Trust and fiduciary transactions. A still ongoing complex process: concise comparison between Italian and German systems

NUCCIA PARODI

Tenured Researcher

Università degli Studi di Milano

nuccia.parodi@unimi.it

ABSTRACT

Before The Hague Convention was signed (on 1st July 1985), it was not allowed to refer to any trust country's law as a framework for domestic trusts having no international objective elements. The Hague Convention has instead allowed it, but it has also enabled its signatory Member Countries to outlaw any reference to such a framework (art. 13 The Hague Convention).Well, shortly after The Hague Convention came into force, Italy has instead largely acknowledged the legitimacy of domestic trusts, while extensively enforcing some domestic rules deemed to be binding under articles 15 and 18 of the Hague Convention. France's and Germany's approach have been different. France has ratified the Convention, but it has also enacted a trust-related law regulating any domestic fiduciary transactions (Act dated 19th February 2007. De la fiducie). Germany (which has not ratified The Hague Convention) has drawn up specific rules about fiduciary

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transactions, giving rise to an increasingly clear development over the last twenty years. Therefore, three different solutions to the same substantial problems in major Civil-law Countries. This essay outlines and focuses on the development of the German system.

Keywords: trust; Italian system; German system

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SUMMARY: 1. Introduction. – 2. Fiduciary transactions in the German system. - 2.1. Trusteeship – 2.2. "Legitimizing *trust*" Some concise comments. – 2.3. Further comments on fiduciary transactions in the German system. – 2.4. Some conclusions. The assets managed by the *trustee* as something separate.

1. Introduction

Before the Hague Convention was signed (1st July 1985), the legitimacy of a *trust*, established by expressly referring to some *trust* countries' specific laws, had been substantially acknowledged in the main civil-law systems (particularly including France, Italy and Germany).

However, some remarkable issues remained open, regarding the fundamental principles of the law being referred to (first issue),[1] as well as the so-called domestic *trusts*, namely *trusts* whose "important" aspects were connected to a specific *civil-law* system not providing for *trust* as a legal concept or for the desired category of *trust* to be set up (second issue).[2]

With reference to the first issue, the Hague Convention has clearly identified the *essential elements* needed in order for a legal entity to be legitimately defined and therefore acknowledged as a *trust* (articles 2; 7; 8 and 11 of the Convention); whereas, as to the second issue, it has allowed the member Countries to freely acknowledge or decide not to acknowledge any *trust* whose main features (except for applicable law, place of administration and trustee's habitual place of

[1] There being no doubt that the English system was and is still the main reference frame, many *trust countries*' regulations and common practices have not enabled us to clearly figure out not only their respective peculiar features, but sometimes also the fundamental requirements for validly establishing a *trust*.

[2] Several Countries had acknowledged the legitimacy of domestic *trusts*, but there was still some uncertainty about possible issues arising from that practice as to whether a foreign law could be referred to without any objective international elements and without any *specific* international private law provisions underlying their legitimacy.

abode) are more closely connected to Countries alien to the concept of *trust* or to the relevant category of *trust* (art. 13 of the Convention).[3]

As we all know, the aforesaid approach has led to the development of domestic *trusts* without any substantial international elements, thus fostering a very complex evolution, particularly in Italy, starting as early as in the '90s, resulting in the definition of rules and principles and in the consolidation of a significant common practice.[4]

Domestic trusts have also been acknowledged in Switzerland (as of 2007).[5] Other Countries (such as Belgium) have instead expressly outlawed any domestic *trusts*.[6] Specific laws, allowing the establishment of *trusts* having no substantial international elements, were however already in force in some European Countries (which could legitimately be regarded as *trust countries*). Let us recall the Principality of Liechtenstein, where, as early as in 1926, a ruling was enacted by specifically regulating domestic trusts as well as foundations (*Stiftungen*) designed to manage their founders' private assets and institutions (*Anstalten*) pursuing purposes like those of a *trust* .[7] More recently, in Europe, the Grand

[3] In this respect, there had been discussions during the preliminary works. Some delegations from civil-law countries had formally asked *not* to allow any domestic trusts; the wording of art. 13 of The Hague Convention has quite ambiguously upheld the legitimacy of domestic *trusts* by envisaging the possibility of enabling any of its signatory Countries to outlaw such a legitimacy by way of specific law decree or judicial ruling ("No Member Country is obliged to acknowledge a *trust* whose main features - except for its applicable law, place of administration and *trustee*'s habitual place of abode – are closer connected to Countries not providing for the legal concept of *trust* or the relevant category of *trust*"). Cf. Maurizio Lupoi, *Istituzioni del diritto del trust negli ordinamenti di origine e in Italia*, IV Ed., Giuffré, Milan, 2020, 267 ff.; for an introduction, cf. Angelo Busani, *Il Trust, Istituzione, gestione, cessazione*, Cedam, Padua, 2020, p. 47 ff.

[4] For a general framework, again cf. Maurizio Lupoi, *Istituzioni del diritto dei trust,* cit., p. 267 ff.

[5] Cf. *Introduzione del trust: modifica del Codice delle obbligazioni*, (Explanatory report for the start of the consulting procedure dated 12th January 2022), 11 ff., with reference to the acknowledgement and spreading of *trusts* after the entry into force of The Hague Convention in 2007, which established the rules applicable to domestic *trusts*, along with their specific taxation system (19) as opposed to the institutions regulated by the Swiss law (18 ff) with special reference to *trusts* (20 ff.).

[6] In other Countries, including Holland, the legitimacy of certain *trusts* can be outlawed by *ad-hoc* rulings issued by the judges empowered to adjudicate on the substantial legitimacy of a domestic trust, with reference to the specific purposes stated by the parties setting up the *trust*.

[7] As to the trust-governing law dated 1926 but later amended and supplemented, cf. the remarks and clarifications by Francesco Armando Schurr, *La revoca del trustee e la sostituzione del medesimo con altro. Alcune riflessioni comparatistiche*, in *Trusts*, 2021, p. 17 ff. pointing out the restrictions applicable to domestic trusts in relation to the Principality's

Duchy of Luxembourg has approved specific rules designed to regulate *trusts* (law dated 27th July 2003 on *trusts* and fiduciary agreements) as well as Repubblica di San Marino. Such Countries can therefore be fully referred to as *trust countries*.[8]

In Switzerland, with its long-established legitimacy of domestic *trusts*, an important debate is now going on about the introduction of specific rules into the Code of obligations.[9] Should the relevant decree be enacted, then Switzerland could also legally qualify as a *trust country,* in spite of its need for some upcoming supplementation and clarifications, due to the simplicity of current regulations presumably requiring an extensive process of interpretation.

Let us however emphasize that, in the main civil-law countries, many purposes achievable by establishing a *trust* had long been implemented by means of fiduciary agreements, so that a general legitimation of fiduciary transactions - according to guidelines substantially shared by both jurisprudence and case-law – has led to a *standardization* of the main types of fiduciary transactions.The legal concept of *trust* had been generally acknowledged in Germany since the beginning of the 20th century, [10] whereas the features of major fiduciary transactions have been defined and embodied more recently (with special reference to *trusteeship* and to *trust* as a guarantee).[11]

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ethical code and the need for appropriate accounting records kept by the trustee in a *professionally adequate* and objectively verifiable way.

[8] In the absence of specific rules, some problems and issues are still open as for the definition of rules and principles, with the consequent need to look at major *trust countries'* long-established rules (such as the UK system, whose fundamental principles and some guidelines are complied with - in the absence of specific rules - not only by *Commonwealth trusts* but also by systems more recently developing their specific *trust*-related rules), but on the basis of a substantial framework of references where no rules or principles are deeply rooted. As an example, cf. the issues relating to *sham trusts* and sham transactions regulated by the new rules approved by the Republic of San Marino (Court's ruling on *trusts* and fiduciary relations in the San Marino Republic dated 5.12.2017 in *Foro it.*, 2018, IV, p. 163 ff. and in *Trusts*, 2018, p. 222 ff.).

[9] The initial project proposes the amendment to the Code of obligations to the Federal Assembly of the Confederation, by introducing title XXII bis regarding *trust* (new articles from 529 a through to 529 w). More generally, Guillame Grisel, *Le trust en Suisse*, Schulthess Éd. Romandes, Genève, 2020, p. 121; Luc Thévenoz, *Propositions pour un trust suisse*, in Schweiz. Zeitschrift für Wirtschafts- und Finanzrecht, 2018, p. 99 ff.; Paolo Bernasconi, *Obblighi del trustee in diritto svizzero: novità legali e giurisprudenziali*, in *Trusts*, 2020, p. 624 ff.

[10] For some comments on how the study of the Pandects has developed until the '30s, please refer to my essay: Nuccia Parodi, *Le operazioni fiduciarie*, Giappichelli, Turin, 2018, p. 9, focusing on notes 30 and 31.

[11] Let us emphasize the transition from an approach still based on the study of the Pandects, allowing the *trustee*'s "power of abuse" as something typical of the so-called "Roman-law-based" *trust*, to the current system, extensively enforcing *trust* against any third parties if the entrusted assets are managed by the *trustee* in a strictly professional way as a "separate estate". Cf. para. 2.5 below.

In Italy, the legitimacy of major fiduciary transactions had already been fully acknowledged since the '30s. Some important fiduciary transactions have been increasingly standardized in various major sectors since the '50s (for example, the so-called *"fiducia amministrazione" [trusteeship]*; *trust* as a guarantee; *trust* for donation purposes; *trust* for winding-up purposes; *trust* as a collateral to ensure contractual obligations).[12]

In France, fiduciary agreements were *substantially* allowed as a common practice, whilst legal authors were quite reluctant to acknowledge the validity of the major fiduciary transactions and, even more so, their standardization. Furthermore, it was often pointed out that, should the *trustee* turn out to have no independent managerial powers, the relevant transaction would be considered illegitimate and referred to as *convention de prête nom*. [13]After The Hague Convention was signed, the so-called "domestic" *trusts* were expected to become very common, referring to specific *trust countries* for regulation purposes, whereas traditional fiduciary transactions were expected to become less widespread even in those Countries where they had long-standing roots. [14]

[12]For an extensive overview of jurisprudence and case-law in the relevant sectors, cf. Nuccia Parodi, *La operazioni fiduciarie*, *ibidem*, from para. 2.2 to para. 2.10, in addition to para. 2.11 for conclusions.

[13] In this respect, as an example cf. Philippe Malaurie – Laurent Aynès, *Les biens*, II Ed., Defrénois, Paris, 2005, par. 757 ff. about *Propriètè fiduciaire*, which clearly points out the differences between a lawful fiduciary agreement, although just based on a recent common practice, and a conventional *prête-nom,* with a focus on the poor diffusion of structured and clearly standardized fiduciary transactions and on a common attitude viewing the various fiduciary agreements within the framework of a mandate, in spite of some controversial issues. In this connection, again Nuccia Parodi, *Le operazioni fiduciarie*, cit., p. 73 ff.

[14] The above remark particularly applies to Italy and Germany, where some major fiduciary agreements had long been standardized, as mentioned above. The same cannot be said about France, where *fiducie* has always been applied subject to restrictions. Please also note that, however, in Italy, after domestic *trusts* have been definitely legitimized by increasingly acknowledged jurisprudence and case-law, attention has also drawn to how the main fiduciary transactions could no longer be considered legitimate because of their extensively reported crucial issues. In this respect, above all cf. Maurizio Lupoi, *Il contratto di affidamento fiduciario*, Giuffré, Milan, 2014, which, after accurately examining the traditional framework of fiduciary agreements (p. 59 ff.) and analytically referring to the major relevant judgements by the Supreme Court (p. 163 ff.), finally ends up by generally ruling out the legitimacy of fiduciary agreements (particularly p. 121 ff. "Conclusione sui contratti di intestazione e prestanome e sulle differenze del mandato", and p. 139 ff. "Critica della prassi del negozio fiduciario"). Furthermore, such a negative approach has remained substantially isolated, whereas positive opinions have instead been expressed about the proposal - generally shared by legal authors as well as by case-law - based on the need for a discipline of a specific agreement for *entrustment* under guidelines already acknowledged in both jurisprudence and common practice (cf. M. Lupoi, *Il contratto di affidamento fiduciario*, cit., p. 23 ff.) in spite of some issues still awaiting in-depth

But this turned out not to be the case. France is well known to have signed The Hague Convention, but, instead of enacting and making it come into force,[15] it approved a specific *Loi sur la fiducie* (on 19th February 2007) that we will examine hereinafter. In some respects, the fiduciary [manager] can be regarded like a *trustee*, but there are still some major differences. [16]

The point is that Germany did not even sign The Hague Convention and has instead developed some very interesting *Treuhand*-related regulations, as detailed hereinafter (para. II). Let us now however mention the most interesting concepts, which are: standardization of several fiduciary transactions, based on both common practice and case-law, as well as *Verwaltungstreuhand* and *trust* as a guarantee.

It is interesting to point out the transition from a trend set since the early twentieth century – ruling out the possibility to enforce *trust* against any of the *trustee*'s third-party creditors (with consequent "power of abuse" as a distinguishing feature of the "Roman-law-based" trust) – up to the consolidation of a system where the assets managed by the fiduciary manager can be regarded as *separate* assets very similar to the assets managed by a *trustee*. [17]

As mentioned above, Italy has joined The Hague Convention, has executed and enforced it, according to particular guidelines, thus giving rise (within the framework of specific regulations mostly regarding taxes) to an increasingly solid case-law and common practice about domestic *trusts*, while however interpreting and adjusting some expressly mentioned laws to our legal system's rules and principles. Not only internal rules have extensively been enforced, under art. 15 of The Hague Convention, but also domestic regulations and principles typical of the Italian legal system, through an adjustment process brilliantly referred to as "metabolization process". [18]

It is also generally believed that Italy, due to its peculiarities, can be regarded as a country acknowledging and regulating trusts by enforcing its specific regulations (although based on rules and principles typical of the legal systems expressly referred to by the parties). Italy can therefore be considered as

examination (in further detail, cf. Nuccia Parodi, *Le operazioni fiduciarie*, cit., p. 138 ff.). The inclusion of fiduciary transactions within the legal framework of a mandate, in spite of its resulting from an outdated view, is still occurring in Italy (Cf. Angelo Busani, *ibidem*, p. 129 ff. In this connection, please also cf. Nuccia Parodi's comments, *Le operazioni fiduciarie*, cit., p. 74 ff. and particularly the notes on p. 89 and p. 189 ff.).

[15] Hence, no space for the development of domestic *trusts.*

[16] The Swiss Explanatory Report, ibidem, dated 12th January 2022, p. 55, emphasizes the restrictions to the possible applications of *trust* in France, by pointing out how the fiduciary agreement is void and null if it implies a donation in favour of the beneficiary and by pointing out that such a nullity is a matter of public order.

[17]On the development of the German system, cfr. para. 2 below as well as, more generally, Nuccia Parodi, *Le operazioni fiduciarie*, ibidem, p. 189 ff.

[18] Successful wording devised by Maurizio Lupoi. Cfr. Maurizio Lupoi, ibidem, p. 270 ff.

an actual trust country. The approval of art. 2645 *ter* Italian Civil Code has supported the above trend: according to a wide-spread view, the aforesaid article has been deemed to comply with principles which can definitively legitimize a legal structure, disciplined by our domestic regulations, having the same features as an actual trust.[19]

Finally, such an approach has not been shared: M. Lupoi has deemed it defective "if compared to other legal systems, because of its focus on the recipients' profiles and because of its poor perception of the relevance of fiduciary obligations." Accordingly, it cannot be argued that the Italian legal system provides for legal structures functionally comparable to an actual trust, although it must also be noted that The Hague Convention has turned out to be now virtually useless to the Italian legal system, considering how domestic trusts have developed their distinguishing features, often far from the law being referred to.

In conclusion, as a result, the relevant legal framework for *trusts* and fiduciary transactions in major civil-law Countries (Germany, France and Italy) is nowadays quite complex. We will hereinafter just focus on the fundamental principles underlying the German system, which has maintained its important role in the development and consolidation of the traditionally allowed fiduciary transactions - so as to consider any assets duly and professionally managed by a *trustee* like separate assets (cf. para. 2 below) - and has instead not allowed the development of a domestic *trust* (incidentally, like France).[20]

2. Fiduciary transactions in the German system

In the German system, rules and principles about *trusteeship* (*Verwaltungstreuhand)* and *trust* as a guarantee *(Sicherungstreuhand*) have become firmer and firmer over time, thus highlighting a standardization in the main fiduciary transactions in both sectors, along with the legal possibility of enforcing

[19] This allegation is extensively upheld and evidenced by Gaetano Petrelli in particular, *Vincoli di destinazione ex art. 2645 ter c.c. e trust, quindici anni dopo,* in *Riv. Not*., 2020, p. 1091 ss. In addition, cf. Lucilla Gatt, "I*l "trust interno", una questione ancora aperta. Dal trust al trust. Storia di una chimera.*, ESI, Naples 2011, p. 73 ff., with no substantial approval by the other legal authors, nor by the common practice. Cfr. Maurizio Lupoi, *ibidem* p. 270 ff.; Nuccia Parodi, *Le operazioni fiduciarie*, *ibidem*, p. 134-137.
Please note that the aforesaid Swiss Explanatory Report, dated 12th January 2022, instead assumes (p. 55) that Italy has already regulated *trust* by means of law 51 dated 23rd February 2006, which has introduced art. 2645 *ter* in the Italian civil code.

[20] As well known, France has regulated the main fiduciary transactions by way of a specific ruling (*Loi sur la fiducie*, 19th February 2007, n. 211). Only few lawyers still acknowledge the legitimacy of fiduciary transactions according to the traditional approach. Cf. Claude Witz, *La fiducie en droit privé francais,* Paris, 1980, p. 36 ff.; Nuccia Parodi, *Le operazioni fiduciarie*, cit., cap. 4, para. 4.8/4.11.

any fiduciary transactions against any of the *trustee*'s third-party creditors, far beyond the limits set by the *Reichsgericht* in early '900.[21]

Based on the aforesaid traditional trend, *trust* had been defined by lawyers studying the Pandects and jurists in early '900 as a "Roman-law-based" trust, because it was indeed difficult to effectively react to any possible "abuse powers" by the *trustor*, according to a tradition rooted in the analysis of Roman law.

Over the last few years, it has instead become increasingly clear that - whether within the framework of *trusteeship* or of *trust* as a guarantee - fiduciary transactions can generally be acknowledged by and enforced against any of the *trustee*'s third-party creditors, especially in the event of his bankruptcy.

Let us now point out the most interesting highlights.

2.1. **Trusteeship**

When it comes to trusteeship, in case of *trustee*'s bankruptcy (or, more generally, in case of actions taken against him by creditors claiming to enforce their rights on assets *formally* owned by him), it can actually be argued that, for the *trustor*'s sake, the *trustee* is *only formally* owning the relevant assets, bought within the framework of a fiduciary transaction and therefore *actually* owned by the *trustor*.

The above objection could however only be raised under certain specific circumstances: as a rule, it was necessary to prove the *direct* conveyance of assets from *trustor* to *trustee*. In that case, it was possible to safely enforce the *trustor*'s rights against the *trustee*'s creditors. Such a circumstance could easily enable the *trustor* to enforce his rights against the *trustee*'s creditors.[22] If instead some amount of money had been transferred and if the *trustee* had used it to buy assets on the *trustor*'s behalf and had undertaken to manage them, or if the real properties transferred to the *trustee* had been sold and therefore other assets had been bought, then the management of the entrusted assets was generally referred to as "*dynamical trust",* and in principle, according to well-established rules, under no circumstance could the *trustor*'s rights, on the assets being so managed, be enforced against any third parties.

It must however be also pointed out that, over the last years, a different trend has become stronger and stronger, enabling the rights on any *trust*-based assets to be enforced against any third parties, even in case of *dynamical*

[21] For a very clear analysis, Joachim Gernhuber, *Die fiduziarische Treuhand*, in *IuS* 98, Heft 5, p. 355 ff.

[22] This is the trend based on many judgements over time. In this respect, cfr. Joachim Gernhuber, recalling the *Reichsgericht*'s judgements dating back to early '900, considering that the aforesaid principle has even been substantially clinched by recent cases. Cfr. BGH, 7th July 2005, number III ZR 422/04, in *NZI* 2005, p. 265 ff.

trusteeship, as long as the trustee is *professionally* managing the assets and it is therefore possible to objectively reconstruct the executed transactions.

Such principles are also applicable in case of *trust* as a guarantee, and, more generally, a distinction is acknowledged between *trustor*'s assets and *trustee*'s assets, if the relevant accountancy is being accurately kept, like when it comes to amounts banked in safe custody at banks or entrusted to professionals' (*Anderskonto*) or, more generally, when it comes to assets managed according to professional and objectively ascertainable criteria. [23]

When *trust* is set up as a guarantee, there is however a closer focus on fiduciary agreements and on whether they can be enforced against third creditors .In many cases, in the event of the *trustee*'s bankruptcy (creditor), the trustor (debtor) has been entitled to keep his assets - being held in trust by the creditor - well apart from the bankruptcy estate, even if they were being managed by the creditor in a dynamical way.[24] Some *specific* evidence must however be provided about the executed administrative deeds, whereas the *trustor* must have paid off his debt towards the *trustee*. [25]

Furthermore, the *trustor* might formally object to the *trustee*'s credits being levied on the assets transferred to him by way of security, pursuant to paragraph 771 *Zivilprozessordnung* (ZPO). [26]

Consequently, the *trustor*'s rights are quite extensively acknowledged towards any of the *trustee*'s third-party creditors, so that in many cases it can be argued that *trust* can "nearly" be regarded as a right *in rem* (*Quasidingliche Wirkung*), probably to a greater extent if compared to the cases of "trusteeship/fiducia amministrazione".

In the event of the *trustor*'s bankruptcy (debtor), the *trustee*'s legal protection (creditor) is less intense. In any event, although the *trustee* is not deemed to fully own a right *in rem* enforceable towards other creditors, he has been treated as if he was the owner of a *preferential* pawn. [27] He will therefore be given his due with the value resulting (after an accurate assessment - *Verwertung*) from the sale of the asset(s), but the transactions will be executed by the receiver in bankruptcy.

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[23] G. Walter, *Das Unmittelbarkeitsprinzip bei der fiduziarischen Treuhand*, Moht Siebeck, Tübingen, 1974, p. 55 ff.; Dirk Andres, § 47 InsO, marginal number 38, in Nerlich/Römermann, *Insolvenzordnung*, C.H. Beck, München, 2019. Cf. also BGH, 7th July 2005, number III ZR 422/04, in *NZI* 2005, 625.

[24] Based on paragraph 47 of Bankruptcy Law (*Insolvenzordnung*).

[25] In this connection, cf. Heribert Hirte – J.P. Prab, 35 InsO marginal number 27, in *Uhlenbruck, Insolvenzordnung*, C.H. Beck, München, 2019, as well as *ibidem* the references to the extensive case-law justifying the trustor's right to separation based on his actual-economic ownership of the asset being assigned as a guarantee

[26] For an effective and still relevant overview, cf. Alessandra Braun, *I trust di garanzia in Germania*, in *Trusts* 2000, 42-43.

[27] In this connection, cfr. Moritz Brinkmann, § 47 InsO marginal number 86, in *Uhlenbruck, Insolvenzordnung*, C.H. Beck., München, 2019.

In case of normal levy by the *trustor*'s creditors, the *trustee* can however file his legal objection (para. 771 ZPO) with good prospects of success in preventing his assets from being subject to enforcement.

Let us however add some further comments to the above remarks about trusteeship/"fiducia amministrazione".

Firstly, there must be an easy chance to ascertain the *actual* value of the assets provided as a guarantee and to ascertain their transfer from *trustor* to *trustee* (*Unmittelbarkeitsprinzip*: principle of immediateness). *Specific* evidence is required if the assets have been transferred and replaced with other ones, along with accurate and professional accountancy specifying the assets contributed on a fiduciary basis.

As a rule, the replacement of assets (whether entrusted in order to be managed or as a guarantee) with other assets can result in a forfeiture of the right to separation or opposition against the trustee's creditors' claims (*Bestimmtheit*: principle of determination) when there is no indisputable evidence of the executed transactions. If there has been a *dynamical trusteeship*, an accurate and professional management of the assets being held in trust is also required.

In conclusion, as for *trusteeship* and *trust* as a guarantee, the German system has well clinched the principle whereby any rights resulting from *trust* can even be enforced against the *trustee*'s creditors (even in case of bankruptcy) not only when the assets held in trust have been directly bought by the *trustee*, based on a *certain indisputable evidence* (within the framework of a *static* management), but also whenever the *trustee* has purchased assets from third parties by using amounts of money made available to him by the *trustor*, provided that the assets have been managed (dynamically) in a professionally exemplary way in order for the relevant executed transactions to be easily traced. [28]

2.2. "Legitimizing trust". Some concise comments

The issues regarding the so-called "legitimizing" *trust* are centred around the transfer of shares or stakes from joint-stock companies (*AG: Aktiengesellschaften*) or limited liability companies (*GmbH*) to trust companies.[29]

[28] In this respect, cf. the comments by Alessandra Braun, *I Trust di garanzia*, *ibidem*, p. 43 and p. 44.

[29] Italian jurisprudence had focused on the possibility of transferring any shares or stakes held in public limited companies or limited liability companies, by considering the fiduciary [manager] not like an actual shareholder, but like a mere appointee. On this issue, let us recall the contributions by Giuseppe Portale and Enrico Ginevra, *Intestazione a società fiduciarie di azioni non interamente liberate e responsabilità per i conferimenti residui,* in *Studi* Pier Giusto Jaeger, Giuffré, Milan, 2011, also referring to Pier Giusto Jaeger's opinion, *Sull'intestazione fiduciaria di quote di S.r.l.*, in *Giur. comm*. 1979, p. 182 ff., with special reference to the possible acknowledgement of the "legitimizing trust", not only for shares held in public limited companies but also for stakes held in limited liability companies (which is instead a solution outlawed by the German system, as pointed out by P.J. Jaeger).

We will however focus on few points.

In Germany, the view of the so-called *"legitimizing" trust* within the framework of a fiduciary transaction is deemed inappropriate. Such a transaction would qualify as fake (*unechte)* or improper *(uneigentliche*) trust. The trustor is indeed still the owner of the right. The "trustee" acts (in the cases regulated by the *AkG* or, otherwise, by para. 185 BGB, as mentioned above) as an indirect (*Unmittelbarer*) representative. In short, he is a mere proxy-holder empowered to carry out *certain transactions* during his management of securities whose *title* is however still being held by the shareholder.

Generally speaking, the *entitled* person can certainly be deemed to be vested with powers providing him with some managerial independence comparable to a trustee, but the differences from "true" trust are still significant.[30] Furthermore, it is all about a *dynamical* management of shares (purchase and sale of shares within the framework of an appreciation of the owner's security portfolio), even if sometimes there can be a more specific mandate to optimize some narrower security portfolios. As a result, on the balance sheet of the company entitled to manage the securities, the shares must necessarily be recorded on specific dedicated accounts (instead of being recorded among the proper statements of assets and liabilities).

In case of need for intervention at shareholders' general meetings, some *specific* instructions will have to be asked of the shareholder (who can however also intervene directly). In particular cases, there can also be a power of attorney resulting in an entitlement to some actions (*Ermächtigungstreuhand*)[31] or in a wider entitlement providing the appointee with full powers, if necessary (*Vollmachtstreuhand*). Even in the latter event, the appointor however still holds the shares whereas the proxy-holder is empowered to carry out all necessary or advisable administrative and managerial ordinary transactions (interventions at shareholders' general meetings, initiatives in possible disputes, etc.), but always for and on the shareholder's behalf.

In the above scenarios, the appointee can be regarded as some sort of "improper" *trustee*, while however still acting as a proxy-holder (with consequent precise financial reporting obligations) and certainly not within the framework of a true fiduciary agreement, as characterized above.

In fact, strictly speaking, only the above-mentioned managerial agreements (*Verwaltungstreuhand*) and surety contracts can *truly* qualify as fiduciary agreements (whether *Echtetreuhand* or *Vollrechtstreuhand*), whereas any agreements giving rise to *Ermächtigungstreuhand,* as well as any agreements qualifying as

[30] In any case, please note that any transfer merely legitimizing the buyer of shares should be all about the transfer of shares and be therefore inapplicable to any transfer of stakes held in a limited liability company [GmbH].

[31] Paragraph 185 BGB. In such cases (classified as sham trust), the *trustee* is vested with *specific* representative powers.

Vollmachtstreuhand pursuing the broader purposes outlined hereinabove, are reported to have fiduciary purposes, namely for mere entitlement, without however strictly qualifying as fully fiduciary transactions (*Echtetreuhand*).[32]

2.3. Further comments on fiduciary transactions in the German system

After outlining the rules increasingly acknowledged in the German system about *trusteeship*, *trust* as a guarantee and legitimizing *trust* improperly labelled as *Echtetreuhand*, let us now draw some conclusions along with a short comparison with the rules progressively developed in our Country with regard to the *trust* that we call "confidential" because it is unknown to any third parties.

There is no doubt that the underlying rules about the fiduciary transactions tackled above (*trusteeship* and *trust* as a guarantee) are similar in the two Countries and usefully comparable.[33]

Firstly, both German jurisprudence and case-law have very clearly acknowledged the *validity* of *confidential* atypical agreements with fiduciary purposes (and their spreading) by establishing some clear and well-defined rules relating the main issues underlying such transactions.

The risks for the *trustor* of being unable to duly cope with the *trustee*'s defaults (and the issues in case of bankruptcy) are very clearly outlined. It is indeed still argued, in very explicit and general terms, that *trust*, understood in its strictest sense (*Echtetreuhand*), is however characterized by a certain *risk of abuse* by the trustee that can be mitigated (or almost totally neutralized in several ways) without *ever* being definitively ruled out.[34]

[32] This view is clearly upheld by C. Schäfer, *Münchener Kommentar zum BGB*, 8. Auflage 2020, para. 31 ff. and Claudia Schubert, in *Münchener Kommentar zum BGB*, 8. Auflage 2018, para. 51 ff.

[33] Let us remember that, so far, we have applied a comparative method capable of considering both case-law and common practice (*law in action*) and jurisprudence (*law in books*) and of highlighting the underlying interests in order to better understand the solutions in force in other Countries for the purpose of classifying our solutions and of adjusting or modifying them, if necessary, in an appropriate way. Moreover, the aforesaid method is based on the teachings by comparative law's founders (*in primis,* of course, Gino Gorla and Rodolfo Sacco).

We have deemed such a method to be the most sensible with reference to both the current trend in the harmonization of rules from several systems (including regulations or principles set out in EU directives) and the more practical purpose of solving domestic problems in a clearer way, by better understanding the relevant complex underlying interests.

[34] We have outlined the most interesting solutions proposed by some major German lawyers for curbing the risk of abuse by the *tustee*, as well as the development of common practice in favour of a better protection of the *trustor's* rights towards the *trustee's* creditors.

The definition of *Roman-law-based* trust with its consequent possible abuses by the trustee seems to be still substantially correct. The protection of the trustor's rights has been enhanced over the last years, also considering that, in the German legal system, any difficulties caused by sham purchases of real properties by *trustees* do not give rise to the same problems reported sometimes in the Italian legal system: the fiduciary transaction regarding real properties must indeed be authenticated, even if the consequent limits may not be recorded on *Grundbuch*.[35] As to the contents of fiduciary agreements, we have already pointed out that the most common types have long been classified (like in our legal system) with special reference to both *trusteeship* and *trust* as a guarantee.[36]There are no substantial and important differences between the two systems. The cases of nullity are however marginal. Both in Italy and in Germany, invalidity is detected in any fiduciary transactions where the assets are *actually* managed by the *trustor*, as a matter of fact, whilst the *trustee* plays a merely passive role.[37]

No particular fears are reported about whether fiduciary transactions can give rise to tax-related issues or problems in case of fictitious registrations. The legal system's reactions, including its jurisprudence and case-law, are indeed adequate.

On the other hand, fiduciary agreements, if dealing with real properties, must be authenticated in case of both *trusteeship* and *trust* as a guarantee:[38] consequently, the German system does not need to cope with the same problems as the Italian system when it comes to the *simulation* of the official documents needed to convey real properties from *trustor* to *trustee*.[39]Consequently, the

[35] In the German system, the transfer of ownership of rights *in rem* is well known to involve the execution of a causal transaction (a sale or other transactions) that must be authenticated pursuant to para. 311 b BGB. The transcription does not take place ob the basis of the aforesaid transaction, but on the basis of a second abstract transaction (*Auflassung*) kept apart from the first transaction: principle of separation (*Trennungsgrundsatzprinzip*) – para. 295 ff. BGB.

[36] With regard to trust as a guarantee, it would also be interesting to focus on fiduciary transactions dealing with chattels (by making a particular distinction between reservation of ownership and fiduciary transactions and a reference to the importance of long-established common practice – *Rechtsgewohnheit* – when it comes to legitimacy and classification of different fiduciary transactions dealing with chattels). On these matters, cf. Rolf Serick, *Le garanzie mobiliari nel diritto tedesco*, cit., p. 14 ff., as well as the still very interesting comments in the introduction by P. Rescigno.

[37] The same principles had long been extensively applied by the French system, cf. Philippe Dupichot, *Rapport de synthèse*, in Association Henri Capitant, *La fiducie dans tous ses états*, Journée nationale, tome XV, Dalloz, Paris, 2011, p. 89 ff. and Philippe Malaurie-Laurent Aynès, *Les biens*, cit., p. 243 ff.

[38] When it comes to real properties, "notarization" is indeed required under para. 311 b BGB.

[39] As mentioned above (cf. footnote 38 above), under German system, the deed conveying the ownership of real properties is an abstract deed (not specifying the reason for

transparency of transactions, with reference to taxes and anti-money-laundering regulations, is *better* ensured. [40]

Finally, it is clear that, when it comes to transactions unevidenced by authenticated papers or recorded deeds and when fiduciary agreements are designed to avoid tax issues affecting the trustor (by transferring his assets or money to the trustees), the relevant transaction would be deemed to have been executed for the sole purpose of paying lower taxes or however obtaining direct or indirect advantages in taxation.

We won't here tackle the above issues in further detail, but let us just remind that, generally speaking, paragraph 42 AO (*Abgabeordnung*) can regulate such cases, thus considering the agreement executed between the parties like an *abuse* of the regulatory options allowed by law, whenever it is proved that the controversial transactions were *exclusively* executed while aiming at paying lower taxes.[41]It can also be useful to remind that the German system allows to set up a *trust* for fiduciary purposes, but only if it is a trust with *indisputably* international features. Therefore any "domestic" *trust*, according to rules well established in our Country, cannot be allowed in Germany. Only genuinely international *trusts* are admissible, subject to the limits set by the German system's mandatory regulations or public policy.[42]

The analysis of the German experience is also interesting for the existence of rules shared about various types of fiduciary agreements and about the legitimacy of "confidential" fiduciary transactions, in even many more cases than

entitlement to conveyance of ownership), giving rise to no issues possible alleged shams, whenever the underlying entitlement is a fiduciary agreement. In addition, the fiduciary agreement, if dealing with real properties, is openly disclosed and authenticated. There is therefore no purchase and sale between *trustor* and *trustee* (*Kaufvertrag*) entitling to the conveyance of the asset, because the conveyance directly results from the fiduciary agreement, so that the relevant record is abstract.

[40] In all fiduciary transactions conveying assets (whether real properties or chattels, etc.) from *trustor* to *trustee*, any notices for the Inland Revenue Office are always deemed to be necessary whenever the cause for taxation changes, with special reference to any capital gains due to the difference between value upon purchase (*input*) and value upon exit from the *trustee*'s assets (*output*).

[41] Para. 1: "Through the abuse (*Missbrauch)* of lawful possibilities of conforming to regulations, no tax law can be dodged."

[42] Cf. Hein Kötz, *Trust und Treuhand*, Vandenhoeck & Ruprecht, Göttingen, 1963, p. 156 ff. Objectively international aspects are therefore required of a *trust* in order for its validity to be acknowledged in the German system. Let us remind that Germany did not sign The Hague Convention and that, when it comes to *trusts* with international purposes and aspects, their clauses are assessed based on the German system's principles of public order. A substantially similar situation can be observed in France, which has signed The Hague Convention, without however ratifying it.

those we've already focused on, namely *trusteeship* and trust as a guarantee. [43]More importance can therefore be attached to the conclusions about fiduciary transactions intended as a guarantee whereby the creditor is expected to acquire an asset following an accurate assessment of its value.[44]

It is also interesting to observe the use, in *trusts* as a guarantee, of agreements with simple and flexible clauses designed to regulate even complex situations that nowadays, in our Country, are preferably regulated by way of irregular pledges, revolving pledges and other kinds of atypical agreements, often inspired by international common practice with consequently tricky and complex issues in their implementation.[45]

It must be pointed out that other forms of entrustment, in a broader sense, are quite common, as mentioned above, with special reference to the registration of shares in the name of companies authorized to manage security portfolios. However, in such cases, the appointed company usually does not *own* the shares, but it is simply *entitled* to manage the securities as per agreement with the shareholder.[46] It is all about a *Legitimaktionsaktionär* whose managerial powers are based on specific regulations meant for joint-stock companies (para. 129, third subparagraph, and 135, sixth subparagraph of *AkG*), even if it is sometimes argued that this particular type of "legitimizing" *trust* can generally be justified by para. 185 of the German Civil Code (BGB).[47] There can be a generic "fiduciary aspect" of

[43] Cf. several cases overviewed by Rolf Serick, *Le garanzie mobiliari nel diritto tedesco*, *ibidem*, with special reference to fiduciary transactions undertaken as a guarantee dealing with chattels.

[44] The goal, pursued in Italy through a complex development of case-law about equitable pre-default agreement [so-called "*patto marciano*" in the Italian Consolidated Banking Act], has also been simply attained in Germany according to the principles safeguarding transparency in the transactions between debtor and creditor.

[45] For an introduction, cf. Enrico Gabrielli, *Sulle garanzie rotative*, ESI, Naples, 1998; G. Piepoli, *Garanzie sulle merci e spossessamento*, Jovene, Naples, 1980, p. 30 ff. for a comparison with the German system. Also cf. the critical comments by Franco Anelli, *L'alienazione in funzione di garanzia*, Giuffré, Milan, 1996, p. 401 ff., and the comments on the German system by Roberto Calvo, *La proprietà del mandatario*, Cedam, Padua, 1996, p. 82 ff. An important overview of security rights in European private law - in search for a *common core* shared by the various legal systems, including interesting connections between German and Italian system - can be found in the overview Eva Maria Kieninger (co-edited with Michele Graziade; George L. Gretton; Cornelius G. van der Merwe; Matthias E. Storme), *Security Rights in Movable Property*, in *European Private Law*, *Cambridge University Press*, 2004; p. 647 (*pactum commissorium*), with special reference to Greving (regarding the comparison between German and Italian system) and to Willem Zwalve, p. 50 ff. about *fiducia cum creditore.*

[46] Cf. the comments already worded on the in-depth and well-evidenced remarks by G.B. Portale and Enrico Ginevra, *Intestazione a società fiduciarie di azioni non interamente liberate e responsabilità per i conferimenti residui*, *ibidem*, p. 121, footnote 24

[47] Para. 185 of BGB: dispositions by any non-legitimized person.

the transactions, but it is however no "confidential" trust qualifying as a *Roman-law-based* trust.[48]

Let us also remember some German jurists' proposals about the development of legal concepts enabling to enforce fiduciary agreements towards any third parties, thus resulting in an external effectiveness (*Außerwirkung*) whenever certain circumstances occur.[49]

In addition, attention must be paid to relevant legal concepts or judgements allowing to "undermine" the *trustee*'s "ownership" (*Verdinglichung*), and therefore his power of abuse with interesting effects in terms of a wider protection of the *trustor*'s rights *in rem*.[50] Such trends allow to curb the *trustee*'s power of abuse, but they don't rule it out in many situations, so that several issues are still unsolved.

2.4. **Some conclusions. The assets managed by the trustee as something separate**

However, the crucial question is whether the assets managed by the *trustee* on the *trustor*'s behalf can be deemed to be *separate*, even when they were not *directly* purchased by the trustee from the trustor, but they were bought by third parties by using either money made available by the trustor or assets bought by the trustor but *dynamically* managed by the trustee. This attitude has long developed in Germany, particularly over the last years, in both jurisprudence[51] and case-law,[52] thus giving rise to principles deemed to be definitively acknowledged, and qualifying the assets managed by the trustee on the trustor's behalf as a *separate* estate, even in the absence of clearly defined rules on disclosure.[53]

The traditional requirement limiting the enforceability of trust against third parties – namely the *direct* purchase of assets from the trustor and the *static*

Any disposition of an asset by a non-legitimized person is only effective with the relevant assign's prior consent.

The disposition comes into force if ratified by the assign or if the settlor buys the asset or succeeds the assign, thus unlimitedly undertaking his hereditary obligations. In either case, if incompatible provisions apply to the relevant asset, then the earlier provision shall remain in full force and effect.

[48] Cf. in general, *ex pluribus*, Rudolf Lenders, *Treuhand am Gesellschaftsanteil*, Peter Lang Verlag, Frankfurt u. Bern, 2004.

[49] For a general framework, cf. M. Henssler, *Treuhandsgeschäft-Dogmatik und Wirklichkeit*, in *Archiv für die civilistische Praxis (AcP)*, 1996, p. 37 ff.

[50] Cf. M. Henssler, *Treuhandsgeschäft*, cit., p. 39 ss.

[51] We refer to the interesting comments by J. Gernhuber, *Die fiduziarische Treuhand*, cit., p. 58 ff., who finally qualifies the *trustee*'s assets as a "formal" property and the *trustor*'s assets as an "economic property", by emphasizing that the conveyed ownership of the real properties entrusted to the *trustee* can be enforced against any third parties whenever it is possible to prove that the money resulting from the sale have been reinvested into another specific real property, based on indisputable written evidence.

[52] Cf. the authors and case-law recalled in Nuccia Parodi, *Le operazioni fiduciarie*, cit., p. 160.

[53] Again, cf. comments in para. i) on whether any fiduciary agreements intended as a guarantee can be enforced in case of the *trustee*'s bankruptcy.

management of the purchased assets - seems to be no longer in force. It was indeed a principle worded by the *Reichsgericht* over one century ago.[54]

It is nonetheless necessary to point out that the *trustee* must manage the assets in an *objectively* verifiable way, which is actually the case whenever the asset management is simple and can easily be ascertained.[55]

In more complex cases, a *professionally exemplary* management is always required, based on accounting rules suitable for the importance of the assets being managed subject to a clear distinction between such assets and other assets personally belonging to the *trustee* or managed by him on other *trustors*' behalf.[56] If such rules are complied with, the trustor can enforce his rights against third parties even in case of *trustee*'s bankruptcy, so that trust can therefore be really effective to a greater extent than acknowledged according to stricter regulations in force in the past.[57]

Let us now briefly recall the long-applied criteria.

Firstly, there is a need for a professional management, not necessarily based on conservative criteria, but sufficient to identify the assets managed by the *trustee* as a *separate estate*, other than his own assets or than other assets managed by the *trustee* on behalf of different *trustors.*[58]

It is still too early to say whether a system is being developed where the fiduciary manager is getting closer and closer to a *trustee*, as long as it is possible to apply rules capable of *objectively* preventing the confusion between *trustee*'s personal assets and assets entrusted to him.[59] However, the aforesaid approach seems to be an *objectively* ascertainable trend in Germany, which substantially changes one of the features deemed to be *peculiar* to traditional *Roman-law-based* trust, with the remarkable difficulties in remedying any abuses by the *trustee*.

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[54] Cf. the comments by Joachim Gernhuber, *Die fiduziarische Treuhand*, *ibidem*, p. 360 ff.

[55] As an example, let us think of a real property transferred from *trustor* to *trustee* whereby the relevant countervalue is reinvested into another real property on the basis of clearly defined entitlements to buy and to sell.

[56] It is an implementation and development of the theses already worded by Joachim Gernhuber, *ibidem.*, p. 360 ff. Please note that the Principality of Lichtenstein allows the separation of assets, within the framework of trusteeship or of *trusts* regulated by the Principality's laws, subject to the requirement of appropriate accountancy to be kept by the *trustee* or fiduciary [manager] in a professionally adequate and objectively verifiable manner. In this connection, cf. the remarks by Francesco Armando Schurr reported in *Trusts*, 2021, p. 17 ff.

[57] In this respect, cf. the comments on *trusteeship* and trust as a guarantee in my article: *Le operazioni fiduciarie*, *ibidem*, 158 ff. and 163 ff.

[58] In this respect, again cf. Nuccia Parodi, *ibidem*, Chapter 4, para. 4.7.

[59]The rules viewing the assets managed by the *trustee* as something separate are substantially in line with the long-established rules based on articles 2 and 11 of The Hague Convention: the assets entrusted to the *trustee* must be viewed as "separate estate", clearly distinguishable from his personal assets.

It clearly appears to us that the above trend (enabling to qualify the assets managed by the trustee as a *separate* estate) is similar to the trend getting stronger and stronger in Italy as well.[60] In addition, we can well argue that the rules enabling to enforce trust against any third-party creditors are better rooted in the German system, particularly in case of the trustee's bankruptcy, where more attention is paid to substance than to formalities and where attempts are made to oppose the claims raised by the bankrupt trustee's personal third-party creditors over assets objectively not belonging to the bankrupt debtor's estate.

A further major issue must be carefully investigated. In the Italian legal system, a common belief regulates fiduciary transactions by applying the same rules as the mandate. We have worded our critical remarks, but also pointed out the existence in Italy of a quite wide-spread tendency not to comply with the restrictive rules of articles 1705, 1706, and 1707 Civil Code whenever the assets are professionally managed by the agent. [61]

In the German system, the reference to the rules about mandates does not seem to be a problem, since the provisions applicable to mandates (*Auftrag*, para. 662 ff. BGB) and to the well-remunerated business management (*Geschäftsbesorgungsvertrag,* para. 675 ff. BGB) exclusively apply to managerial agreements without any reference to the *framework agreement* that such agreements might justify.[62]

It is therefore sensible to point out the atypicality of our specific rules as to whether a mandate is enforceable against the agent's creditors (within the framework set by articles 1705, 1706 and 1707 Civil Code) if compared to the principles in force in other legal systems and particularly in the German and French systems.

On the other hand, even in common-law systems, the *framework agreement* for an *agency*[63] is regulated by specific rules and is nearly always a "*standardized*" agreement.[64] In any event, according to a commonly shared principle, if the *agent* buys assets on the *principal*'s behalf, then *trust*-related rules will apply to the assets or estate being managed, and the agent will be regarded as a *trustee* managing

[60] In this connection, cf. my comments in my article *Le operazioni fiduciarie*, *ibidem*, Chapter 4, para. 4.12.

[61] Again, cf. Nuccia Parodi, *Le operazioni fiduciarie*, *ibidem*, Chapter 1, para. 1.6.

[62] Interesting comments on the differences between the German system and our system, when it comes to mandates, are found in Michele Graziadei, *Mandato in diritto comparato*, in *Digesto delle Discipline Privatistiche*, Sez. Civ., Vol. XI, UTET, Turin, 1994, p. 192 ff. and particularly p. 197 and p. 198. In France, no specific rules apply to the enforceability of the *mandat* against any of the agent's third-party creditors (articles 1984 ff. *Code Civil*), whereas the aforesaid issue is now being expressly considered after the approval of *Loi sur la fiducie.*

[63]Which is clearly no agreement, but an a*uthority* resulting in a relationship between *principal* and *agent.*

[64] A tender, an employment or self-employment contract, etc.

assets on his principal's behalf whilst his managerial deeds will be enforceable against any third parties subject to the relevant rules peculiar to *trust*.[65]

In this general framework, the German system, developing according to the applicable guidelines, is closer to the international common practice.

The clear distinction between mandate and trust, which has long been developing in the German jurisprudence and common practice, allows to directly protect the *trustor* in any conflict with the *trustee*'s possible creditors against unauthorized conveyances of assets bought on the *trustor*'s behalf. The aforesaid approach shows a similarity between the solutions wide-spread in German on this matter and the solutions typical of the common-law systems where the agent can be easily regarded as a *trustee* on behalf of his *undisclosed principal*.[66]

The Italian system seems instead to be still based on more traditional interpretations not allowing a correct distinction between *framework agreement* (as an example, a fiduciary management agreement or a fiduciary agreement as a guarantee) and any mandate related thereto, thus enforcing articles 1705, 1706 and 1707 Civil Code even when they are not compatible with the specific provisions of the *framework agreement*.[67]

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[65] For further details, cfr. Nuccia Parodi, *Le operazioni fiduciarie*, cit., Chapter 1, para. 1.6.

[66] Further remarks on this issue in Nuccia Parodi, *Le operazioni fiduciarie*, *ibidem*, Chapter 1, para. 1.6.

[67] The relations between mandate and trust have been brilliantly investigated by Maddalena Semeraro, *Acquisti e proprietà nell'interesse del mandante*, ESI, Naples, 2011, p. 155 ff. (*Disciplina applicabile all'esecuzione del programma gestorio)* and p. 225 ff. (*Proprietà del mandatario e fiducia*). With reference to articles 1705 ff. c.c. and to the allocation of several proprietary components to different subjects, attention should be paid to M. Graziadei's well-known thesis about the acknowledgement of the appointor's ownership of the asset and the acknowledgement of the appointee's sole entitlement to a higher protection of the appointor's rights over third parties, particularly when the assets are being managed in a *professional* way. We disagree with M. Graziadei's approach arguing that ownership on somebody else's behalf, typical of trust, can refer to mandate without representative powers according to a solution well-established in Switzerland too. Cf. Michele Graziadei, *Mandato in diritto comparato*, *ibidem*, p. 197 and p. 198. We can however point out a very clear trend becoming stronger and stronger in our Country in favour of an equalization between the role of a fiduciary manager, professionally managing the assets entrusted to him, and a trustee's role, without therefore applying the general rules on mandate and particularly art. 1707 c.c.

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