The risk of 'misusing' trusts: some lessons from the Italian experience

Alexandra Braun[·]

1. Introduction

In the course of the past decade, several European legislatures have introduced devices into their legal systems that are functionally or structurally similar to trusts,[1] including the Czech Republic, which has introduced a new set of provisions into its new Civil Code.[2] Such developments are sometimes accompanied by fears that trusts might be misused or abused. Some of the concerns commonly raised about trusts are that trustees could misappropriate trust property to the detriment of beneficiaries, or that trusts could be used to shield assets from creditors, spouses or forced heirs of the settlor.[3] Other fears are that trusts can be used for money-laundering purposes or to hide assets from tax authorities, and that third parties dealing with trustees may be unaware of the trust's existence. [4]

· Professor of Comparative Private Law, University of Oxford, and Fellow and Tutor in Law, Lady Margaret Hall, Oxford. The author would like to thank Gregor Christandl, Lionel Smith and Igor Valas for their valuable comments on an earlier draft of this contribution, which was presented at a conference that took place at the Charles University in Prague on 15-16 May 2015. Parts of this article are based on a chapter by the same author: A Braun, 'Italy: The Trust Interno' in D Hayton (ed), *The International Trust*, 3rd edn (Bristol: Jordans 2011) 787.

[1] Such as, for instance, France, Romania and Hungary. See, A Braun, 'The Framing of a European Law of Trusts' in LD Smith (ed), *The Worlds of the Trust* (CUP 2013) 277.

[2] Introduced by Law no 89/2012, which came into force on 1 January 2014.

[3] The 'trust creator' in the language of the Czech Code. See §1448 Czech Code.

[4] Similar concerns were expressed when France first considered establishing the *fiducie*. See F Barrière, 'The French fiducie, or the chaotic awakening of a sleeping beauty' in L Smith (ed), *Re-imagining the Trust. Trusts in Civil Law* (Cambridge: Cambridge University Press, 2012) 222. For an analysis of general concerns against vehicles with limited liability features, including trusts, see the publication by the OECD, 'Behind the Corporate Veil Using Corporate Entities for Illicit Purposes' published in 2001. Available on http://www.oecd.org/daf/ca/behindthecorporateveilusingcorporateentitiesforillicitpurposes.htm

The purpose of this article is to report on Italy's experience with trusts, where they have become a popular instrument used in a variety of contexts. The aim is to provide a brief overview of the nature of the trusts employed in Italy, and their purposes, and to discuss whether and to what extent some of the concerns mentioned above have materialised in legal practice, and how they have been addressed. The focus will rest primarily on the following aspects: the protection of the interests of creditors and of forced heirs of the settlor, and of those of third parties dealing with trustees. This paper will not consider the use of trusts for tax avoidance or money-laundering purposes.

Before exploring developments in Italy, it is important to clarify briefly what is meant when we speak of 'misusing' or 'abusing' trusts.[5] By nature trusts segregate assets and dedicate them to a particular purpose. Thus, the effect of setting up a trust is to place assets beyond the reach of the creditors of the settlor and to ring-fence the assets so as to render them immune from the personal circumstances of the trustee. As a consequence, they do not form part of the trustee's estate upon his insolvency, bankruptcy or death, and are unavailable to his spouse. However, asset segregation comes at a price i.e. the settlor has to drop out of the picture so that, in principle, he loses control over the assets,[6] while the trustee holds the legal title, and thus the power to manage and dispose of the trust assets. Thus, if a settlor wants to avail himself of a trust to place his wealth beyond the reach of his spouse, creditors or heirs, he has to give up his control over the wealth during his lifetime.[7]

Just as a person may wish to establish a foundation or a company, he or she may also wish to set up a trust and may wish do so for a number of different reasons, many of which are legitimate. For instance, the settlor may wish to protect his personal assets or family wealth from risks involved in carrying on a business or from a potential future incapacity. A person may also want to shield the assets from creditors, so as to protect a vulnerable beneficiary. In fact, trusts can offer a useful means of ensuring that a disabled person will be able to continue living in the family home after the death of their parents.

However, there is a difference between employing a trust in order to pursue the objectives just described and using it to evade the law and to hinder or prejudice certain interests, or to perpetrate fraud, which are cases considered in this article. Although the law allows the use of instruments that limit liability, it usually also sets certain restrictions on these instruments. That is not to say that people will not try to employ trusts to pursue unlawful purposes. In a way, any legal instrument that ring-fences assets, including foundations and corporations, can be misused or abused. Even gifts can be employed to defeat the interests of creditors and heirs. In this respect, the trust is in good company. However, legal systems can put in place mechanisms that operate either *ex ante* to prevent some of the risks involved, or *ex post* to mitigate some of the consequences.

2. Trusts in Italy: the *trust interno*

Unlike the Czech Republic and other European legislatures, to date Italy has not passed legislation introducing the trust into its legal system, though it has been planning to do so for

[5] For an interesting approach to this question, see P Willoughby, *Misplaced Trust* (Saffron Walden: Gostick Hall, 1999). For different ways of interpreting the terms 'misusing' or 'abusing' trusts, see the articles by LD Smith 'Mistaking the Trust' (2011) 40 *Hong Kong Law Journal* 787, and MJ de Waal 'The Abuse of the Trust (or: "Going Behind the Trust Form")' (2012) 76 *RabelsZ* 1078.

[6] This is the case in England and Wales, though there are other trust jurisdictions where settlors are granted wide powers of control and intervention.

[7] This is so irrespective of whether there is a transfer of assets from the settlor to the trustee or of whether the settlor declares himself trustee of his own assets in favour of someone else.

quite some time.[8] Several proposals have been submitted to Parliament, the most recent one in March 2015,[9] but so far, none have been implemented. Although, Italian private law provides for many different devices that satisfy some of the needs usually catered for by trusts and that cover both the family and the commercial sphere,[10] none of them perform all of the functions of their common law counterparts.[11]

Therefore, when in 1989 Italy ratified the Hague Trusts Convention,[12] it was suggested that the Convention could be interpreted in a way that would allow Italian courts to recognise not only foreign trusts,[13] but also Italian domestic trusts, that is to say trusts placed in Italy but regulated by foreign law.[14] Even though at first, legal practitioners and legal scholars were somewhat sceptical, soon Italian courts began to recognise the validity of the *trust interno* (internal trust), by which is meant a trust entirely connected to Italy, with an Italian settlor, trustee and beneficiaries, but regulated by foreign law chosen by the settlor on the basis of article 6 of the Hague Convention. The law so chosen regulates the validity of the trust, its construction, its effects, and administration. By contrast, preliminary issues relating to the validity of wills and of other acts by virtue of which assets are transferred to the trustee, are regulated by Italian law.

The choice of law obviously depends on the type of trust the settlor intends to establish. However, in the majority of cases, Italian settlors seem to opt for the law of jurisdictions such as England and Wales, and, especially, Jersey. Italian trusts are usually drafted in Italian and are not mere translations of foreign standard trust forms. Most are irrevocable and it is common practice to appoint a protector who supervises the trustee, and who is often the settlor himself. It is also interesting to note that many trust instruments contain a jurisdictional clause attributing exclusive jurisdiction to an Italian court.[15]

Over the course of the past twenty or so years, in Italy trusts have become increasingly popular in legal practice and are employed for a variety of useful purposes, both in the family and the commercial context.[16] Frequently, they are resorted to in situations that cannot be catered for by existing legal instruments, for these are often too rigid or have other shortcomings. Hence, in Italian legal practice, trusts fill perceived gaps in the legal system. In

[8] For details, see Braun (n ∗). That said, in 2006, the Italian legislature has introduced a set of provisions regulating the taxation of *trust interni*. See Law no 296 of 27 December 2006. Also, on 14 June 2016 the Italian legislature passed statutory provisions (Law no 2232) that foresee tax exemptions for trusts employed for the protection of beneficiaries with serious disabilities, and who lack familial support.

[9] Disegno di Legge no 1826, of 19 March 2015.

[10] For an overview, see M Graziadei, 'Trust Law', in JS Lena and U Mattei (eds), *Introduction to Italian Law* (Kluwer, 2002) 317.

[11] This is true also of article 2645-*te*r C civ which allows for the segregation of land or personal property registered in public registers in favour of a beneficiary, for specific purposes that are considered 'worthy of protection', that is to say interests referable to disabled persons, public services or other entities or individuals.

[12] The Hague Convention on the Law Applicable to Trusts and on their Recognition, 1 July 1985. The Convention was ratified by Italy with Law no 364 of 6 October 1989, which entered into force on 1 January 1992.

[13] This interpretation was first suggested by M Lupoi, 'Il Trust nell'ordinamento giuridico italiano dopo la Convenzione dell'Aja del 10 luglio 1985' (1992) *Vita notarile* 966; Id, *Introduzione ai trusts. Diritto inglese, Convenzione dell'Aja, Diritto italiano* (Milan: Giuffrè, 1994) 162, note, 703. Soon, however, it came to represent the prevailing view. For an overview of the developments, see Braun (n ∗) 797 ff and M Graziadei, 'Recognition of common law trusts in civil law jurisdictions in the light of the Hague Trusts Convention of 1985 with particular regard to the Italian experience', in LD Smith (ed.), *Re-imagining the Trust: Trusts in Civil Law* (Cambridge: CUP, 2011) 29, 66.

[14] M Lupoi, 'A civil law perspective on trusts and the Italian case' (2005) 11 *Trusts & Trustees* 10; For an account see Braun (n ∗). See further Graziadei (n 13) 65 ff.

[15] Graziadei (n 13) 77.

[16] For an analysis of some of the most common examples, see M Lupoi, 'Trusts in Italy as a living comparative law laboratory' (2013) 19 *Trusts & Trustees*, 302, 305 ff.

the field of commercial and financial matters, trusts have been created for security purposes (for instance, in place of pledges or mortgages), to finance new projects, for the purchase and management of a block of shares, for the management of time-sharing, for the administration of companies, as well as for the management of bankruptcy proceedings.[17]

Conversely, in the family and domestic context, trusts have been set up in order: to protect minors or vulnerable people; to further charitable purposes; to preserve family assets of artistic value; to protect the family estate from the creditors of a settlor who is running a business; to administer and assign assets after the settlor's death; to manage the intergenerational transfer of family businesses; and to segregate assets in case of legal separation or divorce agreements.

Particularly noteworthy is the fact that Italian trusts have not been devoted primarily to the management of wealthy assets but are often used to cater for everyday occurrences,[18] such as the care of disabled children or the inter-generational transfer of wealth.

3. Safeguards provided by the Hague Trusts Convention

The Hague Trusts Convention has certain safeguards in place that affect the recognition of trusts within legal systems that, just like Italy, have ratified the Convention.[19] Among the various provisions that limit the scope for the application of the law regulating the trust, there are three that we should briefly mention.[20]

A first important provision is article 15 which is designed to prevent a trust from breaching mandatory provisions of a law designated by the conflict rules of the forum. These provisions include for instance, those protecting minors or incapable parties (subsection a), those regulating the personal and proprietary effects of marriage (subsection b), those concerning succession rights (subsection c) and those protecting creditors (subsection e). Thus, as we shall see below,[21] a *trust interno* cannot, for instance, prevent the application of provisions provided by Italian law and aimed at protecting forced heirs and creditors. In other words, the provision 'makes recognition of trusts simpler, because it prevents all kinds of abuse right from the outset'.[22]

In addition, article 18 states that 'the provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (*ordre public*).' It is therefore possible for an Italian court to refuse recognition on the basis of incompatibility of a *trust interno* with public policy principles. Finally, article 13 of the Hague Trusts Convention establishes that Italian courts do not have to recognise all trusts where it states that:

> 'No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.'[23]

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[17] For further details Braun (n ∗).

[18] Lupoi (n 16) 305.

[19] These are enshrined in articles 15-25 of the Hague Trusts Convention. Few other countries have ratified the Convention, such as Australia, Canada (on behalf of most of its provinces which decide individually whether to bring the Convention into force), Liechtenstein, Monaco, San Marino, and Switzerland.

[20] Graziadei (n 13) 58 ff. For a detailed analysis of the provisions, see J Harris, *The Hague Trusts Convention* (Oxford: Hart Publishing, 2002).

[21] See text below at 4 and 5.

[22] M Lupoi, *Trusts. A Comparative Study* (Cambridge: CUP, 2000) 363-64.

[23] For a discussion of the path that led to the enactment of article 13, see ibid, 357-362.

Although in principle Italian courts could refuse to recognise *trust interni* on the basis of article 13, the provision has been interpreted as providing the ultimate remedy in some instances where, notwithstanding articles 15, 16[24] and 18, the methods or the purposes of the trust in question are judged by the court to be repugnant in a certain legal system (which is not necessarily that of the forum) which does not recognise that particular type of trust, but in which the trust has its main effects. As a consequence, the provision has hardly ever been invoked by Italian courts to prevent recognition of a *trust interno*.

To summarise, the Hague Trusts Convention already addresses some of the concerns mentioned at the beginning of this article. It does so by putting in place mechanisms that ensure that where trusts are used to obtain effects that are in conflict with the fundamental principles of the legal system that is asked to recognise them, they are either not recognised or mandatory provisions of the respective legal system prevail. In this respect, Italian law differs from Czech law, which has trust provisions embedded in its Civil Code. Still, I hope that there are some useful lessons to be drawn from the Italian experience.

4. Protecting the interests of creditors of the settlor

4.1. Introduction

One common concern voiced in relation to trusts is that settlors may transfer assets to a trustee in order to hide them from their creditors. As we said earlier, in principle, this transfer is not in and of itself fraudulent, as setting up a trust necessarily places trust assets beyond the reach of creditors of the settlor. However, the situation is different where trusts are set up with the sole aim of hiding assets and to prejudice or, even more so, to defraud creditors. In Italy, the legal profession has not normally viewed trusts as a means of evading obligations with respect to the basic principles of Italian law.[25] However in recent years, and in particular since 2013,[26] the number of instances in which creditors have brought successful claims accusing their debtors of having set up a trust with the sole purpose of shielding assets from them, has unfortunately considerably increased.

The good news for creditors is that when settlors have had unlawful intentions, Italian courts have not usually hesitated to intervene so as to protect creditors who would otherwise have suffered a detriment. They have done so by accepting requests to set aside dispositions made to prejudice creditors, by confiscating trust assets, by declaring trusts void or by refusing to recognise them. Thus, the message Italian courts have been conveying is that if settlors have such intentions, they will not be allowed to get away with it. The pages that

[24] Article 16 provides that 'The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws. If another State has a sufficiently close connection with a case then, in exceptional circumstances, effect may also be given to rules of that State which have the same character as mentioned in the preceding paragraph. Any Contracting State may, by way of reservation, declare that it will not apply the second paragraph of this Article.'

[25] Both, legal academics and the society 'Il trust in Italia', which counts about 500 members, have strongly campaigned for the use of trusts for legitimate purposes and only where there is no national legal device that offers the same results. The society has not only reported legal practitioners who market trusts for illegal purposes to the Italian Law Society, but in 2012 it also established a register of professional trust lawyers (*Registro dei professionisti accreditati*) that lists legal practitioners and financial advisors who have passed an exam set by the society and who are required to continue their professional development as well as to comply with professional conduct rules. In 2016, the Society has further set up a national register of professional trustees which represents a step towards regulating the profession.

[26] See below text at 4.2.2.

follow provide a brief overview of the avenues creditors can pursue, as well as the ways through which Italian courts have protected their interests.

4.2. Setting aside dispositions prejudicing the rights of creditors

4.2.1. The safeguard provided by article 2901 C civ

As noted earlier, article 15(1)(e) of the Hague Trusts Convention establishes that the Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, relating to the protection of creditors in matters of insolvency.[27] Pursuant to article 2740 of the Italian Civil Code, a debtor is answerable for his obligations with all his assets, present and future. In order to protect the creditor from actions the debtor might undertake to avoid such liability, and to prejudice the interests of the creditor, the Italian Civil Code contains a provision, article 2901 C civ, which includes the so-called *Actio Pauliana.* Article 2901 C civ (ordinary revocatory action) provides that both in the course of an insolvency proceeding or under a scenario where no insolvency proceeding has been commenced against a debtor, a creditor can request that acts by which the debtor has disposed of his assets to the prejudice of such creditor's rights be declared ineffective *vis-à-vis* the creditor. Such action is subject to a limitation period of five years running from the day of the disposition creating such prejudice.

Where the disposition was gratuitous, as is often the case with trusts, there are two requirements for it to be set aside: (i) the debtor must have known that the disposition was going to cause prejudice to the rights of the creditor or, (ii) if the disposition was made prior to the existence of the creditor's claim, that it was fraudulently designed to prejudice the satisfaction of the creditor's claim. Where the disposition was made for value, it is further necessary that: (i) the third party was aware of such prejudice and, (ii) if it was made prior to the existence of the claim, that such third party participated in the fraudulent design. Thus, for article 2901 C civ to operate, proof of fraud is only required when the debt arises *before* the trust was set up. In cases of gratuitous dispositions, it is not necessary that the third party, ie the settlor, was aware of the prejudice caused to his creditors for it to be set aside.

Where the creditor's action is successful, the trust as such is not set aside. It is only the disposition of assets which is set aside and only in so far as the claimant is concerned.[28] As a consequence, the transferred property is not reinstated to the debtor's assets, but remains with the person who received the asset, subject to execution by the creditor. In fact, once the creditor has brought a successful action based on article 2901 C civ, he can then bring an action for the compulsory execution against the third party, ie the trustee (article 2902 C civ). A creditor can further request the seizure (*sequestro conservativo*) of the assets of the debtor (article 2905 C civ).[29]

4.2.2. Recent case law

As mentioned earlier, in recent years, cases in which creditors have brought actions aimed at setting aside dispositions of assets on trust have risen considerably. One of the first cases in which article 2901 C civ was invoked dates back to 2009, in which the Tribunal of Cassino set aside the transfer of immovables to a trustee of a family trust, because it found that the

[27] See above text after fn 20.
[28] In this sense, Tribunale di Massa, 23 September 2014, (2015) *T & AF (Trusts e attività fiduciarie)* 60. Unreported cases are available to members of the Society 'Il Trust in Italia' at http://www.il-trust-in-italia.it.
[29] In conformity with article 671 of the Italian Code of civil procedure.

settlor had divested himself of the assets in order to defeat the creditor's claims.[30] A few months earlier, the same Tribunal granted a similar claim.[31] In that case, the court held that where there is proof of fraudulent intent, which was not the case in the specific instance, a court could also decide not to recognise the *trust interno*, which would therefore be void.[32] The same year, the Tribunal of Turin,[33] granted permission to prevent the segregation of immovables in relation to three trusts established by settlors whose assets were about to be seized by their creditors. The Tribunal of Milan too authorised confiscation of trust assets that were transferred on trust in order to defeat the creditors of a company.[34]

Further cases involving actions based on article 2901 C civ were decided in 2011 and 2012 but it is since 2013, that similar instances have increased in frequency, and in the vast majority of the cases the action was granted and the interests of the creditors protected.[35] This is not surprising given that in several instances the trust had been set up after or at the same time the debt had arisen, and in a number of cases even after recovery of the debt was sought.

In recent years, claims have been granted, for instance, in cases decided by the Tribunal of Benevento,[36] the Tribunal of Bologna,[37] the Tribunal of Cuneo,[38] the Tribunal of Forlì,[39] the Tribunal of Genova,[40] the Tribunal of Massa,[41] the Tribunal of Milan,[42] the Tribunal of Modena,[43] the Tribunal of Monza,[44] and the Tribunal of Naples,[45] the Tribunal of Novara,[46] the Tribunal of Parma,[47] the Tribunal of Pavia,[48] the Tribunal of Rome,[49] the Tribunal of Sassari,[50] the Tribunal of Siena,[51] and the Tribunal of Velletri.[52]

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[30] Tribunale di Cassino, 1 April 2009, (2009) *Famiglia e diritto* 925 and (2010) *T & AF* 183. For an earlier case, see Tribunale di Firenze, 6 June 2002, (2004) *T & AF* 256.

[31] Tribunale di Cassino, 8 January 2009, (2009) *T & AF* 419.

[32] Such an intent was found by the Tribunal of Pavia in a case decided on 12 June 2014, (2016) *T & AF* 56, in which it rejected the opposition of the debtor against the execution of an immovable. The court held that the trust was established with the sole intent to defraud creditors and considered it therefore void, due to being contrary to articles 13 and 15(e) of the Hague Trusts Convention.

[33] Tribunale di Torino, sez distaccata Moncalieri, 15 June 2009, (2010) *T & AF* 83.

[34] Tribunale di Milano, sezione VIII civile, 17 July 2009, (2009) *T & AF* 628. The appeal against the decision was rejected by the Tribunale di Milano, sezione VIII civile, 22 October 2009, (2010) *T & AF* 77.

[35] For a case in which the claim by the creditor based on article 2901 C civ was rejected, see the decision of the Court of Appeal of Venice of 9 January 2015. Here the bank had not given sufficient proof of the *scientia fraudis*. For earlier instances, see the decisions of the Tribunale di Genova, 21 May 2014, (2015) *T & AF* 63, the Tribunale di Parma, 28 July 2014 (available on De Jure), the Tribunale di Milano, 26 March 2014, (2015) *T & AF* 76, the Tribunale di Bologna, 26 March 2014, the Corte d'Appello di Torino, 6 December 2013, the Tribunale di Monza, 3 January 2013, and the Tribunale di Bologna, 24 March 2015, (2015) *T & AF* 595. For a more recent case, see Tribunale di Latina, 22 March 2016.

[36] Tribunale di Benevento, 25 November 2014.

[37] Tribunale di Bologna, 18 March 2015 and 23 April 2015.

[38] Tribunale di Cuneo, 22 May 2013 and 15 March 2013.

[39] Tribunale di Forlì, Ordinanza of 5 February 2015, (2015) *T & AF* 283 and Tribunale di Forlì, 19 April 2016.

[40] Tribunale di Genova, 18 February 2015.

[41] Tribunale di Massa, 19 September 2014 and 23 September 2014 (n 28).

[42] Tribunale di Milano, 24 April 2015. The trust was set up by the guarantor. See also Tribunale di Milano, 20 May 2015 and 19 October 2015.

[43] Tribunale di Modena, 14 March 2012, 10 April 2014 and 16 June 2015, (2015) *T & AF* 587.

[44] Tribunale di Monza, 12 January 2015 (2015) *T & AF* 292. Tribunale di Monza 20 January 2015, (2016) *T & AF* 283.

[45] Tribunale di Napoli, 23 November 2015 and 18 March 2016.

[46] Tribunale di Novara, 29 January 2015. In this case the trust was declared and constituted the day after the debt had arisen. See also Tribunale di Novara, 1 March 2016.

[47] Tribunale di Parma, 28 July 2014 (n 35).

[48] Tribunale di Pavia, 12 September 2014 and 4 June 2015, (2015) *T & AF* 591.

[49] Tribunale di Roma, 12 October 2015, (2016) *T & AF* 270.

[50] Tribunale di Sassari, 20 February 2015, (2015) *T & AF* 384.

[51] Tribunale di Siena, 22 May 2015, (2015) *T & AF* 503.

The numerous cases demonstrate not only that the risk that settlors will use trusts to evade creditor rights is a real one, but also that there are effective mechanisms with which to restrict their unlawful use and that Italian courts have so far adopted the 'correct' approach towards such trusts. Although the trust is not set aside, creditors will be protected through the revocatory action, and the possibility of seizing the trust assets.

Where a criminal action is brought against a debtor (eg for fraudulent bankruptcy), the court may even authorise the preventive seizure of the assets held on trust. For instance, this was authorised in a case decided by the Tribunal of Turin,[53] in which the trust was set up with the purpose of protecting immovables from the claims of the settlor's creditors. The court ruled that the trust had been created primarily to defeat the claims of creditors, and it therefore decided to place the trust assets under distraint.[54] The appeal against the judgment of the Tribunal of Turin was rejected by the Criminal Division of the Corte di Cassazione,[55] which ruled that, a settlor who transfers assets to the trustee with the intention of defeating creditors who have already obtained a legal title, has committed the crime set out by article 388 of the Italian Criminal Code (sanctioning contempt of court). It therefore concluded that the assets had been rightly confiscated in order to prevent their transfer to third parties and frustration of the *actio Pauliana* of the creditors.[56]

4.3. The new article 2929-*bis* C civ

Recently, the Italian legislature has strengthened the position of creditors even further but only against gratuitous dispositions (including trusts) which a debtor has made of immovables or movables that are subject to registration.[57] This was achieved by introducing a new provision into the Civil Code, article 2929-*bis*,[58] which came into force in June 2015 and applies to proceedings started thereafter. This provision allows creditors to skip the action to set aside the disposition as discussed above (article 2901 C civ), and to proceed directly to an application for compulsory execution of the assets. For this application to succeed, two conditions must be met: i) the gratuitous act that procured the detriment must have been carried out *after* the debt arose,[59] and ii) the seizure must have been recorded within a year from the moment at which the transfer of the immovable or the registered movable was registered. Once a year has passed, the creditor continues to enjoy the possibility of presenting a claim based on 2901 C civ, but loses the advantages introduced by article 2929-

[52] Tribunale di Velletri, 3 April 2015.

[53] Tribunale di Torino, 9 February 2004, (2005) *T & AF* 414. For a discussion of the two decisions, see M Lupoi 'La reazione dell'ordinamento di fronte a trust elusivi' (2005) *T & AF* 333.

[54] The Tribunal of Florence in an earlier case reached the same conclusion. Tribunale di Firenze, 6 June 2002, (2004) *T & AF* 256.

[55] Corte Suprema di Cassazione, 18 December 2004, (2005) *T & AF* 574. In March 2011, the Corte di Cassazione established that a self-declared trust in which the trustee had no obligations, had been created in order to defraud creditors. Corte Suprema di Cassazione, sezione V penale, 30 March 2011, no 13276, (2011) *T & AF* 408.

[56] For an earlier case, see the decision of the GIP of the Tribunale di Alessandria, 5 April 2000, (2000) *T & AF* 375. The decision was upheld by the Tribunal of Alessandria with a judgment of 2 May 2000, (2000) *T & AF* 377.

[57] In all other instances article 2902 C civ still applies.

[58] The provision was introduced by article 12 of the decreto-legge 27 June 2015, no 83, which was converted into Law by Law no 132 of 6 August 2015, G.U. 20/08/2015.

[59] The article further establishes that creditors, whose claims have arisen *before* the act, may join compulsory execution proceedings started by other creditors, but must do so within a year from the act that caused the prejudice.

bis C civ. In other words, he will first have to bring a successful claim in court before being able to start proceedings for the compulsory execution.

Thus, the provision offers creditors greater protection in the form of a simplified, faster and less costly action. A creditor, who sees his rights prejudiced by a gratuitous transfer of immovables or registered movables on trust, can start the compulsory execution irrespective of a court sentence that declares the ineffectiveness of the disposition *vis-à-vis* the creditor. In other words, there is no preliminary requirement that the act has actually prejudiced the interests of the creditor. *De facto*, therefore, the provision has introduced an irrebuttable presumption that certain transactions are carried out with the intention of prejudicing the creditor. Since article 2929-bis C civ has only recently been introduced, it is too early to predict its relevance for the use of trusts. That said, given the amount of cases currently brought by creditors against settlors of trusts, the provision is likely to be used by creditors, though it may not always be easy to establish whether a trust is gratuitous or not.[60]

4.4. Protecting creditors of an already bankrupt settlor

Where a person who is already declared bankrupt tries to set up a trust and to dispose of his assets so as to affect the *par conditio creditorum*, the trustee in bankruptcy can bring the 'azione revocatoria fallimentare' pursuant to articles 64 and 67 ff of the Italian Insolvency statute. The purpose of the action is to reconstitute the estate of the bankrupt, and to return the assets that have exited his estate during the period (of up to two years) prior to the insolvency.

In this respect it is interesting to note that in recent years, trusts have been set up in Italy by people who were insolvent with the aim of facilitating the liquidation of their assets in favour of their creditors (so-called *trust liquidatori*). Although there have been instances in which such trusts have been considered valid by courts,[61] in the majority of cases, these trusts have been declared void.[62] In fact, while in some cases the intention of the settlor was to speed up and to simplify the distribution of assets among creditors, by providing a private liquidation procedure, in others the purpose was clearly to hide assets or to hamper the insolvency proceedings.

In a decision of May 2014, the Corte di Cassazione dealt with a latter type of *trust liquidatorio*. The facts concerned a trust set up by a company which had recently become insolvent. In that case, the trustee was given the entire assets of the company, which was subsequently cancelled from the register of enterprises. The Tribunal of Rome declared the company insolvent and the trust void, as it pursued the (illegal) purpose of depriving the trustee in bankruptcy of the assets of the debtor. The Court of Appeal rejected the appeal against the first instance decision and the Corte di Cassazione confirmed the decision, declaring the trust non-existent, because it could not be recognised on the basis of the Hague Trusts Convention.

4.5. Denying recognition of the trust or declaring it void

[60] For a discussion, see D Muritano, 'Il nuovo art. 2929 bis c.c.: quale futuro per la protezione del patrimonio familiare?' (2015) *Rivista di diritto bancario* 1, 17 ff.

[61] Tribunale di Milano, Sez. Legnano, 8 January 2009, (2009) *T & AF* 634; Tribunale di Alessandria, 24 November 2009, (2010) *T & AF*171.

[62] On whether or not such trusts should be declared void see G Fanticini, 'L'ingloriosa fine del trust liquidatorio istituto dall'imprenditore insolvente: *tamquam non esset*!' (2014) *T & AF* 585 who cites a number of cases. For a recent decision see Tribunale di Forlì, 20 February 2015, in which is a *trust liquidatorio* was declared void.

We mentioned earlier that dropping out of the picture is a price to be paid by the settlor to isolate assets against certain claims and to dedicate them to a particular purpose. Nonetheless, sometimes settlors are unwilling to pay this price and wish to maintain control. In such cases it may be possible for a creditor to invalidate the trust, and to have it declared void, or to ask the court to refuse recognition of the trust under the Hague Trusts Convention.

4.5.1. Sham trusts

In some instances, Italian courts have been confronted with cases in which the settlor, though appearing to leave the scene, *de facto* continued to maintain control over the trust assets.[63] In international trust practice, such trusts are often referred to as 'sham' or 'illusory' trusts,[64] in which the intention of the settlor to create a trust with all its effects seems to be lacking right from the beginning, as he never intended to divest himself of the assets. In other words, the settlor uses the form of the trust to disguise his true intentions.

As far as *trust interni* are concerned, the question that has arisen is whether the sham or illusory nature of the trust is to be judged on the basis of the law chosen by the settlor in accordance with article 6 of the Hague Trusts Convention, which as we said regulates the trust, or instead the law of the forum, that is to say Italian law. The majority of legal scholars seem to take the view that the question is not to be judged according to Italian law but rather on the basis of the foreign law regulating the trust.[65] However, case law on the matter is inconclusive.[66] Another question that still awaits satisfactory answer is whether and to what extent the doctrine of sham should apply to self-declared trusts.[67]

Nonetheless, courts have been faced with instances in which *trust interni* have been alleged to be a sham. That said, compared to cases in which creditors have brought actions based on article 2901 C civ, such cases have been rare. Most are first instance decisions that were rendered in the course of the past two years, and only in few of them have courts come to the conclusion that the trust was a sham.[68] However, there are two interesting decisions of the Italian Supreme Court worth considering. In the most recent decision from 16 April 2015, the criminal division of the court agreed to authorise preventive seizure of assets held on trust, because the loss of control by the settlor was judged to be only apparent. In other words, in reality the assets had remained under the actual control and power of the settlor.[69] This decision is in line with an earlier case judged by the same court on 30 March 2011 and in which it held that, irrespective of what had been stated in the trust deed of a self-declared trust,

[63] D Muritano, 'Il trust nullo (sham)' in D Zanchi (ed), *Il trustee nella gestione dei patrimoni. Responsabilità e risoluzione dei conflitti* (Turin: Giappichelli, 2009) 143 ff.

[64] J Mowbray, 'Shams, pretences, blackmail and illusion: Part 2' (2000) *Private Client Business* 105. See further G Thomas and D Hayton, 'Shams, Revocable Trusts and Retention of Control', in D Hayton (ed) *The International Trust* (3rd edn, Bristol: Jordans, 2011) 597 ff.

[65] On this point see A Vicari, *Il trust di protezione patrimoniale*, Trusts, Quaderni della Rivista "Trust e attività fiduciarie", no. 3 (Milan: Ipsoa, 2003). While Vicari suggests that Italian law should apply (see also A Vicari 'Il Trust sham o simulato: questioni di diritto internazionale privato' (2010) *T &AF* 603), Valas is of the opinion that the question can only be judged on the basis of the law regulating the trust. I Valas, 'Le Trust disputes: azioni relative ai termini del trust ed alla sua validità', in M Monegat, G Lepore and I Valas (eds), *Trust. Aspetti sostanziali e applicazioni nel diritto di famiglia e delle persone* (Turin: Giappichelli, 2010) 457 ff.

[66] Tribunale di Trento, sez dist. Cleves, 3 February 2009, (2010) T & AF 194.

[67] The Tribunal of Trento in a decision of 3 February 2009, (2010) *T &AF* 194 rejected the claim that a self-declared trust could be considered *sham*, due to the lack of a bilateral nature of the relationship. By contrast, see the decision of the Tribunale di Cremona, Giudice del riesame, 9 January 2015 in which the court held that the trust was not a sham, and therefore set aside the decision of the GIP to seize the assets held on trust. See further the decision of the Tribunale di Rimini, 12 March 2014 which rejected a claim that the trust in question was a sham because the claimants had not produced the trust deed to be examined in court.

[68] See Tribunale di Massa, 19 September 2014 and Tribunale di Pescara, 9 Maggio 2014, (2014) *T & AF* 665.

[69] Cass. pen, sez II, 16 April 2015, no 15804, *T & AF*, 2015, 605.

the trustee had no obligations and the settlor had not lost access to the assets held on trust.[70] The court concluded that the trust had been established to defraud the creditors of the settlor and therefore rejected the appeal against the decision of the *Tribunale del Riesame* that had confirmed the preventive seizure of the assets held on trust.[71]

These decisions confirm that the mere intention of a settlor to place trust assets beyond the reach of his creditors does not render the trust illusory or a sham. What is required is for the court to ascertain that the settlor never really dropped out of the picture.[72] The fact that he maintained *some* control over the assets transferred to the trustee, for instance, in the form of a right to live in the trust property, is not conclusive.[73] However, in a case in which the settlor was the trustee, as well as one of the beneficiaries, and no protector had been appointed to supervise the trustee, which, as we said, is common in Italian legal practice, the Tribunal of Milan found the trust to be a sham.[74] Conversely, the Tribunal of Monza has recently come to the conclusion that a trust in which the loss of powers of the settlor who had declared himself trustee of his assets was only apparent did not fall within the scope of the Hague Trusts Convention.[75] The court referred to the principle 'donner et retenir ne vaut' and refused to recognise the trust holding that it had been set up to defraud the interest of the creditors.

4.5.2. Reservation of extensive powers in the trust deed

What happens if the settlor explicitly reserves himself powers in the trust deed? In principle, the Hague Trusts Convention does not stand against such a reservation of powers because article 2 explicitly states that the reservation by the settlor of *certain* rights and powers is not necessarily inconsistent with the existence of a trust. However, an Italian court may not recognise a trust in which a settlor has reserved himself unlimited powers. This happened in a bankruptcy case decided by the Tribunal of Reggio Emilia.[76] The Tribunal declared the trust unrecognisable under the Hague Trusts Convention because the settlor had reserved himself most administrative powers, including unlimited powers to change the terms of the trust. In other words, the court could not find a real intention to set up a trust. Interestingly, it did not invoke article 13, but rather held that the trust in question was not a trust that falls within the definition of article 2 of the Hague Trusts Convention, which refers to placing 'assets under the control of the trustee'.

The decision referred to an earlier case of the same year, this time adjudicated by the Tribunal of Bologna.[77] Two settlors (a married couple) had set up a trust and retained the power to control the trust assets. The trust deed also excluded any powers of the protector to act against the trustee, so that the beneficiaries were left without any real protection. Again the court questioned whether there really was an intention to declare a trust. It held that the trust could not be recognised as it did not fall within the definition of article 2 of the Hague

[70] Cass. pen., sez V, 30 March 2011, no 13276. The court also held that sham trusts are void and not just ineffective *vis-à-vis* the claimant.
[71] See also, Cass. pen. sez VI, 27 May 2014, no. 21621, (2014) T&AF 411.
[72] In this sense, see Tribunale di Sassari, 20 February 2015 (n 50), in which case there was no proof that the trust was a sham, though the court granted a claim under article 2901 C civ.
[73] *Ibid.* By contrast the Tribunale di Pescara (n 68), saw the right to live in the property as one of the many indicators that the trust in question was sham.
[74] Tribunale di Milano, 27 May 2013, (2013) *T & AF* 46. Interesting also the decision of the Tribunale di Trieste, 22 January 2014 in which the court concludes that a trust cannot be recognised under the Hague Trusts Convention when its actual purpose is to segregate the settlor's assets and the settlor is the principal beneficiary of the trust.
[75] Tribunale di Monza, 13 May 2015, (2016) *T & AF* 58.
[76] Tribunale di Reggio Emilia, 21 October 2014, (2015) *T & AF* 598.
[77] Tribunale di Bologna, 9 January 2014.

Trusts Convention, given that the settlor had reserved *all* of its powers to himself, whereas the provision only refers to the possibility of reserving *certain* rights and powers.

5. Protecting the interest of forced heirs of the settlor

Another concern often mentioned in literature is that trusts may produce effects conflicting with mandatory provisions of succession law and, in particular, forced heirship rules.[78] However, as mentioned earlier, article 15(c) of the Hague Trusts Convention explicitly states that the Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, such as for instance, those protecting succession rights, testate and intestate, and especially the indefeasible shares of spouses and relatives. It follows, that the provisions on forced heirship apply and the heir can resort to the conventional remedies available to him against dispositions that prejudice his rights.

Although the possibility that trusts would be used to circumvent forced heirship rules seemed to be a common concern in Italy, in practice, it would appear to have rarely materialised. At least so far, the reported cases in which forced heirs have alleged an infringement of their rights are very few, altogether a handful since the Hague Trusts Convention was ratified in 1989.

It is interesting to note that in the first two instances in which courts have been faced with such a claim, the claimants had alleged that the trust was void because it infringed their rights as forced heirs. However, in both cases the courts, though admitting that the rights of the forced heirs had been violated, ruled that the trust could *not* for this reason be declared void. Instead, an action for reduction (claw-back claim) had to be brought, just as is the case with other (indirect) donations.[79] In other words, the claw-back claim, which is grounded in article 553 of the Italian Civil Code, allows for the claw-back not only of testamentary dispositions, but also of lifetime gifts that exceed the so-called disposable portion of the estate, including indirect gifts, which in turn include trusts. This claim is available up to ten years after the opening of the succession and its aim is to claw-back the most recent donations first, and then to consider the more remote ones.

The first case referred to above was decided by the Tribunal of Lucca in 1997.[80] It involved an Italian citizen, resident in the United States, who had made a will which provided that the assets should go to a trustee on discretionary trusts for the benefit of the testator's only child and her children. When the testator died, his daughter challenged the will alleging that it was void because, among other reasons, it failed to make provision in her favour as a forced heir, and apparently attempted to create a fiduciary substitution prohibited by Italian law. The court rejected the daughter's claim and held that the will did not create a fiduciary substitution, but a trust, to which the Hague Trusts Convention applied. It further ruled that art 15(c) of the Convention, did not prevent the trust from taking effect: it merely provided a saving for the effect of rules on forced heirship in the event that any were applicable in the particular case. Such rules in Italian law did not prohibit gifts, but made them subject to claw-back claims. Since the daughter had not brought a claw-back claim, but instead alleged that the trust was void, her claim failed. On appeal, the Court of Appeal of Florence upheld the

[78] Which is one of the reasons why the French *fiducie* cannot be used to effect a gratuitous transfer (Article 2013 Code civil). See Barrière (n 4) 241 ff.

[79] This was confirmed by the decision of the Tribunale di Urbino of 11 November 2011 where the court discussed the hypothetical case in which a person sets up a trust thereby prejudicing the rights of a forced heir. According to the court, the trust remains valid but ineffective in relation to the heir who brings a successful claw-back claim.

[80] Tribunale di Lucca, 24 September 1997, (1998) *Foro italiano*, I, c 2007.

decision issued by the court of first instance.[81] Several years later, the same position was adopted by the Tribunal of Venice in a decision of 2005,[82] in which it declared that the rules on forced heirship are not to be considered fundamental principles of the Italian legal system. Therefore, a trust is valid even when it violates the rights of forced heirs. It is up to the forced heir to bring a claw-back claim against the relevant disposition.

These two cases confirm that the setting up of a trust, whether lifetime or testamentary, is not in principle incompatible with the rules on forced heirship. Whenever those rules are violated, the forced heir can resort to remedies that are available to him against any other gratuitous dispositions, without the validity of the trust instrument being affected. This position was recently endorsed by the Tribunal of Udine in a decision in which it rejected the claim brought by a forced heir seeking a declaration that a foreign trust established by the deceased, as well as any transfers on trust, were void on the basis that their purpose was to circumvent mandatory provisions of Italian succession law.[83] The court found that it was reasonable to assume that the settlor intended to guarantee continuity as well as a unitary and coordinated management of the group of businesses he had owned, rather than to circumvent those mandatory provisions. It also established that the individual transfer of assets on trust can be subject to a claw-back claim against the trustee.

Thus, settlors who intend to circumvent forced heirship provisions through the use of a trust should be warned that for this purpose, trusts are treated as indirect donations, and will therefore be subject to a claw-back claim. Such a claw-back claim was successfully brought in a case decided by the Tribunal of Turin in which the surviving spouse, who had separated but not divorced from the deceased, brought an action for reduction against transfers of assets made by the deceased, to a trust of which she had not been a beneficiary.[84] By contrast, in a decision of 2015, the Tribunal of Urbino held that the trust in question did not infringe the rights of the forced heir.[85] Interestingly, the court further stated that the trust had the legitimate function of managing the intergenerational transfer of wealth of a business, which had taken place without infringing those rights. In other words, the court recognised that trusts may be usefully employed for estate-planning purposes and that this was a perfectly legitimate objective.[86]

However, the extension of the provisions on indirect donations to trusts has not been entirely unproblematic.[87] One issue that has arisen, and that distinguishes trusts from other instruments, is that it might not be clear to the heir, whom to bring the action against, the beneficiary or the trustee. The latter position seems to be prevailing in court.[88] The problem may be particularly relevant in the case of discretionary trusts where it is often unclear whether the person in question will or will not benefit. For this reason, discretionary trusts pose the additional question of whether or not assets held on trust should be made subject to the claw-back claim, given that the object of the trust may not receive anything. The Tribunal of Udine felt that the fact that the trust is discretionary should not stop a forced heir from

[81] Corte d'Appello di Firenze, 9 August 2001, (2001) *T & AF* 244.
[82] Tribunale di Venezia, 4 January 2005, (2005) *T & AF* 245.
[83] Tribunale di Udine, 18 August 2015, (2016) *T & AF* 159.
[84] Tribunale di Torino, 27 December 2011.
[85] Tribunale di Urbino, 31 January 2015.
[86] This was also confirmed in the recent decision of the Tribunale di Lucca of 8 April 2016, in which the court held that to use a trust for the intergenerational transfer of wealth is not in itself illicit. Therefore, the trust could not be declared void or deemed unrecognizable. Nonetheless it felt that the creditor could bring a claim based on article 2901 C civ.
[87] For more detail, see Valas (n 65) 479 ff.
[88] Cited above at Fn 84 and 85. See also M Lupoi, *Istituzioni del diritto dei trust e degli affidamenti fiduciari* (Padova: Cedam, 2008) 83-84.

acting against the trustee even though, for the duration of the trust, he is prevented from establishing an effective and measurable infringement of his rights as forced heir.[89]

Thus, in Italy, the protection of the interests of forced heirs has been upheld. Whether there will be more case law in future, when the first settlors of trusts set up in the past ten or so years will have died, is difficult to predict. That said, there may well be other instruments that are much better suited to circumventing relevant provisions.[90]

6. Protecting third parties dealing with trustees

Another common concern raised in connection with trusts is whether third parties will realise that they are dealing with a trustee. For instance, how will a third party purchaser know that the property they are purchasing belongs to the vendor as trustee of a certain trust and not to him absolutely? How will banks lending money know whether the property the client is offering as security is his and not part of a trust fund?

As is well known, English practice shies away from registering trusts. However, in Italy, in order to interpose rights against third parties, the law requires documents evidencing transfers of assets, mortgages, attachments and other encumbrances to be mandatorily registered in public registers.[91] This applies to immovables as well as, for instance, to movables that have to be registered, such as cars, ships or airplanes.[92] That said, for the present purposes, we will only deal with the registration of transfers concerning immovables.

Article 12 the Hague Trusts Convention permits trustees to register trust assets or their supporting documents.[93] Hence, when trusts were first established in Italy the question arose as to whether the fact that the transfer is made to a person as trustee could be annotated in the respective registers and, in particular, Land Registers (*registro immobiliare*).

Despite some initial objections, Land Registrars throughout Italy began to execute such registrations, as the majority of the Italian courts held that there is no express rule against the registration of trusts and that it would be contrary to the spirit of the Hague Trusts Convention to refuse registration.[94] In fact, Italian courts have refused registration only to the extent that the trust infringes the mandatory rules of article 15 discussed above. Their position is that, in order for the transfer of land from a settlor to the trustee to be immune against claims from third parties, it must be registered in the Land Register, or in the Cadastral Registers in those regions where these are in use. The same applies to self-declared trusts,[95] as well as to

[89] Tribunale di Udine (n 83).

[90] Such as, for instance, the *contratto di mantenimento*. See G Christandl, 'Will-Substitutes in Italy' in A Braun and A Röthel (eds), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Oxford, Hart Publishing, 2016) 131, 144-5.

[91] F Mazzocchi, 'On the registration of trusts in Italy' (2006) *Trusts & Trustees* 21.

[92] As for movables, such as cars, registration takes place in the relevant register. As far as shares in companies are concerned, registration is required in the business registers (Register of Enterprises) at the local chamber of commerce. For movables not subject to registration it is sufficient that the disposition of the settlor in favor of the trustee is made in the name of the trustee in his quality of trustee or to the trust and that the same has a certain date (*data certa,* an officially certified date).

[93] Article 12 of the Hague Trusts Convention reads as follows: 'Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.'

[94] See Tribunale di Bologna, Giudice del Registro, 16 June 2003, (2003) *T & AF* 580.

[95] Tribunale di Pisa, 22 December 2001, (2002) *T & AF* 241 and the decision of the Court of Appeal of Venice of 10 July 2014.

acquisitions of property effected by the trustee.[96] However, there were still some practical issues to be solved.

While the Hague Convention prescribes that a trust must be merely *evidenced* in writing (article 3), article 2657 of the Italian Civil Code states that only deeds executed by, or documents signed before, a notary may be registered. Italian legal practice chooses to adopt the more rigorous of the two approaches, with the consequence that trusts *interni* are usually made in writing and executed in the presence of a notary so that the document can be registered.

One problem that emerged in relation to the registration of trusts in Land Registers was that there were no indications as to whether registrations should be made in the name of the trust or of the trustee. The latter solution has prevailed so that land registrations are normally made in the name of the trustee, by indicating that the latter acquires legal title to the trust assets only as a trustee of a given trust. However, in the course of the past year or so some courts have adopted the view that it is perfectly valid to register the transfer against the trust, even though the trust does not have legal personality.[97]

Italy does not have a special public register for trusts, as is the case with other jurisdictions.[98] However it has become common practice to register the transfer to the trustee of immovables or of certain movables, and a notice is made that the person acquires the property as trustee. This does not only mean that third parties can consult the register, but it also shows that the existence of a formalised registration system does not operate as a bar to accommodating trusts in civil law jurisdictions.

7. Conclusion

What does the Italian experience teach us and what lessons does it hold for other jurisdictions? First, it shows that trusts can fulfil many important and useful functions and that, due to their flexibility, they can be used in a variety of different circumstances. In fact, as mentioned above, *trusts interni* have been employed for a number of purposes, both in the domestic and commercial context, and often to make up for shortcomings of domestic law.[99]

The Italian experience also demonstrates that not all concerns that are generally voiced against trusts necessarily arise in practice. We have seen that at least so far the fear that trusts would be used to prejudice the rights of family members has not materialised. We further saw

[96] Tribunale di Chieti, 10 March 2000, (2000) *T & AF* 372.

[97] The Corte D'Appello di Venezia, 10 July 2014, (2015) *T & AF* 183 seems to have approved registration in the name of the trust and against the settlor/trustee of a self-declared trust, thus confirming the earlier decisions of the Tribunale di Torino, decreto 26 February and 10 March 2014. The decision of the Corte d'Appello di Venezia is in contrast with the decision of the Corte d'Appello di Trieste of 30 July 2014 concerning the same trust (a self-declared trust), and with a decision of the Tribunale di Reggio Emilia, 25 March 2015.

[98] For instance, San Marino has a trust register where all declarations of trust regulated by the law of San Marino are registered, as well as all foreign trusts with a seat of administration in San Marino. In addition, the trustee is required to comply with the relevant formalities to enable the effective segregation of trust assets by registering trust assets in the land registry, company registry or in any other public registry. Lack of registration does not affect the validity of the trust. By contrast, in France registration of the *fiducie* in an apposite register (set up in March 2010) is required for its validity (article 2019 of the *Code civil*), but the objective of the registration is to serve as a basis for verifications by government departments and agencies. In addition, the trustee registers in the Land registry as trustee. In Liechtenstein, it is common practice for the trust deed (*Treuurkunde* or *Treusatzung*) to state whether the trust should be registered or whether its documents should be deposited at the Public Registry. Trusts created for a period longer than 12 months must be registered if a trustee's domicile or head office is in the principality (arts 900 and ff PGR). However, unlike in France, in Liechtenstein the trust will be validly created whether or not it is registered.

[99] Graziadei (n 13) 73 and 76.

that the registration system in place in Italy enables third parties to know about trusts involving immovables or certain movables. Thus, trusts should not automatically be met with suspicion.

That said, there is undoubtedly a risk that people might try to use trusts to prejudice the rights of third parties, including tax authorities. However as noted above, this risk does not only exist with trusts but, as the Italian experience demonstrates, also with other domestic instruments that allow for the segregation of assets.[100] Where issues arise, such as is the case with creditor protection, it is important to have adequate remedies in place. In this respect, the Italian experience has shown that the legal system is well equipped to tackle or mediate risks of misusing and abusing trusts. Where necessary, Italian courts have been prepared to intervene and to adopt strict measures, not only setting aside dispositions, but also refusing to recognise trusts or declaring them void, or seizing assets held on trust. In other words, they have reacted effectively even though there is no national legislation providing Italian courts with special powers, and even though, at least initially, judges were unfamiliar with the law of trusts.

[100] Including the 'atti di destinazione' regulated by 2645-ter C civ and the 'fondi patrimoniali' regulated in articles 167 ff C civ.