Divergences and Convergences of Common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis

Giacomo Rojas Elgueta *

Abstract

The purpose of this study is to bring some insights from the civil law tradition to the corporate debate on asset partitioning, which has developed over the last decade in the common law literature. In comparative law study, the possibility that the common law legal system could benefit from solutions developed under the civil law tradition with respect to the partitioning of assets has been essentially overlooked. Therefore, the purpose of this research is to create a two-way dialogue between the common law and civil law traditions regarding this particular area of law, and to reveal efficient solutions developed in continental Europe. Asset partitioning can be defined either as the segregation of an owner’s assets from a firm’s creditors, or the segregation of an organization’s assets from its owners’ personal creditors. The latter aspect, in particular, has been emphasized by H. Hansmann and R. Kraakman, who suggest that an organization is truly characterized by such a protection of its assets. The comparative analysis of these various partitioning devices is being conducted in order to help understand the economics of achieving affirmative asset partitioning through the creation of a new legal entity, as opposed to doing so through a property law which grants asset separateness within the boundaries of the same entity. The tentative thesis of this study is that in the former system (common law), there is a sharp trade-off between the costs avoided due to asset partitioning (e.g. lower monitoring costs for specialized creditors), and the benefits lost by not having legal integration take place within a single entity (e.g. information economies of scale). In contrast, the asset separateness doctrine of the civil law tradition, by allowing a legal subject to partition these assets not only outside but also within the boundaries of the same legal subject, successfully overcomes this trade-off.
Introduction

The purpose of this study is to bring some insights from the civil law tradition to the corporate debate on asset partitioning, which has developed over the last decade in the common law literature. Exposing common law scholars to legal solutions that are rooted in civil law systems has the potential to transform the traditional approach taken by comparative civil law scholars in this field. In fact, it is a well-known fact that civil law scholars have produced an extensive body of literature on the feasibility of transplanting one of the most successful products of equity – trust law – to the civil law tradition. In comparative law study, the possibility that the common law legal system could benefit from solutions developed under the civil law tradition with respect to the partitioning of assets has been essentially overlooked.

Therefore, the purpose of this research is to create a two-way dialogue between the common law and civil law traditions regarding this particular area of law, and to reveal efficient solutions developed in continental Europe.

Asset partitioning can be defined either as the segregation of an owner’s assets from a firm’s creditors, or the segregation of an organization’s assets from its owners’ personal creditors. The latter aspect, in particular, has been emphasized by H. Hansmann and R. Kraakman, who suggest that an organization is truly characterized by such a protection of its assets. These authors have noticed that this legal effect cannot be effectively achieved by contract alone, and that a special rule of law is necessary in order to exclude claims by owners’ personal creditors on a firm’s assets without those creditors’ consent.

This study aims to identify, from a functional perspective, the costs and benefits of different legal substitutes used to partition assets. The comparative analysis of these various partitioning devices is being conducted in order to help understand the economics of achieving affirmative asset
partitioning through the creation of a new legal entity, as opposed to doing so through a property law which grants asset separateness within the boundaries of the same entity.

While American legal scholars conceive asset partitioning exclusively through the formation of a new legal entity, the civil law tradition allows this legal effect to be achieved within the boundaries of the same legal subject, thereby avoiding the creation of multiple legal entities.

The tentative thesis of this study is that in the former system (common law), there is a sharp trade-off between the costs avoided due to asset partitioning (e.g. lower monitoring costs for specialized creditors), and the benefits lost by not having legal integration take place within a single entity (e.g. information economies of scale). In contrast, the asset separateness doctrine of the civil law tradition, by allowing a legal subject to partition these assets not only outside but also within the boundaries of the same legal subject, successfully overcomes this trade-off.

The analysis is organized as follows. Part I provides a description of the current debate on asset partitioning in the U.S. Part II describes the doctrine of “asset separateness” rooted in the civil law tradition. Part III provides the historical evolution of asset partitioning in civil and common law traditions. Part IV examines the costs and benefits of civil and common law regulations on asset partitioning, with regard to different business transactions (including asset securitization and the organization of a mutual fund). Part V offers concluding remarks describing how financial transactions are the driving power behind the current convergence between civil and common law traditions on asset partitioning.

I. The Corporate Theory Debate on Asset Partitioning in the U.S.
In 2000, H. Hansmann and R. Kraakman published an essay entitled “The Essential Role of Organizational Law” in the Yale Law Journal. Since then, a lively doctrinal debate has developed over the notion of asset partitioning and its attributes.¹

The fundamental question posed by these two authors is: what is the essential role played by organizational law in modern society?

The answer that they offer diverges from the traditional position, which singled out limited liability as the defining characteristic of several business organizations.² Instead, according to Hansmann and Kraakman, what truly characterizes an organization is precisely the reverse of limited liability: assigning to the organization’s creditors a pool of assets which is shielded from the claims of the creditors of that entity’s owners and managers.³

More specifically, asset partitioning is described as a phenomenon characterized by two symmetrical sides. The first side, which these authors label as “defensive asset partitioning” or


³ Hansmann & Kraakman, supra note 1, at 394.
“owner shielding”, is the most traditional and well-explored. By these terms they mean the protection of the personal assets of a firm’s owners from the firm’s creditors: what traditionally is called limited liability\(^4\). The second side, “affirmative asset partitioning” or “entity shielding”, represents the reverse of defensive asset partitioning, where the terms refer to the protection of a firm’s assets from the claims of personal creditors of its owners and managers.

The law governing business corporations is one of the clearest examples of affirmative asset partitioning. Through incorporation, an individual is able to commit a pool of assets to a specific business and specified group of creditors. The assets, in coming under the ownership of the corporation, achieve the desired goal of partitioning them from the personal creditors of its owners. The same mechanism could be chosen by a company that wishes to separate the creditors along two distinct lines of business. Creating two distinct subsidiary corporations allows a single parent company to partition the assets in separate pools, each one committed to a specified group of creditors.

Until Hansmann and Kraakman’s article, the affirmative side of asset partitioning had been traditionally overlooked by the corporate literature. Subsequently, several corporate studies have focused more closely on this characteristic, pointing to it as the key peculiarity of legal personality. Using various terminologies (e.g. “forward partitioning”\(^5\), “capital lock-in”\(^6\), “asset separation from

\(^4\) Id. at 393-394, 423; Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and Rise of the Firm*, 119 HAR. L. REV. 1135, 1339 (2006) where they now label as “owner shielding” the phenomenon that, in their previous work, was labeled “defensive asset partitioning”.

\(^5\) Mahoney, *supra* note 1, at 876-877, uses “forward partitioning” to designate the reverse of limited liability which is, in turn, referred to as “reverse partitioning”.

5
shareholders”\textsuperscript{7}, “resource commitment”\textsuperscript{8}), corporate scholars have agreed with Hansmann and Kraakman that the essential – if traditionally overlooked – contribution of business organization law is to permanently commit owners’ contributions to a firm, so that those assets cannot be suddenly withdrawn from the firm by either the owners’ creditors or the owners themselves.

One of the merits of Hansmann and Kraakman’s article is not simply to have shifted the attention of corporate scholars to this less-explored, affirmative side of asset partitioning, but also to have prompted a reconsideration of the common notion of a firm as a mere “nexus of contracts”, and of corporate law, however specialized, as a mere branch of contract law.

In the Seventies, the economic model which recognized a firm as nothing more than a complex set of contracts began to be the dominant approach, thanks to the contributions of Alchian and Demsetz\textsuperscript{9} and, a few years later, Jensen and Meckling\textsuperscript{10}. If a firm is nothing more than the sum of

\textsuperscript{6} Blair, supra note 1, at 387, where the ability to commit capital to a specific investment, with no possibility for shareholders and their creditors to extract assets from the firm, is referred to as “capital lock-in”. The same terminology has been used by Stout, supra note 1, at 254.

\textsuperscript{7} WILLIAM A. KLEIN & JOHN C. COFFEE, BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 108 (9\textsuperscript{th} ed. 2004).

\textsuperscript{8} Blair, supra note 1, at 392, where, in order to explain her terminology, she points out that “perhaps as important as protecting the assets of the enterprise from participants’ creditors […] was the role played in establishing a pool of assets that was not subject to being liquidated or dissolved by any of the individual participants who might want to recover their investment”.

\textsuperscript{9} Armen A. Alchian & Harlod Demsetz, Production, Information Costs and Economic Organization, 62 AM. ECON. REV. 777 (1972).

contracts binding different stakeholders (e.g. shareholders, officers, directors, debtholders, employees and suppliers), corporate law risks becoming trivialized, since it would only serve to introduce a set of default standards for business organizations that could also be introduced, at a higher cost, by commercial actors\(^{11}\).

Hansmann and Kraakman show in their essay that the contractarian theory of corporate law is not in itself sufficient to explain the role played by organizational law. They observe that in the universe of business organizations, there are effects which cannot be practically established by contract alone, and in particular, “affirmative asset partitioning”\(^{12}\).

Without a special rule of law to limit the rights of owners’ personal creditors over firms’ assets, it would be necessary for each owner of a firm to negotiate a waiver with these creditors regarding the seizing of the firm’s assets, or an agreement subordinating their claim to those of the firm’s creditors. It is evident that such affirmative asset partitioning through the use of contracts would not only impose prohibitively high transaction costs (since each owner would have to convince all of his individual creditors to accept this waiver), but also create obvious moral hazards and, consequently, excessive monitoring costs. Each waiver, in fact, by improving the position of a firm’s creditors, creates a collective benefit for all of its owners by reducing the cost of credit. But,

---


\(^{12}\) Hansmann & Kraakman, *supra* note 1, at 406; Hansmann, Kraakman & Squire, *supra* note 4, at 1340-1341.
at the same time, such a waiver increases the personal cost of credit to individual owners. As a consequence, each owner has a clear incentive to act as a free rider, and omit the waiver from his personal contracts. This opportunistic behavior, which improves the position of the free rider’s personal creditors to the detriment of the firm’s creditors, effectively reduces the free rider’s personal borrowing costs while imposing an increase in the firm’s borrowing costs to the rest of the owners. The possibility for such opportunistic activity, which would increase with the number of owners, thus leads to excessive monitoring costs that render a successful partitioning practically impossible without a special rule of law.\(^\text{13}\)

Under corporate law - or more generally, organizational law - excluding claims of personal creditors over a firm’s assets without their consent allows owners to create an affirmative asset partitioning, without incurring the transaction and monitoring costs highlighted above, simply by using a property law – a rule that is “good against the world”\(^\text{14}\). This rule of law, which according to Hansmann and Kraakman is the essential contribution of organizational law, challenges the

\(^{13}\) Hansmann & Kraakman, supra note 1, at 406-411; Hansmann, Kraakman & Squire, supra note 4, at 1340-1341.

\(^{14}\) Henry Hansmann & Ugo Mattei, Trust Law in the United States. A Basic Study of its Special Contribution, 46 AM. J. COMP. L. 133, 134 (1998) reach the conclusion that the contribution offered by the law of trusts is “that it facilitates the partitioning of assets into bundles that can conveniently be pledged separately to different classes of creditors”. These authors believe that the classic literature focusing on fiduciary duties as the main characteristic of trust law overlooks the point that these aspects could be achieved even without a special property rule, by simply using the basic tools of contract and agency law (for the contractarian approach see John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 YALE L. J. 625 (1995); Robert H. Sitkoff, An Agency Costs Theory of Trust Law, 69 CORNELL L. REV. 621 627 (2004) who advance the claim that trust law blends features that are familiar from both property and contract law).
perspective that views corporate law as a mere branch of contract law, recovering a proprietary foundation for it.\footnote{According to Hansmann & Kraakman, supra note 1, at 422, “[…] both organizational law and the law of security interests are at bottom, in important part, forms of property law: They define the types of property interests that can be created and made binding against third parties”. The fact that legal partitioning can be realized only by way of a property law and that, consequently, a corporation is more than a nexus of contracts has been emphasized, since the work of Hansmann and Kraakman, by Iacobucci & Triantis, supra note 1, at 569; Blair, supra note 1, at 407; Armour & Whincop, supra note 1, at 431. This position, while recognizing the role of corporate law as a tool to provide a set of standard organizational forms (contractarian perspective), recovers and emphasizes a more “Coasean” idea of the firm which is viewed as an instrument to eliminate market transactions (see Ronald H. Coase, The Nature of the Firm, 4 Economica 386, 388 (1937); Oliver E. Williamson, The Economic Institutions of Capitalism (1985); Oliver Hart, Firms, Contracts and Financial Structure (1995)).}

Hansmann and Kraakman’s analysis has two essential merits to be stressed: a) it recognizes the affirmative side of asset partitioning as the core defining characteristic of an organization; and, b) it labels this attribute as one of property, made possible only by a special rule of law.

From these two main ideas, a functional analysis of the benefits and costs of asset partitioning has followed in the corporate theory literature.\footnote{Hansmann & Kraakman, supra note 1, at 398-405 and 423-427; Hansmann, Kraakman & Squire, supra note 4, at 1343-1354. More recently see Iacobucci & Triantis, supra note 1, at 515.}

This research aims to bring a comparative perspective to the analysis developed up to this point in the U.S. legal literature and, in particular, the European civil law tradition, with respect to asset partitioning. Bringing the latter into the current debate not only serves to broaden the more limited American version of the doctrine, but on a more pragmatic level, points to the revision of conclusions reached by American scholars in their functional analysis of this legal phenomenon.
II. Enhancing the U.S. Debate on Asset Partitioning in Light of the Civil Law Tradition

In the civil law tradition, affirmative asset partitioning captured the attention of legal scholars in the late nineteenth and early twentieth century when the notion of juridical person was fully distinguished from that of asset separateness (also termed asset autonomy). At this stage in the civil law system it became clear that in order to create an affirmative asset partitioning, it would not be necessary to form a new legal entity or juridical person. Legal scholars began to acknowledge the possibility that a legal subject (either a natural person or a legal entity), based on a fixed number of property laws (what, in the civil law tradition, is labeled *numerus clausus*), could be the owner of multiple, separate pools of assets, each committed to a different purpose and pledged to a specified group of creditors (asset separateness doctrine)\(^{17}\).

The possibility of a legal subject as the owner of multiple funds or patrimonies committed to different groups of creditors, without necessarily forming a new legal entity, is, in a nutshell, what distinguishes the asset separateness doctrine of civil law countries from the affirmative asset partitioning doctrine developed in the U.S.

It is also interesting to note that even though the juridical person doctrine has been much less influential in the U.S. than in Europe, American legal scholars nevertheless seem unwilling to conceive of an asset partitioning effect without the formation of a new legal entity.

\(^{17}\) In Germany, this phenomenon is well-known as *Zweckvermögenstheorie* and was first assumed by ALOIS BRINZ, *LEHRBUCH DES PANDEKtenRECHT* (2d ed. 1873) and ERNST IMMANUEL BEKKER, *SYSTEM DES HEUTIGEN PANDEKtenRECHT* (1886). In Italy, the contribution of FRANCESCO FERRARA SR., *TRATTATO DI DIRITTO CIVILE ITALIANO* (1921) is fundamental.
According to Hansmann and Kraakman, a firm has two fundamental attributes: 1) a well-defined decisionmaking authority and 2) the ability to bond its contracts with an existing pool of assets.

Since a natural person has both these attributes, it can be defined as a firm. Since a natural person is liable for its contracts involving all of its assets (personal liability), in order to insulate these assets from his personal creditors and pledge them to a specified group, it is necessary to employ a separate legal person. Accordingly, since a debt is a firm-wide obligation, if a firm wishes to separate its assets from the personal assets of its owners and managers, and commit them to a specific business purpose, it is necessary to create a juridical person (also called legal entity). Hence, if a firm wishes to separate its assets from the personal assets of its owners and managers, and commit them to a specific business purpose, it is necessary to create a juridical person (also called legal entity).

The basic premise is that each individual or juridical person represents a distinct pool of assets, which is considered a legal entity. Since the “firm’s boundaries define the set of assets that are subject to the personal obligation of the firm to pay its debts”, if the individual or juridical person (e.g. a corporation) wishes to shield some of its assets from personal creditors and pledge them to a specified group of creditors, it is necessary to create a new legal subject, thereby multiplying the number of legal entities employed.

---

18 Iacobucci & Triantis, supra note 1, at 529.

19 Hansmann & Kraakman, supra note 1, at 393 and at 416. What they maintain with regard to affirmative asset partitioning created by a trust is a further example of this approach: “the law of trusts makes the trustee, vis-à-vis creditors with whom he contracts two distinct legal persons: a natural person contracting on behalf of himself, and an artificial person acting on behalf of the beneficiaries. […] While it is sometimes said that the common-law trusts lacks legal personality, in our view it is, on the contrary, quite clearly a legal entity, and trust law is consequently a form of organizational law”.

20 Iacobucci & Triantis, supra note 1, at 525.

21 Hansmann, Kraakman & Squire, supra note 4, at 1337.
In other words, according to this view, it is not possible to conceive of a juridical person or an individual owning more than one pool of assets without employing some kind of organizational form, since each separate pool is itself a distinct legal entity\textsuperscript{22}. As a consequence, given that legal entities incur debt on a firm-by-firm basis by pledging all their assets to bond their contracts, affirmative asset partitioning is conceivable only outside the boundaries of the same firm by partitioning assets among multiple legal entities\textsuperscript{23}.

This is not the lesson learned from the civil law tradition where, as this research will explain, it is possible to achieve affirmative asset partitioning – or, to use a terminology closer to civil law, asset separateness – within the boundaries of the same legal entity.

The use of trust law certainly represents a boundary between common law and civil law traditions surrounding affirmative asset partitioning, and explains the divergence in the evolution of this doctrine. It is evident that the existence of the trust device facilitated acceptance of the assets partitioning principle by the common law tradition. In civil law countries, on the other hand, this involved a complicated doctrinal debate that added to the notion of partitioning the idea of the same patrimony for multiple and separate pools of assets. Intuitively, it is easier to conceive of asset partitioning when this is achieved through transfer of assets to a different entity (e.g. the trust), than when accomplished within the same patrimony.

\textsuperscript{22} Accordingly, an individual can be considered the owner of distinct pools of assets when he owns shares (and not the assets) of distinct legal entities, but cannot segregate his own patrimony in different pools of assets without creating new legal entities.

\textsuperscript{23} Iacobucci & Triantis, \textit{supra} note 1, at 525.
Also, in civil law countries, the default rule governing the relations between debtor and creditors is that all of a person's property (his or her entire patrimony) is available for seizure and sale to satisfy the claims of judgment creditors (so-called “universal patrimonial liability”).

This principle was first introduced in modern codifications by Article 2092 of the French Code Napoléon, and can be found nowadays in many civil codes such as the Italian Civil Code and the Civil Code of Québec.

This principle resembles the concept of the firm-wide character of debt examined with regard to the American debate on asset partitioning: all of the debtor’s property represents the common pledge of creditors. Nonetheless, in civil law countries, in addition to the principle of “universal patrimonial liability” the law expressly provides that, in a numerus clausus of circumstances, a legal subject is allowed to make a division or partitioning of his patrimony. As an illustration, Article 2645

---

24 Hansmann, Kraakman & Squire, supra note 4, at 1337, describe exactly the same principle: “When an individual enters into a contract, modern law in effect inserts a default term by which the individual pledges all his personal property to bond his performance”. The same is true for an entrepreneur: “The default rules of property and contract law in effect provide that, absent contractual agreement to the contrary, each of the entrepreneur's creditors has an equal-priority floating lien upon the entrepreneur's entire pool of assets as a guarantee of performance. That is, the creditors each have a shared property right of sorts in the entrepreneur's assets--a contingent claim on the assets that can be exercised in case of the entrepreneur's nonperformance” (Hansmann & Kraakman, supra note 1, at 407).

25 Article 2092 Code Napoléon: “Quiconque s'est obligé personnellement, est tenu de remplir son engagement sur tous ses biens mobiliers et immobiliers, présents et à venir”.

26 Article 2740 Italian Civil Code: “The debtor is responsible for his obligations with all his present and future assets”.

27 Article 2644 Civil Code of Québec: “The property of a debtor is charged with the performance of his obligations and is the common pledge of creditors”, and Article 2645 Civil Code of Québec: “Any person under a personal obligation charges, for its performance, all his property, movable and immovable, present and future […]”. 

13
of the Civil Code of Québec states that the common pledge does not extend to “property which is the object of a division of patrimony permitted by law”.

In civil law countries, even if all the property normally constitutes the only patrimony of an individual and is pledged to bond all his performances, the law allows a legal subject to partition his patrimony among several pools of assets without creating a new legal entity. In particular, asset separateness must be recognized when a pool of assets is subtracted from the common pledge of personal creditors, and committed to a specialized group. Consequently, each pool of assets is bonded to a different purpose and pledged only to creditors whose claim is connected with that purpose.\(^2\)

What is clear from the studies of civil law scholars is that only the law, through a property rule, is capable of achieving asset separateness. Accordingly, only in a *numerus clausus* of circumstances, provided by property laws, is a legal subject able to partition his patrimony in separate funds.\(^3\)

It must be noted that these separate pools of assets are not considered new legal entities. Therefore, the asset separateness doctrine and formation of a new legal entity represent alternative and sometimes competing legal devices to achieve affirmative asset partitioning.

Unlike the practice followed in the U.S., the asset separateness doctrine of the civil law tradition allows a legal subject to accomplish a partitioning not only outside (through the formation of a new legal entity), but also within the boundaries of the same legal subject.

---


\(^3\) Ferrara Sr., *supra* note 17, at 875.
This difference is not merely semantic. As this research will show, the formation of a new legal entity and the articulation of a patrimony in separate pools of assets are two distinct legal techniques. Both can result in affirmative asset partitioning, yet they are not equivalent in terms of costs and benefits. It is also worth clarifying why the asset separateness of civil law does not coincide with the floating lien device used in the United States. A floating lien is a security interest that a creditor holds on a debtor’s set of assets, and that covers any additional property obtained by the debtor. In contrast to the creditor of a segregated pool of assets, the secured creditor has still recourse as an unsecured creditor against the general patrimony of the debtor (the assets not included in the floating lien). Furthermore, all of the unsecured creditors have recourse against the assets covered by the floating lien once the secured creditor has been fully paid. In short, neither a defensive asset partitioning nor a strong affirmative asset partitioning is achieved through a floating lien.

The functional analysis conducted in part IV will examine from a comparative perspective a series of business transactions which, in order to achieve their effects, require use of the affirmative asset partitioning mechanism.

In particular, this research will compare the common law and civil law systems with regard to a) the use of a corporate subsidiary versus the use of “funds committed to a specific purpose” created within the boundaries of the same legal entity; b) the regulation of asset securitization; c) the organization of mutual funds; d) the differences between trust law and the recent regulation on fiduciary relations adopted by French legislators.

III. The Historical Evolution of the Asset Partitioning Doctrine

A) The Historical Evolution of the Asset Separateness Doctrine in the Civil Law Tradition
1. The Unity and Indivisibility of the Patrimony Doctrine in the Eighteenth and Nineteenth Centuries - In the late eighteenth and early nineteenth centuries, a metaphysical concept of patrimony prevailed in civil law countries which conceived of assets or property according to an anthropocentric vision, as the external manifestation of an individual and tangible expression of the human personality. Patrimony, in other words, was considered to represent nothing more than that same human personality as related to objects. This idea, rooted in natural law, developed out of the philosophical thought of the Enlightenment and Romantic movement\(^{30}\). Such an indissoluble bond between the individual and his patrimony shifted from a philosophical to legal doctrine during the first half of the nineteenth century\(^{31}\).

In this era, patrimony was considered an attribute of the human personality. Since human attributes were indivisible and intangible, the patrimony was also considered so. Since an individual had only one personality, this meant, likewise, only one patrimony which could not be partitioned among distinct pools of assets (singleness of patrimony doctrine)\(^{32}\).

---

\(^{30}\) The idea that the bond between the individual and his patrimony is rooted in natural law is pointed out by Fedele, *Patrimonio*, in *5 DIZIONARIO PRATICO DI DIRITTO PRIVATO* 240 (1939) and by Francesco Ferrara sr., *La teoria della persona giuridica*, *RIVISTA DI DIREITO CIVILE* 638, 664 (1911). In the French literature see Heinrich Ahrens, *COURS DE DROIT NATUREL OU DE PHILOSOPHIE DU DROIT*, COMPLETE, DANS LES PRINCIPALES MATIERES, PAR DES APERÇUS HISTORIQUES ET POLITIQUES 71 (1892) where, adopting the absolute idealist philosophy of Hegel, he says: «Le droit se développe ensuite dans les divers degrés de la réalité objective de l'esprit. D'abord la volonté libre se manifeste comme individuelle; c'est-à-dire, comme personne; l'existence que la personne donne à sa liberté est la propriété [...]».

\(^{31}\) This shift is normally ascribed to a French law handbook written by a German scholar (K.S. Zachariae), and subsequently updated and augmented by two French scholars, Charles Aubry & Charles Rau, *COURS DE DROIT CIVIL FRANÇAIS, D'APRES L'OUVRAGE DE M. C.S. ZACHARIE* (1856-1858).

\(^{32}\) *Id.* at 573.
2. The Estate as an Entity Doctrine and the Commitment of Assets to a Specific Purpose - If an individual could only be the owner of one pool of assets, how did civil law scholars justify those circumstances where the law conceived the existence of autonomous pools of assets, committed to specific groups of creditors?

It is worth mentioning three different cases that serve as examples of situations in which, in civil law systems, it is not surprising to run into pools of assets exclusively committed to creditors whose claim is related to the same pool. a) In the civil law tradition, inheritance law provides that if a devisee accepts the devise under benefit of inventory (i.e. a public officer is in charge of singling out and describing the property of the decedent), he is not personally liable for the decedent’s debts (defensive asset partitioning), and his personal creditors hold junior claims to the probate estate that are subordinate to the senior claims of decedent’s creditors (weak affirmative asset partitioning). b) Italian family law provides that spouses, together or separately, can constitute a “family fund” whose assets are committed to satisfy family’s needs. Spouses’ creditors who are aware that their claim is related to a purpose different from the family’s need have no recourse against the assets of the “family fund” (affirmative asset partitioning)\(^33\). c) In the absence of trust law, civil law countries expressly regulate special funds, committed to pension purposes. In particular, the employer has to maintain a portion of his/her employees’ salary and assign this portion to the special funds. The assets of these funds are separate from the general patrimony of the employer, and are unavailable to satisfy the employer's obligations to his personal creditors (affirmative asset partitioning)\(^34\).

In the late nineteenth century, German and Italian scholars developed two different theories to justify the legal existence of pools of assets that, because they were committed to a specific purpose

\(^{33}\) In Italy, the “family fund” is currently regulated by Articles 167-171 of the Italian civil code.

\(^{34}\) In Italy, the partitioning between the pension funds created by employers and their general patrimony is provided by Article 2117 of the Italian civil code.
and pledged to a specified group of creditors, were separate from the general patrimony of an individual.

According to the first theory, since an individual can be the owner of only one patrimony, any time the law provides for the existence of an autonomous pool of assets, the legal system introduces a new patrimony that has no owner. The unity of this autonomous patrimony is assured by the specific purpose to which the assets are committed.\footnote{BRINZ, supra note 17, at 201. In Italy this theory, first developed in Germany, has been further analyzed by Gustavo Bonelli, \textit{La teoria della persona giuridica}, RIVISTA DI DIRITTO CIVILE 445-508 and 593-673 (1910).}

According to the second theory, any time the law provides for the existence of a pool of assets that is separate from the general patrimony of the individual, the legal system recognizes the presence of a new legal entity. If any separate pool of assets is considered a distinct legal entity, the idea that each individual can be the owner of only one patrimony is preserved.\footnote{\textit{Id.} at 657-658.}

If an individual has only one patrimony, then in order to partition his assets he can only participate as a residual claimant to the ownership of a distinct legal entity. This latter theory recalls the view held by common law scholars examined above, according to which the estate separateness doctrine is absorbed into the concept of a juridical person.\footnote{A juridical person is traditionally defined as a legal subject distinct from the individuals who compose or promote it. As a distinct legal subject, a juridical person may have its own legal relations with third parties, exercised through organs whose activity is not attributed to the individuals, but directly attributed to that juridical person. Therefore, it is the juridical person, not its members, that enters into a contract, undertakes an obligation, acquires a claim, is summoned before a court, or brings a suit against a third party. In the civil law tradition, there are different theories that try to explain this concept. 1) The juridical person is a fiction: for economic and functional purposes, the legal system created the fictional subjectivity of entities different from individuals. 2) The juridical person as reality: the legal system simply recognizes a phenomenon that exists in social life. 3) The juridical person as a device of legal language: the juridical person is only a legal term used to summarize a complex body of legal rules regulating relations between

---

\textit{Id.} at 657-658.
3. The Substitution of the Indivisibility of the Patrimony Doctrine with the Numerus Clausus of Asset Separateness Principle - In the early twentieth century, civil law scholars began to question the singleness and indivisibility of patrimony doctrine (i.e., an individual can be the owner of one and only one patrimony, which cannot be partitioned in separate pools without the creation of a new legal entity). The basis of this approach – the metaphysical conjunction between the human personality and its patrimony – was increasingly rejected by scholars\(^{38}\).

At this stage, assets were no longer viewed as an external expression of an individual. This is reflected by the very simple objection to the singleness of patrimony doctrine: what is single and indivisible is not the patrimony itself, but rather the right to have a patrimony, which belongs to any individual as an external expression of his personality. As a consequence of this new viewpoint, an individual was no longer identified with his patrimony, nor was the latter considered a unique attribute of the human personality\(^{39}\).

Since the patrimony is no longer necessarily indivisible, it is also no longer necessary to recognize a new legal entity each time that the law provides autonomous pools of assets. At this stage, scholars began to acknowledge the possibility that a legal subject can be the owner of multiple, separate pools of assets, each one committed to different purposes and pledged to a specified group of creditors (asset separateness doctrine). In its acknowledgment that a legal subject can be the owner of multiple funds, the asset separateness doctrine reacquires its force from the juridical person concept.

---

38 Ferrara sr., supra note 30, at 665 and 675.

39 Id. at 665-680; Fedele, supra note 30, at 242; NICOLA COVELLO, MANUALE DI DIRITTO CIVILE ITALIANO - PARTE GENERALE, 252 (4th ed. 1929).
What is clear from the studies of civil law scholars is that only the law, through a property rule, is capable of achieving asset separateness. Accordingly, only in a *numerus clausus* of circumstances, provided by property law, is a legal subject able to partition his patrimony in separate funds.\(^\text{40}\)

In the light of this historical evolution of the concept of patrimony, the default rule adopted in civil law countries regulating the relations between debtors and creditors becomes more clear. On one side, there is a universal patrimonial liability (which stems from the idea of the indivisibility of the patrimony), and on the other, there is the possibility that only property law allows a division, through a partitioning of the patrimony itself.\(^\text{41}\)

**B) The Historical Evolution of Affirmative Asset Partitioning in the United States**

As for civil law countries, the modern concept of asset partitioning in the common law tradition has its origins in the early nineteenth century. It is in this period that demand became more urgent for business organizations able to separate the firm’s assets from the owners and owners’ personal creditors.\(^\text{42}\) The ability to commit assets to a specific business purpose for significant periods of

\(^{40}\) Ferrara Sr., *supra* note 17, at 875.

\(^{41}\) It would be useful to read Article 2645 of the Civil Code of Québec once again, in light of what has just been described: “Any person under a personal obligation charges, for its performance, all his property, movable and immovable, present and future, except property [...] which is the object of a division of patrimony permitted by law”.

\(^{42}\) Blair, *supra* note 1, at 413.
time, without the threat of the firm’s assets being liquidated either by an owner or his personal creditors, was regarded as a fundamental attribute for businesses of substantial dimensions.

Before corporate charters were issued on a more widespread basis in the U.S. in the nineteenth century, attempts to achieve an affirmative asset partitioning were made in those contexts where there was a compelling necessity to gather significant capital assets. In the seventeenth century, two significant developments in this direction occurred in England: a) In 1683, the Chancery Court ruled that partnership creditors enjoy priority over partners’ personal creditors in the event of a bankrupt partnership (weak affirmative asset partitioning); b) The English Crown began granting charters to join stock companies in order to assure them an existence longer than a single trade mission. To compensate the restrictions on merchants to withdraw their capital at the end of each voyage, the right to sell shares of the company without the consent of other owners was introduced.

Since the English Parliament only granted a limited number of charters, in the eighteenth century merchants and other business people tried to achieve affirmative asset partitioning through partnership and trust law. The unincorporated joint stock company was, in that period, the form of entity used by merchants to accomplish both affirmative asset partitioning and share tradability. The

43 The restriction on the ability of a firm’s owners “to force the payout of an owner’s share of the firm’s net assets” has been referred to some authors as “liquidation protection” (Hansmann & Kraakman, supra note 1, at 403-404 and Hansmann, Kraakman & Squire, supra note 4, at 1338), and by another author as capital-lock-in (Blair, supra note 1, at 387).

44 See Hansmann, Kraakman & Squire, supra note 4, at 1381.

45 Hansmann, Kraakman & Squire, supra note 4, at 1376-1377.
latter was achieved through complex contract clauses, and the former achieved by placing the assets into a trust.\footnote{Hansmann, Kraakman & Squire, supra note 4, at 1383; Blair, supra note 1, at 414-416; Mahoney, supra note 1, at 880, highlights merchant law as “an excellent place to look for voluntary solutions to asset partitioning problems”.
}

Only in the nineteenth century (1844) did the English Parliament enact a statute admitting incorporation as a general right.

In the first half of the nineteenth century in the U.S., incorporation was still restricted to a fixed range of business purposes. In order to achieve affirmative asset partitioning, business people were also using unincorporated joint stock companies together with trust law.\footnote{Blair, supra note 1, at 414.}

Despite the fact that many states passed general incorporation statutes in the nineteenth century, in the early twentieth century, the use of the trust – in particular, the business trust (also known as the Massachusetts trust) – was a strong competitor to the corporation in this regard.\footnote{“Trust’s salience as a form of business organization during this era explains why today we have antitrust law, not competition or monopoly law, as it is known abroad” (see Robert H. Sitkoff, Trust as “Uncorporation”: A research Agenda, 2005 U. ILL. L. REV. 31, 32 (2005)).}

The use of trust law certainly represents a boundary between common law and civil law traditions on affirmative asset partitioning, and explains the differences in the evolution of this doctrine. It is evident that the existence of the trust device facilitated the acceptance of the asset separateness principle in the common law tradition. In the civil law countries, on the other hand, a complicated doctrinal debate was required in order to establish the practice of partitioning the same patrimony in multiple and separate pools of assets. Intuitively, it is easier to conceive of asset partitioning when this is achieved through transfers of assets to a different entity (e.g. the trust), than when it is accomplished within the same patrimony.
In explaining the rise of the corporate form as a general device to achieve asset partitioning, American scholars have neglected to explain why, in operating enterprises, corporations prevailed over the statutory business trust that is used only in specific cases, such as mutual funds and structured finance\(^{49}\).

The history of asset partitioning and the differences between the common law and civil law systems in this area sets the framework for understanding why today, in important business transactions where affirmative asset partitioning is required, these two legal systems employ different legal devices.

IV. Affirmative Asset Partitioning and Asset Separateness: A Functional Analysis

As has been explained above, while in the U.S. scholars consider affirmative asset partitioning to represent one – and, according to the most recent studies, the most significant – characteristic of a juridical person (together with limited liability, perpetual life, centralized management and free tradability of shares), in civil law countries there is a clear distinction between the concepts of asset separateness (which can be likened to the concept of affirmative asset partitioning) and the juridical person.

This distinction has practical consequences, and is not merely semantic. A comparative analysis of different asset partitioning devices is conducted in this section in order to understand the economics of affirmative asset partitioning through the use of a new legal entity, as opposed to

\(^{49}\) Id. at 43-44, where it is pointed out that explaining the success of corporations relative to trusts only by highlighting the fact that in the twentieth century, regulatory limits in state corporate codes fell away, presumes the superiority of the corporate form in the absence of any real explanation.
doing so through a property law granting asset separateness within the boundaries of the same entity.

A) The “Funds Committed to a Specific Purpose” of the Italian Civil Code v. a Corporate Subsidiary

1. Preliminary Considerations. – In a recent study, Iacobucci and Triantis presented a general capital-structure theory for the legal partitioning of assets. They explored the question of when it is more efficient to partition the assets into distinct organizations, to achieve the efficiency gains that result from tailoring; and, on the other hand, in which cases it is more efficient to group assets within a single entity to benefit from the economies deriving from integration. In keeping with the affirmative asset partitioning doctrine, the analysis is conducted based on the assumption that a debt is always a firm-wide obligation, and that partitioning can be achieved only through the formation of multiple legal entities.

According to this logic, since it is not possible to accomplish a partitioning of assets within the same entity, there is a consequent trade-off between the efficiency gains that result from asset partitioning and the economies that derive from integration into a single entity.

\[^{50}\text{In particular, Iacobucci & Triantis, supra note 1, at 518-520 assume that a subdivision of a person may not own property: “a corporation is a legal person that may own property, but a division or branch of the corporation may not [...]. Although the corporation itself might enter into a contract that attempts to limit its exposure to only a subset of its assets, we show that such segmentation is difficult to achieve under current law [...]. To fully match groups of assets with appropriate financing and governance features, an entrepreneur [...] must partition the groups into distinct entities [...]}.\]

24
This conclusion does not appear to be necessarily true in a civil law country where the foundational legal principle of this analysis has been disproven.

The asset separateness doctrine allows a legal subject to partition its assets within its own boundaries, enabling a firm to limit its obligation to a subset of its assets without having to form a new legal entity. Thus, it would be possible to argue that a firm could avoid the trade-off described by Iacobucci and Triantis, simultaneously achieving the benefits of partitioning while maintaining the economies of integration.

2. **The Italian “Committed Funds”**. – The clearest example of this approach is the regulation of the “funds committed to a specific purpose” introduced in 2003 in the Italian Civil Code (Articles 2447 bis-2447 decies).

This set of rules provides that a corporation may partition up to 10% of its assets in order to commit it to a specific business purpose. This separate fund is pledged only to those creditors whose claim is related to the specific purpose (“specialized creditors”), while the “general firm’s creditors” have no recourse against these assets (affirmative asset partitioning). Meanwhile, the firm’s assets that are not committed to the specific business purpose and are not part of the committed fund are protected from each group of specialized creditors (defensive asset partitioning)\(^5\).

Through a property law which is “good against the world” the Italian Civil Code allows a corporation to partition its assets into different pools (a general one, and one or more that are committed to a specific purpose) and to distinguish its creditors in different categories (“general

\(^5\) The asset partitioning effect is regulated by Article 2447 quinquies C.c.
creditors” and “specialized creditors”) without creating a new legal entity (e.g. a corporate subsidiary)\(^{52}\).

The correct way of analyzing this legal device from a cost and benefit perspective is to make a comparison with its closest functional equivalent: the corporate subsidiary. In particular, it is interesting to verify what, if any, are the differences between achieving the affirmative asset partitioning within the boundaries of the same entity (committed funds) and achieving this through the formation of a new legal entity (corporate subsidiary).

3. **Lower Monitoring Costs.** – Both the committed fund and corporate subsidiary are able to pledge separate pools of assets to specific lines of business. In both cases, affirmative asset partitioning enables a corporation to group its creditors into distinct categories, defined only by those assets committed to a specific line of business. Since each group of creditors is not concerned with the success of other lines of business, and is instead exploiting its monitoring specialties, a lower cost of credit is achieved\(^{53}\).

4. **Matching Capital Structure and Asset Type.** – The possibility of moving assets into a separate pool, or into a corporate subsidiary, facilitates a better match between capital structure and the nature of the assets. If two asset groups differ in certain aspects, corporate finance literature has argued that it is efficient to locate these assets in distinct corporations so that the optimal capital

---

\(^{52}\) This legal device has captured the attention of several corporate scholars in Italy. Among the many authors on this subject, see Andrea Zoppini, *Autonomia e separazione del patrimonio, nella prospettiva dei patrimoni separati della società per azioni*, RIVISTA DI DIRITTO CIVILE 545 (2002); Gianvito Giannelli, *Commentario agli articoli 2447 bis - 2447 decies Cod. civ.*, in 2 SOCIETÀ DI CAPITALI – COMMENTARIO 1210 (Giuseppe Niccolini & Alberto Stagno d’Alcontres eds., 2004).

\(^{53}\) The lower creditor monitoring costs, as one of the benefits of affirmative asset partitioning, has been pointed out by Hansmann & Kraakman, *supra* note 1, at 399-401 and Hansmann, Kraakman & Squire, *supra* note 4, at 1344-1345.
structure between debt financing and equity financing can be achieved\textsuperscript{54}. Since regulation of committed funds provides that the corporation can issue different securities for each fund (i.e. securities that are only attached to the specific assets committed to the fund), in the Italian legal system it seems plausible to argue that an optimal capital structure can be achieved without the formation of different legal entities\textsuperscript{55}.

5. \textit{Agency Costs. --} Integrating several lines of business into a unitary entity poses a managerial agency cost. In an internal market, managers “may allocate resources so as to enhance their private benefits rather than overall profitability”\textsuperscript{56}. To limit opportunistic behavior on the part of the management, the formation of a corporate subsidiary has been proposed as a possible solution. While in a single corporation, a director’s decisions are protected by the business judgment rule in order to make it more difficult to second-guess transfers of assets between different lines of business, in a parent-subsidiary structure, minority shareholders can challenge transfers between these two entities by designating them as a related-party transaction which needs to be intrinsically fair. Where the parent wholly owns the subsidiary such that there are no minority shareholders, creditors of that subsidiary can, through covenants, restrict the shifting of capital between the two entities\textsuperscript{57}.

\begin{footnotesize}
\begin{footnotes}
\item[54] Iacobucci & Triantis, \textit{supra} note 1, at 523 and 544.
\item[55] The majority interpretation of Article 2447-\textit{ter} (e) C.c., which allows a corporation to issue asset-specific securities, argues that a corporation can issue common stocks that attach to the committed fund’s assets, debt securities and hybrid securities. See Carlo Comporti, \textit{Commento all’ articolo 2447 ter Cod. civ.}, in \textit{2 LA RIFORMA DELLE SOCIETÀ} 973-975 (Michele Sandulli & Vittorio Santoro eds., 2003).
\item[57] Triantis, \textit{supra} note 52, at 1125-1127; Iacobucci & Triantis, \textit{supra} note 1, at 563.
\end{footnotes}
\end{footnotesize}
Even if the partitioning of assets between two entities reduces the risk of opportunistic behaviors, however, a parent-subsidiary structure or group of subsidiaries under common control will not be able to completely eliminate managerial agency costs.

At first glance, the committed funds device seems to create a greater risk for such opportunistic asset shifting, since the fund is part of the corporation and thus managed by the same directors. However, a fundamental aspect of this legal device is a rule providing that the assets of the committed funds are registered in public records as being bound to a specific purpose. In particular, if real property is committed to a separate fund, its specific purpose must be registered in the same public record where the real property is registered. With regard to personal property, the resolution constituting the committed fund must report all assets that are part of the fund, and the resolution must be registered in the same public record where the corporation is recorded. Consequently, since the commitment to a specific purpose is made public (i.e., “good against the world”), any use of the committed assets contrary to the specific purpose (i.e., ultra vires) is considered void. This appears to be a more effective solution to the managerial agency problem than the formation of a corporate subsidiary.

6. Value of Switching Options and Hold-Up Problem. – Resolving the management agency cost associated with asset shifting imposes an inversely correlated cost whereby, once a pool of assets has been allocated to a separate legal entity, it becomes more costly to reallocate capital between different projects. While managers of a unitary entity can readily redeploy capital by authority, two

58 See Article 2447 quinquiies, paragraph 2, C.c.

59 See Giannelli, supra note 52, at 1243-1246.

60 Hansmann, Kraakman & Squire, supra note 4, at 1346, describe a different managerial agency cost. In an internal market, managers could be tempted to borrow too much since they can bond the assets of the whole entity. Asset partitioning reduces this risk, since managers will be able to borrow only against the assets of the separate entity. With regard to this agency problem, corporate subsidiaries and committed funds appear to be perfectly equivalent solutions.
separate entities must enter into a contract and bear the transaction costs of moving capital between projects managed by each entity.

Both the corporate-subsidiary and committed funds reduce the value of “switching options”; meanwhile, this value is enhanced when the managers are free to switch capital between ventures. However, while in the first case the two legal entities have to enter into a contract to capture the surplus generated by their synergy, managers of committed funds do not; still, those managers may not redeploy assets any time that the new use is inconsistent with the purpose originally pursued by the funds.

In both cases, it is plausible that some stakeholders will make the opportunistic attempt to hold-up over the surplus generated by that synergy. In the case of the parent-subsidiary structure, the minority shareholders can threaten the parent company with a challenge to the contract as a related-party transaction. With respect to the committed funds structure, creditors can threaten to challenge the decision of the management as one contrary to the specific purpose of the fund. Moreover, a wholly owned subsidiary does not appear able to overcome these costs of partitioning. “If a parent attempts to strengthen, ex ante, its control over a subsidiary in order to avoid transaction costs and hold-up activity, it invites judicial veil piercing or enterprise liability under state corporate law or substantive consolidation in bankruptcy.”

7. Tracking of Value. – Securities rights are attached to all of a corporation’s property, not to specific assets. In order to track the progress of a particular line of business, corporations can issue tracking stocks that try to reflect its value. This device, however, is limited by several factors: 1) the impossibility of directors’ announcing a dividend payable out of the profits of a single division, if the firm as a whole has failed to meet the statutory threshold (a minimum capital surplus); and, 2)

61 Triantis, supra note 52, at 1105-1106; Iacobucci & Triantis, supra note 1, at 521-522 and 561-563.

62 Id at 563.
the inability to link a stock’s dissolution rights to the tracked assets rather than the value of the entire firm.\(^6^3\)

To overcome these limitations, a corporation can establish a distinct legal entity to oversee a specific line of business. In this case, securities rights would now attach only to assets related to the specific business venture.

Committed funds enable a firm to issue asset-specific securities. This means not just that dividends are payable only by considering the profits of the separate fund, but also that upon dissolution, the stockholders of asset-specific securities receive a fraction of the value of the fund without sharing the losses suffered by the general patrimony of the firm, which are shared only by common stockholders. In other words, the residual claims of asset-specific stockholders are linked only to the assets of the tracked fund. Once again, this legal device enables a corporation to achieve the benefit of partitioning without the costs of establishing a new legal entity.

8. *The Asset Partitioning Effect.* – As explained earlier, both a committed fund and a corporate subsidiary can accomplish an affirmative asset partitioning. While the subsidiary achieves what has been called a strong entity shielding, the fund accomplishes what has been called a complete entity shielding.\(^6^4\)

A strong entity shielding restricts the ability of both shareholders and their personal creditors to seize the assets of the corporation. However, the shares of a corporate subsidiary also represent an asset of the parent corporation. This creates a paradoxical situation whereby, on the one hand, creditors cannot seize the subsidiary’s assets; yet on the other hand, they can still seize the shares of

---

\(^{63}\) *Id* at 535-537.

\(^{64}\) For this distinction, see Hansmann, Kraakman & Squire, *supra* note 4, at 1338 where they use the expression “entity shielding” as the equivalent of affirmative asset partitioning.
the subsidiary, and if the shares seized constitute the majority, they can force the subsidiary’s liquidation.

In contrast, a committed fund creates an effective wall between the corporation’s general creditors (corresponding to the parent corporation’s creditors) and the assets transferred into the fund. The corporation does not own any share representing the fund, so any claim to those assets is denied. Asset partitioning achieved through a committed fund resembles the one achieved in the U.S. through a trust, and leaves open the question of the relative costs and benefits of this solution.

9. Informational Economies. – Partitioning allows firms to attract investors with specialized expertise in assets having specific characteristics. Segregating these assets from the rest of the patrimony lowers investigation and monitoring costs. However, it may be the case that some investors wish to invest in different groups of assets. In this case, integrating those assets into the same entity has the advantage of creating information economies of scale. Investors dealing with a single entity only need to investigate the structure of one board of directors, one set of takeover defenses, and, more generally, one corporate governance structure.\footnote{Iacobucci & Triantis, supra note 1, at 558-560.}

In a system that conceives affirmative asset partitioning only through the formation of a new legal entity, there is clearly a trade-off between the costs avoided through asset partitioning (lower monitoring costs for specialized creditors) and the benefit achieved through legal integration (information economies of scale).

While the corporate subsidiary acts as a device to allow firms to achieve the benefits of asset partitioning, but at the cost of losing the benefits of integration, the use of committed funds can overcome this trade-off. The latter allow a corporation to attract investors with specialized expertise, willing to invest in specific assets bound to a specific purpose. At the same time, by
maintaining the corporation’s unity, they can create information economies of scale and attract those investors seeking the benefits of diversification.

B) Asset Securitization

1. Overview of Asset Securitization. – In a typical asset securitization transaction, a corporation (the originator) transfers some of its assets (normally the receivables) to a distinct legal entity (the special purpose vehicle or SPV), that is either a new corporation or a trust. The SPV issues securities, backed by the receivables, and uses the raised capital to pay the originator the price of the receivables.

Through this transaction, the originator is able to separate the risk associated with its general activity from the risk associated with the receivables. Since the receivables are transferred to the SPV, investors are concerned only with the securitized assets and need not concern themselves with the general financial condition of the originator66. In other words, asset securitization accomplishes an asset partitioning which is both affirmative, and defensive. The originator’s creditors have no claims against the receivables that have been sold to a third party and pledged to the exclusive satisfaction of the investors (affirmative asset partitioning). The investors, meanwhile, as creditors of the SPV, cannot seize any assets of the originator (defensive asset partitioning).

The partitioning of assets between two distinct legal entities enables the originator to lower the cost of credit. Since the SPV, also called a “bankruptcy-remote vehicle”, is unaffected by the

---

originator’s incidental bankruptcy, investors are willing to pay a higher price for securitized assets.

In light of the discussion above, it is not surprising that in the U.S., asset securitization accomplishes partitioning through the formation of a new legal entity. Normally, the originator creates a separate entity (either a corporation or a trust) for each securitization transaction to avoid comingling asset pools related to different transactions. The logic of achieving asset partitioning through duplication of legal entities is therefore corroborated.

2. Asset Securitization in Italy. – The regulation of asset securitization in Italy offers another example of the asset separateness doctrine or, put differently, an affirmative asset partitioning achieved within the boundaries of the same entity.

The Law No. 130 of April 30, 1999 provides two different possibilities for achieving an asset securitization. The first is reminiscent of the scheme described above with regard to the U.S., and is accomplished through the formation of a SPV, typically a new corporation (Article 3). The second allows a corporation to perform an asset securitization, transferring the receivables to a mutual fund (Article 7).

With regard to the first scheme, the Italian regulation provides different levels of asset partitioning. Firstly, the new legal entity grants segregation between the general assets of the originator and the securitized assets. Secondly, and more significantly, a property law provides two additional levels of partitioning: 1) between the incidental personal assets of the SPV and the

---

receivables (“vertical partitioning”); and 2) between different pools of securitized assets, each related to different transactions (“horizontal partitioning”).

In Italy, the SPV is normally organized as a corporation. Beside the securitized property, the special entity owns the legal capital required by law. Having its own patrimony, in addition to the pool of securitized assets, implies that an SPV engages in a managing activity and undertakes obligations with third parties different from the securities holders. As described above, a property law is intended to insulate the securitized assets of the SPV from its personal creditors, thereby departing from the principle that a debt is necessarily a firm-wide obligation and that partitioning can be achieved only through the formation of multiple legal entities.

The law grants segregation not only between the SPV assets and receivables, but also between different pools of securitized assets that are held by the same SPV but related to different transactions. The segregation between these asset pools is thus achieved within the boundaries of a single SPV, avoiding the creation of multiple legal entities.

3. Asset Securitization in the U.S. – In the U.S., in order to avoid the SPV’s pledging the securitized property to bond obligations different from the ones undertaken with securities holders, its business purpose is limited to owning and operating the pool of securitized assets; no new property may be acquired. Furthermore, the SPV is prevented from incurring additional debt.

68 See Law No. 130 of April 30, 1999, Article 3, paragraph 2.

69 See Law No. 130 of April 30, 1999, Article 3, paragraph 2. Whether these pools were commingled in a single patrimony, investors with different degree of risks would be exposed to the outcomes of others portfolios. Without a property law that grants horizontal partitioning, an originator would need to create a new SPV for each asset securitization transaction.
To reinforce the segregation between claims by different categories of creditors, in the U.S. it is common to organize the SPV in the form of a trust⁷⁰. The receivables are committed to the trust fund, and consequently insulated from claims of the settlor (the originator) and of the trustee’s (the SPV’s) personal creditors. While the originator’s personal creditors cannot seize the trust fund because it is owned by a third party (the trustee)⁷¹, in the common law of trusts, if the trustee becomes insolvent, the trust property he administers is unavailable to satisfy the trustee’s obligations to his personal creditors⁷².

4. The Case of Multiple Transactions. – As mentioned above, the Italian legal system provides that in the case of multiple asset securitization transactions, the same entity can hold different and separate pools of assets. A property law ensures that each pool of receivables is committed only to the corresponding group of securities holders.

It is important to distinguish the case of multiple, separate and unrelated transactions under one SPV, from the multiple issue of certificates under the master trust that is common in the U.S.


⁷¹ This is true to the extent that the substantive consolidation doctrine does not apply in the event of the originator’s bankruptcy. According to this doctrine, all assets and liabilities of two different entities are consolidated as if the latter were one entity. As a consequence, the originator’s personal creditors can seize the receivables transferred to the SPV. This doctrine applies after the court’s consideration of several factors including: (1) presence or absence of consolidated financial statements; (2) unity of interests and ownership between the various corporate entities; (3) the existence of parent and inter-corporate guarantees on loans; (4) the degree of difficulty in segregating and ascertaining individual assets and liability; (5) the existence of transfers of assets without the observance of corporate formalities; (6) commingling of assets and business functions; and (7) the profitability of consolidation at a single physical location (Pension Benefit Guaranty Corp v. Ouimet Corp. 711 F.2d 1085 (1st Cir. 1982)).

⁷² Hansmann & Mattei, supra note 14, at 141.
practice. In the latter case, when a corporation or a financial institution has a substantial amount of receivables that belong to the same category, and are therefore difficult to separate in order to obtain a different rating, a practical solution is for the corporation to transfer these receivables to a master trust (a SPV). This trust will then issue different classes of trust certificates at different points in time. Each class of certificates can be fashioned in a distinct way, with different substantial rights (e.g. different interest rates) and diversified subordination rights.

Even though a series of covenants and subordination agreements are designed to keep each class of certificates separate, it must be stressed that each debt assumed by the master trust is a firm-wide obligation; that is, all the receivables of the trust fund are the common pledge of all investors. Therefore, each claim is backed by the same pool of receivables. It is true that a junior investor only has recourse against the pool of assets that remains after senior creditors have been fully paid. Notwithstanding, since all receivables are in the same pool of assets, if the trustee breaches a covenant or does not respect the seniority of one class of certificates, senior investors will have only contractual remedies at their disposal.

To be sure that each class of investors is completely shielded by the others’ claims, it is required that the SPV hold wholly separate pools of assets containing separate classes of securities for each pool. Under the same SPV, multiple transactions must be structured so that securities backed by one pool do not have rights to other pools. This outcome will be especially complicated without there being a statutory rule to enable the realization of asset partitioning within the boundaries of the same entity. In the absence of a property law ensuring that different pools of assets under one entity are kept wholly separate, it would be necessary for an SPV to negotiate with each investor a

73 For a description of the master trust see STEVEN L. SCHWARCZ & ADAM D. FORD, STRUCTURED FINANCE – A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION 3.18 (3RD ed. 2003).

74 On this reasoning see supra II.A.
waiver to seize the assets of a pool backing a separate class of securities. Making certain that each investor accepts this waiver will not only raise transaction costs, but at the same time impose higher monitoring costs on other investors, since the contractual nature of such an agreement exposes it to moral hazard and potential breaches.

The practical response to these difficulties of realizing separate and unrelated transactions under one issuing entity is to create multiple issuing entities, each related to a different category of investors. Once again, the common law experience seems to confirm the general principle that distinct pools of assets are conceivable only as separate legal entities.

5. Cost and Benefit Comparison of the Two Systems. – Describing the differences between the Italian and the American legal systems with regard to asset securitization is not only a theoretical exercise, but reveals different functional outcomes.

The possibility of an SPV’s holding multiple and wholly separate pools of assets, each backing a different asset securitization transaction, has been identified by representatives of U.S. issuers as a way to reduce the costs of creating multiple issuing entities. On the other hand, the lack of a property law in the U.S. that would grant an affirmative asset partitioning within the same entity imposes this result only through a complex series of covenants and subordination agreements.

See PRACTISING LAW INSTITUTE, NUTS & BOLTS OF FINANCIAL PRODUCTS: UNDERSTANDING THE EVOLVING WORLD OF CAPITAL MARKET & INVESTMENT MANAGEMENT PRODUCTS 115 (2007). “It often happens that an investment bank or other sponsor wishes to create, for sale to investors, debt or equity securities that are backed by identified assets. For repeat business with various asset pools and investors, it is cheaper, easier and quicker to use as the securities issuer segregated portfolios within a single company rather than multiple companies. Companies need to be formed and cared for. They must have a board of directors or managers and stockholder or member meetings. It is better to form a company once rather than 100 times if there is a commercial desire to create 100 series of securities backed by distinct asset pools” (see James M. Peaslee & Jorge G. Tenreiro, Tax classification of segregated Portfolio Companies, in TAX PLANNING FOR DOMESTIC & FOREIGN PARTNERSHIPS, LLCs, JOINT VENTURES & OTHER STRATEGIC ALLIANCES 277, 286-287 (2008).
Consequently, it seems reasonable to conclude that the transaction costs of managing multiple asset securitizations transactions under one SPV outweigh the benefits of not having to create multiple issuing entities.\(^76\)

As described above, the Italian legal system provides that a SPV can hold multiple, wholly separate pools of assets backing different asset securitization transactions. Article 3, paragraph 2 of the Law No. 130 of April 30, 1999, provides that each pool of assets is segregated from both the SPV’s legal capital required by law, and from other pools committed to a different asset securitization transaction.

This means that, each investor, in the absence of his previous consent, has a limited recourse against the pool of assets corresponding to his transaction; therefore, he is banned from seizing either assets of the corporation’s patrimony (normally corresponding to the minimum legal capital required by law), or assets committed to different categories of investors. Essentially, this property law reduces the transaction costs of asset partitioning compared with the partitioning achieved either through a complex series of waivers, covenants and subordination agreements, or by multiplying legal entities.

Nonetheless, this legal structure is not free of risk.

As is the case in the U.S., the SPV’s business purpose is limited to operating the pool of securitized assets (Article 3, paragraph 1, Law No. 130 of April 30, 1999). Unlike the U.S.,

\(^{76}\) As stated in PRACTISING LAW INSTITUTE, supra note 70, at 115: “The more fundamental issue with the use of multiple, separate and unrelated transactions under one issuing entity for asset-backed securities is that it raises concerns that deviate from the core principle that investors of a particular asset-backed security should look solely to the related pool of assets for primary repayment. With a series trust structure, instead of only analyzing the particular pool, an investor also may need to analyze any effect on its security, including bankruptcy remoteness issues, if problems were to arise in another wholly separate and unrelated transaction in the same issuing entity. These concerns are exacerbated if new unrelated transactions are created after the original transaction involving the investor”.  

38
however, its patrimony is not limited to securitized assets; in fact, each SPV is compelled to own the minimum legal capital required by law. Therefore, it will be engaged not only in asset securitization transactions, but at the same time, in managing its own patrimony. The latter activity implies the possibility of undertaking obligations with third parties, and therefore reducing the bankruptcy remoteness of these entities. Even if the property law described above successfully segregates the corporation’s patrimony from the other pools of assets, the managerial activity of this patrimony increases the risk of comingling different funds, as well as the chance of default. On this point, the U.S. approach seems to lower the risks of commingling and defaulting. In fact, especially when the SPV is structured as a trust, trust law makes sure that trust property is unavailable to satisfy the trustee's obligations to his personal creditors. Furthermore, the fact that the trust is limited not only in its business purpose, but also in the sense of owning only the securitized assets, reduces the risk of undertaking and defaulting on obligations with third parties.

Asset securitization represents another example of the dichotomy between common law and civil law countries regarding asset partitioning. The alternative between performing multiple but separate asset securitization transactions either through the formation of multiple legal entities, or within the

---


boundaries of the same SPV, leads to contradictory outcomes. While on one hand Italian regulation lowers the transaction costs of this partitioning, on the other hand, managing multiple pools of assets together with the SPV’s legal capital increases the risk of eliminating the bankruptcy remoteness quality of the vehicle.

C) Mutual Funds

1. Overview of Mutual Funds. – Another set of legal instruments that deserve special attention from any research comparing asset partitioning devices are mutual funds.

These entities, clearly, are very different from the ones analyzed so far.

In a corporate subsidiary or asset securitization, asset partitioning is used to segregate different risks and to attract specialized investment at a lower cost of credit. The purpose of a mutual or pension fund is essentially to serve as a mediating device between an investor and securities’ secondary markets. To this end, investors transfer some of their assets to an intermediary that becomes the manager of the fund.

One fundamental priority for investors is to shield the managed assets from claims of the manager’s personal creditors (vertical partitioning).

In the U.S., trust is one of the two devices used to manage a mutual fund (along with the corporation), and is considered by ERISA to be mandatory for managing a pension fund.
Unlike other legal entities, a trust is able to assure that the fund’s assets are shielded from claims of the manager’s personal creditors. It is a well-established rule that “although a trustee becomes insolvent or bankrupt, the beneficiary retains his interest in the subject matter of the trust” and, accordingly, the beneficiary “is entitled [to retain that interest] as against the general creditors of the trustee.”

It is widely known that in most European countries, a body of trust law has not developed. Nonetheless, as stated above, in a *numerus clausus* of circumstances the law admits asset partitioning through the separateness doctrine. Mutual funds are included in these well-defined circumstances.

In Italy, there are two different schemes for mutual funds’ regulation. 1) A fund’s assets are treated as being under joint ownership of the investors, and are managed by a specialized third party. Vertical partitioning is a direct consequence of this ownership structure; the assets are not owned by the manager, and consequently cannot be seized by its personal creditors. 2) Assets are transferred to a new entity that acquires the ownership and manages the fund. In this case, investors are considered residual claimants of the corporation managing the fund, and no vertical partitioning is granted.

2. *Mutual Series Funds in Italy.* – Property laws that grant asset partitioning are not only relevant for shielding managed assets from claims of the manager’s personal creditors; they also allow a single mutual fund to be structured into several sub-funds, in which contributions from investors are

---

79 “If it were otherwise – if, for example, a pension fund were just an investment account maintained by the corporation within its corporate shell – the employees’ pensions would always be subject to the risk of the corporation’s creditors” (Hansmann & Mattei, *supra* note 62, at 467).

80 Langbein, *supra* note 73, at 179, citing the *RESTATEMENT (SECOND) OF TRUSTS*. 

41
pooled separately. Both the joint ownership, and the new entity schemes described above, enable the mutual fund to segregate the assets among separate portfolios.\footnote{See Article 36, paragraph 6, and Article 43, paragraph 8 of the Italian regulation on financial intermediation (Legislative Decree No. n. 58 of February 24, 1998).}

Offering multiple portfolios within the same entity allows investors to choose the sub-fund that better matches their risk profile, and to easily switch all or part of their investment from one sub-fund to another. Issuing more than one class of shares is not sufficient to fully segregate different sub-funds. In order to shield each class of investors from other classes’ risks, a property law is necessary.

Without such a property law granting the segregation between sub-funds, each class of shares would be affected by the losses suffered by another series. In the law’s absence, the extent of the rights to participation in the capital property or distribution account would be the same for each class of shares, according to the general principle that each share represents a portion of the general capital of the entity, and not a portion of a sub-fund. As explained in the course of this study, without asset partitioning that is enforced by property law, any creditor or residual claimant of an entity will share the risks of that entity's consolidated activity, according to the principle that each debt is a firm-wide obligation. Consequently, in order to insulate one pool of assets from investors of a different pool (or series), it is necessary to establish asset separateness statutorily.\footnote{See Lucia Picardi, \textit{Comment to Article 43 D. Lgs. n. 58/1998, in COMMENTARIO AL TESTO UNICO DELLA FINANZA} 380, 390 (G. Campobasso ed. 2002).}

In particular, the Italian regulation on mutual funds states that when a fund is structured as a number of sub-funds, each sub-fund is for all intents and purposes separate from the others. Accordingly, liabilities incurred with respect to a particular sub-fund are enforceable only against
the assets of that fund, and not against the general patrimony of the mutual fund or the assets of other sub-funds (defensive asset partitioning). On the other hand, liabilities incurred with respect to the general activity of the mutual fund are enforceable only against its general patrimony, and not against the assets of the sub-funds (affirmative asset partitioning).

3. Mutual Series Funds in the U.K. and the U.S. – Wholly separate investment portfolios allow the attracting of diversified investors at lower monitoring costs, since each class of investors has recourse only to the assets attributable to their segregated portfolio. This beneficial structure can be achieved within the same mutual fund, or through a family of separate entities. Absenting a statutory provision granting asset partitioning, one might predict a preference toward creating a family of entities, due to the prohibitively high costs of partitioning assets through contracting.

Departing from the traditional approach of the common law system, which conceives asset partitioning only through the creation of a new legal entity, the U.K. has regulated the so-called Umbrella Company. In 1997, the Financial Services (Open-Ended Investment Companies) Regulations introduced the possibility for a mutual fund to issue different classes of shares, each linked to a separate sub-fund. Contributions from shareholders would be pooled separately, so that property and distribution rights of each class of investors are exclusively backed by the corresponding sub-fund83.

The U.K. regulation reinforces the intuition that without a property law – a statutory rule “good against the world” – it is effectively impossible to achieve asset partitioning within the same entity. The U.S. experience offers further confirmation of this.

Pursuant to rule 18f-3 of the Investment Company Act of 1940, in the U.S., mutual funds can issue more than one class of shares. In accordance with the fundamental principle that a debt is a firm-wide obligation, all shareholders’ claims lie on the same investment portfolio. Consequently, a

multi-class structure, while facilitating the diversification of shares with respect to expenses and
distribution, administration and shareholder services, does not assign different property and
distribution rights to distinct classes of investors.\textsuperscript{84}

In order to insulate the claims and distribution rights of one class of shares from other classes,
the two typical legal forms of mutual funds\textsuperscript{85}, trust and corporation – can create within their
boundaries distinct funds having different investment objectives. This structure, normally named
“mutual series funds”, aims to assign a separate pool of assets to each series so that each class of
shares tracks only those assets. The ultimate goal of the series structure is to shield the assets of one
series from claims arising out of or in connection with another series.\textsuperscript{86}

Consistent with the fundamental principle that all assets are the common pledge of creditors,
both the common law of trusts and conventional corporate statutes do not provide a rule allowing
assets of one series to be wholly insulated from creditors of another series. Absenting a statutory
recognition of asset partitioning, the mutual series funds structure requires each class to monitor the
overall financial condition of the mutual fund. As has been asserted in the case of multiple asset
securitization transactions, the costs of creating fully separate sub-funds through contracting would
seem to outweigh the benefits of avoiding the creation of multiple legal entities.

\textsuperscript{84} See Laurin B. Kleiman & Carla G. Teodoro, \textit{Forming, Organizing and Operating a Mutual Fund – Legal and
Practical Considerations, in ABCs of Mutual Fund} 13, 48 (2008).

\textsuperscript{85} Some scholars have tried to understand why the trust structure seems to be dominant in comparison to the corporate
structure by focusing their attention on the agency problem between investors and managers, and exploring the
characteristics of fiduciary duties in trust law as compared to corporate law. In particular, see Langbein, \textit{supra} note 14,
625-628; Sitkoff, \textit{supra} note 14, at 37-38; Schwarcz, \textit{supra} note 73, at 573-581. On the contrary, Hansmann & Mattei,
\textit{supra} note 62, at 469-472, point out the proprietary characteristics of trust law.

\textsuperscript{86} See James M. Peaslee & Jorge G. Tenreiro, \textit{supra} note 70, at 221-222.
4. *The Delaware Series Regulation.* – In order to give the series structure a statutory foundation, in 1990 the Delaware Business Trust Act recognized that the governing instrument of a trust may establish series of trustees, beneficial interests or beneficial owners, which have separate rights, powers or duties with respect to separate property or obligations of the statutory trust, as well as profits and losses associated with specific series. This reform indicates the awareness that without a statutory rule (i.e. property law), the power to create a wholly separate series without investors’ consent is absent. The statutory language ensures that with appropriate “records and notices” the debts, obligations, liabilities and expenses associated with these particular series are enforceable only against that series, and not against other series of the trust or the trust generally.

It is worth noting that, even if the series structure was conceived to allow a single mutual fund to operate different investment portfolios under a centralized board of directors and a single registration as required by the Investment Company Act of 1940, this reform has expanded the use of such a structure to any business purpose.

In 1996, the Delaware Limited Liability Company Act was amended to include the series structure. Section 18-215 provides that “[...] the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the limited liability company generally or any other series thereof, and, unless otherwise provided in the limited liability company agreement, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof shall be

---

87 See 12 Del.C. § 3806(b)(1)(2).


89 See *id.* at 652-653.
enforceable against the assets of such series [...]”. In the same year, the Delaware Revised Uniform Limited Partnership Act included Section 17-218 which allowed the creation of a series in the Delaware limited partnership.

V. Conclusions: Convergences between Civil Law and Common Law Traditions

A) Broadening Horizons of the Common Law Tradition

The Delaware law reforms which have been followed by seven other States and Puerto Rico90, together with the proliferation of the so-called Segregated Portfolio Companies (SPCs) throughout non-U.S. jurisdictions91, confirm that in order to create an asset partitioning within the boundaries of the same legal entity, a statutory foundation is necessary. This study has given such a statutory provision the label of property law.

The possibility of separating assets between different investment portfolios without the investors’ consent spares the costs of achieving the same result through contracting and, alternatively, the costs of creating multiple legal entities. Multiple legal entities implicitly necessitates the duplication of governance structures, expenses, agreements with service providers,


91 In particular: Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, Luxembourg, and Mauritius.
prospectuses, periodic reports, and other regulatory filings. A single entity that offers segregated investment portfolios can eliminate the costs of duplication, while at the same time benefiting from the efficiencies of attracting diversified categories of creditors.

In conclusion, the specific case of mutual funds could signal a global trend toward the recognition of asset partitioning within the boundaries of the same legal entity. While this structure, is familiar to the civil law tradition thanks to the asset separateness doctrine, it seems to have been less well-explored in the common law tradition. In the future, it will be important to observe whether the legal reforms implemented in Delaware, which expanded the possibility of using the series structure for any business purpose within the boundaries of a business trust, limited liability company or limited partnership, will lead to a similar alignment between the common and civil law traditions for other business practices.

To this end, a critical factor will be whether in the future, the series structure is also considered in corporate statutes. The suggested reform appears to be the necessary step for filling some of the gaps between the common law and civil law traditions that this study has attempted to describe. Allowing for asset partitioning within the same entity has proven an efficient way to overcome the tradeoff between the economies of scale that derive from operating multiple transactions under one entity (integration), and the efficiency gains that result from asset partitioning (tailoring).

B) Broadening Horizons of the Civil Law Tradition

It is a well-known fact that comparative studies on asset partitioning have traditionally focused on the possibility of transferring trusts law to a civil law environment. Notwithstanding the fact that this study has come at the matter from the opposite perspective, by inquiring as to whether the civil

law tradition can offer insight to the common law debate on asset partitioning, it seems relevant to describe the most recent impacts of trusts law on civil law countries.

At this stage, we would be well served to remember that in the civil law tradition, only in a *numerus clausus* of circumstances provided by property laws is a legal subject able to partition his patrimony in separate funds. Here, what civil law countries have traditionally lacked is a general legal scheme able to provide for the partitioning of assets under an indefinite number of circumstances.

While the common law tradition has developed trusts law, which has turned out to be an extremely flexible device capable of granting asset partitioning for a virtually indefinite set of purposes, civil law countries have taken an opposite path, granting specific property laws which allow asset partitioning for highly scrutinized purposes.

This pattern began to shift in 1985, thanks to the adoption of the Hague Trusts Convention, which has been ratified thus far by Italy, Holland\(^{93}\), Malta, Luxembourg and Switzerland. This Convention is aimed at a recognition of the effect of foreign trusts, through the application of foreign trust laws, in countries where the trust concept is completely unknown\(^{94}\).

---

\(^{93}\) Notwithstanding the ratification of the Hague Convention, in 1992 the Dutch legislator struck down the proposal to introduce a regulation of a national trust. In particular, the Legislator added one provision that seems incompatible with the common law trust structure: “A juridical act which is intended to transfer property for purposes of security or which does not have the purpose of bringing the property into the patrimony of the acquirer, after transfer, does not constitute a valid title for transfer of that property” (see Article 84, paragraph 3, chapter III of the Dutch civil code).

Thus far, many European countries have been reluctant to ratify the Hague Convention which, nonetheless, had the great merit of having stimulated a debate in many countries over the prospect of a legal device which would share the characteristics of a common law trust.

While the small Republic of San Marino has decided to fully regulate the trust (Law No. 37 of March 17, 2005), Luxembourg, Lichtenstein, France and Italy, who refuse to introduce such an alien instrument into their legal systems, have decided instead to reshape domestic devices for the purpose of achieving an outcome functionally resembling that of the trust\(^95\). All of these countries, with the exception of Italy\(^96\), preferred to amend the \textit{fiducia}, a device which originates from ancient Roman Law in the concept of \textit{fideicomissa}, and is deeply rooted in the civil law tradition\(^97\).

The \textit{fiducia} is a contract between the “constituent” (i.e. the settlor) and the \textit{fiduciario} (i.e. the trustee), where determined property is transferred to the \textit{fiduciario}. The transferred property is dedicated to the benefit of a third party (and/or to the benefit of the “constituent”) or to a specific purpose, and the \textit{fiduciario} has the obligation to manage the property according to the instructions of the “constituent”. Upon expiration of the contract, the \textit{fiduciario} must return the property either to the “constituent” or to the beneficiaries. In contrast to the trust, the \textit{fiducia} does not distinguish


\(^96\) The Italian civil code has been amended in order to introduce a legal device that resembles a trust’s essential features with respect to asset partitioning (see Article 2645 ter of the Italian civil code). A detailed description of this device would be beyond the scope of this study. For further details, see Giacomo Rojas Elgueta, \textit{Il rapporto tra l’art. 2645-ter c.c. e l’art. 2740 c.c.: un’analisi economica della nuova disciplina}, BANCA, BORSA, TITOLI DI CREDITO 185 (2007).

\(^97\) Michele Graziadei, \textit{The development of fiducia in Italian and French law from the 14th century to the end of the Ancien Régime, in Itinera Fiduciae. Trust and Treuhand in Historical Perspective} 327 (Richard Helmholz and Reinhard Zimmermann ed. 1998).
between legal ownership and equitable/beneficial ownership. Consequently, the *fiduciario* has full disposal of the property and both the constituent and beneficiary after accepting the beneficial provision have only a contractual claim toward the *fiduciario*.

According to trusts law, if the trustee becomes insolvent, the trust property he administers is unavailable to satisfy the trustee's obligations to his personal creditors. In contrast, in the *fiducia* there is no segregation of assets between the dedicated property and personal property of the *fiduciario*. Therefore, the traditional civil law *fiducia* does not provide any asset partitioning.

In keeping with the civil law tradition where asset partitioning is only granted by a specific property law in a limited number of business transactions, the *fiducia*, which can serve an indefinite number of purposes, normally lacks the ability to segregate assets without the consent of different categories of creditors (the beneficiaries and *fiduciario*'s personal creditors).

Luxembourg, Lichtenstein and France decided to intervene in order to provide the *fiducia* with a property law that would enable a partitioning between the managed assets and the personal property of the *fiduciario*. In particular, the French legislator, through Article 2025 of the French civil code (introduced by the Law No. 2007-211 of February 19, 2007), provided that the managed assets are the common pledge of only those creditors whose claim is related to the managed property. This rule, by acknowledging that it would be effectively impossible to create an affirmative asset partitioning through contracting, shifts the traditional contractual nature of the *fiducia* device to a

---

98 Article 2025 of the French civil code states that “[...] le patrimoine fiduciaire ne peut être saisi que par les titulaires de créances nées de la conservation ou de la gestion de ce patrimoine”.

50
new proprietary foundation\textsuperscript{99}. Using Hansmann and Kraakman’s terminology, it could be said that the French \textit{fiducia} is now a new example of organizational law.

Notwithstanding the new direction marked by the French law reform toward continental acceptance of a legal device which offers affirmative asset partitioning to an open-ended set of purposes, there is still a remarkable resistance to introducing something as general as the trust.. In fact, according to the new French regulation: a) the \textit{fiducia} comes to an end within the durational limit of ninety-nine years, while the duration of a trust is often unlimited\textsuperscript{100}; b) the \textit{fiducia} can be constituted only by contract, while the trust may be the result of a unilateral declaration by an owner of property either during the settlor’s lifetime or by will; c) the role of \textit{fiduciario} is reserved only for certain entities having legal personality (investment and insurance companies) and for attorneys at law\textsuperscript{101}.

The French reform illustrates the resistance that exists in each country to adopting legal devices that diverge from its tradition. The field of asset partitioning offers an interesting case in which

\textsuperscript{99} On the new regulation of the French \textit{fiducie} see Claude Witz, \textit{La fiducie française face aux expériences étrangères et à la Convention de La Haye relative au trust}, RECUIL DALLOZ 1369 (2007); Christian Larroumet, \textit{La loi du février 2007 sur la fiducie. Propos critique}, RECUIL DALLOZ 1350 (2007). Similar legal reforms have occurred in Latin America. The segregation of assets has been provided, for example, in the Uruguayan law regulating the \textit{fiducia} (see Article 7 Law No. 17.703 of October 27, 2003). For further information about trust in Latin American legal systems see Dante Figueroa, \textit{Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?}, 24 ARIZ. J. INT’L COMP. L. 701 (2007).


\textsuperscript{101} See Article 2015 of the French civil code.
financial transactions are becoming the primary motivating force in breaching these obstacles and dictating uniform global solutions.
BIBLIOGRAPHY

- Heinrich Ahrens, Cours de Droit Naturel ou de Philosophie du Droit, Complete, dans les Principales Matieres, par des Aperçus Historiques et Politiques (1892).


- Charles Aubry & Charles Rau, Cours de Droit Civil Français, d’Apres l’Ouvrage de M. C.S. Zacharie (1856-1858)

- Ernst Immanuel Bekker, System des Heutigen Pandektenrecht (1886).

- Lina Bigliazzi-Geri, Patrimonio autonomo e separato, in 32 ENCICLOPEDIA DEL DIRITTO 280 (1982).


- Gustavo Bonelli, La teoria della persona giuridica, RIVISTA DI DIRITTO CIVILE 445-508 and 593-673 (1910).

- Alois Brinz, Lehrbuch des Pandektenrecht (2d ed. 1873).


• Carlo Comporti, Commento all’ articolo 2447 ter Cod. civ., in 2 LA RIFORMA DELLE SOCIETÀ 973-975 (Michele Sandulli & Vittorio Santoro eds., 2003).

• NICOLA COVIELLO, MANUALE DI DIRITTO CIVILE ITALIANO - PARTE GENERALE, 252 (4th ed. 1929).


• Durante, Patrimonio, in 22 ENCICLOPEDIA GIURIDICA 3 (1990).


• Fedele, Patrimonio, in 5 DIZIONARIO PRATICO DI DIRITTO PRIVATO 240 (1939).

• Francesco Ferrara sr., La teoria della persona giuridica, RIVISTA DI DIRITTO CIVILE 638 (1911).

• FRANCESCO FERRARA SR., TRATTATO DI DIRITTO CIVILE ITALIANO (1921).


• Gianvito Giannelli, Commentario agli articoli 2447 bis - 2447 decies Cod. civ., in 2 SOCIETÀ DI CAPITALI – COMMENTARIO 1210 (Giuseppe Niccolini & Alberto Stagno d’Alcontres eds., 2004).
• Michele Graziadei, *The development of fiducia in Italian and French law from the 14th century to the end of the Ancien Régime*, in *ITINERA FIDUCIAE. TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE* 327 (Richard Helmholz and Reinhard Zimmermann ed. 1998).


• OLIVER HART, FIRMS, CONTRACTS AND FINANCIAL STRUCTURE (1995).


• Claude Witz, *La fiducie française face aux expériences étrangères et à la Convention de La Haye relative au trust*, RECUEIL DALLOZ 1369 (2007).

• Andrea Zoppini, *Autonomia e separazione del patrimonio, nella prospettiva dei patrimoni separati della società per azioni*, RIVISTA DI DIRITTO CIVILE 545 (2002).