

PRINCIPLES OF EUROPEAN TRUST LAW*

Article I

Main characteristics of the trust

- (1) In a trust, a person called the "trustee" owns assets segregated from his private patrimony and must deal with those assets (the "trust fund") for the benefit of another person called the "beneficiary" or for the furtherance of a purpose.
- (2) There can be more than one trustee and more than one beneficiary; a trustee may himself be one of the beneficiaries.
- (3) The separate existence of the trust fund entails its immunity from claims by the trustee's spouse, heirs and personal creditors.
- (4) In respect of the separate trust fund a beneficiary has personal rights and may also have proprietary rights against the trustee and against third parties to whom any part of the fund has been wrongfully transferred.

Article II

Creation of the trust

The general rule is that in order to create a trust a person called the "settlor" in his lifetime or on death must, with the intention of creating a segregated trust fund, transfer assets to the trustee. However, it may also be possible for a settlor to create a trust by making it clear that he is to be trustee of particular assets of his.

Article III

Trust fund

- (1) The trust fund consists not only of the original assets and those subsequently added, but also of those assets from time to time representing the original or added assets.
- (2) The trust fund is not available to satisfy claims made against the trustee in his personal capacity. Except to the extent that the settlor's creation of the trust contravenes laws protecting his creditors, spouse or heirs, the trust fund is available only for claims made by creditors dealing with the trustee in his capacity as such and, subject thereto, for claims of the beneficiaries or the enforcer, who is an office holder entitled to enforce a trust for purposes.
- (3) A trustee of several trusts must keep each trust fund not only segregated from his private patrimony but also from each of the other trust funds, except to the extent that the terms of the trusts otherwise permit.

* This text is published in D.J. Hayton, S.C.J.J. Kortmann, H.L.E. Verhagen, *Principles of European Trust Law*; The Hague 1999.

Article IV

Trusts for beneficiaries or for enforceable purposes

- (1) Upon creating a trust, the settlor must designate ascertained or ascertainable persons as beneficiaries to whom the trustee's obligations in respect of the trust fund are owed or will be owed, or must designate purposes in respect of which there is an enforcer.
- (2) To the extent that the settlor fails to create rights affecting the whole of the trust fund the trustee will own the assets for the benefit of the settlor or his successors.
- (3) Any beneficiary, or any enforcer of a trust for purposes, has a right to information needed to protect his interest and to ensure that the trustee accounts to him.
- (4) Subject to the terms of the trust, a beneficiary can make a disposition of his rights.
- (5) Any beneficiary, or any enforcer of a trust for purposes, has the right to seek judicial enforcement of the terms of the trust.

Article V

Trustees' duties and powers

- (1) The trustee must exercise his rights as owner in accordance with the law and the terms of the trust.
- (2) The fundamental duty of a trustee is to adhere to the terms of the trust, to take reasonable care of the trust assets and to act in the best interests of the beneficiaries or, in the case of a trust for purposes, the furtherance of those purposes.
- (3) A trustee must keep separate and protect the trust assets, must maintain accurate accounts and must provide the beneficiaries and the enforcer with information requested to protect their interests.
- (4) Except to the extent otherwise permitted by the terms of the trust or by law, a trustee must personally perform his functions. He must act honestly and he must avoid all conflicts of interest unless otherwise authorised.
- (5) A trustee is accountable for the trust fund, must personally make good any loss occasioned to the trust fund by his breach of trust and must personally augment such fund by the amount of any profits made by him in breach of his duty.

Article VI

Remedies against trustees for breach of trust

Remedies that the court can provide against a trustee for breach of trust include an order restraining particular conduct or removing the trustee from his office and replacing him or decreeing payment of compensation for losses or restitution of profits. The court may also have power to declare that particular assets of the trustee have always been part of the trust fund and never became part of his private patrimony or are to be regarded as security for satisfying his liability.

Article VII

Liabilities of third parties

Where a trustee wrongfully transfers part of the trust fund to a transferee who is not protected as a purchaser in good faith or otherwise, the transferee must make good the loss to the trust fund or may be ordered to hold the assets so transferred (or assets representing them) as part of the trust fund separate from his private patrimony or as security for satisfying his liability. This liability may extend to any subsequent transferee who is not protected as a purchaser in good faith or otherwise.

Article VIII

Termination of a trust

(1) Notwithstanding the terms of the trust, where all the beneficiaries are in existence, have been ascertained, and are of full capacity, then, if all such beneficiaries are in agreement, they can require the trustee to terminate the trust and distribute the trust fund between themselves and their nominees as they direct. However, if some material purpose of the settlor remains to be served then the beneficiaries may not be permitted to terminate the trust.

(2) A trust terminates (a) by virtue of all the trust fund having been distributed to beneficiaries or having been used for trust purposes or (b) by virtue of there being no beneficiaries and no person, whether or not then in existence, who can become a beneficiary in accordance with the terms of the trust, or (c) by virtue of a person exercising a power of termination.

(3) At the close of the permitted period for the duration of the trust (subject to the trustee retaining sufficient assets to make reasonable provision for possible liabilities) the trust fund shall be distributed by the trustee as soon as reasonably practicable in accordance with any terms of the trust setting out how the trust fund should then be distributed. However, if there are no such terms then the trust fund shall be owned by the trustee for the benefit of the settlor or his successors.

(4) In the case of a trust for purposes, where such purposes have been fulfilled so far as possible or cannot now be carried out, then the trust fund shall be owned by the trustee for the benefit of the settlor or his successors, unless the terms of the trust are varied or extended.