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The life of trusts in civil law countries: the cases of Italy and San Marino

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The principle of the management of the enrichment

Law No. 42 of March 1st, 2010 Section 48, paragraph 5:

“Anyone that receives or may receive assets or benefits from a purpose trust shall not be granted the legal position of beneficiaries.”

Law No. 42 of March 1st, 2010 Section 2:

“1) A trust exists when a person holds property in the interest of one or more beneficiaries, or for a specific purpose under this Law.

2) The fact that the settlor holds the office of trustee or reserves some rights or powers to himself shall not be inconsistent with the existence of a trust.

3) The settlor and the trustee may be beneficiaries of the trust, but the trustee cannot be the only beneficiary of the trust.

4) The same trust instrument may establish beneficiary trusts and purpose trusts.”

Law No. 42 of March 1st, 2010 Section 50, paragraph 2:

“Unless otherwise provided by the trust instrument, a beneficiary may request in writing to the trustee to transfer the trust assets in his favour or to make the transfer to a party designated by him.”

Law No. 42 of March 1st, 2010 Section 50, paragraph 2:

"Unless otherwise provided by the trust instrument, all beneficiaries with fixed interests in the trust fund or, if there are none, all beneficiaries may require the trustee to terminate the trust and transfer the trust assets to themselves or according to their indications."

Law No. 42 of March 1st, 2010 Section 13, paragraph 1:

“The trust instrument may provide that the provisions contained therein and the choice of the governing law may be amended in the interest of the beneficiaries or to promote the purpose of the trust.”

Law No. 42 of March 1st, 2010 Section 53, paragraph 4:

"A trustee may apply to the judge to be authorised to carry out some useful action which is not included among his powers, or for confirmation of an act already carried out, or to request the judge to introduce changes to the trust instrument which have become necessary or desirable."

Law No. 42 of March 1st, 2010 Section 51, paragraph 1:

“Unless otherwise provided by the trust instrument, a beneficiary may alienate, charge or otherwise dispose of, in whole or in part, his interest by instruments taking effect against the trustee upon they are notified to him or, in the case of a beneficiary with a fixed interest not limited to his life, also by will.”

Law No. 42 of March 1st, 2010 Section 49, paragraph 1:

“Unless otherwise provided by the trust instrument, every beneficiary with a fixed interest shall have the right to examine the records and documents concerning his own rights and make a copy thereof.”

The principle of the trustee's control

Law No. 42 of March 1st, 2010 Section 57:

“Anyone exercising the office of trustee without meeting the requirements envisaged by the Law shall be punished by terms of second-degree imprisonment and a fine amounting to between € 8,000.00 and 12,000.00.”

Law No. 42 of March 1st, 2010 Section 58:

“If a trustee embezzles or misappropriates trust assets, whether for his own or another’s benefit, the provision of Article 197, paragraph 3 of the Criminal Code shall apply, fourth-degree disqualification from the profession or art shall be replaced with fourth- degree disqualification from the office of trustee.”

Law No. 42 of March 1st, 2010 Section 59:

“A trustee who, with the aim of securing for himself or others an unjust profit, acts in conflict of interest, causing financial damage or loss to the beneficiaries of the trust or to the persons intended to benefit from the fulfilment of the purpose of the trust, shall be punished by terms of second-degree imprisonment, a fine amounting to between € 8,000.00 and 12,000.00 and second-degree disqualification from the office of trustee.”

Law No. 42 of March 1st, 2010 Section 60:

“A trustee failing to keep wholly or in part the accounts relating to the trust assets shall be punished by terms of second-degree arrest and second-degree disqualification from the office of trustee, if such a fact causes financial damage or loss to the beneficiaries of the trust or to the persons intended to benefit from the fulfilment of the purpose of the trust.”

Law No. 42 of March 1st, 2010 Section 61:

"A trustee who, in the accounts or in the inventory relating to the trust assets, or in the accounting records relating to the trust envisaged by the Law or the law on the tax treatment of trusts governed by the law of the Republic of San Marino, enters data or facts which are wholly or in part untrue, or conceals wholly or in part true data or facts shall be punished by terms of second-degree imprisonment and a third-degree daily fine, as well as with second-degree disqualification from the office of trustee."

Law No. 42 of March 1st, 2010 Section 10, paragraph 1:

"A trust shall be invalid when: […] the trust instrument or the transfer of property to the trustee is a sham."

Law No. 42 of March 1st, 2010 21:

“1) A trustee shall assure that he has legal ownership of the trust assets. He shall protect the integrity and ownership of the trust assets, by taking all necessary or useful actions for that purpose.

2) A trustee shall keep the trust assets separate from any other property at his disposal, including those relating to other trusts.

3) A trustee shall deposit:

- *a) anonymous bearer shares or certificates representing anonymous bearer shares in companies under San Marino law with a notary public of the Republic of San Marino, in compliance with the law in force;*
- *b) any other bearer security with banks or other deposit-holders authorised to keep securities in custody and required to comply with anti-money laundering legislation.”*

Law No. 42 of March 1st, 2010 Section 33, paragraph 3:

"In managing the trust, a trustee may delegate the decision about investments only to banks and investment companies which are subject to prudential supervision and are not established or administered in Countries identified with a relevant measure by the Supervisory Authority. Such banks and investment companies shall select investments according to the criteria specified by the trustee in a relevant document."

The principle of the patrimonial segregation

Law No. 42 of March 1st, 2010 Section 47:

“1) Anyone other than the other trustees, beneficiaries or the protector who has rights against the trustee resulting from obligations undertaken or acts expressly carried out as a trustee or from acts or facts nevertheless pertaining to that capacity, may satisfy his claim only out of the trust fund.

2) A trustee shall have the right of recourse to the trust fund, in preference to all others, in relation to any obligation he has personally undertaken, unless he is obliged to compensate the fund or any beneficiary or any pending compensation claim against him.”

Law No. 42 of March 1st, 2010 Section 1, paragraph 1:

“For the purposes of this Law, the following expressions shall mean: […]
j) “trust fund”: total trust assets and property and legal relations concerning them.”

Law No. 42 of March 1st, 2010 Section 40, paragraph 1:

"By way of derogation from the rules of ius commune *concerning delivery:*

a) *whenever a trustee is replaced by another trustee, the trust fund is transferred by law to the new trustee;*
b) *when a trustee ceases to hold office, the trust fund remains in the ownership of the continuing trustees;*
c) *when a trustee is added, the trust fund passes into the common ownership of all the office-holders."*

Law No. 42 of March 1st, 2010 Section 40, paragraph 4:

“A new trustee shall replace the trustee ceasing to hold office in every pending legal proceedings.”

Law No. 42 of March 1st, 2010 Section 16, paragraph 2:

“Once his final accounts and the trust fund inventory have been drawn up, the trustee shall transfer the fund to the persons entitled, according to the provisions of the trust instrument. If the provisions of the trust instrument cannot be applied to the whole fund, the trustee shall transfer the residual trust assets to the settlor or his successors and, if absent, to the State.”