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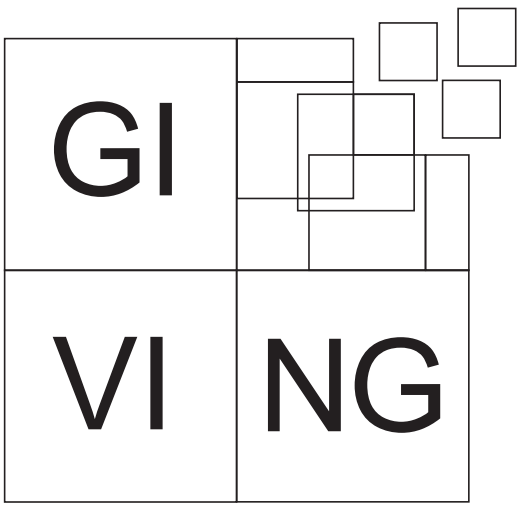

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Foundations in Europe: legal contexts, legal aspects

Bononia University Press

Temi e ricerche di filantropia e innovazione sociale

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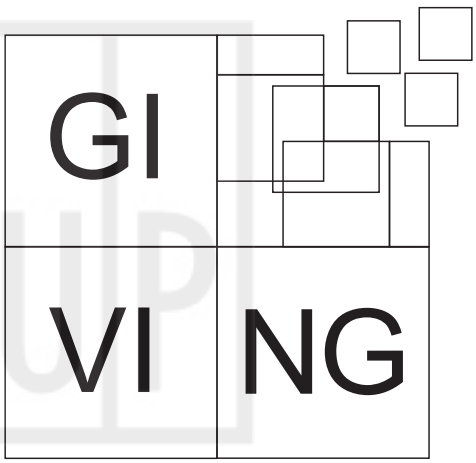

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The Difference Between Foundations and Trusts. Uses and Practical Applications in Italy

Gregorio D'Amato[*]

Foundations and Trusts

Foundations and trusts are very similar kinds of legal institutions. Yet each of the two categorizations presents specific features, which we will attempt to outline in this essay, in order to differentiate their uses.

Foundations are commonly defined as legal entities made up of assets aimed at a purpose.

Lately, the prevailingly patrimonial nature of foundations – as opposed to the prevailingly personal nature of associations – has given rise both to criticism on the part of legal authorities and to significant exceptions in statutory practice.

Clauses assigning growing relevance to the personal element (administrative bodies) are ever more present in the statutes of foundations, whose assets are markedly instrumental to the pursuit of given ends (this means that, while certainly a fundamental part of foundations, assets are supposed to be merely the means by which administrators fulfill their foundation's purpose). Thus, it is increasingly common to find statutes comprising a plurality of administrative and supervising bodies (directive boards, executive boards, boards of auditors, boards of arbitrators, and so forth).

If we think of assets as a static feature (e.g. foundations whose purpose it is to award scholarships) and of the personal element as a dynamic feature (e.g. foundations for scientific study), we might say that, depending on the end pursued, a more preeminently personal element may be attributed to foundations, by which administrative bodies are granted greater and more discretionary powers.

The English word *trust*, identified by the greatest authorities on the matter,[1] refers to a legal institution that until recently was absent from Italian "living law".

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[1] M. Lupoi, *Trusts*, Milan, 2001, second edition, 8 ff.

In Italy, as well as elsewhere,[2] this institution permanently entered into the realm of positive law after The Hague Convention of 1 July 1985 was ratified by law no. 364, dated 16 October 1989, which came into force on 1 January 1992.[3]

As a legal institution, trusts were born in common law countries, and until recently they were unknown to civil law countries, including Italy. Following the ratification of The Hague Convention, however, trusts are no longer foreign to the Italian legal system.

Indeed, the ratification law explicitly requires that signatory states consider trusts a peculiar institution created by equity courts in common law countries. Signatory states have thus agreed to set up common measures on the law applicable to trusts, and to solve the most relevant issues of their recognition. The convention has proved to view trusts as an institution that, by way of such measures, is not incompatible with national legal systems. In other words, it would be unfounded to claim that trusts are irreconcilable with Italian positive law: to reach such a conclusion would be tantamount to ignoring law no. 364/1989.[4]

The trusts that convention speaks of, however, are slightly different from those deriving from common law,[5] as repeatedly stated by many scholars and by the greatest legal authorities.[6]

---

[2] Apart from Italy, so far the following countries have subscribed to The Hague convention of 1 July 1985 on trusts: Australia, Malta, the Netherlands, the United Kingdom, and Canada. The United Kingdom also ratified the convention on behalf of the islands of Guernsey, Jersey, Turks and Caicos. Canada's ratification includes, among others, the provinces of Alberta and British Columbia.

[3] Italy ratified the convention with law no. 364, dated 16 October 1989. Stipulated at The Hague on 1 July 1985, the "convention on the law applicable to trusts and on their recognition" came into force on 1 January 1992 (in G.P. D'Amato (ed.), *Codice degli enti non profit*, Matelica: Halley Editrice, 2008, 1084 ff.).

Comments and thoughts on The Hague Convention can be found, among others, in A.E. Von Overbeck, "Explanatory Report on The Hague Convention on the Law Applicable to Trusts and their Recognition", *International Legal Materials*, 1986, 593 ff.; Id., "La Convention de La Haye du premier juillet 1985 relative à la loi applicable au trust et à sa reconnaissance", *Annuaire swuisse de droit international*, 1985, 37 ff.; D.J. Hayton, "The Hague Convention on the Law Applicable to Trusts and on their Recognition", *International and Comparative Law Quarterly*, 1987, 278; E. Gaillard, D.T. Trautman, "Trust in Non-Trust Countries: Conflict of Laws and The Hague Convention on Trusts", *American Journal of Comparative Law*, 1987, 325 ff.; Id., "La Convention du 1° juillet 1985 relative au trust et à sa reconnaissance", *Revue critique*, 1986, 20; L. Maerten, "Lè régime international du trust après la Convention de La Haye du 1° juillet 1985", *La semaine juridique*, 1988, 3319; C. Jauffret-Spinosi, "La Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance (1° juillet 1985)", *Journal du droit international*, 1987, 53 ff.; M. Revillard, "La Convention de La Haye du 1° juillet 1985 sur la loi applicable au trust et à sa reconnaissance", *Rèp. Defrénois*, 1986, 3373; H. Kotz, "Die 15 Haager Konferenz und das Kollisionrecht des trust", *RabelsZ*, 1986, 562 ff.; A. Gambaro, A. Giardina, L. Ponzanelli (eds), "Convenzione relativa alla legge sui trusts e al loro riconoscimento", *Le nuove leggi civili commentate*, 1212 ff.

On all that preceded the convention, see P. Piccoli, "L'avanprogetto della Convenzione sul trust nei lavori della conferenza di diritto internazionale privato de l'Aja e suoi riflessi di diritto notarile", *Riv. not.*, 1984, 781 ff., which was updated after the convention came into force, "La Convenzione dell'Aja sulla legge applicabile ai trusts e i riflessi di interesse notarile", *Riv. not.*, 1990, 92 ff.

[4] Cf. Court of Bologna, 1 October 2003, *Corriere Giuridico*, 2004, 65 ff.

[5] M. Lupoi, *Trusts*, cit., calls them "amorphous" (491 ff.) because of their differences from those of British law. Please refer to the cited text to address these issues in depth. Trusts can come to be implicitly through equity regulations (constructive trusts or resulting trusts), or they can be established expressly by way of the settlor's voluntary act (express trusts).

[6] M. Lupoi, *Trusts*, cit.; S. Batoli, *Il Trust*, Milan, 2002; G-De Nova, "Trust negozio istitutivo e negozi dispositivi", *Trust*, 2000, 162; F. Di Ciommo, *Proprietà fiduciaria*, 5/1999.

International recognition is thus a prerogative of voluntary trusts and express trusts, whereas this right is not extended to statutory trusts (implied and constructive trusts). Hence, for the time being, Italian law does not recognize legal or judicial trusts: it recognizes only trusts created by voluntary act.

The convention establishes the law applicable to trusts and governs their recognition. Article 2 describes trusts as the "legal relationships 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 trustee may be either a natural person or a legal person, whereas the beneficiary is the subject designated in the constitutive act as the recipient of the goods and of the incomes thereby produced.

The structure of a trust is not always trilateral. Settlors may appoint themselves as trustees, or as beneficiaries. Likewise, it can happen that the beneficiaries are not identified, and that the discretionary power to do so is awarded to the trustee, as is normally the case in so-called charitable trusts. Further, a trust may pursue an impersonal end.

It is worth stressing that if settlors designate themselves as trustees, from that time on they will manage the goods in someone else's behalf.

On the other hand, the structure of a trust may also be quadrilateral, when a protector is included within its organization. This figure has become rather popular in recent years, and it is employed increasingly often. In essence, it involves the breaking up of the management powers traditionally assigned to the trustee. The usefulness of including a protector in the structure of a trust becomes apparent particularly when one thinks of the relationships with parabanking entrepreneurial organizations and activities typical of foundations. For the professional management of wealth in the field of finance these organizations are ideal, but it isn't always wise to give them all the powers enjoyed by the trustee. The protector of the trust, therefore, carries out useful functions of surveillance over the trustee's activities, and, at the same time, holds special powers, which in some cases are duly stated. The protector, for instance, may replace the trustee or move the headquarters from one place to another if such measures are deemed necessary to optimize the results expected by the beneficiaries.

As suggested by the word itself, trusts are based on the fiduciary relationship between the settlor and the trustee, a relationship by which the former carries out a patrimonial attribution benefitting the latter. Yet, as jurisprudence and legal authorities have clarified, trusts are not fiduciary obligations[7] as defined by the Italian normative system.

Thus, the act by which a trust is es-

[7] Thus, M. Lupoi, *Trusts*, cit., 5: "It is not true that trusts are fiduciary acts, in accordance with how this category is viewed by the Italian legal system; trusts are a means by which something is entrusted to someone either to benefit a third party or for a purpose, and their origin is not necessarily voluntary".

Moreover, the Italian Supreme Court (Section I, ruling no. 4943, dated 21 May 1999) has deliberated that in a fiduciary society, trusters – which benefit from a real protection that can be put into effect in a direct and immediate way against each associate – are to be identified as the actual owners of the goods they have entrusted to the society, in whose name the goods were put for instrumental reasons. Institutionally, even as regards the third parties involved, fiduciary societies do not own the stock shares entrusted to their management, by virtue of the laws and regulations that apply to them. Stock shares are not part of the fiduciary society's assets (so much so that they are not available to creditors), and thus their ownership can only be held by trusters, whereas the fiduciary society is only entitled to exercise the rights connected with corporate participation (Cass. civ., Section I, ruling no. 9355, dated 23 September 1997, and Cass., civ., Section I, ruling no. 10031, dated 14 October 1997).

tablished entails that the goods affected by the trust be removed from the settlor's property and segregated from the trustee's personal goods. The latter is bound by purpose obligation to administer and manage those goods in accordance with the agreed-on program, until a final advantage can be attributed to the "beneficiary".

The purpose of foundations and of trusts

Interpretative problems arise as regards the ends that may be pursued by foundations.

First of all, we have to wonder within what limits private autonomy can resort to the legal institution of foundations. According to some, foundations can be set up to pursue "any kind of end that entails private or general utility". According to others, only purposes of economic advantage for the founders themselves are excluded (and indeed there are those who consider these purposes admissible as well). The traditional and most popular view, however, is that foundations may be set up only to pursue some kind of "public utility", or at any rate something more than a personal, economic advantage for the founders. Such ends may have to do with research, cultural activities, charities, a community's welfare, and so on.

For the most part, foundations will concern themselves with non-economic activities, but there's nothing to stop foundations from being organized to produce and exchange goods and services (as long as this is conducive to the ideal purposes typical of foundations), taking on the guise of a company and being subjected to bankruptcy procedures in the event of failure.

There are cases in which foundations aim to pursue exclusively transitory ends, and their assets – based on these ends – will thus necessarily be used for a limited time only.

Foundation boards and bodies generally deal with both the administration of the assets and the use of revenues to pursue the foundation's ends. According to important authorities on the matter of doctrine, it can happen that within the same foundation separate management bodies are set up, or that the foundation splits into distinct foundations: one (the so-called financial foundation or holding) administers the assets or manages the organization, and is required to transfer all the revenues yielded from the management of the assets or the organization's activities to the other (the so-called operating foundation), which will use them entirely to fulfill the foundation's purpose.

Trusts, on the other hand, may have many different kinds of purposes, as long as these are worthy of protection, as required by the convention. Whether the ends pursued by the trust are public or private is irrelevant in this context, but they must be worthy of protection.

Setting up foundations and trusts, and endowment acts

Foundations arise from a unilateral act, or from a plurality of unilateral acts, when more than one person takes part in its establishment.

As for the founders, these may simply be private citizens, natural persons, or legal persons (commercial companies); they may also be public organizations, which engender private law foundations.

Regarding the ways in which foundations are constituted, generally this happens by means of a voluntary act (*inter vivos*) of the founder or founders. A foundation is rightfully assumed to be *in existence* at the very moment when the public official draws up the act (which must be public, lest it be considered void). Even if it is in existence, however, this foundation is not yet *recognized*, for the procedure leading to its recognition may be initiated only after it has been constituted by public act.

Foundations may also be established by will (*mortis causa*), which is not necessarily public. In this case, jurisprudence and legal authorities alike have expressed alternate views on whether testamentary dispositions affect only existing organizations (even if these only exist *de facto*, and thus have yet to be recognized) or non-existing organizations as well.

It is believed that a *modus* appended to an institution of heir or to a donation – with which the beneficiary is required to transfer the object of the disposition to a given end of public utility either entirely or in part – is not a foundation-constituting act, but a simple modal disposition.

Legal doctrine usually makes a distinction between the act of foundation, by which a given organization is set up, and the act of endowment, by which it is provided with the assets it needs. In particular, it is believed that the founder provides the endowment through a legal act that is separate from and secondary to the act of foundation. Yet some doctrinal authorities maintain that the act of endowment, despite being a separate document, is in fact an integral part of the act of foundation, the reason being that the former has no cause of its own, but finds its cause in the latter.

The prevailing jurisprudence, on the other hand, considers each of the two acts an integral part of the other, and thus views the two as a unified whole.

Regardless of how this issue is solved, the prevailing doctrine prefers not to ascribe the act of foundation to the traditional types of liberality *inter vivos* or *mortis causa*, but to qualify it as "a special kind of free attribution". As a result, it may be subjected to norms limiting dispositions that are prejudicial to the legitim, and to those that revoke free acts in fraud of creditors.

Because it includes a patrimonial disposition and it is aimed at the utilization of the patrimony itself, it is commonly believed that – by virtue of article 1324 of the Italian civil code – the rules and regulations that apply to contracts in general (e.g. as regards interpretation) also apply to the act of foundation, and that suspensive conditions may likewise be enforced. As for the invalidity of the act of foundation, it is believed that article 2332 of the Italian civil code applies to protect the position of the person who has come in contact with the organization, and that the causes for the nullity or annulment, ascertained after the foundation was recognized, result in its being terminated.

Trusts also arise from a unilateral act called for by the settlor, and the rules that the trustee must abide by are, apart from those detailed in the constitutive act, those put forth by the law chosen to regulate the management of the institution. Moreover, the written form is required not *ad substantiam*, but only *ad probationem* (article 3 of law no. 364/1989). Finally, the convention does not apply to preliminary matters regarding the validity of wills or other juridical acts by virtue of which given assets are transferred to the trustee.

Assets in foundations and in trusts

Having assets is a crucial requirement for foundations constituted as legal persons. In foundations of this kind, administrators are not held accountable and creditors can lay claim only on the assets of the organization, which are thus an assurance for the third parties involved, and particularly for creditors.

Conversely, having assets is thought to be unnecessary in the case of unrecognized foundations, because their administrators are bound by limitless responsibility.

If one subscribes to the traditional and less recent definition of foundations as corporations constituted by assets aimed at the pursuit of given ends, assets naturally appear to be crucial. But the most insightful authorities on the matter have

stressed that, today, the reality of foundations is different: sometimes foundations are set up without assets, and in that case they acquire financial means to pursue their ends through unearned income; other times, foundations carry out an instrumental commercial activity through which they can procure the means to fulfill their purpose; still other times, it is enough for foundations to state the sources from which they expect to draw the required subsidies in their constitutive acts and in their statutes.

The assets of a foundation may be made up of real estate, chattels, credits, government bonds, shares, other kinds of bonds and investment funds, and negotiable instruments generally. The rules and regulations that apply to such assets are the ones relevant to legal persons.

The controls carried out by the Italian Council of State on foundation properties have two different goals: 1) to prevent *mortmain*[8] (this goal was reached by checking on purchases – article 17 of the civil code, abrogated by article 13 of law no. 127, dated 15 May 1997 – and by applying a totally free regime to conveyances); 2) to ensure the permanence of the assets as a guarantee for the third parties involved and the creditors, and as a means to pursue whatever end the corporation has given itself.

In trusts, on the other hand, segregated goods are removed from the settlor's assets and placed within the patrimonial control of the trustee, giving rise to separate assets. These are set apart from the remaining personal goods of the trustee and are unaffected by any event that might involve the latter.

Thus, trusts must not be confused with fiduciary acts disciplined in Italian law. Very authoritative experts of doctrine[9] have effectively described the difference between the fiduciary act and the trust act. Whereas in the former the counterparty of the trustee is the grantor, in the latter the counterparty of the trustee is not the settlor, but the beneficiaries. In trusts without beneficiaries, in particular, the party legitimized to act against trustees to fulfill any obligation in their name[10] is the guardian, who is always nominated in such cases.

A trust is a unilateral act by which something is entrusted to someone either to benefit a third party or to pursue a given end.[11] Powers are not attributed to the trust as they are to the settlor; trustees are informed of the end/goal to be pursued and more or less extensive powers are given them with the unilateral constitutive act by which a "management route" is traced before them, which they

[8] The term "mortmain" refers to goods that – because they belong to an organization, generally an ecclesiastical corporation – are not transferred by way of inheritance, and are seldom transferred by act *inter vivos*, thus eluding regular tax payment. The term has acquired different meanings throughout the centuries. In the course of the Middle Ages it indicated the condition of those who, owing to a form of personal subjection, were not free to arrange for their goods by testament. This resulted in a lord's right to succeed to his deceased vassals or subjects who had died without producing male heirs. The term also referred to all the lands and tenements held inalienably by ecclesiastical corporations, and came to be used to speak of the corporations themselves that owned these estates; indeed, the protection and inalienability of ecclesiastic property had become established since the earliest centuries of the Middle Ages. The modern era was characterized by the clash between state, whose tax revenues were harmed by the immovability of these properties, and church, which requested total tax exemption for its patrimony. After the French Revolution and the Restoration, ecclesiastical tax exemptions were reined in: between the 19th and the 20th centuries, mortmain taxes were established in several European states.

[9] M. Lupoi, *Trust interni e negozi di affidamento fiduciario*, Milan: Cedam, 2007.

[10] M. Lupoi, *Trusts*, cit., 5.

[11] In tal senso M.G. Monegat, *Trust aspetti sostanziali e applicazione nel diritto della famiglia e delle persone*, Turin: Giappichelli, 2007, 42.

must follow, under penalty of being removed from their position. Such powers may or may not include the possibility of alienating the trust's properties.

A trust's characteristic feature is *segregation* – i.e. the separation of its assets from those of the settlor; the latter shall not get property back from trustees unless this is expressly called for in the constitutive act. As regards trustees: their personal situation has no bearing whatsoever on the property transferred to the trust; should the trustees go bankrupt, their personal creditors can lay no claim on that property, which is also shielded from inheritance and marriage claims. As regards beneficiaries, their personal creditors can lay no claim on the trust properties before these are transferred to them; likewise, it is impossible for them to obtain the trust properties before the term established in the constitutive act has expired.

After all, trusts regulated by the convention specifically prescribe the following characteristics:

a) trust properties constitute a distinct fund and as such are not part of the trustee's assets;

b) trust properties are put in the trustee's name, or in another person's name on behalf of the trustee;

c) trustees are invested with the power – and burdened with the resulting obligations, for which they are held accountable – to administer, manage and make arrangements for the properties in accordance with the terms of the trust and the special applicable norms;

d) the fact that settlor maintain some prerogatives or that trustees have certain rights in their capacity as beneficiaries is not necessarily incompatible with the existence of a trust.

The principle of the segregation of the assets and of the separation of the trust properties, unaffected by the personal situation of trustees (see articles 2 and 11 of the convention), settlors and beneficiaries – in accordance with the law regulating the institution (see article 6 of the convention)[12] – is not unprecedented in the Italian legal system.

The typical and essential segregative effect in the structure of the trust does not result simply from the will of the parties involved. Rather, it results from specific norms, and article 11 of The Hague Convention states, beyond doubt, that "such recognition shall imply, as a minimum, that the trust property constitutes a separate fund". What happens, therefore, is that trust assets do not form part of the trustee's assets if not to pursue the goal pointed out by the settlor and with the specific objective of remaining separate from his/her estates even in the future.

The main and essential effect of the trust is that it segregates a subjective position and destines it to a specific purpose, which results in its being secured against the trustee's creditors. The possibility of constituting independent or separate estates is not entirely new to the Italian legal system: provisions to that effect range from those in article 1707 to those in article 2447-*bis* and following articles of the Italian civil code (the latter reform corporate law and focus on assets destined to a specific business within joint-stock companies).[13]

Hence, the segregative effect on the trustee's estate brought about by a trust is

[12] See note 6; G.P. D'Amato (ed.), *Codice degli enti non profit*, cit.

[13] See ruling no. 4545, dated 1 October 2003 by the Court of Bologna, which addresses at length how the concept of a separate estate is not alien to the Italian legal system, and lists these articles from the Italian civil code: 1707, 167 (and following articles), ex 1881, 1923, and 490. Article 2117 of the Italian civil code allows for the creation of "dedicated estates". Even more significant are the examples of "segregation" offered by recent special laws (on the issue, see decree 18/4/2000 by the Court of

legitimized by virtue of specific provisions of The Hague Convention, included in the Italian legal system via the executive law. Most authorities on the matter of legal doctrine have argued that this ratification law is a departure from article 2740 of the civil code, in the part where it states that it allows limitations of responsibility "in the cases established by the law".[14]

The concept of "property transfer" set forth by point no. 1 of article 2643 of the Italian civil code has ceased to be entirely univocal with the emergence of institutions in which that same property right takes on forms that are partly different from more traditional ones (time-sharing and fiduciary property are examples of this). The current alleged inadmissibility of the transcription of institutions such as obligations *propter rem*, or rather conventions that enforce bonds of an administrative nature, may indeed represent a breach of the principle of peremptoriness mentioned above, and connect to the goal of publicizing rights that are different from typical "real rights" exerting a particular reduction of property. Thus, as far as we can see, there are no special obstacles preventing that the effects produced by an act establishing a trust be assimilated to at least some of those produced by contracts that transfer the property of immovables. As a matter of fact, trusts produce the transfer of the legal ownership of assets to trustees, the so-called segregative property, to be enjoyed and used only to fulfill the purpose/goal specified by the settlor. The ownership of trust properties, therefore, may certainly be qualified, and the effects of the constitutive act undoubtedly seem to fall within those considered by the legislator in accordance with article 2643, point no. 1, and article 2645 of the Italian civil code, or, more succinctly, as obligations *propter rem*.

In essence, while trustees have full legal ownership of property rights, they are limited in their exercise of such rights, for trust properties may only be used to pursue the ends specified in the trust's constitutive act.

If the trustee and the settlor are different people, the transfer of properties to

Bologna): article 22 (titled "Property Separation") of the consolidation act on financial intermediation (legislative decree no. 58, dated 24 February 1998) states that, "in rendering investment or accessory services, individual clients' financial instruments and money, held for whatever reason by an investment company, savings management company or financial intermediary … as well as individual clients' financial instruments, held for whatever reason by a bank, make up a distinct estate, which for all intents and purposes is separate from the intermediary's and other clients'. Actions on the part of the intermediary's creditors or in their interest are not allowed on this estate; actions by creditors of the depositary or subdepositary, or carried out in their behalf, are likewise forbidden". Finally, the recent Italian corporate law reform has added article 2447-*bis* – on "assets destined to a specific business" – to the civil code. As one authors says, this allows companies to create a self-declared trust, given that article 2447-*quinquies* of the civil code forbids corporate creditors from staking claims on funds constituted thus.

[14] The authoritative A. Gambaro, in "Trusts, diritti reali e trascrizioni", argues that "It is incorrect to maintain that the convention cannot derogate from article 2740 of the civil code, on the grounds that the latter is a norm that must be applied. Or rather, [it is incorrect to maintain] that the convention may not impact one's interpretation of that article of the civil code. In this case, too, the logical contradiction is immediately apparent. The proposed interpretation of article 2740 of the civil code is that the limitations on the debtor's property responsibility – i.e. on the debtor's property that may be seized – are established by law, not by private initiative. Apart from all reservations that one may have on such a stance, it is immediately clear that article 11 of law no. 364, dated 16 October 1989, is more than enough to provide the umpteenth legislative limitation to the property responsibility set forth by the civil code. Thus, it is once again difficult to understand where the problem lies. It is obvious that by accepting trusts the internal legal system must also change in this regard, but the law-making authorities were well aware of this and their decision doesn't seem questionable to me at an interpretative level".

the trust, as well as the settlor's "loss of control" over the properties themselves, are requisites that qualify and indeed validate the trust.

The *situs* of foundations and trusts

According to article 16 of the Italian civil code, the *situs*, or seat, of a foundation must be stated in its constitutive act and in its statute in order for it to be recognized. Article 46 of the Italian civil code states that if the seat specified in the constitutive act and in the statute is different from the actual place in which the administrative body carries out its functions, third parties may consider both the place specified in the constitutive act and the one in actual use as the foundation *situs*.

As in the case of companies, secondary seats are also admitted, as long as they respect the "stable representation" requisite referred to in article 2299 of the Italian civil code.

The seat of a trust is certainly important, yet it can be attached to that of its trustees and thus it can vary as they vary, without affecting the constitutive act.

The administration of foundations and of trusts

The foundation statute must contain prescriptions regarding its administrative bodies, their make up and the ways in which their members are nominated, and their respective administrative and representative powers. The administrative body may be made up of one person only, but more often it is collective; as noted above, many statutes call for a plurality of administrative and supervising bodies (directive boards, executive boards, boards of auditors, boards of arbitrators, and so forth).

Foundation administrators, unlike association administrators, may be nominated for life. The criteria by which they are nominated are entirely free: the title of administrator is often made to coincide with public or private offices, or the people who hold these offices may be asked to nominate the administrators; legal persons are also eligible for the title.

It is noteworthy that, if modifications of the foundation's constitutive act are allowed, administrators themselves, in conformity with the statute, may approve these modifications, for assemblies are absent in foundations.

There is no law regulating the administration of trusts specifically. Hence, for the time being – until Italian lawmakers issue a law on the matter – to regulate a trust's administration there is no choice but to refer to a law issued by a foreign state that has accepted The Hague Convention. Guidelines for trust administration are usually given by the settlor in the act by which the trust is established. Trustees must necessarily adapt to and follow these guidelines: should they fail to do so, or should they apply these directives incorrectly, they would be subjected to scrutiny and, in some cases, replaced by the guardian, whose duty it is to keep watch on their doings, so as to ensure that they comply perfectly with the instructions received by way of the constitutive act and applicable regulations.

Another element that emerges from the convention is the absolute liberty with which the settlor can choose the law that shall govern the trust, see article 6 of the convention, whose operativeness entails no limits as regards the objective and subjective links existing between the elements of the fiduciary relationship and the regulating law. The convention does not indicate, as a precondition for its application, that other extraneous elements be present, besides the choice of the applicable foreign law, as long as the law that is applicable by virtue of article 6 (or, perhaps, article 7) of the convention provides for trusts or the category of trusts involved, as expressly prescribed by article 5 of the convention. This last point

confirms that the only precondition for conventional rules and regulations to apply (and for the instituted trust to be recognized) is the choice of a law that follows Chapter II of The Hague Convention.

Fulfilling purpose

When a foundation's end has been reached, when it has become impossible to fulfill or scarcely relevant, or when the foundation's assets have become insufficient, the government authority may choose not to have the foundation terminated, but to have it transformed, keeping it as close to the founder's will as possible. This transformation, however, is not allowed if the events that would engender it are listed in the act of foundation as a cause for the termination of the legal person or for the devolution of the estate to a third party, or if it was a family foundation (article 28 of the civil code).

Should the transformation not take place, the foundation would be declared terminated, its assets would be liquidated, and articles 29 and 30 of the civil code would consequently be enforced.

After the liquidation process, any remaining assets of the legal person are devolved in accordance with the constitutive act and the statute; if both lack instructions on the matter, the government authority shall decide and attribute the assets to other corporations, whose ends are similar to those previously pursued by the terminated foundation (articles 31 and 32 of the civil code).

We have seen how the traditional distinction between foundations and associations – viewed as *universitas honorum*, a set of assets aimed at the pursuit of a given end, and *universitas personarum*, a series of people united to pursue a shared goal, respectively – has been largely criticized by the most recent authorities on the matter of legal doctrine.

The preferred and most influential line of thinking seeks the distinction between the two institutions within a homogeneous category, that of collective organizations, which may take on the form of associations or of foundations. Both institutions are expressions of contractual autonomy, for they both arise from a juristic act and carry out activities – in pursuit of given ends – executive of their respective constitutive acts. In doctrine, the main differences between the two institutions are seen in the different nature of their constitutive acts and in the different ways in which these are executed. Regardless of the fact that, unlike associations, foundations may be made up of only one person, the constitutive act of foundations is always unilateral in nature, whereas that of associations is always a contract. Further, the founder does not participate in the executive phase following the act of foundation, having permanently divested himself of the estate through the constitutive and endowment acts. In associations, on the other hand, contracting parties take part in the management of the association and may even influence it.

As for trusts, once the end for which they were set up has been reached, their assets may return to the settlors, if still living, or to their heirs; otherwise, they may be devolved to other trusts or to third parties. Thus, once purpose is fulfilled, the choice as to what to do is free: in the constitutive act, the settlors establish that the remaining assets be given to someone of their choosing or possibly to trustees, so that it may be the latter that decide how to carry out the devolution and who will benefit from it among the beneficiaries previously singled out by the settlors.

Recognition

The discriminating factor between foundations and trusts is the legal recognition of the former as legal personalities (this is also the case of *some* associations). Foundations must be constituted by way of a public act, and they may also be arranged

for by will. The constitutive act and the statute must include:

- The foundation's name;
- Its purpose (i.e. the end for which it is established);
- Its estates;
- Its *situs*, or seat;
- The rules and regulations on which it is based, and those through which it shall be administered;
- The criteria by which and the ways in which its earnings shall be distributed.

The constitutive act and the statute may also include the norms regulating the termination of the corporation, the devolution of its remaining assets and/or their transformation.

Following presidential decree no. 361, dated 10 February 2000, recognition of the legal personality of foundations is attributed to:

- Prefectures, in the case of foundations that operate nationwide;
- Regional governmental agencies, in the case of foundations confined to a given region or to a regional subdivision.

Each prefecture and each region holds a specific register of all private legal persons operating in their territories. The recognition procedure starts when the founders present a formal request, which must also include the constitutive act, a certified copy of the statute, and the documentation attesting to the fact that the foundation's assets are fit for its purpose. Once the foundation is recognized, it becomes a legal person, and as such it has an independent legal capacity and its own ability to function.

Recognition procedures vary depending on the type of foundation, and they are regulated by different norms:

- Ecclesiastical institutions: article 1 of law no. 222, dated 20 May 1985;
- Religious foundation: article 12 of law no. 222, dated 20 May 1985;
- Corporations managing mandatory forms of welfare and social security: legislative decree no. 509, dated 30 June 1994;
- Corporations operating in the field of music: legislative decree no. 367, dated 29 June 1996;
- Opera corporations and comparable concert institutions: law by decree no. 345, dated 24 November 2000, later modified and passed into law no. 6, dated 26 January 2001;
- Social enterprises (ONLUS): article 10 and following articles of law no. 152, dated 30 March 2001;
- Charitable institutions and benevolent funds: article 3 of law no. 152, dated 30 March 2001;
- Public assistance and beneficent institutions (IPAB): legislative decree no. 152, dated 4 May 2001.

Besides carrying out all standard formalities (entering and registering the act at the Register Office, transcribing the act at the competent Registers of Immovables Depository, and, if the foundation was constituted by will, sending the form issued by the General Register of Wills to the notarial archive and a copy of the will-publication transcript to the Chancellery of the magistrate's court of the place where the succession is opened), according to article 3 of the norms implementing the civil code, the notary public shall inform the prefect, within 30 days of the act, that the foundation was constituted; in informing the prefect, the notary public shall provide the basic details of the act, the literal text on the endowment, the heirs' names and residences.

Trusts, on the other hand, do not require a preliminary public assessment to achieve recognition: it is enough for their constitutive act to be registered at the local Revenue Agency. Likewise, trusts are neither bound by a minimum assets condition, nor required to produce their constitutive act publicly. A registered private deed suffices even to carry out the activi-

ties listed above, which are also routinely carried out by one kind of foundation or another. Trusts may be provided with the financial means they need to pursue a given end at a later time. Further, in keeping with the principle of segregation, once assets are transferred to a trust, they are shielded from the settlor's personal situation and destined specifically to the purpose for which the trust was established.

Family foundations and trusts, and the weak: conclusions

Family foundations bear a resemblance to family trusts. The latter, however, and especially those set up to benefit the disabled, display a convenient feature.

Family foundations are established for the benefit of only one or more specific families (article 28, paragraph 3, of the civil code). By establishing that their estates are inalienable and entrusting their management to executors, while allowing that the descendents of a certain branch of their family enjoy, in successive order, the estates in usufruct, testators do not give rise to a foundation with a legal personality. In this case, the estates lack a unifying purpose. They merely give rise to a *de facto* entity, which – even if constituted in accordance with laws previously in force – is incompatible with the current Italian legal system. The reason for this is that, in addition to pursuing ends similar to those of fideicommissary substitution, it is at odds with prohibitions protecting public order (articles 469, 692, 698, 699, 796, 979, and 1379 of the civil code), which set the limits of private autonomy (Civil Court of Cassation, Section II, 3969, dated 10 July 1979). Family foundations are allowed only if a purpose of general utility, such as providing for the education of the family members, is present.[15]

In the light of the features noted above, trusts seem especially suitable for the needs of certain classes of people, particularly the weak. Now more than in the past, the need to provide for the welfare of the disabled after their parents have died, or of the elderly, in particular those who are no longer independent and live in nursing homes, is perceived as crucial. Trusts – which are more convenient and efficient than foundations in this regard – can fulfill parents' desire to ensure that their children receive proper care after their death.

The issue is not only economic. It often has to do with the specific living conditions of these people (where they are to live and with whom), their habits, the expert assistance they need and so forth. The economic aspect of the matter may have to do with parents' desire to reserve part of their assets to the future satisfaction of their disabled children's necessities: these assets are often modest, the result of much sacrifice on the part of the parents, who endure such sacrifice precisely in hopes of making their disabled children's life less precarious and potentially riddled with hardships. Thus, they use profits of the estate to sustain all costs encountered by the disabled person, alienate sources of income of the estate if its profits prove insufficient, and collect disability or survivorship pensions to which the disabled person is entitled. Moreover, many families comprise other children besides the one who is disabled; in these cases, after the weaker child's needs have been satisfied, upon his/her death, it is in the family's interest that any remaining assets pass on to the other children.

In Italy, traditional legal instruments have proved inadequate to satisfy these needs: trusts seem to fill this gap in the Italian legal system and to reach these ends. Indeed, the characteristics of trusts,

[15] F. Gazzoni, *Manuale di Diritto Privato*, Naples: ESI, 2003, 163.

as described above, make them preferable to foundations, which are much more complex and have higher initial and management costs.

The recognition of trusts in the Italian legal system is an effective means to protect the disabled. Trusts are particularly suitable in anticipation of the death of the people who normally take care of the disabled persons, for they are used to protect both their moral and their patrimonial interests. For example, trusts are used to destine both movables and immovables registered in the disabled person's name, and allow the disabled person to take part in juristic acts and relationships.

Today, all people, whether they reside in Italy or not, may legitimately constitute a trust – i.e. a legal relationship centered on goods of any nature – to benefit other people of their choosing. Trusts are essentially based on the fiduciary relationship between settlors (those who have ownership of the assets and/or estates) and trustees (those to whom the assets are transferred, and who are called upon to manage the assets and to act in the interest of the beneficiaries).

A trustee is comparable to a tutor, but the two differ from a legal point of view. Trustees receive assets, which they manage in accordance with instructions detailed in the constitutive act, and even gain ownership of the assets, although the latter is dependent on the purpose of the trust and on the rules dictated by the parents as regards succession. Tutors, on the other hand, do not gain ownership of the estate: they are merely court-appointed legal representatives.

In the specific case in which parents wish to use their estates to cover the economic and welfare needs of their disabled children, the former shall constitute a trust aimed at the well-being of the latter through the professional management of their estates.

In the trust's constitutive act, parents/settlors arrange for whatever needs legal regulation, identify the purposes of the trust, single out those involved and their respective roles, and describe their children's health problems, as well as the required therapies and care.

Trustees acquire ownership of the estates transferred to the trust, but they can arrange for them exclusively to pursue the ends for which the trust was set up – i.e. the security and well-being of the disabled person until his/her death.

"Segregation of the assets" is the typical effect of a trust: property handed over to the trustee is unaffected by the latter's personal situation, as well as by the settlor's. Estates transferred to the trust, and thus handed over to trustees, do not become their personal property. As a result, the personal creditors of the trustees can lay no claim on the segregated assets, which are also shielded from inheritance and marriage claims.

This prevents the commingling of the personal property of the person required to look after the interests of the weak party with the property entrusted to the former solely for the purpose of attending to the needs of the latter.

In conclusion, when the aim is to look after family interests, or the interests of a disabled person, trusts appear to be simpler, more flexible and more beneficial than other institutions, such as supporting administrations, fideicommissary substitutions, and foundations.

The rules and regulations on supporting administrations – recently introduced into the civil code (articles 404 and following) by law no. 6, dated 9 January 2004 – allow for a simplified application of this institution and shorter times. Nonetheless, supporting administrations require a public procedure, and thus they are not preferable to trusts, which are strictly private and fiduciary in nature, and perfectly suitable to look after the interests of a disabled person.

Despite pursuing the same ends as trusts, fideicommissary substitutions

provided for by articles 692 and 699 of the civil code may not be used unless the disabled person is legally incapacitated; trusts, on the other hand, may be set up regardless of whether formal incapacitation/disqualification procedures have been carried out. Further, trusts are not encumbered by the double succession that typifies fideicommissary substitutions, by effect of which parents designate their incapacitated child as their heir with the provision that upon his/her death the estate will be preserved and transferred to the person or organization that took care of him/her. In trusts, conversely, trustees acquire ownership of the estate, but they are not qualified as heirs. However, they must not be of prejudice to the application of imperative norms; in particular, they must not conflict with internal norms protecting minors and incapacitated citizens, or with norms on the succession of legitimate heirs.

In addition to these advantages, and to the fiscal benefits affecting direct and indirect taxes, given that trusts that do not carry out entrepreneurial activities have been recognized as nonprofit corporations (article 73 of the 1986 consolidation act), the advantage deriving from their possible recognition as social enterprises (ONLUS) is also worth noting.