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The Relevance of the Hague Convention on the Law applicable to Trusts and their Recognition on the Italian legal framework.

When the Italian Parliament decided to ratify the Hague Convention on the Law applicable to Trusts and their recognition nobody could expect the big changes it would bring to the Italian legal landscapes in the years to come. From that moment an increasing attention to trusts has been duly paid in terms of literature and legal practice.

Italy was the first civil law country to ratify the Hague Convention in 1989 and at the very beginning the majority of the legal scholars thought that if Italy could (should) recognize foreign trusts embodying the features of the Convention, on the other hand, an Italian trust could not have any effect without clashing with the very nature of the Convention itself and with principles of Italian Civil Code.

In a short time it's quite impossible to provide for a deep explanation of the debate ongoing since the entering into force of the Convention (1992), therefore I will outline only few remarks which shall drive our analysis on the positive side of the trust practice.

Italy:

Trusts "*interno*": Is a trust in which all the elements are strictly connected with Italy (that's to say the settlor, the trustee, the beneficiaries and the assets fund). We could translated "*trust interno*" into the English word "domestic trust" anyhow in the trust *interno* the unique foreign element is its proper governing law. On the other hand authors could easily argue that a Convention of Private International law operates only in the presence of elements of internationality, which are objective and thus to mean different from the personal choice of the settlor: if there are no other elements of internationality, the Italian Law should apply (that's to say the Convention doesn't operate since Italy has not a specific law on trust).

The real question arises few seconds after: does the Hague Convention cover this kind of trust (*interno*) or does it deal only with foreign trusts to be effective (recognized) in our jurisdiction? According to the international private law rules as implemented in Italy, one element of foreignness - the governing law-, allows the Convention to cover with its principles.

The initial dispute on Italian trust *interno* basically started on the hedge of this kind of interpretation. The debate concentrated on the arguments related to the entry of a special kind of property (trust property) different from those actually in the Civil Code. Is it possible to enlarge the internal list of property rights via Conventional Law?

Italy is a traditional civil law country and its jurisdiction had to face with numerous trust problems among which:

- 1) Is a trust a legal entity or should it be considered as a simply burden obligation?
- 2) Who owns the assets?
- 3) Does the trusts provide for a condition precedent ownership?

Many of these questions has been solved by jurisprudence rulings and practice but many other arose alongside.

Here below find some clues of the issues which mainly focused on trust practice.

FORMATION: as a matter of extreme importance the trust deeds dwell on the “*reason why*” the settlor has decided to form a trust *interno* (with a foreign governing law as mentioned before) instead of addressing to usual legal Italian instrument. Accordingly the legitimate purpose arises as main check control of the worthiness of the trust *interno* choice. That’s why a typical trust deed should contain a wide description of the settlor’s reasons. The most evident, and even important, is that the settlor couldn’t achieve the same result by using a typical Italian legal tool (as illustrated below).

The Hague Convention prescribes that a trust must only be evidenced in writing (article 3). The Italian legal practice usually adopts a more rigorous approach and as a consequence the trust *interno* is made in writing and executed by a Notary.

In recent cases the analysis of the importance of the deserving and legitimate “*reason why*” allowed the Court to declare a trust not having effect in Italy (recent rulings : Tribunale of Bologna 9/1/2014; Tribunale of Trieste 22/1/2014)

Of paramount importance is the certainty of the date and the signature of a trust deed therefore it’s common use to execute it before the Notary. To be remarked that normally the Italian trust deed is basically formed by two different acts: the trust instrument and the transfer of assets to the trustee. The first provides for the program laid down by the settlor, the latter is devoted to be executed in Italy therefore according to the Hague Convention (art.4 “*The Convention does not apply to preliminary issues relating to the validity of wills or of other facts by virtue of which assets are transferred to the trustee*”) the transfer is under Italian Law.

THE LONG RUN TOWARDS VALIDITY

In the long run to full validity of the trust more than hundred judgments have been delivered by the Courts. Many of them, at the very beginning, concerned the fact that the trust was not perfectly admissible and consistent with Italian legal system.

Tribunale of Bologna 2003

This ruling summarized the position of the majority of the Italian judiciary and dispelled may doubts on the validity of the *trust interno*. In fact at the end the Court clearly stated that there’s no infringement to the fundamental principles of Italian law as the Hague Convention has been ratified (so that means expressly,

clearly and fully adopted as internal law) and therefore there isn't any legal ground to say that the use of trust is necessarily devoted to avoid the application of law.

Now this argument has been largely overcome by the majority of the authors nevertheless others have been put on the table. According to someone's opinion the *trust interno* conflicts with certain principles in succession law and moreover it clashes with general liability enshrined in Art 2740 Civil Code.

On these arguments many trustees and settlors have been sued before the Courts. However almost all have been rejected by the judges and that encouraged Italian professionals and experts to discover the possible uses of trust from commercial to financial to family fields. Exactly for that reason 80% of the trust deeds do not necessarily involve assets of huge amount, on the contrary they often concern assets and estates of not relevant economic interest.

The very recent use of trust in this case can easily show how the legal framework in Italy has changed since the Hague Convention has come into force.

Let's see what were (and still are) the usual legal means before the entering into force of the Hague Convention the Italian clients should devote themselves to if protection is what they needed:

- a) *Fondo patrimoniale*: Family Patrimonial Fund, created to fulfill the needs of the family during its lifetime. Widowhood and divorce put to end the fund. All assets go back to the original owner.
- b) *Snc*: the general partnership is a legal incorporation of a small group of people (only natural person). For the peculiar aspect of "*intuitu personae*" no legal duties can be carried on that interest as the personal obligations of members cannot affect the partnership patrimony.
- c) *Fondazione*: It is a no-profit legal entity which is primarily demanded to pursue a social and/or a charitable purpose. No beneficiary is entitled to claim funds profits or has any management control.
- d) Art. 161 civil code provides for the spouses to establish what law (even a foreign law) will rule their matrimonial property regime.

After the Hague Convention came into force some other legal instruments have been adopted which touch on the concept of segregation of assets. Nevertheless the trust instrument increasingly started to be used thus because no other satisfying legal mean could really care and protect at the same level.

- a) *Patrimoni destinati ad uno specifico affare*: The limited company separates funds by the assignment of a sum of money, of estates. This allocation of fund for a specific business means the new business can draw directly from separate incomes or profits.
- b) Laws on investment funds, on retirement funds, on investment intermediaries and on securitisation.
- c) *Trascrizione di atti di destinazione* Art 2645 ter c.c.: which allows the segregation of immovable assets or other registered chattels for a specific purposes that are considered worthy of protection (e.g. less able people, minors, cultural and social purposes).

Whereas Italy hasn't got a specific rule on trust this legal instrument has been largely used in common practice and the judiciary positive approach towards its use allowed practitioners to be confident on.

- a) Separation and divorce agreements approved by the Court (Tribunal of Milan, 2006) which frequently contain a declaration of trust by one or both spouses for the benefit of children.
- b) The Tribunal (Trieste, 2007) has approved the use of trust by an unmarried couple as a mean to provide for their children.
- c) In case of less able or incapable people the Special Court for Guardianship often authorized the administrators in charge to create a trust for the benefit of the person subject to guardianship.
- d) In any other further case in which a trustee acted improperly, a guardian should be replaced or guidelines are invoked the Courts properly answered with positive attitude (recent case in Tribunale of Milan 18/2/2014).

That clearly shows how the interaction between Conventional right and domestic principles is going beyond the expectations.

As I heard once to say the Convention started to grow "*a system of common law in a civil law jurisdiction*"; it means that the famous bridge between common law countries and civil law jurisdictions (as stated in the von Overbeck Report on The Hague Convention point 12) has come to be real.

This mainly shows that Italian Courts has become the more deeply aware of the trust and also "*they facilitated the spread of the trust and its use in many fields. They have further claimed and exercised powers that one normally considers belonging to common law judges*" (A. Braun, Italy: The Trust Interno, extract from "The International Trust", London 2011).