

# REPUBBLICA DI SAN MARINO

Law 1 March 2010 No. 43

## AFFIDAMENTO FIDUCIARIO<sup>1</sup>

### General Provisions

#### Article 1

##### *(Definition and Form)*

1. An entrustment is a contract by which the entruster and the fiduciary agree on a programme that dedicates certain assets and the advantages deriving from them to one or more beneficiaries, who may but need not be party to the contract, for a period not exceeding 90 years.
2. The assets can be current or future assets, ascertained or ascertainable, transferred by the entruster or by third parties to the fiduciary, or belonging to the fiduciary himself, and settled by him.
3. An entrustment is presumed to be gratuitous.
4. The contract shall be invalid unless it is:
  - (a) in writing; and
  - (b) accompanied by the opinion of a Notary Public admitted in San Marino certifying its validity.

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<sup>1</sup> English translation by Mara Monte and Paul Matthews of Withers LLP, with assistance from Prof Maurizio Lupoi. In this translation we have used some old-fashioned English words which accurately represent the sense of the original Italian, though they do not have any technical legal sense in English. Thus:

*affidante* = entruster;

*affidamento fiduciario* = entrustment.

On the other hand, for *affidatario* we have preferred 'fiduciary' to 'trustee' (because too close to trustee), and for *patrimonio affidato* we have preferred 'dedicated patrimony' to 'entrusted patrimony' (because less clumsy).

5. The contract cannot be terminated except in the event of impossibility of performance.

## **Article 2**

### *(Entruster)*

1. An entruster can declare himself to be fiduciary, on a temporary basis, provided that at least one beneficiary is party to the contract.
2. Unless otherwise provided by in the contract, the rights and powers conferred on an entruster cannot be exercised by his heirs, and neither are they subject to his obligations.

## **Article 3**

### *(Dedicated patrimony)*

1. The assets transferred to an fiduciary or settled by him for the purpose of implementing the contractual programme, constitute a dedicated patrimony. Neither the transfer nor the declaration need comply with the formal requirements required for gifts or be confirmed before the court.
2. A dedicated patrimony:
  - (a) belongs temporarily to the fiduciary who may, subject to the terms of the contract, exercise over it any of the rights and powers of an absolute owner;
  - (b) is separate and distinct from the personal assets of the fiduciary, is not affected by his matrimonial property regime and is not subject to any claims by his heirs or his creditors;
  - (c) can only be subject to execution in relation to obligations arising in connection with the contractual programme itself.
3. Where the contract appoints two or more fiduciaries, they hold the assets jointly, so that upon the first death the dedicated patrimony will accrue to the surviving fiduciary or fiduciaries by survivorship.
4. The contract may give a name to a dedicated patrimony.
5. The assets forming part of a dedicated patrimony shall be both segregated from those owned by the fiduciary in his personal capacity and identifiable as such; any registration in public registries shall state that the assets form part of the dedicated patrimony.

**Article 4**  
*(Beneficiaries)*

1. The contract shall:
  - (a) identify the beneficiaries or the criteria for their identification;
  - (b) determine the rights of the beneficiaries in the dedicated patrimony and its products;
  - (c) determine under what circumstances the rights of a beneficiary under the contract shall or may come to an end.
2. The contract may provide that the entruster may nominate beneficiaries at a later stage, as long as at least one beneficiary is mentioned in the contract.
3. The contract may provide that the fiduciary or a third party may:
  - (a) determine which of several named persons or which members of a named family or class of persons shall benefit;
  - (b) determine the rights of beneficiaries, provided that the beneficiaries are different from the persons making such determination.
4. Lineal descendants of a person living at the time when the contract is made may be beneficiaries, although they might not yet have been conceived.
5. The entruster may be a beneficiary; the fiduciary may be one of the beneficiaries.

**Article 5**  
*(Implementation of the contractual appropriation programme)*

1. The contract shall provide under what circumstances:
  - (a) the prior consent of the entruster or of a person appointed by him is required for the fiduciary to carry out a valid act;
  - (b) the fiduciary can be replaced or joined by others in the contractual relationships arising out of the contract;
  - (c) the entruster or a person appointed by him is authorised to assign to another person the benefit and the burden of the contract, free of any and all claims by the fiduciary, and to

carry out all acts and execute all documents in connection with the dedicated patrimony, as an exception to the provisions of the *ius commune*.

- (d) the fiduciary may act despite a conflict of interest.
2. Even where the contract does not so provide, or provides otherwise:
- (a) in the event of a breach of duty by the fiduciary, the entruster or the person appointed by him may exercise the power referred to in paragraph 1(c), without prejudice to the fiduciary's duty to make losses good;
  - (b) that person must exercise the powers referred to in paragraph 1(c):
    - (i) if the fiduciary dies or becomes incapacitated and a new fiduciary has not been appointed;
    - (ii) if the fiduciary desires to be discharged from his duties.
3. If at any time there is no beneficiary and there is no possibility that any beneficiary may be appointed or come into existence before the expiry of the contract term, then, so soon as this is known, the contract shall come to an end and the dedicated patrimony shall be returned to the entruster.
4. In the event that the rights of the beneficiaries do not extend to the entirety of the dedicated patrimony, the entruster shall be entitled to the excess of the assets and their products to the extent that and for so long as such excess persists.

## **Article 6**

### *(Obligations of the fiduciary)*

1. The fiduciary must act fairly and in good faith.
2. In performing his obligations under the contract the fiduciary shall;
- (a) act in a fiduciary capacity and as such in the interest of the beneficiaries;
  - (b) observe the same standard of care that a person would be expected to observe in relation to his own assets in similar circumstances;
  - (c) if he is acting professionally as fiduciary, observe the same standard of care that it is reasonable to expect from such a professional.

3. The fiduciary must provide a full account of his activities to the persons indicated in the contract and in any event to the beneficiaries, according to their interests. The right of the beneficiary to receive a full account cannot be excluded.
4. The contract may provide that the fiduciary may, at his own instance or with the prior consent of the entruster or the person appointed by him, assign the benefit and the burden of the contract to another person to be a new fiduciary.

#### **Article 7**

##### *(Exclusion of liability)*

1. The fiduciary shall be liable for the acts of any consultants, agents, managers or delegates appointed by him, notwithstanding any provisions in any contract between them aiming at excluding or limiting his liability unless the consultants, agents or delegates have been chosen and appointed by the fiduciary observing the same standard of care that he would have exercised in relation to his own assets in similar circumstances and their actions are not the result of *dolus*, gross negligence or bad faith.
2. Any provision of the contract which excludes or limits in advance the fiduciary's liability for *dolus*, gross negligence or bad faith or generally for acts carried out where a conflict of interest exists or which are unauthorised shall be void.

#### **Article 8**

##### *(Damages)*

1. In addition to any contractual damages to which the entruster and the beneficiaries are entitled as a result of the loss suffered, the fiduciary shall be bound to restore the dedicated patrimony to the value it would have had, had no breach occurred.
2. The fiduciary shall surrender to the dedicated patrimony any benefit improperly obtained from his position as fiduciary, even if no loss has been caused to the beneficiaries.

#### **Article 9**

##### *(Dealing with third parties)*

1. Third parties dealing with the fiduciary are entitled to require the fiduciary to demonstrate his powers and to supply a copy of the relevant provisions of the contract of the entrustment, duly certified by him, before entering into a contract with the fiduciary.

2. Any restrictions on the authority of the fiduciary are binding on third parties if they are aware of such restrictions or if they are unaware of them through their own fault.
3. Third party claims arising in contract, tort or by operation of law against the fiduciary can only be enforced against the dedicated patrimony. However, where the fiduciary, in dealing with a third party, did not hold himself out as fiduciary, he is personally liable, but with a right to recoup himself out of the dedicated patrimony.

### **Article 10**

#### *(Invalidity of acts carried out by the fiduciary)*

1. Any act of an fiduciary which has the effect of reducing the dedicated patrimony and any administrative act satisfying one of the following conditions shall be invalid:
  - (a) It is a donative act made neither pursuant to a contractual obligation nor in the exercise of power given to the fiduciary;
  - (b) It is an act beyond the limits, binding on third parties, of the fiduciary's authority;
  - (c) It is an act where the consideration received by the fiduciary for goods and/or services is much lower than their actual value, causing loss to the dedicated patrimony;
  - (d) It is an act carried out despite a conflict of interest which has not been authorised in the contract.
2. Where a dispositive act relating to assets of a dedicated patrimony is invalid, any subsequent dispositive act of the same assets or their substitutes shall also be invalid, but without prejudice to any rights acquired by third parties in good faith, for consideration and without notice of the cause of invalidity, except where a restriction has been entered in the relevant registry in connection with a claim.
3. An invalid act can be validated with the consent of all beneficiaries, provided that all the beneficiaries are in existence and ascertained.

### **Section 2**

#### **Special Provisions**

### **Article 11**

*(Entrustment in favour of vulnerable individuals)*

1. No disposition in favour of beneficiaries who are disabled, older than 75 years, incapable or incapacitated, drug or alcohol addicts or affected by serious chronic disease shall amount to a gift so long as:
  - (a) the assets of the dedicated patrimony the subject matter of the disposition, have been transferred or settled by the spouse of the beneficiary, a blood relative no more remote than the third degree or the beneficiary's mother- or father-in-law or brother- or sister-in-law; and
  - (b) the assets are not manifestly excessive with respect to the needs of the beneficiary, any excess being regarded as a gift.

### **Article 12**

*(Forced heirship)*

1. Where the contract involves the making of gifts and has not been fully performed:
  - (a) forced heirs can take action only in order to protect the share to which they would be entitled under the forced heirship rules; and
  - (b) this action can be brought against the fiduciary as well as against the recipients of the gifts, if in existence and ascertained.
2. Beneficiaries to whom the provisions of article 11 apply can bring a claim under the forced heirship rules only if the assets belonging to the dedicated patrimony are clearly not sufficient for their needs.

### **Article 13**

*(Protection of creditors)*

1. Creditors may challenge acts transferring assets to the fiduciary or settling such assets, if the contract has not been fully performed, by action brought against the fiduciary and against the beneficiaries having rights in the transferred assets, if in existence and ascertained, as if the transfer had been made directly to them.
2. The grounds for the claim may exist either in relation to the fiduciary or in relation to one of the beneficiaries.

3. The limitation period is five years.

#### **Article 14**

*(Will provisions)*

1. If an entrustment is created by will, subjecting an heir, a legatee or a testamentary executor to the obligation to carry it out, the provisions of this Law shall be followed so far as applicable.

#### **Article 15**

*(Prescription)*

1. A beneficiary's rights against an fiduciary shall be prescribed after ten years have elapsed from the time when the beneficiary became aware of the facts on which his claim is based.

#### **Article 16**

*(Powers of the courts)*

1. The court on the application of any interested person and, if appropriate, after having made any necessary investigations, may, by reasoned judgment:
  - (a) if there is no longer an entruster or any person appointed by him, or if there is but he fails to act, make any decisions that may be required in the exercise of the powers set out at paragraph 1(c) of article 5;
  - (b) give directions to the fiduciary;
  - (c) vary the contract by adding new provisions or amending or deleting existing provisions, where this appears desirable to achieve the contractual programme.

#### **Article 17**

*(Evidence)*

1. Witness evidence in relation to declarations and/or agreements subsequent to the conclusion of the contract or, in the case of an entrustment created by will, subsequent to the testator's death, shall always be admissible.

**Article 18**

*(Criminal offences)*

1. An fiduciary who, in breach of contractual or other legal obligations applicable to his position, uses the assets of the dedicated patrimony for his own or another's benefit or delays their transfer to those beneficiaries entitled, shall be punished by imprisonment at degree two or disqualified<sup>2</sup> from acting as fiduciary.

**Article 19**

*(Entry into force)*

1. This Law shall come into force on the fifth day after that on which it is published as a law.

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<sup>2</sup> *Interdizione di secondo grado*