SAN MARINO[1]

by Andrea Vicari[2]

I. TRUSTS IN THE IUS COMMUNE

San Marino is a civil law country, probably one of the purest remaining: no civil code was enacted and ius commune is still at the basis of its legal system. Ius commune is the common law that prevailed throughout Europe before the codes. In San Marino's law, save when a specific matter is governed by a statute, ius commune applies.

The European *ius commune* is rooted in Roman law but did not coincide with Roman law; on the one hand, because of the enactment of local legislation and, on the other, because of customary as well as doctrinal developments supported by the most important courts.

An institution that was named "fideicommissum confidentiale" or "fideicommissum fiduciarium" was one important of the several development of the ius commune[3].

Roman law entitled the heir or legatee charged with a *fideicommissum* to retain one fourth of the assets before handing them over: this was the "quarta", also called "Falcidia" or "Trebellianica"[4].

The fideicommissum known to Roman law was not a trust in structural terms because the "quarta" cannot be derogated by the will of the settlor. This entitlement cannot be removed[5].

Throughout continental Europe the Roman law rule was applied whenever an ordinary *fideicommissum* was concerned, not when the legal relationship was a *fideicommissum fiduciarium or confidentiale*. It followed that one of the fundamental differences between the Roman-style *fideicommissum* and the medieval *fideicommissum fiduciarium or confidentiale* was that in the latter the fiduciary had to hand over to the beneficiary everything he had received. The same rule applied to executors, similarly to English law where executors were deemed trustees.

"Haeres fiduciarius" was the pivotal role in a *fideicommissum fiduciarium or confidentiale*, like the trustee in a trust" and, like a trustee, he could not retain any *commodum* that is to say, any advantage from the *fideicommissum*. He was not entitled to the "Quarta" or "Tribellianica"[6].

However, the fiduciary who received property was properly a "heres", an heir.

Here we find the basic structure of trusts: full legal title in the name of the trustee and, at the same time, no personal advantages in his favour.

Thus, a European *ius commune* institution existed – "*fideicommissum confidentiale*" or "*fideicommissum fiduciarium*" – under which the party who received something, to be managed for a purpose or to benefit another party, had no beneficial claims to the assets he received and had to turn them over at the prescribed time or upon the occurrence of a specified condition. Hence, he was not only a holder of title, under the duty to manage it, but also a "custos".

"Confidentia" was at the root of this institution.

Prof. Maurizio Lupoi showed that the English expression "trust and confidence" derived directly from European *ius commune* and that the European notion of "*confidentia*" was at the root of the development of trusts in England[7].

Therefore, similarities between the trust are evident both from the structural and on the linguistic point of view.

However, the fundamental idea lying on the basis of the *fideicommissum*, was different from that lying on the basis of the trust.

The *fideicommissum* was not a gift over time to beneficiaries, but a tool to allow the settlor to exercise the dead-hand, a tool intended to set an appropriation programme for the assets transferred under the *fideicommissum*, a programme that could not be derogated by beneficiaries, who were bound by it, a programme aimed to restrain their rights, not to enrich them.

II. THE TRUST LAW IN SAN MARINO: A BRIDGE BETWEEN THE COMMON LAW TRUST AND THE TRUST-LIKE INSTITUTION OF THE ROMAN LAW TRADITION.

It was on this historical foundation that San Marino built its statute of 1st March 2010 No. 43 on the contract of "Affidamento fiduciario"[8] and its statute of 1st March 2010, No 42 on trusts (hereinafter "the Trust Law").

The contract of Affidamento fiduciario is a contract mixing up the basic functioning structure of fideicommissum with features of the trust. Its analysis is beyond the scope of this article, devoted exclusively to the analysis of the Trust Law and its theoretical implications.

The Trust law is a fully new law, totally revising the prior trust law in force (17th March 2005, n. 37)[9], enacted after the ratification of the Hague Convention on the Law Applicable to Trusts and on their Recognition of 1st of July 1985 (the "Hague Trust Convention"), occurred with Decree 20th September 2004, n. 119 which produced relevant effects in the San Marino legal system[10].

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

A trust may be created by written instrument, inter vivos or by will. The deed will have further requirements of form varying according to the place where it is executed. If it is executed in San Marino, the trust deed has to be executed before a public notary.

The trust deed shall contain standard requirement of a common law trust deed:

a) the intention of the of settlor to create the trust;

b) the identification of the trustee;

c) the identification of the trust assets, or the criteria which enable them to be identified.

As mentioned, both purpose trusts and beneficiary trusts are allowed. Purpose trust are allowed without any limitations.

In the case of purpose trusts, the trust deed shall contain

a) the identification of a particular purpose, achievable and not contrary to mandatory law, public order or good morals;

b) the identification of a protector with the duty to ensure that the provisions contained in the trust instrument are observed, or the criteria which enable him to be identified;

In the case of beneficiary trusts, the trust deed shall contain:

i) the identification of the beneficiaries, or the criteria which enable them to be identified, or the identification of the person who has the power to appoint them;

ii) the rules which ensure that there is a protector, empowered to take the claim against the trustee in case of breach if for any reason there are no beneficiaries in existence, and in the other cases provided for by law.

The rule under ii) above is a peculiarity of San Marino trust law, compared to the typical common law trust in other jurisdictions.

It applies both when beneficiaries are appointed in the trust deed but not in existence (i.e. "the children of Paul", where Paul has no children at the time of the trust settlement) and when no beneficiary is appointed at all in the trust deed (i.e. "trust beneficiaries are to be appointed by Paul before the end of the trust period"), but a power of appointed is granted in the trust deed.

With this provision, two very relevant effects are introduced.

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

Secondly, by thus rule, the new Trust law creates a new type of trust for beneficiaries, unknown to any other common law trust in the world.

A valid trust for beneficiaries, both fixed or discretionary, can be created even if no certain or ascertainable person is intended to be benefited by the trust at the time of its creation.

In this manner, individuation, appointment, identification of any type of beneficiaries can be postponed, even in trust for beneficiaries, up to the end of the trust period.

Trust assets are segregated and the trustee is under a duty to manage them to preserve and increase them, and distribute them to beneficiaries when they will be appointed. The enforcer, meanwhile, will ensure that trustee's duties are properly performed.

This is an unique solution.

Under English Law and the law of jurisdictions influenced by it, any trust has to have beneficiaries appointed, identified or identifiable, unless it is aimed to create a purpose trust (*Re Wood* [1949] Ch 498), or, from another perspective, the persons or objects intended to be benefited must be certain or ascertainable (*Knight v. Knight* (1840 3 Beav. 148). In fact, "there must be someone in whose favour court can decree performance" (*Morice v. Bishop of Durham* (1804 9 Ves 399 at 405)

Under the new San Marino Trust Law, this requirement is not required.

A trust is valid and trusts assets are segregated, without any resulting trust arising in favour of the settlor, even if no person is a certain or ascertainable beneficiary and even if the trust is not a purpose trust. Trustee duties, as long as beneficiaries are absent, are enforced by the enforcer.

This is the first of several indicia making clear that, under the San Marino law, a new model of trust is born.

III. TRUST AS AN APPROPRIATION PROGRAMME V. TRUST AS A GIFT OVER TIME.

Under the new San Marino trust law, the trust is considered a pure instrument to imprint trust assets with a destination, dropping the standard common law idea of a trust as gift over time to beneficiaries.

Bernard Rudden made clear that the common law trusts is a form of gift over time to beneficiaries, even if not always this is clearly recognized by common lawyers: "it may be suggested that the learning on "the three certainties" and on resulting trusts in courses on Equity is made difficult by failure to stress that the normal private trust is essentially a gift, projected on the plane of time and so subjected to a management regime".

Recently, John Langbein subscribed this view[11] and it became widely shared, in the common law world, the idea that the trust "is a donative transfer to the beneficiaries, structured to permit the management of wealth"[12].

In fact, even under a discretionary trust, one can notice the "gift over time" idea underlying common law trusts, especially under English Law. In fact, in these cases, "you treat all the people put together as though they formed one person, for whose benefit the trustees were directed to apply the whole of a particular fund"[13]. As Paul Matthews put it, under the English model of trust, "whatever subject matter of the trust, it no longer belongs to the settlor or (obviously) the testator, and the decision whether to enjoy it or destroy it is no longer for him. Instead, it is ultimately a decision for those who benefit from the trust"[14]. That's why they are enriched by the creation of the trust.

If, as described above, under San Marino law, a trust can be created without appointment of beneficiaries, there can be settlement of assets into trust, segregation of them, trustee's management duties but no "gift" to anyone. No beneficiary needs to be enriched, none of them needs to receive any rights or powers to create a trust valid.

In this manner, the trusts deed cannot be considered a form of "gift over time", but an asset protection instrument, containing the programme for the management of assets, transferred to the trustee, that can, but not necessarily has to, allocate immediately certain assets and the advantages deriving from them to one or more beneficiaries. One might speak of "appropriation programme", whose advantages in favor of beneficiaries can be set immediately but the beneficiaries can be individuated later and appointed later.

Further elements, in the new Trust Law, allows a characterization of the trust, under San Marino law, as an "appropriation programme", instead of a gift over time.

However, in order to appreciate how emblematic these elements are, one should realize which features of the common law trusts originate the perception of the trust as a gift over time.

IV. COMMON LAW TRUST AS A "GIFT OVER TIME" TO BENEFICIARIES.

Even with some nuances[15], American Law and English Law treat the beneficiaries as enriched by the trust and treat them as if they received some property rights under a gift.

Several rules confirm the idea that, in common law, a trust is perceived as a form of gift over time to beneficiaries.

First of all, relevant to this idea are the rules, applicable under English law, considering restraints on the alienation of a beneficiary vested entitlement invalid. In other words, the beneficiary position, once vested and not contingent, is a beneficiary's property and, as any property in which the beneficiary has full title, alienation cannot be restrained by the settlor (*Brandon v. Robinson* 18 Vesey Jun. 429, 433-34, 34 Eng. Rep. 379, 381 (L.C.)). This is because the beneficiary is considered as having received a "gift" of property which enriched him and, in trusts as in gifts, once a property is gifted it is the donor's property and his ownership cannot be restrained.

In the United States, spendthrift clauses restraining the right of alienation of beneficiaries, (invalid under English Law), are instead valid[16]. However, "the current position on spendthrift clauses is increasingly nuanced, recognizing more circumstances in which the beneficiaries must bear all the consequences as if it has ownership"[17]. Therefore, even if on this point the two legal system departed from two opposite points of view, now they are getting closer and closer in considering the beneficiary as automatically enriched by the trust.

Further confirmations that the trust is seen in common law systems[18], as an instrument to "give over time" to beneficiaries[19], instead of an appropriation of assets according to the settlor's programme[20] are:

i) the *Saunders v. Vautier* rule. Beneficiaries are the beneficial owners of the trust property and they can terminate the trust, if they all agree, before the time set by the settlor, even against the settlor's will. (*Saunders v. Vautier* (1841) 4 Beavan 115, 49 Eng. Rep. 282 (M.R.), aff'd, Cr. & Ph. 240, 41 Eng. Rep. 482 (L.C.) ; Trust (Jersey) Law 1984, art. 43 (3)).

ii) the rule allowing beneficiaries, under a discretionary trust, to agree about the manner in which trust property shall be divided among them and to obtain it,

even if the settlor gave the trustee the power to decide it (*In re Smith*, [1928] Ch. 915);

iii) the rule under which beneficiaries can instruct the trustee to transfer to a third party the trust property they are entitled to (*Grey v. IRC*, [1959] 3 All E.R. 603 (H.L.);

iv) the rules under which beneficiaries may obtain a variation of trust when they are all adult and capable, and they all agree, as well as those under which they may request, and the judge may consent, to a variation of trust when they can show that it is in their best interest, even if they are not all adult and of full capacity (Variation of Trusts Act 1958; Trust (Jersey) Law 1984, art. 47 (1)).

V. SAN MARINO TRUST AS AN "APPROPRIATION PROGRAMME".

All the rules confirming the idea that, in common law systems, the trust is treated as gift over time to beneficiaries are reversed under San Marino trust law.

This was done with the purpose to abandon the idea of the trust as gift over time to beneficiaries and embrace the idea that the trust is an appropriation programme set by the settlor for the management of segregated assets; that the trust is an asset partitioning tool for assets to be managed according to the settlor's will set in the trust deed.

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

According to article 50.3 of the Trust Law, only if the trust instrument does not provide otherwise, all the beneficiaries with fixed interests in the trust fund or, if there are none, all the beneficiaries may require the trustee to terminate the trust and transfer the trust assets to themselves or as they direct. Therefore it is in the settlor's hands to decide whether beneficiaries can terminate in advance the trust. They are not considered automatically enriched by the creation of the trust. Trust assets are managed by the trustee under the settlor's programme. The beneficiary's collective will cannot interfere with it in any manner.

Confirmation that, under the San Marino Trust Law, the trust is not considered as a gift over time to beneficiaries, who are not enriched by the creation of the trust, but an appropriation of segregated assets according to the settlor's programme, can be also found in the rule under article 51.2 providing that only if the trust instrument does not otherwise provide, a beneficiary may alienate, charge or otherwise dispose of, in whole or in part, his beneficial interest by instrument or instruments taking effect as against the trustee when he becomes aware of it or them, or, in the case of a beneficiary with a fixed interest not limited to his life, by will. Beneficiaries are not, therefore, enriched by the trust, if the settlor does not wishes so and if he restrains their rights. Their entitlement under a trust cannot be disposed as they wish, if the settlor otherwise provided for in the trust deed. They can enjoy the entitlement, but this is not necessarily a property that they can realize by selling it.

The idea that, under San Marino Trust Law, the trust is not a gift over time to beneficiaries, that they are not the beneficial owners of the trust assets, that they are not enriched by the trust, if the settlor does not want, emerges also from the rules about variation of trusts. The trust deed contains the programme for the appropriation of trusts assets set by the settlor. If beneficiaries can vary it, this means that assets are at the beneficiaries' disposal, that they are enriched by them. Under San Marino law, the settlor can grant the power to vary the trust to beneficiaries. He can decide to enrich them. According to article 13.1, a trust instrument may provide that the provisions contained in it or the governing law may be amended in the interests of the beneficiaries or to promote the purpose of the trust, and may give this power of amendment to the person chosen by the settlor. The settlor can decide not to grant such a power to beneficiaries and therefore he can decide not to enrich them. In this case, they cannot vary the trust, not even with the help of the judge. In fact, according to article 53.4, only the trustee may apply to the judge to make changes to the trust instrument which have become necessary or desirable. Beneficiaries are not entitled to request from the judge a variation of the trust, and in this manner obtain it, if the settlor did not grant them the power to modify the trust in the trust deed.

Under English law, for a long time the beneficiary's right of information was decided according to the "gift over time" idea of trust. A beneficiary was entitled to inspect the trust documents and obtain information about them because, in some sense, they were his. He was considered the beneficial owner of the trust documents as well as of the trust assets. Nowadays, the information duty is not, in rhetorical terms, based on the beneficiaries' ownership of trust assets, but the scope of application of the rule is wider than before. All beneficiaries can get information about the management of the trust, regardless of whether they can be considered or not owners of them. This is because the trust is considered a gift over time to all beneficiaries, regardless that they received a fixed interest in the trust property or not[21].

San Marino Trust Law parted with this idea very clearly. Since the trust is not a gift over time to beneficiaries, but an appropriation programme of segregated assets to be managed and disposed according to the settlor's programme, beneficiaries does not have a right of information if the settlor does not grant it to them. According to article 49.1 of the Trust Law, only if the trust instrument does not provide otherwise, every beneficiary with a fixed interest shall have the right to inspect and take copies of the instruments and documents concerning his own rights. Similarly, under article 27.2 only if the trust instrument does not otherwise provide, the trustee of a beneficiary trust is bound to give to every beneficiary having a fixed interest:

a) notice of the existence of the trust, of its name and of the address of the trustee, and of the provisions of the trust instrument which confer such interest;

b) notice of all instruments or matters which amend or extinguish such interest;

c) at the request of such a beneficiary, within an adequate period, an inventory limited to the trust assets in respect of which the beneficiary claims his interest, and an estimate of their market value comparable to the value claimed by the beneficiary.

A further element indicates that San Marino Trust Law did not embrace the English idea of trust as a gift over time to beneficiaries, but an appropriation of segregated assets to be managed, under fiduciary duties, by the trustee: the regulation of the breach of trust. Under a

traditional English or international trust law, where trusts are viewed as a gift to beneficiaries, these latter are always entitled to take legal action against the trustee in case of breach. They are the beneficial owners of the trust property because the settlor, with the creation of the trust, wished to enrich them. Therefore, they shall be entitled to enforce the trustee's fiduciary duty in case of breach. Under San Marino law, it is the settlor that, in the trust deed, can attribute or remove the entitlement of a beneficiary to take legal action against the trustee. In fact, according to article 42, only in the absence of a contrary provision in the trust instrument, a trustee who commits a breach of his own duty shall be bound at the request of a beneficiary or of the protector to restore the loss caused to the trust fund, or to the beneficiary who makes the claim. Of course, a trust deed cannot deprive all beneficiaries and the protector of the right to take a legal action against the trustee. At least one person with this entitlement has to remain.

In no way, hence, it can be said that the trust enriched the beneficiaries, under San Marino law, if the settlor does not want. In fact, the settlor can exclude the entitlement of a specific beneficiary to take legal action against the trustee.

A last, but not least, argument can be put forward to make clear the originality of the structure of the San Marino Trust Law.

Under the traditional idea of the trust as gift over time to beneficiaries, the judge is urged to find a donee (that is to say a trust beneficiary under such a gift over time) in every case he can. Therefore, the tendency is to find a trust beneficiary even when the settlor did not want to have one. For example, under English law, if the settlor attempted to create a purpose trust, where no beneficiary entitlement is expected to arise according to the settlor's will, but the implementation of the purpose does benefit individuals, the judge shall characterize the trust as a beneficiary trust and attribute to these individuals all rights of a beneficiary (*Re Bowes*, [1896] 1 Ch 507).

Under San Marino law, article 48.5, makes clear that persons who receive or may receive assets or benefits from a purpose trust shall not be considered beneficiaries. Therefore, the settlor can characterize the trust as a purpose trust, depriving all individuals that can benefit from it of the rights of beneficiaries. No risk of re-characterization may arise.

In substance, since no gift over time idea is embodied in the new San Marino trust law, the settlor can fully shape the legal position of beneficiaries, because the trust is seen, under such a law, as an appropriation of segregated assets, to be managed under the settlor's programme indicated in the trust deed.

VI. SAN MARINO TRUST V. COMMON LAW TRUST: AUTONOMY OF TRUST PROPERTY V. SEGREGATION OF TRUST PROPERTY

A further characteristic of the San Marino trust takes distance from the existing common law trust law.

In a common law trust, trust assets are considered as a fund[22]. The fund is composed only by assets, not liabilities. As article 2 of the Hague Convention makes clear:

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

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

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

Both under the International trust model (see article 32, Trust (Jersey) Law 1984) and under the English trust model (*Muir v. City of Glasgow Bank*, (1879 4 App. Cas 337, 368), the trustee is bound by all obligations he entered as a trustee, even if the extent of his liability can vary.

With the extent varying from one legal system to the other, the trustee can limit its liability if the counterparty accepts a clause with this effect or if he is aware that the trustee is acting as such, In any case, the trustee is liable toward third parties in tort for damages created by the trust assets (In U.S, see *Maine Shipyard v. Lilley* 2000 ME 9).

Under common law systems, the trust can be considered as an asset partitioning tool[23], not a liability partitioning tool. Trust assets are intangible by trustees' creditors, but trustee's assets are not always insulated against "trust liabilities" toward third party creditors.

Under San Marino law, the trust fund is composed by trust assets and liabilities, following the civil law idea of patrimony (See art. 1, lett. j). This fund composed by assets and liability transfer as such, all together, in all cases where trustee are substituted (see art.40.1). In this manner it avoids the standard problems arising in common law systems when the trustee leaves the office, transfer the assets, but remains bound by the all liabilities. In this manner, trust assets and trustee's obligation are transferred all together to the new trustees, who will be substituted, as debtor, in all the obligations entered, but not fully executed by the former trustee. As a consequence, the former trustees are automatically substituted by the new ones in all legal proceedings (see art. 40.4). At the termination of the trust, liabilities are transferred to beneficiaries, according to the share of assets they are entitled to receive (see art. 16.4). Assets and liabilities are a fund, which is transferred as such, in all cases where assets are transferred.

Furthermore, this fund is totally independent from the trustee's own estate, not simply segregated from it. Under article 47.1, of the Trust Law any person, not being a trustee, a beneficiary or a protector, having rights against a trustee as a result of obligations undertaken or acts carried out manifestly as trustee or from acts or facts *nevertheless inherent in that capacity*, may satisfy [his claim] only out of the trust fund. In this manner, any liability incurred by the trustee ("*inherent in that capacity*") is to be satisfied by the trust assets, never by the trustee's own assets, regardless the fact that the third party knew the trustee was acting as such or had a claim in tort arising from the trust assets. In this manner, a complete autonomy is created between the trust fund and the trustee's own estate, not a simple separation or segregation.

VII. CONCLUSIONS

The San Marino Trust Law created a new model of trust. It is not simply a new trust law, with inspiration to the several international trust laws enacted in recent years.

This model of trust leaves to the settlor the power to decide completely the programme of appropriation of the trusts assets he wishes, without being bound by any rule deriving from the traditional common law idea that the trust is a gift over time to beneficiaries.

This idea is of a pure civilian tradition. Civilian settlors are not at odd with the trusts, but with the gift over time idea embodied in the common law trust. They are able to appreciate the value of segregation for their assets and are able to appreciate the value of drafting an appropriation programme for these assets, but they do not want to enrich the beneficiaries immediately. They want to "dominate" the beneficiaries' will and not be "dominated" by the beneficiaries' will. Their attitude is produced by centuries of experience with the *fideicommissum*, which embodied the dead-hand idea. Over the centuries, civilians set up *fideicommissa* to set an appropriation programme for the management of family assets over time, to bind the beneficiaries' will regardless of their desires not to be bound by it. English trust law did not embody such an idea, on the contrary it adopted the gift over time idea, and had the will of beneficiaries prevail over the settlor's will expressed in the trust deed. That's, in my view, the reason why the civilians are not always enthusiastic for the trust and they prefers foundations. Foundations still embodied the idea of an appropriation tool of segregated assets, segregated because of the legal personality, to be managed under the settlor's programme, dominating the beneficiaries' will.

San Marino's trust law got inspiration from the basic principles under *fideicommissa* and from its fundamental idea, creating a trust working on this basis[24].

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[3] See M. LUPOI, *The new law of San Marino on the "affidamento fiduciario"*, TRUST LAW INTERNATIONAL, 2011.

[4] The references are to the lex Falcidia of 40 BC and to a *senatusconsultum* of 56 AD.

[5] Although Roman law did not recognize a 'trust' in the same sense as it is used in common law today, it did develop a device — the fideicommissum — which achieved very similar ends

[6] Inst., 2.23.1: "fideicommissa appellata sunt, quia nullo vinculo iuris, sed tantum pudore eorum qui rogabantur continebantur".

[7] M. LUPOI,"*Trust and Confidence*", 125 L.Q.R. 253 (2009).

[8] See M. Lupoi, *The new law*, note 1. Professor Maurizio Lupoi was the drafter of the law on "Affidamento Fiduciario".

[9] See A. VICARI, *San Marino*, in D. BROWNBILL & AL, INTERNATIONAL TRUST LAWS; P. PANICO, *San Marino*, TRUSTS & TRUSTEES (2007), 500-502.

[10] After the ratification of the Hague Convention, there has been no case law recognizing foreign trusts, because there was no litigation on this point, but several foreign trust were inscribed in public registries in San Marino, according to the provisions of the Hague Convention.

[11] J. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce; 107 Yale L.J. 165 (1997-1998).

[12] Thomas P. Gallanis, New Direction of American Trust Law 97 Iowa L. Rev. 218, 218 (2011-2012).

[13] J. Romer. *In Re Smith* [1928] Ch. 915.,

[14] P. Matthews, The Comparative Importance of the rule in *Saunders v. Vautier*, LQR (2006) 266, at 274.

[15] Thomas P. Gallanis, *supra* note 13, at 237 ("American trust law will not become as proprietarian as the English trust law from which it descends. But the rebalancing of the desires of the settlor with the interests and rights of the trust's beneficiaries is both appropriate and welcome").

[16] See RESTATEMENT (THIRD) OF TRUSTS Â§ 58 cmt. a (2003) ("Spendthrift restraints are not permitted under English law . . .."). For a superb treatment of the American history, see Gregory S. Alexander, The Dead Hand and the Law of Trusts in the Nineteenth Century, 37 Stan. L. Rev. 1189 (1985).

[17] Thomas P. Gallanis, New Direction of American Trust Law, 97 Iowa L. Rev. 215, 222 - 223 (2011-2012).

[18] An excellent comparative analysis, can be found in P. Panico, International Trust Laws (2010).

[19] Under English law, the trust can be seen, in my opinion, as a gift over time to beneficiaries, even in case of discretionary trust. The class of object of powers can be represented as a whole, as the donee. Beneficiaries,

under a trust, are often considered, by English lawyers, as having a proprietary interest in the trust. They have a proprietary interest because, as a result of the gift under the trust by settlor, they are considered enriched by it. The fact that they may be entitled to receive possession of the trust assets later in respect of the settlement, explains the "over time" perspective of the gift embodied in the trust.

[20] Even under English law, one may view the trust as a management and wealth holding tool, but of a wealth that is, in substance, considered already beneficiaries' wealth, even if they are not the owners of the trust property yet. That's why, before being a management tool, the common law trust is to be seen as a "gift over time"..

[21] As well know to all readers, this position was abandoned in *Schmidt v. Rosewood Trust Limited* [2003] 2 A.C 709.

[22] B. RUDDEN, Things as Thing and Things as Wealth
Oxford J Legal Studies (1994), 81-97.

[23] HENRY HANSMANN & UGO MATTEI, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998).

[24] Other trust jurisdictions attempted to adopt Foundations to satisfy this needs and attract civilian clienteles, without realizing that the problem with the trust is not in the absence of legal personality, but with its fundamental structure based on the gift over time idea. These attempts are destined to fail because they often created nothing but an incorporated trust, see A. Binnington, Jersey foundations: the birth of the incorporated trust?, Trusts & Trustees 133-139 (2009).