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## COUNTRY REPORTS: SAN MARINO

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### I. TRUSTS IN THE IUS COMMUNE

San Marino is a civil law country, probably one of the purest remaining: no civil code has ever been 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 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 throughout the continent.

An institution that was named "*fideicommissum confidentiale*" or "*fideicommissum fiduciarium*" was one important of the several development of the *ius commune*<sup>1</sup>.

Roman law entitled the heir or the 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*"<sup>2</sup>.

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<sup>3</sup>.

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 are 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 "*Trebellianica*"<sup>4</sup>.

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<sup>1</sup> See M. LUPOI, The new law of San Marino on the "*affidamento fiduciario*", TRUST LAW INTERNATIONAL, 2011.

<sup>2</sup> The references are to the lex Falcidia of 40 BC and to a *senatus consultum* of 56 AD.

<sup>3</sup> 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

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 the title holder, but also a “*custos*”.

“*Confidentia*” was at the root of this institution.

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<sup>5</sup>.

Therefore, similarities with 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*”<sup>6</sup> 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 the main 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.

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<sup>4</sup> Inst., 2.23.1: “*fideicommissa appellata sunt, quia nullo vinculo iuris, sed tantum pudore eorum qui rogabantur continebantur*”.

<sup>5</sup> M. LUPOI, “Trust and Confidence”, 125 L.Q.R. 253 (2009).

<sup>6</sup> See M. Lupoi, *supra*, note 1. Maurizio Lupoi was the drafter of the law on “Affidamento Fiduciario”.

The Trust law is a brand new law, totally revising the trust law previously in force (17th March 2005, n. 37)<sup>7</sup>, 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 of 20th September 2004, n. 119 which produced relevant effects in the San Marino legal system<sup>8</sup>.

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 the standard requirements 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 already 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 laws, 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:

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<sup>7</sup> See A. VICARI, San Marino, in D. BROWNBILL & AL, INTERNATIONAL TRUST LAWS; P. PANICO, San Marino, TRUSTS & TRUSTEES (2007), 500-502.

<sup>8</sup> 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, on the ground of the provisions of the Hague Convention.

- a) 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;
- b) 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 b) above is a peculiarity of San Marino trust law, unknown to the trust laws in force in most of the common law jurisdictions.

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

By this provision, two very relevant effects are produced.

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

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

A valid trust for beneficiaries, being it 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 in order to preserve and increase them, and to 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 laws of jurisdictions influenced by it, any trust has to have appointed, identified or identifiable beneficiaries, unless it is aimed to create a purpose trust<sup>9</sup>, or, from another perspective, the persons or objects intended to be benefited must be certain or ascertainable<sup>10</sup>. In fact, “there must be someone in whose favour court can decree performance”<sup>11</sup>.

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

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<sup>9</sup> See *Re Wood* [1949] Ch 498.

<sup>10</sup> See *Knight v. Knight* (1840 3 Beav. 148)

<sup>11</sup> See *Morice v. Bishop of Durham* (1804 9 Ves 399 at 405)

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's 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 the trust as a gift over time to beneficiaries.

Bernard Rudden made clear that the common law trust is a form of gift over time to beneficiaries, even if this is not always 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<sup>12</sup> 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"<sup>13</sup>.

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"<sup>14</sup>. 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"<sup>15</sup>. That's why they are enriched by the creation of the trust.

If, as above described, 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

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<sup>12</sup> J. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997-1998).

<sup>13</sup> Thomas P. Gallanis, *New Direction of American Trust Law*, 97 IOWA L. REV. 218, 218 (2011-2012).

<sup>14</sup> J. Romer. In *Re Smith* [1928] Ch. 915.

<sup>15</sup> P. Matthews, *The Comparative Importance of the rule in Sounders v. Vautier*, L.Q.R. (2006) 266, 274.

management duties but no “gift” to anyone. No beneficiaries need to be enriched, none of them needs to receive any right or action to create a valid trust.

In this manner, the trust deed cannot be considered a form of “gift over time”, but an asset protection instrument, containing the programme for the management of the assets transferred to the trustee, that can, but not necessarily has to, immediately allocate entitlement on 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 and appointed later.

Further elements in the new Trust Law allow 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<sup>16</sup>, 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, which considers restraints on the alienation of a beneficiary’s vested entitlement invalid. In other words, the beneficiary position, once vested and not contingent, is a beneficiary’s property and, as for any property in which the beneficiary has full title, alienation cannot be restrained by the settlor<sup>17</sup>. 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 becomes the donee’s property and his ownership cannot be restrained.

In the United States, spendthrift clauses restraining the beneficiaries’ right of alienation, (invalid under English Law), are instead valid<sup>18</sup>. However, “the current position on spendthrift clauses is

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<sup>16</sup> Gallanis, supra note 10, at 237 (“American trust law will not become as proprietary 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”).

<sup>17</sup> See *Brandon v. Robinson* 18 Vesey Jun. 429, 433-34, 34 Eng. Rep. 379, 381 (L.C.)

<sup>18</sup> 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.

increasingly nuanced, recognizing more circumstances in which the beneficiaries must bear all the consequences as if they had ownership”<sup>19</sup>. 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 elements confirm that the trust is seen in common law systems<sup>20</sup>, as an instrument to “give over time” to beneficiaries<sup>21</sup>, instead of an appropriation of assets according to the settlor’s programme<sup>22</sup> are:

- i) the rule in *Saunders. v. Vautier*. 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.<sup>23</sup>
- 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<sup>24</sup>;
- iii) the rule under which beneficiaries can instruct the trustee to transfer to a third party the trust property they are entitled to<sup>25</sup>;
- 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 rules under which they may request, and the judge may consent, to a variation of trust when they can show that it is in their best interest, even if they are not all adult and of full capacity<sup>26</sup>.

## V. SAN MARINO TRUST AS AN “APPROPRIATION PROGRAMME”

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Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

<sup>19</sup> Gallanis, *supra* note 10, at 222 – 223.

<sup>20</sup> An excellent comparative analysis, can be found in P. PANICO, *INTERNATIONAL TRUST LAWS* (2010).

<sup>21</sup> 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.

<sup>22</sup> 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”.

<sup>23</sup> See *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).

<sup>24</sup> See *In re Smith*, [1928] Ch. 915.

<sup>25</sup> See *Grey v. I.R.C.*, [1959] 3 All E.R. 603 (H.L.).

<sup>26</sup> See Variation of Trusts Act 1958; Trust (Jersey) Law 1984, art. 47 (1).

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

This was done with the clear purpose to abandon the idea of the trust as a 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 out 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 in writing the trustee to postpone the transfer of trust assets to him 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 the 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 that 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, in whole or in part, of his beneficial interest by instrument or instruments taking effect as against the trustee when he becomes aware of it or them, or, in the case of a beneficiary with a fixed interest not limited to his life, by will. Beneficiaries are not, therefore, enriched by the trust, if the settlor does not 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 so, 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 deed 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 interest of the beneficiaries or to promote the purpose of the trust, and this power of amendment can be granted to the person chosen by the settlor. The settlor can decide not to grant such a power to beneficiaries and therefore 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 in order to be duly authorized to make those changes to the trust instrument which have become necessary or desirable. Beneficiaries are not entitled to appear before a judge attempting to obtain by him a variation of the trust deed, and so implicitly overruling the settlor's wish, having the latter explicitly chosen not to grant them such amending power.

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 from 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. 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<sup>27</sup>.

San Marino Trust Law parted with this idea very clearly. Since the trust is not a gift over time to the beneficiaries, but an appropriation programme of segregated assets to be managed and disposed according to the settlor's programme, the beneficiaries do 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 of time, an inventory limited to those 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 the 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, creating the trust, wished to enrich them. Therefore, they shall be entitled to enforce the trustee's fiduciary duties in case of breach. Under San Marino law,

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<sup>27</sup> As well know to all readers, this position was abandoned in *Schmidt v. Rosewood Trust Limited* [2003] 2 A.C 709.

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 absence of a contrary provision in the trust instrument, a trustee committing 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 at the same time all the beneficiaries and the protector of the right to take legal actions against the trustee. This entitlement has to be vested in at least one person.

In fact, the settlor can exclude the entitlement of any beneficiary to take legal action against the trustee.

A last, but not least, argument can be put forward to make clear the independency of the structure of the San Marino Trust Law from the ‘trust as a gift’ idea.

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 the rights of a beneficiary<sup>28</sup>.

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 beneficiaries’ rights. 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.

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<sup>28</sup> See *Re Bowes*, [1896] 1 Ch 507.

In a common law trust, trust assets are considered as a fund<sup>29</sup>. 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 can be.

Both under the international trust model<sup>30</sup> and under the English trust model<sup>31</sup>, the trustee can be 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 his 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)<sup>32</sup>.

Under common law systems, the trust can be considered as an asset partitioning tool<sup>33</sup>, not a liability partitioning tool. Trust assets are intangible by trustee's 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 transfers as such, all together, in all cases where trustees 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, transfers the assets, but remains bound by all the liabilities. In this manner, trust assets and trustee's obligation are transferred all together to the new trustee, who will be substituted, as debtor, in all the obligations entered, but not fully executed, by the former trustee. As a consequence, the former trustee is automatically substituted by the new one in all legal proceedings (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 related that capacity, may satisfy his claim

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<sup>29</sup> B. Rudden, *Things as Thing and Things as Wealth*, OXFORD J. LEG. STUDIES (1994), 81-97.

<sup>30</sup> See article 32, Trust (Jersey) Law 1984.

<sup>31</sup> See *Muir v. City of Glasgow Bank*, (1879 4 App. Cas 337, 368.

<sup>32</sup> See P. PANICO, *INTERNATIONAL TRUST LAWS* (2010).

<sup>33</sup> Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998).

only out of the trust fund. In this manner, any liability incurred by the trustee (“related 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 that the trustee was acting as such or had a claim in tort arising from the trust assets. In this way, 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 brand 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 completely decide 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 purely a civilian one. Civilian settlors are not at odd with trusts, but they are with the ‘gift over time’ idea embodied in the common law trusts. 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 immediately enrich the beneficiaries. 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 the will of beneficiaries has prevailed over the settlor’s will expressed in the trust deed. That’s, in my view, the reason why civilians are not always enthusiastic for the trust and they prefer foundations. Foundations still embody the idea of an appropriation tool of segregated assets, segregated because of the foundations’ legal personality, to be managed under the settlor’s programme, able to dominate the beneficiaries’ will.

San Marino’s Trust Law got inspiration from the basic principles under *fideicommissa* and from its fundamental idea, created a trust working on this basis<sup>34</sup>.

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<sup>34</sup> Other trust jurisdictions has attempted to adopt Foundations to satisfy this needs and to attract civilian clientele, without realizing that the problem with the trust does not lay in the absence of legal personality, in 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. Binnigton, *Jersey foundations: the birth of the incorporated trust?*, TRUSTS & TRUSTEES 133-139 (2009).