CORTE PER IL TRUST E I RAPPORTI FIDUCIARI

Case No. 2021/06/VG - Decree of 9 February 2023

§ 1 Facts.

By private deed authenticated at the Ministry of Notary Public A on 12 December 2019, Rep. 6,451 Collection No. 5,428, registered at the Milan 1 Revenue Office on 7 January 2020 under No. 361 series 1T (doc. 9), the Trust named "B" ("the B Trust") is settled.

By a private deed authenticated at the office of Notary Public A dated 31 January 2020, Rep. 6,650 Collection No. 5,584, registered at the Revenue Office of Milan 1 on 10 February 2020 under No. 10364 Series 1T, (doc. 2) the Trust named "C" ("the C Trust") is settled.

The settlors of both trusts elect San Marino law as the governing law of the trust.

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Both trusts identify the same person as the resident agent.

The Trust Register Application Forms of the C Trust and the B Trust signed by the Resident Agent on 16 June 2020 confirms that the trustee appointed the Resident Agent on 27 May 2020 for both the B Trust and the C Trust.

Article 7 of Law No. 42 of 1 March 2010 (hereinafter also the "Trust Law") provides that within fifteen days from the date of the creation of the trust, the Resident Agent, on the basis of the information provided to him by the non-resident trustee, shall draw up the certificate required for filling application in the Register of Trusts. Thus, the trustee appointed the Resident Agent and provided him with the information necessary for filling the registration well after the deadline that would have allowed the latter to fulfil its duties in a timely manner.

For both trusts, the Resident Agent therefore requested the registration of the trusts in the Register of Trusts of the Republic of San Marino belatedly, with applications filed on 16 June 2020.

As a consequence of the failure to comply with the terms of the law, the Registrar of Trusts - the M - communicated the refusal of the registration on 23 June 2020 (doc. 3, for the Trust C and doc. 10 for the Trust B), pursuant to art. 3 of the Delegated Decree 16 March 2010 n. 50, reserving the right to apply the sanctions as provided by law.

Shortly thereafter, the Trustee amended the trust deeds of both trusts.

By private deed authenticated at the office of Notary Public A on 24 July 2020, Rep. 7,199 Collection No. 5,980, registered at the Milan 1 Revenue Office on 7 August 2020 under No. 57911 series 1T, the Trustee of the C Trust exercised the powers of amendment granted to him by Art. 45 of the Deed of Trust to amend the governing law of the Trust and remove the jurisdiction of the courts over the Trust, by making the following amendments to the Deed of Trust (hereinafter, the "Trust C Deed of Amendment"):

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- deletion of Article 12 on the identification of the Resident Agent;
- adoption of the new text of Article 14 on the choice of the governing law;
- adoption of the new text of Article 15 on arbitration and jurisdiction;
- adoption of the new text of Article 38 (G) concerning the powers of appointing trustees;
- adoption of a new text of Article 43 letter G concerning the powers of appointing the protector;
- deletion of Article 24(II)(C) concerning the regulation of the trustee's position with respect to the trust fund.

By a private deed authenticated at the office of Notary A on 24 July 2020, Rep. 7.200 Raccolta n. 5.981, registered at the Milan 1 Revenue Office on 10 August 2020 under no. 58340 series 1T, the Trustee of the B Trust exercised the powers of amendment granted to him by the Deed of Trust to amend the governing law of the Trust and to introduce arbitration, as well as to modify the duration of the trust (hereinafter "B Trust Deed of Amendment").

Specifically, in both deeds of amendment the Trustee declared that, in lieu of the San Marino law chosen by the settlor in the deed of trust, the law governing the trust would become the law of Jersey, Channel Islands, but he derogated from this law with the obvious intention of maintaining the San Marino law to regulate all legal relations between trustee, protector, beneficiaries (governed by Articles 17 to 52 of the Trust Law), invoked Art. 9 of the Hague Convention and stated that “the following matters are governed by the law of the Republic of San Marino on trust: trustee's obligations, trustee's powers, termination of the trustee and transfer of the trust property, trustee's liability, beneficiaries, protector (Articles 17 to 52 of Law No. 42 of 1 March 2010, as amended, omitted any reference to the resident agent and the Trust Register)".

Moreover, in both deeds of amendment the Trustee introduced clauses derogating from ordinary jurisdiction in favour of arbitrators.

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The B Trust Deed of Amendment introduced an arbitration clause with the intention of removing any court supervision over the trust: "any question concerning the creation, validity or execution of the trust or of the acts by virtue of which assets are transferred to the Trustee, whether or not inherent in a dispute in progress or contemplated, shall be mandatorily and exclusively submitted to the Arbitration Chamber constituted at the Association "Il Trust in Italia", under whose regulations the same orders may be pronounced as those that the judge of the State whose law regulates the trust or the matter in question could pronounce both in contentious and supervisory jurisdiction" (cf. letter b) of the B Trust Deed of Amendment).

The Trust C Deed of Amendment introduced an arbitration clause with the intention of removing any court supervision over the trust: "Any dispute concerning the creation, validity or execution of the Trust or of the acts by virtue of which assets are transferred to the Trustee, shall be compulsorily and exclusively submitted to the Arbitration Chamber constituted at the Association "Il Trust in Italia", under the regulation of which the same orders may be pronounced as those that the judge of the State whose law regulates the Trust or the matter in dispute may pronounce. The foregoing provision shall also apply to any request for the issuance of directions to the Trustee or orders relating to the Trust" (cf. letter c) of the Trust C Deed of Amendment).

In the Trust C Deed of Amendment, the Trustee also introduced an exception to the Arbitration Clause, by providing that orders concerning the appointment of Trustee and Protector are, in any case, issued by the Tribunal of Milan (sub-paragraphs d) and e) of the Trust C Deed of Amendment).

No application for the registration in the Trust Register of the B Trust Deed of Amendment and the C Trust Deed of Amendment has been filled.

On 27 July 2020, the Trust Register Office (hereinafter also the "Office") initiated the proceedings pursuant to Article 23 of Decree No. 76 of 30 May 2006 (doc. 4 for the Trust C and doc. 11 for the Trust B) aimed at imposing sanctions for the late registration of the settlement of the trust. As a result

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of these proceedings, a sanction was imposed by the M on 27 October 2020 and respectively Prot. no. 20/10537 (doc. 5), for the C Trust and Prot. no. 20/10536 (doc. 12), for the B Trust.

However, the Resident Agent filed an appeal against the administrative act sanctioning him for late application, thus initiating the Administrative Proceeding No. 40 of the year 2020, for the C Trust, and Administrative Proceeding No. 39 of the year 2020, for the B Trust, both of which upheld the appeal.

In consideration of this, the Registrar of Trusts executed the registration of the two trusts in the Register, which was suspended pending the sanction proceedings, and served notice of this to the Resident Agent by delivering, on 21 June 2021, the certificates attesting to the registration, occurred on 15 June 2021, of the C and B trusts in the Register of Trusts, respectively under No. 239-2021 (doc. 6) and No. 238-2021 (doc. 13).

Only on 28 January 2021, the Resident Agent filed a petition for the deletion of the two trusts from the Register pursuant to Article 8(6)(b) of the Trust Act, on the basis of an alleged change in the governing law that had occurred with the two deeds of amendment.

The Trust Register Office issued orders denying the request for deletion on 5 July 2021, Prot. No. 21/7584, for the C Trust (doc. 8), and Prot. No. 21/7583, for the B Trust (doc. 15), raising doubts as to the effects of the change of the governing law.

§ 2 The proceedings.

On 24 December 2021, the Register Office of Trusts filed an application to the Court pursuant to Article 53 of the Trust Law represented by advocate Mr D of the San Marino Bar (hereinafter 'Application'; the Registrar of Trust also referred to as the 'Applicant').

The Applicant pointed out that, in the deeds of amendment, 'while on the one hand the law of Jersey is chosen as the law governing the trust, on the other hand the vast majority of matters pertaining to

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the trust continue in fact to be regulated by San Marino Law No 42 of 1 March 2010, with the express exclusion of the rules governing the registration of the trust, the Registrar of Trusts and the Resident Agent'.

With reference to the Trust C Deed of Amendment, the Applicant considered that it had been adopted solely 'for the purpose of circumventing the burdens arising from registration in the Trust Register and the other duties arising therefrom'.

He raised doubts as to the compatibility of the Trust C Deed of Amendment with both San Marino and Jersey law[1] and with the Hague Convention itself.

The Applicant requested the President to issue the appropriate orders pursuant to Article 53(II) and, in the alternative, to lay down interpretation of the rules in force on the point, setting out the appropriate interpretative lines and operating methods to be adopted.

On 27 December 2021, Mr D filed an application to supplement the documents originally annexed to the Application, since due to an error or malfunction of the computer system the documents did not correspond to those relevant to the Application.

After a preliminary analysis of the issues raised by the Application, the President of the Court issued a decree on 9 February 2022 in which, among other things, he determined the fees to be paid by the

[1] In particular, he raised the question of compatibility with section 9(1) of the Trust (Jersey) Law which provides that "any question concerning- (a) the validity or interpretation of a trust; (b) the validity or effect of any transfer or other disposition of property to a trust; (c) the capacity of a settlor; (d) the administration of the trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal; (e) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers; (f) the exercise or purported exercise by a foreign court of any statutory or non-statutory power to vary the terms of a trust; or (g) the nature and extent of any beneficial rights or interests in the property, shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question".

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trustee, not authorizing him to withdraw such sums from the trust fund until the final decision was reached and set a hearing on 11 March 2022 by videoconference to hear the Trustee.

This decree also granted the trustee a deadline of 1 March 2022 to request the separation of proceedings.

At the hearing on 11 March 2022, the Trustee was absent and no petition or notice was filed; only the Applicant's advocate attended the hearing.

Since at that time the Court Registrar had not yet received from the competent Italian authorities the reports of notices served to the Trustee of the Decree of 9 February 2020, the President of the Court reserved the matter in order to issue the appropriate orders.

Subsequently, in the absence of any report from the Italian authorities on the completion of the service to the Trustee and in order to accelerate the proceedings delayed by the servicing problems, the President by decree of 29 April 2022 ordered the separation of the proceedings relating to the B Trust and the C Trust in order to be able to hear simultaneously several interested parties (trustee, beneficiaries, protector) to each trust and to avoid sharing of confidential information.

The supervisory jurisdiction proceedings in respect of the B Trust therefore remained lodged at 01VG of the Year 2022 and that of the C Trust was lodged at 06VG of the Year 2022.

By decree dated 16 May 2022, the President of the Court appointed, as special curator for the unborn and minor children beneficiaries of the C Trust, Advocate Ms E of the San Marino Bar, granting the Trustee, beneficiaries, protectors and special curator of the trust a period of 20 days from receipt of service to file observations; the Trustee was also granted a period of 20 days from receipt of service to file with the Court all documents in its possession concerning the facts which are the subject matter of the Application.

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Finally, it divided the judge's fee previously fixed, allocating 3,000 (three thousand) euros to the supervisory jurisdiction proceeding 01VG of 2022 and 3,000 (three thousand) euros to the proceeding 06VG of 2022.

It was ordered that the application be served to the Applicant by electronic communications and that it be served, together with all decrees previously issued by the President, to the Trustee, Beneficiaries and Protector of the Trust, through the use of Italian authorities; it was ordered that this also be served on the Special Curator by electronic communications.

The notification of the Application and the decrees relating to the present proceedings to the descendants of the Beneficiary of the C Trust, F born in […], c.f. […], and G, born in […], c.f. […], was not ordered.

Such persons, in fact, although included in the stipulative definition of "Beneficiaries" contained in Article 7 of the Trust Deed of Trust C, actually acquire the corresponding legal position only upon the occurrence of the conditions provided for in Article 10 of the same Trust Deed (see Trust Deed of Trust C, Article 10, letters A and B), pursuant to Article 48, paragraph III of the Trust Law, which provides that the conditions or terms shall operate on the attribution of the entire beneficiary position, always without prejudice to the possibility of expressly providing otherwise. Therefore, before conditions are not triggered, no beneficiary position arose on these descendants.

That Decree was notified to the Applicant, by electronic means, on 9 May 2022, as attested by the Register on 13 June 2022.

The notification to the Special Curator was completed on 19 May 2022, as attested by the Register of the Court on 13 June 2022.

On 7 June 2020, the Special Curator timely filed his observations.

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The Special Curator emphasised the importance of hearing the trustee to clarify the purpose of the changes introduced.

In any event, the Special Curator pointed out potential problems with the validity of the amendment and, indeed, of the entire trust deed resulting from the amendment because of possible conflicts with San Marino law, Jersey law and the provisions of the Hague Convention.

She raised doubts, in any event, as to the beneficiaries' actual interest in having a trust governed by a plurality of inconsistent laws, a phenomenon that hinders their reconstruction of their rights. The trust would thus be exposed "to the risk that a conflict would arise as to the applicable rule even with reference to the specific position of the beneficiaries". Moreover, she pointed out that the choice of the law of Jersey and, at the same time, the derogation in favour of maintaining San Marino law to completely regulate the legal relations between trustee, protector and beneficiaries constituted an circumstantial element suggesting that the trustee himself harbored doubts as to the beneficiaries' interest in the change of governing law.

She considered that, in this situation, the trustee had to recourse to the Court to be authorised to make the changes he introduced.

On 14 July 2022, the Registry of the Court certified the completion of service to the Protector occurred on 9 June 2022 to the Trustee.

On 10 August 2022, the Registry of the Court attested the attempted service on the Beneficiary, Ms H, who, although living at the address indicated, did not accept the service through the house clerk.

It was only on 4 October 2022 that the Registry of the Court was able to certify that the Beneficiary, Mr. I, had been served of notice on 31 May 2022, due to delays in the communication by the foreign offices in charge of the service.

No further comments or documents were filed.

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§ 3 Subject matter of the proceeding.

The Applicant and the Special Curator, from a different perspective, raised doubts about the trustee's conduct with respect to the Trust C Deed of Amendment.

The Applicant raises doubts as to the validity and effect of the Deed of Amendment, in light of the rules of San Marino law, Jersey law and the Hague Convention.

The Special Curator also raises doubts as to whether the beneficiaries had a real interest in the changes introduced by this act.

Foreign courts made clear that the trustee power to change the governing law of the trust must be exercised in compliance with the trustee's fiduciary duties[2] and excluded that this power may be validly exercised to pursue interests unrelated to those of the beneficiaries, e.g. to reduce the trustee's own liability and risks[3] .

In San Marino law, all the trustee powers are always fiduciary powers, since the law allows the settlor to opt for the personal nature of powers only with reference to the protector (Art. 7(1)(d); Art. 53(III) of the Trust Law), and in exercising his powers - and thus also the power to change the governing law - the trustee must act in accordance with his fiduciary duties.

[2] According to the Jersey Court of Appeal, "It is accepted by the parties that the power to change the proper law and the forum for administration is a fiduciary power", Crociani v. Crociani, [2014] JCA089 n.56; According to the Privy Council, "the action of the trustee in bringing the document into being had to be a proper discharge of the fiduciary power", Oakley v Osiris Trustees Ltd [2008] UKPC 2, no. 49.

[3] According to Lord Scott of Foscote in Oakley v Osiris [2008] UKPC 2, no. 44, when exercising the power to change the governing law, the trustee should seek prior legal advice on the advantages and disadvantages of changing the governing law and should share it with the settlor and beneficiaries. When heard by the court, the trustee should in any event be able to provide plausible explanations to show that the exercise of the power is actually exercised in the sole interest of the beneficiaries.

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Pursuant to Article 20 of the Trust Law, 'the trustee shall perform the duties and exercise the powers inherent in his office in good faith and with the diligence of a good family man who has to take care of interests that are not his own' and, in relation to trustees who, like the present trustee, 'professionally carry out this activity or to other persons possessing professional competence, diligence shall be assessed with regard to the professional nature of the activity exercised'.

In changing the governing law, the trustee must therefore act in good faith and with professional diligence and do so in the exclusive interest of the beneficiaries.

These duties are more stringent when the change of governing law involves the reference to several legal systems as in the present case.

At general level, the technique of dépeçage of the applicable law was expressly considered a 'risk to be avoided' by both the Supreme Court of The Bahamas[4] and the Privy Council[5] due to the uncertainties and difficulties caused by its application.

In any case, dépeçage may only be introduced in compliance with the provision contained in Article 9 of the Hague Convention.

The original text of this rule requires that the aspect intended to be governed by a different regulatory law be "*severable*" and, according to the French version, "*susceptible d'etre isolé*".

Separability requires that the aspect to be separated had sufficient logical-legal autonomy.

[4] Volpi v. Delanson & Volpi [2018] 1 BHS J. No. 195 (Bahamas), § 26.

[5] Crociani v. Crociani [2014] UKPC 40, § 40.

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As the former Chief Justice of this Court Prof. Maurizio Lupoi stated in one of his extrajudicial writings, "it appears difficult to isolate aspects of the trust where the legal rules governing them do not refer to other aspects subject to a different law"[6] .

Prof. Paul Matthews, a former judge of this Court and now a judge of the English High Court, even went so far as to state, in a fundamental extrajudicial writing, that "logically, it is impossible that a single relationship could derive from two legal systems"[7] , unless in fact two different trusts were actually created under the same document[8] .

Normally, where permitted, dépeçage of the governing law relates to the administration to be separated from all other aspects of the trust (interpretation, validity and effects).

Article 9 of the Hague Convention mentions precisely this specific type of dépeçage.

However, even in this elementary case, not all legal systems agree on the possibility of separating these aspects and, hence, on the possibility of dépeçage of the governing law of the trust.

For example, English case law also emphasizes the difficulty - if not the impossibility - of isolating, in concrete terms, aspects of the trust endowed with sufficient legal and logical autonomy. According to Scott, J. [9] "as a matter of principle, I find myself unable to accept the distinction drawn between 'validity, interpretation and effect' on the one hand and 'administration' on the other hand. The rights and duties of the trustees, for example, may be regarded as matters of administration but they also concern the effect of the settlement. The rights of the trustees are enjoyed as against the beneficiaries;

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[6] M. Lupoi, Istituzioni del diritto dei Trust negli Ordinamenti di Origine ed in Italia, Padua, 2016, § 201.

[7] P. Matthews, Migration and Change of the Proper Law, London, 1997, p. 61 ff.

[8] 'It is difficult to see how a settlor or testator can select a law to govern administration which is different from the law to govern validity and effect. [...]. On principle, it is difficult to see how there can at common law be two or more laws applying to the same trust simultaneously, as opposed to two or more laws applying to a separate trust" (P. Matthews, Migration and Change of the Proper Law, London, 1997, p. 65).

[9] Chelleram v. Chelleram, [1985] 1 Ch. 409.

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the duties of the trustees are owed to the beneficiaries. If the rights of the beneficiaries are to be ascertained by applying the proper law of the settlement, I do not understand how the duties of the trustees can be ascertained by applying a different law, and vice versa".

Therefore, 'a principle of unity of the governing law' is often considered to be in force in English law[10] .

Furthermore, due to the fact that it would be the law of the forum to determine whether an aspect is severable or not[11], it is indeed not entirely foreseeable, at the time of the introduction of the severability clause, which court will have jurisdiction in the specific case and thus on the basis of which law severability will be determined.

Generally speaking, however, many interpreters question whether the dépeçage of the governing law, albeit provided for with a generic wording in Article 9 of the Hague Convention, can be concretely employed in order to avoid the mandatory rules of the forum[12] or in order to avoid the application of mandatory rules of the law governing the validity of the trust[13].

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[10] Webster-Tweel v. Royal Trust Corp. of Canada 2010 CarswellAlta 1609, 2010 ABQB 139, [2011] 2 W.W.R. 532, [2011] A.W.L.D. 32, [2011] A.W.L.D. 33, [2011] A.W.L.D. 70, 185 A.C.W.S. (3d) 1098, 33 Alta. L.R. (5th) 91, 496 A.R. 102 ("In England and Australia, there is a principle of unity which dictates that the validity and administration of trusts are governed by the same law. See for example the English case of Chellaram v. Chellaram (No.1) (1984), [1985] 1 All E.R. 1043 (Eng. Ch. Div.) and the Australian case of Webb Estate, Re (1992), 57 S.A.S.R. 193 (Australia S.C.)").

[11] "[The] Convention [...] contemplate that severable portions of a trust can be governed by different systems. [...] the idea of severability, however, is probably subject to the same analysis as characterization; the forum law governs the breaking down into 'issues' of the matters in dispute", D. Waters - M. Gillen - L.D.Smith, Waters' Law of Trusts in Canada, Toronto, 2012, p. 1468.

[12] "The settlor, just as he may not select a governing law so as to circumvent mandatory rules of the forum [...] likewise, in order to achieve the same result, he may not split up the trust", A. Saravalle, Sub Article 9, in A. Gambaro, A. Giardina, G. Ponzanelli, *Convention on the Law of Trusts and their Recognition, Commentary*, p. 1262 and 1263.

[13] "Can the mandatory rules of the law applicable to the validity of the trust be avoided by the settlor splitting the law applicable to different parts of the trust or expressly stating that this trust shall be subject to the laws of Utopia, except it mandatory rules? [...]. [I]t is very unlikely that [the Convention] would allow the applicable law to be distorted by a clause excluding its mandatory rules. Accordingly, it is suggested that such a clause would be treated as ineffective', J. Harris, The Hague Convention, Oxford, 2002, p. 191.

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Because of some of these factors, the most authoritative English doctrine on private international law states that "it is desirable that a trust should be treated as a unit and that the trust of all the property comprised therein should be governed by a single law"[14] .

The exposure of the beneficiaries to the risks and uncertainties associated with the dépeçage requires that the benefits to them deriving from it outweigh the risks and that both the reasonableness of such a choice and the fact that its adoption was not determined by any personal interest of the trustee can be objectively appreciated.

Before exposing the beneficiaries to such a risk, a diligent trustee would have obtained a legal opinion from an independent advisor regarding not only the validity of the change but also its actual appropriateness, highlighting the actual benefits that the choice of splitting the governing law would bring for the beneficiaries.

Such a legal opinion has not been filled with the Court, since the Trustee did not even appear before the court.

However, the subject matter of this proceeding is not the assessment of a breach of trustee's fiduciary duties and this proceeding is not intended to grant remedies in favour of the beneficiaries, as this is not a litigation between trustee and beneficiaries and is not a supervisory proceeding concerning administration initiated by an application by beneficiaries seeking the removal of the trustee on account of an alleged breach of fiduciary duties.

The sole purpose of this proceeding is to issue appropriate orders pursuant to Art. 53 (II) (a), (b) or (c) on application by the office keeping the Trust Registrar.

[14] Dicey. Morris and Collins on The Conflict of Law, London, 2022, vol.2. p.1566.

Although the Court may take the appropriate orders and exercise the supervisory jurisdiction under Art. 53(I) ex officio to ensure the proper administration of the trust, the situation suggests to suspend anu judgment on the trustee's conduct, deferring the assessment of whether it would be appropriate to issue further orders against the trustee if the trustee's subsequent conduct provides further evidence or these orders are requested by the beneficiaries or by the Special Curator.

Similarly, this proceeding is not concerned with the judicial and final assessment of invalidity of the trust deed, which instead falls within the contentious jurisdiction and requires a litigation.

However, the detection of grounds for invalidity is not precluded where it may be required to issue orders under the supervisory jurisdiction.

Evidently, the entry in the Register of Trusts presupposes that the trust deed is valid, so that the notary charged with the notarization of the trust deed is obliged to verify its conformity with the law (Art. 6, para. I, Trust Law) and the discovery of a ground of invalidity obliges the trustee or resident agent to remove the trust from the Register (Art. 8, para. VI, Trust Law).

Article 6(1) and (2) of the Trust Law, after prescribing that a trust is created by a written deed between living persons, identifies the requirements of a trust deed under penalty of invalidity.

Pursuant to Article 6, paragraph II, letter e) of the Trust Law, the trust deed must expressly provide for 'the trustee's obligation to inform the resident agent of any fact or deed to be recorded in the Register of Trusts of the Republic of San Marino'.

Article 10(I)(c) of the Trust Law provides that a trust is invalid if "the trust deed lacks or do not determine the requirements of Article 6(2) of the Law".

The version of the trust deed of the Trust C filed in this proceeding does not mention the trustee's duty to inform the resident agent of any fact or act that must be recorded in the Register of Trusts.

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It follows, therefore, that in the absence of one of the essential requirements imposed by Trust Law, the trust deed could be considered invalid.

However, the deed of Trust C filed with the court is missing page 13, where the requirement of Article 10(I)(c) of the Trust Law could have been mentioned.

The Applicant did not raise any issue regarding the validity of the Trust C and, on the basis of the documentary evidence, it is not possible to assess whether or not the deed of trust actually met the these requirements of validity.

This assessment must be deferred.

In the light of the specific requests of the M, a decree is issued with a particularly detailed motivation due to the novelty of the questions submitted to this Court and containing guidelines aimed at identifying the criteria for the interpretation and application of the laws relevant to the case.

Moreover, in view of the novelty of the topics covered and their international relevance, this decree is issued in two languages (Italian and English). In any case, the Italian language version prevails over the English one.

§ 4 The jurisdiction of the Court.

The jurisdiction of the Court that must be examined first. Such an examination is in any case appropriate even though no such issue has been raised.

By the Trust C Deed of Amendment, the Trustee introduced a clause derogating from ordinary jurisdiction with such a wording: "A. Any dispute arising out of the creation, validity or performance of the Trust or of the acts by virtue of which assets are transferred to the Trustee, shall be compulsorily and exclusively submitted to the Arbitral Chamber constituted at the Association "Il Trust in Italia", under the rules of which the same orders may be pronounced as may be pronounced by the court of

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the State whose law governs the Trust or the matter in dispute. B. The foregoing provision shall also apply to any request for the issuance of directions to the Trustee or orders relating to the Trust".

As further partial derogation from the arbitration clause again in favor of the ordinary jurisdiction of the Court of Milan by further providing that administration orders relating to the appointment of Trustee and Protector shall be issued by the Court of Milan (letters d) and e) of the Trust C Deed of Amendment).

The effects of these clauses on the jurisdiction of this Court must be examined.

This examination requires the prior characterization of the nature of the powers of control and supervision of the trust that the Trust Law reserves to the Court under supervisory jurisdiction.

§ 4.1 The Court's supervisory jurisdiction.

Pursuant to Article 53(1) of the Trust Law, "the Judicial Authority is vested with a general judicial power to control and supervise any trust governed by the Law, which it exercises by issuing appropriate orders". In addition to this general power, sub-section II of this article provides for specific powers of control and supervision: in fact, the trustee, a beneficiary, a protector or "any interested person" can make application to the Court to obtain "an order concerning: (a) the performance of an obligation or the exercise of a power of the office of trustee or protector; (b) the replacement of a trustee or protector who has committed a breach of the law of the trust deed or for reasons of expediency or for the absence, as regards the trustee, of the requirements of Article 18 of the Law; (c) the appointment of a new or additional trustee or protector or resident agent; (d) acts of administration and disposition of trust property". Other specific powers of control and supervision are conferred on the Court by paragraphs III, IV, V of Article 53 and by Article 23.

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The supervisory jurisdiction of the court is an essential element of the trust in most jurisdictions, so much so that in common law systems no one doubts that "the jurisdiction of the Court to supervise a trust [...] cannot be ousted by a trust settlor"[15].

Trust relations differ from contractual relationships precisely for being subject to this control during their performance: the formers are subject to the control and supervision of the court during performance whereas the latter are not, involving the court only when the dispute arises[16] .

This is also the case under San Marino law.

By an unequivocal expression and a mandatory provision, it is provided precisely that 'any trust governed by law' is subject to the Court's power of judicial control and supervision (Art. 53 (1) Trust Law).

It is therefore clear that in San Marino law the power of control and judicial supervision of the trust relationship is an essential and inherent element of the trust and is not available to the private autonomy of the settlor, let alone that of the trustee which cannot escape it.

The powers of control and supervision provided for in Article 53 of the Trust Law are exercised by the Court through its supervisory jurisdiction (Article 12, Delegated Decree No. 128 of 30 September 2013).

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[15] "The jurisdiction of the Court to supervise a trust [...] cannot be ousted by a trust settlor"; Bermuda, First Instance Court, 24 April 2013, § 51 affirmed on appeal, v Court of Appeal of Bermuda, In the matter of an Application for Information about a Trust [2013] CA (BDA) 8 CIV and affirmed by the Supreme Court [2013] SC (BDA) 16 (Civ). In English law, Re Wynn [1952] Ch 271, 278-279; Schmidt v Rosewood Trust Ltd [2003] 2 AC 709 ("It is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust".

[16] Crociani and others (Appellants) v Crociani and others (Respondents) [2014] UKPC 40, no. 36 'However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which represents a clear and, for present purposes, significant distinction between trusts and contracts'.

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The object of supervisory jurisdiction does not concern the sole care of private interests but is extended to the protection of general, public and super-individual interests related to the integrity of the trust property and the proper administration of trust relationships.

This is confirmed by the fact that the Court may exercise the general power of control and supervision provided for in Article 53, paragraph I, also ex officio and, where it acts on application, the person entitled to propose it is not only "a trustee, a beneficiary, a protector" but also "any interested party". By "any interested party", inter alia, must also be understood the Trust Register Office (art. 53, par. II, as amended by Law no. 207 of 22 December 2021, art. 14), which acts for the protection of public interests related to registration. In common law systems, moreover, the trust creditors are also considered stakeholders in the proper administration of the trust and are therefore entitled to apply to the court for orders to ensure the proper administration of the trust[17] . The question whether the trust creditors may be considered entitled to apply to the court under Article 53 of the Trust Law has not yet been addressed under San Marino law. However, the common law experience shows that the proper administration of the trust is not only relevant to the private interests of the beneficiaries, trustees and protectors but may abstractly also involve interests beyond those of the trustee, beneficiaries and protectors.

Although the Court may operate for the benefit of certain private interests involved in trust relationships and must also take these into consideration, it performs a function that is specific in relation to requirements that are objectively relevant in terms of public policy and the protection of public and super-individual interests.

[17] McLean v. Burns Philp Trustee Co Pry Ltd (1985) 2 NSWLR 623, 637 "In the past, it appears that creditors were permitted to bring proceedings where it was appropriate, and today in a proper case the court would listen to a creditor's application in a case involving inter vivos trust, where there was good reason for bringing the application. [...]. As I have said before, the trust is the creature of Equity, rights under a trust exist only because of the orders an Equity Court may make and it is to my mind inconceivable that if a matter of mal-administration or, worse, fraud were brought to the attention of the Equity Court by a plaintiff who was a creditor, the court would not act on that motion. It certainly would not send the plaintiff away with his suit dismissed with costs because of a lack of standing'.

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So much so that when the possible beneficiaries of the trust include minors or unborn or incapacitated persons or not all the beneficiaries are identified, a special curator is appointed for them. A precedent of this Court (Order, 12 November 2020, Judges Prof. Maurizio Lupoi & Prof. Paul Matthews) ruled that in supervisory jurisdiction proceedings the special curator is appointed to protect public interests ("the presence of the curator before the court is required to protect the public interest") and not the private interests of those beneficiaries. Moreover, those of unborn or unidentified beneficiaries cannot be private interests because there is no one who can be their holder. Regarding minors and incapacitated persons, the Court does not in any case have the same function as the judge (and the special curator does not have the same function as the guardian, curator or support administrator) who is entrusted with the care of the patrimonial (and personal) interests of minors or incapacitated persons. In fact, the Court's supervisory jurisdiction is not entrusted with the direct care of their patrimony but with the care of the proper administration of the trust and the assets included in it for the protection of public and general interests, and the presence of the special curator ensures that the proceeding also takes into account the perspective of these persons in assuming the relevant order.

Supervisory jurisdiction protects the private, public and super-individual interests connected with the trust by ensuring that the trust property is properly, reasonably and usefully administered in order to implement the purposes of the trust and that this is done in accordance with the law and the trust deed. The proper administration of the trust ensures the protection of public, private and super-individual interests directly or indirectly dependent from it.

In order to ensure the proper administration of the trust, Article 53(IV) of the Trust Law provides that "the trustee, if he deems it expedient, shall apply to the court in order to be authorised to execute an useful act that is not within his powers or to obtain ratification in relation to an act that has already been performed or to have the court make such amendments to the trust deed as may be necessary or expedient".

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Since the trustee is the one responsible for ensuring the proper administration of the trust, an indirect effect of the orders issued under this rule is also to provide protection to those trustees who, by addressing the Court, request orders for activities they are about to perform or ratification for activities they have already performed in their office.

However, the court's orders order always granted for the purpose of ensuring the proper administration of the trust, not for the direct protection of the trustee's individual private interests or those of the individual beneficiaries, notwithstanding the fact that the court, in granting it, must also consider whether the act serves the purposes of the trust and promotes the interests of beneficiaries.

This is so even when it is an order authorizing the trustee to modify the provisions of the trust deed, either if the jus variandi has been directly conferred on the trustee by the trust deed and the trustee wishes to avoid liability for exercising it or if no such power has been conferred on the trustee and the trustee nevertheless considers useful to introduce modification.

The Court's case law has established that the trustee may also be authorised to introduce amendments to the deed of trust (Order, 5 December 2017, Judges Prof. Maurizio Lupoi, Prof. Antonio Gambaro, Prof. Paul Matthews, p. 6).

However, the requirements for such authorisation "are substantiated, on the positive side, by the assessment that the changes to be introduced are directed to improve the management of the trust assets and thus to pursue more effectively the purpose in view of which the trust was established; on the negative side, by verifying that the changes do not cause prejudice to the present and future beneficiaries" (Order, 27 November 2018, Judge Prof. Antonio Gambaro, p.10).

In the negative, therefore, the modification may be authorized only if it does not cause a decrease in the beneficiary's assets and therefore does not have an effect on their entitlements corresponding to that of an act of disposition or renunciation voluntarily made by the beneficiary pursuant to Article 50 or Article 51 of the Trust Law, for which the consent of the beneficiaries who already hold these

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rights and who should be affected by such s modification would be required. If they are incapacitated or minors, it is up to the person entrusted with the guardianship of their interests, possibly with the authorization of the guardian judge, to give consent to such act of disposition or renunciation.

The fact that the Court cannot dispose of the beneficiaries' entitlements confirms that its function is to ensure the proper administration of the trust and not to protect the beneficiary's patrimony, which remains with the guardian judge.

Pursuant to the same Article 53(IV), the trustee's petition may be addressed to the court so that it may directly make such amendments to the trust deed as may have become necessary or appropriate.

Again, when the court grants an order to make directly "such modifications to the deed of trust as may have become necessary and appropriate", such an order is granted in order to ensure the fulfilment of the purpose of the trust and its proper administration but, like the authorisation to the trustee to make the amendment (arg. ex Order, 27 November 2018, Judge Prof. Antonio Gambaro, p.10), it cannot affect the entitlements of the beneficiaries who have already acquired such entitlements.

In San Marino law, precisely because the amendment cannot affect the entitlements of the beneficiaries, the court order do not approve on behalf of the unborn or undetermined beneficiaries a modification of the trust based on the consent of all beneficiaries as is the case in English law under the Variation of Trust Act 1958[18] . Under this provision, the deed is deemed to be modified by the

[18] Variation of Trusts Act 1958, art. 1 "(1)Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of- (a)any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of" assenting, or (b)any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or (c)any unborn person, or (d)any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or been determined, any arrangement (by whomsoever proposed, and

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consent of all the beneficiaries (and not directly and exclusively by the court's order) and the court simply 'approves' the modification of the deed in lieu of both the unborn or undetermined beneficiaries and the minor or incapacitated beneficiaries. For these specific purposes, with reference to minors and incapacitated persons, in English law the court entrusted with the control and supervision of the trust also plays a similar role to the court entrusted with the supervision of their guardianship. In fact, the trust is not modified by the court but by the agreement of all the beneficiaries and the court provides the approval on behalf of those who cannot consent.: thus, if all the other beneficiaries do not consent, no modification takes place even though the court could 'approve' it[19] .

In San Marino law, however, this is not the case and Article 53 allows the court to amend the trust deed directly but with the exclusion of those amendments that affect the entitlements of the beneficiaries who have already acquired such entitlements.

Both the authorisation to perform useful acts or the ratification of acts already performed and the judicial amendment of the deed of trust, in essence, constitute ways to ensure the proper administration of the trust on which public and general interests depend, not to protect the private interests of trustees and beneficiaries even if these are indirectly protected by court orders.

It is therefore clear that supervisory jurisdiction in trusts is not functionalized to the direct protection of mere private interests but is designed to protect public and super-individual interests.

This aspect represents a first difference between the supervisory and contentious jurisdiction.

There are others.

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whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts: Provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person".

[19] Re Holmdens's Settlement Trust IRC v. Holmdens [1968] All ER 148, 151.

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In contrast to contentious jurisdiction, the Court's supervisory jurisdiction does not necessarily presuppose the existence of disputes and is not concerned with dispute resolution.

Well before and irrespective of whether the trustee has taken any action that might constitute a breach of his obligations or give rise to a dispute, the Court may authorise him, as stated above, 'to perform a useful act that is not within his powers' or may give him precise directions when 'he is in a state of uncertainty as to the performance of an act inherent in his office' (Art. 53(4) and (5)).

Even in the case of the substitution of a trustee or protector pursuant to Art. 53 (II) (b) Trust Law, the Court may order substitution also for simple "reasons of expediency".

In contrast to contentious proceedings, supervisory jurisdiction is not concerned with the final ascertainment of rights or their infringement.

Even if the court orders the replacement of the trustee or protector pursuant to Article 53(II)(b) of the Trust Law on the ground that they have "committed a violation of the law or the trust deed", the assessments made in the supervisory proceedings do not constitute a final determination and do not bind a subsequent ordinary court in the event of litigation by the beneficiaries, nor do they exempt the plaintiff from providing the relevant evidence in court.

The orders issued under the supervisory jurisdiction and removing the trustee or protector are, in fact, only functional to bringing about a change of status for the person charged with the office and does not create any preclusion on the subsequent verification of breaches of its duties in future litigation.

Moreover, the court's order issued under the supervisory jurisdiction does not definitively ascertain the rights of the beneficiaries either when, in applications based on Art. 53(II) or (IV), such orders affect the distribution of the assets to the beneficiaries or contain the criteria to be followed by the trustee in doing so.

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Indeed, such an orders, like any other orders of supervisory jurisdiction, may indirectly protect the trustee and prevent him from being held liable if he has complied with the court's requirements. The court's assessment of the conditions for distribution is functional only to the decision under the supervisory jurisdiction but does not preclude any subsequent review in any litigation against a beneficiary who has been unjustly enriched by reason of having received sums not due to him. The beneficiary would not be able to benefit from the findings incidentally reached under supervisory proceedings. Only the trustee could, on the other hand, benefit from this order and could not be held liable for the distribution made according to the order adopted in the supervisory proceedings.

This is also the case in common law systems[20] .

Supervisory jurisdiction over trusts is thus distinguished from contentious jurisdiction not only in that it is designed to protect important public and super-individual interests, but also in that it does not deal with disputes or presuppose breaches or aim at the final ascertainment of rights.

In these respects, the Court's supervisory jurisdiction functionally follows the 'supervisory jurisdiction over trusts' attributed to the court in common law systems, which is clearly distinguished from contentious jurisdiction precisely because it does not have as its object the ascertainment of the rights of the beneficiaries[21] and does not presuppose the existence of a 'breach of trust'[22] .

This necessary premise on the characteristics of the Court's supervisory jurisdiction makes it possible to assess the Court's jurisdiction and the effects on it of the clauses introduced by the Trust C Deed of Amendment.

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[20] Macrae v. Walsh (1927) 27 SR (NSW) 290, 295; Re Westminster Bank [1963] 2 All ER 400, 401.

[21] Macrae v. Walsh (1927) 27 SR (NSW) 290, 294 "The Court does not act [...] for the purpose of determining the legal rights of any person, whether living or unborn; all that it does is to authorize the distribution of funds within its actual or notional control".

[22] D. Clarry, The Supervisory Jurisdiction over Trust, Oxford, 2018.

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§ 4.2 Arbitration.

A first issue is posed by the clause seeking to waive the Court's jurisdiction to award it to arbitrators non only for contentious matters but also for matters and activities falling within the scope of supervisory jurisdiction, which was introduced by the Trust C Deed of Amendment by replacing article 15 of the original Trust Deed.

Before concretely assessing this clause in its specific wording, it is appropriate to examine whether it is abstractly possible to refer to arbitrators the judicial powers of supervision and control that the Trust Law attributes to the Judicial Authority and that the latter exercises in the context of its supervisory jurisdiction.

The relationship between trusts and arbitration is different in each jurisdiction and depends on the applicable statutory framework. This determines whether, when and to what extent the subject matter of the trust is arbitrable; it also determines whether, when and how an arbitration clause in favour of arbitrators is possible and binding on the trustee, beneficiaries and protectors, and how the agreement to arbitrate may be reached.

Whether the jurisdiction can be ousted in favour of arbitrators depends, fundamentally, on two issues: a) whether the matter is arbitrable or not, and b) the formation of the necessary arbitration agreement, with particular attention to the problems posed by the possible presence among the beneficiaries of unborn, unidentified, minor or incapacitated persons.

In any event, this issue must be assessed considering the general legal rules on arbitration in force the Republic of San Marino.

The Republic has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the 'New York Convention') and has enacted a

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domestic regulation on arbitration: Law No. 34 of 18 March 1999 (hereinafter referred to as the 'Arbitration Law').

In the present case, this would be a foreign arbitration whose seat would have to be outside the Republic of San Marino and the arbitral award would have to be issued abroad: the New York Convention (Art. 1) would therefore be applicable.

In light of this framework, it is possible to assess whether matters and orders relating to the control and supervision of the trust are to be attributed to arbitrators and whether the Court's supervisory jurisdiction can indeed be ousted in favor of arbitration by the clause.

Article 1(I) and Article 2(II) of the New York Convention requires, as a necessary condition for its application to arbitral awards and agreements, that they have as their object and concern "differences between persons", "differences which have arisen or which may arise between them in respect of a defined legal relationship".

The case law that has interpreted the concept of 'differences' internationally has considered it equivalent to 'disputes'[23] .

Thus, an award and arbitration agreement must necessarily concern disputes in order for the New York Convention to apply.

Article 1 of the Arbitration Law states that 'arbitration constitutes an instrument, alternative to ordinary jurisdiction, for settling disputes arising between two or more parties, which fall within the competence of the Ordinary Judicial Authority under the law and which concern disposable rights'.

[23] Resort Condominiums International INC v. Ray Bolwell and Resort Condominiums Pry Ltd (1993) XX Yearbook Commercial Arbitration 1995 628.

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It is therefore confirmed that arbitration can only concern the "settlement of *disputes*".

The Court's judicial powers of control and supervision exercised through activities and orders of supervisory jurisdiction do not relate to "disputes" or even "the settlement of disputes" (see above § 4.1).

The case law of this Court (Order of 12 November 2020, Judges Prof. Maurizio Lupoi and Prof. Paul Matthews) has expressly and clearly distinguished the Court's supervisory jurisdiction from contentious jurisdiction precisely because the supervisory jurisdiction does not presuppose and does not concern disputes between parties. It then expressly ruled that the matters and activities under the supervisory jurisdiction cannot be qualified as 'disputes' for the application of the rules attributing jurisdiction to the ordinary courts (pursuant to Article 5(1) of the Trust Law).

Accordingly, it must be held that matters and the orders falling within the Court's supervisory jurisdiction do not refers to 'disputes' and are not for the purposes of the Arbitration Law and the New York Convention either.

This alone would be sufficient to exclude the referral to arbitrators of activities and orders falling within the Court's supervisory jurisdiction notwithstanding the arbitration clause introduced in the Trust C Deed of Amendment.

In any event, Art. 2(II) of the New York Convention also requires that the subject matter be arbitrable ("subject matter capable of settlement by arbitration").

It is up to the lex fori to determine whether the matter is arbitrable or not.

Article 1 of the Arbitration Law states that only 'disputes' 'involving "disposable rights"' may be referred to arbitrators.

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The activities and orders that fall within the Court's supervisory jurisdiction do not concern 'rights' or their ascertainment but only interests and involve and protect mostly super-individual and public interests that are by their nature certainly not 'available' (§ 4.1).

This excludes that activities and orders under the supervisory jurisdiction subject be “matter capable of settlement by arbitration” under art. 2 (II) of the New York Convention.

Moreover, even in common law systems, it is recognized that the "sensible and well-informed drafting of arbitral clauses in trust instruments should focus on "disputes" thereby leaving the supervisory jurisdiction over trust administration intact without raising difficult public policy issues over "outsters" that will, in any event, be undesirable if a clause purports to limit the means by which the Court can facilitate the performance of trusts through the attachment and exercise of its supervisory jurisdiction over trust administration"[24] .

A final - but no less important - obstacle to the waiver of jurisdiction (moreover, not only supervisory jurisdiction) of the judicial authority in favor of arbitration derives from the requirement of an arbitration agreement.

An in-depth study by Professor Matthew Conaglen concluded that "contrary to arguments presented by some, there are real difficulties in enforcing trust arbitration clauses under the arbitration statutes that are predicated on the arbitration of an "arbitration agreement"[25] .

Indeed, even a very recent decision of the Supreme Court of Virginia[26] ruled that, where there are statutory rules regulating arbitration with reference to the contractual sphere and requiring a 'written

[24] D. Clarry, The Removal of Trustees by Arbitration: Australia and England, in S.I. Strong (ed.), Arbitration of Trust Disputes, Oxford, 2016, p. 287.

[25] M. Conaglen, Trust Arbitration Clauses, in R. Nolan & al. (ed.), Trusts and Modern Wealth Management, Cambridge, 2018, p. 76, at p. 128.

[26] Boyle v. Anderson, 871 S.E. 2d 226 (Va. 2022) ("This appeal calls upon us to decide the narrow question of whether the Virginia Uniform Arbitration Act, Code §§ 8.01-581.01 to -.016) ("VUAA") or the Federal Arbitration Act, 9 U.S.C.

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agreement' to submit a 'dispute' to arbitration (Virginia Uniform Arbitration Act, Code §§ 8.01-581.01 to -.016) ("VUAA") or the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA")), cannot be made mandatory in trust matters because the trust deed is not a contract and the beneficiary of a trust cannot be deemed a party to an agreement merely because he is a beneficiary.

In the present case, the New York Convention contains provisions that presuppose either the presence of an arbitration clause included in a 'contract' or an autonomous arbitration agreement.

According to Art. 2 para. II of this Convention, the parties may agree on "*an arbitration clause in a contract"* or on a separate "*arbitration agreement*".

The New York Convention defines an 'arbitration clause' as one that is contained in a 'contract' and an 'arbitration agreement' as one that is formed between the parties independently and separately from a contract and is not included in a contract.

First, it must be determined whether the provision in favor of arbitration included in a trust deed can be considered:

(a) an 'arbitration clause' included in a 'contract'; or

(b) a separate and independent 'arbitration agreement' (even if it is contained in the same document as the trust deed).

§§ 1-16 ("FAA") compels enforcement of an arbitration clause in a trust. Both statutes require arbitration for contracts. The VUAA also compels arbitration for written agreements to submit a dispute to arbitration. We conclude that a trust is not a contract and, therefore, the VUAA and the FAA do not require arbitration on that basis. We further conclude that a beneficiary of a trust is not a party to an agreement to arbitrate and, therefore, the provision of the VUAA compelling arbitration when there exists a written agreement to arbitrate likewise does not apply. Accordingly, we will affirm the judgment of the circuit court").

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Under San Marino law, the trust deed must state only the settlor's 'will to establish the trust' (Art. 6(II)(a) Trust Law).

A declaration of will of the beneficiaries is therefore not required for the formation of the trust deed: this is simply a unilateral act of the settlor and its formation does not require an agreement with (or the consent of) the beneficiaries nor any negotiation with them.

Moreover, unlike a contract which in the abstract may have as its object obligations and performances binding on all its parties, the trust deed cannot bind the beneficiary vis-à-vis trustees and protectors. Indeed, no obligations for the beneficiaries vis-à-vis the trustee or protectors comparable to those arising under a contract arise or can arise from this deed.

This is the position advocated by Prof. Paul Matthews, a former judge of this Court who now sits as a judge of the English High Court, in an extrajudicial paper[27] and is also shared by the case law of other jurisdictions that regulate trusts[28] .

[27] P. Matthews, What is a Trust Jurisdiction Clause?, 7 Jersey Law Review (2003) 232, n. 32 "Now it is true that in English law there is a doctrine of so-called "benefit and burden", whereby a person who takes a benefit under a deed is sometimes said to be obliged to take the burden of obligations purportedly imposed by it. I have found no trace of a similar general doctrine in Jersey law, although there do exist apparently exceptional rules of Jersey succession law and company law which in their particular contexts produce a similar effect. But even in England it seems that this doctrine at most gives the person concerned a choice whether to perform: if the obligation is not performed, the benefit may be withdrawn. It is a 'stick and carrot' arrangement. It does not make that person personally liable for the obligation in question. And it is clear law in England that (except in the special case of a "simple" trust) a beneficiary under a trust is not personally liable (say) to the trustee to reimburse his proper expenditure or pay his stipulated remuneration, where the trust assets are otherwise insufficient for the purpose. I have found nothing to suggest that Jersey trust law is different on this point".

[28] Crociani and others (Appellants) v Crociani and others (Respondents) [2014] UKPC 40, n. 36 “In the case of a clause in a trust, the court is not obliged to require the parties to comply with the obligations they have entered into in their contractual agreement. It is, of course, true that a beneficiary who wishes to obtain the benefits arising from the trust might also be expected to be bound by the terms of the deed of trust, but his obligations cannot be regarded as being of the same nature as those to which a party to a commercial contract is bound') ('In the case of a clause in a trust, the court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract'.

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As evidence of this, it is worth noting that in San Marino law the beneficiaries cannot even be obliged to pay the trustee's fees and the trustee does not even have the right to act against the beneficiaries to obtain his or her fees, but only the right to withdraw them from the trust fund (Art. 38(I) of the Trust Law).

The beneficiaries are not involved in any negotiations, they do not participate in any way in the formation of the trust deed, and no obligations can arise from it as in the case of contracts, which, in fact, if they give rise to obligations must be the result of an agreement on the part of those who assume them.

The same arguments are shared in a recent ruling of the Singapore Court of Appeal[29] .

Thus, the trust deed cannot be the basis for creating obligations on the part of the beneficiaries to refer the dispute to arbitration, whereas such obligations must be the necessary effect of any arbitration agreement within the meaning of the New York Convention, since by such an agreement the parties must 'undertake to submit to arbitration' (Art. 2(1), New York Convention).

The trust deed thus lacks a fundamental element - the consent of the beneficiaries – and cannot be brought under the category of contract or agreement and its clauses cannot produce binding effects on the beneficiaries, as Article 2 of the New York Convention would require.

[29] Ivanishvili, Bidzina and others v. Credit Suisse Trust Ltd [2020] SGCA 62. No 78 'In the establishment of a trust there is no substantial negotiation between the parties with different interests that normally takes place in pre-contractual discussions. While there is the settlor who may give his directions, the beneficiaries generally have no role in the establishment of the trust. Indeed, in many cases the beneficiaries do not even exist at the time the trust is created. The trust instrument is not a contract between two parties with mutual obligations, rather it is a unilateral act by which the trustee binds himself [...]") ("In the settlement of a trust there is little of the negotiation between parties with different interests that ordinarily takes place in pre-contractual discussions. Whilst there will be a settlor who may have some input, generally the beneficiaries have no say at all in the setting up of the trust. Indeed, in many cases the beneficiaries do not even exist at the time of the settlement of the trust. The trust deed is not a contract between two parties with obligations on both sides - rather, it is a unilateral undertaking by the trustee [...]".

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Foreign courts finds these arguments convincing[30].

An arbitration clause in a document containing the trust deed may therefore not be "*an arbitration clause in a contract*" but could, if accepted, be an autonomous and separate "*arbitration agreement, signed by the parties*" within the meaning of Art. 2(II) of the New York Convention.

In other words, the outsted of jurisdiction in favour of arbitration, where it meets the formal requirements, can only be agreed upon by means of an autonomous arbitration agreement.

The fact that such an agreement is present in the same document containing another legal transaction (the trust deed) does not affect this possibility.

The arbitration agreement and the trust deed remain two totally separate and independent transactions even though they are contained in the same document. Each has its own rules of validity, formal requirements and effects, even though both are contained in the same document.

However, it will be necessary for this consent to be specifically formed by signing such an agreement.

The New York Convention provides that this autonomous arbitration agreement must be "signed by the parties", as expressly provided in Art. 2, para. II of this Convention. Alternatively, the consent

[30] Gibbons v. Anderson, 2019 Ark. App. 193, "First, we emphasize that a trust is not a contract. [...]. Because a trust is not a contract, we have no carte blanche to apply the principles, judicial precedent, or statutory provisions set forth in contract/arbitration to this dispute." "First, we point out that a trust agreement is not a contract. [...]. Since a trust agreement is not a contract, we cannot carte blanche apply contract/arbitration principles, statutes, or precedent to this dispute"; Schonenberg v. Oelze, 208 Ariz. 591 "Arizona has enacted legislation validating and enforcing provisions in 'written contracts' requiring arbitration of future disputes. See Arizona Revised Statutes ("A.R.S.") section 12-1501 (2003). The issue presented in this appeal is whether an arbitration provision in an instrument establishing an irrevocable inter vivos trust may be enforced against trust beneficiaries who sued the trustors and trustees. We hold the trust beneficiaries are not required to arbitrate their claims because such a trust is not a "written contract" requiring arbitration; Boyle v. Anderson, cit.

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may be "contained in an exchange of letters or telegrams" (Art. 2, para. II of the 1958 New York Convention).

Trustee, beneficiaries (and protector) must therefore manifest their consent in writing, either by signing the arbitration agreement or by manifesting their consent again in writing through remote means of communication.

Without this, the requirements of form for the arbitration agreement under the New York Convention cannot be said to be met.

For for this very reason, the Jersey government found it useless the introduction of domestic legislation on trust arbitration that derogated from the requirement of express written acceptance by the beneficiaries[31].

Article VII of the New York Convention specifies that the provisions of the Convention do not 'deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon'.

According to the interpretation suggested by UNCITRAL, Article VII (1) of the New York Convention could also extend to the arbitration agreement and would not be limited to the 'award'

[31] According to the Government's official position: "whether or not such a clause could bind a beneficiary-usually not a party to a trust deed- seeking to enforce its rights under the trust is less clear. The question for consideration is whether or not legislation should be enacted so as to render an arbitration clause in a trust instrument binding on a beneficiary by statutory force and without the consent of the beneficiary (whether or not that is due to a beneficiary not wanting to arbitrate or that the beneficiary is unascertained, unborn, a minor or otherwise lacks capacity and thus cannot provide valid legal consent). [Finally, it is not considered to be clear that an arbitration award made in the absence of a voluntary submission to arbitration will be enforceable in a foreign jurisdiction as it will not be made pursuant to an 'arbitration agreement' as required by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (commonly known as the 'New York Convention'). Whilst Jersey naturally wishes to be at the vanguard of the new developments for the trust industry, the Working Group has concluded that it is not desirable to impose enforced arbitration in the trust context, certainly at this time"), Consultation Chief Minister's Department, 11 April 2016, §6 available at https://www.gov.je/SiteCollectionDocuments/Government and administration/C Proposed Amendments to the Trusts (Jersey) Law 1984 consultation 20160411 CB.pdf28).

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alone, relaxing the requirement of the signature of the agreement or arbitration clause in Art. II (1) and allowing the parties to avail themselves of domestic rules that are more favourable than those of the Convention ("it should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement")[32].

As a result, in some jurisdictions, an arbitration agreement under the New York Convention has been found even in the presence of a tacit acceptance of the written arbitration clause included in or acceding to a contract, in the presence of applicable domestic law provisions that are more favourable than the Convention's stringent signature requirement.

Under San Marino law, the arbitration agreement must in any case be 'in *writing*' (as provided for in Articles 3.II and 2.II of the Arbitration Law) and therefore, at present, the acceptance by all parties of the arbitration clause or agreement must always be express and manifested in writing and there is no provision for tacit acceptance of such agreement, not even for domestic arbitrations.

Moreover, even if the *lex fori* permitted tacit acceptance of the arbitration agreement by equating it with express acceptance made in writing and signed by the parties, with respect to trusts it could not be held that such acceptance occurs merely because the beneficiaries have accepted the benefits from the trustee.

[32] Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006), Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17), paras. 177-81 and Annex II, available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf. The Travaux préparatoires to the Recommendation are contained in Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17), para. 313; Ibid., Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 183; and in United Nations documents A/CN.9/468, paras. 88-106; A/CN.9/485, paras. 60-77; A/CN.9/487, paras. 42-63; A/CN.9/508, paras. 40-50; A/CN.9/592, paras. 82-88; A/CN.9/WG. II/WP.118, paras. 25-33; A/CN.9/607; and A/CN.9/609, and its addenda 1 to 6.

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The trustee may perform its obligations by unilateral acts (e.g. a wire-transfer) and, in this case, the beneficiary does not manifest any consent to the transfer.

In some cases, performance may require the consent of the beneficiary (e.g. where real estate is transferred).

In any event, such consent would obviously be circumscribed to the transaction at issue, even if the transaction expressly contained a general reference to the trust deed.

Even if the beneficiary consent to this trasaction were expressed in writing, it could not be inferred that through such consent the beneficiary also intended to accept, *per relationem*, the arbitration agreement contained in the same document as the trust deed.

In fact, one cannot but agree with the principle expressed by the United Sections of the Italian Supreme Court, which denied the possibility of deeming consent to be formed on the arbitration clause present in general contractual terms and conditions referred to in the parties' written agreement, but without this agreement expressly and specifically recalling the arbitration clause, stating that "only the express reference ensures the full awareness of the parties regarding the derogation from jurisdiction"[33] .

It would therefore be necessary for the beneficiary to manifest in writing, by signing, his consent to the transaction and for the transaction to contain an express reference to the arbitration provision contained in the same document as the trust deed.

In any event, all this is lacking in the present case.

[33] Cass. civ., Sez. Unite, Sent., 19 May 2009, No. 11529.; Cass. civ., Sec. VI - 1, Order, 19 November 2017, No. 21655.

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It does not appear from the records that the beneficiaries gave their consent in writing, by signing it, to the Trust C Deed of Amendment that introduced the arbitration clause, nor to any subsequent agreement containing express and specific reference to that clause.

From the case file, however, it does not appear that this agreement was formed and therefore it must be denied that any arbitration agreement 'signed by the parties', according to the provisions of the New York Convention, or 'in writing', according to the Arbitration Law, was formed.

Moreover, such an agreement could take effect only with respect to those who expressly signed it and not with respect to third parties.

For these reasons, in any case the arbitration provisions contained in the Trust C Deed of Amendment could not constitute a valid derogation from San Marino jurisdiction.

§ 4.3 The jurisdiction: the 'applicable law'.

Pursuant to Article 5(1) of the Trust Law, 'the jurisdiction of the Judicial Authority in trust matters exists when the defendant has its domicile, residence, or registered office in San Marino or the trust is administered in San Marino or the law applicable to the trust is the law of the Republic of San Marino or the parties have agreed to submit the dispute to the San Marino Judicial Authority'.

This provision defines the general criteria for the application of San Marino jurisdiction.

It applies to both contentious and supervisory proceedings (see Court of Trusts, Order, 12 November 2018, Judges Prof. P. Matthews & M. Lupoi).

In the present case, the criterion potentially conferring jurisdiction on the Court is the 'law applicable to the trust'.

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In fact, pursuant to Article 5(1) of the Trust Law the Court's jurisdiction exists even when the 'law applicable to the trust is the law of the Republic of San Marino'.

Pursuant to Article 4 of the Trust Law, "the identification of the governing law" is governed by "the Hague Convention of 1 July 1985 on the law applicable to trusts and their recognition," ratified by the Republic by Decree No. 119 of 20 September 2004.

Thus, the concept of "law applicable to the trust" within the meaning of Article 5(1) must be interpreted and reconstructed in the light of the provisions of the Hague Convention, to which the Trust Law itself expressly refers.

The Hague Convention 'specifies the law applicable to trusts' (Art. 1), clarifying that “the term "trust" refers to the legal relations created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose' (Art. 2).

As clarified by the Explanatory Report of the Convention drafted by Von Overbeck, Art. 8(II)[34] supplements Art. 2 and provides an enumeration of the elements and aspects of these "legal relations" that are to be regarded as governed by the law regulating them ("In this Convention, such an enumeration may contribute to showing what the problems are which arise in connection with trusts

[34] "In particular, the law shall regulate: (a) the appointment, resignation and removal of the trustee, the particular capacity to exercise the trustee's duties and the transfer of the trustee's functions; (d) the rights and obligations of the trustees among themselves; (c) the right of the trustee to delegate, in whole or in part, the performance of his obligations or the exercise of his powers; (d) the powers of the trustee to administer or dispose of the trust property, to pledge it as security and to acquire new property (e) the powers of the trustee to make investments; (f) restrictions on the duration of the trust and the powers to set aside the trust income; (g) the relationship between the trustee and the beneficiaries, including the personal liability of the trustee to the beneficiaries; (h) the modification or termination of the trust; (i) the distribution of the trust property; (j) the duty of the trustee to account for its management."

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and thus complement Article 2", Explanatory Report by Arthur Von Overbeck, The Hague, 1985, p. 387).

The enumeration of the elements of the trust in Article 8(II) does not mention the trust deed.

As noted by one of the most authoritative commentators on the Convention, "the existence and validity of the deed of trust is not even mentioned in the enumeration in Article 8" and "there is also no reference to aspects relating to the formal validity of the trust"[35] .

The trust deed must not be confused with the legal relationships that result from it.

The validity and interpretation of the trust deed is simply extended to the application of the law governing the legal relations by reason of para. I of Art. 8, unless of course the dépeçage of the governing law is applicable and applied in such a way as to have the aspects relating to the trust deed governed by a law other than the law governing the trust relations[36] .

In the system of the Hague Convention, the "law applicable to the trust" is thus to be understood as the law applicable to the "legal relations" between trustee, protectors and beneficiaries and provides that this also becomes the law governing the trust deed only derivatively.

On the basis of the combined provisions of Article 4 of the Trust Law, Articles 2 and 8, paragraph II of the Hague Convention and Article 5, paragraph I of the Trust Law, it must be held that when the law applicable to the legal relationships between trustee, protectors and beneficiaries is San Marino law, the criterion of attribution of jurisdiction based on the "law applicable to the trust" will be integrated.

[35] Harris, p. 232.

[36] Harris, p. 232.

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§ 4.4 The 'law applicable to the trust' in Trust C.

In the present case, the legal relations relating to the C Trust were initially governed by San Marino law since - without any exception - the trust was governed by San Marino law; with the Deed of Amendment, the situation has not substantially changed.

In fact, the Trust C Deed of Amendment on the one hand declares to modify the law regulating the trust by choosing the law of Jersey to regulate the "trust", on the other hand it expressly provides that "the following matters are governed by the law of the Republic of San Marino on trust: obligations of the trustee, powers of the trustee, termination of the trustee and transfer of the trust property, liability of the trustee, beneficiaries, protector (Art. 17-52 of Law No. 42 of 1 March 2010, as amended, omitting any reference to the resident agent and the Trust Register)" (see lett. b) of the Trust C Deed of Amendment).

Every legal relations is composed of rights, obligations, powers and responsibilities.

Thus, establishing that the "obligations of the trustee, powers of the trustee, termination of the trustee and transfer of the trust property, liability of the trustee, beneficiaries, protector" are governed by San Marino law is tantamount to saying that the Trust C legal relations are governed by San Marino law.

However, the Trust C Deed of Amendment also states that the 'trust' is governed by Jersey law and the original trust deed defines the term 'trust' as a 'legal relations arising out of this deed (Art. 2(A)).

The contradiction is self-evident.

This contradiction must be resolved by interpretation, not only in order to determine whether the law governing the trust relations is the law of Jersey or San Marino in order to establish whether there is San Marino jurisdiction under Article 5(I) of the Trust Law but also to avoid two conflicting but concurrent choices as to the law governing the same issues, which would lead to the conclusion that a real choice under Article 6 of the Hague Convention is lacking. This would then lead to the

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application of Article 7 of the Convention for the determination of the law applicable to the trust on the ground of the closest connection of the trust relationship with a jurisdiction. That criterion, in the present case, would lead to the identification of such connection with the Italian legal system lacking, on the contrary, a law on trusts, with negative consequences first of all on the validity and effects of the trust and only then eventually on the jurisdiction of the San Marino Courts.

These contradictions must be resolved through interpretations rules of San Marino law.

In fact, pursuant to Article 10 of the Hague Convention, the validity and interpretation of the Deed of Amendment to the Trust C must be made in the light of the San Marino law that governed the validity of the trust prior to those amendments.

According to the rules of interpretation applicable to deeds between living persons in San Marino, the judge must provide an interpretation of the parties will aimed at excluding any contradiction and, if necessary, reconciling it.

In fact, "contradictions must be avoided and reconciled in every disposition" ("Contrarietates sunt evitandae et conciliandae in omni dispositione (Rotae Romanae Decisiones coram Coccino ab anno 1600 ad annum 1640, Romae, 1672, De MDCCCXLIX, 10 November 1629, no. 20, see also "Contrarietas in contractibus omnino vitanda est" (Rotae Romanae Decisiones coram Coccino, De MMCCLXXXIII, 20 December 1638, no. 38).

In order to eliminate these contradictions, the judge may even go so far as to force the literal meaning of the words ("omni interpretatio sumenda est in omni materia per quam non inducitur contrarietas sed induci debet concordia etiam impropriando verba" Rotae Romanae Decisiones coram Coccino, cit., De MDCCCXLIX, 10 November 1629, no. 21).

It can be assumed that the trustee relied on the fact that in Italian experience the term "trust" is “a 'polysemic' expression and, that is, able to have a plurality of meanings: the term 'trust', in fact, has a

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rather generic connotation, being able to refer to a plurality of situations. [...]" and thus took into consideration that "in Italian language […] the term 'trust' can refer to:

(a) first, to the trust considered in its concrete development and, therefore, to the set of legal positions related to the fact that a trust has been created, understood as an autonomous logical-legal entity [...];

(b) secondly, and as is often the case, the term 'trust' may also refer to the trust deed that gives rise to it or to the content of the material document containing the expression of the will directed to the creation of the trust;

c) finally, the term trust can also refer to the relationship between the settlor and the trustee, which in Italian can be translated by the expression "affidamento" [...]"[37] .

In the light of this, the trustee, by employing the expression "trust" in the Trust C Deed of Amendment by which, precisely, he changed the governing law of the "trust" in favour of the law of Jersey, could certainly have been referring to the "deed of trust" and thus that deed of amendment could have intended to change the governing law of the deed of trust, its validity and interpretation.

The change of the law governing the trust in favor of the law of Jersey should refer to the trust deed or, rather, to certain aspects of it.

Confirming that the Trust C Deed of Amendment intended to amend the governing law of the trust deed are the individual provisions referred to in the Trust C Deed of Amendment in relation to which the dépeçage was carried out.

[37] A. Busani, The Trust. Istituzione, gestione, cessazione, Padua, 2022, pp. 13 ff.

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This deed, in fact, identifies the aspects regulated by a law (that of San Marino) on the basis of a reference to the rules of that law (Art. 17-52) and, by subtraction, this should lead to the identification of the aspects concretely regulated by Jersey law.

Few articles of the Trust (Jersey) Law would actually become applicable by reason of the reference introduced in the Trust C Deed of Amendment.

The reference to the law of Jersey cannot include the rules of private international law contained in that law (art.3 ("Recognition of the trust by the law of Jersey"), art. 4 ("Proper Law of a Trust"), art. 5 ("Jurisdiction of Court"); art. 9 ("Extent of application of law of Jersey to creation, etc, of a trust"), art. 49 ("Enforceability of a Foreign Trust")). These rules regulate the activity of the court and not the activity of private parties. Article 17 of the Hague Convention clearly provides that once the law applicable to the trust has been identified, it must be taken into account to the exclusion of the rules of private international law.

Furthermore, Articles 10 ("Beneficiaries of a trust"), Art. 10A ("Disclaimer of interest"); 13. ("Enforcers"); Art. 14. ("Resignation or removal of enforcer") and articles 16 to 43A as well as article 57 of the Jersey Law would not be applicable: some provisions regulate the "enforcers" in special purpose trusts and are therefore inapplicable to the Trust C, others deal with matters regulated in articles 17 to 52 of the San Marino Trust Law and therefore remain reserved to San Marino law by express choice made in the Trust C Deed of Amendment.

Nor would Articles 44 to 47J, which constitute a section of Part II intended to regulate the 'Powers of the Court', be applicable since they are rules on judicial control and supervision intended to regulate the judicial activities and orders of the Inferior Number of the Royal Court alone (Art. 1(I)) and therefore not intended to regulate aspects relating to relations between private individuals.

The same applies to most of the provisions contained in Articles 52 and 54.

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Articles 54(III) ("Following trust property") and 55 ("Protection to persons dealing with trustees") would not be applicable because they concern the protection of bona fide third parties who, pursuant to Article 15(f) of the Hague Convention, are governed by the mandatory rules of the forum that are intended to take precedence over those of the governing law.

Art. 57 ("Limitations of actions or prescription") does not apply, as for the breach of trustees, because these matters are regulated, under San Marino Law, under article 46 which, according to the Trust C Deed of Amendement, are to be governed by San Marino Law.

Arts. 58-61 are provisions on the law in general, its scope of application, its retroactivity and its relationship to other laws already in force.

In conclusion, the aspects that could at least abstractly be considered to be governed by Jersey law are only those contained in Art. 2 ("Existence of the trust"); Art. 7 ("Creation of a trust"); 8 ("Property which may be placed in a trust"); 9A ("Powers reserved by settlor"); art. 11 ("Validity"); art. 15 ("Duration of a Jersey trust"); art. 54 ("Nature of trustee's estate, following trust property and insolvency of trustee ").

In practice, not all of these are applicable either.

In any event, Article 7 would not be applicable because at the time of its creation the trust was governed by the law of San Marino and therefore the moment of creation would continue to be examined under the law of San Marino. The amendment of the governing law, in fact, has no retroactive effect both under the Hague Convention[38] and Article 13(X) of the Trust Law.

[38] A. Saravalle, Sub Article 10, in A. Gambaro, A. Giardina, G. Ponzanelli, *Convention on the Law of Trusts and their Recognition, Commentary, p*. 1265, at p. 1266: 'the decision to change the governing law may not produce retroactive effects'.

Article 54 primarily regulates the segregation of assets in trust: it is highly doubtful that private autonomy can separate the property regime of trust assets from the trustee's obligations and the beneficiaries' rights.

Thus, the aspects of the trust actually governed by Jersey law would be the notion of trust (Art. 2), and certain rules on the validity of the trust deed, also in the light of the retention of powers by the trustee (Art. 9A and 11) and the duration of the trust in the absence of different provisions in the trust deed (Art. 15).

By reason of the dépeçage adopted in the Trust C Deed of Amendment Jersey law would therefore regulate only certain limited and general aspects concerning the deed of trust and only these.

In fact, the validity of many provisions of the deed of trust governing legal relations is also governed by San Marino law.

Articles 17 to 52 of the Trust Law which the Trust C Deed of Amendment leaved to be governed by San Marino law are, in fact, composed of mandatory rules and default rules. Therefore, it is for San Marino law to determine whether the individual clause of the deed of trust that regulates the obligations, powers and rights of the trustee, protector or beneficiaries in a manner different from the Trust Law is valid because the corresponding rule of law is a default rule or invalid because it is mandatory rule that cannot be derogated.

In any event, none of the few aspects concretely regulated by Jersey law due to the dépeçage introduced by the Trust C Deed of Amendment concerns the relationships between trustees, protectors and beneficiaries.

In the light of this and of the polysemy attributable to the term "trust" in Italian usage it may therefore be held that, in the Trust C Deed of Amendment, the choice of Jersey law to regulate the trust in realty could be interpreted as being limited to certain aspects of the trust deed i.e. for example, its validity

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in general from the time of the modification (with the exclusion of the validity of the clauses governing the obligations, powers and discretions of the trustee, protector and beneficiaries) and not to the legal relations arising therefrom.

It may then be concluded that, by reason of the Trust C Deed of Amendment, San Marino law (Articles 17-52 of the Trust Law) is still called upon to regulate all the elements that Article 8(II) of the Hague Convention enumerates for the purpose of describing what a 'trust' is, which Article 2 of the Convention defines in terms of legal relations, whereas Jersey law is called upon to regulate certain aspects of the trust deed and its validity.

With reference to the Trust C, the law of the Republic of San Marino shall therefore be deemed to be the "law applicable to the trust" pursuant to Art. 5(I) of the Trust Law (§ 4.3) and consequently, San Marino jurisdiction exists.

It is, however, appropriate to analyze whether an express derogation from San Marino jurisdiction exists in practice, since the Trust Law provides that San Marino jurisdiction may be 'derogated in favour of a foreign court' if this derogation is provided for in the deed of trust (Article 5(II) of the Law).

The original trust deed of the Trust C did not provide for any derogation from San Marino jurisdiction but even attributed exclusive jurisdiction to the Trust Court in contentious and supervisory matters (Art. 15).

The Trust C Deed of Amendment does not provide for a general waiver of San Marino jurisdiction in favour of a foreign court.

However, only the power to appoint the trustee and the protector is attributed to the President of the Court of Milan (see Trust C Deed of Amendment according to which the Trustee provides "to amend the provisions of letter "G" of Article 38 of the Trust Deed [...], by adopting the following new text

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(which replaces the text given in the Trust Deed): 'the appointment shall be made by the President of the Court of Milan upon the request of any interested party' (see letter d, Trust C Deed of Amendment); see also Trust C Deed of Amendment, letter e) where it is likewise provided that the appointment of the Protector "shall be made by the President of the Court of Milan at the request of any interested party").

The clause introduced by the Trust C Deed of Amendment establishes the jurisdiction of the Italian courts only with respect to the appointment of Trustee and Protector and not in all other matters or orders falling within the Court's supervisory jurisdiction.

In any event, such a clause could only produce its effects vis-à-vis 'internal' parties to the trust (trustee, protectors, beneficiaries), never vis-à-vis third parties who, pursuant to Art. 53(II), are considered to be interested parties entitled to apply for the Court's supervisory jurisdiction.

Moreover, in the presence of a valid and effective exception to San Marino jurisdiction, the exercise of control and supervision of the trust by the foreign court may then take place actually and concretely only if this court has powers of control and supervision over the trust, attributed to it by its own law, which are similar to those that the Trust Law attributes to the Court.

The mere ratification of the Hague Convention by the legislature of the foreign country whose jurisdiction is elected in the trust deed does not invest the foreign court with the jurisdictional powers attributed by the Trust Law to the "Judicial Authority" in matters of control and supervision of the trust.

In the Trust Law, 'judicial authority' is not a generic name for any judge.

Pursuant to Article 1(1)(b) of the Trust Law, "Judicial Authority" shall mean exclusively and specifically "the Court for Trusts and Fiduciary Relations of the Republic of San Marino".

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Thus, when Trust Law attributes judicial powers for the supervisory jurisdiction to the "Judicial Authority" it attributes this exclusively to the San Marino Court for Trusts and to this court alone.

The settlor's choice of San Marino law and the recognition of the trust abroad in application of the Hague Convention are not sufficient to attribute to the foreign court the jurisdictional powers that the Trust Law expressly and exclusively confers to the Trust Court alone even if, in the deed of trust, the settlor had attributed to that court the jurisdiction, derogating from that of San Marino.

Indeed, it is necessary for the foreign court to have jurisdictional powers provided for within its own system and similar to those that the Trust Law attributes to the Court in order for it to be able to exercise them, as emphasised by the judge of this Republic, Prof. Gianluca Contaldi, in an extrajudicial writing on the interpretation of the Hague Convention[39] .

This interpretation of the Hague Convention is, moreover, also shared by the English High Court.

In C v C & Ors [2015] EWHC 2699 (Ch), the English High Court held in fact that the Hague Convention does not confer on an English court the powers of control and supervision that foreign governing law confers on the "Court" especially where, in that law (as in the Trust Law), the expression "Court" expressly and specifically refers only to the court of the jurisdiction to which that governing law belongs.

The High Court has further ruled that the English court, where jurisdiction is conferred upon it, may, however, exercise the judicial powers of control and supervision that its own system confers upon it with respect to trusts governed by English law also with respect to trusts governed by foreign law,

[39] G. Contaldi, Il trust nel diritto internazionale privato, Milan, 2001, p. 341.

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applying the provisions of the latter only to assess the existence of the substantive law prerequisites necessary for the issuance of the order required of it[40] .

The same interpretation is, in substance, adopted by the Royal Court of Jersey. When it has jurisdiction with respect to trusts governed by foreign law, this court employs the powers of control and supervision that the Trust (Jersey) Law confers on it and does not apply the corresponding provisions of the law governing the trust; the rules of foreign law that are employed are only those of a substantive nature (and not procedural or judicial) that are used exclusively to assess the existence of the substantive law prerequisites necessary for the issuance of the order[41] .

Where the domestic law of the system to which the foreign court belongs does not confer on it jurisdictional powers equivalent to those which the Trust Law confers on the Court, the court may therefore fail to exercise the control and supervision of the trust even if the settlor has conferred jurisdiction on it in the trust deed.

In line with this interpretation is also the Italian case law which, in the light of Italian law, has denied orders of supervisory jurisdiction in the matter of control and supervision of the trust precisely

[40] The principle had already emerged in Chellaram v Chellaram [1985] Ch 409, p. 432 'The function of English courts in trust litigation is to enforce or protect the rights of the beneficiaries which bind the conscience of the trustee defendants. The identification and extent of those rights is a matter for the proper law of the settlement, but the manner of enforcement is, in my view, a matter of machinery which depends upon the powers enjoyed by the English courts. Among the powers available to English courts is the power to order the removal of trustees and the appointment of new ones. This power is, in my view, machinery which, under English domestic law, can be exercised by English courts where necessary in order to enable the rights of beneficiaries to be enforced or protected. The exercise of the domestic power does not, in my view, depend upon whether the rights of the beneficiaries are enjoyed under domestic settlements or foreign settlements, or upon whether the trust property is situated in England or abroad. The locality of the trust property will, however, determine whether the removal can be achieved by an in rem order or whether an in personam order is appropriate. Accordingly, except where rights conferred by the settlement are under consideration, the removal of trustees and the appointment of new ones is not, in my judgment, a matter to be governed by the proper law of the settlement. Nor, in my opinion, is it a matter governed by the law of the place where the administration of the settlement has taken place. It is, in my judgment, a matter to be governed by the law of the country whose courts have assumed jurisdiction to administer the trusts of the settlement in question'.

[41] In the matter of M and Others Trusts re A B and C v Rozel Trustees Limited [2012] JRC 127; In the matter of the H Trust [2007] JRC 187; Representation of G Trustees Limited [2017] JRC 162A.

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because of the lack in domestic law of jurisdictional powers equivalent to those of the foreign court of the legal system to which the applicable law belonged (see Court of Reggio Emilia, 27 August 2011, decrees of the President of the Court of Crotone of 29 September 2008 and 26 May 2009).

Conversely, a ruling by the Court of Ancona held that the jurisdictional powers of control and supervision over a trust governed by foreign law would be attributed to the (Italian) judge directly by the foreign law chosen by the settlor by reason of the mere force of the Hague Convention, without making any reference to provisions of Italian domestic law and therefore without applying these by adapting them even through an analogical procedure (see Court of Ancona, Sec. II Civ., 29 January 2018, no. 414). In the present case, in fact, the Tribunal thus considered that it could directly exercise the powers of control and supervision granted to the "Court" by Article 51 of the Trust (Jersey) Law, 1984 since, under the Hague Convention, the trust was governed by Jersey law.

The Court of Ancona, moreover, considered that it was invested with the judicial power of control and supervision that section 51 of the Trust (Jersey) Law attributes to the 'Court', without, however, taking into consideration the fact that that law expressly attributes those powers exclusively to the Royal Court of Jersey, since under section 1(1) of the Jersey Law any reference to 'Court' in the legislative text must be understood as referring to the 'Inferior Number of the Royal Court'.

The interpretation of the English High Court must be preferred to that of the Ancona Court not only because it is more in conformity with the Hague Convention but also because it is argued by taking into consideration the rules of the foreign governing law that expressly limit the conferral of the power of control and supervision to the courts of that legal system.

Therefore, where the foreign court to which jurisdiction is attributed in the trust deed does not have, according to the provisions of its own law, powers similar to those conferred by the Trust Law on the Trust Court, the exercise of its jurisdiction could find clear obstacles to the control and supervision of a trust governed by San Marino law.

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§ 5 The registration regime of the trust: structure, functions, protected interests.

The rules aimed at ensuring that the Register of Trusts is complete and up-to-date constitute an extensive network of provisions found in all parts of the Trust Law and are present in the regulation of all aspects of trusts.

Article 6(I) of the Trust Law provides for requirements of form for the trust deed and requires the presence of a notary public. In fact, if the deed of trust is "drawn up between living persons, the form of the public deed [...] or of the deed with the signature authenticated by a notary, who shall certify *its legality,*" is necessary. These requirements also apply to deeds amending the trust deed (Art. 13(II)).

It is provided that the certificate that must be filed in order to fill the registration with the Registrar of Trust must have the signature authenticated by a notary public, "*who shall ascertain its truthfulness*" (Art. 7(II) and Art. 13(VI)).

The law requires, as a requirement of validity, that the deed of trust contain "c) the identification of the resident agent if the trustee is a non-resident trustee" in addition to containing "e) the trustee's obligation to notify the resident agent of any fact or deed that must appear in the Register of Trusts of the Republic of San Marino" (Article 6, paragraph II). The lack of such contents is cause for invalidity of the trust (Article 10, paragraph 2, letter c of the Trust Law).

To the same end, a number of duties are imposed on the trustee or resident agent or notary.

Within fifteen days from the date of the creation of the trust, the resident trustee or the resident agent, on the basis of the information provided to him by the non-resident trustee, shall draw up a certificate, with a notarially authenticated signature that also ensures its veracity, to be filed with the Trust Register Office for registration purposes (Art. 7).

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The notary who notarised the signature of the certificate for the registration has to ensure that it is filed with the Registrar of Trust within ten days from the date of notarization (Art. 8(III)).

If the notary fails to file the certificate, there is a further duty for the trustee or resident agent to do so himself within the next ten days (Art. 8(5)).

Finally, the trustee is under the duty to record in the Book of Events 'any information that the non-resident trustee has communicated to the resident agent' (Art. 28(I)(a)) and under the duty to appoint a new resident agent within thirty days of the termination of the relations with a resident agent's (Art. 28a(I)).

In art. 13, duties are laid down for any person who makes or receives changes to the aspects of the trust deed who must be reported in the certificate: he must notify the trustee within thirty days of making or receiving the change. If the trustee is non-resident, he must then notify the resident agent within fifteen days of making or receiving the change. The resident trustee or the resident agent shall notify the Registrar of Trust, by filling an amended certificate, of the changes concerning the elements indicated in the certificate referred to in Article 7 within fifteen days from the time when they are made or received. Paragraph 8 of this Article then obliges the resident agent to inquire with the non-resident trustee, at least once every six months, whether any changes to the trust deed and to the aspects to be reported in the certificate ha been made, by means of a registered letter sent for information also to the Register Office of Trusts in March and September of each year.

A further duty is imposed on the trustee or resident agent, who are obliged to request the removal of the trust from the Register from the occurrence of a cause for removal of the trust (Art. 8(6)).

There are also rules intended to regulate the effects of registration in the Register and possible conflicts between private individuals, which state that

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a) the occurrence of a cause for cancellation is not enforceable against bona fide third parties as long as it is not entered in the Register (Art. 8(VII));
b) the invalidity of the trust does not affect third parties who in good faith have acquired rights for consideration from the trustee after the trust has been entered in the Register (Art. 10(V));
c) Only limitations on the trustee's powers resulting from the Register are effective (even before they are simply enforceable against third parties) (Art. 31(I)).

All these rules constitute a system designed to ensure the functioning of the Register of Turst and weave a web of rules that inextricably binds all aspects of the Trust Law through rules from which the trust deed cannot derogate.

These rules are intended to regulate not only the formal contents of the trust deed but also the activities of various private parties (trustee and resident agent, first and foremost) as well as public officials (notaries and Register office officials), concerning not only private activities but also the organization of public offices (the Register Office) and the provision of public services (those related to the operation of and access to the Register).

A large part of these rules are therefore of an obvious administrative nature and, therefore, attributable to public rather than private law.

Moreover, even the rules of the trust's registration regime that, prima facie, appear to be attributable to private law are, in reality, functionalized to protect general and super-individual interests rather than mere private interests.

In fact, the rules intended to ensure the legal certainty and validity of trust relationships, the truthfulness and updating of the information contained in the Register and those intended to regulate conflicts between private individuals are, in the final instance, aimed at achieving the general interest in the security of the economic transactions in which the trustee and the trust property are involved.

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The registration regime of the trust is, moreover, also intended to protect some pure public interests.

Entry in the Register not only ensures the 'preservation' of the deeds that, pursuant to Law No. 42 of 1 March 2010, must be entered therein, but also enables 'searches carried out or ordered by the Judicial Authority, the Financial Intelligence Agency and the Police Force performing judicial police functions' (Delegated Decree No. 50 of 16 March 2010, Art. 2, Section II).

Indeed, the purpose of preventing money laundering and fighting crimes conduct and the protection of national and international security is probably one of the most important public interests to the protection of which the current regulation of the Trust Register is directed.

With its 2008 report, the Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures and Financing of Terrorism (Moneyval) of the Council of Europe (acting as a regional body of the FATF) had, in fact, requested that the information contained in the Register of Trusts of the Republic of San Marino include the personal data of all the subjects who could be beneficial owners of the trust, as well as the revision of the system of access to the Register, in order to make its findings usable for the purposes of combating money laundering and terrorist financing[42] .

[42] European Committee on Crime Problems (Cdpc) - Committee Of Experts on the Evaluation of Anti-Money Laundering Measures And The Financing Of Terrorism (Moneyval), Third Round Detailed Assessment Report on San Marino, Combating money laundering and the financing of terrorism, 2008, § 5.2.2. "In the light of the foregoing, the evaluators believe that the San Marino authorities should take additional steps to ensure that legislation on trusts require additional information on the beneficial ownership and control of trusts and other legal arrangements. More specifically:

- A clear definition of beneficial ownership should be provided in the legislation, notably as to trusts' beneficiaries.

- It should be clearly stated in the legislation that information accessible in the Trust Register should include details on settlors, administrators, and trustees; this information should include details also on individuals owning or controlling legal persons acting as beneficiaries, settlors or trustees.

- The relation between the public nature of the Register of Trusts, accessible to anybody (under article 9.3 of the Trust law and article 4 of Decree No. 86/2005) and the confidentiality of registered information (article 3 of Decree No. 86/2005) should be clarified.

- The reference to reasons to request access to the Register made by article 4.3 of Decree No. 86/2005 should also be clarified'.

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In enacting the Trust Law, the legislature intended to comply with the recommendations of Moneyval, so much so that the Report on the Draft Trust Law (p.2) expressly clarifies that entry in the Register is provided for "the indispensable elements indicated by Moneyval for combating money laundering and terrorist financing".

By order (Prot. No. 4/10 GA/PI/10) of 5 July 2010, the administrative judge acting as the magistrate assigned at the time to the functions referred to in Article 5(II) of the Trust Law indicated that the Trust Register Office was authorised to issue certifications whenever data was required for the purpose of carrying out due diligence by persons subject to anti-money laundering obligations, 'without the need for further specific authorisation by the judicial authority'. It expressly clarified that the purpose of these indications was 'to allow the immediate and correct fulfilment of the requirements in force concerning the prevention and combating of money laundering and terrorist financing'.

The function of the Trust Register in preventing and combating money laundering and terrorist financing was subsequently expressly reconfirmed by the legislature, which intervened on further suggestions of Moneyval.

In its 2011 report, Moneyval noted the continuing shortcomings in the rules governing the Register of Trusts for the purposes of preventing money laundering and combating the financing of terrorism, and pointed out the existence of loopholes that made it impossible to ensure that the Register data were updated in the presence of a non-resident trustee, also emphasising the inadequacy of the sanctions provided for the delay in updating the data in the event of a change of trust[43] .

In light of this, with Title III of Decree-Law No. 98 of 25 July 2013, the legislator introduced amendments to the Trust Law in order to fill the gaps relating to the Register of Trust highlighted by Moneyval. As expressly clarified in the preamble of the Decree, such amendments are motivated by

[43] Report on the Forth Assessment Visit, 29 September 2011, no. 27.

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the "need to strengthen the integrity and soundness of the San Marino financial economic system and the international cooperation of the Republic of San Marino in the fight against money laundering and terrorist financing as well as in the protection of national and international security" and by the "urgency to give immediate enforceability to the rules useful for this purpose and to adapt the national legislation also in the light of the need for a rapid adjustment to the most recent international standards".

It is therefore clear that the legislator has attributed to the Trust Register not only the typical function of constructive notice but also those of preventing and combating money laundering and terrorist financing, in the domestic and international context.

In light of all this, it must be considered that the rules of the trust disclosure regime, taken as a whole, are primarily public law in nature and, with respect to those aspects that may be considered to be of private law, by rules that are not, if at all, of purely private interest.

So much so that the violation of the obligations laid down in the regulations is punished with a sanction of an administrative nature that testifies to the public nature of the latter (e.g., see Art. 7(2); Art. 8(8); Art. 13(4)).

On the other hand, this nature does not differ from that normally assumed by registration regimes in other civil law jurisdictions, including Italy[44] .

[44] G. Pugliatti, La pubblicità in generale, Milan, 1957, p. 218; G. Petrelli, Pubblicità legale e trascrizione immobiliare tra interessi privati e interessi pubblici, Rassegna di diritto civile, 2009, p. 689.

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§ 6 The Register of Trusts: instrument to ensure constructive notice.

From a purely private point of view, the Register of Trusts can be considered an instrument to ensure constructive notice.

In the Republic of San Marino, the Register of Trusts was introduced by Law no. 37 of 17 March 2005.

Article 9(I) of this law expressly provided that 'the Register of Trusts is public'.

Decree No. 86 of 10 June 2005 then clarified that "consultation of the Register of Trusts is permitted to anyone and consists of the right to examine the contents of the Register of Trusts and to request certifications of its findings". Consultation was, however, excluded for information the disclosure of which could 'jeopardise national security, the exercise of national sovereignty, the continuity and correctness of international relations, the protection of public order and the repression and prevention of crime' (Art. 4, paragraph 7, Decree 10 June 2005 no. 86).

Access to the public Register was subject to a "request [that] must in any event contain the details of the trust that is the subject of the request, or the elements that enable its identification, with an indication of the purposes justifying the request" (Art. 4, paragraph II, Law 37 of 17 March 2005).

The Register was kept by the Register Office of Trust under the supervision of a judge delegated by the Chief Justice and it was up to the Register Office to assess the interest in consultation in the light of the request filed and had the option to deny it if there were grounds for doing so.

Persons who were denied authorisation by the Register Office were entitled to apply to the courts (Article 9, Delegated Decree No. 86 of 10 June 2005).

The judge, therefore, only verified the concrete interest in consultation and the balancing of this interest with that of confidentiality if the Register Office denied access.

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Law No. 37 of 17 March 2005 contained few rules on the Trust Register and the registration regime, as the regulation of all these aspects was mainly contained in Delegated Decree No. 86 of 10 June 2005.

Among the many rules contained in this decree there was one (art. 8) which, in general terms, provided that 'the registration of the extract of the deed of trust in the Register of Trusts has declaratory effect' (para. I).

Article 8 also provided for specific rules, stating that:

(a) the elements of which the law requires registration in the Register of Trusts, if they have not been enter in the Register, cannot be opposed to third parties unless it is proved that the third parties had actual knowledge thereof (para II);

(b) ignorance of the elements of which registration in the Register of Trusts is required by law cannot be opposed by third parties from the time of registration (para. III);

(c) limitations on the trustee's powers provided for in the trust deed are enforceable against third parties provided they have been entered in the Register of Trusts (para. IV);

(d) the non-deletion of the trust is not enforceable against third parties unless they knew of the reason for the trust's cancellation (para. V).

The Register was thus conceived as an instrument for implementing and ensuring constructive notice.

The Trust Law replaces and innovates several rules contained in Law No. 37 of 17 March 2005, but retains its fundamental pillars.

One of the elements of continuity is the Register of Trusts, although its discipline receives some innovation.

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The nature of the registration effected by the registration of the trust in the Register as well as the effects of the registration of the trust on private law relationships have not substantially changed, although their location has changed.

Today, Trust Law directly incorporates the rules stating that:

a) the emergence of a cause for cancellation is not enforceable against bona fide third parties as long as it is not entered in the Register (Art. 8(VII));
b) the invalidity of the trust does not affect third parties who in good faith have acquired rights for consideration from the trustee after the trust has been entered in the Register (Art. 10(V));
c) only limitations on the trustee's powers resulting from the Register of Trusts are effective (even before they are simply enforceable against third parties) (Art. 31(I)).

On the other hand, the procedure for accessing and consulting the Register is partially modified.

Pursuant to art. 8, paragraph II and art. 5 of Delegated Decree, 16 March 2010 no. 50, the Register Office of Trusts issues certifications of the Register entries to the trustee who so requests and to parties other than the trustee, if authorised by the Judicial Authority by reason of their concrete interest in consulting it.

By order (Prot. No. 4/10 GA/PI/10) of 5 July 2010, the administrative judge, as the magistrate who was originally assigned the functions referred to in Article 5(II) of the Trust Law, confirmed the public nature of the Register of Trusts, confirming that it is consultable by the public but specifying that for "parties other than the Trustee, the existence of a proven legitimate interest on the part of the applicant is required".

This measure also acknowledged that:

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- the new regulations - unlike what was previously provided for - did not intend to attribute supervisory functions to the Judicial Authority in relation to the keeping of the Register of Trusts, assigning to it only authorising powers in relation to the issuance of certifications of the results of the Register of Trusts to parties other than the Trustee ("Notwithstanding the preceding paragraph, certifications shall be issued to parties other than the Trustee if authorised by the Judicial Authority" - Article 5, paragraph 2, of the Delegated Decree 16 March 2010 No. 50);
- therefore, Article 5 of the above-mentioned Delegated Decree attributes the ultimate and exclusive competence to issue certificates of the Register's findings to the Trust Register Office;
- in the context of such proceedings, the intervention of the Judicial Authority is presented as a possible phase of the proceedings with endoprocedural character, devoid of autonomous external relevance;
- proof of this is to be found in Article 8 of Delegated Decree No. 50 of 16 March 2010, which allows recourse to the Judicial Authority exclusively "against the orders adopted by the Trust Register Office".

He then concluded, inter alia, that:

- "the Trust Register Office may issue certifications to parties other than the Trustee only after having obtained specific authorisation from the Judicial Authority, which may be issued following a specific request by the same Office. The burden of forwarding the request for authorisation to the Judicial Authority falls, therefore, on the Registrer Office of Trusts as the only entity in the material possession of the Register itself and ultimately responsible for the indicated procedure. Consequently, it will be up to the Trust Register Office to inform the applicant of the outcome of the certification request. Against such orders, issued by the Office in accordance with the decision of the Judicial Authority, the applicant shall in any case be

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given the possibility to apply pursuant to the aforementioned Article 8 of Delegated Decree no. 50/2010".

Thus, the Trust Law simply transformed the role of the Judicial Authority in the procedure for assessing the concrete legitimate interest in access to the Register, which has changed from a judicial scrutiny subsequent to the possible refusal by the registrar to an administrative scrutiny carried out as an endo-procedural phase, deprived of autonomous external relevance and activated upon the necessary application of the Register Office.

The Register of Trusts thus maintains its function as an instrument to ensure constructive notice, accessible to third parties with a concrete interest in consulting it and capable of generating a presumption of knowledge of the data and elements entered in it on the part of third parties.

§ 7 The subject matter of registration in the Register of Trusts: legal relations.

In order to better determine the perimeter of registration, it is useful to clarify its subject matter.

The trust deed cannot be said to the subject matter of registration.

In fact, Art. 7 of the Trust Law provides that, for registration purposes, a certificate must be prepared by the Trustee or the Resident Agent, with data extracted from the deed of trust.

The certificate and not the trust deed is filled with the Register of Trusts (Art. 8, Trust Law).

The trust deed, therefore, is not accessible through consultation of the Register and the registration cannot therefore be said to relate to such a deed.

What is cognizable are only the elements indicated by the Certificate, some of which may appear to belong to the sphere of the deed of trust, but in truth most of which belong to the sphere of the effects of the latter and, therefore, of the legal relations of trust.

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In fact, most of the elements contained in the Certificate are pertinent precisely to the trust relations and are not simply elements of the trust deed in its formal and static form.

For example, the following are elements relevant to the legal relationships (which of the trust deed are the effect): the name of the trustee and any limitations on his powers; the name of the protector, if any, and the nature of his powers; the name of the beneficiaries with fixed rights over the trust fund, if any, or, where the trust deed so provides, the name of the beneficiaries and their entitlements; the duration of the trust; the governing law.

In particular, the powers of the trustee, the protector and the entitlements of the beneficiaries are fundamental elements of the legal relations of trusts and are characteristic of the individual trust relation, as is the identification of the persons between whom such a relation is established.

This confirm that the object of constructive notice is the legal relations constituting the effect of the trust deed and not the deed itself.

In other words, although the Certificate may appear to be the immediate object of the registration, the mediated object of the registration is the legal relations that are the effect of the trust deed.

This is, on the other hand, characteristic of registration systems in other civil law systems[45] .

[45] S. Pugliatti, La Trascrizione, La pubblicità in Generale, 1957, p. 396 "It can be said that registration has as its immediate object the fact or deed and as its mediate object the legal situation that derives from it, whether that situation takes the form of the birth or extinction or changes in the status, capacity or conditions of the subjects; whether it takes the form of the acquisition, modification or extinction of rights or other subjective powers, or whether it takes the form of any legal change"; F. Gazzoni, La Trascrizione degli Atti e Sentenze, Torino, 2012, vol. 1, p. 67 "In practice, one can also refer to the transcription of deeds, provided that it is clear that in reality the transcription of deeds is not a legal situation, but a legal situation that is not a legal one". Gazzoni, La Trascrizione degli Atti e delle Sentenze, Turin, 2012, vol. 1, p. 67 "One can, in practice, also refer to the transcription of deeds, as long as it is clear that in reality what is subject to transcription is always and only the effects".

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The preservation of the Certificate has only the purpose of certifying that a change in reality has taken place, a function that is therefore evidentiary and functional to the protection of the public interests of access to that document.

Since the registration in the Register of Trusts is required not only for trusts whose applicable law is that of the Republic of San Marino but also for trusts whose applicable law is a law on trusts of a foreign State but administered in the Republic of San Marino (Art. 1(p); Art. 56, paragraph II, Law on Trusts), it is clear that the object of the registration in the Register of Trusts shall be those legal relationships of trusts which are governed, as in the present case, by the law of San Marino or by foreign law, where the administration activities are carried out in San Marino.

§ 8 The dépeçage of the governing law introduced by the Trust C Deed of Amendment: the precedence of Article 16 over Article 9 of the Hague Convention.

By reason of the public and general interests protected as well as the nature of its public law rules, the system of rules on the Register of Trusts belongs to the category of mandatory rules whose regulation is imposed irrespective of the effects of the rules of private international law, i.e. among the rules of necessary application ('*lois de police*') precisely because it is dedicated to the protection of fundamental interests of a public and general nature.

Article 16 regulates the relationship of the Hague Convention with these rules.

This rule provides that the "Convention does not affect the provisions of the law of the forum that must also be applied to international situations independently of the law designated by the conflict of laws rules".

The provisions of the Hague Convention cannot therefore be used to evade the registration provisions of trusts in the Republic, since the latter consists precisely of rules of necessary application, aimed at the protection of public interests.

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Thus, in the present case, the provisions of Article 9 of the Hague Convention cannot be used to evade the duty to register in the Register of Trusts.

A comparison with other legal systems supports this conclusion.

The rules on the registration of trusts are also considered to be rules of necessary application in other jurisdictions, which expressly exclude that the dépeçage of the governing law, even where permissible under private international law, may be used to evade the obligations to register a trust.

For example, in Antigua and Barbuda, it is expressly provided that the obligation to register a trust exists and remains whenever local law also regulates 'any part of its administration'[46] .

Similarly, in the Nevis Law it is expressly provided that the obligation to register exists and remains whenever the "law governing all or some aspect of the trust" is local law[47] .

Thus, in these jurisdictions, it is expressly recognised that the use of the dépeçage allowed by the rules of private international law may not become a means of circumventing the rules about registration of the Trust and, therefore, it is recognised that the rules about the Registry are “lois de police” or rules of necessary application and that the rules of private international law may not be used to disapply them.

It follows that, by reason of Article 16 of the Hague Convention, the provisions of Article 9 of that Convention, even if they were applicable, cannot be used to evade the duties relating to the Register of Trusts.

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[46] THE INTERNATIONAL TRUST ACT, 2007 No. 18 of 2007, art. 17(3) 'An international trust that specifies the laws of Antigua and Barbuda *for any part of its administration* shall be registered on the Register of International Trusts'.

[47] THE NEVIS INTERNATIONAL EXEMPT TRUST ORDINANCE 1994, art. 37 (2) "2) Where a trust provides for the law of Nevis to be the governing law of all or any aspects of that trust an application for entry on the register as an international trust shall be made to the registrar [...]".

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In the present case, this allow to exclude that the Trust C Deed of Amendment, by invoking Article 9 of the Convention and by employing the depeçage for the declared purpose of escaping trust relations governed by San Marino law from registration in the Trust Registry, could reach its purpose.

§ 9 Final provisions.

WHEREAS:

- there is San Marino jurisdiction, since the law applicable to the legal relations of the Trust C was, and remains also after the Trust C Deed of Amendment, the law of San Marino and therefore the law applicable to the trust must be considered, pursuant to Article 5, paragraph I, of the Trust Law, the law of San Marino;
- even in the absence of a party's request, it is acknowledged that the Court would in any event not be obliged to refer the matter to arbitrators pursuant to Article 2, Paragraph III of the New York Convention despite the provision in favour of arbitration introduced by the Trust C Deed of Amendment because activities and orders issued in the context of supervisory jurisdiction are not arbitrable and, in any event, no arbitration agreement signed by the parties or concluded in writing pursuant to Article 2, Paragraph I of the New York Convention has been formed;
- moreover, there appears to be no derogation from San Marino jurisdiction in favour of foreign courts for the matters at issue in this proceeding, inasmuch as the only derogation in favour of foreign courts introduced by the Trust C Deed of Amendment appears to be that in favour of the Court of Milan and exclusively with regard to the orders appointing trustees and protectors;
- the registration regime for trusts pursues not only private interests but also overriding public and general interests, including, inter alia, the prevention and combating of terrorism and money laundering and affect legal relations of trust governed by San Marino law or, if governed by foreign law, administered in San Marino;

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- for this reason, that regime consists of rules of necessary application that cannot be disapplied by reason of the Hague Convention, not even by invoking Article 9 of that Convention, since this is not permitted by Article 16 of that Convention;
- notwithstanding the provision of the Trust C Deed of Amendment introducing depeçage, legal relations of the Trust C are still governed by San Marino law and therefore the Trust C should be registered in the Register of Trust.

That being said, the Chief Justice

ACKNOWLEDGES

- that, having received notice of the resignation of the Resident Agent appointed at the time of the institution, the Trustee should have appointed a new resident agent and did not do so;
- the assessment of this omission for the purpose of imposing the penalties provided for by the Trust Law is a matter for the Trust Register Office;
- however, it seems appropriate to appoint an independent resident agent to ensure that the trust is registered in the Register of Trust, with the necessary cooperation of the trustee, who will have to take all necessary steps to regularise the application in a timely manner;
- once the registration formalities have been completed, the Trustee, if he so wishes, may still exercise his powers to amend the trust's governing law, but only by amending it in its entirety and choosing a governing law other than the San Marino law;
- this may only be done a) in the sole interest of the beneficiaries; b) after obtaining an opinion from an independent advisor to prove this; and c) after removing any conflict of interest possibly related to the matter in question; d) or, alternatively, after obtaining authorisation to carry out the change from the Judicial Authority pursuant to Article 53 of the Trust Law;

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- only then can the resident agent contact the Register Office of Trust to cancel the trust and the office will follow up on it;

and therefore the Chief Justice

DECREES

- that the Trustee, pursuant to Article 53(II)(a) of the Trust Act, shall carry out all the necessary steps for the registration of the Trust with the Trust Register Office;
- the appointment, pursuant to Article 53, paragraph II, letter c) of the Law on Trust, of Mr. L, lawyer, with office in […] as independent resident agent for the fulfilment of the aforesaid mandatory trust registration ;
- that the appointed Resident Agent shall agree with the Trustee on its remuneration but, in the event that such agreement cannot be reached within 30 days from the service of this Decree on the Resident Agent, it shall be fixed by an appropriate Decree in these proceedings provided that an application is made within 15 days from the expiry of the aforesaid 30 days period; failing such application within the aforesaid period, it shall be necessary to file an independent application for the adoption of a Decree on the determination of the Resident Agent's remuneration;
- that the Resident Agent, once he has acquired the deed in its entirety, assesses the presence of causes of invalidity and, if any are present, proceeds in accordance with the law (Article 8, Paragraph VI (c) of the Trust Law);
- however, pursuant to Article 10, Paragraph II of the Trust Law, the invalidity may be cured when its cause has been removed;
- that pursuant to Article 53(9) of the Trust Law, according to which: "The court shall decide on the costs of the court proceedings. In the cases provided for in subsection 2 above, all the costs of the court proceedings shall be borne by the trust or the trustee, according to the decisions made by the court", all the costs of the present proceedings shall be borne by the

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Trustee personally, without the possibility of recourse to the trust fund, since it does not appear from the case file that the Trust C Deed of Amendment:

(i) was entered into in good faith in the interest of the Beneficiaries, and

(ii) with due professional diligence with respect to the assessment of the validity and effectiveness of the amendment of the law governing the trust, and the interpretation of the law with respect to the continuing registration requirements.

Given that these elements may not appear in the records of the Courts because the Trustee decided not to participate in the proceedings and did not filled documents or elements of proof on the matter, but that there may nevertheless be these elements, the allocation of costs to the Trustee may always be modified by a subsequent Decree, if the Trustee files an application by attaching the appropriate evidence.

- that the expenses charged to the Trustee personally are:

(a) the judge's remuneration in the amount of EUR 3,000.00, as established by Decree of this Court of 16 May 2022,

(b) the fees and legal expenses of the Applicant and the Special Curator, which shall be determined by a separate Decree following the filing by the latters in the present proceedings and within 15 days from the service of this Decree, of the relevant notes including fees and expenses.

- that this Decree will not be accessible to the public in its entirety and that no copies other than those notified, not even to the Parties, will be issued without the authorisation of the Chif Justice;

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- that a copy of it, devoid of the names of the Parties and other persons involved in the case, as well as of other elements that may lead to the identification of the Parties or the specific subject matter of the case, is deposited at the Registry of the Court and is accessible to the Parties and third parties, who may take copy of it.

The President, reserving further decrees for fees with reference to (b),

ORDERS

- to the Trustee to pay to the Registry of the Court the sums of EUR 3,000.00 as the judge's fee, as set forth in the Decree of 16 May 2022**.**

COMMANDS

To the Registry of the Court to order service:

- in telematic mode to the Applicant, the M, and to the Special Curator, Avv. E;

- at the registered office of the Trustee, N.;

- at his residence to the Protector, Mr O, to the Beneficiaries, Messrs H and I, and at his office as indicated above to the Resident Agent, Mr L,

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CORTE PER IL TRUST E I RAPPORTI FIDUCIARI

Chief Justice for the Court for Trusts and Fiduciary Relations

Andrea Vicari