

The trust

The protagonists of the trust: the trustee

The role and centrality of the trustee clearly emerge from the reading of Article 2 of the Hague Convention: "Trust shall mean the legal relationships created by a person, the settlor - by inter vivos or testamentary disposition - where assets are placed under the control of a trustee for the benefit of a beneficiary or for a specific purpose."

The settlor who decides to establish a trust transfers their own assets or part of them to the trustee, who must manage them with the aim of fulfilling the program defined by the settlor in the founding deed. The first observation to make is that anyone can be called to hold the office of trustee (including the settlor themselves, and in this case, we refer to it as a self-declared trust).

It can be a natural person, who does not necessarily need to have particular skills, but many factors propound resorting to a trust company instead, which is a company whose corporate purpose is precisely to manage trusts.

Firstly, to avoid the risk of confusion between the personal assets of the individual trustee and those of the trust or trusts for which they act as trustee. Secondly, and this aspect should not be underestimated, as it also emerges from the reading of many judgments, to provide greater "credibility" to the trust externally. This is because the autonomy that the trustee must demonstrate in their management is more easily recognizable in a professional trustee. If assets are not placed "under the control", real and not virtual, of a trustee, there is no trust, as clearly stated in Article 2 of the Convention.

A "healthy" relationship between the settlor and the trustee, including the use by the former of the so-called "letters of wishes" to communicate their "hopes", is fundamental for the "smooth running" of the trust: the settlor can provide recommendations or requests to the trustee, but it is important that the trustee demonstrates autonomy of judgment and that there is no relationship of subordination, which would indicate a role of the trustee as a mere executor of the settlor's wishes.

In certain situations, it may be appropriate for the trustee to have certain characteristics related to any specificities of the trust itself: for example, in the case of a trust established for the benefit of a disabled individual, the trustee could be the association that deals with that particular disability.

So far, I have talked about the trustee, but in reality, there could be more than one trustee, and in this case, clear rules must naturally be provided in the trust deed to understand how collective decisions should be made.

We have seen that as a result of the assets being placed in trust, they become the property of the trustee. The trustee is in a truly unique situation because they have full and unconditional rights over the trust assets, which are legally their property. However, these assets are not truly "theirs" in the sense that they cannot dispose of them freely, but must instead serve the program outlined in the trust deed.

The death of the individual trustee does not entail any succession mortis causa; the trust fund remains segregated and does not become part of the estate, just as the potential bankruptcy of the trust company does not involve the trust assets.

Naturally, the trustee can resign (and in certain cases, it may be absolutely appropriate), but generally, regulatory laws (and it will be good practice to provide for this in the trust deed as well) stipulate that resignations are not effective until a new trustee is appointed.

An important aspect is the removal of the trustee. It is essential to properly regulate this aspect in the trust deed by establishing the revocability of the trustee without subjecting it to specific conditions. If, instead, we

specify that the trustee can be removed for just cause, or worse, we enumerate possible scenarios, there is a risk of dispute over whether the condition justifying the removal exists, with the risk of "paralysis" in trust management.

It would be advisable to reserve this power for the guardian rather than the settlor to avoid the identification of a scenario that could be considered by the Revenue Agency as an interposed trust.

When there is a transition to a new trustee, it is evident that the incoming trustee must be careful, demanding an updated account, the trust documents, and the transfer of the fund. Naturally, the exiting trustee will be held accountable for any breaches of duty.

Lastly, there is the matter of the trustee's compensation. The trustee's remuneration, which is borne by the trust, is agreed upon between the trustee and the settlor who appointed them. For subsequent renegotiations, the trust deed may specify that they are to be conducted with the entity responsible for the removal and appointment of the trustee, typically the guardian.

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