

COURT FOR TRUSTS AND FIDUCIARY RELATIONS

§ 1. The institution

The Court for Trusts and Fiduciary Relations was established in San Marino and is governed by the Constitutional Law of 26 January 2012 no 1 "Establishment of the Court for the Trust and the Fiduciary Relationships" (hereinafter referred to as "the Court" for the sake of brevity).

The Qualified Law of 26 January 2012 no 1 regulates the "Provisions for the operation and functioning of the Court for Trusts and Fiduciary Relationships" and the Decree of 19 July 2013 no 85 describes the "Proceedings at the Court for the Trust and the Fiduciary Relationships", as amended by the Decree of 30 September 2013 no 128 at the time of ratification by the *Consiglio Grande e Generale* (Great and General Council).

The Court as an institution responds to the need of creating a specialized and highly qualified judicial body, a requirement that is met thanks to the jurists' expertise in the field of trusts and fiduciary relations in general, thus being able to offer adequate answers to specific issues which arise in such proceedings and as well as being able to act accordingly to the jurisdiction imposed in this particular field of law¹.

The basic idea stemmed from the perception that there is a need for a judicial body that can settle disputes in this specific field of law with solutions which are legally satisfactory for the parties and which implement their will as embodied in the documents subscribed by them².

§ 2. The competence

The Court "shall be competent for all cases and disputes concerning legal relationships deriving from entrustment or confidence, such as trust, fiduciary agreement, fideicommissum, institutes of fiduciary heir and similar institutes, regulated by whatsoever legal system. Disputes concerning mandates shall not fall within the competence of the Court, unless the agent is an authorised party under Law of 17 November 2005 no 165 or a party carrying out fiduciary activities in legal systems other than the San Marino legal system³."

In order to regulate the border areas between the jurisdiction of the Court and the jurisdiction of the ordinary Tribunal, the Head Magistrate and the President of the Court

¹ See § 5 below for the general monitoring power to which the Court is entitled.

² See Pierfelici V., *La Corte per il trust a San Marino*, in *Trusts & attività fiduciarie*, 2016, p. 5.

³ Art. 1 Constitutional Law of 26 January 2012, no 1.

jointly signed a Decree (11 November 2014). As a consequence, the Head Magistrate identified four cases pending before the Tribunal which fell within the jurisdiction of the Court and suspended the relevant proceedings, giving notice to the parties. Immediately after, two of the four suspended cases were introduced before the Court and a third was introduced somewhat later.

Any conflicts of jurisdiction between the the ordinary Tribunal and the Court are settled by the *Collegio Garante della Costituzionalità delle norme* (Guarantors' Panel on the Constitutionality of Rules)⁴.

§ 3. The Judges

The Court is composed of a President and six standing members, elected by the *Consiglio Grande e Generale* (Great and General Council) by a two-third majority, among ordinary university professors of law even if retired, magistrates and former magistrates, law graduates having served for at least twenty years in the specific subjects pertaining to the jurisdiction of the Court.

The candidates may be either San Marino or foreign citizens.

The President and the members of the Court shall be appointed for a five-year renewable mandate. After the expiry of their mandate, they shall continue to exercise their functions until the appointment of the new President and members or until the renewal of their mandate. The President and the members of the Court shall take office by swearing before *Eccellentissima Reggenza* (Their Excellencies the Captains Regent)⁵.

The Court shall not be subject to the provisions concerning the Judicial System. The President and the members of the Court are not members of the *Consiglio Giudiziario* (Judicial Council).

⁴ Art. 3 of the Decree of 30 September 2013 no 128 provides an informal procedure for the solution of conflicts of jurisdiction relating to the President of the Court and the Head Magistrate. If the agreement is lacking, the Law assigns the decision-making power to the *Collegio Garante della Costituzionalità delle norme* (Guarantors' Panel on the Constitutionality of Rules) referring to the procedure - as applicable - dictated for the resolution of conflicts of jurisdiction by the Qualified Law of 25 April 2003 no 55 concerning the "Discipline on the organization, the incompatibilities, the functioning, the forms of the appeals and the procedures, the effects of the decisions of the *Collegio Garante della Costituzionalità delle norme* (Guarantors' Panel on the Constitutionality of Rules)". See also Pierfelici V., recital 2, p. 14.

⁵ The election and the appointment of the Court's members, as well as the rules governing incompatibilities, abstention and objection, shall be specifically established by the ad hoc Qualified Law of 26 January 2012 no 1 "Provisions for the activation and operation of the Court for Trusts and the fiduciary relations" by way of derogation from Qualified Law of 30 October 2003 no 145 "Provisions on the judicial system".

The President and the members of the Court, under penalty of forfeiture of mandate, shall not hold posts or in any case carry out activities within political or trade union associations, stand for political or administrative elections, carry out commercial or industrial activities, hold the position of company directors or auditors, neither in the territory of the Republic nor abroad, nor shall they be engaged in a professional activity in the territory of the Republic. Resignations shall be placed in the hands of the *Reggenza* (Captains Regent). Resignations shall be immediately effective.

At its meeting on June 4, 2014, the *Consiglio Grande e Generale* (Great and General Council), appointed the following as President and members of the Court for trusts and fiduciary relations for the duration of five years⁶:

- Maurizio Lupoi: president;
- Paolo Bernasconi: judge;
- Antonio Gambaro: judge;
- Michele Graziadei: judge;
- David Hayton: judge;
- Paul Bernard Matthews: judge;
- Sonia Martin Santisteban: judge.

§ 4. Jurisdictional activity

For the reduction of procedural time and for simplification according to art. 15 of the Declaration of Rights and art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, a model for the judicial proceeding was set up for the Court which is characterized by orality, concentration and absence of formalism, and is managed through telematic means⁷, so that the Court has been able to resolve each procedure within 4-5 months so far.

Art. 11 of the Decree of 19 July 2013 no 85 governs the appeal procedure.

The appeal is only permitted on matters of law and is characterized by short deadlines⁸. In fact, the losing party can ask the President of the Court to be authorized to lodge an appeal within 14 days of the sentence's publication. The President can reject or grant

⁶ Art. 1 of the Constitutional Law of 26 January 2012 no 1 and art. 3 of the Qualified Law of 26 January 2012 no 1.

⁷ As overview of the most important procedural aspects see Pierfelici V., recital 2, pag. 12 and 13.

⁸ Please note that the Qualified Law of 26 January 2012 no 1, laying down provisions for the activation and operation of the Court for trusts and fiduciary relations, had provided in art. 8 para. 1 that "the delegated Decree shall regulate the proceedings before the Court, with a view to guaranteeing expeditious proceedings, while respecting the fundamental principles of procedural law and in particular the rights of defense and to be heard" and the subsequent paragraph 2 letter j, which "shall establish that the appeal phase does not exceed 180 days following the date of the appeal. Otherwise, the decision appealed against carries the effect of *res iudicata*".

the authorization to appeal by a reasoned order on the basis of the uncertainty of the underlying legal issues or of the general importance of the legal issue raised by the losing party.

If the President denies the authorization to appeal, the losing party may ask the Judge of Appeal to give leave to appeal in the following fourteen days.

If the request to appeal is granted, within fourteen days after the reasons for the appeal are lodged the Judge of Appeal requires the *consilium sapientis* to an expert selected among those listed in the appropriate register⁹ "among experts of the highest repute for trusts and fiduciary relations"¹⁰, so that even in the proceedings at second instance the specialisation of Judges in the subject is maintained.

Currently the following professors are part of the list of *sapientes*:

- Giovanni Diurni;
- Nicolò Lipari;
- Pietro Perlingieri;
- Anton Rudokvas;
- Luc Thévenoz;
- Ferdinando Treggiari.

The Judge of Appeal identifies a single expert if the judgement of first instance was rendered by a single Judge, or a board of three experts in case it was rendered by a board or by the full Court.

In issuing his/her judgement, the Judge of Appeal is bound to follow the principles of law enunciated by the expert.

Afterwards, there is no possibility of a third instance: in fact, the subsequent appeal to extraordinary remedies (allowed by the general law) is here precluded.

§ 5. The supervisory power, provisional protection and non-contentious proceedings

Art. 53, para. 1, of the Law of 1 March 2010 no 42 attributes a general jurisdiction to control and supervise any trust governed by San Marino Law, which shall be exercised

⁹ The register of experts is drawn up in accordance with art. 7, para. 4 of the Qualified Law of 26 January 2012 no 1.

¹⁰ Art. 7, para. 3, of the Qualified Law of 26 January 2012 no 1.

by issuing the most appropriate measures for the specific case, to the *Autorità Giudiziaria* (Judicial Authority), and therefore to the Court¹¹.

The combined provision of art. 54 of the Law of 1 March 2010 no 42 and art. 7 of the Decree of 19 July 2013 no 85 regulates protective and provisional measures that the Court may enact.

With regard to the broad discretionary powers of the Judges to implement the intention if the parties those rules, in contrast to the limited protection measures of the San Marino system and in addition to the provisions of the ordinary civil procedure, provide that the Court can “impose or prohibit a conduct in all cases where there are clear grounds for believing that, during the time necessary to assert a claim in court, the interests of the claimant will suffer irreparable damage.”¹²

In addition, if so requested by the party, the court may order “by a decree representing an enforceable title the amount of money that the defendant will have to pay in the event of non-compliance or late compliance, determining such amount with regard to of the damage likely to occur and the value of the object of the dispute.”¹³

Both these powers attributed to the Judges are seen as discretionary powers which allow the Court to intervene in order to protect a trust and, more generally, fiduciary relations¹⁴.

Art. 53, para. 2ff. of the Law of 1 March 2010 no 42 regulates the provisions that could be called non-contentious proceedings. The law and consequently the powers conferred to the Court aim at an efficient functioning of the judicial system and allow the Court upon a request lodged by any interested party to issued orders of any nature concerning:

- a) the fulfilment of an obligation or the exercise of a power of the office of trustee or protector;

¹¹ The supervisory power has been exercised by the Court in the context of the procedure of non-contentious proceedings relating to a trust which remained without trustee. From the facts presented in the course of the proceeding, the Court has taken the view that it needed to activate its general supervisory power over the trusts under San Marino law and, following a proper investigation, the Court made a provision that had been notified to the competent Central Bank’s offices for any of their initiatives.

¹² See art. 7, para. 1, of the Decree of 19 July 2013 no 85.

¹³ See art. 7, para. 1, of the Decree of 19 July 2013 no 85.

¹⁴ Starting from the assumption that these powers are generally recognized to the Judge by the common law, in particular to protect the subjects of objective and subjective weakness, Pierfelici V., *recital 2*, p. 13 believes that they can be compared to a kind of *inherent jurisdiction*. For the definition of *inherent jurisdiction* see M. Lupoi, *Istituzioni del diritto dei trust negli ordinamenti di origine e in Italia*, 3rd ed., Padua, 2016, p. 126.

- b) the replacement of the trustee or the protector who has violated the law or the trust instrument or, for reasons of convenience or because the trustee lacks the requirements referred to in Article 18 of this Law;
- c) the appointment of a new or additional trustee or of a new or additional protector;
- d) management and disposition of trust assets.

If the petition is lodged by the trustee - an ordinary occurrence in trust law¹⁵ - the Court may go so far as to authorize him/her to carry out a useful act that does not fall within his/her powers or to ratify an act he/she has already completed or, if he/she is in a state of uncertainty about the fulfilment of a deed in relation to his/her office, he/she can ask the Judge to comment on the matter, requesting inter alia specific instructions.

Pursuant to art. 55 of the Law of 1 March 2010 no 42, the Court may also intervene when a trustee has mixed trust assets with other assets or has disposed of trust property in violation of the instrument establishing the trust or without consideration or for a clearly inadequate consideration.

§ 6. Registry charges and compensation of the Judges

With the Decree of 2 December 2014, the President has regulated the payment of the registry charges and the compensation of the Judges.

The registry charges for litigation proceedings correspond to the value of the dispute, determined in accordance with art. 9 of the Law of 17 June 1994 no 55, as shown in the following table:

<i>Value of the dispute in €</i>	<i>Registry charges €</i>
Up to 50,000	800
From 50,001 to 250,000	1,500
From 250,000 to 1,000,000	3,000
From 1,000,001 to 5,000,000	6,000
Over 5,000,000	6,000 + 0.05% of the excess value 5,000,000

¹⁵ In this sense see M. Lupoi, fn 14, p. 219 and, p. 337ff for more general information on the topic of non-contentious proceedings.

Indeterminate value	The amount is decided by the President
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The Decree then provides hypotheses for the increase in charges (if the defendants are more than one and if one or more parties must be summoned from outside the territory of the Republic of San Marino) and for a reduction (in the case of a counterclaim and for a third party call).

In the case of a protective and provisional measure request, the registry charges are due to the same extent as for the contentious proceedings. If, on the other hand, a provision of non-contentious proceedings is required, the registry charges are set at € 1,500 including the appeal stage.

The fee owed to the Judge to which a cause is assigned is the following:

<i>Value of the dispute in €</i>	<i>Compensation in €</i>
Up to 50,000	1,500
From 50,001 to 250,000	4,500
From 251,000 to 1,000,000	10,000
From 1,000,001 to 5,000,000	25,000
Over 5,000,000	25,000 + 0.2% of the excess value 5,000,000
Indeterminate value	The amount is decided by the President

Also these amounts may vary; in particular, the president can reduce them to half when the cause appears particularly simple and can increase it by no more than half when the cause appears particularly complex. Moreover, if the case is assigned to the President only, the fee is reduced by 20%; if, instead, it is entrusted to a board, the amount shown above is increased by 15% if the Judges are two, and it is increased by 30%, if there are more than two.