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# Non-recourse Agreement and Creditors' Common Pledge: a Comparative Perspective

**(doi: 10.4478/90684)**

Osservatorio del diritto civile e commerciale (ISSN 2281-2628)
Fascicolo 1, gennaio 2018

**Ente di afferenza:**
*Università di Padova (unipd)*

# Non-recourse Agreements and Creditors' Common Pledge: a Comparative Perspective

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The validity of non-recourse agreements, that are widely used in the United States of America, is questioned in those systems where the main rule governing debtor – creditor relations is that of the entire patrimony of a debtor as the common pledge to his/her creditors. The issue is getting even more important in recent years, in an attempt to find useful instruments to encourage a fresh start of debtors. This essay will consider the problem with reference to Italy, Spain and Québec and aims to argue the validity of non-recourse agreements in those systems.

Keywords: creditor's common pledge, non-recourse debt, non-recourse mortgages.

## 1. Non-recourse debt: introduction and useful concepts

A debt is non-recourse when it «can be satisfied only out of the collateral securing the obligation and not out of the debtor's other assets»[1]. This is in contrast with the fact that normally creditors can levy charges on any goods owned by the debtor to obtain satisfaction despite the default of an obligation.

This concept is familiar in the United States of America, where the non-recourse nature of a debt can be a matter of the application of the so called «antideficiency laws» or the result of an agreement between the parties.

In both cases, the practical effect is the same: the debtor is not personally liable[2] in the event of default and the creditor can levy on the collateral securing the obligation but not on any other property.

[1] See *Black's law dictionary*, Editor Garner, 9th ed., St. Paul, Minnesota, 2009, 1153. On this topic, among others, see Robinson F.H., *Nonrecourse indebtedness*, in *Virginia Tax Review*, 1991, 11, 3 ff.: «nonrecourse debt is an indebtedness with respect to which the person who has the use of borrowed funds has no personal liability. Instead, the indebtedness is primarily secured by property which the borrower owns».

[2] The notion of personal liability is: «liability for which one is personally accountable, and for which wronged party can seek satisfaction out the wrongdoer's personal assets». In these terms see *Black's law dictionary*, cit., p. 998. When the debt is recourse – the normal situation – the debtor is personally liable for the performance of the obligation. When the debt is non-recourse, the debtor has no personal liability and the repayment of the creditor will depend solely on the foreclosure of the collateral.

In some States of the US, especially in the area of residential mortgage loans, recourse provisions are unenforceable under antideficiency laws that limit or exclude deficiency judgments[3]. Thus, even though the parties agree upon a recourse mortgage loan, it is not possible for the creditor to pursue a deficiency judgment[4] for the unpaid part of the debt if the foreclosure of the mortgaged property is not sufficient to cover the full amount of the debt due, even though the debtor has the financial means to pay.

Instead of being a matter of the law, the non-recourse nature of a debt can be the result of an agreement that aims to exclude a debtor's personal liability.

Agreeing on a non-recourse clause, a creditor cannot levy on his/her debtor's assets that are not those specifically indicated and cannot sue the debtor for any deficiency. In most cases, the non-recourse creditor obtains a security over the assets in question.

Since the Twentieth century, in the US, the use of the non-recourse financing technique[5] has increased to the point that it is now considered a key

[3] It has been estimated that in about a quarter of the US states residential mortgages are non-recourse, meaning that the lender, in case of default, can only repossess the house but cannot collect on the borrower's other personal assets and future income. There is no consensus between scholars and economists regarding the number and the identity of the states that have to be considered recourse and non-recourse. See, for instance, the classification proposed by Ghent A.C., Kudlyak M., *Recourse and residential mortgage default: evidence from US States*, in *The Review of Financial Studies*, 2011, v. 24 n. 9, 3139 ff. The recent American mortgage crisis and the Great Recession of 2007-2009 has drawn the attention to this particular feature of American residential mortgages and to the impact of the non-recourse nature of the debt on the economic downfall. On these points see also Harris R., Asher M., *Non-recourse mortgage – A fresh start*, in *ABI Law Review*, Vol. 21, 2013, 119 ff.; Bao T., Ding L., *Nonrecourse mortgage and housing price boom, bust, and rebound*, in *Real Estate Economics*, V. 44, 2016, 584 ff.; Solomon D., Minnes O., *Non-recourse, no down payment and the mortgage meltdown: lessons from undercapitalization*, in *Fordham Journal of Corporate & Financial Law*, 2011, 16, p. 529 ff. On the notion of «residential mortgage loans» see, e.g., Bruce J.W., *Real Estate Finance,* 6th ed., St. Paul Minnesota, 2009, 16-17: «Residential mortgage loans are loan secured by any form of residential property – for example: single-family dwellings, duplexes, apartments, or condominiums […] Commercial mortgage loans are loans made on non-residential property - for example: shopping centres, hotels, office buildings, warehouses, or manufacturing plants».

[4] A deficiency judgement is «a judgement against the debtor for the unpaid balance of the debt if a foreclosure sale or a sale of repossessed personal property fails to yield the full amount of the debt due». In these terms *Black's law dictionary*, 918 s. On this topic see also Nelson G.S., Withman D.A., *Real estate finance Law*, 2nd ed., St. Paul Minnesota, 1985, 594-598 and Bruce J.W., *Real Estate Finance,* cit., 217. On the functioning of antideficiency laws and in general on non-recourse laws see Solomon D., Minnes O., *Non-recourse, no down payment and the mortgage meltdown: lessons from undercapitalization*, cit., 535 and Harris R., Asher M., *Non-recourse mortgage – A fresh start*, cit., 123 ff.

[5] «Nonrecourse financing is a method of financing whereby the lender accepts a promissory note or other evidence of indebtedness on which the maker is not personally liable. In

component in the world of project finance[6] and in the area of commercial real estate transactions[7], where it has been used especially in the mortgage loans sector[8].

case of default, the lender can lay claim only to the underlying property which secures the obligation». See *Internal Revenue Manual*, Vol. III, Chicago, 1989, par. 4236. Non-recourse debts created by contract can take whatever form wanted by the parties. The parties can exculpate the debtor from personal liability completely, so that in every case the debt will be secured solely by the collateral. On the other hand, the parties can agree a limited recourse loan, using «carve-out clauses». The so called carve-outs impose that the debtor remains personally liable in a defined set of circumstances. Carve-outs impose liability for a variety of acts that might reduce the value of the collateral, such as waste, failure to obtain and maintain the insurance coverage desired by the creditor, fraud and so on. The use of carve-outs is deeply increased, at the point that it has become an obstacle to the scope and correct functioning of nonrecourse financing. On this issue see Owen Morrison P. - Senn M.A., *Carving up the «Carve-outs» in non-recourse loans,* in *9 Probate & 8 Property*, 1995; Stein J., *Nonreourse carveouts: how far is far enough?*, in *Real Estate Law Review*, 1997, 3 ff.; Schwarz J.H., Striefsky L.A., *The nuts and bolts of negotiating nonrecourse carve outs (with sample provisions)*, in *The Practical Real Estate Lawyer*, 2015, 5 ff.; Murray J.C., Scott R.L., *Enforceability of carveouts to nonrecourse loans: an evolution*, in 48 *Real Property, Trust and Estate Law Journal*, 2013-2014, 217 ff.

[6] See McKaig T., *How and when to use nonrecourse financing*, in Aa. Vv. *Financing and Raising Capital*, London, 2011, 49-53: «Nonrecourse financing is the norm in the world of project financing for major projects that are government or quasi-government sponsored (infrastructure projects such as toll roads, hospitals, or power generating plants). It is so much a part of project financing that many textbook definitions of "project finance" specify that it is a key component: a project is financed based on, and secured by, the project itself, with the lender being repaid out of the project's cash flow, rather than the project being secured by the general assets or creditworthiness (the balance sheets) of the sponsors (the engineering companies, the construction companies, or even the government bodies) of an infrastructure project». See also Hoffman S.L., *The law and business of international project finance*, 3rd ed., Cambridge, 2008, 4-5 e 8 e Vinter G.D., *Project finance*, London, 2006, 180 ff.

[7] On the diffusion of the non-recourse financing in commercial real estate transactions see: Robinson F.H., *Nonrecourse indebtedness*, cit., 4; Javaras G., *Nonrecourse debt in real estate and other investments*, in *Taxes*, 1978, 801; Barnes J.E., *Don't sound the death knell for nonrecourse lending yet: a proposal for determining a nonrecourse lender's standing under the uniform fraudulent conveyance act*, in *The Business Lawyer*, Vol. 49, 1994, No. 2, 669 ff. Non-recourse financing is the standard technique in the area of «long-term financing of income producing commercial real estate». In these terms see Stein J., *Nonrecourse carveouts: how far is far enough*, cit., 3.

[8] A mortgage loan is «a loan secured by a mortgage or deed of trust on real property». See *Black's law dictionary*, cit., 1020. The concept of mortgage refers to «an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt». In these terms see Aalberts R.J., *Real estate law*, 9th ed., Stamford, 2015, 318 ff. The typical mortgage transaction includes two documents: a promissory note, that creates the obligation, and the mortgage deed, that creates a security interest in the land and serves as collateral security for the loan. The parties can agree a «recourse note», that makes the borrower personally liable for the amount of the debt, or a «non-recourse note»: in this case the borrower is not personally liable and the creditor has no recourse against the debtor's other assets, those different from the collateral. On this issue see also Creteau P.G., *Principles*

Non-recourse financing is a «mechanism for splitting up a debtor's patrimony» even though it does not create a true separation of patrimonies.

The main feature of the separation of patrimonies is the destination of a pull of assets to a specific purpose. As consequence, these assets constitute a segregated fund, that is unattached from the general patrimony of a debtor. Only those creditors whose claim is relating to that specific purpose have recourse on the assets involved in the segregated fund (so-called affirmative assets partitioning).

Non-recourse financing is a different phenomenon, first of all because no segregated fund is created and it does not lead to any affirmative asset partitioning effect. The non-recourse creditor does not obtain an exclusive right of execution and the other creditors may execute their claims upon all the debtor's assets, including the property indicated.

Rather, a non-recourse loan is useful for obtaining the opposite effect of defensive asset partitioning, which allows the debtor to protect a part of his/her assets from the claims of the non-recourse creditors[9].

In addition, it should be noticed that while the separation of patrimonies is effective *erga omens*, non-recourse agreements are legally binding solely for the consenting creditors, so they are effective *inter partes*.

From the debtors' perspective, it is easy to understand that non-recourse clauses are useful to minimize liability and risks of a specific transaction[10].

It is not so easy to understand why creditors should agree to be secured solely by the collateral, thus renouncing the right to sue the debtor for any deficiency.

*of real estate law*, Portland, Maine, 1977, 228-232; Kratovil R., Werner R.J., *Real estate law*, 8th ed., New Jersey, 1983, 280-283; Nelson G.S., Withman D.A., *Real estate finance Law*, 2nd ed., St. Paul Minnesota, 1985, 18-20; Hinkel D.F., *Pratical real estate law*, 2nd ed., St. Paul, 1995, 358; Jennings M., *Real Estate Law*, Mason, 2011, 405.

[9] Cf. Macdonald R.A., *Privileges and other preference upon moveable property in Quebec: their impact upon right and recourses of execution creditors*, in *Debtor – Creditor Law. Practice and Doctrine*, edited by Springman, Gertner, Toronto, 1985, 266 and Rojas Elgueta G., *Autonomia privata e responsabilità patrimoniale del debitore*, Milano, 2012, 197-198. For the concepts of affirmative asset partitioning and defensive asset partitioning see Hansmann H., Kraakman R., «*The essential role of organisational law*», in *Yale Law Journal*, 2000, Vol. 110: 387, 393 ff.

[10] Non-recourse financing can be used as an alternative to the constitution of a new company for a project. Cf. Vinter G.D., *Project finance*, cit., 180-181. This technique has been used by real estate professionals forming limited partnerships to obtain protection against personal liability likewise corporations. Although a corporation offers the best protection against personal liability, it is an expensive instrument in fiscal terms. Conversely, a limited partnership offers tax advantages but exposes general partners to unlimited liability in contract and tort. Cf. Stein G.M., *The scope of the borrower's liability in a nonrecourse real estate loan*, in *Washington & Lee Law Review*, 1998, 55, 1212-1217.

Indeed, when the debt is non-recourse, the possibility of repayment depends only on the value of the collateral and the creditor will share one of the classic risks of ownership: the loss of value of the property. Therefore, the creditor apparently makes «an uneconomic decision»[11].

This choice can be explained however for several reasons. For instance, non-recourse clauses permit a reduction in monitoring costs of the debtor's estate. Creditors find non-recourse loans attractive also because of the advantages they receive in return, such as additional guarantees or warranties from the borrower, or obtaining a higher interest rate on the purchase money loan[12].

Therefore, although the benefits of a non-recourse debt for a debtor are obvious, this instrument is not free of costs[13].

## 2. Creditors' common pledge and non-recourse agreements: the problem

Non-recourse financing is a product of freedom of contract and the application of a recourse or a non-recourse regime is a matter of a debtor's and a creditor's choice.

For this reason, there seem be no bars that can prevent the parties making such a decision.

[11] In these terms see Robinson F.H., *Nonrecourse indebtedness*, cit., 4.

[12] On this point see Javaras G., *Nonrecourse debt in real estate and other investments*, cit., 801; Stein G.M., *The scope of the borrower'a liability in a nonrecourse real estate loan*, cit., 1217 ff.; Robinson F.H., *Nonrecourse indebtedness*, cit., 4 f.; Stein J., *Nonreourse carveouts: how far is far enough?*, cit., 3: «A nonrecourse loan is functionally a two-step sale of an asset. Today, the lender (buyer) pays an attractive price for the asset to the seller (borrower). Tomorrow, when the loan matures, the borrower (seller) will either return the purchase money or peacefully deliver the asset sold. It is the borrower's choice. With proper loan underwriting, the transaction works for both borrower and lender. It allocates risks in a way that both parties find attractive, even though the lender bears the full risk that the value of the asset will drop below the loan amount». Cf. also Rojas Elgueta G., *Autonomia privata e responsabilità patrimoniale del debitore*, cit., 204.

[13] An interesting analysis of costs and benefits relating to non-recourse financing has been offered by McKaig T., *How and when to use nonrecourse financing*, cit., 50-51. Considering the costs stimming from the non-recourse nature of the loan, several scholars doubt about its convenience for the debtor. On this topic, relating to nonrecourse residential mortgage loans, see: Meador M., *The effects of mortgage laws on home mortgage rates*, in *Journal of Economics and Business*, 1982, 143 ff.; Solomon D., Minnes O., *Non-recourse, no down payment and the mortgage meltdown: lessons from undercapitalization*, cit., 536. By the way, the analysis of Ghent A.C., Kudlyak M., *Recourse and residential mortgage default: evidence from US States*, *op. cit.*, 3142, did not find that in the US the mortgage prices are significantly higher in non-recourse states than in recourse states.

Nevertheless, the validity the of non-recourse agreements can be questioned in those systems where the main rule governing debtor – creditor relations is that of the entire patrimony[14] of a debtor as the common pledge to his/her creditors, such as Italy, France and Spain. The rule is known as «*responsabilità patrimoniale universale*» in Italy (article 2740 of *Codice civile*), «*responsabilidad patrimonial universal*» in Spain (article 1911 of *Código civil*) and «*droit de gage général*» in France (article 2284-2285 of *Code civil*)[15].

Article 2740 of the Italian Civil Code, article 1911 of the Spanish Civil Code, as well as article 2284 of the French Civil Code, rule that a debtor is liable with all his/her present and future properties for the performance of his obligations[16].

[14] The concept of patrimony is that of the complex of a person's assets, or rather of a person's patrimonial rights. On the notion of patrimony see among Italian scholars: Fedele P., voce *Patrimonio*, in *Diz. Prat. priv. priv.*, Vol. V., Milano, 1937-39, 237 ff.; Vitucci E., voce *Patrimonio*, in *Nuovo Dig. it.*, IX, Torino, 1939, 557; Biondi B., *Patrimonio*, in *Noviss. Dig. It.*, Vol. XII, Torino, 1957, 614 ff.; Trimarchi V.M., *Patrimonio (nozione generale)*, in *Enc. dir.*, Vol. XXXII, Milano, 1982, 271 ff.; Durante V., voce *Patrimonio* (dir. civ.), in *Enc. giur.*, Vol. XXII, Roma, 1990, 1. The concept of patrimony is uncodified and worked out in legal writing of 19th century, although the idea was not completely unknown in the Roman law.

[15] The literature on this issue is large. For Italy, see, in particular: Nicolò R., *Della responsabilità patrimoniale, delle cause di prelazione e della conservazione della garanzia patrimoniale,* in *La tutela dei diritti*, di Nicolò, Andrioli, Gorla, in *Comm. c.c.*, curated by Scialoja, Branca, sub art. 2740, Bologna, 1954; Roppo V., *La responsabilità patrimoniale del debitore*, in *Tratt. dir. priv.*, directed by Rescigno, Vol. XIX, Torino, 1985, 485 ff. and Id. voce *Responsabilità patrimoniale*, in *Enc. dir.*, Vol. XXXIX, Milano, 1988, 1041 ff.; Barbiera L., *Responsabilità patrimoniale. Disposizioni generali*, in *Il cod. civ. comm.*, directed by Schlesinger, 2nd ed., Milano, 2010; Miraglia C., voce *Responsabilità patrimoniale*, in *Enc. Giur.*, Vol. XXVII, Roma, 1991; Macario F., *Responsabilità patrimoniale: nozioni introduttive*, in *Tratt. dir. civ.*, curated by Lipari, Rescigno, Zoppini, Vol. IV, Tomo II, Milano, 2009, 164 ff.; Sicchiero G., *La responsabilità patrimoniale del debitore*, in *Tratt. dir. civ.*, directed by Sacco, Torino, 2011; Roselli F., *La responsabilità patrimoniale*, in *Tratt. di dir. priv.,* curated by Bessone, Vol. IX, Tomo III, Torino, 2000; Bianca C.M., *Diritto civile, Le garanzie reali e la prescrizione*, Vol. VII, Milano, 2011, 4 ff. For Spain, I have used: Capilla Roncero F., *La responsabilidad patrimonial universal y el fortalecimiento de la protección del crédito*, Cádiz, 1989; Cordero Lobato E., *Artículo 1.911*, in *Comentarios al Código Civil*, Tomo IX, directed by Bercovitz Rodríguez-Cano, Valencia, 2013, 1357 ff.; Toribios Fuentes F., *Artículo 1.911*, in *Comentarios al Código Civil*, Valladolid, 2010, 2079 ss.; Orduña Moreno J., *Artículo 1.911*, in *Código Civil Comentado,* Libro IV, directed by Bercovitz Rodríguez-Cano, Navarra, 2011, 1516 ff.; Gullón Ballesteros A., *Artículo 1.911*, in *Comentarios al Código Civil y Compilaciones Forales*, Tomo XXIV, directed by Albaladejo, Madrid, 1984, 662 ff.; Díez-Picazo L., *Fundamentos del derecho civil patrimonial*, II, 6th ed., Navarra, 2008, 149 ff.; Lasarte C., *Principios de derecho civil*, Vol. II, *Derecho de obligaciones*, 20th ed., Madrid, 2016, 222 ff.

[16] See article 2740, par. I, of the Italian Civil Code: «*Il debitore risponde delle obbligazioni con tutti i suoi beni presenti e futuri*»; article 1911 of the Spanish Civil Code: «*Del cumplimiento de las obligaciones responde el deudor con todos sus bienes, presentes y futuros*» and article 2284 of the French Civil Code: «*Quiconque s'est obligé personnellement, est tenu de remplir son engagement sur tous ses biens mobiliers et immobiliers, présents et à venir*». Before the *ordonnance*

The characteristics of the liability affecting a debtor, or rather his/her patrimony[17], are expressed through the adjectives *patrimonial*, which means that creditors' claims can be satisfied solely out of assets; *universal* or *unlimited*, meaning that all of a debtor's property are part of the common pledge of his/her creditors; *perpetual*, because future incomes are involved too.

The idea of a debtor's patrimony like the common pledge of his/her creditors, is one of the civil law concepts *par excellence*. It was introduced by the Napoleonic Code, but its origins can be traced back to Classic Roman law[18].

In Classic Roman law, creditors had two instruments to obtain satisfaction - *nexum* and *manus iniectio* – both of which affect the person of the debtor[19]. It was *Lex Poetelia Papiria*[20] that, for the first time, established that creditors should enforce their claim only on their debtor's assets, through the *missio in bona*. The aim of this was to protect persons. Indeed, initially, it was directed to affect the debtor's whole patrimony – rather than single assets – because this combination of property was considered a substitute for the person.

Even the modern codifications of 19th century, for example the Napoleonic Code and the Italian Civil Code of 1865, respectively in article 2092[21] and article 1948, imposed the rule of a debtor's patrimony serving as the common pledge of creditors as a civilized principle that sought to save debtors from physical execution[22].

26th march 2006, n. 2006-346, the principle was expressed by article 2092 of the French Civil Code, while article 2093 stated the *par concidicio creditorum* principle.

[17] A debtor is personally liable for the non-performance of an obligation. Since the abolition of the imprisonment for debt, this liability can be satisfied only out of his patrimony.

[18] On debtor's liability for non-performance of obligations in Roman law see: Arangio Ruiz V., *Istituzioni di diritto romano*, Napoli, 1968, 286 f.; Talamanca M., voce *Obbligazioni (dir. rom)*, in *Enc. dir.*, Milano, 1979, 2 ff.; Betti E., *Teoria generale delle obbligazioni*, Vol. II, 1953, Milano, 114 ff.; Pacchioni G., *Lezioni di diritto civile. Le obbligazioni. Parte generale*, Padova, 1926, 5 ff.

[19] On *nexum* and *manus iniectio* see: Grosso G., voce *Nexum*, in *Enc. It.*, Vol. XXIV, Roma, 1934, 742 f.; Riccia L., voce *Debiti (Arresto personale per)*, in *Enc. dir.*, Vol. XI, Milano, 1962, 740 ff.; Salomo M.D., voce *Debiti (Arresto personale per)*, in *Dig. it. disc. priv., Sez. civ.*, Vol. V, Torino, 1989, 122 ff.; Grassetti C., voce *Debiti (Arresto personale per)*, in *Nuovo Dig. It.*, Vol. IV, Torino,1939, 551 ff. The *nexum* was an agreement that obliged a debtor to serve his creditor until the relief of the debt. The *manus iniectio* consisted in the assignment of a debtor to his creditor, who had the power to sell him as slave or kill him.

[20] Most of the scholars state that *Lex Poetelia Papiria* was issued in 326 BC. See Grosso G., voce *Nexum*, cit., 743; Talamanca M., voce *Obbligazioni (dir. rom)*, cit., nt. 43. Instead, for Salomo M.D., voce *Debiti (Arresto personale per)*, cit., 122, the law was issued in 429 BC.

[21] Current article 2284 of the French Civil Code. See footnote 16.

[22] In these terms, with reference to article 1948 of the Italian Civil Code of 1865, see: Luzzati I., *Dei privilegi, Commento teorico pratico al capo I, titolo III del Codice civile italiano*, Torino, 1895, 4; Cattaneo V., *Codice civile italiano annotato*, Libro III, Vol. II, Torino, 1865, 1560; Borsari L., *Commentario del c.c. italiano*, Vol. IV, Torino, 1881, 442. For article 2092 of the

In legal writings, the rule has been used as the basis of the «one person, one patrimony» theory worked out by Charles Aubry and Frédéric – Charles Rau in their *Cours de droit civil français*. This theory considered the unlimited scope of the common pledge of creditors the outcome of the fact that the patrimony was indivisible[23].

Partly because of the influence of 19th century legal scholars, the importance of the principle that a debtor's entire patrimony is the common pledge of creditors has been overvalued, and misunderstood, giving rise to a general aversion for those mechanisms that aim to split up a debtor's patrimony[24].

Non-recourse clauses constitute an exception to the rule of liability affecting a debtor's whole patrimony. When the debt is non-recourse, the debtor is not liable with all his/her present and future property: creditors can be satisfied only out of the collateral securing of the obligation. Therefore, non-recourse clauses limit the scope of the common pledge of creditors.

That said, the main problem is that of understanding whether contractual autonomy can set such a limit.

Traditional scholars has considered the provision of article 2740, paragraph I, of the Italian Civil Code, as well as of its French and Spanish equivalents, of public order. For this reason, it would not be possible for a creditor

Napoleonic Code I have seen Pont. P., *Commentario ossia trattato dei privilegi e delle ipoteche*, in *Spiegazione teorico pratica del Codice Napoleone*, curated by Marcadé, Pont, annotated by Golia, X, I, Napoli, 1883, 7-9 and Baudry Lacantinerie G., De Loynes P., *Del pegno, dei privilegi, delle ipoteche e dell'esecuzione forzata, in Trattato teorico pratico del diritto civile a cura di Baudry - Lacantinerie*, Italian translating curate by Bonfante, Pacchioni, Sraffa, Milano, 1912, 347-348. For grater deeph on this point see: Morace Pinelli A., *Atti di destinazione, trust e responsabilità del debitore*, Milano, 2007, 34.

[23] Aubry C., Rau C., *Cours de droit civil français d'après l'ouvrage de C.S. Zachariae*, 4th ed., Vol. VI, Strasbourg, 1873, par. 573: «l*e patrimoine est, en principe, un et indivisible, comme la personnalité même*» and par. 579: «*Le droit de gage est indivisible, comme le patrimoine auquel il s'applique*». For Aubry and Rau each person has one patrimony (even if they possess no property) and each person can have only one patrimony. The literature on the classical theory of patrimony is large. I have seen, in particular, the critical analyses offered by Thomat-Raynaud A.L., *L'unité du patrimoine: essai critique*, 2007, Paris, 31 ff.; Kasirer N., *Translating part of France's legal heritage: Aubry and Rau Patrimoine*, in *Revue générale de droit*, 2008, 458 ff. and Zoppini A., *Autonomia e separazione del patrimonio nella prospettiva dei patrimoni separati delle società per azioni*, in *Riv. dir. civ.*, 2002, 552 ff.

[24] Cf. Thomat-Raynaud A.L., *L'unité du patrimoine: essai critique*, cit., 78: «*Aubry e Rau n'ont pas expressément soulevé la question de savoir si l'on peut déroger par convention au droit de gage général. Il semble que pour eux l'idée d'une dérogation opposable à tous est inconcevable, parce qu'elle sera contraire à l'article 2092 du Code civil*». On this issue, with reference to the Italian legal system, see Bianca M., *Vincoli di destinazione e patrimoni separati*, Padova, 2001. On the historical evolution of the asset partitioning doctrine in the Civil law tradition see Rojas Elgueta G., *The economic foundation of debtor – creditor relations*, Bologna, 2018.

to agree a non-recourse clause that reduces the common pledge which guarantees an obligation.

This essay seeks to suggest a different view.

Indeed, considering that the agreed restriction on the content of the creditors' common pledge is effective *inter partes*, there is no reason to forbid them renouncing the right to pursue their claim on the debtor's whole patrimony.

This study will consider the problem with reference to Italy, Spain and Québec.

In Italy and Spain, attention on non-recourse debt has increased in recent years, during the recent economic crisis, in an attempt to find useful instruments for reducing the scope of the common pledge of creditors, and to encourage a fresh start among debtors.

The case of Québec is interesting because of the evolution that has taken place regarding the rules on the limitations of the «*droit de gage général*» in the Civil Code.

At first glance, article 2740 of the Italian Civil Code, article 1911 of the Spanish Civil Code and article 2645 of the Civil Code of Québec set different rules for the restrictions on a creditor's common pledge.

Article 2740, paragraph II, of the Italian Civil Code states that such limitations are not allowed except in cases set forth by the law. However, article 1911 of the Spanish Civil Code does not contain any regulation of this nature.

Article 2645 of the Québécoise Civil Code has a twin-track approach, admitting only lawful exemptions from seizure and divisions of patrimony. However, the rule allows a debtor to agree with his/her creditor to be bound to fulfil his/her obligation only from the property that had been designated.

This essay intends to argue that, even though these rules are apparently different, the twin-track regime can be applied even in the light of article 2740, par. II, of the Italian Civil Code, as well of article 1911 of the Spanish Civil Code.

## 3. The Italian perspective

### 3.1. Non-recourse clauses and article 2740, par. II, of the Civil Code: the traditional approach

The Italian legal system seems to have much more obstacles than other civil law systems, like Spain or France, against non-recourse clauses.

Indeed, article 2740, par. II, of the Civil Code appears to be unique to the Italian legal system[25] and an insuperable impediment to non-recourse clauses.

The main principles governing debtor-creditor relations in the Italian legal system are: that of the unlimited patrimonial liability of a debtor (article 2740, par. I); and that of the validity of lawful limitations of the common pledge of creditors (article 2740, par. II).

I have already explained that article 2740, par. II, of the Civil Code states that limitation of a debtor's unlimited patrimonial liability are not allowed, except in cases set forth by the law[26].

It might appears that, because of this rule, only the legislature can reduce the content of the common pledge of creditors. Actually, the meaning of article 2740, par. II, of the Italian Civil Code is more complex.

In the frame of article 2740, par. II, should be made a distinction between those limitations of liability originated by the law and those originated by private autonomy[27].

The limitations of liability originated by the law are a matter of a legal provision fixing the non-leviable nature of certain assets relative to all or some creditors[28].

Alternatively, the limitations of liability originated by private autonomy arise as the legal consequence of the constitution of a special purpose patrimony[29].

[25] Article 2284 of the French Civil Code, as well as article 1911 of the Spanish Civil Code, does not contain an express rule for limitations on the scope of a creditor's common pledge. On the lack of such a provision in the French Civil Code see Thomat-Raynaud A.L., *L'unité du patrimoine: essai critique*, cit., 439 f.

[26] See article 2740, par. II, of the Civil Code: «Le limitazioni della responsabilità non sono ammesse se non nei casi previsti dalla legge». The concept of limitation of liability in the frame of article 2740 is that of one or more assets of a debtor exempt from seizure relative to all or to certain of his creditors. In these terms, see Nicolò R., *Della responsabilità patrimoniale, delle cause di prelazione e della conservazione della garanzia patrimoniale,* cit., 11. Therefore, limitations of liability relevant to article 2740 c.c. concern the scope of the common pledge of creditors and are different from limitations affecting damages for breach of contract regulated by article 1229 of the Civil Code.

[27] For a distinction between the different categories of limitations of liability relevant to article 2740 of the Civil Code see Roppo V., *La responsabilità patrimoniale del debitore*, cit., 514 ff. Cf. Barbiera L., *Responsabilità patrimoniale*, cit., 35 ff.

[28] Take for instance article 326 of the Civil Code, stating that the *usufructus* on children's property held by parents is not leviable for parents' creditors. On this topic see Gennaro M., voce *Usufrutto legale dei genitori*, in *Dig. It., Sez. priv.*, Vol. XIX, Torino, 1999, 572 ff.; Pelosi A.C., voce *Usufrutto legale dei genitori*, in *Noviss. Dig.*, appendice VII, Torino, 1987, 1047 ff.

[29] The origin of this category can be traced to the German doctrines of the *Zweckvermögens* developed at first by Brinz A., *Lehrbuch der Pandekten*, Band I, Erlangen u. Leipzig,

Indeed, in a *numerus clausus* of circumstances, the law allows a subject to destine a few assets to a specific purpose, creating a separate patrimony. The assets involved in the special purpose patrimony are segregated from the general patrimony, they are subtracted from the common pledge of creditors and pledged to a specific group of creditors[30]. Limitations on the unlimited liability of a debtor stemming from the creation of a special patrimony are effective *erga omnes* («good against the world»).

Take for instance the so-called «*fondo patrimoniale*»: articles from 167 to 171 of the Civil Code that allow spouses, as well as third parties, to constitute a fund committing a pool of assets to meet the needs of the family. Because of article 170 of the Civil Code, the creditors, who are aware that their claim stems from an obligation with a different purpose from meeting a family's needs, have no recourse on the assets involved in that fund[31].

Both limitations of liability are possible in the light of article 2740, par. II. However, according to this rule, the limitations originated by private autonomy are valid solely in the cases provided for the law and in compliance with lawful forms.

It is not the main issue of this essay, but it's interesting to notice that in the Italian legal system the lawful cases of special purpose patrimony have progressively increased[32]. This phenomenon has put in crisis the idea

1884, 201 ff. and Id. Band III, part II, *Das Zweckvermögen*, Erlangen u. Leipzig, 1888, 453 ff. and of the *Sondervermögens* developed by Bekker E.I., *System des Heutigen Pandektenrechts*, I, Weimar, 1886, § 42-43, 141 ff.; Regelsberger F., *Pandekten*, I, Liepzig, 1893, § 95, 361 ff.; Hellwig K., *Lerbuch des deutschen Zivilprozeßrechts*, Band I, Leipzig, 1903, 295. On *Sondervermögens* see also Thur A.v., *Der Allgemeine Teil des Deutschen Bürgerlichen Rechts*, Band I, Berlin, 1910, 330 ff.; Wolff H.J, *Organschaft und Juristiche Person*, Band I, Berlin, 1933, 179 ff. and Boegel H., *Des Begriff des Sondervermögens nach Reichsprivatrecht*, Leipzig, 1933, 6 ff. A *Zweckvermögen* is a purpose patrimony without a holder, while a *Sondervermögen* is a special patrimony held by a person. The model of special patrimony recognized by many Italian legal provisions is that of special patrimony held by a person apart from his general patrimony.

[30] For a description of special patrimony and its most significant legal effects see Durante V., voce *Patrimonio* (dir. civ.), cit., 3.

[31] The literature is large. For a general framework see: Auletta T., *Il fondo patrimoniale. Artt. 167-171*, in *Il codice civile. Commentario*, directed by Schlesinger, Milano, 1992; Corsi F., *Il regime patrimoniale della famiglia*, in *Tratt. dir. civ. e comm.*, directed by Cicu, Messineo, Vol. VI, II, Milano, 1984; Gabrielli G., voce *Patrimonio familiare e fondo patrimoniale*, in *Enc. dir.*, Vol. XXXII, Milano, 1982, 293 ff.; Cenni M.L., *Il fondo patrimoniale*, in *Tratt. dir. fam.*, directed by Zatti, Vol. III, Milano, 2012.

[32] Just to have an idea take for instance: the provident and assistance special funds regulated by article 2117 of the Civil Code; the funds committed to a specific purpose of company limited by shares regulated by articles from 2447 *bis* to 2447 *decies* of the Civil Code; the investment funds regulated by article 36 of T.U.F.; the so-called «trust *interno*» possible following the ratification of The Hague Trust Convention and the so-called the acts of destination, regulated by article 2645 *ter* of the *Civil Code*.

that a debtor must guarantee the performance of an obligation with all his/her assets[33].

This is not all: after the ratification of the Hague Trust Convention and the introduction in the Civil Code of article 2645 *ter* – that allows the constitution of a segregated fund without fixing the purpose of affectation – the contractual autonomy is achieving even more space in creating separation patrimonies, to the point that the current value of article 2740 is doubtful[34].

Coming back to our main issue, on the traditional view, the common pledge of creditors is intangible by freedom of contract. As consequence a creditor may not renounce the right to pursue his claim upon the entire patrimony of his debtor.

The question regarding the validity of non-recourse clauses has not attracted the attention of Italian doctrine for a long time. Recently, however, some authors have begun to look in depth at this problem, in an attempt to open up the Italian legal system to the opportunity, for debtors and creditors, to agree to a reduction in the scope of the common pledge[35].

[33] Several scholars observed that nowadays the principle the patrimonial unlimited liability has a residual value and that it has been replaced by its opposite. In these terms see eg.: Barbiera L., *Responsabilità patrimoniale. Disposizioni generali*, in *Il cod. civ. comm.*, directed by Schlesinger, 1st ed., Milano, 1991, 34; Di Sabato F., *Sui patrimoni destinati*, in Aa. Vv., *Profili patrimoniali e finanziari della riforma – Atti del convegno di Cassino 9 ottobre 2003*, curated by Montagnani, Milano, 2004, 53; Zoppini A., *Autonomia e separazione del patrimonio nella prospettiva dei patrimoni separati delle società per azioni*, cit., 545; Morace Pinelli A., *Atti di destinazione, trust e responsabilità del debitore*, cit., 118; Lenzi R., *I patrimoni destinati: costituzione e dinamica dell'affare*, in *Riv. not.*, 2003, I, 543 ss.; Roppo V., *Responsabilità patrimoniale*, cit., 1050; Rojas Elgueta G., *Autonomia privata e responsabilità patrimoniale del debitore*, cit., 76 e 80.

[34] The impact of article 2645 *ter* of the Civil Code – introduced by d.l. 30.12.2005, n. 273, converted by l. 23.2.2006, n. 51 – on the rule imposed by article 2740, par. II, is widely discussed. Normally, in the Italian legal system, a subject can affect one or more assets to a specific purpose fixed by the legislature in advanced. Otherwise, article 2645 *ter* does not impose a fixed purpose of affectation. This norm imposes solely that the purpose of affectation must be the pursuing of an interest worthy of protection in compliance with article 1322, par. II, of the Civil Code. Therefore, several scholars state that contractual autonomy has achieved so much space in creating special patrimony to the point that the rule imposed by article 2740, par. II, of the Civil Code would have lost any value. The question is complicated. For a panoramic on the different positions of the Italian scholars on this point see Marchetti G., *La responsabilità patrimoniale negoziale*, Padova, 2017, 219 ff.

[35] In this innovative perspective see: Sicchiero G., *I patti sulla responsabilità patrimoniale (art. 2740 c.c.)*, in *Contr. e impr.*, 2012, 91 ff. and Id., *La responsabilità patrimoniale*, cit., 41 ff.; Rojas Elgueta G., *Autonomia privata e responsabilità patrimoniale del debitore*, cit., *passim*; Pagliantini S., *Il debito da eccezione a regola*, in *Persona e Mercato*, 2014, 111 e 118; Follieri L., *Esecuzione forzata e autonomia privata*, Torino, 2016, 81 ff.; Di Sapio A., *Patrimoni segregati ed evoluzione normativa: dal fondo patrimoniale all'atto di destinazione ex art. 2645 ter.*, in *Dir. e fam.*, 2007, 1277 ff.; Porcelli M., *Profili evolutivi della responsabilità patrimoniale*, Napoli, 197

Because of the general wording of article 2740, par. II, of the Civil Code, most scholars consider non-recourse agreements null and void[36], but do not offer a real argument to support this conclusion.

The position is mainly based on the unproven assumption that article 2740, par. II, applies to any restriction on the scope of creditors' common pledge, without distinction of any kind. From this perspective, it is unimportant whether a limitation of the common pledge is the result of a debtor's choice of creating a special patrimony, or the result of an agreement between a debtor and his/her creditor.

Furthermore, as explained above, the idea that the principle of universal patrimonial liability, established by article 2740, par. I, of the Italian Civil Code, is of public order, has played a decisive role in making the common pledge of creditors intangible by freedom of contract[37].

In support of the mandatory nature of article 2740 c.c., prohibiting even non-recourse clauses, scholars have also argued that there is no valid obligation without patrimonial liability[38]. Indeed, through non-recourse agree-

ff. and Id., *Le limitazioni convenzionali della responsabilità patrimoniale del debitore*, in *Collana dei maestri del diritto civile. Domenico Rubino. Interesse e rapporti giuridici*, I, curated by Perlingeri e Polidori, Napoli, 2009, 630 ff.

[36] See Barbiera L., *Responsabilità patrimoniale*, cit., 2nd ed., 75 and 131 ff., who stated that article 2740, par. II, of the Civil Code imposes a principle of legality. See also other bibliographic reference in the next footnotes.

[37] Cf., in particular, Pratis C.M., *Della tutela dei diritti: artt. 2740-2783*, in *Comm. del cod. civ.*, Libro VI, Torino, 1976, 43; D'amelio M., *Della responsabilità patrimoniale, delle cause di prelazione e della conservazione della garanzia patrimoniale: disposizioni generali*, in *Commentario del Codice civile*, directed by D'Amelio-Finzi, Firenze, 1943, 438; Gentile F., *Il nuovo Codice civile commentato, Libro VI, della tutela dei diritti*, Napoli, 1958, 196; Salamone L., *Gestione e separazione patrimoniale,* Padova, 2001, 12 ff.; Roppo V., *La responsabilità patrimoniale del debitore*, *op. cit.*, 511. Report n. 1124 to the Civil Code states that the second paragraph of article 2740 has been introduced to improve the rule imposed by paragraph I, perusing the general interests of credit and economy. The reference to these interests has enforced the idea that universal liability principle is of public order. On the historical process that led to recognize in article 2740, par. I, of the Civil Code a principle of public order see the interesting analysis of Rojas Elgueta G., *Autonomia privata e responsabilità patrimoniale del debitore*, cit., 57 ff.

[38] The topic of the relation existing between patrimonial liability and obligation has been developed by the German Pandectistics' *Schuld und Haftung* theory. This theory considered the patrimonial liability the main component of any legally binding obligation. The origin of the *Schuld* und *Haftung* theory can be traced to Brinz A., *Der Begriff obligatio*, in *Grünhuts Zetischrifts für das Privat und öffentliches Recht der Genwart*, Vol. I, 1874 and Id., *Lehrbuch der Pandekten*, II, Leipzig, 1879, 8 ff. Following the long debate on this point, nowadays the patrimonial liability is considered the external condition of existence of any legally binding obligation. In these terms see eg. Roppo V., *La responsabilità patrimoniale del debitore*, cit., 490; Breccia U., *Le obbligazioni*, in *Trattato di diritto privato*, curated by Iudica, Zatti, Milano, 1991, 68; Bianca C.M., *Diritto civile. L'obbligazione*, Vol. IV, Milano, 1993, 26. Cf. also Larenz K., *Lehrbuch des Schuldrechts*, I, *Allgemeiner Teil*, München, 1987, 23-24: «*Die Haftung*

ments, the possibility of the non-recourse creditor being satisfied, despite the nonperformance of the obligation, would be jeopardized, thus conflicting with the legally binding character of the obligation[39].

This approach is open to criticism in a number of respects.

First of all, it has been rightly argued that non-recourse agreements do not pose a problem of public order, since the creditor does not give up the right to pursue his/her claim against debtor's patrimony, but merely agrees upon a reduction of the assets involved in the common pledge[40].

In other words, non-recourse clauses do not have the purpose of making the debtor free to decide whether or not to fulfill his obligation, but rather seeks to limit the scope of the creditors' common pledge.

Furthermore, considering that non-recourse agreements do not exclude the debtor's patrimonial liability, the fact that there is no valid obligation without a debtor's patrimonial liability is not at all an impediment to the validity of non-recourse clauses[41].

### 3.2. Article 2740, par. II, and beyond: towards a twin-track regime

The aim of article 2740, par. II, of the Civil Code is traditionally and widely seen as being that of protecting creditors[42]: in absence of this rule, a debtor

*ist zwar von der Schuld, dem Leistensollen, begrifflich zu sondern, sie folgt ihr aber gleichsam wie ein Schatten nach*».

[39] Cf. Roppo V., *La responsabilità patrimoniale del debitore*, cit., 508; Nicolò R., *Della responsabilità patrimoniale*, cit., 11 ff.; Di Majo A., *Responsabilità e patrimonio*, Torino, 2005, 48 ff.; Bianca C.M., *Diritto civile*, *Le garanzie reali e la prescrizione*, cit., 6 ff.; Miraglia C., voce *Responsabilità patrimoniale*, cit., 8; Bianca M., *Vincoli di destinazione e patrimoni separati*, cit., 188 e 246; Nervi L., *La responsabilità patrimoniale dell'imprenditore*, Padova, 2001, 58 ss. Cf. also Spada P., *La tipicità delle società*, Padova, 1974, 56,

[40] This is the positition of Sicchiero G., *La responsabilità patrimoniale del debitore*, cit., 44, followed by Follieri L., *Esecuzione forzata e autonomia privata*, cit., 81. It should be also noted that, because of the increasing of the legally provided cases of special patrimony, the principle of the universal patrimonial liability is considered to be of public order no more. In these terms eg.: Gambaro A., voce *Trust*, in *Dig. disc. priv.*, *Sez. civ.*, Vol. XIX, Torino, 1999, 466 f.; Bianca M., *Vincoli di destinazione e patrimoni separati*, cit., 244; Rojas Elgueta G., *Autonomia patrimoniale e responsabilità del debitore*, cit., 80-82; Morace Pinelli A., *Atti di destinazione, trust e responsabilità patrimoniale del debitore*, cit. 106 ff.

[41] On this point see Sicchiero G., *La responsabilità patrimoniale del debitore*, cit., 40 f. and Follieri L., *Esecuzione forzata e autonomia privata*, cit., 76-80.

[42] Report n. 1124 to the Civil Code does not explain why has been introduced par. II of Article 2740. I have already explained that this report argues only that the rule pursues the interests of creditors and economy (see footnote n. 35). About the fact that the aim of article 2740, par. II, is that of protecting creditors see e.g.: Miraglia C., voce *Responsabilità patrimoniale*, cit., 8; Quadri R., *La destinazione patrimoniale. Profili normativi e autonomia privata*, Napoli, 2004,

could reduce the scope of a creditor's common pledge and jeopardize his/her likelihood of receiving satisfaction.

I have already explained that, scholars traditionally argue that it does not matter whether a limitation of the common pledge is the result of a debtor's choice of creating a special patrimony or the result of an agreement between a debtor and his/her creditors.

Nevertheless, it should be noted that creditors need different forms of protection against different kinds of limitations of debtor's patrimonial liability, taking into account if the limitation is originated through the creation of a segregated fund or through a non-recourse agreement. Indeed, these two ways of reducing the scope of the creditors' common pledge are different in a number of respects.

In the first model, the limitation of the common pledge is the matter of a debtor's unilateral choice to create a special patrimony. The debtor then has two patrimonies – a general patrimony and a special purpose patrimony – and the limitation of his/her patrimonial liability is «good against the world».

In non-recourse clauses, the limitation on the scope of the common pledge is agreed by the debtor with one or more of his/her creditors, it is binding only for those creditors that consent to such a limitation and there is no separation of patrimony[43].

In this context, the traditional way of interpreting article 2740, par. II, seems simplistic, and not the best one to use. Indeed, it is mainly based on a literal criterion and does not take into account the broad differences that exist between limitations of the creditors' common pledge «good against the world» and limitations resulting from non-recourse agreements that are effective *inter partes*.

Take for instance article 2645 of the Civil Code of Québec: on the one hand, it states that the legislator alone may create exemption from seizure or establish divided or separated patrimony. On the other, it exempts non-recourse clauses from the application of this rule.

Is article 2740, par. II, c.c. an obstacle to this solution or, according to a teleological interpretation, should it not even be applied to non-recourse agreements?[44]

17; Bianca C.M., *La responsabilità*, cit., 412; Tucci G., *Responsabilità patrimoniale e cause di prelazione*, cit., 134; Porcelli M., *Profili evolutivi della responsabilità patrimoniale*, cit., 69; Nervi L., *La responsabilità patrimoniale dell'imprenditore*, cit., 58. For more details about scholars' debate on this point see Marchetti G., *La responsabilità patrimoniale negoziale*, cit., 92-96.

[43] On this point see also point 1. of this work.

[44] The teleological criterion focuses on the aim of a rule. The idea that I suggest is that of making a teleological reduction on the scope of application of article 2740, par. II, c.c. On

It is certainly true that the aim of article 2740, par. II, c.c. is that of protecting creditors, but we might ask protect them from what and in what ways.

Paragraph II of Article 2740 was introduced by the Civil Code of 1942. However, even though the previous Civil Code of 1865 did not expressly impose the rule, only lawful limitations of the creditors' common pledge were considered valid.

On the one hand, most scholars would argue that, under the old Civil Code, a debtor could not constitute a special purpose patrimony except in the cases set forth by the law because the reduction of the common pledge of creditors would have been effective *erga omnes*. On the other, non-recourse agreements were considered to be a problem of freedom of contract . This was because the reduction of the common pledge was not undergone by creditors as a consequence of a unilateral choice made by the debtor so it would have affected only consenting creditors, so it was not necessary to protect third parties[45].

These considerations are useful identify the real problem that must be dealt with, and the real rationale behind article 2740, par. II, of the Italian Civil Code of 1942.

The problem faced by the rule is basically that of protecting creditors from those restrictions on the common pledge that are «good against the world», those imposed by the debtor through a unilateral decision, and is not to prohibit such reductions *per se*[46].

teleological reduction see eg. Larenz K., *Methodenlehre der Rechtswissenschaft*[3], Berlin-Heidelberg-New York, 1975, 377 ff.; Enneccerus L., Nipperdey H.C., *Allgemeiner Teil des Bürgherlichen Rechs*, I, Tübingen, 1959, par. 59; Larenz K., Canaris C., *Methodenlehre der Rechtswissenschaft*, Spinger, 1995, 210 ff. This method is used when a rule contains general provisions that, following a literal criterion, should be applied with no distinction also to cases that need a different approach because they are strange to the aim of that rule. See also Kramer E.A., *Juristische Methodenlehre*, Bern, 2005, 192 ff., that talks about «*Rechtsfindung contra verba sed secundum rationem legis*».

[45] See Ferrara F., *Trattato di diritto civile*, Vol. I, Roma, 1921, 873 ff.; Greco P., *Le società di* «comodo» *e il negozio indiretto*, in *Riv. dir. comm.*, 1932, I, 798, footnote 1 and Bianchi E., *Dei privilegi e delle cause legittime di prelazione del credito in generale*, Napoli, 7 and 43 ff. The validity of non-recourse agreements has been justified also because the principle of universal patrimonial liability imposed by article 1948 of the Civil Code was not considered of public order at the point to prevent agreements between the parties. For more details see Marchetti G., *La responsabilità patrimoniale negoziale*, cit., 82-85.

[46] Rubino D., *La responsabilità patrimoniale. Il pegno*, in *Tratt. dir. civ. italiano*, directed by Vassalli, Vol. XIV, Tome I, Torino, 1956, 7-8, was the first to suggest that the aim of article 2740, par. II, c.c. was that of protecting creditors from limitations of the common pledge created through debtor's unilateral decision. As consequence, it should not have been applied to prohibit no-recourse agreements. This position was not accepted for a longtime. Nowadays, it is followed by Sicchiero G., *La responsabilità patrimoniale*, cit., 44-45 and *I patti sulla re-*

In other words, on the one hand legal control is necessary in order to protect creditors for those limitations of the common pledge effective *erga omnes* that have not been accepted by the creditors themselves. On the other hand, there's no reason for any legal control for non-recourse agreements because creditors do not need to be protected from their own decisions.

The *ratio* of article 2740, par. II, c.c. is that of preserving creditors' expectations, based on paragraph I, to satisfy their claim on the whole debtor's patrimony because of its *erga omnes* effectiveness[47].

This way of interpreting article 2740, par. II, c.c. is also founded on a systematic approach.

Indeed, the rule reflects one of the main principles of the Italian legal system: the *numerus clausus* of situations "good against the world", that sustains the issues of rights *in re* and registration in order to protect third parties[48].

From a systematic perspective, there is evidence to support the thesis that article 2740, par. II, does not apply to non-recourse agreements. Article 2741 c.c. rules that creditors have equal rights to being paid out of the property of the debtor, subject to lawful causes of preferences. Nevertheless, subordination agreements are permitted arguing that the aim of article 2741 c.c. is that of protecting creditors from situations of subordination good against third parties that they had not agreed[49].

*sponsabilità patrimoniale (art. 2740 c.c.)*, cit., 94; Porcelli M., *Le limitazioni convenzionali della responsabilità patrimoniale del debitore*, cit., 633 and Follieri L., *Esecuzione forzata e autonomia privata*, cit., 81-82.

[47] In similar terms see Pino A., *Il patrimonio separato*, Padova, 1950, 29 f. and footnote 101; Iamiceli P., *Unità e separazione dei patrimoni*, Padova, 2003, 58; Salamone L., *Gestione e separazione patrimoniale,* Padova, 50.

[48] This aspect is the main core of Rojas Elgueta G., *Autonomia privata e responsabilità patrimoniale del debitore*, cit., 44 ff. For the author the provision of Article 2740, par. II, c.c. is due to systematic coherence reasons, instead to ensuring the protection of creditors. In this perspective, the rule must be applied only to the limitations of the common pledge «good against the world» and not to non-recourse clauses. On registration see Gazzoni F., *La trascrizione degli atti e delle sentenze*, in *Tratt. della trascrizione*, directed by Gazzoni, Gabrielli, Vol. I, t. I, Torino, 2012, 85 ff. On the *numerus clausus* of rights *in re* see Comporti M., *Contributo allo studio del diritto reale*, Milano, 1977; Gambaro A., *La proprietà. Beni, proprietà, comunione*, in *Tratt. dir. priv.*, curated by Iudica, Zatti, Milano, 1990, 68 ss.; Natucci A., *La tipicità dei diritti reali*, Padova, 1988; Morello U., *Tipicità e* numerus clausus *dei diritti reali*, in *Tratt. dei diritti reali*, curated by Gambaro, Morello, Vol. I, Milano, 2008, 69 ff.; Mezzanotte F., *La conformazione negoziale delle situazioni di appartenenza.* Numerus clausus *– autonomia privata e diritti sui beni*, Napoli, 2015. For more details and bibiliografic reference see Marchetti G., *La responsabilità patrimoniale negoziale*, cit., 182-187.

[49] For a large depening on subordination agreements see: Tullio A., *La postergazione*, Padova, 2009; Vanoni S., *I crediti subordinati*, Torino, 2000; Follieri L., *Esecuzione forzata e autonomia privata*, cit., 88 ff. and *Sugli accordi di postergazione del credito*, in *Riv. dir. priv.*, 2015,

In other words, article 2741 does not forbid subordination agreements, because the aim of the rule is that of protecting creditors from prejudicial effects imposed by others and not from their own decisions[50].

All this evidence supports our thesis that non-recourse agreements are alien to the real rationale of article 2740, par. II, of the Italian civil Code. The rule has an implicit twin-track approach embedded in its text, that prohibits only separation of patrimonies except in the cases set forth by the law.

## 4. The Spanish perspective

Even in the Spanish legal system the principle of the unlimited patrimonial liability is considered a fundamental rule[51].

Article 1911 of the Spanish Civil Code rules that a debtor is liable with all his /her present and future property for the performance of the obligation, as does article 2740, par. I of the Italian Civil Code. However, the Spanish Civil Code does not contain any provision similar to paragraph II of article 2740 of the Italian Civil Code.

Despite this gap, the problem of restrictions on the creditors' common pledge is not unknown to Spanish scholars and in decisions of the courts, which seem to be rather more aware than Italian doctrine is, that the limitations of debtor's patrimonial liability «good against the world» and non-recourse clauses are not the same thing.

Indeed, on the one hand, discussion about the validity of the limitations of the common pledge of creditors effective «*erga omens*» focuses on both the public order and the mandatory nature of article 1911 CC, that is deemed to be intangible by freedom of contract and such limitations are admitted only in those cases set forth by the law[52].

507 ss. The validity of subordination agreements is generally admitted by scholars and courts. Just few authors exclude it. See Bianca C.M., *Diritto civile*, *Le garanzie reali e la prescrizione*, cit., 8 and Barbiera L., *Responsabilità patrimoniale. Disposizioni generali*, 1st ed., cit., 133. However, in the second edition, Barbiera L., *Responsabilità patrimoniale. Disposizioni generali*, cit., 210, recognizes the validity of subordination agreements.

[50] In these terms see Follieri L., *Sugli accordi di postergazione del credito*, cit., 611-613; Campobasso G.F., *I prestiti subordinati nel diritto italiano*, in *Ricapitalizzazione delle banche e nuovi strumenti di ricorso al mercato*, curated by Portale, Milano, 1983, 364 ff. and Galletti D., *«Elasticità» della fattispecie obbligazionaria: profili tipologici delle nuove obbligazioni bancarie*, in *Banca, borsa e tit. cred.*, 1997, I, 255 ff.

[51] See Capilla Roncero F., *La responsabilidad patrimonial universal y el fortalecimiento de la protección del crédito*, cit., 7, that consideres article 1911 «*la pieza central, aunque no la ùnica, del sistema de responsabilidad por incumplimiento de las obligaciones*». See also footnote 15.

[52] See *infra* in this paragraph.

On the other hand, the main problem taken into account regarding non-recourse clauses is not much that but rather the issue of the content of the agreement and, basically, that of understanding whether the parties want to limit, or to delete a debtor's patrimonial liability.

The question of the validity of non-recourse clauses has also taken into account the fact that, in the Spanish legal system, despite the provision of article 1911 of the Civil Code, a debtor and a creditor may agree to opt out of the unlimited liability rule. Article 140 of the Mortgage Act allows the parties to agree that the debt is secured solely by the mortgaged property. As a consequence, the debtor's responsibility, by virtue of the mortgage loan, is limited to the amount of the mortgaged assets and will not affect any other goods of the debtor's estate (the *hipoteca de responsabilidad limitada*)[53].

Here, the main problem can be summarized as: are non-recourse agreements valid only in the cases set forth by the law or, is there an opposite implicit rule[54]?

Some authors have excluded the validity of non-recourse agreements because of the mandatory nature of article 1911 CC[55].

However, many scholars have argued that non-recourse agreements should be considered null and void because of their conflict with article 1256 CC – stating that the performance of contracts cannot be left to the discretion of one of the contracting parties – but only if their goal is that of removing the debtor's responsibility[56].

Nevertheless, non-recourse agreements are valid when the aim of the parties is to reduce the scope of the common pledge of creditors and not to free the debtor from liability. This position is based on the assumption that non-recourse agreements are a result of freedom of contract, as recognized

[53] On the *hipoteca de responsabilidad limitada* see *infra* par. V. The Spanish Civil Code recognizes other cases of conventional derogation to the rule stated by article 1911. E.g., in the issue of life annuities, article 1807 state that a person, who constitutes an annuity over his property as a gift, may provide, at the time of execution, that such annuity shall not be subject to attachment as a result of the pensioner's obligations. In this case the limitation upon patrimonial liability is not agreed with creditors, but stims from a unilateral decision of the person who constitutes the life annuity. On this point see Orduña Moreno J., *Artículo 1.911*, in *Código Civil Comentado*, cit., 1525; Toribios Fuentes F., *Artículo 1.911*, cit., 2080.

[54] Cf. Gullón Ballesteros A., *Artículo 1.911*, cit., 664; Cordero Lobato E., *Artículo 1.911*, cit., 13058.

[55] In these terms see Roca Sastre R., *Derecho hipotecario*, Vol. IV, Barcelona, 1968, 398; Cárdenas A., *El pacto de exclusion de la acción personal en la hipoteca*, in *Revista Crítica de Derecho Inmobiliario*, 1945, 389; O' Callaghan Muñoz X., *Compendio de Derecho civil*, Vol. I, tomo II, Madrid, 1991, 167.

[56] Among Italian scholars this aspect has been considered by Follieri L., *Esecuzione forzata e autonomia privata*, cit., 56-57, 79; Sicchiero G., *La responsabilità patrimoniale del debitore*, cit., 40, 42 and Marchetti G., *La responsabilità patrimoniale negoziata*, cit., 239 and 256-257.

by article 1255 CC[57]. Furthermore, it has been argued that creditors can regulate their position as they wish, as they are the absolute owners of their own interests[58].

It should be noted that this approach is no different from that recently developed by some Italian scholars: non-recourse clauses are a product of freedom of contract. These agreements are not subject to the rule that the limitations of the scope of the common pledge of creditors are possible only in cases set forth by the law because creditors are free to decide what is in their own interests and they cannot be protected from their own decisions.

It is interesting to observe that, despite the absence of an express provision similar to article 2740, par. II, of the Italian Civil Code, the limitations of the creditors' common pledge good against third parties, affecting creditors as the consequence of a unilateral choice by the debtor, are subject to the same principle of lawfulness in Spain.

The problem has been considered in the issue of the special purpose patrimony[59] and of the *prohibiciones de disponer* (prohibition to dispose).

[57] Article 1255 state that the contracting parties may establish any covenants, clauses and conditions deemed convenient, provided that they are not contrary to the laws, to morals or to public policy.

[58] In these terms see Gullón Ballesteros A., *Artículo 1.911*, cit., 664. The validity of non-recourse agreements in the Spanish legal system has been recongized also by Castàn Tobeñas J., *Derecho civil español*, tomo III, Madrid, 13th ed., 1983, 264; Cecchini Rosell X., *El pacto de concreción de la responsabilidad en la hipoteca*, Valencia, 1996, 37; Orduña Moreno J., *Artículo 1.911*, cit., 1525; Toribios Fuentes F., *Artículo 1.911*, cit., 2080. Favourable is also *Tribunal Supremo*: see eg. SSTS 21.5.1963, in *Repertorio de Jurisprudencia Aranzadi*, 1963, 2817. In doubtful terms see Cordero Lobato E., *Artículo 1.911*, cit., 1358. See also the position of García Amigo M., *Clausolas limitativas de la responsabilidad contractual*, Madrid, 1965, 174 ff., arguing that non-recourse agreements are valid only if they allow to the creditor to satisfy his «*id quod interest*».

[59] The problem has been considered, for instance, in the issue of the so-called «*patrimonio especialmente protegido de las personas con discapacidad*», introduced by the Law no. 41/2003 «*de protección patrimonial de las personas con discapacidad y de modificación del Código civil, de la Ley de Enjuiciamiento Civil y de la normativa tributaria con esta finalidad*». This figure is qualified by the law like a special purpose patrimony («*patrimonio de destino*») because a pool of assets is committed to the needs of a person with physical or psychical disabilities. The law rules also that this special patrimony is submitted to a special administration regime. However, the law does not provide the segregation of this complex from the general patrimony of the owner, so the special purpose patrimony is not subtracted from the general common pledge and pledged to a specific group of creditors (this effect is provided instead, eg., for the Italian «*fondo patrimoniale*», see par. 2). Most of the scholars conclude that, in absence of a rule stating an effect like this, the special purpose patrimony cannot be subtracted from the common pledge of creditors because only lawful exceptions to the principle of article 1911 CC are valid. Cf. eg. Escribano Tortajada P., *El patrimonio protegido de las personas con discapacidad*, Valencia, 2012, 140; Messía De La Cerda Ballesteros J.A., *Naturaleza jurídica del patrimonio especial de las personas con discapacidad*, in *Protección jurídica patrimonial de las personas con discapacidad*, coordinator Pérez de Vargas Muñoz, 2007, 659.

This prohibition is effective *erga omnes* and limits the power of having a specific right[60]. This right cannot be object of alienation and of any other act of removing, so, theoretically, even seizure and judicial sale should not be possible.

Nevertheless, most scholars and court decisions s affirm that the prohibitions of disposal can preclude the enforcement proceeding just in the cases set forth by the law because only lawful limitations of the common pledge of creditors are admitted, due to the fundamental value of the rule imposed by article 1911 CC[61].

That said, it seems that even in the Spanish civil Code there is a twin-track regime for restrictions on the scope of creditors' common pledge, so that the limitations good against third parties, stemming from a debtor's choice, are valid only in the cases set forth by the law, while non-recourse agreements are not subject to this rule.

## 5. The perspective of the Civil Code of Québec

The Civil Code of Québec is the most significant expression of the twin-track approach towards mechanisms that seek to split up a debtor's patrimony.

[60] The so-called *prohibiciones de disponer* are regulated by article 26 and 27 of the Spanish Mortgage Act and article 785, paragraph two, of the Spanish Civil Code. The figure has been defined like this: «privación o restricción del poder de disposición que leva anejo un derecho subjetivo y que impide que ésta pueda ser enajenado, gravado o de otro modo ser objeto de disposición, con mayor o menor amplitud o sin llenar determinado requisitos». In these terms Roca Sastre R.M., Roca Sastre Muncunill L., *Derecho hipotecario*, II, Barcellona, 1979, 702. For more details on this issue see Gómez Gálligo F.J., *Comentario al art. 26. 1° de la Ley Hipotecaria*, in *Comentarios al Código Civil y Compilaciones Forales*, Tome VII, Vol. IV, directed by Albaladejo, Díaz Alabart, Madrid, 1999, 172 ff. and Id. *Las prohibiciones de disponer en el derecho español*, Madrid, 1992; Mateo Sanz J.B., *Comentario al art. 26 de la Ley Hipotecaria*, in *Comentario a la Ley Hipotecaria*, directed by Domínguez Luelmo, Pamplona, 2016, 475 ff.; Murga Fernández J.P., *La vendita in sede di espropriazione forzata tra autonomia contrattuale e interessi di rilievo pubblicistico*, Padova, 2014, 209 ff., where can be found also other bibliographic references.

[61] In these terms, for the first time, *Resolución de la DGRN*, 22nd February 1989, in *Cuadernos Civitas de Jurisprudencia Civil*, 1989, n. 20, 387 ff. Among scholars see e.g. Capilla Roncero F., *Prohibición de disponer impuesta en testamento*, in *Cuadernos Civitas de Jurisprudencia Civil*, 1989, n. 20, 387-398; Gomez Gálligo F.J., *Comentario al art. 26. 3° de la Ley Hipotecaria*, cit., 215; Cañizares Laso A., *Eficacia de las prohibiciones de disponer voluntarias*, in *Anuario de Derecho Civil*, Vol. 44, 1991, 1521-1522; Rodríguez López F., *Las prohibiciones de desponer voluntarias: Estudio de sus efectos*, in *Revista Crítica de Derecho Inmobiliario*, n. 554, 1983, 49; Murga Fernández J.P., *La vendita in sede di espropriazione forzata tra autonomia contrattuale e interessi di rilievo pubblicistico*, cit., 274 and 253-261 for a detailed analyse of the debate on this topic.

In Québec, a dual track regime for the limitation of the «*droit de gage général*» has been in force since 1983, when a second paragraph was added to article 1980 of the *Civil Code of Lower Canada*, ensuring the validity of non-recourse agreements.

Like many modern codifications of the Civil law systems whose origins can be traced back to Roman law, article 1981 of the *Civil Code of Lower Canada* imposed the principle of a debtor's patrimony as the common pledge of his/her creditors[62].

Furthermore, article 1980 of the *Civil Code of Lower Canada* provided that: «Whoever incurs a personal obligation, renders liable for its fulfilment all his property, moveable and immoveable, present and future, except such property as is specially declared to be exempted from seizure».

In the absence of a specific rule referring to non-recourse agreements, their validity was questioned. Indeed, as consequence of the principle of article 1980 and due to its public order nature, some scholars have argued that a creditor may not renounce pursuing his/her claim against the whole patrimony of his/her debtor[63].

The amendment of 1983 left no more doubt. According to the new paragraph of article 1980 a creditor may agree with his/her debtor that he/she will be bound to fulfil his/her obligation only on the property they describe and which is affected, with a legal cause of preference, in favour of that creditor[64].

It is interesting that the *Québécoise* scholars did not consider this amendment strictly necessary to achieve the desired objective. It has been argued that the validity of non-recourse agreements could be admitted even in the ab-

[62] Article 1981 stated: «Les biens du débiteur son le gage commun de ses créancier et, dans le cas de concours, le prix s'en distribue par contribution, à mien qu'il n'y ait entre eux des causes légitime de préférence». Québec law is part of the French civil law tradition. At the same time, this tradition is mixed with elements of the common law. Because of the combination of two legal system, the Anglo-American common law and the Roman-Germanic Law, Québec is a mixed legal system. On this point see Milo M., Smits J., *Trusts in Mixed Legal Systems. A challenge to comparative trust law*, in *Trusts in Mixed Legal Systems*, curated by Milo, Smits, Nijmegen, 2001, 14-15. For deepening the historical evolution of the Québec civil law see Normand S., *An introduction to Québec Civil law*, in *Elements of Quebec civil law: a comparison with the common law of Canada*, edited by Grenon, Bélanger-Hardy, Toronto, 2008, 25-47.

[63] In argue see Macdonald R.A., *Privileges and other preference upon moveable property in Quebec: their impact upon right and recourses of execution creditors*, in *Debtor – Creditor Law. Practice and Doctrine*, edited by Springman, Gertner, Toronto, 1985, 265-266 and Payette L., *Obligation à engagement restreint*, in *Revue de Barreau*, 1984, 44, 149 ff.

[64] The text of article 1980 since the amendment of 1983 was: «Quiconque est obligé personnellement est tenu de remplir son engagement sur tous ses bien, à l'exception de ceux que son spécialement déclarait insaisissables. Toutefois, un créancier peut convenir avec son débiteur que celui-ci ne sera tenu de remplir son engagement que sur les bien qu'ils décrivent et qui son affecté d'une cause de légitime préférence en faveur du créancier».

sence of such a provision given that they do not pose a problem of public order and that there are no negative consequences for third parties. Other creditors however, obtain an indirect benefit from these agreements because the non-recourse creditors do not share the entirety of the debtor's patrimony[65].

In 1994 the *Civil Code of Lower Canada* was substituted by a new Civil Code, the Civil Code of Québec[66]. The principle of the entire debtor's patrimony as the common pledge of creditors still remains one of the basic rules governing debtor – creditor relations and is now expressed by article 2644 of the Civil Code of Québec[67].

Article 2645 C.c.Q. also maintained the twin-track regime as regards the restrictions on the scope of the common pledge of creditors introduced by the amendment of 1993. Indeed, on the one hand it rules that the legislature alone can create exemptions from seizure or establish separated or divided patrimonial masses. On the other hand, it allows a debtor to agree with his/her creditor to be bound to fulfil his/her obligation but only from the property they have designated[68].

There is no explanation about the real rationale underlying the provision of article 2645 C.c.Q. and the different rules imposed for the separation of patrimony and non-recourse agreements. However, article 2645 C.c.Q. confirms that the validity of non-recourse agreements in Québec can no longer be questioned.

From a more general perspective, the experience of Québec suggests that the principle of a debtor's patrimony, like the common pledge of creditors, is not an obstacle for non-recourse agreements. In addition, it should be noted that article 2645 C.c.Q. allows for only lawful exemptions from seizure

[65] Cf. Payette L., *Obligation à engagement restreint*, cit., 151.

[66] On this topic see Normand S., *An introduction to Québec Civil law*, cit., 42-47.

[67] Article 2644 C.c.Q. states: «*Les biens du débiteur sont affectés à l'exécution de ses obligations et constituent le gage commun de ses créanciers*».

[68] Article 2645 C.c.Q. provides: «Quiconque est obligé personnellement est tenu de remplir son engagement sur tous ses biens meubles et immeubles, présents et à venir, à l'exception de ceux qui sont insaisissables et de ceux qui font l'objet d'une division de patrimoine permise par la loi. Toutefois, le débiteur peut convenir avec son créancier qu'il ne sera tenu de remplir son engagement que sur les biens qu'ils désignent». The only difference between the rule provided by article 1980 of the Civil Code of the Lower Canada, as amended in 1993, and article 2645 of the Civil Code of Québec is this: in the previous Code, the property designated by the parties of the non-recourse agreements must be affected with a legal cause of preference in favour of that creditor. This requirement has been provided in order to protect creditors from the alienation of the property specifically affected to their claims. On these aspects see Payette L., *Obligation à engagement restreint*, cit., in 151 *Le sûretés réelles dans le Code civil du Québec*, 4° ed., 40-41. See also Deslauriers J., *Les sûretés réelles au Québec*, Montreal, 2008, 18-19. The requirement is imposed no more by article 2645 C.c.Q., so the parties can affect to the claim of the non-recourse creditor the property they want.

and from separated or divided patrimony. These two situations have a common feature: they are effective *erga omnes* and creditors do not agree the resultant restriction of the common pledge.

In the light of the Civil Code of Québec, this rule does not apply to non-recourse agreements, that are, instead, effective *inter partes*, so the restriction of the common pledge binds only consenting creditors.

In conclusion, the real rationale justifying such a different approach seems that of the major differences existing between the reductions on the common pledge undergone by creditors because of the effectiveness of *erga omnes* rather than as a result of their own decision.

## 6. Non-recourse mortgages in the Spanish and Italian legal system

Lawful cases of non-recourse agreements close to the non-recourse mortgages of the United States can be found in both the Spanish and the Italian legal systems: the main cases are the so-called *hipoteca de responsabilidad limitada* (article 140 of the Spanish Mortgage Act) and the non-recourse model in the area of credit agreements for consumers relating to residential immovable property (article 120 *quinquiesdecies*, paragraph III, of the the Italian Consolidated Banking Act).

In Italy and Spain, the main rule of debtor – creditor relations is that of unlimited patrimonial liability, so a mortgage creditor has the possibility of charging upon both the realizable value of the collateral and the rest of a debtor's assets[69]. However, through the instruments mentioned above, the parties may opt out of the unlimited responsibility rule thus the mortgage creditor may levy only on the mortgaged property.

Article 140 of the Spanish Mortgage Act allows the parties constituting the mortgage to agree that the debt is secured only by the mortgaged

[69] For the Spanish legal system see article 105 of the Mortgage Act that rules: «La hipoteca podrá constituirse en garantía de toda clase de obligaciones y no alterará la responsabilidad personal ilimitada del deudor que establece el Artículo 1.911 del Código Civil» and Article 579 of the Civil Procedural Code that rules: «[...] Si, subastados los bienes hipotecados o pignorados, su producto fuera insuficiente para cubrir el crédito, el ejecutante podrá pedir el despacho de la ejecución por la cantidad que falte, y contra quienes proceda, y la ejecución proseguirá con arreglo a las normas ordinarias aplicables a toda ejecución [...]». Fort he Italian legal system see article 2911 of the Civil Code that ruels: «Il creditore che ha pegno su beni del debitore non può pignorare altri beni del debitore medesimo, se non sottopone a esecuzione anche i beni gravati dal pegno. Non può parimenti, quando ha ipoteca, pignorare altri immobili, se non sottopone a pignoramento anche gli immobili gravati da ipoteca».

property. Due to this agreement, the debtor's responsibility by virtue of the mortgage loan, is limited to the amount of mortgaged assets and does not touch any other assets of the debtor's estate[70]. If the foreclosure of the mortgaged property is not sufficient to cover the debt the non-recourse mortgage creditor cannot claim any deficiency[71].

The Spanish non-recourse mortgage was introduced with the amendment of 1944 to the Mortgage Act. Some scholars traced the origins of this to a Cuban law of the 1930's, adopted during the Great Depression, as part of a package of measures to protect mortgage holders[72].

This is a very interesting point, because even in the United States the origins of antideficiency legislation can be traced to the period of the Great Depression, aiming to give relief to mortgagers after the collapse of the real estate market[73].

[70] On these aspects see Dominguez Luelmo A., *Artículo 140*, in *Comentarios a la Ley Hipotecaria*, Director Dominguez Luelmo, Navarra, 2nd ed., 2016, 1269 ff.; Carrasco Perera A., Cordero Lobato E., Marín López M.J., *Tratado de los derechos de garantía*, Tome I, Navarra, 2008, 851 ff.; Pretel Serrano J., *Artículo 140*, in *Comentarios al Código Civil y Compilaciones Forales*, Vol. VIII, Tome VII, Directed by Albaladejo, Diaz Alabart, Madrid, 2004, 27; Del Carmen Castillo Martinez C., *Responsabilidad personal y garantía hipotecaria*, Pamplona, 1999, 50; Espinosa Enfante J.M., *Manual de derecho hipotecario*, Madrid, 2003, 393 ff.; Pau Pedrón A., *La hipoteca de responsabilidad limitada*, in Aa. Vv., *Desauchios y ejecuciones hipotecaria. «Un drama social y un problema legal»*, Valencia, 2014, 81 ff.; Cecchini Rosell X., *El pacto de concreción de la responsabilidad en la hipoteca*, cit., 48 ff.

[71] On this point see, in particular, Cecchini Rosell X., *El pacto de concreción de la responsabilidad en la hipoteca*, cit., 53 and Roca Sastre R.M.ª, Roca-Sastre Muncunill L., Bernà I Xirgo J., *Derecho hipotecario*, Tome VII, 9th ed., Barcelona, 2009, 589. Due to the non-recourse agreement, the creditor cannot proceed against debtor's assets different from the mortgaged property even if the value of the foreclosure is not sufficient to cover the full amount of the debt. Spanish scholars discuss if the debt is extinguished or not, arguing that the creditor cannot pursue the debtor for any deficiency but the debtor can voluntarily pay the residual amount of the debt. In these terms see Cecchini Rosell X., *El pacto de concreción de la responsabilidad en la hipoteca*, cit., 118 ff.; Blasco Gascó F., *La hipoteca inmobiliaria y el crédito hipotecario*, Valencia, 2000, 230-232; Del Carmen Castillo Martinez C., *Responsabilidad personal y garantía hipotecaria*, 60 and Carrasco Perera A., Cordero Lobato E., Marín López M.J., *Tratado de los derechos de garantía*, cit., 852. *Contra* Roca Sastre R.M.ª, Roca-Sastre Muncunill L., Bernà I Xirgo J., *Derecho hipotecario*, cit., 596-597 and Chico Ortiz J. M.ª, *Estudios sobre Derecho hipotecario*, Tome II, 3° ed., Madrid, 1994, 1480. These authors follow the thesis of the extinguishment of the residual debt.

[72] In these terms see Roca Sastre R.M.ª, Roca-Sastre Muncunill L., Bernà I Xirgo J., *Derecho hipotecario*, cit., 584; Pretel Serrano J., *Artículo 140*, cit., 20-22; Del Carmen Castillo Martinez C., *Responsabilidad personal y garantía hipotecaria*, cit., 46 ff. and footnote 40. For a different perspective see Cecchini Rosell X., *El pacto de concreción de la responsabilidad en la hipoteca*, cit., 21 ff. For more details about the attitude of the non-recourse regime to protect mortgagors from adverse fluctuations in the real estate market see footnote 73.

[73] Cf. Harris R., Asher M., *Private valuation and private information: can mandatory non-recourse mortgage legislation restore a missing market?* (February 26, 2012); Nelson G.S.,

Papers on the *hipoteca de responsabilidad limitada* point out that the use of this figure is rather marginal[74].

Nevertheless, the recent economic and financial crisis has drawn the attention of legal scholars and economists to the non-recourse mortgage as a mechanism that is useful to encourage a debtor's to start again and for preventing the «housing bubble» phenomenon[75].

Withman D.A., *Real estate finance law*, 2nd ed., St. Paul Minnesota, 1985, 600-602; Aalberts R.J., *Real estate Law*, 9th ed., Stamford, 2015, 354.

[74] There is no consensus about the reasons of the absence of this figure in the *praxis*. Some scholars state that it is not attractive for creditors: in these terms see Pretel Serrano J., *Artículo 140*, cit., 22. Others, affirm that such a lack is due to the expensive cost of the non-recourse mortgage loans for debtors (on this point see paragraph I and footnote 13): in these terms see Cuadrado Iglesias M., *La dación en pago y su problemática aplicación por los deudores hipotecario insolventes*, in *Estudios de Derecho Civil en Homenaje al Profesor J.J.Ramos Albesa,* Madrid, 2013, 869. Lacruz Mantecón M.L., *La moderna dación en pago*, in *Revista de Derecho Civil*, 2014, 98, noticed that, in addition, non-recourse mortgage loans increase the risk of default, so they are unattractive for creditors. Others argue that the lack of non-recourse mortgage is the consequence of a market failure due to an asymmetric information. It's the thesis of Castilla M., *Non-recourse mortgages and prevention of housing bubbles – A proposal for a change in the default rule on mortgage liability in Spain*, in *House finance international,* 2011, 18-19: «The striking lack of non-recourse mortgage loans in Spain can be attributed to the irrational belief in the infallibility of the real estate investment. Since borrowers do not contemplate the possibility of a decline in the value of property, there is no point for them in negotiating the implementation of art.140 LH […] it makes no sense to pay the interest premium necessary for the lender to assume the risk of deflation in the housing market since that risk is not considered significant […]. Although the assignment to the lender of the risk of deflation in the housing market seems to be a socially superior agreement, the asymmetry in the information available to contract parties prevents such an outcome to be reach. Since credit institution enjoy better information about the risks of real estate market deflation, they will discount a higher value for it than individuals and since they typically predispose the contractual clauses of the loan they will systematically pass to consumers the risk of deflation in real estate. Furthermore since consumers neglect deflation risk no competition from other banks willing to uptake is expected». In a similar perspective see Anguita Rios R.M., *Y de nuevo la hipoteca. Reflexiones sobre la situación actual de la institución jurídica*, in *Estudios de Derecho Civil en Homenaje al Profesor José González García*, Coordinator Jiménez Liébana, Pamplona, 2012, 896. This argument has been developed, but in a different perspective, by Harris R., Asher M., *Private valuation and private information: can mandatory non-recourse mortgage legislation restore a missing market?*, cit., to explain the lack in the US of non-recourse agreements in the area of the residential mortgage loans. Indeed, in the US non-recourse mortgages are common in the commercial real estate market. In the home mortgage area, there's no market for non-recourse mortgages and the non-recourse regime can be found only in those US states where the legislation mandates only non-recourse mortgages for dwellings in the form of anti- deficiency judgments.

[75] In Spain, the question has been developed in this perspective by Castilla M., *Non-recourse mortgages and prevention of housing bubbles – A proposal for a change in the default rule on mortgage liability in Spain*, cit., 18-19. The author, once found out the marginal use of the *hipoteca de responsabilidad limitada* (see footnote 71), argues that the generalization of

The benefits and negative effects of the non-recourse mortgage loans have been widely discussed in particular in the United States and there is no agreement on this point[76].

However, for our purpose, the most significant finding is that the model of the non-recourse mortgage is becoming increasingly attractive for civil law systems.

In the Italian legal system, there is no a general rule like article 140 of the Spanish Mortgage Act. Nevertheless, because of the amendment to the Consolidated Banking Act (*Testo Unico Bancario*, from now TUB), intro-

recourse mortgage has been a major booster of the Spanish real estate bubble. Based on these findings, the Author suggests a reform of the Spanish regulation: the adoption of a mandatory non-recourse mortgage rule for loans that meet certain characteristics making credit institutions bearing the risk of real estate market deflation. As consequence credit institution might be more cautious in the release of credit. Thus, the allocation of the risk of deflation in real estate to credit institutions should be helpful in modulating housing demand. On this point, it must be taken into account the recent paper of Bao T., Ding L., *Nonrecourse mortgage and housing price boom, bust, and rebound*, cit., 584 ff., on the impact of non-recourse – recourse mortgages on housing price dynamics in major U.S. metropolitan areas for the period from 2000 to 2013. This paper, comparing recourse and non-recourse states results, finds out that nonrecourse mortgages appear to be a destabilizing factor in the housing market, encouraging speculative buying. However, non-recourse mortgages may improve the resilience of the market, because the price recovery is faster. The attitude of non-recourse mortgage to encourage debtors fresh start has been considered, in a problematic perspective, by Cuadrado Iglesias M., *La dación en pago y su problemática aplicación por los deudores hipotecario insolventes*, cit., 868-869 and Lacruz Mantecón M.L., *La moderna dación en pago*, cit., 101.

[76] In the US, these aspects have been considered in the contest of the Great Recession of 2007-2009. See footnote 3. Many studies on this issue pointed out that the recourse – non-recourse distinction is relevant when there's a negative equity phenomenon, *id est* when the property value declines and the outstanding loan amount may be greater than the value of the property. In this situation when the mortgage is non-recourse there is a financial benefit to default. The property must be surrendered to the lender, but its value is less than the amount that would otherwise have to be paid. The non-recourse regime has two opposite consequences. On one hand, it is useful to protect debtors from negative equity, close to an insurance instrument against adverse fluctuations in the real estate market. On the other hand, borrowers may find it advantageous to stop paying to surrender the property – even if they have the financial means to pay – and to be relieved of further obligations to the lender, a step known as «strategic default». For more details cf. Harris R., Asher M., *Non-recourse mortgage – A fresh start*, cit., 121 and 133-135. Cf. also Solomon D., Minnes O., *Non-recourse, no down payment and the mortgage meltdown: lessons from undercapitalization*, cit., 537-540 and 545-546. About the impact of the non-recourse regime on the «strategic default» see: Ghent A.C., Kudlyak M., *Recourse and residential mortgage default: evidence from US States*, cit., 3140 ff.; Bhutta N., Dokko J., Shan H., *The depth of negative equity and mortgage default decisions*, in *Finance and Economics Discussion Series, Federal Reserve Board, Washington DC*, 2010, 25. In a general perspective, on «strategic default» see Guiso L., Sapienza P., Zingales, *The determinants of attitudes toward strategic default on mortgages*, in *The Journal of Finance*, 2013, Vol. LXVIII, n. 4, 1473 ff.

duced by legislative decree n. 72/2016[77] as an implement for the Mortgage Credit Directive – MCD 2014/17/UE[78], this figure is not unknown in the Italian legal system.

Article 120 *quinquisdecies*, paragraph III, TUB, allows the parties constituting a mortgage credit to agree (for the case of default of the consumer) that the transfer to the creditor of the collateral or proceeds from the sale of the collateral is sufficient to repay the credit. Article 120 *quinquisdecies*, par. III, TUB rules also that the debt is extinguished even if the value of the collateral is lower than the entire amount of the debt due[79].

[77] The legislative decree no. 72/2016 (the so-called «*Decreto Mutui*») introduced a new section «*Capo I-bis. Credito immobiliare ai consumatori*» to the sixth Title of the Consolidated Banking Act.

[78] It's the Directive of the European parliament and of the council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010. The main goal of the Directive is that of creating a genuine credit internal market, more efficient and transparent, with a high level of consumer protection. Article 1 rules: «This Directive lays down a common framework for certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers secured by a mortgage or otherwise relating to residential immovable property, including an obligation to carry out a creditworthiness assessment before granting a credit, as a basis for the development of effective underwriting standards in relation to residential immovable property in the Member States, and for certain prudential and supervisory requirements, including for the establishment and supervision of credit intermediaries, appointed representatives and non-credit institutions». For our purpose, it is relevant article 28 «Arrears and foreclosure». The fourth paragraph of article 28 rules: «Member States shall not prevent the parties to a credit agreement from expressly agreeing that return or transfer to the creditor of the security or proceeds from the sale of the security is sufficient to repay the credit». Both those cases limit the consumer's patrimonial exposure to the collateral (or to its value at the moment of the fulfillment) from the signing of the contract, so their functioning is that of the nonrecourse regime. Referring to this provision, the Community Legislator might have taken into account the negative equity phenomenon. Indeed, the aim pursued by the Directive is that of prevent, on one hand, the housing bubble phenomenon, on the other hand, the excessive and unfair indebtedness of households (see the third recital). On this point see the critical analysis of Bertolini A., *La tutela del debitore inadempiente nella disciplina europea dei mutui ipotecari. Eterogenesi dei fini, errori prospettici ed aporie alla luce dell'analisi economica del diritto*, in *Le nuove leggi civili commentate*, 2016, 330 ff. For a general analisys of the Mortgage Directive I have seen Pagliantini S., *Statuto dell'informazione e prestito responsabile nella direttiva 17/2014/UE (sui contratti di credito ai consumatori relativi a beni immobili residenziali)*, in *I mutui ipotecari nel diritto comparato ed europeo. Commentario alla direttiva 2014/17/UE*, curated by Sirena, part of *I Quaderni della Fondazione Italiana del Notariato*, n. 1, 2015, 27 ff.

[79] See article 120 *quinquiesdecies*, par. III, TUB, that is the implement of article 28 of the Mortgage Credit Directive. For a large deeping see: Piraino F., *L'inadempimento del contratto di credito immobiliare ai consumatori e il patto marciano*, in *I nuovi marciani*, Pagliantini, D'Amico, Rumi, Pirano, Torino, 2017, 173 ff.; Visconti G., *La disciplina del credito immobiliare ai consumatori introdotta nel t.u.b. dal d.lgs. n. 72/2016*, in *Immobili e proprietà,* 2016, 489 ff.;

It's clear that, through this agreement, the parties opt out of the unlimited responsibility rule and choose a non-recourse mortgage[80].

As I have said before, the scope of this figure is that of credit agreements for consumers related to residential immovable property. Nevertheless, despite the limited scope of application, it could be considered one of the most significant indications that even the Italian legal system is not totally unfamiliar with non-recourse agreements that can be used by the parties as a form of risk allocation[81].

## 7. Conclusion

This study aimed to show that the rule of the entire patrimony of a debtor as the common pledge of his/her creditors, is found in many civil law systems like Italy and Spain, and is also known in the mixed legal system of Québec, and is in no way an obstacle to the validity of non-recourse agreements.

Our finding is that, in these systems, there is an explicit (as in article 2645 of the Civil Code of Québec) or an implicit (as in article 2740 of the Italian Civil Code and article 1911 of the Spanish Civil Code) twin-track approach for the restrictions on the scope of the common pledge of creditors.

Only lawful exemptions from seizure and lawful separated patrimony are possible in this twin track regime, but this rule does not apply to non-recourse agreements.

Civale F., *La nuova disciplina del credito immobiliare ai consumatori*, in *www.dirittobancario.it*, 2016; Ferretti R., Santoro A., *Prime osservazioni sul decreto legislativo di recepimento della direttiva mutui*, in *www.dirittobancario.it*, 2016; Bulgarelli A., *La fase patologica dei contratti di credito ai consumatori relativi a beni immobili residenziali, trasferimento dell'immobile ed esdebitazione. Note a margine del D. lgs. 72/2016 di attuazione della Direttiva 17/2014/EU*, in *www.dirittobancario.it*, 2016 and Marchetti G., *La responsabilità patrimoniale negoziata*, cit., 322-329.

[80] Brodi E., *La tutela del credito in Italia: spunti per una lettura gius-economica delle cause di prelazione*, in *Vita notarile*, 2016, 1410, noticed that the model set up by article 120 *quinquiesdecies*, par. III, TUB is an hybrid, because the application of the recourse or non-recourse regime depends on the choice of the parties.

[81] Another model of non-recourse mortgage has been introduced in the Italian legal system in the issue of the so-called life annuity mortgage loans (*prestito vitalizio ipotecario*) by the Law no. 44 of 2015 that amended article 11 *quaterdecies* of the Decree Law no. 203/2005. On this issue see Rumi T., *La nuova disciplina del prestito vitalizio ipotecario*, in *I Contratti*, 2015, 10, 937 ff.; Id. *Il prestito vitalizio ipotecario tra le nuove soluzioni «marciane» a garanzia del credito immobiliare*, in *I nuovi marciani*, cit., 105 ff. Iuliani A., *Il prestito vitalizio ipotecario nel nuovo «sistema» delle garanzie reali*, in *Nuove Leggi civ. comm.*, 2016, 4, 717 ff. and Lenzi R., *Prestito vitalizio ipotecario, riforma del credito immobiliare e incerto destino del marciano di diritto comune*, in *Osservatorio del diritto civile e commerciale*, 2017, 321 ff.

Indeed, while legal control is necessary to protect creditors from the limitations of the common pledge effective *erga omnes*, those that have not been accepted by the creditors themselves, such legal control is not necessary for non-recourse agreements because the creditors do not need to be protected from their own decisions.

In conclusion, non-recourse agreements are a product of freedom of contract and there is no valid reason to prohibit them.

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