THE FOURTH PILLAR

The fourth pillar: is the Anglo-Saxon trust a model for the private foundation?

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AGEFI LUXEMBOURG · MARCH 2011

Before speaking of its positive content, we must first set out the contours of the trust and what the trust is not. The trust is not a contract but arises from a unilateral undertaking by the settlor, who has transferred his assets to a third party intended to become the trustee. The trustee will use the assets received for the benefit of beneficiaries or for a particular purpose.

A legal approach to the trust

The trust does not fall under the law of obligations, and does not arise through an agreement between the settlor and the trustee, or between the settlor and the beneficiary. Nor is the trust a legal person, and it therefore cannot own the assets, hire staff or enter into contracts. Only the trustee can be a legal or natural person, and it is the trustee who owns the trust's assets for the life of the trust. The trustee must fulfil the mission entrusted by the instrument constituting the trust and may, in order to fulfil that mission, bind the trust. Article 2 of the Hague Convention clearly specifies that the trust assets constitute a separate fund and do not form part of the trustee's own estate, this in order to avoid any discussion about the links between person and estate, or the allocation of the estate. The trustee is not an absolute owner. The trustee's role is more active than that of a mere interposed person for the transfer of assets. The settlor disappears as soon as the trust is created. There is therefore no contractual relationship.

The trust is not a fiducie (fiduciary arrangement) either. The fiducie arises through an agreement between the fiduciant and the fiduciary, and has as its object the transfer of an asset in absolute ownership to the fiduciary, so that the latter transmits it to the fiduciant or to a third party. The trustee is neither an intermediary nor an agent of the deceased.

The institution of the trust falls under property law. The right of ownership is divided between legal ownership (attached to the title of ownership, which belongs to the trustee) and equitable ownership, which belongs to the beneficiary (this right is recognised and protected by the jurisdictions that apply the law of equity).

The beneficiary can therefore compel the trustee, who has not undertaken any obligation towards him, to fulfil the obligations placed upon him by the trust instrument or by law. He may exercise a right of pursuit over the trust assets against any person who holds the assets in conditions that the law does not protect. In the event of a dispute, equitable ownership prevails over legal ownership. The trust is more than a division of the right of ownership. The continuing relationship between the trustee and the beneficiary, to whom the trustee must render account, together with the obligations to act and the prerogatives conferred on him, bring the trustee close to a guardian. Moreover, the beneficiary cannot acquire a real right over the trustee's legal ownership.

The settlor

The settlor, or constituent, is the person who creates the trust by transferring to the trustee the ownership rights he holds over certain assets. The transfer of the assets, or settlement, is made free of charge, without however being a gift within the meaning of the Civil Code. It is called "placing in trust".

The trust fund

Any movable or immovable asset can be included in the trust's assets (the trust fund). The choice of the assets placed in trust depends on the settlor's sole will. The choice of reinvestments depends on the trustee's decisions, taken within the limits possibly imposed by the trust deed. The trustee has entirely discretionary powers. The trustee decides as a "prudent person". His choice may be influenced by the wishes expressed by the settlor.

The trust

The trust is an obligation imposed on the trustee to exercise all rights of possession and ownership over assets in the interest, profit or advantage of other persons who are the beneficiaries.

The trust deed is most often an irrevocable contract, and the funds held by the trust do not form part of the settlor's estate.

The trustee

The trustees hold the trust fund and administer the assets in the interest of the beneficiaries. They form a body whose existence continues despite any resignation or appointment of individual trustees. The trustees exercise all rights of ownership over the assets, subject however to the reservation that they may neither profit from them nor enjoy them.

The beneficiaries

These are the persons who, by virtue of the trust deed, are intended to benefit from the trust fund. Depending on the provisions, the trustees will make them benefit by paying them part either of the income or of the capital, by allowing them to use the trust's assets, to borrow them, or by guaranteeing their debts. The list of beneficiaries does not specify the distribution of the trust funds among them, since the trust is said to be discretionary. The settlor is not one of the beneficiaries. At most, the settlor may obtain a loan from the trustees if the deed allows it. It is possible to specify, among the beneficiaries, those who will be entitled to the income of the trust funds and those who will also be entitled to the capital.

The protector

His appointment is optional. He may be a body that oversees the trustees, being bound by the provisions of the trust deed to give prior consent to the exercise by the trustees of certain of their powers. Most of the time, he is a friend of the family, a kind of wise counsellor.

The trustee's mission

A distinction is drawn between simple trusts and special trusts. In a simple trust, the trustee has no active obligations to fulfil; the trustee is a mere custodian of the trust assets. In a special trust, the trustee is active and must accomplish a mission defined by the settlor. The special trust may be a functional trust or a discretionary trust. In the former, the trustee simply deals with the management of the assets handed over to him. In the latter, the trustee must make choices among a set of beneficiaries, specified persons or charitable institutions that he judges suitable to fulfil the tasks.