.

Commercial trusts, such as the *Quistclose trust*, are often challenging to classify within the framework of traditional express trusts. Due to the inherently flexible and open-textured nature of trusts, they resist rigid categorization. However, commercial

---

[35] Lord Reed, *Kelly v Cooper* [1993] AC 205, 214–215.

trusts can generally be grouped into four main types: investment trusts; asset protection trusts in insolvency; trusts supporting commercial loan arrangements; and trusts relating to shareholding.

1.5. Main Forms of Commercial Trusts

The growing prominence of commercial trusts has made it crucial to rethink trust principles to address modern needs[36]. Evidence clearly shows that trusts in the commercial and business world are now instrumental in shaping current trust laws, reflecting their dominant role in today's legal and financial systems. This evolution has necessitated a departure from some traditional views on trusts. In particular, the long-standing ideas that were relevant when trusts primarily served domestic purposes have become outdated. For example, Maitland's early 20th-century belief that "*almost every well-to-do man [could be] a trustee*" is no longer applicable[37]. The role of a trustee today requires specialized skills that most individuals do not possess. Moreover, the historical expectation that trustees should not benefit financially from their role has shifted significantly. As Millett noted[38], trustees are now often professionals who justifiably expect to be compensated for their expertise. Another key shift relates to the powers of trustees over investments. In the past, these powers were tightly restricted to protect beneficiaries. However, the commercial need for capital—especially from banks and businesses—has taken precedence, resulting in a more flexible approach. The rigid list of approved investments from the Trustee Act of 1925 has been replaced by a broader "*general power of investment*" under the Trustee Act 2000, allowing trustees to invest as though they were the outright owners of the trust's assets, unless otherwise directed by the trust itself.

1.5.1 Trusts for investment purposes

In the UK, trust-related investment schemes primarily take two forms: *investment trusts* and *unit trusts*.

[36] Zhang, T. (2010). "*Principal forms of commercial trusts in the UK and the rethinking of traditional approaches*". Trust Law International, 24(3), 151-165.
[37] Maitland, F.W. (1905). *"Trust and Corporation"*.
[38] Millett, P. (1998). "*Equity's place in the law of commerce*". Law Quarterly Review, 114, 214-227.

A *wealth management trust* can be understood as one where trustees hold assets on behalf of beneficiaries, with the aim of investing those assets to generate financial returns for them. Such a trust offers individuals access to a level of expertise and asset diversification that small investors often cannot achieve with their own portfolios. At any given time, the assets in a wealth management trust typically consist of a mix of intangible holdings such as shares, bonds, and bank balances. As Maitland eloquently described, the "*trust fund*" may change its form but still retain its identity: today it might be a piece of land, tomorrow coins, and later shares in a company or bonds[39]. This illustrates how the assets within the trust are frequently traded, yet the core identity of the trust remains the same. In essence, it makes more sense to view the real subject matter of a wealth management trust as a *fluid fund*, comprised of assets that are designated by the rules of the trust as part of the fund.

A *unit trust* is a specific type of wealth management trust operating as a collective investment scheme, in which assets are held on trust for its participants, or unitholders[40]. When participants invest funds into the trust, they receive units in exchange, with each unitholder's benefits determined by the proportion of units they hold. The open-ended structure allows the unit trust to grow as more participants and contributions increase the fund's size, making it an accessible investment vehicle for those seeking a prudent, medium to long-term wealth-building strategy. Unit trusts are managed by professionals (*i.e.* investment managers) who, through diversification, work to reduce risk while seeking solid returns. The manager's capability allows them to identify and invest in new asset classes, a function that goes beyond the trustee's role of holding trust property and providing income or capital growth to unitholders. In a unit trust, responsibilities are then split between two distinct roles: the trustee, who legally holds the assets, and the manager, who oversees the investment strategy[41]. This division of roles, certified under the Public Trustee Act 1906, introduces an additional layer of specialization and oversight. Despite its structured framework, the defining characteristic of a unit trust is its relatively careful

---

[39] Maitland, F.W. (1905). "*Trust and Corporation*", reprinted in Runciman, D. & Ryan, A. (Eds.), "M*aitland: State, Trust and Corporation*" (Cambridge University Press, 2003).
[40] In the UK, the *unit trust* is defined in s 237(1) of the Financial Services and Markets Act 2000 (FSMA 2000) as a "*collective investment scheme under which the property is held on trust for the participants".*
[41] KF Sin, *The Legal Nature of the Unit Trust* (Oxford, Oxford University Press, 1997).

risk management, typically offering more modest returns compared to higher-risk financial instruments.

1.5.2. Pension fund

In the context of pensions, the formal recognition of pension funds as trust-based arrangements emerged with the *Report of the Pension Law Review Committee* and was solidified by the Pensions Act 1995. Section 252 of the Pensions Act 2004 further mandates that any occupational pension scheme with principal administration in the UK must be established as an irrevocable trust before trustees or managers can accept contributions. This requirement emphasizes the importance of the trust structure in ensuring that pension assets are securely held and managed solely for the benefit of members, shielding funds from employer or third-party claims.

A *pension fund* generally consists of assets held on trust for employees, who contribute to the fund alongside their employer—usually through monthly salary deductions—expecting these assets to be invested to provide financial benefits upon retirement. In *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*[42], Browne-Wilkinson V-C observed that "*pension schemes are of quite different nature to traditional trusts*". Unlike wealth management trusts, where returns are flexible, the benefits employees receive from a pension fund are strictly determined by the terms of the pension. Browne-Wilkinson further stated that "*pension benefits are part of the consideration which an employee receives in return for the rendering of his services... contractual and trust rights can exist in parallel*". This contrasts with traditional trusts, where beneficiaries gain interests without prior obligation, whereas in pension trusts—typically formed from an employment contract—beneficiaries earn their interests through contributions and employment.

The trustee, often a corporate entity[43], is responsible for managing the assets of the pension scheme. This role encompasses both investment decisions and the administration of the fund, all while upholding fiduciary duties and acting in the best

[42] See *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589.
[43] They are typically corporate trustees, including pension companies, trust companies, or commercial banks. These trustees bear the responsibility of overseeing the trust's assets and are required to notify the pension authority if they detect any irregularities within the trust or among the involved parties.

interests of the scheme members. Even when the fund performs exceptionally well and generates a surplus beyond the employees' claims, these extra assets are not exclusively for the employees. As outlined in *Air Jamaica Ltd v Charlton*[44], any surplus is distributed between the employees and the employer based on their proportional contributions.

While pension funds appear financially stable by continuing to pay out benefits, many face challenges in generating sufficient investment returns, sometimes resembling Ponzi schemes where new contributions are used to fulfil existing obligations. This issue, along with the substantial sums involved, also opens the door to potential fraudulent misuse, raising concerns about the security and long-term viability of occupational pension schemes.

1.5.3. Voting trusts

In corporate law, voting power is intrinsically linked to stock ownership, a key element in retaining control over a company after its establishment. Shareholders, particularly minority shareholders, often seek ways to safeguard their influence, and the *voting trust* serves as an effective tool for this purpose. Through a voting trust, shareholders transfer their stock certificates and legal title to a voting trustee under a formal agreement, usually with an expressed time limit. This arrangement consolidates voting power, creating a unified voting bloc capable of influencing company decisions through both ordinary and extraordinary resolutions[45]. Additionally, voting trusts provide shareholders with the option to step back from active management while still preserving their control[46].

Trustee's rights are generally defined within the voting trust agreement; in the absence of such provisions, the trustee retains all stockholder rights and must fulfil fiduciary duties to the beneficiaries. The adaptability of voting trusts—thanks to the trustee's discretionary powers—makes them particularly effective in addressing future contingencies that may require shareholder action.

[44] See *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399.
[45] Companies Act 2006, pt 13 ch 1.
[46] JJ Woloszyn, "*A Practical Guide to Voting Trusts*" (1975) 4(2) *University of Baltimore Law Review* 245.

Whereas some may question the purposes of voting trusts, any lawful objective that aligns with statutory or charter provisions is generally deemed acceptable. Indeed, the primary legitimate aims of a voting trust are to establish cohesive control and protect shareholder interests within an evolving corporate landscape. Therefore, voting trusts are valid if they do not involve fraud, unfairness, oppression, or cause harm to shareholders, creditors, or the corporation itself.

1.5.4. Asset protection trusts

> *He who lends money to a trading company neither wishes nor expects it to become insolvent. (...) But against an evil day he wants the best security the company can give him consistently with its ability to trade meanwhile.*
>
> Nourse LJ in *Re New Bullas Trading Ltd*[47]

Trusts are widely used in commerce to facilitate commercial loan arrangements. Then, a *Quistclose trust* arises when one party transfers money to another with the agreement that the funds will be used for a specific purpose, creating a conditional relationship over the use of the money. This type of trust takes its name from the case *Barclays Bank Ltd v Quistclose Investments Ltd*, where A loaned money to B with the express condition that the funds would be used solely to pay dividends to B's shareholders[48]. In *Quistclose* and the preceding line of cases, the courts dealt with more than just mere contractual obligations. These cases established that the arrangement involved indeed an additional layer of protection through the creation of a trust. In a typical Quistclose scenario, the loan from A to B is intended for a particular purpose—such as paying creditors, C. However, the transaction does not always have to be a loan; it can also be a gift, payment, or debt, with the condition attached to achieving a specific objective, such as acquiring property. In general, security trusts mirror the traditional

[47] See *Re New Bullas Trading Ltd* [1994] BCC 36.
[48] In *Barclays Bank Ltd v Quistclose Investments Ltd*, Rolls Razor, a limited company, borrowed funds from Quistclose with the specific instruction that the money was to be used solely to pay a dividend to its investors. The funds were deposited in an account with Barclays Bank. However, before the dividend payments could be made, Rolls Razor went into liquidation. Barclays Bank then claimed that the money lent by Quistclose could be used to pay the company's creditors. In response, Quistclose argued that the funds were held on trust for the sole purpose of paying the dividends and, as that purpose had not been fulfilled, the money should be returned to them. The House of Lords ruled in Quistclose's favour, holding that the money was indeed subject to a trust. Since the specified purpose had not been carried out, Quistclose was entitled to the full recovery of the funds.

model of bank-intermediated financing, but they provide greater security to lenders, as the trust assets are insulated from the borrower's insolvency proceedings, making security trusts a more reliable and protective financing mechanism compared to standard lending arrangements[49]. In a security trust arrangement, therefore, assets are held in trust for the benefit of creditors, ensuring that these assets remain protected even if the borrower faces bankruptcy. For example, a Quistclose trust can be employed to safeguard lenders providing emergency loans to corporations on the brink of insolvency. By using this type of trust, the lender can inject capital into the financially distressed company with the assurance that the funds will be used exclusively for a specified purpose, such as stabilizing the business or paying off critical creditors.

Once the money is used for the designated purpose, the Quistclose trust terminates. However, if the condition cannot be fulfilled, the trust does not automatically dissolve. Instead, the relationship changes—B is required to return the money to A and becomes a trustee of the funds (or their distinguishable proceeds) for A. At this point, a trust relationship exists, but there is some debate regarding when and how that trust arises.

Barclays Bank v Quistclose Investments Ltd has been the subject of academic analysis[50], because the trust established in the case does not align with the principles of traditional trust law. Lord Millett's analysis of Quistclose trusts in *Twinsectra Ltd v Yardley*[51] is structured around the idea that A, the provider of the funds, retains beneficial ownership until B, the recipient, uses the money according to A's instructions, such as paying dividends (as in *Quistclose*) or purchasing equipment (as in *Re EVTR*[52]). Until B fulfils these instructions, the money is held on trust for A. The trust ends once B, acting as the legal owner, disposes of the funds in line with A's directions. If B misuses the funds for any purpose outside A's instructions, this constitutes both a breach of trust and, where applicable, a breach of contract. However, two difficulties arise in Lord Millett's

---

49 Under a Quistclose trust, funds or property provided for a specific purpose must be kept distinct from the borrower's other assets. In *Barclays Bank Ltd v Quistclose Investments Ltd* and *Carreras Rothmans v Freeman Mathews Treasure* [1985] Ch 207, for instance, special bank accounts were established to receive the funds, effectively isolating them from general assets.

50 Swadling, W. (2004) *The Quistclose Trust.* 1st edn. Hart Publishing.

51 See *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

52 See *Re EVTR* [1987] BCLC 646.

analysis: his characterization of A’s instructions to B and his classification of the Quistclose trust as a “*resulting trust*.”

Under Lord Millett’s framework, the trustee’s obligations in a Quistclose trust can be interpreted in two distinct ways. First, it can be viewed as a bare trust, where A, the provider of funds, retains full beneficial ownership and B, the recipient, holds the funds solely according to A’s instructions. These instructions are personal mandates, which A may give, vary, or revoke, and B is required to follow them. The figure of the trustee is, in this assumption, almost comparable to that of the mere intermediary. Therefore, if B uses the funds in a way that violates A’s instructions, this constitutes a breach of trust. However, B’s failure to act on a particular mandate, such as not carrying out an instruction, would typically be seen as a breach of contract rather than a breach of trust, since B still holds the funds for A’s benefit.

Alternatively, the Quistclose trust can be analysed as a special trust, where A’s instructions are incorporated into the trust terms. In this case, the instructions impose genuine trust duties on B, which may also confer discretionary powers on B over the trust property. These powers might include the authority to deal with the trust property in certain ways, if B chooses to exercise them. If A has the power to alter or revoke the instructions, this is treated as a variation of the trust terms. Under this view, A’s instructions that create mandatory obligations on B would be considered trust duties, while any discretionary rights given to B would be viewed as trust powers.

In a special trust, if A makes the trust irrevocable, A cannot revoke any of the duties or powers conferred on B. As a result, when A imposes specific trust duties on B, such as using the funds for a designated purpose, A’s beneficial interest in the trust property is displaced during the execution of those duties. In such cases, the beneficial interest would no longer remain with A throughout the life of the trust, as it would be temporarily transferred to the specific purpose or beneficiaries. This interpretation departs from Lord Millett’s original analysis, which holds that A’s beneficial interest remains intact until the funds are properly expended. To maintain consistency with Millett’s framework, B’s duties should be regarded as personal or contractual, while any discretionary powers granted to B could be true powers under the trust, ensuring that A’s beneficial interest remains unless B exercises these powers.

Lord Millett's analysis of Quistclose trusts has evolved from his earlier view, where he characterized them as intentional trusts based on the parties' genuine intentions, to his later assertion in *Twinsectra* that Quistclose trusts are resulting trusts arising by operation of law. This shift has caused concern, as it diverges from traditional trust law principles. According to Millett, a resulting trust arises when the transferor, A, does not intend to part with the beneficial interest in the money transferred to B, and it remains with A until the money is applied for its intended purpose. This view aligns with Dr. Chambers' theory of resulting trusts, which posits that a trust arises in response to the absence of an intention to transfer the entire beneficial interest[53].

Due to the above qualities, a Quistclose trust offers a further layer of protection for transferors by ensuring their funds are used firmly for a designated purpose, making it particularly appreciated in cases of financial distress or insolvency. Often used in insolvency proceedings, a Quistclose trust is especially appealing to creditors facing potential borrower default. Indeed, by establishing a trust for the specified purpose of the loan, creditors can safeguard their funds from being mingled with the borrower's general assets, preventing misapplication. Once the trustee fulfils the trust's terms and the agreed purpose between lender and borrower is achieved, the Quistclose trust reverts to a standard loan, transforming the relationship into a typical creditor-debtor dynamic. Thus, this structure provides creditors with stronger security than a regular loan, as they retain a beneficial interest in the funds. If the borrower becomes insolvent before the funds are used, the creditor can rely on the trust to recover the amount, and if the funds are spent as agreed, they can enforce full repayment. In this way, Quistclose trusts give creditors a more robust mechanism to safeguard their interests against financial risk.

[53] However, this approach raises issues, as it challenges the orthodox classification of resulting trusts and cannot account for express Quistclose trusts, where A clearly intends to retain the beneficial interest. Lord Millett himself cautioned against making subtle distinctions between "*true*" Quistclose trusts and analogous arrangements, suggesting that the same principles should apply to all situations where one party has limited use of another's funds for a specific purpose. Nonetheless, it is unclear how Millett's resulting trust analysis can apply to such cases, especially when the parties' expressed intentions indicate otherwise.

1.6. Trustee Responsibilities and Powers: Aspects of Commercial Trust Management

One of the first decisions a settlor or testator must make when creating a trust is the selection of trustees, as choosing the right trustees is crucial for the effective management of the trust and the protection of the beneficiaries' interests. Express trustees have numerous duties under the trust for which they are responsible, and these duties vary depending on the type of trust. Unlike family trustees, who typically focus on preserving wealth, commercial trustees are expected to generate profit, which naturally involves taking risks. Consequently, as the commercial applications of trusts have evolved, the rights and obligations of trustees have become more demanding, reflecting the growing expectations and complexities associated with serving the interests of beneficiaries.

Modern developments suggest a trend toward greater liberalization, giving trustees more discretion, wider freedom in decision-making, and greater involvement in commercial markets[54]. Additionally, with the increasing presence of professional trustees[55] or trust corporations in commercial trusts, trusteeship has evolved into a more market-driven, contractual relationship, where trustees act as professional capital managers, focusing on maximizing returns within the trust's framework.

Older trust instruments often imposed restrictive provisions, leaving trustees less equipped to navigate evolving circumstances. In contrast, modern trust deeds, typically, tend to provide trustees with a broad and adaptable range of managerial powers. To address limitations in trust instruments, Section 57 of the Trustee Act 1925 empowers courts to authorize trustees to undertake transactions and dispositions beyond their original powers[56]. This jurisdiction proves especially valuable when the trust instrument lacks necessary powers or includes them in overly restrictive terms. However, for the court to grant such powers, the proposed transaction must be both necessary and beneficial to the trust as a whole. When the proposed transaction is deemed expedient, courts are generally inclined to exercise their discretion to confer the requisite powers.

[54] In contrast, the trustee of a traditional family trust is often a friend or family member of the settlor or a highly reputable person. These trustees are typically non-experts, whose primary responsibility is the straightforward task of transferring wealth to the trust beneficiaries.
[55] A professional trustee is defined in s 28(5) of the Trustee Act 2000.
[56] Trustee Act 1925, Section 57.

The new powers granted must either directly enable trustees to execute specific transactions or serve as ancillary provisions necessary to implement those transactions, such as powers to manage conflicts of interest or navigate the self-dealing rule.

This principle was illustrated in the decision *Cotterell v Beaumont*[57], where Chief Master Marsh reviewed the court's authority to "*modernize*" trust deeds. In *Cotterell*, the court granted powers to re-appropriate assets, establish companies, make payments to minors, appoint investment advisers, provide indemnities, and delegate asset management. However, it declined to confer a general delegation power, as its necessity and expediency were not demonstrated. Thus, the *Cotterell* decision underscores the practical significance of Section 57 in equipping trustees to address the complexities of administering trusts in a dynamic legal and economic landscape.

Despite the expansion of trustees' powers, the core of trusteeship remains grounded in fiduciary principles, ensuring that trustees act in the best interests of the beneficiaries. However, in recent years, the growing prominence of trusts as key investment vehicles has sparked debate about the nature and boundaries of fiduciary relationships, particularly in managing conflicts of interest and duties.

The defining characteristic of a fiduciary is their obligation to act in what they genuinely believe to be the best interests of the person they serve as a fiduciary[58]. Consequently, a trustee's foremost duty is to act in what they honestly believe is in the best interests of the trust's beneficiaries. A trustee is typically defined as "*someone who holds assets on trust for another*." This *fiduciary duty* forms part of the irreducible core of a trust—without it, a trust cannot exist (*Armitage v Nurse* [1998] Ch 241).

While this duty is the core duty of a trustee, it is subordinate to other duties, which impose further boundaries. And trustees must operate within the boundaries set by the trust's terms, ensuring that they do not overstep their prescribed powers. Without these binding obligations, the arrangement would no longer qualify as a trust. In *Armitage v Nurse*[59], Millett LJ reinforced this point, asserting that a clause in the trust instrument that

---

[57]See *Cotterell v Beaumont* [2020] EWHC 2234 (Ch).
[58] Smith, L. (2014). *The Law of Trusts*. Oxford University Press
[59] See *Armitage v Nurse* [1998] Ch 241.

exempts a trustee from liability for actual fraud would be invalid. Such a clause would allow the trustee to misuse the trust assets, which would violate the "*irreducible core of obligations*" that must be present for a trust to exist. Liability for breach of this kind of duty is therefore strict[60].

However, section 61 of the Trustee Act 1925 allows courts the discretion to relieve a trustee from liability for breach of duty if the trustee acted "*honestly and reasonably*" and can be excused for not seeking the court's guidance on the issue.

Section 3 of the Trustee Act 2000 states that, unless the trust instrument specifies otherwise (as per Section 6), "*a trustee may make any kind of investment that they could make if they were absolutely entitled to the assets of the trust*." Of course, this general power of investment does not imply that the trustee has unrestricted freedom to invest trust assets in anything they choose. Trustees must still act within the limits of their fiduciary duties. Under s 1 of the Trustee Act 2000, a trustee exercising their general power of investment is required to "*exercise such skill and care as is reasonable in the circumstances*," taking into account any "*special knowledge or expertise that they hold themselves out as having*," and if acting "*as a trustee in the course of a business or profession*," the trustee must meet "*any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession*. This provision replaces the older standard articulated by Lindley LJ in *Re Whiteley* (1886), where trustees were expected to exercise the same care a prudent person would take when investing on behalf of others. Under the updated framework, trustees are now required to prioritize the financial interests of the beneficiaries when making investment decisions. While prudent businesspersons may choose speculative investments, trustees are bound to limit themselves to the types of assets permitted by the trust and avoid investments within that class that carry excessive risk. It is the trustee's responsibility to carefully assess which investment strategies are appropriate for the trust, ensuring that they do not expose the trust to undue risk. However, the *duty of care* does not mean trustees must avoid all risk. As held in *Bartlett v Barclays Trust C*o[61], "*the distinction is between a prudent degree of risk on the one hand, and hazard on the other.*"

[60] See *Webb v Jonas* (1888) 39 Ch D 660.
[61] See *Bartlett v Barclays Trust Co* (No 1) [1980] Ch 515, at 531.

Indeed, one of the principal responsibilities of commercial trustees is to accurately assess and manage the level of risk deemed appropriate for the trust.

Further statutory safeguards are provided by sections 4 and 5 of the Trustee Act 2000. TA 2000, s4(1) lays down that a trustee, in exercising the powers of investment, must have regard to the *standard investment criteria*, defined as "*the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind*", and "*the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust*". Emphasis on the *standard investment criteria* is broadly consistent with "*modern portfolio theory*" which entails that "*the risk of a portfolio is a function of the interrelation of its component investments. Thus, a trustee can use securities and instruments that are highly risky viewed in isolation to assemble a portfolio that is safe*"[62]. In essence, modern portfolio theory illustrates the benefits of diversification, emphasizing how it reduces investment risks and minimizes associated administrative costs[63]. The other principal statutory safeguards for beneficiaries are both the obligation to review the investments of the trust from time to time under Section 4(3)(2) of the Act and the advice requirement contained under section 5 of the Act.

In *Bartlett v Barclays Bank Trust Co Ltd*, Brightman J emphasized that corporate trustees, due to their specialized business in trust management, are held to a higher standard of care. Such trustees, supported by professional staff with access to financial expertise, are expected to exercise a level of skill and care beyond that of an ordinary trustee. It would be unrealistic and unjust to demand the same from non-professional trustees, who may serve unpaid and out of a sense of family duty. He further compared the role of professional trustees to that of a contractual professional, who is liable for failing to use the skill they profess to have. However, with the increasing professionalization and commercialization of trusteeship, it has become common for trustees to be compensated for both their management of the trust and their performance, raising important considerations about the trustee's duty of care.

---

[62] Langbein, J. H., & Posner, R. A. (1976). *Market Funds and Trust-Investment Law*.
[63] The importance of investment diversification has also been endorsed by case law, as demonstrated in the English case of *Nestle v National Westminster Bank plc* (1993) 1 WLR 1260 (CA).

Tying trustee compensation to performance introduces the potential for conflicts of interest and creates a distorting incentive, whereby trustees may underestimate the risks of investments that offer high returns for both the trust and themselves[64]. This can compromise their fiduciary duty to prioritize the beneficiaries' interests, leading to decisions that might not align with the trust's long-term welfare. A trustee's fiduciary duty to avoid placing themselves in a position where their self-interest conflicts with their other duties is indeed designed to ensure that their primary obligations as a trustee are properly fulfilled.

Another key mechanism by which Equity ensures that trustees fulfil their obligations is the *duty to account*. This duty requires trustees to provide a complete account of their management of the trust and to restore the trust fund to the position it would have been in if it had been properly managed. Through this process, the financial activities of the trust are closely scrutinized. As Lord Millett has emphasized[65], the duty to account is not a remedy for a breach of trust, but rather a proactive measure aimed at ensuring that trustees meet their responsibilities. It acts as a tool for accountability rather than as a response to misconduct. However, the English courts appear to be shifting away from the traditional accounting process as the primary means of holding trustees accountable for breaches of non-fiduciary duties, instead moving towards awarding equitable compensation to beneficiaries for losses caused by a trustee's breach of trust.

1.7. Remedies for Breach of Trust: Emerging Liberalization in Contemporary Trust Law Cases

The evolution of the trustee's role in the commercial sphere has brought significant changes to the scope of their liabilities and responsibilities. Unlike traditional trustees, who face unlimited personal liability, commercial trustees benefit from limited liability. However, despite these limitations, the duties and obligations of commercial

---

[64] WA Lee, "*Trustee Investing: Homes and Hedges*" (2001) 1(1) *Queensland University of Technology Law and Justice* 3, 19.
[65] See *Libertarian Investments Ltd V Hall* [2013] HKCFA 93, [167].

trustees are far more demanding and complex, reflecting the heightened expectations and challenges associated with managing trust assets in a commercial context[66].

In recent years, the *duty to account*—once the primary mechanism for ensuring trustee accountability—has gradually been overshadowed by the *duty to compensate* beneficiaries for losses resulting from a trustee's breach of trust. The shift towards awarding equitable compensation in lieu of the traditional accounting process as the primary method for holding trustees accountable was first signalled by the House of Lords' decision in *Target Holdings Ltd v Redferns*[67]. This case marked a significant departure from the conventional approach to trustee liability and raised important questions about the future of trust law and how breaches of trust should be remedied.

***Target Holdings Ltd v Redferns:* A Landmark Case**

In *Target*, the claimant, Target Holdings, agreed to lend £1.5 million to Crowngate to finance the purchase of commercial property in Birmingham. Redferns, the solicitors acting for both Target and Crowngate, held the loan money on trust for Target. They were instructed to release the funds only when the property had been formally conveyed to Crowngate. However, Redferns mistakenly disbursed the funds prematurely, before Crowngate had legally acquired the property. Later, Crowngate went into insolvency, and Target discovered that the property's market value was far less than anticipated. After selling the property for only £500,000, Target was left with a £1 million loss.

Target sued Redferns, arguing that their premature release of funds constituted a breach of trust, and under the traditional accounting approach, Redferns should be liable to restore the entire loan amount. The expectation, based on trust law principles, was that since the money was improperly disbursed, Redferns would be required to return the full sum to Target. However, the House of Lords, in a judgment delivered by Lord Browne-Wilkinson, took a different view. Rather than treating the case as one involving strict accounting liability, he framed it as one concerning equitable compensation.

---

[66] R. Zhang, *The Commercial Uses of Trusts: Rethinking the Traditional Approach,* Hart Studies in Private Law, 2024.
[67] See *Target Holdings Ltd v Redferns* [1996] AC 421.

Lord Browne-Wilkinson noted that the case raised a "*novel point*"—whether a trustee who breaches trust could be held liable for losses that would have occurred regardless of the breach. The answer, according to the court, was no. Redferns could not be held liable for Target's loss, because even if the breach had not occurred, Target would still have suffered the same financial loss due to the overvaluation of the property. Therefore, Redferns was not required to restore the entire sum but was instead treated as being liable only for the actual loss caused by their premature disbursement. The court emphasized that trustees should not be required to compensate for losses that would have occurred regardless of the breach.

This decision marked a pivotal moment in trust law, signalling a shift away from the rigid application of the accounting process and towards a more nuanced approach focused on equitable compensation. While the ruling in *Target* sparked significant debate, it paved the way for further clarification of the role of compensation in trust law.

***AIB Group (UK) plc v Mark Redler & Co*: Affirming the New Approach**

The principles established in *Target* were reaffirmed nearly two decades later in *AIB Group (UK) plc v Mark Redler & Co*[68]. In *AIB*, another case involving a breach of trust by solicitors, the UK Supreme Court solidified the shift towards awarding equitable compensation over strict accounting.

In *AIB*, the bank agreed to lend £3.3 million to Mr. and Mrs. Sondhi, who wished to remortgage their home, which was valued at £4.25 million. AIB's condition for the loan was that £1.5 million would be used to pay off an existing mortgage held by Barclays, thus giving AIB a first charge over the property. Redler, the solicitors representing AIB, failed to properly execute this transaction. Believing that the Sondhis only owed £1.2 million to Barclays, Redler mistakenly paid Barclays £1.2 million instead of the full £1.5 million, leaving Barclays with a continuing mortgage over the property for £300,000. Consequently, AIB's mortgage was relegated to second priority. When the property market collapsed in 2008, the Sondhis defaulted on their loan, and AIB was able to recover only £900,000 from the sale of the house, leaving a substantial shortfall.

[68] See *AIB Group (UK) plc v Mark Redler & Co* [2015] AC 1503.

AIB sued Redler for breach of trust, claiming they should be required to restore the full £3.3 million under the traditional accounting approach. As in *Target*, Redler had clearly breached the trust by improperly distributing the funds. However, the UK Supreme Court, led by Lord Toulson and Lord Reed, followed the approach adopted in *Target*. While the court agreed that Redler had breached the trust, they ruled that Redler should only be liable for the actual loss caused by their mistake. This amounted to £300,000—the difference between the property's sale price and what AIB would have received if Redler had secured a first charge. The court held that equitable compensation, rather than strict accounting, was the appropriate remedy.

The decision in *AIB* cemented the shift away from the traditional model of trustee liability based on accounting for the trust fund, toward a system of compensation that accounts for actual losses resulting from a breach of trust. It made clear that trustees would not be held liable for losses unrelated to their breach, nor would they be required to restore the full value of the trust property when their breach did not directly cause the loss.

However, despite the prominence of compensation in recent cases, the duty to account has not been entirely displaced. In *Target*, Lord Browne-Wilkinson suggested that the duty to account would still apply in three key situations: where the trust is a commercial trust created to affect a transaction that has not yet been completed; where the trust is a traditional domestic trust; and where the breach of trust involves fraud. However, *AIB* complicated this by downplaying the relevance of the accounting process in similar cases. This raises the question of when, if ever, the duty to account should be favoured overcompensation.

The Supreme Court's decisions emphasize that trustees' essential duties and obligations—whether in commercial or traditional trusts—are governed by equitable principles, rather than by common law or contract law. Trustees' roles, powers, and responsibilities have grown more complex in response to increased expectations from beneficiaries. As trusts have evolved to encompass intricate commercial applications, the duties imposed on trustees have expanded accordingly. Nevertheless, the foundational principles of trusteeship remain applicable to both domestic and commercial contexts. The distinction between commercial and traditional trusts does not warrant a fundamental departure from these core principles. Rather, commercial and domestic trusts should be viewed as existing along a continuum of factual scenarios, where trust principles originally developed in familial and personal contexts have been extended into commercial applications. Thus, while different types of trusts may warrant distinct treatments based on their specific contexts, this does not justify treating commercial trusts as entirely separate from traditional trusts.

1.8. The Future of Trusts in a Global Context

In recent years, trusts have gained widespread popularity beyond common law jurisdictions due to their flexibility and ability to address diverse legal and financial needs. Traditionally used in wealth management, trusts now serve as essential tools for asset protection, tax planning, and estate management, often replacing or supplementing wills. As a result, the common law trust has evolved from a national institution into a vital mechanism for international trade and finance, playing an increasingly significant role in cross-border transactions.

> *"Trusts, along with tea and trade constitute the three T's that spread across the British Empire"*[69].

Today, trusts are no longer confined to common law jurisdictions; their principles have permeated civil law countries, driven by the global nature of financial markets and international wealth management. As such, many civil law countries are working to integrate both traditional and commercial trusts into their domestic legal systems, establishing legal frameworks or recognizing foreign trusts.

The integration of trusts into civil law systems, however, presents significant challenges. These challenges primarily stem from two core issues: the relationship between the settlor and trustee, and the ownership of trust property. While trusts are deeply embedded in the framework of property rights, civil law views ownership as absolute and indivisible, constrained only by limited property rights such as servitudes, mortgages, and usufructs. In contrast, common law divides ownership into legal and equitable components, with trustees holding legal title and beneficiaries enjoying

[69] *International Trust Laws*. Second Edition. Paolo Panico, Oxford University Press (2017).

equitable interests. This division of ownership is fundamental to the flexibility and adaptability of trusts but is conceptually foreign to civil law systems, where ownership cannot be fragmented in the same way.

In common law jurisdictions, trustees are considered full legal owners of the trust property, with the power to manage and control the assets. However, their actions are constrained by the terms of the trust, and they must act for the benefit of the beneficiaries. Beneficiaries, while having an equitable interest in the trust property, do not interfere in its day-to-day management, although they can enforce their rights if the trustee breaches their duties. For instance, if a trustee improperly disposes of trust property, beneficiaries have the right to trace and recover the assets under common law principles. Civil law systems, by contrast, do not recognize this separation of legal and equitable ownership. In civil law, ownership is singular and indivisible—one either owns the property or does not, making the fragmentation of interests, as seen in common law trusts, difficult to reconcile with civil law doctrines.

Efforts to incorporate trusts into civil law frameworks have thus faced significant obstacles, particularly in terms of the legal fiction that allows trustees to own property for the benefit of others. While civil law systems have developed legal entities such as companies, partnerships, and foundations that share some characteristics with trusts, these institutions do not fully replicate the flexibility or fiduciary obligations of a common law trust. For instance, while a company director's personal assets are protected from company debts, this protection is achieved through corporate legal structures rather than through trust law principles of divided ownership.

In response to the growing demand for cross-border financial management, civil law jurisdictions have increasingly sought to create legal instruments that exhibit more of the characteristics found in common law trusts. This shift has necessitated a partial departure from the principle of absolute ownership, as civil law systems begin to accept that an owner may hold assets not solely for their own benefit but for the benefit of others.

As cross-border transactions continue to grow in importance, the trust's role in the global economy is likely to expand further. International conventions, such as the *Hague Trust Convention*, have been pivotal in facilitating the recognition of trusts across different legal systems, promoting greater legal harmony in the treatment of trusts worldwide. Additionally, modern financial innovations, such as offshore trusts and digital asset management, are pushing the boundaries of traditional trust law, prompting both common law and civil law jurisdictions to adapt and modernize their legal frameworks to meet the needs of an increasingly globalized economy.

This development represents a significant evolution in the global legal landscape, as trust law continues to influence and reshape international commerce and property management.

CHAPTER II. Trusts and Trustees in a Global Context: Comparative Insights

SUMMARY: This chapter examines the transformative influence of the Hague Trust Convention on the Law Applicable to Trusts and on Their Recognition on the incorporation of trust principles into civil law traditions, investigating into the multifaceted opportunities and challenges associated with this legal adaptation. The discussion, thenceforth, places significant emphasis on the diffusion of trusts within the Italian legal context, highlighting the framework shaped by Italy's ratification of the Hague Convention. Central to this analysis is a critical evaluation of "*trust interni*", a unique phenomenon involving domestic trusts that, while operating within Italy, are governed by foreign law frameworks.

Section I:

2.1. Trust in the International Context - 2.1.1 The Appeal of a Global Framework for Trusts – 2.1.2. Key Features of the Trust Structure - 2.1.3. Categories of Trusts Covered by the Convention - 2.1.4. Choice of Law - 2.1.5. Recognition of Trusts – 2.1.6. Trustees under the Hague Trusts Convention.

Section II:

2.2. The Spread of Trusts in the Italian Legal System - 2.2.1. The experience with trusts created via the Hague Convention in Italy: the problem of *domestic* trust - 2.2.2. Trustee and Comparable Legal Figures in Italian Law - 2.2.3. Trusts and Other Legal Figures: Understanding the Distinctions – 2.2.4. Article 2645-ter and the Deed of Destination: Mechanisms and Implications – 2.2.5. The setting up of a trust.

Section I

2.1. Trust in the International Context

2.1.1. The Appeal of a Global Framework for Trusts

The expansion of trusts has been significantly driven by their commercial utility. Common law jurisdictions have leveraged the adaptability of trust structures to foster international investment and streamline cross-border transactions. Consequently, civil law systems have begun integrating trust mechanisms, aiming to attract global economic activity and align with the demands of international commerce, despite their traditional lack of trust concepts.

However, the divergence in legal systems' interpretations regarding the validity of trusts, the powers and duties of trustees, and the rights of beneficiaries can result in significant uncertainty for all parties involved. This issue becomes particularly pronounced in cases where trusts established under English law involve assets, trustees or beneficiaries located in other jurisdictions, thereby subjecting them to the influence of foreign legal systems. Such interactions underscore the pressing need for a harmonized approach to trust law across borders.

To address these complexities and promote consistency, the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition was introduced. This treaty aims to facilitate the recognition of trusts in legal systems that lack the historical framework of equity and trust law. Notably, the Convention is also beneficial for common law countries with differing trust regulations, offering a unified approach. Specifically, for practitioners in common law jurisdictions, particularly those managing substantial investments, the Convention provides confidence that trust structures will be acknowledged and upheld in civil law jurisdictions. Simultaneously, it enables civil law systems to better accommodate and regulate transnational trusts, ensuring they meet the expectations of settlors, and all parties involved.

The Hague Trusts Convention (1985) was established to harmonize the legal treatment of trusts across jurisdictions and has been ratified by numerous countries, including Australia, Canada (except Quebec), Hong Kong, Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, San Marino, Switzerland, and the United Kingdom. In the UK, the Convention is implemented through the Recognition of Trusts Act 1987[70]. While the Convention does not mandate the incorporation of the trust concept into the domestic legal systems of signatory states, it does require them, under principles of private international law, to recognize trusts governed by foreign laws. This allows states without a domestic trust framework to respect and apply trust-related laws when dealing with cross-border trusts. Moreover, the Convention proves advantageous even for common law countries with diverse trust regulations by promoting legal certainty.

At the heart of this integration lies a key conceptual distinction: while the common law trust is often associated with the idea of dual ownership—a concept that has no equivalent in civil law property frameworks - its true essence is the separation of asset management and enjoyment. This division underscores the commercial value of trusts, as it places a fiduciary obligation on trustees to act in good faith and prioritize beneficiaries' interests. Beneficiaries, though lacking direct control over the trust property, are ensured equitable protection through this structure, which balances management responsibilities with the intended enjoyment of the trust's benefits.

The trust structure has demonstrated significant compatibility with European civil law systems, especially for business-oriented trusts. These structures have garnered substantial interest among European citizens for their effectiveness in managing business relationships and facilitating commercial transactions. Consequently, the Hague Convention has exerted a profound influence on domestic trust laws, particularly in civil law jurisdictions, by shaping the legal framework surrounding trusts. Over the last century, civil law jurisdictions across continental Europe have progressively removed barriers to trust recognition, with particular emphasis on the utility of commercial trusts. The increasing interaction between European banking and financial sectors and English-speaking markets has further established asset-segregating trusts as a valuable tool for European financial managers.

---

[70] Section 1(1) of the Recognition of Trusts Act 1987 states that "*the provisions of the Convention ... shall have the force of law in the United Kingdom*".

By ratifying the Hague Convention, civil law jurisdictions have enhanced their legislation, especially in addressing conflict of laws, thereby strengthening their integration into the international trust law community. The Convention emphasizes two closely related areas: the determination of the law applicable to trusts and the recognition of trusts across different legal systems. This dual focus has been instrumental in fostering greater coherence and collaboration in the global trust law landscape.

2.1.2. Key Features of the Trust Structure

A non-trust jurisdiction may occasionally find itself adjudicating trust-related disputes, despite lacking the concept of trusts in its domestic legal framework. This situation presents significant challenges for such states, particularly in applying choice of law principles to trust matters. Often, these jurisdictions interpret the trust concept by analogizing it to similar domestic legal structures. As Hayton observes[71]:

> *"A bare trust may be regarded as creating an agency or mandate. A fixed trust may be regarded as a type of contract (...). A discretionary trust should normally be regarded as a contract. A charitable trust may be regarded as a contract or, possibly, as if it were a foundation or Stiftung with separate personality. An inter vivos trust where the settlor in his lifetime retains extensive powers of appointment or revocation may be regarded as a testamentary trust with the trustees being exécuteurs testamentaires. (...) Where the issue concerns powers of trustees, the courts of the lex situs of the relevant assets favour facilitating matters by holding that the trustees have the necessary ownership powers to enable a transaction to be effected in the course of the trustees' management of the assets."*

In response to these complexities, the Hague Trusts Convention provides a framework for clarifying the essential features of trusts and the nature of the legal relationships they create, thereby promoting their recognition in jurisdictions unfamiliar with trust law. However, Article 2 of the Convention intentionally avoids prescribing a rigid definition of a trust, recognizing the intrinsic difficulties—even among common law jurisdictions—of defining trusts. While the English express trust serves as a model under

[71] Hayton, D., "*International Recognition of Trusts*," in J. Glasson (ed.), *International Trust Laws*, Chapter C3, pp. 17-18.

Article 2, the Convention also acknowledges the potential for other legal institutions across different legal traditions to meet its criteria, provided that, as Hein Kötz highlights[72], "*it is not enough for the institution to be merely functionally equivalent to a common law trust—it must also exhibit structural similarities to qualify under the Convention's framework*".

The first paragraph of Article 2 outlines the principal actors in a trust relationship: the settlor, the trustee, and the beneficiary.

> *"For the purposes of this Convention, the term "trust" refers to 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".*

The term *trust* refers to the *legal relationship* between the parties. The settlor, trustee, and beneficiary—referred to simply as "*person*"—can be either natural or legal entities.

Interestingly, neither Article 2 nor Article 11 explicitly reference the fiduciary duties traditionally associated with trusteeship in common law. This omission reflects the Convention's broader conceptualization of trusts, accommodating a range of legal traditions[73]. While the trustee must exercise control over trust assets, the Convention does not require formal transfer of ownership to the trustee. Instead, it ensures that the trust assets form a separate fund distinct from the trustee's personal estate, addressing the risk of conflating trusts with agency or mandate relationships.

The risk of inadvertently including forms of agency and mandate within the scope of the Convention is addressed by sub-paragraph *a*, which clearly states that "*the assets constitute a separate fund and are not part of the trustee's own estate*." The core of the trust lies in the trustee's ownership of a segregated trust fund, without requiring that legal

[72] Kötz, in D. Hayton (ed.), *Modern International Developments in Trust Law*, ch. 3, p. 40.

[73] Professor Maurizio Lupoi characterized this form of trust as "*shapeless*," highlighting its adaptability and broader, more flexible structure compared to the traditional English trust model. Unlike the English framework, which typically necessitates the transfer of assets to the trustee to establish their legal control, the "*shapeless*" trust bypasses this requirement by allowing assets to come under the trustee's control without a formal transfer of ownership (M. Lupoi, *Trusts: A Comparative Study.* Cambridge University Press, 2000).

and equitable ownership be divided—or that equitable ownership even exist. Indeed, the concept of a separate fund is a feature present in many civil law systems.

Sub-paragraph *b* of Article 2 clarifies that "*title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee*". Legal ownership of the assets must vest in the trustee, minimizing the dangers of the overextension of the trust into cases of agency. This means the assets comprising the trust fund may be formally registered in the name of the *nominee*, but the nominee cannot dispose of them without direction from the trustee. The nominee acts as a formal titleholder with no decision-making authority over the assets, and consequently, no power of disposition.

Sub-paragraph *c* of Article 2 states that "*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 his by law"*. The Convention does not explicitly specify to whom the trustee is accountable. It does not suggest that the trust is limited to situations where the trustee's accountability is exclusively to the beneficiaries, as seen in the traditional common law trust. This further highlights that a trust under the Hague Convention can exist without beneficiaries having proprietary claims or remedies against the trustee.

In the realm of private international law, the classification of legal institutions like trusts remain particularly complex, especially for jurisdictions without comparable domestic frameworks. Article 2 of the Convention serves as a vital tool for determining whether a foreign legal relationship meets the criteria of a trust under the Convention's criteria. As Lupoi emphasizes[74], this assessment must prioritize the Convention's principles rather than rely solely on domestic legal definitions, thereby fostering greater consistency and predictability in cross-border trust litigation.

2.1.3. Categories of Trusts Covered by the Convention

"The Convention applies only to trusts created voluntary and evidenced in writing". Article 3 explicitly limits the scope of the Convention to trusts that clearly

[74] M. Lupoi, *Trusts: A Comparative Study*. Cambridge University Press, 2000.

reflect the settlor's intention, with written evidence supporting their creation. The writing requirement ensures that the settlor's intention to establish a trust is clearly documented, providing a safeguard for recognition in jurisdictions where the concept of trusts is not well established. The requirement for written evidence pertains only to the essential elements of the trust: certainty of intention, subject matter, and object. This allows flexibility in other areas, such as trustee's powers and duties, which need not necessarily be in writing.

Article 3 primarily applies to express trusts that are evidenced in writing. It also encompasses certain automatic resulting trusts and some institutional constructive trusts, provided these arise from the operation of legal frameworks rather than judicial intervention. However, trusts that are created without the settlor's direct intent, including constructive trusts imposed by courts and statutory trusts, fall outside the scope of the Convention. This exclusion extends to presumed resulting trusts and most types of judicially imposed constructive trusts, which limits the Convention's applicability in jurisdictions accustomed to recognizing such trusts.

The exclusion of judicially imposed and statutory trusts can be particularly problematic for trust-friendly jurisdictions that routinely incorporate such mechanisms. Article 20 of the Convention serves as a compromise, allowing flexibility in this regard. It provides that "*Any Contracting State may, at any time, declare that the provisions of the Convention will be extended to trusts declared by judicial decisions*." For example, in the United Kingdom, the opportunity afforded by Article 20 has ensured that "*the UK courts have one set of conflicts of law rules to apply to all trusts arising under the law of any part of the UK even if they are oral trusts and irrespective of any uncertainties that might arise over the application of the Convention to some unusual trust*"[75]. Section 1(2) of the Recognition of Trusts Act 1987 should thus be interpreted as extending the Convention's provisions to all trusts that are validly created under the domestic law of any part of the UK, regardless of their nature. This also includes trusts that an English

[75] D Hayton, *The Hague Convention on the law applicable to Trusts and on their Recognition* (1987) 36 ICLQ 260, 268.

court may impose through a judicial decision. However, it does not extend to trusts that arise under the law of an overseas jurisdiction.

The flexibility provided by Article 20 mitigates the limitation to an extent, enabling jurisdictions like the UK to extend the Convention's application to a broader range of trusts while maintaining coherence in their trust law frameworks. This balance allows the Convention to remain relevant across diverse legal systems, accommodating variations in domestic trust law without undermining the Convention's core principles.

2.1.4. Choice of Law

The primary objective of the Hague Trusts Convention is to establish a clear legal framework for determining the law applicable to trusts and to deal with the most critical issues concerning the recognition. Central to this framework is the principle of the settlor's autonomy in selecting the governing law, enshrined in Article 6 of the Convention. This provision allows the settlor to expressly or impliedly select the law that will govern the trust, thus ensuring that the settlor's expectations regarding the disposition of trust assets are respected. This provision offers considerable flexibility, as it permits the creation of a trust over property located in non-trust states.

The first part of Article 6 provides that "*a trust shall be governed by the law chosen by the settlor*." The choice can be either express or, where necessary, implied from the terms of the trust instrument or other writings evidencing the trust. The ability to designate the governing law is essential to ensure that the trust operates in accordance with the settlor's intentions. In cases where no express choice of law is made, Article 6 allows for the governing law to be determined by interpreting *"the terms of the trust instrument"* and *"the circumstances of the case"*. For example, the use of technical language that resonates with a specific legal system may indicate which law the settlor intended to choose. However, the search for an implied choice should not be strictly confined to the written terms: extraneous factors such as the settlor's intentions or any oral agreements may also be considered.

When neither an express nor an implied choice of law is discernible, Article 7 of the Convention introduces an objective test. According to this article, the trust shall be governed by the legal system with which it is most closely connected. This objective approach contrasts with Article 6's emphasis on the settlor's autonomy, applying only in situations where the settlor's intent cannot be ascertained. To establish the closest connection, Article 7 outlines several factors for consideration[76], including the place of administration of the trust as designated by the settlor, the location of the trust assets, the residence or place of business of the trustee, and the purposes of the trust along with the places where they are to be fulfilled. These criteria ensure that the governing law is the one most closely connected to the trust and its administration, thereby protecting the interests of the beneficiaries and other parties involved when the settlor's choice is not evident[77].

This structured yet adaptable approach enhances the Convention's effectiveness in accommodating the diverse legal traditions and practical realities of cross-border trust administration.

2.1.5. Recognition of Trusts

A key purpose of the Hague Convention is to promote the acceptance of the trust structure by states that do not traditionally recognize trusts. This goal is achieved by first defining the essential characteristics of a trust in Article 2, providing a clear understanding of its nature. Building on this foundation, the Convention then establishes a series of harmonized rules for choosing the applicable law, as outlined in Article 6 and subsequent provisions, which serve to facilitate cross-border recognition and application of trust laws. The concept of recognition as a valid trust across all contracting states outlined in Article 11 pertains therefore to trusts that are regulated by a law identified through the criteria established in Articles 6 and 7.

---

[76] The factors mentioned are not exhaustive.

[77] Let us imagine an Italian entrepreneur, Luca, who owns shares in companies incorporated in the United Kingdom and Germany. Luca wishes to establish a trust to ensure that these shares are professionally managed for the benefit of his family and to safeguard their value for future generations. Under Article 6 of the Hague Trusts Convention, Luca can choose the governing law for the trust. He opts for English law. This choice is explicitly stated in the trust deed with a clause such as: "*This trust shall be governed by the laws of England and Wales*". However, If Luca does not specify the governing law, Article 7 of the Convention would intervene to determine which law applies, based on factors such as the place where the trust will be administered (*e.g.,* London if Luca appoints a trustee based in the UK); the location of the assets; the trustee's residence or principal place of business (*e.g.,* a corporate trustee located in England). Considering these factors, the trust would likely be governed by English law if the trustee is based in England and the trust is administered there. However, if the trust's administration were primarily connected to Germany, German law might be considered instead.

As Hein Kötz puts it, "*the so-called recognition of the trust refers simply to the requirement that the trust must, in principle, be accorded all the effects that the foreign law governing the trust attributes to it*." As set forth in Article 11(2), "*Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity*." By specifying these basic requirements for the existence of a trust, Article 11(2) ensures that trust assets remain distinct from the trustee's personal assets, shielding them from the trustee's personal creditors, as reinforced by Article 11(3)(a) and (b). This distinction is critical for safeguarding the integrity of the trust structure across jurisdictions. However, it is important to note that the Convention does not compel contracting states to integrate the concept of equitable ownership into their legal systems.

Nevertheless, Article 13 of the Convention introduces an important exception to the obligation to recognize trusts established under foreign law. It allows for the foreign law governing a particular trust to be disregarded when the key elements of the trust are more strongly connected to jurisdictions that do not have experience or familiarity with the concept of trusts[78]. This provision permits a civil law judge the discretion to refuse recognition of a trust that would otherwise meet the criteria for recognition under Article 11.

2.1.6. Trustees under the Hague Trusts Convention

The Hague Trusts Convention serves as an innovative instrument in unifying trust recognition across jurisdictions, bridging the conceptual and operational divide between common law and civil law traditions. In doing so, it addresses a significant discrepancy in how fiduciary duties are understood and applied. Common law systems codify fiduciary responsibilities as a cohesive framework, while civil law systems tend to disperse these obligations across various legal domains, such as agency, corporate law, and guardianship.

[78] The provision states that "*No State shall be bound to recognize a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved*".

In common law jurisdictions, fiduciary duties are a cornerstone of trust law, with trustees bearing rigorous obligations of care and loyalty. These duties are well-defined, particularly in English trust law, where trustees are expected to act prudently, akin to a cautious investor, and to prioritize the interests of beneficiaries over personal or external considerations. Modern financial complexity and investment risks demand that trustees possess not only a deep understanding of trust law but also advanced financial expertise, enabling them to manage sophisticated assets effectively while observing the rigorous standards of care and loyalty embedded in fiduciary duties. The duty of care compels trustees to act with the prudence expected of a cautious investor, ensuring all decisions align with the best interests of the trust and its beneficiaries. Meanwhile, the duty of loyalty requires trustees to prioritize beneficiaries' interests over any personal or external interests, effectively guarding against conflicts. These fiduciary principles are codified within explicit legislation[79], providing consistent and high standard of accountability across common law jurisdictions. Trustees are also afforded considerable autonomy in managing trust assets, enabling them to adapt to market changes while remaining bound by these fiduciary duties[80].

Civil law jurisdictions, in contrast, adopt a more fragmented approach to fiduciary obligations[81]. Fiduciary principles are not encapsulated within a unified framework but are instead integrated into broader contractual obligations governed by principles of fair dealing and good faith. In civil law countries, indeed, fiduciary intermediaries such as the *Treuhänder* in Germany, *fiduciaire* in France, and *fiduciario* in Italy typically perform a narrower and more passive role - compared to trustees in common law systems. These intermediaries often act as holders of property on behalf of another party, without the all-encompassing authority or decision-making power granted to common law trustees. Their function resembles that of a *nominee*, fixated on holding assets rather than actively managing them under independent fiduciary discretion. In contrast, trustees in common

[79] Trustee Act 2000 (United Kingdom).
[80] Hayton, D. (2016). "*Reflections on the Hague Trusts Convention after 30 Years*." *Journal of Private International Law*, 12(2), 1–25. See also D. Waters, "*The Hague Trusts Convention Twenty Years On*," in M. Graziadei, U. Mattei, and L. Smith (Eds.), *Commercial Trusts in European Private Law* (Cambridge University Press, 2005, pp. 56–97).
[81] Graziadei, M. (2012). "*Recognition of Common Law Trusts in Civil Law Jurisdictions Under the Hague Trusts Convention: With Particular Regard to the Italian Experience*." In Smith L., *Re-imagining the Trust. Trusts in Civil Law*, Cambridge University Press, 2015.

law jurisdictions operate with substantial independence in managing trust assets, provided they adhere to fiduciary obligations. This autonomy enables trustees to make adaptive decisions in response to market changes, while also relieving beneficiaries of the burdens associated with asset management. Hence, trusteeship in common law provides an agile model for asset administration. Conversely, in civil law settings the role of a trustee is often limited by more rigid contractual terms, with trustors and beneficiaries frequently seeking intervention rights to ensure their interests are protected. Consequently, civil law systems generally impose fiduciary duties that are less intensive than those in common law, where fiduciary standards are rigorous and distinctly codified to protect beneficiaries and hold trustees accountable. This approach also lacks the distinctive fiduciary identity that defines common law trusteeship, where duties of care and loyalty are paramount.

The Hague Trusts Convention reconciles these divergent frameworks by focusing on the fundamental attributes of trusts rather than prescribing specific fiduciary duties. Article 2(c) acknowledges the fiduciary nature of the trustee's obligations but leaves the scope of duties – such as care and loyalty – to be defined by the trust's governing law. This approach allows participating jurisdictions to align trust principles with their legal traditions while fostering international consistency.

However, the Convention, through Article 8(2), outlines essential aspects of trusteeship, including appointment, removal, and the trustee's liabilities. This framework implicitly shapes fiduciary duties, guiding the administration of trusts in a manner that accommodates the diverse legal traditions of participating jurisdictions. Furthermore, by permitting, through Article 9 and *dépeçage*, different administrative aspects of a trust to be governed by laws distinct from the core governing law, the Convention accommodates the diverse legal norms of participating jurisdictions. For example, property transactions may be governed by the *lex situs* (meaning the law of the property's location), ensuring compatibility with local legal norms while preserving the trust's overarching governance structure. In doing so, the Convention respects the settlor's autonomy in choosing the applicable law while providing safeguards against conflicts with public policy. For instance, English courts may enforce foreign laws permitting high-risk investments, unless they contravene fundamental policy principles. This balance ensures that trustee responsibilities are both adaptable and consistent with the trust's intended governance.

At the 2022 HCCH Conference on Commercial, Digital, and Financial Law Across Borders, legal experts proposed enhancing the Convention by adding definite fiduciary duties[82]. Defining fiduciary duties—such as the duty to act in the best interests of beneficiaries, the prohibition against self-dealing, and the prevention of asset misappropriation— would create uniform standards, fostering greater accountability for trustees globally. These additions could take the form of supplementary materials or amendments to the Convention. The HCCH Explanatory Report notably does not address the absence of fiduciary duties in the original Trusts Convention, likely because drafters aimed for broad consensus without delving into the varied and complex fiduciary frameworks in different legal systems. This flexibility allowed individual countries to adapt trust principles to their own legal traditions, facilitating broader international adoption of the Convention. Therefore, existing fiduciary principles within trust legislation in both common and civil law countries could serve as valuable precedents for future improvements or interpretative guidelines produced by the HCCH's Permanent Bureau. Core duties such as loyalty—acting exclusively for the benefit of beneficiaries—care, and adherence to trust terms are foundational elements. Including these principles would create uniform standards, holding trustees to high levels of accountability regardless of jurisdiction[83].

[82] Hague Conference on Private International Law (HCCH). (2022). "*The HCCH 1985 Trusts Convention: Updates and Possible Future Work*."
[83] Noseda, F. (2022). "*Equitable Ownership, Butter and Donkeys: Setting Out a Vision for the Future of the Hague Trusts Convention*."

Section II

2.2. The Spread of Trusts in the Italian Legal System

2.2.1. The experience with trusts created via the Hague Convention in Italy: the problem of domestic trust

Italy was the first civil law jurisdiction to ratify the Hague Trusts Convention in 1989, a milestone that marked the introduction of the trust concept into a jurisdiction traditionally unfamiliar with this legal instrument.

As mentioned above[84], historically, the challenge of reconciling the concept of trust with civil law systems largely stemmed from the divergent understandings of *ownership* inherent to Anglo-Saxon legal traditions. In these systems, the notion of property, which defines the relationship between a trustee and the trust fund, differs from the correspondent civil law concept[85]. Unlike civil law jurisdictions, where property is perceived as an absolute and indivisible right, common law systems have never embraced the idea of full ownership as a private prerogative. Instead, the Crown traditionally retained ultimate ownership of land. Within this framework, the concept of *ownership* in common law evolved not as an unconditional right, but as a nuanced relationship. This relationship, embodied in the interplay between the trustee and the estate that constitutes the trust, reflects a functional rather than absolute approach to property rights.

Since the Hague Trusts Convention ratification, the concept of trusts has gained considerable notice among Italian legislators, legal practitioners, and scholars, reflecting the increasing relevance of this legal institution in Italy[86]. Today, trusts in Italy serve a variety of purposes, from family arrangements and commercial transactions to insolvency

---

[84] See *supra*, at paragraph 2.1.1.

[85] *Trib. Oristano 15 marzo 1956*, in *Foro it.*, 1956, I, 1019.

[86] Among the earliest judgments affirming the admissibility of trusts, the decision of the Rome Tribunal dated July 8, 1999 (*Giurisprudenza italiana,* 2001) holds particular significance. This ruling asserted that "*ownership of the assets held in trust resides with the trustee as a separate estate, capable of constituting an independent legal entity"* (this thesis, which identifies the trust as an independent legal entity is destinated to be definitively surpassed). However, the most notable decision is that of the Bologna Tribunal, dated October 1, 2003, n.4545. The case involved the application of a trust governed by foreign law. The case involved the application of a trust governed by foreign law. The court affirmed the validity of recognizing foreign trusts in Italy under the Hague Convention, provided they meet certain conditions and do not violate the *lex fori* public policy or mandatory rules (Busani A., *Il Tribunale di Bologna dichiara la legittimità dei trust interni,* in *Diritto e pratica delle società,* 2003, n. 21, pag.6).

management and the protection of vulnerable beneficiaries. The extensive applicability, particularly in transnational contexts, underscores the critical role of private international law in addressing trust-related issues.

Numerous commentators have highlighted the profound impact of the Convention on Italy's legal approach to trusts. One analysis clearly stresses three critical changes:

> "*Viewed in the context of Italian domestic law, it becomes clear how revolutionary the application of the Convention will be. It does three things. It introduces into the Italian conflict of laws rules a new category, the trust, notwithstanding that there is no corresponding internal law. It provides the Italian judge with a choice of law rule so that he may identify which foreign law should be applied to the particular trust. It sets down a minimum recognition requirement for the purposes of the application of the trust to a fact situation in Italy*"[87].

Circular No. 48/E of the Italian Revenue Agency dating August 6, 2007 further affirmed that "*the trust does not have a domestic civil law framework but is nonetheless validated by Italy's adherence to the Hague Convention of July 1, 1985, enacted through Law No. 364 of October 16, 1989, and in force since January 1, 1992. The Convention seeks to harmonize the rules of private international law governing trusts, effectively ensuring their recognition in civil law countries lacking an internal regulatory structure*."[88]

The recognition of trusts in Italy is largely uncontroversial for those established abroad and governed by foreign law[89]. However, the concept of *trust interno* has sparked significant academic debate[90]. The definition of *trust interno* is itself contested and vary among scholars. For some scholars[91], a domestic trust is characterized as one that is entirely established in a jurisdiction different from the one chosen by the parties to govern it. In this view, all the trust's subjective and objective elements are located within a

---

[87] A. Paton and R. Grosso (1994) 43 *The International and Comparative Law Quarterly*, 654, 658.
[88] *Circolare No. 48/E del 6 agosto 2007*. Disponibile su: https://www.agenziaentrate.gov.it.
[89] Cassazione civile , sez. II , 17/02/2023 , n. 5073.
[90] The expression "*trust interno*" was originally conceived by Maurizio Lupoi (M. Lupoi, *Trusts*, Milan, 2001,546) to distinguish it from the "*trust di diritto interno*", which is a trust with the same subjects as the domestic trust but is governed by domestic laws. The latter type of trust is clearly impractical in Italy at this time because there is no legislation on the subject yet.
[91] For instance, A.Braun, *Trusts Interni*, in *Riv.dir.civ.,* 2000, II, pp. 577 e 589.

jurisdiction other than the one whose law is applied, with the only transnational aspect being the governing law. Others[92], however, adopt a broader perspective, identifying a domestic trust even when only the predominant or significant elements are situated in a jurisdiction distinct from the chosen legal framework. A more stringent interpretation[93] adds another criterion: the trust must be situated in a jurisdiction unfamiliar with the concept of trust, typically a civil law country. This third, more widely esteemed view, defines a *trust interno* as one where all the parties and assets are connected to a jurisdiction that does not recognize or categorize the relationship as a trust in the sense intended by the Convention. Nevertheless, such a trust is governed by foreign law that does classify it as a trust. This understanding reflects a more authoritative position in the academic debate, emphasizing the complexities of applying trust principles in civil law systems.

Central to this debate is whether the creation of *trust interni* is consistent with Italian legal principles, particularly in scenarios involving entirely domestic elements – such as Italian settlor, assets, beneficiaries, and trustees. Critics have raised concerns about potential conflicts with fundamental principles of Italian civil law, including the protection of inheritance rights, the patrimonial guarantee, and the prevention of fraud or asset opacity. However, this criticism was effectively countered by proponents of the supportive doctrine, who highlighted that creditors, if they believed the creation of a trust had prejudiced their interests, retained the right to bring an action for revocation. Through such an action, creditors could challenge the transfers made by the trustee, rendering them ineffective against their claims. In further support of this favourable interpretation, the Italian Supreme Court itself observed that the Parliament would likely not have ratified the Hague Trusts Convention if the effects of trusts were fundamentally incompatible with the principles of the Italian legal system. This reasoning was explicitly articulated in the Court's ruling on 19 April 2018 (no. 9637), which affirmed the compatibility of trusts with domestic legal principles and reinforced the legitimacy of their operation within the Italian context[94].

---

[92] For instance, S.M. Carbone, *Trust interno e legge straniera*, in *Il Trust nel diritto delle persone e della famiglia*, Milano, 2003, p. 25.
[93] M. Lupoi, Trusts, II, Milano, 2001, p.246.
[94] Corte di Cassazione, sentenza del 19 Aprile 2018, n. 9637.

Initial resistance to *trusts interni* stemmed from the Convention's classification as a private international law treaty, yet its substantive provisions – such as Articles 2 and 11 – facilitate the adaptation of trust principles to civil law jurisdictions[95]. Article 2's definition of a trust and Article 11's elaboration intentionally avoid traditional common law terminology. In Article 2, the term "*placing assets under the control of a trustee*" does not imply a transfer of ownership in the common law sense[96]. Hence, Article 2 defines trusts based on structural features, such as asset segregation and trustee control. Article 11 specifies the minimum features required for recognition as a trust, effectively validating *trusts interni* despite objections based on the Convention's nature. Undeniably, these provisions highlight the Convention's adaptability, permitting civil law jurisdictions to reconcile trust principles with domestic legal frameworks, while preserving their fundamental principles. By emphasizing structural over conceptual features, the Convention demonstrates its capacity to bridge the gap between common law and civil law systems, reinforcing the legitimacy of *trusts interni*. Consequently, criticisms of *trusts interni*—particularly those based on the general nature of the Convention—are increasingly difficult to sustain considering its doctrinal coherence and practical flexibility.

Professor Maurizio Lupoi's contributions have been pivotal in shaping the debate on the application of the Hague Trusts Convention within Italian law[97]. His interpretations of Articles 6 and 13 have introduced transformative ideas, particularly concerning the concept of *trusts interni*—domestic trusts involving Italian assets and beneficiaries but governed by foreign trust law[98].

Article 6 of the Convention, as Lupoi argues, grants the settlor broad discretion in selecting the governing law for a trust, allowing Italian residents to establish trusts under foreign legal frameworks even when all elements of the trust – such as the settlor, assets and beneficiaries - are situated within Italy. This interpretation challenges and expands the traditional view, which confines the Convention's application to facilitating the

[95] For a detailed analysis of Articles 2 and 11, respectively, see *supra*, at paragraphs 2.1.2. and 2.1.5.
[96] Even institutions rooted in civil law traditions can be considered trusts if they incorporate elements like asset segregation and the separation of trust and personal assets of the trustee (G.Petrelli, *Trust Interno, art .2654 – ter c.c. e trust Italiano,* in Rivista di Diritto Civile, 2016, p.171).
[97] M. Lupoi, *Trusts*, II, Milano, 2001.
[98] For an in-depth examination of Articles 6 and 13, respectively, refer to *supra*, at sections 2.1.4. and 2.1.5.

recognition only of foreign trusts tied to jurisdictions where trusts are a well-established legal institution[99]. Lupoi emphasizes that Article 6 imposes no preliminary restrictions on the settlor's autonomy in choosing a governing law. However, the practical efficacy of the chosen law must endure examination, particularly when assessed against mandatory domestic principles or public policy[100].

Central to Lupoi's analysis is Article 13, which states: "*No State shall be bound to recognize a trust the significant elements of which (...) are more closely connected with States which do not have the institution of the trust or the category of trust involved*." This provision addresses domestic trusts and grants contracting states the discretion—not the obligation—to deny recognition in cases involving predominantly internal elements[101]. In the Italian context, this means that the state can reject to recognize a trust when there is no reasonable justification, where the parties acted in bad faith, or where the choice of governing law is evidently manipulative or abusive. However, Lupoi argues that this same discretionary power can be applied positively: it allows Italian courts to recognize *trusts interni* governed by foreign law, provided they serve legitimate purposes and align with Italy's broader legal framework.

Whilst Article 13 addresses the recognition of trusts, the broader regulatory framework for ensuring the compatibility of foreign trusts with domestic law is defined by Articles 15, 16 and 18 of the Convention, collectively referred to as "*safeguard clauses*". These provisions ensure that trust arrangements adhere to the essential values of the forum's state legal system. Article 15 establishes that the Convention does not override the application of mandatory rules of the forum's legal system, which often

---

[99] E.G. Gaillard – D.T. Trautman, *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts, American Journal of Comparative Law*, Vol.35, 1987, p.307: "The authors of the Convention first considered whether it was suitable to limit its application to international trusts. (…) However, it quickly became apparent that such a requirement would not have been appropriate for trusts. It is often the case that a trust is created in a purely domestic setting but must later be recognized aboard, if only to permit the trustee to engage in transactions abroad. The requirement that the trust have an international character would have created an unnecessary obstacle for the recognition of such trusts".

[100] D.Zanchi, *La tutela dei creditori e dei legittimari nel trust,* in Rivista Ianus, 2016, p.86 ss, "*It is important to examine the practice of forum shopping, particularly focusing on the regulations most frequently invoked, such as those addressing the limits of wilful misconduct or negligence under the jurisdictions of Jersey and Malta. Additionally, the legislative framework of San Marino warrants consideration as part of this analysis".*

[101] This understanding is supported by the preparatory documents and *the Rapport explicatif* by A.E. Von Overbeck, as detailed in the *Actes et documents de la Quinzième session* of the Hague Conference on Private International Law (Volume II, The Hague, 1985, paras. 123–124).

protect key societal values, such as wellbeing of minors, inheritance rights, and creditor protections. To mitigate overly expansive applications of these provisions, Article 15(2) introduces a balancing mechanism, enabling courts to seek alternative legal solutions to achieve the trust's objectives while respecting mandatory norms. Article 16 adds a protective layer by mandating the enforcement of non-waivable rules essential to the forum's legal system, preventing attempts to bypass important regulations through party autonomy. Finally, Article 18 invokes public policy as a safeguard against trust arrangements that conflict with fundamental principles and moral values of the forum, ensuring such arrangements can be denied recognition when necessary.

In Italy, trustees establishing *trusts interni* must carefully select governing laws from jurisdictions that recognize trusts, ensuring alignment with Italy's mandatory principles[102]. For example, the Tribunale di Brescia, 12 October 2004 (in *Riv. Dir. Int. Priv. Proc*., 2004, 1410) clarified that "*the application of a foreign trust law chosen by the settlor must be put on hold if its effects conflict with Italy's non-derogable rules or public policy principles, as outlined in Articles 15, 16, and 18 of the 1985 Hague Convention*".

The interplay between the Convention's safeguard clauses and Italian domestic law reflects a balance between private international law principles and the need to preserve essential societal values. This nuanced approach allows Italy to accommodate trust structures while maintaining the integrity of its civil law tradition. Despite criticisms, Lupoi's interpretation of Articles 6 and 13, combined with the practical application of Articles 15, 16 and 18, demonstrate the flexibility of the Hague Trusts Convention in adapting trust principles to jurisdictions unfamiliar with this legal institution.

Italy has yet to adopt a specific legislation to comprehensively regulate trusts. Consequently, trusts continue to be treated as atypical instruments grounded in contractual autonomy. Thus, the incorporation of trusts into the domestic legal system

---

[102] Today, following a process of cultural and professional evolution that has deepened the understanding of the trust as a legal instrument, there exist well-known laws frequently utilized by Italian legal practitioners. Among these, the Trusts (Jersey) Law 1984 is commonly applied, appreciated for its flexibility and its established tradition in trust regulation. More recently, the Law of San Marino (Law No. 42 of March 1, 2010) has gained prominence. However, this legislation mandates the appointment of a resident agent within the Republic of San Marino.

has primarily been addressed through the ratification of the Hague Trusts Convention, implemented via Law No. 364/1989.

Article 13 of the Hague Convention implicitly acknowledges the general admissibility of domestic trusts but introduces an additional layer of causal legality review, beyond the requirement of consistency with public policy principles outlined in Article 15. This provision empowers judges to deny recognition of a trust if the broader transaction serves an unlawful purpose or fails to pursue interests deemed worthy of protection. In the Italian legal framework, the trust is recognized provided it satisfies the requirement of pursuing an interest deemed worthy of protection under Article 1322, paragraph 2, of the Civil Code. For domestic trusts, however, this interest must be "*qualified*," aligning with the framework established by Article 2645-ter of the Civil Code. It is the judiciary's responsibility to evaluate, on a case-by-case basis, the specific purpose a trust aims to achieve and its concrete underlying cause.

The Supreme Court, in a singular and contrary decision[103] (Judgment of April 19, 2018, No. 9637), held that trusts inherently merit protection. The Court argued that this evaluation of merit had already been conducted in abstract by the legislature through the ratification of the Hague Convention via Law No. 364/1989, thus removing the necessity for courts to evaluate the trust's merit on a case-by-case basis. This ruling appears to place emphasis on the "*abstract*" merit of the trust as a legal construct, derived from its typification under the Hague Convention as an international legal instrument. However, the practical implications of this decision must be approached with caution. For domestic trusts, the necessity of a concrete evaluation remains. This evaluation must extend beyond the abstract merit of the standardized contractual framework to ensure the trust is supported by a valid and appreciable causal justification.

This legal practice has encouraged the recognition not only of foreign-established trusts but also of *trust interni*, created entirely in Italy[104]. In such cases, the foreign element is limited to the governing law chosen by the parties, while the trust itself involves Italian-resident parties (*i.e.* settlor, trustee and beneficiaries) and pertains to

[103] Corte di Cassazione, Sentenza del 19 Aprile 2018, N. 9637.
[104] Corte di Cassazione, II Sez., Sentenza del 24 Febbraio 2022, N. 6146.

assets located within Italy. While the trust is governed by the foreign law specified in the trust instrument, Italian courts retain the authority to examine its compatibility with domestic legal principles pursuant to Articles 13, 15, 16, and 18 of the Hague Convention. This scrutiny is particularly significant in contexts involving the protection of minors and incapacitated persons, matrimonial property and succession law, the transfer of property and real securities, creditor protections in insolvency cases, and safeguarding third parties acting in good faith.

A separate argument in favour of the admissibility of the formation of a domestic trust stems, also, from the actions of the Italian legislature, which, while not establishing an organic civil law framework for the trust, has several times taken the trust into account by regulating specific aspects of it. First and foremost, Article 1(74) of Law No. 296 of December 27, 2006, which amended Article 73 of Presidential Decree No. 917 of December 29, 1986 (establishing the Consolidated Income Tax Law), included "*trusts, resident in the territory of the State, which have as their exclusive or principal cause the carrying on of commercial activities*" among the persons subject to corporate income tax[105]. With the adoption of this rule, the Italian legislature might have removed any uncertainty about the legitimacy of the domestic trust. A further significant regulatory recognition of the domestic trust came with Law No. 112 of 22 June 2016, which, in order to "*promote the well-being, full social inclusion, and autonomy of persons with disabilities*" (art. 1, paragraph 1, Law 112/2016), "*without family support*" or "*for the loss of family support*" (art. 1, paragraph 2, Law 112/2016), has encouraged a scenario in which the trust could serve as a tool - alternative to an obligation to use under art. 2645-ter c.c. or a special fund with assets subject to a destination restriction and administered by a fiduciary contract to achieve the aims of this legislation. Evidently, the legislators

[105] Article 73, Presidential Decree No. 917 of December 29, 1986: «[s]ono soggetti all'imposta sul reddito delle società: […] b) […] i trust, residenti nel territorio dello Stato, che hanno per oggetto esclusivo o principale l'esercizio di attività commerciali; c) […] i trust che non hanno per oggetto esclusivo o principale l'esercizio di attività commerciale […]; d) […] i trust […] non residenti nel territorio dello Stato. 2. […] Nei casi in cui i beneficiari del trust siano individuati, i redditi conseguiti dal trust sono imputati in ogni caso ai beneficiari in proporzione alla quota di partecipazione individuata nell'atto di costituzione del trust o in altri documenti successivi ovvero, in mancanza, in parti uguali. 3. Ai fini delle imposte sui redditi si […] considerano […] residenti nel territorio dello Stato i trust istituiti in uno Stato diverso da quelli di cui al decreto del Ministro dell'economia e delle finanze emanato ai sensi dell'articolo 168-bis, quando, successivamente alla loro costituzione, un soggetto residente nel territorio dello Stato effettui in favore del trust un'attribuzione che importi il trasferimento di proprietà di beni immobili o la costituzione o il trasferimento di diritti reali immobiliari, anche per quote, nonché vincoli di destinazione sugli stessi. […]».

wanted to refer to the domestic trust, presuming that the matter would be admissible in our judicial system.

The relationship between trusts and the Italian legal system has been described as "*a prime example of the the validity of the theory of legal flows*"[106]. This theory suggests that in any open legal system, foreign legal concepts are observed, and some of these are adopted as "*legal flows*". These flows emerge when foreign ideas are seen as potentially solving problems that the local legal system hasn't been able to address effectively.

2.2.2. Trustee and Comparable Legal Figures in Italian Law

Having explored the defining characteristics of trusts as articulated by the Hague Trusts Convention[107] and their principal legal effects, it is now possible to identify the features that differentiate trusts from analogous institutions within the Italian legal framework. Although Italian law provides mechanisms for allocating assets for specific purposes and segregating them within the owner's patrimony, these features, while functional, do not equate to the comprehensive framework of the trust institution.

The trust goes beyond mere asset allocation through its distinguishing feature: the comprehensive *ring-fencing* of assets. This mechanism effectively separates trust assets into an autonomous patrimony, safeguarding them from the personal creditors, heirs, and spouses of both the settlor and the trustee. Such a level of asset protection is unparalleled in the Italian legal context, making the trust a particularly effective instrument for managing and securing assets. Thus, the growing appeal of trusts in Italy can be attributed to the limitations of existing domestic legal instruments in addressing the complex demands of fiduciary and asset management sectors.

While scenarios in which one party entrusts another with a legally significant task are universal in legal systems[108], civil law frameworks lack the integrative functionality that defines trust law. Trusts are distinguished by their ability to consolidate multiple significant features into a single, cohesive legal framework, enabling the concurrent

[106] M. Lupoi, *La metabolizzazione del trust,* in *Studi sul trust,* edited by Lupoi, cit., p.3.
[107] Hague Trusts Convention, Article 11.
[108] M. Gelter – G. Helleringer, *Fiduciary Principles in European Civil Law System,* in The Oxford Handbook of Fiduciary Law, pp. 583 – 602.

realization of several legal effects within a specific context. Italian law includes comparable instruments—such as fiduciary agreements, patrimonial funds, destination constraints under Article 2645-*ter* of the Italian Civil Code, mandates, and foundations—but these differ significantly from trusts, particularly in their approach to asset protection and management.

2.2.2.1 Trusts and Other Legal Figures: Understanding the Distinctions

The fiduciary transaction, or *pactum fiduciae*, serves as a legal arrangement that shares certain similarities with the trust[109]. Legal doctrine identifies two primary fiduciary models: the Romanistic and Germanistic arrangements[110]. Both fiduciary transactions and trusts serve as mechanisms for asset management, built on the foundational element of a deliberate expression of intent[111]. In a trust, the settlor grants the trustee authority over specified assets. In a fiduciary transaction, the grantor confers authority on the fiduciary to carry out legally significant actions regarding the grantor's property in accordance with the agreement[112].

Despite these parallels, fundamental differences set these institutions apart. The most notable distinction lies in their legal foundations. A trust arises from a unilateral act by the settlor, while a fiduciary transaction is rooted in a contractual agreement - the *pactum fiduciae*. This agreement imposes obligations on the fiduciary to manage the assets in accordance with the terms of the deed, until the terms are fulfilled. Depending

---

[109] Pardolesi, *Trust, fiducie e contratto di affidamento fiduciario: omologazione contrattuale*? in *Trust*, 2020, 5, 503.

[110] The Romanistic fiduciary agreement is often characterized in legal doctrine as a complex arrangement, arising from the combination of two distinct contracts. First, there is a real contract, through which ownership of the property or right is transferred from the grantor to the fiduciary. Second, there is an obligation contract, wherein the fiduciary commits to managing or disposing of the property or right in accordance with the grantor's instructions. However, a significant limitation of this arrangement lies in its lack of asset segregation: the assets entrusted by the grantor are not separated from the fiduciary's personal assets, exposing them to potential risks from the fiduciary's creditors. In contrast, the Germanistic fiduciary arrangement aligns more closely with the concept of a mandate. Here, the transfer to the fiduciary does not involve the ownership of the assets but instead grants the fiduciary formal authority to manage or dispose them. This notion of formal legitimation, absent in the Romanistic framework, is a pivotal element in addressing the structural weaknesses of the Romanistic fiduciary arrangement. By focusing on legitimation, the Germanistic approach seeks to enhance the efficacy of the *pactum fiduciae* and confer it with greater practical and legal robustness.

[111] Lupoi, *Istituzioni del diritto dei trust negli ordinamenti di origine e in Italia*, Milano, 2016,3.

[112] Santoro – Passarelli, *Dottrine Generali del diritto civile*, Napoli, 2012, 179.

on the fiduciary model, the fiduciary gains either formal title to the assets (as in the Germanistic model) or full ownership (as in the Romanistic model).

The structural divergence between trusts and fiduciary transactions results in far-reaching practical implications. In fiduciary transactions, the grantor retains enforcement rights against the fiduciary in cases of breach, including the ability to terminate the agreement or claim damages for breach. Conversely, in a trust, enforcement rights typically rest with the beneficiaries, who hold the trustee accountable for failing to fulfil the trust's objectives as outlined by the settlor.

Another critical distinction lies in asset treatment. Under Article 11(1) of the Hague Convention, trusts achieve full asset segregation, ensuring that trust property is entirely distinct from the trustee's personal estate and protected from claims by the trustee's creditors or heirs. Fiduciary transactions, particularly Romanistic ones, lack such segregation. Assets transferred to a fiduciary under a *pactum fiduciae* are incorporated into the fiduciary's general estate, making them vulnerable to the fiduciary's creditors. The Germanistic fiduciary model - often employed by fiduciary companies - offers a partial solution by separating the grantor's substantial ownership from the fiduciary's formal title. While this arrangement prevents the assets from entering the fiduciary's estate, they remain part of the grantor's patrimony, exposing them to the grantor's creditors and succession claims. This approach aligns closely with the mandate contract, as evidenced by its use in Italian fiduciary companies[113].

Mandates, as regulated by Articles 1703 et seq. of the Italian Civil Code, also share fiduciary characteristics with trusts. A mandate is established when "*one party undertakes to perform one or more legal acts on behalf of another*."[114] While both involve delegation of authority, mandates and trusts differ fundamentally[115]. A mandate arises bilaterally, creating a direct relationship between agent and principal, who retains oversight. A trust, however, is established unilaterally by the settlor, with the trustee's

[113] Cass., 21 maggio, 1999, n. 4943, in *Società*, 1999, 11, 1330.
[114] Article 1703 of the Italian Civil Code.
[115] Busato, *La figura del trust negli ordinamenti di common law e di diritto continentale,* in *Riv. Dir. Civ.,* 1992, 319.

duties focused on achieving the trust's purpose independently of the settlor's continued involvement.

Another significant distinction is the scope of responsibilities assigned to agents and trustees. A mandate limits the agent's duties to legal acts, as outlined in Article 1703. Trustees, however, are entrusted with a broader range of responsibilities, extending to material acts. Rooted in equitable principles, trustees are tasked with comprehensive asset management and are granted discretion to perform actions beyond the capacity of an agent. For instance, trustees may manage businesses or address the personal needs of incapacitated individuals—tasks that go beyond the execution of legal acts and are central to fulfilling the trust's purpose.

An additional aspect to consider when comparing trusts and mandates is the distinction between the ownership rights conferred by the principal to the agent for the execution of the mandate and those conferred by the settlor to the trustee for the fulfillment of the objective for which the trust was established. In this regard, it is first necessary to distinguish between two scenarios: a mandate with representation, pursuant to Article 1704 of the Italian Civil Code, in which the agent is granted the authority to "*act in the name of the principal*"; and a mandate without representation, under Article 1705.1 of the Italian Civil Code, in which the agent "*acts in their own name"* and therefore "*acquires the rights and assumes the obligations arising from the acts performed with third parties, even if those third parties are aware of the mandate"*. In the first case (*i.e.*, a mandate with representation), the agent acts in the name and on behalf of the principal, and the legal effects of the acts performed in execution of the mandate directly affect the principal's legal sphere. This situation is entirely distinct from what occurs in the case of a trust. In a trust, the trustee acts in their own name, albeit in the interest of the beneficiaries. In the second case (*i.e.*, a mandate without representation), the agent acts in their own name but on behalf of the principal. Consequently, the differences between this type of mandate and the institution of a trust become less pronounced.

However, Article 1707 of the Italian Civil Code, which regulates the enforceability against third parties of acquisitions made by an agent without representation, provides that "[t]he creditors of the agent may not enforce their claims on the assets acquired by the agent in their own name in execution of the mandate, provided that, in the case of movable property or receivables, the mandate is evidenced by a document with a certain date prior to the attachment, or, in the case of immovable property or movable property registered in public registries, the registration of the transfer back or the judicial claim aimed at obtaining it predates the attachment.” This provision establishes a mechanism of patrimonial allocation distinct from that created by the institution of a trust.

With the Reform of the Italian Corporate Law, (*i.e.* Legislative Decree No. 6 of 2003), the Italian legal framework embraced a significant innovation through the introduction of the so-called *asset destined to a specific business,* codified in Articles 2447-*bis* through 2447-*decies* of the Civil Code[116]. The concept of the segregated portions of assets, applicable to all corporations, encapsulates a purpose-oriented constraint applied to a separate pool of assets, effectively isolating it from the company’s general estate. This arrangement establishes a dual limitation: it restricts the owner’s power of disposition over these assets and concurrently narrows the scope of the company’s liability to obligations arising from the designated purpose.

The regulation of segregated assets responds to the practical need to equip companies with mechanisms to confine liability within a specific business venture, thereby avoiding the necessity of forming a separate legal entity. By doing so, it enhances the company’s capacity to pursue entrepreneurial initiatives. The creation of an earmarked estate allows a company to legally partition a portion of its assets from the overall corporate estate while retaining ownership, offering entrepreneurs a structural alternative comparable to a trust. The analogy with a purpose trust emerges from their shared alignment with a specific objective, wherein the identified business serves as the evaluative benchmark for the allocated pool of assets.

An analogy can be drawn between the trust and the *fondo patrimoniale* (family fund), as both institutions involve the allocation of a pool of assets to a specific purpose and the corresponding separation of these assets from the remaining estate of the owner. Like the trust, the *fondo patrimoniale* is governed by a purpose-oriented constraint.

[116] A. Niutta, *I patrimoni e finanziamenti destinati,* Milano, 2006, 102.

However, while the *fondo patrimoniale* is narrowly tailored to serve the "needs of the family," the trust enjoys broader flexibility, allowing its purpose to be defined in diverse and more expansive terms.

2.2.2.2 Article 2645-ter and the Deed of Destination: Mechanisms and Implications

The *deed of destination* offers a mechanism for a grantor to remove immovable or registered movable property from their general estate, dedicating it exclusively to purposes deemed socially or morally significant and linked to specific beneficiaries. This destination ensures that the labelled assets and their proceeds are insulated from general creditor claims, as they may only be used to satisfy obligations directly connected to the declared purpose.

The introduction of Article 2645-*ter* into the Italian Civil Code via Legislative Decree No. 273 of December 30, 2005, marked a significant moment in the development of patrimonial destination regulation in Italy. This provision explicitly allows for the registration of deeds committing property to protected purposes, ensuring that such restrictions are enforceable against third parties. As a result, it has become a cornerstone of the Italian legal framework concerning *patrimonial destination*.

Despite this development, debate persists over whether Article 2645-*ter* merely codifies the effects of patrimonial destination or establishes an entirely new legal framework. Nonetheless, its interaction with trust law is evident[117]. While the provision does not directly impact the operation of domestic trusts, it solidifies a broader principle: the recognition and enforceability of property restrictions for purposes deemed worthy of protection. In this way, Article 2645-*ter* provides a specific mechanism for formalizing and registering these restrictions[118].

---

[117] In particular, the discussion has focused on the influence that the provision exerts on the internal regulation of the trust. The proposed solutions have been varied: some scholars have argued that the provision bears no impact on the trust (for instance, Gazzoni, in *Osservazioni sull'art.2645-te*r, in Giust. civ., 2006, II, 165); others have countered that the conclusions previously reached regarding the admissibility and regulation of trusts must be thoroughly revisited (for instance, Petrelli, in *La trascrizione degli atti di destinazione,* in Riv. Dir. Civ., 2006, II, 161).
[118] L.F. Risso - M.S. Risso, *Una lettura dell'articolo 2645-ter c.c. Luci ed ombre*, *in Trusts e attività fiduciarie*, 2013, 27.

Although the deed of destination and trusts share certain conceptual similarities, significant differences in their form, time limits, content, effects, and fiduciary nature limit any substantive correspondence between the two.

A key distinction lies in the extent of control relinquished by the grantor. The deed of destination imposes a restriction that limits the grantor's ability to freely dispose of the property, diverging from the general principle under Article 2740 of the Civil Code, which establishes a debtor's universal liability for obligations with all their assets.

This purpose-driven restriction requires the property to serve a meritorious interest, as defined under Article 1322 of the Civil Code, such as supporting individuals with disabilities, benefiting public administrations, or serving other socially significant objectives. In essence, the deed of destination embodies the *functionalization* of an asset for a declared purpose. This entails imposing a restriction that limits the free enjoyment and circulation of the asset, as well as creditors' ability to rely on the grantor's general estate as security. Such limitations underscore a shift from general ownership principles toward a purpose-driven model of asset utilization.

The unilateral nature of the deed of destination, whereby the grantor's sole will suffice to establish it, invites comparison to the trust. However, interpretations of Article 2645-*ter* differ. Some scholars suggest it introduces a new type of legal transaction—a domestic trust governed entirely by national law—characterized by its destination purpose, while others contend that the rule simply permits the public recording of typical or atypical transactions that produce patrimonial destination effects without creating a distinct legal framework.

Compared to a trust, the deed of destination offers only limited asset segregation. While a trust achieves complete separation of assets—shielding trust property from both the settlor's and trustee's personal estates—the deed of destination achieves a more restricted form of segregation within the grantor's estate. Moreover, the deed applies solely to immovable and registered movable property, with a maximum duration of ninety years or the beneficiary's lifetime. Trusts, in contrast, provide greater flexibility regarding in terms of the types of assets and the potential duration of the arrangement.

Although the deed of destination does not directly compete with the traditional trust model, overlap may occur when the destination clause becomes part of a broader fiduciary framework for actively managing assets. However, the deed of destination, as envisioned by Article 2645-*ter*, is primarily a passive mechanism aimed at functionalizing property for a declared purpose. This contrasts with the trust, which typically involves a dynamic and comprehensive management to achieve the settlor's objectives.

The *deed of destination* under Article 2645-*ter* represents a distinctive legal tool within Italian law, providing a means of dedicating property to protected purposes while maintaining formal ties to the grantor's estate. While it shares certain conceptual parallels with trusts, particularly in its purpose-driven approach and unilateral nature, its limitations in scope, duration, and segregation differentiate it from the trust model. Rather than serving as a direct substitute, the deed of destination complements the broader landscape of fiduciary arrangements, offering a targeted solution for situations where asset functionalization aligns with the interests recognized as worthy of legal protection.

2.2.3. The setting up of a trust

It is possible to illustrate the sequence of steps involved in establishing a trust by hypothesizing a general case scenario. Mr. Balla, a businessman, wants to figure out a way to ensure that, after his death, his business does not suffer due to mismanagement by his two sons, each of whom possesses unquestionable skills, but unwilling to accept the potential leadership of the other. Balla wants to leave his estate, and thus the company, to his two sons in equal shares without any distinctions, but he also wishes to find a solution to prevent the business from falling into a state of decision-making deadlock in the event that a difference of views arises between his sons regarding the entrepreneurial decisions to be taken. Attorney Romeo advises Mr. Balla that, apart from a trust, there are no other instruments that can achieve the same level of effectiveness as a trust to meet his objectives. Therefore, firstly, Mr. Balla (*i.e.* the settlor) establishes a trust, named the *X Trust,* designed for the intergenerational transfer of the business and for corporate and estate succession planning. He formalizes this by executing a trust deed, which outlines the intended program and sets the operational rules for the trust. Simultaneously, Mr. Balla endows the *X Trust* with a trust fund consisting of company shares and stock, financial assets, and real estate. Additionally, he appoints a trustee and a protector.

However, despite the enthusiasm surrounding this development, experienced practitioners recognize the challenges inherent in integrating trusts into the domestic legal framework. Chief among these is the necessity to align the trust instrument with both the principles of Italian civil law and the provisions of the Hague Convention, while ensuring compliance with public policy norms.

Article 1322 of the Italian Civil Code recognizes the principle of contractual autonomy, allowing parties to craft agreements beyond those explicitly provided for in the legal system. However, establishing a trust involves more than mere negotiation. Article 9 of the Convention introduces the concept of *dépeçage*, permitting the application of different laws to various aspects of a trust. This allows practitioners to use a widely recognized legal framework, such as English law, for foundational principles, while tailoring specific provisions under other jurisdictions to better achieve the settlor's objectives. Strict adherence to the Hague Convention's standards, including provisions for public policy compliance, is essential. Italian jurisprudence scrutinizes trusts to ensure their purpose aligns with lawful objectives and does not conflict with the principles of public policy. For instance, trusts established solely to shield assets from creditors, under Article 2740 of the Civil Code, are generally deemed impermissible[119]. Courts also assess the trust deed's clauses and subsequent actions to verify that the settlor's intent is lawful and consistent with the stated objectives.

The validity of a trust, according to Article 2 of the Hague Convention, hinges on three certainties: the settlor's clear intention to establish a trust, the specification of trust property, and the identification of beneficiaries[120]. The English judiciary has crafted a framework of principles to determine the existence of the three fundamental elements that constitute a trust[121]. In the Italian practice, typically, the deed of trust (*i.e, atto istitutivo*) opens with a preamble titled "*Premises*", which serves as a formal expression of the settlor's intent to establish the trust. Moreover, the deed of trust integrates precise legal provisions, that articulate the trust property and outline the mechanisms for identifying and classifying beneficiaries. The settlor's intent must be explicit and reflect an

---

[119] Cassazione civile , sez. III , 28/02/2019 , n. 5814.

[120] Monegat*, Gli elementi essenziali del trust*, in Monegat-Lepore-Valas, *Trust. Aspetti sostanziali e applicazioni nel diritto di famiglia e delle persone*, Torino, 2010. 81.

[121] For an in-depth examination, refer to *supra*, at section 1.3.

understanding of the trust's legal implications, particularly the transfer of ownership to the trustee and the imposition of fiduciary obligations[122]. Properly drafted trusts emphasize the trustee's duties and powers, ensuring that the cause of the legal transaction is coherent and enforceable. A trust is invalid if the trustee's autonomy in managing the assets is curtailed by excessive settlor oversight, as this undermines the essential fiduciary relationship[123]. Furthermore, the existence of a beneficiary is indispensable to the trust's operation, as they are the ultimate recipients of its benefits, or the purposes defined in a purpose trust.

In professional practice, the establishment of a trust requires the drafting of a trust deed, which typically arises from two distinct yet interconnected legal. These transactions may either be consolidated into a single document or more commonly executed through separate documents. The first, the constitutive transaction, often referred to as the "*deed of establishment*", is a unilateral legal act through which the settlor expresses the intent to establish a trust, outlines its framework (what Article 7(2) of the Hague Convention designates as *the objectives of the trust*), and appoints the trustee. The second, the dispositive transaction, also known as the "*the deed of settlement*", is the legal act through which the settlor imposes the trust's constraints on the assets and rights allocated for the implementation of the trust's program. In the case of a self-declared trust, this constitutes another unilateral expression of will, whereas, in the case of a transfer, it involves a bilateral transaction with the settlor as the transferor and the trustee as the transferee.

The adoption of European Directives 2015/849 and 2018/843, implemented in Italy through Legislative Decrees No. 90/2017 and No. 125/2019, underscores the growing importance of transparency in beneficial ownership data, particularly in relation to trusts. This regulatory effort has been further advanced with a draft ministerial decree, submitted for the opinion of the Council of State (*Consiglio di Stato*), as noted in *Cons. St.*, Section on Normative Acts, 19 March 2021, No. 458[124]. The decree aims to harmonize the Italian

---

[122] Lupoi, *Istituzioni del diritto dei trust negli ordinamenti di origine e in Italia*, Milano, 2016, 43.
[123] Evidence of a lack of awareness can be found in cases where the settlor has reserved the unilateral power to remove the trustee, guardian or beneficiaries, but also in situations where the management of the assets is paralyzed by the settlor's decision-making power, such as in the case of companies in which the trustee is a shareholder and is subject to the settlor's instructions before voting in the shareholder's meeting, or where the settlor's consent is also required before an act can be performed, preventing the trustee from doing what the beneficiaries themselves would have requested.
[124] Consiglio di Stato, Opinion No. 00458/2021, Section on Normative Acts, 19 March 2021.

legal framework with EU directives, addressing the need for clear rules on the access, communication, and the consultation of beneficial ownership data to combat money laundering and terrorist financing.

The trust, as a flexible and adaptable legal instrument, holds significant value in assets planning, facilitating arrangements for asset management, intergenerational wealth transfer, and the protection of vulnerable beneficiaries[125]. However, this adaptability also renders it susceptible to abuse, such as shielding assets from creditors, evading legal obligations, or obscuring beneficial ownership[126]. These risks have driven European and national authorities to prioritize measures ensuring transparency in trusts. Article 31 of Directive (EU) 2015/849, amended by Directive (EU) 2018/843, requires beneficial ownership information to be recorded in a central register accessible to competent authorities and relevant stakeholders. In Italy, this obligation was transposed into national law by Legislative Decree No. 90/2017, mandating to report detailed beneficial ownership data to the business register.

The draft decree under review specifies access protocols for beneficial ownership data. Competent authorities and obliged entities are granted comprehensive access upon accreditation, while private parties must demonstrate a legitimate, direct, and current interest, as defined by Legislative Decree No. 231/2007. For the general public, access is permitted for business-related purposes, except in cases where exceptional risks to beneficial owners are identified. Despite its potential to enhance transparency, the Council of State has flagged several concerns in its Opinion No. 00458/2021. These include ambiguities in the distinction between accreditation and access rights, insufficient procedural safeguards for opposing disclosure requests, and unclear allocation of responsibilities between chambers of commerce and the electronic register manager.

While the decree represents a significant step forward in aligning Italy with European anti-money laundering objectives, these issues must be addressed to strengthen legal certainty and procedural fairness. The Council of State's recommendations emphasize the need for revisions to clarify ambiguities, safeguard fundamental rights, and ensure

---

[125] Lupoi, M., *Trusts: Law and Practice*, 2nd ed., Cambridge University Press, 2017.
[126] Comando Generale della Guardia di Finanza, Circolare n. 1/2018, Volume I.

consistent application of the regulations. Doing so will enhance the decree's effectiveness while balancing transparency with privacy protections and the legitimate use of trusts for estate planning.

By addressing these challenges, Italy can ensure that the draft decree becomes a robust tool in combating financial crime, promoting transparency, and reinforcing the nation's alignment with EU regulatory standards. Ultimately, refining this framework will solidify trust as a legitimate instrument for lawful and equitable purposes within a transparent legal environment.

CHAPTER III. The Role of Domestic Trust in Italian Company law and Related Liability Issues

SUMMARY: This chapter illustrates how trusts, recognized under the Hague Trust Convention on the Law Applicable to Trusts and on Their Recognition, serve as a versatile alternative in the Italian legal system, when similar domestic legal mechanisms prove inadequate. Trusts enable settlors to design structures tailored to their needs, provided they remain consistent with Italian public policy. Within this context, trusts have demonstrated particular efficacy in facilitating generational wealth transfers, preserving family business continuity, reinforcing shareholder agreements, and supporting banking, financing, and insolvency operations. The trustee's role is paramount, with professional trustees ensuring fiduciary compliance and the fulfillment of the trust's objectives.

3.1 Integration of Trusts into Corporate Structures 3.2. Practical Applications of Domestic Trusts - 3.2.1. Navigating Generational Transitions in Family Businesses: The Role of Trusts - 3.2.2. The Use of Trusts in Corporate Governance – 3.2.3. Trusts and Banking Relationships - 3.2.4. Trusts and Insolvency Procedures - 3.3 Trustee Obligations and Responsibilities in the Italian Context

3.1. Integration of Trusts into Corporate Structures

The Italian legal system, unlike common law jurisdictions, is not inherently trust-based and lacks specific domestic legislation regulating trusts. This necessitates a careful evaluation by practitioners to determine whether the intended objectives can be realized using mechanisms already recognized and regulated under Italian law. Should this inquiry reveal that domestic mechanisms are insufficient, resorting to a trust becomes a suitable course of action. Trusts are particularly effective in scenarios where direct management of assets is inadequate, and the delegation of administrative responsibilities to a trustee offers a more versatile approach.

The adaptability of trusts lies in their flexible structure. The settlor appoints a trustee and identifies the beneficiaries, while enjoying the possibility of selecting the governing law from jurisdictions that have adopted comprehensive trust regulation under the Hague Trust Convention on the Law Applicable to Trusts and on Their Recognition. This allows the settlor to tailor the trust to specific objectives, provided that the chosen governing law does not conflict with Italian public policy as per Article 13 of the Hague

Convention. Such adaptability ensures that trusts remain a versatile tool while respecting the mandatory principles of the local legal framework.

The asset segregation intrinsic to trusts creates distinct estates: the trustee's personal estate, which serves their creditors, and the separate trust estate, devoted exclusively to the purpose specified by the settlor. This segregation ensures that trust assets are shielded from the claims of both settlor and trustee creditors, reinforcing the trust's role as guarantee instrument. Trusts thus provide enhanced security in commercial transactions, supported by the trustee's fiduciary obligations to manage assets for the designated purpose.

Although Italian law does not provide a trust-like mechanism, it recognizes various forms of asset segregation and destination. Examples include family funds (Article 167 of the Civil Code), insurance proceeds (Article 1923), and estates dedicated to specific business ventures (Article 2447-bis) [127]. However, these mechanisms lack the comprehensive asset protection afforded by trusts, especially in shielding assets from creditors' claims outside their specific purpose.

Under the Hague Convention, Italy recognizes foreign trusts provided they adhere to its provisions. Practitioners must ensure compliance with both contractual autonomy – a fundamental liberty enshrined in Article 41(1) of the Italian Constitution, which concretely manifests in the choice to adopt a domestic trust – and the recognition of foreign law that governs the trust relationship. This dual consideration reflects a growing acceptance of trusts as legitimate instruments within the Italian legal framework, especially where they satisfy specific needs unmet by domestic tools.

Since the trust structure involves the management of assets assigned for the pursuit of a specific interest worthy of protection ("*objects of the trust*", Article 7(2)(d) of the Hague Convention[128]), as designated by the settlor in the trust instrument, and entails the segregation of assets under the trustee's stewardship, it serves as an exceptionally flexible

[127] For an in-depth examination of analogous domestic legal instruments, refer to *supra*, at sections 2.2.3. and 2.2.4.
[128] The Hague Convention, and through it the domestic laws of the countries that have adopted this model of trust regulation, impose no restrictions on the types of objectives a trust may pursue.

and multifaceted tool for asset management, with almost unlimited applications[129]. In Italy, trusts are employed in a variety of contexts, ranging from family arrangements to philanthropic, charitable, and welfare purposes, as well as creditor protection for settlor-debtors and entrepreneurial or corporate structures. It is therefore unsurprising that one of the main uses of trusts in Italy pertains specifically to its guarantee function, primarily because the trust can ensure more streamlined and cost-effective procedures compared to traditional forms of real guarantees. However, as Lupoi aptly notes:

> "*It is perhaps in the realm of social and commercial life that the role of trusts is most pronounced. (...)"*[130].

Thus, a significant area where the institution of trusts finds applicability is in operations connected to commercial transactions.

"*In Italian corporate law, the applications of trusts have significantly expanded: from their use in exercising voting rights, often as part of shareholder agreements, to their role—particularly in the form of purpose trusts—in the management of equity holdings. Within corporate groups, trusts can thus be employed to manage equity interests held by the holding company or by subsidiaries at various levels of the corporate structure."* [131]

Trusts have proven valuable in addressing a range of entrepreneurial and business-related challenges, particularly in the context of generational wealth and business transfers. By employing a trust, an entrepreneur can ensure the efficient and orderly transition of their business and broader assets to the next generation, aligning this process with both legal requirements and personal intentions. Beyond generational transfers, trusts can play a pivotal role in supporting various aspects of entrepreneurial activity. For instance, they can facilitate the management of shareholder agreements by providing a

---

[129] See Cass., 21 June 2019, no. 16700, in *GT - Riv. Giur. Trib.*, 2019, 7, 590, with commentary by Busani, *La Cassazione si stabilizza: imposte in misura fissa per l'atto di dotazione di qualsiasi tipologia di trust*, which states: "[…] the trust may serve diverse purposes: family-related; guarantee; liquidation and payment; implementation of a public work; social solidarity; or the advancement of interests deserving of protection in favor of disabled persons, public administrations, or other subjects (Article 2645-ter of the Italian Civil Code) …".

[130] M. Lupoi, *Trusts*, Milano, 2001, 672.

[131] G. Galgano, *Shopping del diritto, trust interno, gruppi di società*, in Trusts, 2002, 336

neutral and secure mechanism for holding and transferring shares or voting rights, thereby safeguarding the interests of all parties involved. Trusts can also act as a reliable vehicle for providing guarantees in payment or deposit arrangements, offering enhanced security and flexibility. In the context of insolvency proceedings, trusts can be instrumental in ensuring the effective administration of assets, protecting creditors' interests while enabling the business to navigate and potentially recover from financial distress. Moreover, trusts can oversee specific phases of business operations, such as managing the proceeds of a sale, distributing profits, or allocating funds for reinvestment.

3.2. Practical Applications of Domestic Trusts

3.2.1. Navigating Generational Transitions in Family Businesses: The Role of Trusts

The phenomenon of "*generational transition*" addresses the succession of family wealth to those designated by law or the will of the holder. It encompasses the transfer of wealth in its various forms—movable and immovable assets, tangible and intangible goods, receivables, and values. This process entails complex issues concerning the intergenerational transfer of a patrimony, encompassing both assets and business enterprises.

In Italy's economic system, family-controlled corporate groups are prevalent, reflecting the centrality of family in Italian economic culture[132]. Indeed, the success of a family business is often linked to the proper transfer of management functions from the owner to the most capable descendant and the preservation of unity in ownership structures[133]. Thus, generational transfer should be carried out with careful and adequate planning. This planning must, on one hand, be designed to avoid potential generational conflicts, considering the diverse needs of different generations within the company (including fostering entrepreneurial skills among younger family members while establishing specific supervisory roles for the departing entrepreneur). On the other hand,

[132] The *European Regional Development Fund* of the European Commission, tasked with strengthening social, economic, and territorial cohesion among Member States, has reported that only 30% of businesses survive the second generational transition, and a mere 10% manage to surpass the third.
[133] Assolombarda*, Guida per i passaggi generazionali: condizioni di successo, errori da evitare e case history*, Dispensa n. 06/2016.

it must focus on identifying successors with superior professional and managerial skills while not disregarding other family members with equal rights.

Effective generational planning can prevent conflicts over leadership and direction, which may arise from divergent strategic development visions among family members or from a lack of interest in business management by those destined for it. These critical issues can undermine the governance of the enterprise, potentially leading to its paralysis and, frequently, its inevitable closure[134].

Consider, for instance, the above situation. The business would be inherited by the entrepreneur's successors if such a circumstance was not controlled. This could lead to the business being sold to third parties, managed by one of the successors, or jointly administered by all of the descendants. In the second scenario, there is a serious chance that the company could fail because of their possible incapacity as managers.

In this regard, it is crucial to consider the *family pact* (*i.e.* patto di famiglia per l'impresa) before tackling the problem of generational transitions in business through the usage of trusts. Articles 768-*bis* to 768-*octies* of the Italian Civil Code regulate this institute, which was incorporated into the Italian framework by Law no. 55 of February 14, 2006.

The objective of the *family pact* is to permit the business owner to pass on the company's assets to the descendent who has the greatest capacity to carry on the enterprise he has founded, making sure the transfer takes place while the business owner is still in function. In addition to protecting the business's ongoing existence in the market and the larger interests of preserving employment levels, this strategy promotes generational succession and offers a solution that minimizes prejudice to legitimate heirs by obtaining first their consent[135]. Such objectives had previously been sought in Italy through a variety of methods, including the creation of foundations or specific corporate strategies, such as *put and call* mechanisms, shareholder agreements, capital increases,

---

[134] The challenges and solutions we will address pertain primarily to succession arrangements during the owner's lifetime (*inter vivos* succession). For planning succession upon the owner's death (mortis causa), the specific institutions provided by the Italian legal system should be consulted.
[135] Gabrielli E., ed. *Commentario del Codice Civile - Delle Successioni, Volume III: Artt. 713-768 octies e Leggi Collegate*.

holding companies.[136] Since then, these solutions have been extended to include the *family pact*.

The *family pact* is a contract in the form of a public deed, which enables an entrepreneur/settlor to give title of the "*business*" or "*shares*" to "*one or more*" of their "*descendants*", known as "*beneficiary heirs*". These beneficiaries must then "*liquidate*" to the "*non-beneficiary heirs*" - or to the people who would be considered the settlor's heirs if the settlors' succession *mortis causa* were to be opened at the time the family pact is singed - a sum equal to the value of their respective shares of the reserved portion. However, there is an exception to this rule: the *non-beneficiary heirs* can opt out of all or part of their entitlement to such "*liquidation*", so long as the estate is worth as much as the settlor gave the *beneficiary heir*.

As a result, the *family pact* is an *inter vivos* contract involving parties identified at the moment of execution and it has direct repercussions on the entrepreneur's existing assets. Therefore, the entrepreneur's passing is neither the reason for the contract nor the specific moment at which it takes effect.

This legislative framework signifies a forward-thinking approach by the Italian legislator in fostering stability and security in generational wealth transfers, particularly in the business realm. By circumscribing the remedies aimed at protecting reserved shares to specific assets —namely, business assets and equity interests— the law creates a carefully delineated subset within the estate of the *pater familias,* promoting continuity in the leadership. Specifically, according to Article 768-*quarter,* paragraph 4, of the Italian Civil Code, the execution of a *family pact* entails that "*the allocations received by the participants to the agreement are not subject to collation or reduction*"[137]. However, these allocations must still comply with the principle that they are "*charged to the reserved shares*" due to the recipients.

---

[136] Jovenitti P., *Strategie mobiliari per la continuità e successione d'impresa*, Milano, 1998, 103 ss.
[137] Upon the opening of the settlor's succession *mortis causa*, such distributions remain unaffected by the traditional mechanisms of collation (as outlined in Article 737 of the Civil Code), which normally oblige legitimate heirs to account for gifts received during the deceased's lifetime. Similarly, they are shielded from reduction actions initiated by legitimate heirs to safeguard their reserved shares, as per Article 557 of the Civil Code.

Family pacts in Italy, while designed to facilitate the intergenerational transfer of business assets, often fall short of their intended objectives. They suffer from numerous limitations and uncertainties that can complicate their practical application, impeding the preservation of business unity[138]. In this context, trusts offer a compelling alternative[139]. The underlying *ratio* remains consistent: to preserve the integrity of the business assets achieved, with a forward-looking perspective aimed at fostering the progressive development of the enterprise. By entrusting the administration of assets to a trustee, typically an individual external to the entrepreneur's family, the trustee's fiduciary role ensures that the business remains operationally cohesive and aligned with the settlor's intention, while mitigating the risks of fragmentation. In a business trust, the trustee is tasked with managing the business assets in accordance with the terms of the trust and eventually re-transferring them to the designated trust beneficiary, ensuring professional stewardship of the business during the transitional period. Furthermore, the trustee's role extends beyond merely acting as a guarantor of continuity in the management of the business in line with the founder's directives. More critically, the trustee is tasked with identifying, among the group of beneficiaries, the descendants best suited to assume control of the company. This evaluation must be conducted based on objective criteria, clearly specified in the trust deed, to ensure impartiality and alignment with the long-term interests of the enterprise (for instance, business acumen, a demonstrated sense of responsibility, entrepreneurial aptitude, and a readiness to embrace the risks inherent in managing a business). Furthermore, the trustee, in managing corporate shareholdings, seeks to promote the implementation of a modern and efficient governance system founded on the assessment of the heirs' skills. In contrast, the *family pact* is designed to facilitate the immediate generational transfer of the family business, as the settlor

[138] For instance, the agreement mandates the availability of non-business assets to compensate the reserved share of heirs who do not participate in the business inheritance. This condition is exceedingly difficult to fulfil in practice, as the family firm typically represents the principal, and sometimes the sole, significant financial resource. The lack of sufficient liquid or non-business assets to meet these compensation requirements can undermine the feasibility of the agreement.

[139] For example, the Tribunal of Lucca underscored the legitimacy of such arrangements in its judgment of April 8, 2016 (published in *Trust*, 2017, 3, p. 171). The court affirmed that "*a trust aimed at preparing the generational transition in the administration and ownership of family assets is perfectly recognizable within our legal system*".

identifies the descendant deemed most capable of continuing to manage the enterprise and executes the transfer directly[140].

The exceptional flexibility of the trust offers the *pater familias* a comprehensive tool for achieving generational succession objectives that cannot be fully realized through *family pacts.* Unlike a *family pact,* its establishment does not require the agreement or consent of heirs or other parties, as it is a unilateral act by the settlor. Moreover, it imposes no obligation for asset liquidation at the time of its creation, allowing for the preservation of business integrity. Most critically, the trust neutralizes the succession process by segregating the transferred assets, ensuring their unity and shielding them from the personal circumstances of the settlor throughout the trust's duration[141].

The establishment of a trust aimed at facilitating the generational transfer of a business produces several significant effects that ensure a secure transition. First, the settlor/entrepreneur transfers the business or the shares of the company to the trustee, who acquires legal ownership of the assets[142]. This transfer enables professional management, safeguarding the continuity of the business[143]. If the trust involves corporate shares, the settlor can specify varying levels of involvement for the trustee as a shareholder in the family business within the trust deed. The trustee's role may range from passive oversight, where they monitor the management conducted by the company's directors, to a highly active position, especially in scenarios where the settlor anticipates that no descendants will be ready to assume leadership of the business after their death. This flexibility also encompasses the exercise of voting rights, which the settlor can regulate in the trust deed to ensure alignment with their vision for the enterprise's continuity and governance. Thus, the settlor defines a detailed program within the trust deed that the trustee is obligated to

---

[140] Franceschini, *Patti di famiglia per l'impresa e trust*, in Monegat-Lepore-Valas (a cura di), *Trust. Aspetti sostanziali e applicazioni nel diritto di famiglia e delle persone*, II, Torino, 2010, p. 295.

[141] While Article 15 of the Hague Convention mandates the protection of domestic rules on succession law—particularly regarding potential prohibitions on succession agreements—jurisprudence has consistently excluded trusts from being classified as such agreements. This distinction rests on two fundamental principles: unilateral nature of the act of the settlor and the asset transfer conditions, not contingent upon the settlor's death, rather, death is merely an incidental event.

[142] In contrast, the *family pact* establishes the designated beneficiary heirs as both the owner of the business or corporate shareholdings assigned to them and the beneficiary of the agreement itself. Through the transfer in their favor, these individuals are recognized as descendants chosen by the settlor to continue managing the enterprise.

[143] Companies belonging to banking groups, fiduciary companies, and professional service firms can often serve as trustees in the context of a trust for generational transfer purposes.

execute, outlining specific rules and objectives concerning the administration of the assets and rights transferred into the trust. The assets and rights bound within the trust are segregated from the trustee's personal assets, ensuring they are protected from external claims or liabilities[144]. Finally, all these arrangements are prearranged to serve the interests of the designated beneficiaries. Indeed, from a subjective perspective, the use of a trust – instead of a *family pact* – is justified in several scenarios. For instance, a trust is particularly advantageous when the family member designated to continue the business is not a direct descendant of the settlor but rather a collateral relative or another individual. Similarly, a trust becomes the preferred instrument when the entrepreneur has no descendants but seeks to ensure the continuity of their business by assigning it to a different relative or to the person who, over time, demonstrates the greatest capability. Additionally, a trust offers a practical solution when the descendants are too young to exhibit entrepreneurial aptitude or the necessary skills to manage the business effectively. These individuals, chosen by the settlor, are the intended recipients of the trust's benefits and eventually receive the assets into their personal estates upon the trust's termination.

By examining a tangible example, it becomes possible to better understand how trusts can be effectively utilized to address the challenges of generational business succession.

The Brunello Cucinelli family has set up a domestic trust to ensure the smooth intergenerational succession of their renowned family firm. This distinguished joint-stock corporation, listed on the Milan stock exchange (*i.e.* Borsa Italiana, segment MTA), specializes in luxury cashmere menswear, women's wear and accessories, catering to markets across Europe, North America, and East Asia. Mr. Brunello Cucinelli, the founder, transferred ownership of Fedone SRL, the holding company through which he controls 61,56% of Brunello Cucinelli SPA, to Esperia Trust Company SRL (Banca Esperia), which now holds this participation as trustee[145]. The irrevocable trust was designed not only to secure the continuity of the company's entrepreneurial and

[144] In the *family pact,* there is no segregative effect, as the assets transferred under the agreement become an integral part of the designated beneficiary heir's personal estate. This integration means that the assets are fully absorbed into the heir's patrimony, exposing them to potential risks and claims arising from the heir's personal liabilities.
[145] Brunello Cucinelli S.p.A., *Istituzione del Trust*, available at: https://investor.brunellocucinelli.com/yep-content/media/istituzione-del-trust-brunello-cucinelli.pdf.

philanthropic endeavors but also to prepare for the eventual transfer of control on his descendants. Thus, the trust's beneficiaries are Mr. Cucinelli's two daughters, who actively participate in the governance of the trust as members of the *Committee of Wise Men* – a five-member advisory board established to guide and support the trustee. Notably, this carefully planned succession arrangement has not altered the internal corporate governance of Brunello Cucinelli SPA, ensuring stability and continuity in the company's operations while preserving its core values and legacy[146].

3.2.2. The Use of Trusts in Corporate Governance

In the corporate context, the use of trusts has emerged as a pivotal mechanism to strengthen ownership structures and enhance governance frameworks —objectives historically pursued within the Italian legal system through shareholders' agreements[147], particularly voting and lock-up agreements. While widely used to regulate shareholder relations and protect specific interests, these agreements lack enforceability against the company, rendering them structurally vulnerable.

Their validity hinges on the absence of conflict with mandatory corporate law provisions, yet their primary weakness lies in their contractual nature, which limits enforceability to the contracting parties. Breaches may lead to compensatory obligations but do not affect the proprietary actions of shareholders, as such agreements lack *in rem* effects. Furthermore, the legal limits on their duration —three years for listed companies under Article 123 of the Italian Consolidated Law on Finance (TUF) and five years for non-listed companies under Article 2341-bis of the Italian Civil Code— undermine their long-term utility. In both listed and non-listed companies, even agreements of indefinite duration are subject to unilateral withdrawal rights, compounding their fragility.

[146] "*It is a choice I am very happy with*" tells Cucinelli "*In this way the company does not become stuck, everyone has their role, I can manage the company as I wish, and at the same time the choice in favor of my daughters is irreversible. They, together, can in turn do whatever they want, even sell, but in case of disagreement, one will have to convince at least two of the three professionals I have chosen to support them in the trust*" (reported by V. Puledda in "*Trust, fondazioni, patti aziende familiari al bivio la successione è un rebus", La Repubblica,* 7 November 2016).

[147] This is the type of contract through which the shareholders of a company agree to make decisions concerning the management of the company in which they participate — for example, decisions related to exercising voting rights in shareholders' meetings or board meetings, the appointment of corporate bodies, the distribution of profits, and so forth — or to regulate the transfer of shares in the company's capital, such as through the granting of purchase and sale options.

Shareholders' agreements are further susceptible to dissolution upon events such as a shareholder's death or attachment of shares by creditors, as ownership transfers often terminate the agreement concerning the affected shares. Consequently, the Italian legal framework has highlighted the need for mechanisms ensuring stricter adherence to such agreements and mitigating circumvention risks.

One such mechanism is the integration of a trust into shareholders' agreements, with legal ownerships of shares transferred to a trustee. The trustee administers the shares in alignment with the agreement's objectives, ensuring consistency and protecting against changes in shareholder circumstances. A notable example is the *voting trust,* which concentrates voting rights in the trustee, thereby reinforcing compliance, safeguarding collective shareholder interests, and providing stable governance.

As A. Fusi notes, "*this mechanism involves the shareholders divesting themselves of their shares, which are transferred to a trustee, who is then obligated to exercise the associated rights in accordance with the terms of the trust deed and as agreed upon by the settlors*"[148]. In common law systems, indeed, a *voting trust* involves shareholders transferring their shares to a trustee, who exercises voting rights in strict conformity with the trust deed. This arrangement ensures that voting is consistent with the shareholders' collective agreement, eliminating discrepancies and securing managerial coherence. From a procedural standpoint, original shareholders retain beneficial interests, such as dividend rights, while the trustee holds legal title and voting authority.

"*The use of a trust (...) offers the undeniable advantage of eliminating disputes regarding the separation between ownership and the entitlement to exercise shareholder rights, as it ensures that voting rights are granted to an individual who, under corporate law, holds the status of shareholder"*[149]. This distinction highlights the unique characteristics of a voting trust compared to voting syndicates and proxies, whether revocable or irrevocable, agreements concerning pledged shares, and ordinary trusts.

[148] A. Fusi, *I patti parasociali alla luce della nuova disciplina societaria e le possibili applicazioni del voting trust*, in *Società*, 2007, p. 693.
[149] R. Lener, *Intervento in assemblea e voto del trustee,* p. 517.

Voting trusts establish a fiduciary relationship with irrevocable share transfers, offering superior enforceability and stability.

An example of practical application of a voting trust in Italy could be found in a limited liability company (*s.r.l.*) with many shareholders, some of whom – natural persons – entered into a shareholders' agreement to ensure uniform exercise of voting rights. Aware of the potential for such agreements to be disregarded, these shareholders decided to reinforce their pact by establishing a trust, identifying this instrument as the most effective solution. In this scenario, the participating shareholders transferred their shares to a trust, with ownership vested in a trustee, to ensure neutrality and professionalism in management. The trust deed, executed as a public act, outlined the administration of the shares and provided directives for exercising voting rights during meetings, ensuring that the trustee acts exclusively in accordance with the objectives set by the settlor.

This structure offers numerous advantages. Firstly, it enhances the enforceability of the shareholders' agreement, as decisions regarding the shares are exclusively exercised by the trustee following pre-established rules, thereby reducing the risk of internal conflicts among shareholders. Secondly, asset segregation ensures that the shares remain protected from potential claims by third parties, providing a level of security that traditional shareholders' agreements cannot offer. Finally, the trust deed provides operational clarity and stability, eliminating ambiguities that might undermine the effectiveness of the agreement, as the shares all belong to a single individual who, as such, will exercise the voting rights at the shareholder's meeting and decide when and if to transfer those shares.

3.2.3. Trusts and Banking Relationships

The applications of the trust in the banking and financial sectors are numerous. For the same reasons that the segregation of funds, combined with assigning their control to a third party, enables the effective establishment of security mechanisms, a trust can similarly ensure that financing is allocated to the specific purpose for which it was granted. Thus, the suitability of this instrument to facilitate and execute financial transactions stems from its two fundamental characteristics: asset segregation and the delegation of legal positions to the trustee.

A notable example is the *escrow account*, which involves holding a sum of money under specific conditions that determine its release to one party or the other in a transaction[150]. This mechanism is widely used in international real estate transactions and, more generally, in international trade. For instance, the payment for goods may be held in *escrow* until the buyer verifies that the delivered goods conform to the quality conditions outlined in the order. Similarly, *escrow accounts* are frequently employed in corporate acquisitions, where part of the purchase price is held in *escrow* while the buyer completes the *due diligence* or awaits the fulfillment of specific profitability parameters agreed upon. The funds in *escrow* are ultimately released to the seller upon the occurrence of the arranged conditions; otherwise, they are returned to the buyer.

For broader investment operations with a longer time horizon, such as *project financing* or *private equity*, this form of trust can also be effectively employed to ensure that funds are allocated to a specific project. Whether it involves an infrastructure project, as in the case of *project financing*, or the establishment or acquisition of a company with high asset growth and profitability prospects, as in *venture capital* or *private equity*, a *borrowing trust* can serve as a valuable tool. This structure allows the trustee to receive financing and subsequently disburse it to the promoters of the investment initiative in accordance with a work progress plan agreed upon with the financier. The mechanism of asset segregation ensures that the funds provided cannot be claimed by the personal creditors of the promoters, while the trustee's independence from the promoters guarantees that the financing is used exclusively for the intended project.

In cases involving multiple investors, including private individuals, a *security trust* can be established to consolidate all investments. In this structure, the security trustee represents the collective interests of the investors, whether in dealings with the borrowing trustee or directly with the promoters of the funded initiative. This dual-layered arrangement—borrowing trust for fund management and security trust for investor representation—offers a robust solution for managing complex, long-term investments.

---

150 Zagami, *L'escrow agreement negli ordinamenti di common law e nell'ordinamento italiano,* in *Trust*, 2012, 365.

However, the trustee's role in these contexts is primarily administrative. It is typically limited to verifying the conditions upon which the definitive transfer of funds depends and executing the corresponding transactions. In many cases, the bank where the *escrow account* is held acts as the *escrow agent* itself, simplifying the process further. Still, the trustee's fiduciary responsibilities remain crucial, ensuring transparency, accountability, and adherence to the terms of the arrangement.

Despite the clear benefits of these mechanisms, it is worth noting that in Italy, and more broadly in civil law jurisdictions, the use of *escrow accounts* remains underutilized[151]. These mechanisms are still predominantly viewed as tools of international law. While Italian law provides instruments with some functional similarities, such as contracts for the benefit of third parties or provisions governing deposits in the interest of a third party, these constructs do not offer the same level of security, flexibility, or administrative efficiency as *escrow accounts* - or borrowing trusts. This gap underscores the potential for greater adoption of such mechanisms within Italy and other civil law jurisdictions, particularly to meet the demands of modern banking and financial practices.

3.2.4. Trusts and Insolvency Procedures

A specific type of trust that has gained significant traction in professional practice within our legal system is the liquidation trust. According to Circular no. 34/E of the Italian Revenue Agency, dated October 20, 2022, a liquidation trust is defined as one "*established to facilitate the liquidation of the assets belonging to the settlor*"[152]. In such arrangements, an entrepreneur, whether an individual or a legal entity, places certain assets or rights into the trust. The primary objective is to liquidate these assets to satisfy creditors using the proceeds generated from the trust fund's liquidation[153]. Simultaneously, the structure allows any surplus from the liquidation process to benefit

---

[151] The judgment delivered by the Court of Oristano on March 9, 2016, is significant in this regard, as it provides the definition of *escrow*. Similarly, judgment no. 2612 rendered by the Court of Milan on February 25, 2013.

[152] Circular no. 34/E, dated October 20, 2022, available at: https://www.agenziaentrate.gov.it/portale/documents/20143/4723049/Circolare+Trust+n.+34+derl+20+ottobre+2022.pdf/f286f49d-debe-7eda-89fc-8cf2bbe568fb

[153] Busani, Fanara, Mannella, *Trust e crisi di impresa, risanamento e liquidazione delle imprese mediante i negozi di destinazione patrimoniale*, Milano, 2013, p. 34.

the settlor, provided no alternative allocation of these funds is specified by the settlor pursuant to Article 2, Paragraph 3, of the Hague Trust Convention[154].

Regarding its structure, a liquidation trust, like any other trust, is established through a unilateral act by the settlor. This trust may take the form of either a beneficiary trust, where the creditors are the beneficiaries, or a purpose trust, focused on the goal of satisfying the settlor's creditors. Although creditors technically do not participate in the establishment of the trust deed, it is necessary for the settlor to reach an agreement with them regarding the mechanisms for satisfying their claims through the trust. This ensures that the trust fulfills its dual purpose: aligning with the settlor's interest in settling debts and addressing the creditors' interest in receiving payment for their claims.

The ultimate function of a liquidation trust is to satisfy the claims of one or more creditors (either of the settlor or of a third party for whom the settlor establishes the trust) against a debtor who has incurred obligations in the course of conducting their business[155]. Consequently, the liquidation trust can be established in a variety of concrete scenarios, tailored to address the specific needs and circumstances surrounding the debtor's financial situation and the creditors' claims[156].

In professional practice and case law, various types of liquidation trusts have emerged, differentiated by their specific purposes and contexts. For enterprises in *bonis*, a liquidation trust can be established by an entrepreneur who has not yet entered a state of financial crisis but seeks to prevent individual enforcement or precautionary actions by creditors[157]. In such cases, the trust acts as an alternative form of security, distinct from conventional mechanisms like pledges, mortgages, or privileges, providing reassurance to creditors by prioritizing their claims through the trust. Additionally, a liquidation trust may be created by a company that, while not insolvent, has decided to discontinue its business activities. In this scenario, the trust facilitates the liquidation of the company's

---

[154] In fact, pursuant to Article 2, Paragraph 3, of the Hague Convention: "*The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust*."
[155] Valas, *Trust e procedure concorsuali*, in Monegat, Lepore, Valas (eds.), *Trust: Applicazioni nel diritto commerciale e azioni a tutela dei diritti in trust*, Turin, 2010, p. 82.
[156] Consiglio Nazionale del Notariato, *Studio n. 305-2015-I del 12-13 gennaio 2016, Il trust liquidatorio*, in *Trust*, 2016, 5, p. 554.
[157] Trib. Milano, 22 ottobre 2009, in *Trust*, 2010, 1, p. 77.

assets as an alternative to ordinary liquidation procedures. The Court of Appeal of Milan, in its decision of April 24, 2020, affirmed that a liquidation trust is not void if the company was not already insolvent at the time of its establishment—a condition not automatically inferred from a passive deficit—and if genuine liquidation activities benefiting the creditors follow the trust's creation[158]. Conversely, in situations where a business faces financial difficulty, a liquidation trust may still be used by an entrepreneur to avoid judicial liquidation and aim for a return to solvency. Such a trust can facilitate access to a negotiated crisis resolution procedure, providing a structured approach to addressing financial challenges while safeguarding creditors' interests. This demonstrates the flexibility of liquidation trusts in addressing diverse financial scenarios, from preemptive stabilization to structured liquidation and crisis management.

In detail, in the context of an enterprise *in bonis*, which is neither in a state of crisis nor insolvency, the type of liquidation trust most relevant is the so-called *pure liquidation trust.* This structure is used as an alternative to the ordinary legal procedure for liquidating a company and is not aimed at ensuring the continuation of business activities.

The relationship between liquidation trusts and the regulatory framework for insolvency procedures has been the subject of significant judicial and doctrinal attention, yielding diverse interpretations and conclusions. A commonly held view in doctrine and parts of lower courts asserts that a liquidation trust established by a corporation solely to liquidate its assets, bypassing the statutory liquidation process, lacks legal merit[159]. This is because the statutory liquidation process is often considered mandatory[160]. However, the Italian Supreme Court in a 2014 decision addressed the issue for the first time, holding that a liquidation trust is void under Article 1418 of the Italian Civil Code only if it seeks to bypass insolvency procedures and effectively deprives insolvency authorities of control over the liquidation of assets, violating mandatory insolvency laws, as outlined in Articles 13 and 15(e) of the Hague Convention[161].

---

[158] Court of Appeal of Milan, decision of April 24, 2020, in *Trust*, 2021, p. 191.
[159] Trib. Forlì, 20 February 2015, available at *ilcaso.it*.
[160] On the mandatory nature of the liquidation procedure under Articles 2487 et seq. of the Italian Civil Code, see Campobasso, *Commercial Law, Volume 2: Company Law*, Milan.
[161] Cassazione Civile, Sez. I, 9 May 2014, No. 10105.

The case reviewed by the 2014 decision concerned a falsely labeled liquidation trust established by a company that was already insolvent at the time of liquidation. The trustee (also the corporate liquidator) was entrusted with the entirety of the company's assets and liabilities, after which the company was deregistered from the business register. Within the one-year period prescribed by Article 10 of the Bankruptcy Law, the Tribunal of Rome declared the company bankrupt and invalidated the liquidation trust under Article 1418 of the Civil Code and Articles 13 and 15(e) of the Hague Convention. The Supreme Court upheld this decision, affirming that Italian law cannot recognize a trust whose purpose is to segregate a company's assets at the expense of public mechanisms such as bankruptcy, as mandated by Article 15 of the Hague Convention. The trust, in such cases, is deemed legally non-existent under Italian law.

In Italian law, there are no compelling public policy or mandatory restrictions preventing the use of alternative liquidation procedures to those outlined in Articles 2487 et seq. of the Civil Code, provided that such procedures are not aimed at harming creditors. When examining the effects of a pure liquidation trust, it appears reasonable to assert that creditors should not suffer any prejudice and might, in fact, benefit—for instance, through the greater efficiency and speed of a trustee compared to a traditional liquidator. Supporting this view, the Tribunal of Milan stated that the establishment of a trust is an alternative and faster method compared to statutory liquidation under Articles 2487 et seq. of the Civil Code, posing no inherent prejudice to creditors but instead aiming to satisfy their claims[162].

Consequently, the legitimacy of a company's deregistration from the business register following the establishment of a pure liquidation trust—intended to liquidate all corporate assets and distribute any surplus among shareholders proportionate to their ownership stakes—has been recognized. More recently, the Supreme Court reaffirmed that although the acceptance of liquidation trusts does not constitute blanket approval, it requires a thorough evaluation of the trust's specific purpose, and the merit of the interests involved[163]. Nevertheless, the court acknowledged the trust's competitive utility,

[162] Tribunale di Milano, 8 Gennaio 2018, in *Trust*, 2018, 2, p. 291.
[163] Cassazione Civile, Sezione III, 10 Febbraio 2020, N. 3128.

emphasizing its potential to prevent healthy businesses, which might face sudden disruptions in their operations, from becoming undervalued targets for acquisition by competitors during challenging economic conditions.

This evolving jurisprudence highlights the trust's potential as a legitimate and efficient tool for asset liquidation, provided it is not employed to circumvent mandatory insolvency regulations.

At this juncture, it becomes essential to direct our attention toward those forms of liquidation trusts that intertwine with scenarios of corporate distress: the *endo-concursal trust* - or *rescue* trust. This is a specific type of liquidation trust established by an entrepreneur in a state of significant but reversible financial distress. The purpose of the trust in this context is preventive, aiming to avoid judicial liquidation by liquidating certain assets to satisfy creditors. Once the economic and financial stability of the business is restored, the entrepreneur intends to continue operations[164].

This type of trust is particularly relevant for entrepreneurs facing liquidity crises but who still have sufficient assets. In such cases, the trust serves as an alternative to other negotiated solutions for resolving corporate crises.

The Italian Supreme Court has clarified that the legitimacy of using a trust depends on the legality of the entire operation within which the act of asset segregation is undertaken. In its decision No. 3128 of February 10, 2020, the court emphasized that "*if debtors and third parties act within the limits allowed by bankruptcy law and the system of voidable transactions, [...] there is nothing to prevent the company's recovery or liquidation program from involving a trust*." However, the court also noted that "*if the attempt to resolve the crisis fails, the trust will not be recognized, as the legal system cannot provide protection to an arrangement of interests which, while formally recognized under international conventions, substantively conflicts with the objectives expressed by mandatory domestic rules*."

Furthermore, should the attempt to resolve the crisis fail and the trust deed not already include a termination clause for such circumstances, the trust would dissolve *ipso*

[164] Valas, *Trust e procedure concorsuali*, in Monegat, Lepore, Valas (eds.), *Trust: Applicazioni nel diritto commerciale e azioni a tutela dei diritti in trust*, Turin, 2010, p. 69.

iure due to the supervening impossibility of achieving the purpose set out in the trust deed. This reflects the functional nature of the trust as a tool to address crises, ensuring it operates within the boundaries of legal and economic rationality while adhering to public policy and mandatory rules.

3.3 Trustee Obligations and Responsibilities in the Italian Context

When selecting the most suitable jurisdiction to govern a trust, it is crucial to consider not only the flexibility the instrument provides within financial markets but also the legal framework that defines the duties and responsibilities of the trustee. Under the Hague Convention, the regulation of the trustee is primarily determined by the governing law of the trust, as stipulated in Article 8. This law, chosen by the settlor, governs both the substantive aspects of the trust and the trustee's conduct, prescribing the obligations and standards they must uphold.

The Convention offers Italian practitioners the opportunity to choose from a wide range of foreign legal systems. However, such a decision requires a critical assessment of the standards of conduct imposed on the trustee and their implications for investments. The approach to regulating trustees varies significantly among jurisdictions that recognize and govern trusts, making the selection of the governing law a key factor in determining the operational effectiveness and reliability of the trust.

In traditional trust jurisdictions, such as the United Kingdom, trusts benefit from a robust legal framework established through centuries of practice. For instance, the Trustee Act 2000 in the United Kingdom codifies the trustee's "*duty of care*," requiring trustees to act with the prudence of a "*man of ordinary prudence*" while managing assets for others[165]. This legal framework enables trustees to leverage specialized sectoral expertise to optimize investment decisions, provided they adhere to their obligation to act in the best interests of the beneficiaries and in alignment with the trust's purpose. Similarly, legislation such as the Trusts (Jersey) Law 1984[166], specifically under Article

---

[165] For a detailed analysis of *the duty of care* as codified in the Trustee Act 2000, see *supra*, at paragraph 1.6.

[166] Trusts (Jersey) Law 1984, available at https://www.jerseylaw.je/laws/current/l_11_1984.

21, titled "*Duties of trustee*," mandates that trustees act with proper diligence, akin to how a prudent person would do to the best of their ability and competence, while also observing the utmost good faith. These provisions emphasize the strategic role of trustees in safeguarding and enhancing the trust's assets.

Trustees' responsibilities extend beyond merely segregating assets and ensuring transparent reporting. They also include enhancing the value of the trust's assets, a critical component for attracting capital in global financial markets. This dual focus on protection and growth positions the trustee as a key figure in ensuring the trust remains an effective instrument in both traditional and modern financial landscapes.

Choosing the right trustee is a critical decision. While family members or close friends might be familiar with the settlor's intentions, they often lack the expertise to manage complex trusts or significant assets effectively. In contrast, corporate trustees bring professional expertise, access to specialized resources, and structured asset management. Corporate trustees, supported by advisors and trust protectors, often ensure long-term growth and adherence to the trust's purpose, making them a preferred choice for preserving and enhancing wealth across generations.

Trustees differ considerably across jurisdictions. Unquestionably, the divergence in regulatory approaches underscores the need of aligning the trustee's selection to the requirements and expectations of the governing legal system. Traditional jurisdictions like the United Kingdom adopt a flexible approach: with few exceptions, there are no stringent qualifications or operational restrictions imposed on trustees, leaving considerable room for private autonomy. This approach reflects the confidence placed in the discretion of the parties involved. On the other hand, jurisdictions such as Malta apply a more rigorous regulatory framework. Under the Trusts and Trustees Act 1988, as amended in 2004, Article 52 grants the competent authority the power to issue detailed rules for trustees operating in Malta[167]. These rules include the establishment of specific qualifications for trustees and the adoption of a code of conduct to ensure high professional standards. For instance, Article 84(2)(c) of the Trustee Act 1961of the British Virgin Islands, as revised in 2015, stipulates that anyone may establish a purpose trust,

---

[167] Trusts and Trustees Act 2004, available at: https://legislation.mt/eli/cap/331/eng/pdf.

provided that at least one trustee is a designated person[168]. Under Article 84(1)(a), a designated person must be either a lawyer, a qualified accountant, or an individual holding an appropriate license.

Consequently, when the role of trustee is undertaken within the scope of a profession, the trustee is also subject to the professional regulations applicable to their field. This dual regulatory framework ensures that professional trustees not only comply with trust-specific obligations but also adhere to the ethical and procedural standards required by their profession, reinforcing their accountability and the robustness of the trust structure.

In jurisdictions like Italy, the trustee's role is further complicated by the absence of an internal trust law, relying instead on the Hague Convention's framework and foreign laws. Furthermore, the figure of the trustee finds no equivalent in Italian law. While domestic legal figures such as the mandatary, the executor of a will, or the company director exist, none of them reaches the same level of intricacy and versatility that defines the trustee. This uniqueness stems from the multiple legal relationships inherent in the trust, its flexible structure, and the fiduciary nature of the trustee's obligations—elements that render this figure both central and unparalleled.

In practice, Italian trustees hold full ownership of the trust fund and its assets yet are bound by a fiduciary obligation to manage them strictly in line with the purposes and terms outlined in the trust deed. While the trustee exercises powers comparable to those of an outright owner, these powers must always be directed toward achieving the trust's objectives and safeguarding the beneficiary's interests, all within the framework of mandatory Italian laws and the applicable governing law. What stands out about the role of the Italian trustee is the balance between autonomy and responsibility. The trustee operates with discretion and decision-making freedom, without the need to justify every action, as long as they comply with the trust's provisions. Still, this autonomy is paired with the highest standards of diligence and good faith. The trustee is expected to act with honesty, prudence, and reasonableness—behaviors that mirror those of a conscientious and skilled professional.

[168] Trustee Act 1961of the British Virgin Islands, available at: https://www.bvifsc.vg/sites/default/files/trustee_act.pdf.

The trustee's obligations extend to performing both ordinary and extraordinary administrative acts. These include activities such as purchasing and selling movable and immovable property, granting real or personal rights of use or security, entering into contracts that generate obligations or receivables, as well as maintaining, repairing, insuring, and improving the assets held in trust.

In the corporate sphere, the trustee may also exercise voting rights in the shareholders' meetings of the companies in which the trust holds interests, steering their management in a manner consistent with the objectives of the trust. This comprehensive range of powers underscores the trustee's active role in ensuring that the trust's assets are managed effectively and in alignment with its purposes. Furthermore, to ensure effective and transparent management, the trustee may rely on external professionals, such as banking institutions or asset managers, including those within their own corporate group, by delegating specific activities or granting mandates for individual transactions. In such cases, the trustee must strictly adhere to the provisions of the trust deed and, where applicable, to the written instructions of the settlor. This careful delegation ensures that the trustee remains aligned with the trust's objectives while leveraging external expertise to optimize asset management.

The trustee holds both active and passive legal capacity concerning the trust fund and its assets, enabling them to represent the trust before notaries and public authorities. In managing legal proceedings, the consent of the protector is required for both the selection of legal counsel and the determination of procedural strategies. In the event of a disagreement, the trustee is obligated to follow the protector's instructions, thereby relieving themselves of further liability. This structure ensures a balance of authority and accountability in the administration of the trust's legal matters.

After clarifying the primary powers and duties of the trustee in carrying out their role under the establishment of a trust, the question remains whether non-contentious jurisdiction proceedings, as is common in the legislation of many jurisdictions regulating trusts, could also be invoked before the Italian judiciary[169]. On this matter, according to

---

[169] Valas, *Le Trust disputes: azioni relative ai termini del trust ed alla sua validità*, in Monegat, Lepore, Valas (eds.), *Trust: Applicazioni nel diritto commerciale e azioni a tutela dei diritti in trust*, Turin, 2010, p. 436.

a preferable interpretation—supported by some lower courts—even assuming the existence of a principle of typicity for non-contentious jurisdiction proceedings in the Italian legal system, such a principle could still be considered respected in cases where applications are made to a judge concerning the administration of a trust[170].

In any case, the trustee's liability, whether contractual or tortious, is limited to cases of willful misconduct or gross negligence, as defined under Italian law. Furthermore, the trustee is protected against losses or liabilities arising from fiduciary management, retaining a right of indemnification against the trust fund, provided such liabilities are not the result of fraudulent or grossly negligent conduct. Lastly, any claims brought against the trustee are satisfied exclusively through the segregated assets of the trust, thereby ensuring the protection of the trustee's personal assets.

This intricate framework of rights and duties, combined with adherence to fiduciary obligations, enables the trustee within the Italian legal system to effectively manage the trust in alignment with the objectives outlined in the trust deed. By maintaining accurate financial records and acting in the best interests of the beneficiary, the trustee ensures that the trust operates transparently and efficiently.

---

[170] Trib. Cremona, 8 October 2013, in *Trust*, 2014, p. 303.

Conclusions

The findings of this paper underscore the remarkable relevance of the trust as a legal institution that continues to adapt to the shifting demands of modern legal and commercial landscapes. Born out of the Anglo-Saxon tradition, the trust has proven to be much more than a tool for family asset protection. It has evolved into a dynamic instrument, capable of serving as a strategic vehicle for corporate management and facilitating even the most intricate commercial transactions. What stands out most is how the trust's inherent flexibility and the indispensable role of the trustee have allowed this institution to transcend its origins and find innovative and impactful applications, even within civil law systems where its adoption was once thought unlikely.

Italy, as the first civil law country to ratify the Hague Convention, approached the trust with initial caution, navigating a series of cultural and, later, legal challenges. The absence of a specific domestic regulation forced the Italian legal system to strike a delicate balance between private autonomy and the protection of the fundamental principles underpinning its legal framework. Yet, this very absence has also provided an opportunity for a creative reimagining of the trust, as demonstrated by the application of Article 2645-ter and the experiences associated with domestic trusts.

This research has highlighted how the trust, despite its Anglo-Saxon roots, has found a foothold in areas of particular significance to the Italian economic system, such as the protection of entrepreneurial assets, the management of corporate crises, and the regulation of family successions. These examples not only underscore the adaptability of the trust to the unique characteristics of Italian law but also showcase its potential as a powerful tool for asset management and financial planning.

It has become evident that, through targeted application and greater awareness among legal and economic professionals, the trust could serve as a catalyst for modernizing the Italian legal system, promoting both international competitiveness and internal efficiency.

Looking ahead, it is clear that there is a pressing need for a comprehensive national regulation that fully embraces the trust, providing it with certainty and uniformity in its application. Such a legislative initiative would not only simplify the use of this instrument but also mitigate the interpretative and operational challenges currently left to practice and case law. At the same time, it would send a strong signal to international markets, demonstrating Italy's ability to embrace legal innovation while maintaining alignment with its core principles.

In conclusion, the trust emerges as an institution of remarkable relevance and potential, capable of making a significant contribution to contemporary commercial law. Its dual nature—combining asset protection with managerial flexibility—renders it an indispensable tool for addressing the challenges of an increasingly globalized and interconnected world. This study concludes with the recognition that the evolution of the trust in Italy represents not only an opportunity for legal progress but also a bridge to a future where the law can respond with efficiency and foresight to the needs of both society and the market.

The law must be stable and yet it cannot stand still[171]

[171] Pound, *Interpretations of Legal History*, 1923, The Macmillan Co., p.1.

Bibliography

Assolombarda*, Guida per i passaggi generazionali: condizioni di successo, errori da evitare e case history*, Dispensa n. 06/2016.

Baker, J. H. *An Introduction to the History of English Law* (5th ed.). Oxford University Press (2019).

Braun, A. *Trusts Interni*, in *Rivista di Diritto Civile*, II, pp. 577, 589. (2000).

Brunello Cucinelli S.p.A. *Istituzione del Trust*. Available at: Brunello Cucinelli Trust (2016).

Busani, A. *Il Tribunale di Bologna dichiara la legittimità dei trust interni,* in *Diritto e pratica delle società,* 2003, n. 21, pag.6.

Busani, A. *La Cassazione si stabilizza: imposte in misura fissa per l'atto di dotazione di qualsiasi tipologia di trust*, in *GT*, 2019, 595.

Busani, Fanara, Mannella, *Trust e crisi di impresa, risanamento e liquidazione delle imprese mediante i negozi di destinazione patrimoniale.* Milano, p. 34. (2013).

Busato, A. *La figura del trust negli ordinamenti di common law e di diritto continentale*, in *Rivista di Diritto Civile*, 1992, II, p. 319.

Campobasso, M. *Diritto Commerciale. Diritto delle società. Volume II.* Milano. (2020).

Carbone, S.M. *Trust interno e legge straniera*, in *Il Trust nel diritto delle persone e della famiglia*, Milano, p. 25. (2003).

Cotterell, R. *Power, property and the law of trusts*. *Journal of Law and Society*, 14(1), 77–90. (1987).

Franceschini, A. *Patti di famiglia per l'impresa e trust*, in Monegat-Lepore-Valas (Eds.), *Trust: Aspetti sostanziali e applicazioni nel diritto di famiglia e delle persone* (II), Torino, p. 295. (2010).

Fusi, A. *I patti parasociali alla luce della nuova disciplina societaria e le possibili applicazioni del voting trust*, in *Società*, p. 693. (2007).

Gabrielli, E. *Commentario del Codice Civile - Delle Successioni, Volume III: Artt. 713-768 octies e Leggi Collegate*. (2016).

Gaillard E.G. - Trautman D.T. *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*, in *American Journal of Comparative Law*, 35. (1987).

Galgano, G. *Shopping del diritto, trust interno, gruppi di società*, in *Trusts*, 336, (2002).

Gazzoni, F. *Osservazioni sull'art.2645-te*r, in Giust. civ., 2006, II, 165.

Gelter M. – Helleringer G., *Fiduciary Principles in European Civil Law System,* in *The Oxford Handbook of Fiduciary Law*, pp. 583 – 602, March 2018.

Graziadei, M. *Recognition of Common Law Trusts in Civil Law Jurisdictions Under the Hague Trusts Convention: With Particular Regard to the Italian Experience*, on Cambridge University Press, April 05, 2012.

Hanbury, H. G. *Modern Equity*, Oxford University Press. (1929).

Hayton, D. *International Recognition of Trusts*, in J. Glasson (ed.), *International Trust Laws*, Chapter C3, pp. 17-18.

Hayton, D. *The Hague Convention on the Law Applicable to Trusts and on Their Recognition, 36 ICLQ*, 260, 268. (1987).

Hayton, D. *The Uses of Trusts in the Commercial Context,* in A. Kaplan (Ed.) *Trusts in Prime Jurisdictions* (3rd ed.). Globe Law and Business, pp. 611, 623. (2010).

Hayton, D., *Reflections on the Hague Trusts Convention after 30 Years,* in *Journal of Private International Law*, 12(2), 1–25. (2016).

Ho, L. *Trusts: The Essentials*, in Smith, L. (ed.) *The Worlds of the Trust*, Cambridge University Press. (2013).

Jovenitti, P. *Strategie mobiliari per la continuità e successione d'impresa*, Milano, 103 ss., 1998.

Kötz, in D. Hayton (ed.) *Modern International Developments in Trust Law*, ch. 3, p. 40.

Langbein J. H. - Posner R. A. *Market Funds and Trust-Investment Law*. (1976).

Langbein, J.H. *The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale Law Journal 929 (*1997).

Lee, WA. *Trustee Investing: Homes and Hedges,* 1(1) Queensland University of Technology Law and Justice 3, 19 (2001).

Lener, R. *Intervento in assemblea e voto del trustee,* in *Trusts e attività fiduciarie,* pp. 510- 517.

Locke, J. *An Essay Concerning Human Understanding*, 1690.

Lord Reed, *Kelly v Cooper* [1993] AC 205, 214–215.

Lupoi, M. *Istituzioni del diritto dei trust negli ordinamenti di origine e in Italia*, Milano, 2016, 3.

Lupoi, M. *La metabolizzazione del trust,* in *Studi sul trust,* edited by Lupoi, cit., p.3.

Lupoi, M. *Trusts: A Comparative Study.* Cambridge University Press, 2000.

Lupoi, M. *Trusts: Law and Practice*, 2nd ed., Cambridge University Press, 2017.

Lupoi, M., *Trusts*, II, Milano, 2001.

Maitland F.W. – Chaytor A.H. – Whittaker W.J., *Equity: A Course of Lectures,* II edition, p. 23, 1936.

Maitland, F.W. *Trust and Corporation* (1905), reprinted in Runciman, D. - Ryan, A. (Eds.) M*aitland: State, Trust and Corporation*, Cambridge University Press (2003).

Millett, P. *Equity's place in the law of commerce*, in *Law Quarterly Review*, 114, 214-227 (1998).

Monegat, M. *Gli elementi essenziali del trust*, in Monegat-Lepore-Valas, *Trust. Aspetti sostanziali e applicazioni nel diritto di famiglia e delle persone*, Torino, 2010. 81.

Niutta, A. *I patrimoni e finanziamenti destinati.* Milano, p. 102 (2006).

Noseda, F. *Equitable Ownership, Butter and Donkeys: Setting Out a Vision for the Future of the Hague Trusts Convention* (2022).

Panico, P. *International Trust Laws*. Second Edition., Oxford University Press (2017).

Pardolesi, P. *Trust, fiducie e contratto di affidamento fiduciario: omologazione contrattuale?* in *Trust*, 2020, 5, 503.

Paton A. - Grosso R. *The International and Comparative Law Quarterly*, 654 -658 (1994).

Penner, J. E. *Property Rights: A Re-Examination*, Oxford University Press (2020).

Petrelli, G. *La trascrizione degli atti di destinazione,* in *Rivista di Diritto Civile*, 2006, II, 161.

Petrelli, G. *Trust Interno, art. 2654–ter c.c. e Trust Italiano*, in *Rivista di Diritto Civile*, p. 171 (2016).

Puledda, V. *Trust, fondazioni, patti aziende familiari al bivio la successione è un rebus,* published on *La Repubblica,* 7 November 2016.

Risso L.F. - Risso M.S., *Una lettura dell'articolo 2645-ter c.c. Luci ed ombre*, *in Trusts e attività fiduciarie*, 2013, 27.

Santoro – Passarelli F., *Dottrine Generali del diritto civile*, Napoli, 2012, 179.

Sealy, L. S. *The Director as Trustee*, Cambridge Law Journal, Vol. 25 No.1, April 1967, pp.83-103.

Selected Historical essays, p.129 (1936).

Shattuck, MA. *The Development of the Prudent Man Rule for Fiduciary Investment in the Twentieth Century,* 12 *Ohio State Law Journal* 491, at 491–492 (1951).

Sin, KF. *The Legal Nature of the Unit Trust,* Oxford, Oxford University Press (1997).

Smith, L. *Re-imagining the Trust*. *Trusts in Civil Law.* Cambridge University Press, 2015.

Swadling, W. *The Quistclose Trust: Critical Essays,* 1st edn, Hart Publishing (2004).

Valas, *Le Trust disputes: azioni relative ai termini del trust ed alla sua validità*, in Monegat, Lepore, Valas (eds.), *Trust: Applicazioni nel diritto commerciale e azioni a tutela dei diritti in trust*, Turin, 2010, p. 436.

Valas, *Trust e procedure concorsuali*, in Monegat, Lepore, Valas (Eds.), *Trust: Applicazioni nel diritto commerciale e azioni a tutela dei diritti in trust*, Turin, pp. 69-82, 436 (2010).

Von Overbeck, A.E. *Rapport explicatif*, as detailed in the *Actes et documents de la Quinzième session* of the Hague Conference on Private International Law, Volume II, The Hague, 1985, paras. 123–124.

Woloszyn, JJ. *A Practical Guide to Voting Trusts* 4(2) *University of Baltimore Law Review* 245 (1975).

Zagami, L. *L'escrow agreement negli ordinamenti di common law e nell'ordinamento italiano*, in *Trust*, p. 365 (2012).

Zanchi, D. *La tutela dei creditori e dei legittimari nel trust,* in Rivista Ianus, 2016.

Zhang, R. *Principal Forms of Commercial Trusts in the UK and the Rethinking of Traditional Approaches,* 28, in Trusts and Trustees, 787 (2022).

Zhang, R. *The Commercial Uses of Trusts: Rethinking the Traditional Approach*, Hart Studies in Private Law, 2024.

Jurisprudential References

AIB Group (UK) plc v Mark Redler & Co [2015] AC 1503.

Air Jamaica Ltd v Charlton [1999] 1 WLR 1399.

Akers v Samba Financial Group (2017) UKSC 6, at para. (51).

Armitage v Nurse [1998] Ch 241.

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567.

Bartlett v Barclays Trust Co (No 1) [1980] Ch 515, at 531.

Boyce v Boyce (1849) 16 Sim 476.

Carreras Rothmans v Freeman Mathews Treasure [1985] Ch 207.

Cassazione Civile, Sez. I (2014). Sentenza n. 10105.

Cassazione Civile, sez. I (2018). Sentenza n. 9637.

Cassazione Civile, sez. II (1999). Sentenza n. 4943, in *Società*, 1999, 11, 1330.

Cassazione Civile, sez. II (2022). Sentenza n. 6146.

Cassazione Civile, sez. II (2023). Sentenza n. 5073.

Cassazione Civile, sez. III (2019). Sentenza n. 16700, in *GT - Riv. Giur. Trib.*, 2019, 7, 590.

Cassazione Civile, sez. III (2019). Sentenza n. 5814.

Cassazione Civile, Sez. III (2020). Sentenza n. 3128.

Comiskey v Bowring-Hanbury [1905] AC 84.

Corte di Appello di Milano, decisione di Aprile 24, 2020, in *Trust*, 2021, p. 191.

Cotterell v Beaumont [2020] EWHC 2234 (Ch).

Hunter v Moss [1994] 1 WLR 452.

Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589.

Kelly v Cooper [1993] AC 205, 214–215.

Knight v Knight (1840) 3 Beav 148, at 172.

Libertarian Investments Ltd v Hall [2013] HKCFA 93, [167].

McPhail v Doulton (1970) 2 All ER 228.

Nestle v National Westminster Bank plc (1993) 1 WLR 1260 (CA).

Paul v Constance [1977] 1 WLR 52.

Re EVTR [1987] BCLC 646.

Re Kayford Ltd (in liquidation) [1975] 1 WLR 279.

Re London Wine Co. (Shippers) Ltd (1986) PCC 21.

Re New Bullas Trading Ltd [1994] BCC 36.

Re *Witheley, Whiteley v Learoyd* (1886) 33 Ch D 347, 355.

Stack v Dowden [2007] UKHL 17.

Target Holdings Ltd v Redferns [1996] AC 421.

Trib. Cremona, in *Trust*, 2014, p. 303.

Trib. Forlì. Available at: ilcaso.it. (2015).

Trib. Milano, in *Trust*, 2010, 1, p. 77. (2009).

Trib. Milano, in *Trust*, 2, p. 291. (2018).

Trib. Milano, 22 Ottobre 2009, in *Trust*, 2010, 1, p. 77.

Trib. Oristano, 15 marzo 1956, in *Foro it.*, 1956, I, 1019.

Trib. di Lucca, 8 Aprile 2016, in *Trust*, 2017, 3, p. 171.

Trib. Milano, 25 Febbraio 2013, N.2612.

Trib. di Bologna, Sezione Prima Civile, 1 Ottobre 2003, N. 4545.

Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 AC 164.

Webb v Jonas (1888) 39 Ch D 660.

Legislation and Official Documents

Circolare del Comando Generale della Guardia di Finanza, N. *1/2018,* Volume I.

Circolare dell'Agenzia delle Entrate, N. 48/E 6 Agosto 2007. Disponibile su: https://www.agenziaentrate.gov.it.

Circolare dell'Agenzia delle Entrate, N. 34/E 20 Ottobre 2022. Disponibile su: Agenzia delle Entrate.

Consiglio Nazionale del Notariato, *Studio n. 305-2015-I del 12-13 gennaio 2016, Il trust liquidatorio*, in *Trust*, 5, p. 554. (2016).

Companies Act 2006, part 13 ch 1.

Consiglio di Stato, Opinione N. 00458/2021, Sezione Consultiva per gli Atti Normativi, 19 Marzo 2021.

Financial Services and Markets Act 2000 (FSMA 2000), s 237(1).

Hague Conference on Private International Law (HCCH). "*The HCCH 1985 Trusts Convention: Updates and Possible Future Work*". (2022).

Recognition of Trusts Act 1987.

Trustee Act 1961 (British Virgin Islands). Available at: BVI FSC.

Trustee Act 2000 (United Kingdom). Available at: https://www.legislation.gov.uk/ukpga/2000/29/contents.

Trusts (Jersey) Law 1984. Available at: Jersey Law.

Trusts and Trustees Act 2004. Available at: Maltese Legislation.

Presidential Decree No. 917 of December 29, 1986.