Trust and fiduciary companies for the internationalisation process

Premises

The privatisation process in development in most of the countries has not solved yet the problem of the juridical order in force of which could actually happen a flux of movements of capitals able to allow the foreign investors to participate to the long-expected process of development of the economies.

In fact, the frequent prohibition to alienate applied by some countries raises the problem of a substantial prohibition for the internationalisation of the economies. As a clear result, the trader who wants to develop economic activities would need specific guaranties for the intended activities, for the unlimited control over the assets acquired through any legal means, for the eventual free transmissibility to those interested *(ayant cause* or *assignees)* – through an act *inter vives* or *mortis causa* – of the patrimony the economic agent should have full disposability over. Thus, it results the necessity for a substantial and uniform *jus civile* and for an ordinary or arbitral jurisdiction very rapidly and effectively functioning. In spite of the good will and of the preparation of an almost unlimited number of factional instruments of international range, such a juridical certitude, has never been accomplished.

An example in this respect, at least regarding our country, is the strong contentious between the companies operating here and those existing in the rest of Europe and of the world.

In order to overcome the existing displacement between different legal orders, in Italy is functioning since 1939 an Institute: the one of the fiduciary companies, that, with its characteristics, maybe sometimes not even intuited by the legislator at the moment of their concretisation, represents a real juridical platform for the internationalisation of the companies. In fact, the "static" fiduciary company, according to the Italian law, is first of all carrying mandates without representation; therefore, the given goods and rights do not enter into the patrimony of the company, but they always remain in the domination sphere of the mandatory agent. The fiduciary activity is defined in the limits intended and determined by the mandatory agent, with no possible voluntary execution from the part of the fiduciary company.

The certitude for all of the above is given by the control power exercised by the M.A.P., which was able to guarantee the functionality of this sector, due to its vigilance activity.

Obviously, on the base of the above mentioned rules, nothing forbids the entrustment to a trust company of a mandate for goods and/or rights administration, that has as object the cession of these to third parties, for a determined period of time, shorter than the period of the mandate received. The cession of these goods and/or rights could embrace the form of: leasing, right of use, right to inhabit, to transport, to exploit, right of passage, right of license etc., for the payment of a fee, a due or a royalty. On the other hand, nothing forbids the same fiduciary company to receive a mandate with an opposite object from its own clients/mandatory agents, the company playing in this case the role of the third party.

In the extent in which the fiduciary company acts as a good-will third party, it can accomplish the received mandates in full juridical and functional autonomy, it can act as a compensation room, it can accomplish the task of the "escrow accounts", it can rise to the condition

of arbitrator in conflicts deriving from the application of the received mandates, it can receive or give guaranties (even if suitable and entirely collateralised), it can operate in the same conditions on the *spot* or *futures* markets with merchandises, metals and movable values, it can administrate or create stock exchanges and it can conduct tax assessments.

Such a model can exercise the same activity also in third countries or in the European Union countries, in a direct or indirect manner. In a direct manner – by receiving mandates from public and private subjects, national or multinational non resident, having as object the privatisation of goods or rights on their territories. In an indirect manner, the activity could be exercised through the promotion of the creation of local fiduciary subjects, with local capital prevailing, but using the know how and the management of the so called "trust company for internationalisation of local economies", which – with an eventual Italian participation from SIMEST and ensured by MIGA – could gather the mandates related to the cession of a good, even if not permanent, to subjects who are not necessary residents.

The mandate this way obtained will be either directly administrated, according to the local fiduciary law (if any), or transferred to Italy or to the EU in the context of the fiduciary company for internationalisation, put under the control of the m.s.e. and adopting as an instrument of its own administration the activity criteria of the Italian fiduciaries.

In case of bankruptcy of the fiduciaries, the entrusted goods or rights do not enter in the bankrupted patrimony and they are to be pre-deduced and returned to their rightful owners.

Obviously, the above presented solution is valid on short term, but it can not be used over a long period of time, because it seems absurd to find, within the E.U., the contemporaneous existence of different non-concurrent laws (rights), in spite of their common descend from the same Roman matrix[1].

In the Italian Law, as shown, the legislator decided in 1939 to return to the antique Roman roots of the fiduciary relations within the mandate without representation. Finally, the importance of the old conflict between the interpreters of the Romano-German school and those of Anglo-Saxon school decreases, after they have worn out each other for 45 years in debates on the distinctions between the Italian and the Anglo-Saxon juridical regulations. So, it is now possible to advance the creation of a European fiduciary law, based on the direct fiduciary commerce (*nominee* and *figure head*) and on the fiduciary instrument ("**TRUST"**, "**Fiduciarie statiche"** and "**familien stiftung"**).

The French legislator made a movement in this respect, by creating a project to introduce the "trust" in its own juridical regulations.

The lack of legislative harmonization results in the use of different regulations to solve problems that should be deal with on uniform basis, with consequences, even fiscal, that can prove to be extremely serious.

Under these circumstances we have to adequate our regulations to such procedures, by innovating the legislation on the "static" fiduciaries on one hand, and by asking for the creation of a common regulation regarding the fiduciary activity, also extended to the *trust* and to the *familien stiftung,* that relates also to the so called regulations relative to the succession pacts.

The Italian specific instrument of the fiduciary company is certainly useful for the promotion of the international activities of the companies and it could be a valid contribution, as well as a starting point for the definition of a community model of the fiduciary company, meant to avoid distortions of the market, also created by the different fiscal regulations at the national level.

I – The fiduciary Institute (origins)

There was an old debate, taking place in the same time with the beginnings of the fiduciary institute.

An extended literature placed the origins of this institute either in the Roman-German law or in the English-Roman one, also recognizing the Gothic and/or Longobardic influences.

The institute finds its roots in the "fides" concept as a general principle, already found at the basis of the Roman negotiation system in the époque prior to the twelve tables legislation. In the efficiency expression, this principle is connected to the one of "potestas" or "manus", found at the top of the parties that have decided to conclude an agreement ("potestas" is the most recent and the most used of the two terms). The same principle of "fides" is also correlated to the one of "mancipium", relative to the "potestas" over the Roman citizens reduced to a servile status, with the single application for private purposes, in the sense of the condition of the debtor citizen who, if not sold "ultra tiberium", was in a servile condition (*servi loco*), even if considered a free citizen in the public matters.

So, the "fides" concept is the one that becomes first individuated, verifying how much its "good" existence has influenced the development of all those negotiation simulations and persons interpositions that could be find for example in the concept of "coemptio" (the matrimonial feint acquisition in the civil form of *mancipatio*). The negotiation *fides* is also assumed within the selling process, where "emere" has, apart from the significance of interchange of goods, the one of the change of price against the respective good, which means *selling*. So, *good* and *price* are essential elements of the selling contract, next to the agreement of the two parties both on the good and the price. Once the contract concluded, the buyer can legitimately keep the good (HABERE LICET), being in the same time under the obligation to pay for it.

If in the preliminaries of the naissance of a selling contract the vendor did not have other obligation except the one to give the good to the buyer, in the time of Plauto the "mancipatio" and the relative eviction guaranty were necessary at the conclusion of the contract. The latter was intended as a normal element of the contract and it could be excluded only through an appropriate decision through which "auctonantem defugit". The guaranty for the vices of the thing was to be added. At the same time, the buyer's obligation to pay the price was not immediate, meaning that the price could be paid after the actual delivery of the good.

The satisfaction of the price became the passing point from the selling concluded from time to time with the immediate passage to the selling as a consensual and not real contract.[2]

From the same comedies of Plauto can be deduced the existence of an *action empti* through which was possible to obtain the execution of the contract, even concluded by simple agreement.[3]

Concerning the **property acquisition modalities**, next to those of **original title** (occupation, invention etc.) there also were those of **derived title**, among which *tradere* and *mancipatio*. The "traditio" was still based on the protection of "fides".

The importance of "fides" actually increased along with the decrease of the old primitive formalism, which implied the subordination of the commercial relations between Romans and strangers to the *jus civile*. The consequence was the necessity to appeal to the reciprocal *fides*, either in negotiations or before the peregrine praetor.

The "fides bona" becomes in time a guiding criterion for the activity of the judge. The fact determined Cicerone to declare that "fundamentum est justitiae fides". As a consequence of this evolution, the *bona fides* was more and more seen as an important element even in the *jus civile*, in order to fix the quantum of the condemnation.

Such evolution is founded a great deal on the development of the relations between Rome and entities usually regulated by the "foedera", consisting of the mutual intention of the undersigned to consider the pact as a source of binding tie between the associates. So, *fides* becomes a concept of juridical standardization in the Roman territory and in the expansionist process of the Roman world. The affirmation is confirmed, says Pietro Bonfante (*Storia del Diritto Romano,* Milano, 1958), by the sources. Actually, the archaic Roman law is founded on the crime as source of obligation and not on the contract as regards the subsequent contract, and the crime is essentially the break of the *fides*. In this phase, "the crime emerges and invades the entire system of obligation", while it weakens in the classical law, where the pin of the *variae causarum figurae* becomes the contract (Gaio). The crime has been worn-out as an instrument that produces obligations "ex lege", because the State assumed the task to apply the criminal law, doing its best in order to cease the private punishment.

The same thing can be found in the history of the German law, where the same term – "Schuld" – identifies the debt and the fault.

The origin of the modern obligation, even in the fiduciary field, can be found in 326 B.C., in the period of *Lex Poetelia*. Tito Livio narrates the entire history of this law.

Lucio Papirio had a *nexus* (almost servant) status towards the creditor for a debt contracted by his father. Because of the insults and bad treatments of the creditor, he runs away and he succeeds to organise the people. The mob, getting down on their knees before the senators who were entering in the Curia, pointed to the lacerated back of the young man. The fathers, moved, authorize the consuls to present to the people a law in force of which the status of *nexus* was abolished, except the situation of *noxae debitio* crime. For the future, the responsibility for the debt was to fall on the goods, not on the debtor's body. The mention of the *noxae debitio*, which remains in force, shows that the condition of *nexus* was the one of the *mancipio dati*, so the *nexus* status was the one of *obbligatio* and the payment of the debtor, even for the action of a third party (fiduciary), was the only possibility of getting set free from the obligation. So, it is accurate to consider the abolition of the institute as an *aliud initium libertatis* and it is also accurate to say that starting with that law the guaranty for the credit would have been to be the patrimony, not the debtor's person.

In the Antiquity (Bonfante) the obligation could have been accompanied by the guaranty in order to ensure the execution and probably to avoid the debtor's almost servant condition. At that time there were fiduciary guaranties or securities that did not presume the transfer of authority on the good or on the person, because the real guaranties for the obligation were absolutely unknown in the antic *jus Quiritium*.

The "pignus" is present only in a criminal form in the public law, where the good declared in a concerning situation by the magistrate gets destroyed, not sold, in order not to allow a transfer of property, and it embraces the form of the private law executive procedure. So, during the first Roman juridical phase, *the trust* in based on the personal relation established through the mandate without representation, as in the situation of "(co)emptio senilis", and only later it becomes the transfer of a *res mancipi* in property, as a guaranty.

The fact is confirmed if we analyse the primitive forms of personal guaranty, forms that imply a situation of obligation, founded on trust (*praes*, *vas*, *vindex*), which separates anyway the division of the debt from the obligation, even in the time following the *lex Poetelia*.

In fact, the *praes,* the *vas* and the *vindex* (all figure heads), are the only ones obliged in the antic period (almost guarantors), if their intervention is posterior. In this case the debtor is liberated. But the *praes* is also used as guarantor in the contracts of the private contractor (*manceps*) with the State and a Varrone's text (Varro, De I.I., 6,74) also shows the *vas* was also used out of the process. The specific in the development of the concept of obligation and in the later formation of the fiduciary agreement as a form of property transfer, is that each of the original forms, as the *vadimonium* and the *praediatura*, as the most ancient *vindex* institute, become useful to the integration in the same context of the *debitum* and the *obbligatio*. These cease to be only guaranty fiduciary institutes, as long as the debtor becomes his own *vas*, *praes* or *vindex*, unifying in himself the figure of the settler or of the nominee without representation, and creating the circumstances for the naissance of the further trust, strengthen by the representation and

the transfer of property. But even during the classical period, the trust maintains the characteristic of polyvalent *negotium*, which is used in different situations, including the pledge, the bailment, the deposit, as well as bad treatment of the alienate slave, the donation *mortis causa* (bound to restitution if the beneficiary dies before the donor) donation through persons interposition, maybe even in the situation of the restitution of the dowry after the dissolution of marriage, from where the various names as *fiducia cum creditore, cum amico, manumissionis causa etc.* It consisted of the obligation assumed through a convention regarding a *res mancipi*, which was legally transmitted from one part (creditor or settler) to the other (debtor or nominee).

In his "Disposizioni penali in tema di società e consorzi" ("Criminal provisions regarding companies and consortium"), p. 618 and the following, Taglierini underlines the fact that the concept of fiduciary contract was already known in the classical Roman world, as well as in the German one: (1) when one wanted to establish, on the account of somebody else, an economic activity that he couldn't develop himself (the Roman *cives* could develop the *otium* not the *negotium*, under the penalty of own public image sacrifice and, as a consequence, the sacrifice of his *cursum honorum*; the solution was to have the slaves, the freedmen and the clients making commerce, sailing, managing, administrating in their own name, but on the account of the chief of their *gens*, to whom they were reporting the economic results: this was the rule from Caio Mario to Silla, from Julius Cesar to Licino Crasso, from Pompeo to Cicerone, to Catone and then to Divina Livia); (2) for minor age, when the subject did not want to appear as the direct owner and administrator of an economic initiative; (3) in order not to create situations of concurrence, even if not legally feasible, economically prejudicial.

II – the **coemptio fiduciae causa** *and the* **negotium fiduciae cum amico** *as institutes GENERATINg the FIDUCIARY european law*

Approaching the details of the "negotium gestio fiduciae causa", there can be individuated species divided in four different genders, all-deriving from the same source:

1) coemptio fiduciae causa, from where derives the so called mandate without representation, specific for the fiduciary law originating from the 1939 law;
2) negotium fiduciae cum amico, from where derives the commerce of "trust" from the French law, the fiduciary activity developed for example by the Italian notaries, the Anglo-Saxon client's account, but also the *stiftung*, particularly the *familien stiftung*, the figure head and the contract of nominee from the English law, as well as the trust and the foundation;
3) negotium fiduciae cum creditore, developed in the Roman Justinianian law into the specific forms of deposit, bailment, pledge;
4) the trust: understood in the sense of the inspiring principle of the activity developed by the *cives romanus* in the interpersonal relations, either with other citizens or strangers. It is important not to forget that the *cives romanus*, normally involved in the *cursus honorum*, had to be able to practice only the *otium* and not the *negotium*. For that reason, in order to find the financial resources necessary to pay for the life style he had to lead (especially financing all potential requests of economic assistance from his clients), he needed a subject (figure head) to develop in his own name those activities that were not possible for him to exercise in person because of the *dignitas*.

Of course, this kind of relation couldn't have a written form, considering the virulence of the political confrontation in the classical Rome of the last republican century.

The arrival of the Giulio-Claudio's Empire exasperated the relation of trust, because the imperial throne entrusted its own security to the German guard, in a fiduciary relation that lasted until the fall of the two branches of the Roman-Germanic Empire.

The evolution of the Longobardic law concentrated on the defence of the activities developed by the in formation bourgeoisie of craftsmen and mercantile, classical and individualistic, meant to restrain in the glossed codifications the manifestation of will between tow parties, specific for the classical Roman law. This kind of tradition, without the reception of the Justinianian rules, is followed in Britain and there signs of it are still to be found in the "augustal laws", where the Romans retired

from the empire after Constantine the Great asked for the Germans, The Saxons and the Normans to come in their service, to whom they gave the mandate to govern, leaving the hereditary economic power for ever confirmed in the Magna Charta. Their isolationism was not a choice of diversity, but the fidelity towards the classic and democratic Roman model, which means the best juridical and social Roman republican democracy, even if interpreted within a temporal climate marked by the passed centuries.

The history teaches that the breach of the contract of trust was the thing that led to the important historical brakes, the very fist being the one with the Catholic Church, apart from the fact that its universalism did not conciliate with the fiduciary commerce found at the basis of the *necessary bilateral relation*, that was existing between the throne and the economic power – *tertium non datur* – and that exploded later with the process and the execution of the sentence for King Carlo I, then with the removal of the “dictator’s” son – Cromwell – and then with the non violent call to the throne of Queen Maria d’Orange.

What at Rosseau is the social contract, in the British tradition is the fiduciary consensus, which ties the King governing without a governing executive, republican in fact, expression of the binary counter-position between the majority and the opposition. It is a tradition for the members of the “House of Lords” (The High Chamber) and the subjects in *cursus honorum* to administrate their fortunes trough the family trusts or “familien stiftung” (in the Roman-Germanic law). Going back to our discussion, the Roman law (Cf. Sacco “Il Contratto Fiduciario”) knew the trust, meaning the transfer of a right, carried out for a determinate purpose, accompanied by the clause in force of which the buyer (nominee), once the goal accomplished, would have re-transferred the right to the settler. The interpretation is reductive, because of the fact that the applicative importance of the trust is surely much wider, with the possibility of the limited application, proof of a wider application. Around this central hypothesis, continues Sacco, others analogues were configured and the German and the Italian doctrine of this century analysed the specifics of such an agreement.

It is important to take into account the fact that the Romans had no such problem as putting obstacles to the freedom of concurrence and to the accumulation of fortunes in the hands of private persons (especially the *equites*). The *praetor peregrinus*, interpreting the practical case, was adopting adequate criteria of resolution, which were difficult to be derogated from by the following praetor. Considering these jurisdictional “precedents” (think about the origins of Common Law), a series of new kinds of relations or reports, especially of commercial kind, ignored in the old *jus civile*, gained juridical tutelage. For example: relations of mandate, *societas*, *emptio-venditio*, *locatio-conductio*. It was logical that these relations, initially considered to be valid only between Romans and strangers, became relevant also between Romans, in force of the same criteria. The *praetor urbanus*, the magistrate to whom was attributed the *juris dictio* between the Roman citizens, had to recognize and to protect them at his turn; so, a sort of new sector of *jus civile Romanorum* has been created through the induction process, with the characteristic of been applicable not only to the Roman citizens, but also to the strangers, giving birth to the *jus gentium*.

Obligationes re contractae

Guarino (op cit. p. 859) asserted that this kind of obligations were those established between their subjects (creditor and debtor) in force of the fact that the first one had effectuated a voluntary “datio rei” (with the title of property, possession or detention) in favour of the second, which means that because the debtor has not refuted the “datio” and does not have the right to keep the good under another title, he was forced to give it back to the creditor. The contracts constitutive of real

obligations could be unilateral or bilateral, but they all had in common their transformation in a *datio rei* and the inexistence of a right of the beneficiary to give back the good to the donor. As it is obvious that at the basis of these “fiduciary” operations (to give and then to take back) there has to be a practical outcome, this was usually accomplished either through a separate understanding between the donor and the beneficiary or through the adequate clauses of the contract. Obviously, the juridical practice proceeded to the schematisation, formulating the most frequent practical hypothesis and arriving in the last part of the classical époque (Gaio; Just.) at a limitative definition. The last one disappeared in the Justinianian *Corpus*, the codification of which intended to give to the State elements of absolute legal surety, in order to determinate the cause of the movement of things and persons.

Anyway, Guarino continues, the juridical relevance of the obligations deriving from the trust and of those deriving from the “commodatum”, “depositum” and “pignus” is the one of an intervention operated, as always, through the trial, this way creating specific actions for the creditors, because the Roman jurisprudence (the classic one included) was less inclined, in order not to say resistant, to the systematic categorization.

The conclusion is that the jurisdictional Roman practice divided the fiduciary contract in two large branches: (1) the branch of the *obligationes re contractae* in the basic sense, originated from a *datio rei* with transfer of *dominium* (today fiduciaries of non Italian law – trusts, stiftung), which is deriving from the *mancipatio fiduciae causa* or from *datio mutui*, because in force of these the *obligatus* found himself in a situation of pure obligation (of *remancipatio*) towards the creditor, who had no absolute rights on the good; (2) the branch of the *obligations contractae* in the secondary sense, deriving from the *datio rei* involving the beneficiary’s detention or possession (not property) of the good (*coemptio fiduciae causa*, *immaginaria venditio*, *fiducia cum amico*, where the element of the apparent transfer of the dominium does not necessarily imply the material dispossession of the good), which is particularly relevant in the relation *fiducia cum amico*. In this situation, the intervention means the tutelage of the patrimonial interests of the figure head, in terms of safeguard of property and of juridical defence of the same against anyone. So, it is the case of a “fiducia pura”, as it realizes itself in the pre-eminent interest of the figure head and with important expenses from the part of the trustee, the eventual benefits resulted from the use of the good being insignificant comparative to the basic purpose of the parties. Another particularity of the *fiducia cum amico* results from the possibility of the figure head to take possession of the good given in trust without stealing it and to be able to usucapt (usureception) (Gaio Just. 2,58 – 59 – 61).

III – the FIDUCIARy contract today

…The fiduciary contract must be considered today legal and accepted in the general framework of the contractual autonomy recognized to the parties by art. 1322, ph. 2, c.c., even if the law does not expressly regulates it, excepting the general case of the mandate and of the most specific form of testamentary trust, as regulated by art. 1703 and 627 c.c. (we also mention the institute of the fiduciary companies to which refers the law from 23.11.1939, n. 1966).

The hypothesis of the fiduciary entrustment of administrative tasks within the companies, is not different, either combined or not with the registration of shares or social quotas, since it normally has the legal purpose to give to the nominee the relative management and administration powers.

It is common, in the doctrine and in the jurisprudence, states, at his turn, Luminoso (in “Il mandato e la commissione”), the introduction of the so called indirect representation in the

phenomenon of the person interposition, as well as its connection with the fiduciary contract on one hand and with the so called fictitious interposition of another, which would constitute the main manifestations of the interposition phenomenon.

It is important to underline, continues Luminoso, that in spite of the apparent linearity of the traditional system, according to which the mandate (in own name) and the trust both configure as cases of real interposition of person, if there is a sector in which the difficulty to individuate the relations between the gravitating figures can prove to be really insurmountable, this is the one just indicated.

Apart from the serious doubts on the admissibility of the contracts characterized by an autonomous "causa fiduciae", we observe that, function of how they are configured, the contractual trust on one side and the mandate on the other, the possibility of overlapping and, in the affirmative situation, the limits of interference between the two figures, are meant to sensibly vary. This explains the return into the contemporaneous doctrine of opinions that postulate both the total separation between the fiduciary contract and the mandate (without representation), and their total coincidence, in spite of their partial overlapping.

The extreme variety of perspectives does not create obstacles for a comparative analysis between trust and mandate. The most important doctrine is in fact consisting basically in pointing out the way in which, in the presence of typical negotiable figures, we cannot talk anymore, or that it doesn't make any sense to talk about the fiduciary agreement (the so called *legal trust*), no matter what general conception is followed in this respect.

At the basis of this matter stays the accurate intuition that in the real trust the accomplishment of the interest of the settler (or of the third beneficiary, think of **familien stiftung** and/or of **familiar trust**) remains committed to the loyalty of the nominee (or trustee) and that the trust seems to develop a function as penetrating in the relational life as distant from the law is the situation characterized and/or shaped by it.

From here comes the discrepancy between the fiduciary contract and the so-called contracts of trust of which particularity only stands in the higher intensity that the considerations of individual qualities of the subjects can assume in the purpose or of the conclusion or execution of the contract; and precisely the mandate is traditionally considered a typical example of "agreement of trust".

The mandate

Luminoso, with regard to the property transfer effects from the part of the trustee, affirms that according to an orientation of thinking, the conveyance made by the trustee (in his own name) in the execution of the assignment would determine a direct transfer of good from the settler to the third party. According to various formulations adopted, the direct efficiency would find foundation either in a power of disposition of the settler's right from the part of the trustee, according to an authorization that would accompany the mandate, or in an exceptional legitimation coming from the trustee's duty to take care of other's interests, or in an (abstract) transfer act of a purely exceptional legitimation coming from the trustee's duty to take care of other's interests. To the acceptance of this interpretation there is the opposition of all the reasons, already presented, related to the different thesis that associate to the execution of the mandate a direct transfer between the settler and the third party (the admissibility relative to the movable and immovable registered goods is excluded, because of the difficulties generated by the necessity of transcription).

Montuori qualifies trust as an aspect of the trust company on the basis of art.2 of the convention regarding the law of trusts and their recognition and specifies that trust has the following features:

a) the goods of trust represent a distinct mass and they are not part of the trustee's patrimony;

b) the goods of trust are registered on the name of the trustee or on the name of another person, on the account of the trustee;

c) the trustee benefits of the power and is under the obligation (he has to give account about) to administrate, to manage or to provide goods in terms of the trust and the peculiar norms imposed by the law.

The same Convention defines the trust as those juridical relations established by a person, the constituent – through acts between living persons or *mortis causa* – whatever goods are controlled by a trustee in the interest of a beneficiary or for a specific purpose.

This, continues Montuori, gives the opportunity to impose the transcription in the appropriate registers of the goods administrated by the trustee, under the peculiar administrative form, in order to make them not attackable by his creditors. Nowadays such a solution is anti-historical and anti-juridical, because in order not to loose the result deriving from the transcriptions, the State prejudices the application of a juridical agreement, when the same finds application in the most advanced juridical systems – USA, UK, Switzerland – because they are more roman-classical and not Justinianian, like ours. Besides, there are in our system, insuperable obstacles to the admission of the extern efficiency and, generally, a dissociation or legitimation along with the peremptory hypothesis provided by the law, as well as the difficulties related to the impossibility of transcript the acquisition made by the third party, in the case of registered immovable and movable goods.

IV – THE TRUST IN ITALY AND THE HAGUE CONVENTION

The potential of an institute almost unknown in our Juridical System, but very well known in the countries of the Common Law, as the TRUST, has been noticed by many in our country, too.

For this matter has been stipulated a Convention of the representatives of 32 countries, including ours (The Hague Convention).

The Convention aimed to respond to a necessity more and more relevant within the practice of the trans-national relations. Such necessity is obvious in the individual investments field, especially for those citizens to whom the State does not recognize this institute.

The Convention, part of the private international law, aims to solve the problem of the applicable law and recognition of TRUST.

The subject of the recognition actually includes the matter of the feasibility of the TRUST instrument. The problem is approached in art. 6 of the Convention, which stipulates that the trust should be ruled according to the law chosen by the constituent, and in art. 11, which shows that a trust constituted according to the above-mentioned law should be recognized in consequence by the countries adherent to the Convention.

Art. 13 quotes: "No State shall be bound to recognize 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".

The provisions are the result of the debates prior to the drafting of the Convention between some Civil Law and Common Law countries.

The elements referred to are those connected to art. 13 of the Convention, concerning the residence or the citizenship of the settler or of the beneficiary, as the one of the place where are to be found the entrusted goods. The exceptions from the rule are the choice of the applicable law, of the place of administration and of the trustee's usual residence, corresponding to those elements substantially depending on the will of the subject who constitutes the trust.

Art. 13 underlines that relating the trust to the localization of the goods seems to be untrustworthy, especially if applied in relation with the shares, bonds etc. There is no clear and univocal criterion to apply in the situation in which some elements prove a connection with a State that does not consider the trust and other elements are more strictly related to States that do not know the institute of trust. It is the case of an Italian who changed his residence to United Kingdom or who still is an Italian resident and has properties in United Kingdom.

The literal interpretation of the rule does not seem to be able to really help, being possible to exclude the fact that the simple existence of a single connection point with a State that does not apply the institute of trust could determine its non-recognition.

Analysing the concept of recognition implied in the Convention, this could be seen in a double sense, meaning that some effects are recognized without any doubt: the separation between the personal patrimony of the trustee and the entrusted goods; the possibility of the trustee to file and to be filed in a lawsuit as a trustee in front of a notary or in front of another person who represents the public authority.

Other effects are recognized only when provided by the law applicable to the trust. They are basically application of the principle of separation between the personal patrimony of the trustee and the entrusted good: the impossibility of sequestration of the entrusted goods by the trustee's creditors, the insensibility of trust to a possible bankruptcy of the trustee, the separation of the trust from the matrimonial regime and from the succession matters of the trustee, the possibility to claim the entrusted goods when the trustee has confused them with his own goods.

It is obvious that the minimum recognition of the trust effects is inseparable from the ability to understand the forms ruled by each juridical system.

Thus, in the case of the acquisition of an immobile, if the subject declares to act as a trustee and asks for the transcription of the juridical act, it seems that the annotation cannot be refused and that it will inform the third parties about the non inherence of the substantial property of the goods with the patrimony of the subject who is their official owner. Once this annotation made, a sentence relative to the non-recognition of the trust is given.

The fact is also deducible from the fact that the recognition of a trust according to the Convention does not imply in any way the creation of new juridical entity, as underlined by the same reference to the law project presented on 24.11.1987.

In simple words, the recognition of the trust does not mean that the entrusted goods should be attackable exclusively by the trust's creditors. The matter should certainly be studied in depth, but, once excluded the confusion with the trustee's patrimony, the thesis that the entrusted goods guarantee for the obligations of the beneficiary becomes sustainable. If this thesis is accurate, it seems improbable that the annotation in the registers, whatever they are, would mention only the fact that the alleged nominee is actually a trustee; it is presumable that it should indicate at least the information regarding the beneficiary and perhaps even those regarding the settler.

The "control" would be even more complicate if instead of immovable goods there were movable ones, especially shares, quotas and any other similar ones.

In the few Italian jurisprudential precedents in the field of trust, the judges, recognizing the inexistence of the institute, have judged the facts of the case according to an interpretation that was

safeguarding the essence of the phenomenon, or at least intended to do so.

It is obvious that, in this way, the content of the Convention is respected, considering the fact that it was given in order to allow the accomplishment of the characteristic effects of the trust, using the available juridical instruments.

Briefly, it is difficult to deny the recognition of some of the trust's effects, as long as these are not violating the public order provisions and, in the same time, they imply extraneous elements able to facilitate the appeal to an institute ruled by a foreign system.

The reflection on this circumstance leads to a discussion on the necessity of modifying the rule in force in order to allow also, among other things, the recognition of those hypothesis that do not imply foreign elements in our system.

V – THE FIDUCIARY COMPANIES IN the E.U.

If the institute finds its origins in the Roman law (like many other rights in the commercial field) the *negotium fiduciae cum amico* finds partial citizenship in our system in 1939, fundamentally to protect those subjects who were punished by the so-called racial laws. Nowadays the internationalisation of enterprises, consequence of the distribution of work on sub continental basis, the globalisation of financial markets, the arising of new financial products not strictly connected to raw materials markets, brought an enormous request of juridical harmonization which, present in other community countries, are still not received or reintroduced in Italy. On this basis, while the bilateral action of singles governments does not succeed to advance, as whished, in the Private International Law field, Associations, Entities, International Chambers of Commerce and other International Organisms have proceeded in the elaboration of a new series of behaviour norms, codifying the current procedures and adapting them to new commercial ones. They were thus satisfying the most immediate needs of the market technique and of the company practice (consolidated group budgets and consequent unique debtor or creditor mass). In this field can be also found the new specific function of fiduciary companies of both types before they become SIMs. In the same time, the abnormal development of monetary and financial-fiscal criminality led to an elaboration of an adequate criminal-financial legislation, which approves in parallel the development of the system of Conventions meant to avoid the double impositions, prevalently based on the principle of paying the income taxes in the same place where the income is effectively produced.

As a consequence, the economic operators and not only the important ones, understood that they have to become citizens of the world, in order to be able to produce the goods and the services required by the market, directly at the consume places.

At this fact seems to be opposed the absence of a uniform commercial law. From here the use and the abuse of foreign fiduciary instruments (from which the trusts, the stiftung, the fiduciary companies) who, naturally assigned to regulate purely individual situation, are used to certificate, in a juridical way, situations which otherwise would remain entirely deficient (think of the matters related to reserved domain).

In order to avoid these uncontrolled abuses it is possible to appeal to the fiduciary companies of Italian type. In practice, however, it is not taken into consideration, in order to regulate, constitute and extinguish such rights, the Italian institute of the so-called static fiduciary company and of the related fiduciary agreement, in a meaning, unfortunately limited, that from it derives the national

law. A law, which, fortunately, different in its application from other countries, is submitted to serious controls of the Ministry of the Productive Activities and therefore it offers sufficient guarantees of transparency and absence of the "dispositions d'opacité", which the recent, almost worldwide spread norm on the fiscal monitoring and anti-recycling, demands and therefore imposes.

Moreover, in the administration of any right received by a settler, resident or not, the fiduciary company which has the main residence in Italy, has to apply the Italian law as the law of the mandate contract, applying the foreign one only on the object of the mandate, when this exists or is executable abroad.

When the Italian fiduciary company operates directly abroad through secondary and/or subsidiary residences, this will be submitted to competent local controls according to the different juridical systems.

When an Italian fiduciary company, for example, disposes of a Moroccan subsidiary, when controlled in this manner, it will operate the required juridical agreement, also as a counter part of the local operators, in the application and in the limit of "dahir marocain des obligations et contracts", directly in its own name and with its own means.

In consequence, any ulterior fact or act, which has juridical-economic relevance in that country, will remain ruled exclusively by the Moroccan law (regarding for example the succession law, the accounting and fiscal law).

Returning to the main subject, it is important to take into consideration the formation of a unique internal market that should determine the international economic operator to develop his action at least at the community level, in order to resist to the international and trans-national concurrence, both on the defensive and the proposal level, in order to understand the world as a unique economic area where the richness and the relative rights that express it, liberally circulate.

According to the juridical systems in force in the individual states, the international criminal provisions regarding the transparency of the economic and financial activities, the dirty money recycling and the appliance of the provisions included in the Conventions meant to avoid the double taxation, are bilaterally mentioned between the individual states. But it is necessary to create a European fiduciary law in which to include the international agreements about trusts.

In order to achieve this goal, it must be underlined that the activity of the Italian fiduciary company abroad, either static or dynamic, involves an unquestionable reciprocity law. In other words, even the foreign fiduciary institutions, especially the communitarian ones, may unfold their activity in Italy for the interest of the settler clients right from their own country, without being controlled by the Ministry of the Productive Activities or/and by the CONSOB. While in Italy the fiduciary agreement is precisely conceived to present the *contemplatio domini* to the third parties, except the L. 23.11.1939, n. 1966, in many other systems the representation with the obligation of acknowledgement is not very specific (see for example the joint provisions of the art. 3/33 of the Swiss Obligations Code) and there is no need to apply the "Convention on the law applicable to the *trusts* and to their recognition", adopted in the Hague on the 1st of July 1985 and ratified in Italy by L. 16.10.1989, n° 364.

Such discrepancy may be explained by the prejudice that the Italian legislator shows regarding the so called "dead hand" which reminds the so numerous parliamentary post-Risorgimento debates, but which cannot be considered current any more.

According to the above-mentioned agreement of the Hague, to the articles 7 and 221 of the CEE Agreement and to the modification proposal of the French Civil Code, the institution "De la fiducie" included, a proposal inspired by that Government recognizing the Anglo-American trust, to

accept the current regime is to agree with the development of a series of fiduciary laws in Italy regarding the activity and national sources entirely controlled and administered from abroad without any pending of competence in favour of the above-mentioned Italian authorities.

That is why the study of a directive proposal, similar to those adopted in the banking field, which should define the fiduciary agreement and the fiduciary activity, must be initiated at a trans-national and community level. Consequently, one should proceed to the modification of the Hague Convention, even through the action of the UNIDROIT, which has declared its own availability by means of the Italian Secretary. As sustained in the doctrine, the afferent agreement concepts of "stiftung" and "foundations" on one hand (particularly the familiar ones: familien stiftung and/or charitable trust if comparable) and the concepts of the Italian model of fiduciary companies on the other hand, lead to the succession pacts, prohibited in Italy, and are meant to reaffirm the priority of the community law in front of the common law of the individual states.

Internally the fiduciary law should be revised, from the point of view of the Roman law, in fact, non existing in the Italian discipline, while it exists largely in the Anglo-Saxon discipline and *de jure condendo* in the French one.

Because of the fact that in any juridical system, the fiduciary element accomplishes, beyond the law, un important role, by its social function it impels the development of the law with the introduction of new institutions. The reference to the Roman law is due to the fact that its development presents a large explanation of fiduciary, as Giuseppe Grosso mentions about the word "fiducia" in the Encyclopaedia of Law.

As recently said in the commentary to the draft of the law regarding the trust agreement, presented in 1992 at the French National Assembly and as Alessandro Munari has recently stated "the internationalisation of the affairs life … together with an extreme practicality of the English trust had as a consequence the spreading of certain important commercial operations in favour of countries of the common law", and it's a pity.

The "*fiduciae*" is defined as "un contrat par lequel un constituant transfère tout ou partie de ses biens et droits à un fiduciaire qui, tenant ces biens et droits séparés de son patrimoine personnel, agit dans un but déterminé au profit d'un ou plusieurs bénéficiaires conformément aux stipulations du contrat".

In this context, the "constituent" corresponds to the Anglo-Saxon "settler", the "fiduciaire" is the equivalent of the "trustee", while the object of the mandate (goods and rights transferred) constitutes the "trust fund".

This is confirmed by G. Casson in a comment addressed to the Court of Casale Monferrato on the 13th of April 1984, in the Italian Jurisdiction, 1986, 1, 2, col. 753 e 756, in which it is stated that there is a trilateral fiduciary relation in which the trustee is not a real mandate holder in comparison with the settlor because he has the so-called "legal ownership" of the goods object of the trust; at his turn, the beneficiary is not only the last addressee of the dispositions of the trust, but he also has the "equitable ownership" of the goods of the trust or the property of the trustee who gives him the so-called right "to follow the trust property" which means a certain kind of real action of demand from the third party.

Even if with certain international public limits, this fact is entirely recognized, by the report of the bill (cfr. Preparatory Acts Chamber of Deputies n. 1934) which led to the promulgation of the above mentioned law 364, 1989, which, cancelling the opposite opinion of the Law Court of Oristano on the 15th of March 1956 (cfr. Foro it., 1956, col. 1021) that "…the trust… contradicts the fundamental principles of the Italian law", claims that "…the wide spreading of the trust covers a geo-political area wider than the one covered by the Common law systems". The trust is in fact a

concept which can be found even in mixed systems as the ones in Israel and Quebec and also in Roman type systems as the Brazilian one – with the mention that the last one considers the common law system as a direct and real follower of the Magistrate Roman law – and generally in all the systems of the Central and South America.

This last information may be used to underline, on one hand, the importance of acknowledgement of the effects of the trusts in a country like ours, that suffered a consistent migrating phenomenon in the direction of the two Americas and to deny, on the other hand, without any doubt, the superficial positions that consider that the trust cannot be recognized in systems of Roman type.

As later confirmed, the already mentioned parliamentary document continues: "…it must be underlined the fact that the fiduciary registration of mobile goods is admitted in our system, that even provides a legislative discipline apposite for the most relevant hypothesis as the one introduced by the recent L. on the 23rd of March 1983, n. 77, regarding the investment common funds".

This fact recognizes that our country, considering the economic interdependencies between various countries, is now ready to receive in the system the absent fiduciary institutions.

As an example, a British physical person can develop fiduciary functions in force of an *affidavit* (institute that consists in an oath made by the deponent in front of an official public of various content, which reflects the purpose to which it is destined and that cannot have any restriction regarding neither the quality of the *deponens*, nor the object of the oath). So, according to the fact that the *consortium gentium* has already re-established, inland the international law, a sort of *lex mercatoria* which the states, in their original political sovereignty, and the multinational societies can refer to for tutelage of their rights.

In this sense the Council of Ministers of the OCSE (The Organization for the Cooperation and Economic Development) with the decision from the 21st of June 1976, successively modified by the decision from the 13th of June 1979, stated that whenever a member state declares that its interests could be injured by the effects produced on their own direct international investments, by the procedures adopted by another member state (in this case the Italian fiduciary companies the capital of which is being controlled from abroad), can ask for completion of the consultations during which the member states should provide the information regarding the procedures mentioned above, in order to consent to the multinational societies to express their own point of view on the arguments involving their interests.

If the sworn statements given by a fiduciary subject, resident in the UK, are not considered suitable, *affidavit*, according to the norms accepted in Italy, the already mentioned subject, being protected by its own state, could resort, on one hand, to "The center for the resolution of the investments controversies", founded with the Convention of Washington from 18th of March 1965; on the other hand could sue Italy to "The International Law Court" of the Hague, for objective injury of the English civil law, that the Italian juridical system has to align to when interpreting juridical acts (even unilateral) from abroad, done by subjects who are not resident and who make use of the laws from the place where they are resident (cfr. Art.7 and 21 from the CEE Treaty).

It must be underlined that, through the English juridical system, it may be possible (on the base of an *affidavit*) for a resident subject (the institute of the fiduciary nominee) to designate a "nominal shareholder" or a "legal owner", meaning a fiduciary nominee or a legal holder of social quotas, shares, goods, exercisable rights, in order to interpose himself ("figure head") to any interested third party. In this way the beneficial owner, or the settlor, settler or proponent, will remain unknown to the Italian law, avoiding the transparency in fiduciary matters, stated by the

Italian law.

A particular matter is that of the effects of the regulations' invalidation, which can have an eventual recourse to the European Court of Justice, against the proposal to the national judge, on the limitations imposed by an English or French fiduciary or trust company, to the activity of an Italian society (defined as: "…a person, a company or an association holding assets in trust for a beneficiary. The fiduciary is charged with the responsibility of investing the money wisely for the beneficiary's benefit"), that id subdued to the Italian administrative regulations (CONSOB and MAP documents).

On the same basis, another problem of doctrinaire nature derives from the juridical regime applied to an English fiduciary that decides to transfer itself, from the place where it was constituted, in our Italian system. Once the decision of the residence transfer adopted by the General Assembly of the Associates, the territorial Italian Court must homologate it, in order to obtain the full capacity of action. This operation is necessary even in the case of an already existing juridical capacity according to the art. 52 of the CEE Treaty, considering the fact that the homologation implies the access to the fiduciary activity under the conditions defined by the establishment country's legislation, for its own citizens.

The research, that must be done, is related to those internal regulations capable of conferring the *plenitudo potestas operandi.* The so-called freedom of establishment (art. 52 CEE Treaty) requires the access to all the activities and to their execution, considering that art. 59 of the CEE Treaty provides, within the Community, the suppression of the restrictions of the free services for the citizens of the member states, established in one of the Community countries, different from the country of the beneficiary of these services. As Mengozzi affirms in his "Law of the European Community", it is implicitly understood that the services should be freely provided for payment by a citizen of member state, established in a state of the Community, in favour of another person established in another state, different from the state of the services provider. It is not necessary to take into consideration the possible local limitations, as the Court of Justice affirms in the cases of Reyners and Van Binsbergen, and as it can be observed in the directives regarding the banking cooperation that transfer the power of observation to the authorities of the provenience country.

From this example derives the fact that the establishment right, ex art. 52, implies the right to perform a working activity, once the fundamental civil regulations (the homologation) applied, the controlling device being introduced in order to apply the art. 56, 1st paragraph of the CEE Treaty (public order and public security reasons). A confirmation in the sense is to be found in the "Commentary to the Treaty", by Ruggero De Dominicis, who speaks about …an explicit attribution of a particular private right, very important in the commercial field…, to stipulate a company contract or to transfer the residence, creating in this way a new juridical subject. The reference to the 2nd paragraph of the art. 58, operated by the 2nd paragraph of art. 52 is meant to indicate what types of company can be created by the citizens of the member states, as an application of the establishment right.

From all the above-mentioned derives a concise indication of the principal juridical forms the community should refer to, also by identifying a central authority of coordination that. Using the unique national authorities of reference (where these don't exist, the authorities of the central banks, the B.C.E. or the associations of category could be used), this could give to the unique promoting settlers, promoters and constituents, those juridical certitudes, transparency and harmonization, even fiscal, that at the moment of the nationalization operated by the missing integration of different juridical systems implies: fiduciary agreement, nominee, fiduciary, trust, charitable trust, foundation, familien stiftung. Moreover, this will allow the extremely controlled and regulated Italian fiduciaries to perform their professional function at the same level as their foreign sister

companies. As provided by regulations in force, these have a privileged treatment (the absence of the controls), nevertheless maintaining the same quality of the services. It means that the European legislation must be modified on a transnational basis, in order to avoid the violation of the art. 59 of the CEE Treaty (free services) for any foreign trust company of community provenience, submitted to different operative limits and controls (without mentioning the fiscal benefit that is presently reserved to those residents that operate through foreign fiduciaries).

Finally, it must be reminded that the trust companies can satisfy the request for services that rises from the operators present in the country, regarding the internationalisation of societies and the aid of the countries recently associated with the UE.

Once the inner market closed because of the recession, the societies have to appear on the international market and in order to do this, the 90 thousand operators with the Italians from abroad (a huge number in comparison with 14-15 thousand in France, Germany and Great Britain) need specialized intermediaries who should communicate with the international organisms and the complex juridical and economic agencies in various countries. Such a new qualified activity could be considered to be an important and transparent source of income, also in the benefit of the country that cannot use the expected contributions because of the lack of professionals. The foreign countries, particularly ACP and PECO, need professionalism not words, but, until now, in spite of the delegation to the banking institutes and to ICE, little was actually done.

In others' opinion, there are many reasons to consider closed the experience of the Italian fiduciaries, excepting their settlement in other community countries.

The complex matter connected to the fiduciary activity deals with a progressive restriction of functions and consequently, of professional and economic dignity, based on a strange equation: professional discretion = source of suspicion of a possible illicit act.

Rejecting the assumption as a professional person, as a scholar or as a M.A.P. inspector, let's try to follow the development of the argument through an atemporal and locative vision, which leads us out of the professional activity, in favour of the foreign concurrence, which fully operates in Italy too, without being controlled and without providing any kind of moral or material guarantee (except those imposed by the origin country, if any).

The necessity of the national operators to have a precise reference point in their internationalisation process, their difficulty to access the community information and to communicate with the banking system – distributor of the financial community resources to the entitled subjects, rises the problem of individuating the necessary private structures that could begin to develop their professional function, building a controlled and transparent bridge between the Italian provincialism and the rest of the world.

A simple solution

The daily matter consists in finding simple, guarantying, entirely operating solutions to the complex problems.

Because it is, first of all, a cultural and social problem, one cannot pretend that the operator becomes accustomed with the various directions of CEE and of the World Bank or of other various regional institutions of development. He is unable to do it and this fact is demonstrated by the continuous defeats of the Italian finance at the various tables to which it tempted to be sited, almost confirming the fame of lack of accuracy that accompany us.

Culturally speaking, there must be rediscovered a value and a role that, in a professional way, should function as a transmission belt that the professional person on his own (even if

associated) can not accomplish because of the lack of credibility in the long-period and because of the lack of sufficient financial resources (also from the point of the spending motivations) in order to realize an entire program of general-consulting services for institutions and companies (these too lacking of a real dialogue capacity with the users).

A possible response could be the instrument the practice and the law have been developing in Italy for five thousand years – the so-called *static fiduciaries*.

Some exclusions seem to be necessary, in this respect: the business banks, the Merchant Banks or the investments banks cannot serve to the purpose because they attempt to assume different functions – of guarantee, of trade union or of participation, besides their tendencies to accomplish a professional function of unique financial engineering projects development. Also the trading companies do not answer to this necessity, because they are directly involved in everyday problems, in the management of various commercial relations on very different markets, that have specific problems of the various economic fields, that are no longer driving sectors.

In fact, the appearance or the desire to remain on the international market nowadays, also means respect for this market, not only to provide merchandise and goods. It also means constant assistance to the client in the correct use of its elements; it means to make statements on the origin of the raw materials and on the related processes of transformation, in order to evaluate the environmental impact in terms of ecosystem; it means to surpass the ancient and unfortunate concept of Euro-centrism, by choosing the existential priorities of the existent communities in the various areas of the planet, in order to respect, recognize and appreciate those local values that constitute the poor dignity of the human being.

The international rules

The new rules of the game in a global world are founded on a legitimate and equal participation, based on a natural law of nations on one hand and, on the other hand, based on the supremacy of a law created by the United Nations in the penal, financial, corporate, banking and commercial field. This law does not mean uniformity, but generalisation of the bilateral agreements by applying the clause of the most favourite nation on the basis of coexistence and partnership.

This fact is demonstrated by the diffusion of the so-called “anti-abuse clause” for the concession of the credit tax reimbursement (art. 10, paragraph 5 of the Italy-Great Britain Convention) which gives to the competent Authority of the State where the society that distributes the dividends resides, the power to demand from the beneficiary the proof that the participation according to which the dividends have been paid, was acquired:

1) in good faith and (alternatively):
   a) for commercial reasons,
   b) within the limits of an activity of developing or administrating investments;
2) not with the specific purpose to obtain the tax credit provided by the Convention.

Along with the development of the noble international activity, it starts to configure a real international law of the economy, also law of procedures, in which can cohabit, with equal “civilian” dignity, economic private forces and public subjects of national, trans-national and/or international relevance, without entrusting the Supremacy to any of the parts, but to a law established on the proclamation of the principles arising from the agreements on the binding rules.

Considering the last thirty years of Italian presence in the international context, there is a necessity to have a contractual subject capable to act on the basis of a mandate without representation, submitted to significant controls of the behaviour, according to the prevalent regulations of the national law, of the international law and of the international organizations.

The static fiduciary company

The "static fiduciary company", as already known, in the interest of clients, benefits of a separation between its means and the means of the others in the balance sheet. Therefore it is a container of the third parties' rights; it is a legitimate arbiter and a capable structure of consultancy, on the basis either of the mandate or of a confidence (not fiduciary) relation. Such subject examines and/or analyses a contract, looking for a partner, in order to develop a program of commercial penetration.

Thus, the fiduciary company can supply services in the juridical field, marketing and organization services, for the internationalisation of the company in order to count on multilateral funds, either as an applicative partner of the international Boards (also at the national level), or as a trustee in the transactions of the Italian Boards, like SIMEST or ICE.

Moreover, this activity should be the expression not only of the fiduciary companies of the professionals, but also of those that benefit from the participation of primary financial institutes, capable of giving a minimum moral and eventually material guarantee to the international market, that knows very little about our country and our protagonists.

The new (but at the same time very old) activity of the fiduciary companies should be able to move from the mandate of the private custom stores administration to the administration of stock exchange one, in order to perform an intellectual activity in supporting the juridical innovation in various countries that need it, and to assume functions of extra territorial juridical platform (for example the one regarding the reserved domain and the cession of the use or exploitation right) to that of the information and formation in the interest of the International Organisms, as qualified partners for pursuing their targets.

From a private point of view, these fiduciary companies could perform their most recurrent functions, and in the same time could become the instrument for the dialogue with the banks delegated to examine the requests within multilateral programs, for searching partners both on the internal market and on the international one, also in collaboration with SIMEST and ICE – entities of which they could become members or organic partners.

The action should be structurally concerted with other social parts and especially with Confindustria, under the condition that the given services should be always suitable to respond to the demands of the economic agents.

Concretely, the services for the two types of clients should make profitable the action of the fiduciary companies, become international, and should make the country capable of communicating with various protagonists of the world economic scene, as a qualified professional intermediary, not only as an occasional professional person.

As it is already known, the most important problem that opposes to the development of the collaboration between the private agents that belong to different economic systems, is represented

by the substantial juridical differences that intervene between various systems, both from a freelance journalism and a civil point of view.

In other words, the Italian economic agents, living in the reality of a world market, encounter difficulties in having true partnership relations, between equals, because of linguistic problems, because of the lack of reliable information, or because of the fact that unique juridical systems are absolutely unknown to them, from a sociological point of view.

Besides, Italy maintains, at a European level, the sad primate of the country that does not succeed in spending its quotas of structural funds or in using other community instruments, meant to assist the oriental countries and the ACP ones.

All these facts are accompanied by the constant production of passive residuals even within the country, as a consequence of the incapacity, both of the P.A. and the private economic operator, to spend correctly and legitimately.

The conf-industrial system considers that it is time to proceed in adopting professional structures able to offer a full collaboration with the international boards and organisms, regarding the development of the activities with the third parties.

Meanwhile, the fiduciary agreement, at national and international level, could solve the problem of cession, towards non residents, of pertinence goods located in countries that do not allow their foreignism, technically favouring the appearance of the local fiduciary companies and guarantying their professional quality through the assumption of a direct co-interest, benefiting of the vigilance of the Ministry of the Productive Activities as a subsequent guarantee and maintaining also the characteristic of separation between the fiduciary company's goods and activities and those of the settlers.

The unique market and the enlargement towards East

The problem of a new revision became actual, this time, in law not in fact, as it occurred with the Memorandum from London on 1964, of the juridical "status" of the Free Trieste Territory, as defined by the sentence n. 53/6964 of the Constitutional Court. This fact was integrated indeed in the Italian juridical system under the State law (S.O., Guri, n. 295 of 24/12/1947). Moreover, this situation of law is not substantially modified by the successive agreements from 1954 (October 5), Memorandum from London of 1975 (November 10), the so-called agreements of Osimo with the Law 73/77 (in S.O. Guri, n. 77 of 21/3/1977). This situation well underlined in the mentioned sentence of the Constitutional Court, which recognizes the persistence of the peculiarity of the situation of the Trieste Territory, also confirmed by the special status and validated by the same constitutional legislator.

In fact, the impossibility "to translate in facts the clauses of the Peace Treaty" and to assume further responsibility for the administration of the Trieste Territory led to the definition "*de facto*" of a practical arrangement, materialized in the transfer of the administration of the Trieste A zone to Italy and of the Trieste B zone to Yugoslavia, the parts guaranteeing the respect of the inalienable rights of the inhabitants.

The signatory parts of the agreement (London Protocol) have communicated it to the Security Council of the United States (if admitted the real inner validity of the subscribed instrument).

In a letter, edited as representative of his own country, on 12/10/54, and addressed to the president of the Council, Wyshinski noted the mentioned agreement (Protocol); no other country had recognized the international efficiency of the London "instrument".

Indeed, nowadays, the theme could be confronted again considering the "European common house" proposed by Gorbaciov, through the overcoming of the "de facto" situation in order to transform it in a "de jure" situation. In fact, Italy has never considered the London agreement as a final renunciation to the B zone territory nor has attached, under a jurisdictional profile, the Trieste territory to the rest of the metropolitan territory. Thus, the sentence of the Court of Appeal from 9/12/47 (Foro it. 1984, I, 73), pronouncing the impossibility of knowing about the appeal proposed against a sentence of the Gorizia Tribunal, through the effect of the Peace Treaty and of the constitution of the Free Territory, the Court has lost the character of the Italian authority. Analogically, the Constitutional Court has pronounced the sentence 53/64. The Court, according to the thesis of the State Advocate, sustains that the General Commissary of the Government for Trieste derives his powers from DPR 27/10/54, which entrust to the above mentioned Commissary the powers of the same Government in order to administrate the Territory as well as the powers already exercised by the former allied Military Government.

According to the words of the London Memorandum, quoted by DPR (powers of administration owned by the Government, where the Government is to be understood as the State) among the powers of the Commissary should have been included the normative ones too, especially that the already exercised powers in the Territory of Trieste were also given to the above-mentioned Commissary. The powers of GMA, the normative ones included, were fully exercised and their exercise recognized as legal by the Court of Cassation.

Any doubt on the constitutional legitimacy of the powers conferred to the Commissary of Trieste is to be considered overcome by the constitutional law 31/1/63 n. 1 (that approves the special status of the Friuli Venezia Giulia Region); art. 70, paragraph 1, disposes that "the administration powers of the General Commissary of the Government for the Trieste Territory will be exercised by the Commissary of the Government, except those of the prefect and those transferred to the Region until the law of the Republic shall provide otherwise"; the "ratio" of the norm that preserves the powers of the General Commissary depends on the necessity of a gradual adaptation of the special situation of the territory to the general system of the State. It can be stated the eventual anti-constitutionality of the DPR 27/10/54 (emitted in order to permit the execution of the London Memorandum), in contrast with art. 87 Const. that speaks about an agreement that can be counted among the conventions, the validation of which implies the authorization of the two Chambers through art. 80 Const. The decree led, observes the Court, to the substitution of the Italian State and of the Commissary at the Allied Military Government, with the same powers exercised by the last one. This way the normative power of the Commissary derives from an international title and it is not based on the national Italian System.

Furthermore, Italy and Yugoslavia, in a "Special Status" annexed to the London Memorandum, take measures in order to ensure, in the areas of competence, the "human rights and the fundamental freedoms without distinction of race, sex, language and religion". Through such a status, temporary and extraordinary measures were adopted, as a consequence to a real situation of necessity and assumed through a diplomatic act considered as anomalous and exceptional by the doctrine. Neither the successive discussion in the Italian Parliament made equal the Trieste Government with the one for the rest of the national territory. So, it remains stated, concludes the Constitutional Court, that the special situation of the Trieste Territory is also recognized in the "Special Status".

The interpretation given to art. 70 of the Status proves that the "extra ordinem" character of the Trieste Territory regime has been recognized and validated by the legislator.

The proceeding towards a multilateral pactional right of the international commerce seems to become irreversible, considered the success of the WTO, when proceeding in various matters of its competence.

In such a process, the competence of new centres for settlement of controversies, either jurisdictional or extra judicial, through the activation of the useful procedures of conciliation and of real arbitral activities is widen (think of the strengthening of the activities of ICSID – International Centre for Settlement of Investments Disputes – through the effect of the Nafta Treaty).

The world, become global, advances towards new challenges that, for the first time in history, after four hundred years of euro-centrism, turn to be collaboration challenges, in terms of equal dignity and of reciprocal tolerance between different parts of the globe. An enormous contribution to this process have the liberalization of the capital movements, the information circularity, the deriving products development on various international financial markets, progressively released of the connection to the raw materials, of any legitimate nature.

The consequences of the Second World War disappear, new inter-nation subjects become parts of the United Nations Security Council, thus underlining the principle that the states of the world are the real protagonists of history, not their "*pro-tempore*" representatives.

If it is true, and it is true, that the nationalistic slaughters which distort the actual sense of the civil process are still present in the history bags, it is necessary to find useful correctives that approving and financing the tolerance, consent to the cohabitation of the actions of the important financial capital with the small productive unities, based on the real economy.

In this respect, it is important the thought of the International Labour Office of Geneva, which raised the problem of the social clause as the external bond to the development of the International Commerce, putting this way at risk the very survival of the most antique International Organizations.

The economy of tolerance

It is clear that the principle of tolerance and of the respect of the human being at the working places, where the dignity appears, does not depend on the important capital that moves in the light of pure speculative reasons and of remunerative assurance, above the multilateral or/and multinational legislations, except those referring to anti-recycling regulations, applied in the development model of the real economy.

The real economy is composed of little beings, any of us, that strain to produce a richness able to satisfy the natural needs and sometimes luxury ones of the human being. The real economy has to consider the ecosystem that incorporates it and consequently, it has to consider the international labour distribution, the capacity of consuming, not only in terms of wasting, but also in terms of satisfying the needs.

It is clear that the Northern world is more capable of bearing the exclusive concentration of the productive activities in its territory, and has to export towards the places in which the raw materials and markets of consume cohabit, its own financial resources able to become the necessary capitalistic accumulation, its own technological innovations, its own quality and control systems, its own accountability revision systems, its own security bonds in the working places and in the quality of life, in a manner able to consent a harmonization between various markets or between various expectations of the human beings, different from the opening of a global confrontation first with

the ecosystem and than with the world.

A very important role, in this sense, has the development of durable economic relations between medium and small enterprises, belonging to different economic areas, in accordance with the Edinburgh model, able to stimulate the development of direct investments in the real economy. Some dislocations that must be remedied oppose to this concept.

The theme of financing the international commerce

The international commerce, as the domestic one, needs to be financed. In this respect, the banking system has uniform regulations and practices on a multilateral level, liberally accepted, but not universally applied. This implies different diseconomies that could be solved by an adequate action of MIGA (Multilateral Investment Guarantee Agency).

In fact, conventionally, MIGA could assure special credit lines between the countries belonging to different economic and geographic areas, activating in parallel an important program of formation and of control on the banks of the PVS and of the transition countries, that do not have an adequate legislation and of an accurate distribution of functions in the single banking structures. In the sense, consenting to the development of bilateral relations, some category associations could favour the creation of financial compensation rooms between credit and debit consignments, able to help the economic agents, medium-small, to overcome the problem of monetization in time of their reasons of credit and debit, that could function as discount, forfeiting, factoring and confirming houses.

The juridical increase

However, there still remains the problem of the complex increase of the juridical systems in force in the different realities of the so called Occidental area, considering the fact that they are the diversities of the juridical culture and of the methodologies in solving controversies that make the reception of the different provisions difficult, and further more, the standardization of behaviours, subject, in the case of non-application, to sanctions consisting of significant economic, financial and commercial measures, at that point effectively credible.

An adequate multilateral juridical support should allow the valorisation of the natural resources present in those countries that constitutionally reject the foreignism of their economy, even if they officially declare their will to promote the foreign investments in their territories. The incardination of punctual and controlled trust companies in different countries, could facilitate the naissance of a foreign circulation of the existent natural resources, in the form of the usage or exploitation rights, administrated by the trustee, which should benefit from the international “trust”. The trustees would consequently receive the fruit of the rights application and, in a specific form, under the instructions of the settlor (settler), they could use them for the strongbox or for the signature.

As we have seen, another issue is the one relative to the tutorship of the good will third parties’ rights and of the associates’ rights in the case of the agreement pathologies or the opening of the competition procedures on the account of mixed capital juridical subjects.

In this field Italy disposes of a single treaty, signed at its time with Austria, while on the bilateral basis some justice courts force themselves to initiate a process of factual collaboration, especially in Germany and England. It means that in the case of agreement pathologies the beneficiary of the

right remains without any adequate form of multilateral jurisdictional tutorship, the only applicable jurisdictions being the national ones, with consequences in terms of efficacy, time and costs easy to imagine. From this point of view it would be useful to imagine, on a multilateral basis, the creation of a kind of *practor peregrinus*, capable of a judgement of equity, which, armed with adequate powers, could solve the mentioned pathologies through the correct retribution of the active and passive obligations to each of the involved subjects.

Obviously, in a world that puts ad the basis of its future development model, compatible with the human, financial and natural available resources, the small and medium enterprise, the cooperative society should more and more find citizenship and operative functionality. The specific of the human being is not the profit itself, even if the life conditions and quality of the same human being could be improved through an economic-enterprising activity. In this respect, in a world in which the informatisation and the development of the services give back autonomous space to the creativity of the individual, that is now tutored in the most part of the world by the diffusion of the intellectual rights protection, along with the development of the capitalist microstructures (Ltd, Srl, SpA, GmbH etc.) should be also imagined the development of the mutual and cooperation structures, open to the participation of the juridical subjects and able to participate themselves to consortiums or capitals companies.

Between the last two past centuries, the mutual cooperatives opposed to the capitals companies have agreed to contribute to the solving of the most immediate problems of the weakest social classes, consenting in different ways and proportions to give a solution to the social conflicts occurring between the various classes.

Once finished the époque of the social confrontation, in a single territory, it is now the époque of the global conflict and of the ways to solve it.

Towards a conclusion

Obviously, the juridical connection is the first step; in spite of the differences between civil law, common law and Muslim law, they are going towards a common law of the peoples or a new *lex mercatoria* that will be the platform for the development of the international traffics and of the investments (see the negotiations between OSCE and WTO in the field of the direct investments law).

The second step, also son of the wide form of volunteering present in the world, could be the collaboration within juridical structures organized in the cooperative and multilateral consortium forms, able to interact in sectors of high intensity of work, at a high intensity of intellectual contribution and research, as well as in the specific sectors of mutual symbiosis between man and nature.

The basic principle should be the recognition of the peculiar juridical figure, next to the universe of the economic organizations and of the juridical tutorship multilateral ones, recognizing it as the beneficiary of special juridical and financial protections, and, correlatively attributing to it a full subjectivity in the field of the private international law.

All the above mentioned could contribute to the creation of new spaces of development between the equals and the distincts, considering the principle of recognition and remuneration of the individual labour within the group.

Operative plan of presence in the countries belonging to the stability pact and in those from the Mediterranean and the Black See areas

At the origin of such development there is the Mediterranean 2000 programme, established by the D'Alema Government in 1999 through the construction of an adequate trust fund at UNCTAD (Geneva), meant to help in ten countries of the Mediterranean area, including Albania, the system of Small and Medium Enterprises, under the profile of the completion of the relative juridical system and under the organizational profile, through the predisposition of a series of economic, financial, fiscal and organizational instruments, able to create a series of practical possibilities of partnership between the Italian enterprises and those from the considered areas; between datorial associations of the single areas, seen in terms of economic sectors where they are representative.

The role of such offices is to assist the local governments at any level in the reinforcement of the democratic structures and in the systematisation of the privatisation process in course, in order to allow the national enterprises system to be continuously present in the single territories.

One of the chapters has regarded the creation of a special Arbitral Chamber that could consent, in collaboration with the International Chamber of Commerce – Italian Section, using the arbitral and conciliation procedures, as well as the most evolved techniques of ADR.

The characteristic of such an instrument should be the maintaining at a real low level the "Arbitration" costs, so that even the operators who have concluded commercial contracts with Western European clients of suppliers could have access to this measure.

In counterpart, the single countries should conventionally implicate themselves in automatically recognizing within their juridical system the awards issued by such arbitral tribunals.

The draft suggests a system of appeal to the awards released in the first instance.

As stipulated by the Treaty of Cotonou, concluded between the European Union and the ACP countries in order to substitute the Lomè agreements, in the light of the enlargement and considering the creation of a free exchange area for the Mediterranean countries, such proposal would allow the activation of the regional agreements between countries belonging to different areas, on the example of the economic collaboration agreement between the Black Sea countries.

As shown, the stability pact and the result of the G8 of Geneva give Italy the specific task of assisting either the countries of the Central-Oriental Europe or the Asian ones of the Black Sea or those of the southern shore of the Mediterranean Sea, in their process of approaching the juridical system of the European Union, in order to realize a complex area of free exchange not founded on the unilateral financing of the European Union and of the other international bodies (the economic and financial necessary resources do not exist any more), but using a new intervention instrument: the transfer of an advanced technology instrument from the part of the enterprises system, as well as the realization of a regional enterprises system, meant to help the local system, in the respect of the ILO criteria: respect of the union wrights of workers, the tutorship of the human rights, particularly of the weak social categories, tutorship of the ecosystem and protection of the environment in the respect of the financial transparency.

Such organic instrumentation centralizes the role of the Chambers of Commerce, unifying the separate national initiatives of the Law on the Balcans application, expressly requested by the G8 and by the new defensive system that includes Russia in the NATO staring June.

The specificity of the Italian interest passes through the recreation of a favourable environment for

the tutorship of the mountains, as well as for the safeguard of the water, in the candidate countries and in the other above-mentioned ones.

An intervention criterion is to assist the local public administration at any level in the adoption process, within the application of the administrative acts, in the usage of the e-governance and e-participation process and in the realization in the administrative justice of that transparency that is the basic condition of the citizen's participation to the public things administration.

Such initiative obviously implies a continuative formation activity, realized through an e-learning instrument.

The enormous emptiness in which these initiatives are moving is represented by the lack of an organic connection between the juridical systems and their progressive modification.

The Islamic world cannot proceed to innovations other than in an analogical way and a laboratory of analysis and adjustment is necessary.

In the Oriental countries the situation is identical, because the legislation derives from universalism: communist and orthodox.

In the light of the precise indications offered by the United Nations, the chambers of Commerce could become the unique door for services in the territory, realizing a practical counselling activity regarding the application of the regulations in force in the single territorial realities and in the relative regional unions. They could also become the channel for the movement of the national and multilateral financial instruments, for the development of joint economic initiatives (direct investments abroad), through the fiduciaries for internationalisation and the banks system. All these could lead to the full realisation of the single privatisation processes in the de-quo countries, starting with the agricultural and tourism sectors, both of them responding to the criterion of high intensity of labour.

The individuated financial bodies, using local projections, would realize those activities of social prevalence, sanitary assistance and integration of the capitalistic accumulation, which otherwise could not have a significant presence of the local product in the international context.

Concretely, for example, one cannot proceed to the land reconstruction in Poland without creating a mutual cooperation system between the peasants (direct cultivators, conf-cooperatives, rural houses etc.), in order to be able to get to a unique controlled offer on the international distribution market.

Such items, able to bring on the capitals international market the above-mentioned countries, could also benefit from the declared intention to operate in their favour, from the part of some very important Italian credit institutions, also present in some sectors of the insurance field, as: San Paolo di Torino, BCI, BCI Soditic, MPS, Mediobanca.

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[1] In fact, in the context of the Roman Law we can see that the first commercial forms of the fiduciary and of the selling do not allow the transfer of the property, but the right to ask the consignment of the sold item. (COEMPTIO SENILIS, FIDUCIA, MANCIPATIO, TRADITIO, IN IURE CESSIO) Plauto, Mastellario 5.1 and in E. COSTA, "Il Diritto Privato Romano nelle Commedie di Terenzio" and "Il Diritto Privato Romano nelle Commedie di Plauto" in Archivio Giuridico Vol. L fasc. 5 and 6 Bologna 1983. "LEXICON" terms FIDES, FIDUCIA, FIDUCIARIUS, NEGOTIUM, COEMPTIONALIS. The same happened in the case of TRADITIO, starting from the times prior to the XII tables. The evolution that followed and the extension to non-citizens crystallized the institutes in the prevalent interpretation that the Praetors give territories conquered in the expansion of Rome. The subsequent crystallization of the Law led to a new and rigid formalism and thus to the transfer of property in the context of the fiduciary commerce.

[2] Before the immediate or credited payment, the simple *traditio ex causa emptionis* does not produce the transfer of property.

[3] At Plauto the selling does not operate the transmission of property, but it gives the right to ask for the delivery of the sold good, with application, if necessary, of the appropriate action resulting from the contract, which is to bring an action against the vendor (Cf. Costa – *Il diritto privato nelle commedie di Terenzio*). At Terentio the use of “tradere” and “traditio” is very frequent, with a more juridical sense then at Plauto, which leads to the assumption that the initial fixed buying price of the property, even if already known at the time of Plauto, was explained only later, when it became the most usual way of property transmission, so that *tradere* was intended as way of property transmission.

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