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INTERNATIONAL TRUST LAWS

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Chapter 35

San Marino

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Chapter 35

San Marino*

Digest of Trust Law

Introduction

San Marino has four main statutes relating to the law of trusts: **A35.1**

(a) Trusts Law ('TL') (Law of 1 March 2010, n 42 as amended by Decree of 25 July 2013, n 98);
(b) Taxation of Trusts Law ('TTL') (Law of 17 March 2005, n 38);
(c) Establishment of the Court for Trust Law Disputes ('CTL') (Constitutional Law of 26 January 2012, n 1);
(d) Functioning of the Court for Trust Law Disputes ('FCTL') (Law of 26 January 2012, n 1).

San Marino also enacted the following Decrees, which integrate the TL and the TTL in some respects: **A35.2**

(a) Decree for the Adhesion to the Hague Convention on the law applicable to trusts and their recognition (Decree of 10 September 2004, n 119) ('DHague');
(b) Decree about withholding of taxes on trust income paid to beneficiaries of fixed trusts (Decree of 14 November 2005, n 161) ('DWithholding');
(c) Decree about formalities and communications to the tax authorities about trust revenues (Decree of 8 June 2005, n 84) ('DTaxComm');
(d) Decree about Professional Trustees (Decree of 16 March 2010, n 49) ('DProTrustees');
(e) Decree about the Registry of Trusts and Journal of Events (Decree of 16 March 2010, n 50) ('DRegistry');

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(f) Decree about Trust Accounts and Evaluation of Trust Assets (Decree of 5 May 2010, n 85) ('DEvalution').

A35.3 The Central Bank of San Marino has also issued:

(a) a Uniform Letter (25 October 2005), which deals with the procedure for the authorisation of authorised trustees ('CBLetter'); and
(b) under the powers granted by the TL:
  (i) Regulation n 2010-01 – amended by Regulation n 2011-01 – which deals with the exercise of professional trusteeship ('CBPRORegulation'); and
  (ii) Regulation n 2011-06, which deals with the supervision of financial trustees ('CBFTRegulation').

A35.4 San Marino, while a civil law country, is one of the few in the world where Roman law – under the form of ius commune – is still applied and represents the basis of the legal system. In Roman law,[1] and in the ius commune, testamentary trusts existed under the headings of fideicommissum and heres fiduciarius.[2] The TL both confirmed the recognition of trusts as a part of San Marino law and extended their scope by providing for the regulation of inter vivos trusts.

A35.5 The TL embodies traditional trust principles as evolved in English law, but with many differences and innovations. Some of them have been inspired by the trust laws of other jurisdictions analysed elsewhere in this publication; most of them are original innovations by the San Marino legislature.

A35.6 In legal theory, the San Marino trust law has been reconstructed as a new model of trust, independent from those in English law, US law and elsewhere.

A35.7 Central to the structure of the TL are the concepts of the 'foreign trust' and, by contrast, that of the San Marino trust. A San Marino trust is a trust whose proper law is the law of San Marino and a foreign trust is a trust whose proper law is the law of any other jurisdiction.[3]

A35.8 Foreign trusts are fully recognised in San Marino as a consequence of the enactment of the DHague, which made the Hague Convention on the Recognition of Trusts directly applicable in San Marino. All the provisions of the Convention therefore have force of law in the Republic of San Marino.

A35.9 According to the TL, Art 56 trust deeds of (a) foreign trusts where settlors or trustees are individuals or legal persons resident in San Marino and (b) foreign trusts whose trustees are resident in San Marino shall be subject to the same formalities provided for a San Marino trust. As a result of this:

(a) a testamentary trust may be created only by an instrument in writing;

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1 R Zimmerman, *Roman Law, Contemporary Law, European Law* (2000), pp 163–165; R Helmholz and R Zimmerman (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (1998).
2 M Lupoi, *I Trust nel Diritto Civile* (2004).
3 TL, Art 1(1)(p).

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(b) an inter vivos trust may be created only in writing by a deed drafted by a notary public or by an instrument in writing with signatures certified as authentic by a notary public; and
(c) foreign trusts with their seat of administration in the Republic of San Marino must be registered with the Registry of Trusts.[4]

This chapter will be devoted to the analysis of the San Marino trust.

1. Definition of a trust

A35.10 The TL provides:[5] 'A trust exists where a trustee holds assets in the interest of one or more beneficiaries or for a specific purpose.' This is similar to the position under most trust laws.

2. Who may be a settlor

A35.11 The TL provides that 'settlor' means a person who created the trust, by executing the trust deed.

A35.12 Subjects to the terms of the trust, anyone interested in the trust can transfer property to a trust already created by somebody else.[6]

A35.13 There is no restriction on who may be a settlor, though it follows from this definition that a settlor must have capacity to enter into legal transactions in order to create a trust.

3. Who may be beneficiaries

A35.14 As in England and in other jurisdictions, any individual or corporation capable of being vested with legal rights can be a beneficiary of a trust and likewise there would be no trust where a sole trustee purported to hold property on trust for himself as the sole beneficiary.[7]

A35.15 The protector of the trust may be one of the beneficiaries with a fixed interest.[8]

4 TL, Art 56(2).
5 TL, Art 2.
6 TL, Art 11(4).
7 TL, Art 2(3).
8 TL, Art 52(7).

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4. Who may be trustees

A35.16 One or more individuals and legal persons may be trustees under the TL; none of them, though, is entitled to be trustee of more than one trust governed by the law of San Marino unless he is bound by anti-money laundering regulations in the Republic of San Marino or in other states whose law implements the relevant EU Directives or is substantially equivalent to them.[9]

A35.17 The professional exercise of trusteeship in San Marino is governed by the dispositions of the DProTrustees.[10]

5. What property may be subject to a trust

A35.18 The TL provides that:[11] 'any property under the Law may be included in the trust fund.'

A35.19 Furthermore, the TL defines[12] 'trust fund' as 'total trust assets and property and legal relations concerning them', 'trust assets' as 'assets and property held in the trust fund' and 'property' as 'any interest, power, right or expectation susceptible to economic evaluation'.

A35.20 This is a peculiarity of San Marino laws.

A35.21 The trust fund, under the TL, is a patrimony, encompassing both trusts assets and all trust liabilities against third parties incurred by the trustee while holding the office.

A35.22 Therefore, liabilities incurred by the trustee against third parties can be said to be 'trust liabilities', instead of being deemed trustee's liabilities.

6. The creation of a trust

(i) Language sufficient to create a trust

A35.23 No particular language is required to create a trust, but an intention to create a trust must be present in the trust deed. The TL also contains provisions as to necessary terms of trusts, and their certainty. These provisions are discussed further below.

9 TL, Art 18(1).
10 TL, Art 18(2).
11 TL, Art 11(1).
12 TL, Art 1(1)(d), (f) and (j).

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(g) the date of the trust deed and the duration of the trust if this is provided for in the trust deed;
(h) the proper law of the trust;
(i) one of the following indications:
  (i) 'this instrument creates a beneficiary trust';
  (ii) 'this instrument creates a purpose trust';
  (iii) 'this instrument creates a beneficiary trust and a purpose trust';
(j) the description of the purpose of the trust (where relevant); and
(k) the identity of the resident agent (if any).

A35.36 The abstract should be prepared and signed by the trustee, if resident in San Marino, or otherwise by the resident agent. The signature should be authenticated by a notary public.

(e) *Stamp duty or other government levies*

A35.37 There is no stamp duty, gift tax or transfer tax on transfers to trustees or from trustees to beneficiaries, except for:

(a) a registration tax on transfer of real property located in San Marino to beneficiaries of the trust;
(b) an import tax on goods and merchandise imported into San Marino by the trustee; and
(c) a duty due for the registration of the trust in the Trust Registry (€500 when registration is first completed, and €250 per year thereafter).

A35.38 For income tax purposes, a trust resident in San Marino is taxed as a taxable entity. Income taxes are due yearly. The tax rate is presently 17%. The tax basis is income from whatever source, capital gains included. Only income realised and cashed is taxed. No deduction is granted (ie capital losses or trust expenses and costs are not deductible from the income). Normally, trust income is 90% exempt (50% exempt if the source of trust income is located in the few tax havens described in the Decree of 24 January 2005, n 2). Therefore the tax rate is generally only applied to 10% of the actual income realised and cashed by the trustee. The effective tax burden is generally therefore 1.7% on the trust income.

A35.39 Distribution of trust income to a beneficiary is exempted from income tax, except when income distributed arises from interests under the EU Savings Directive and is paid to the beneficiary of a fixed trust. In this case, a withholding tax of 35% is applied unless the beneficiaries' identity is communicated to the San Marino tax authorities.

(f) *Governmental consents*

A35.40 There are currently no governmental consents required for the establishment and constitution of a trust.

(g) ***Powers reserved by settlor***

A35.41 The validity of a trust is unaffected by the settlor being the trustee, reserving any beneficial interest or certain specified powers to himself.[17]

7. Voidable and impeachable trusts

(i) Where action can be taken against a trust by or on behalf of creditors

(a) ***On bankruptcy***

A35.42 In San Marino, bankruptcy (otherwise known as '*concorso dei creditori*') is governed by the Law of 15 November 1917, n 17. Proceedings for a *concorso dei creditori* are begun by a judicial decree and are essentially a process by which the debtor's assets are gathered in and sold with the net proceeds shared among creditors. The San Marino court only has jurisdiction to grant such a decree in respect of an individual or legal entity where he is or was domiciled or resident in San Marino, carries or carried on business in San Marino or has property in San Marino.

A35.43 In the law that provides for *concorso dei creditori*, there are provisions dealing with transactions defrauding creditors such that there is potential for dispositions to trusts to be set aside. Where a person transfers assets to a trust for no consideration within one year before the opening of a *concorso dei creditori* the court may declare such a transfer invalid, and provide appropriate relief to restore the position to what it would have been if the debtor had not entered into the transaction.

(b) ***Irrespective of bankruptcy (actio pauliana)***

A35.44 Even outside bankruptcy, a transfer of assets into a trust can be set aside by a creditor if it has been executed with the purpose of committing a fraud against him (*actio pauliana*).

A35.45 In this case, the creditor using the *actio pauliana* must prove that the debtor entered into the transfer with the specific intent to defraud him.

A35.46 Therefore, the gratuitous transfer of assets by a person to a third party (ie the trustee) in order to ensure that the assets are unavailable to his creditors may be set aside if a specific intention on the part of the settlor to defraud creditors is proved. There has, however, so far been no case in which a transfer to a trust has been set aside in this way.

A35.47 The risk that a trust or transfer of assets to a trust would be set aside will clearly depend on the circumstances of each particular case, and in particular whether or not there were substantive claims against the settlor at the time of the transfer.

17 TL, Art 2(2).

other persons indicated in the trust deed and the financial or banking authority with supervision of the authorised or qualified trustees are entitled to access the Journal's content.[36]

(l) *To supply information*

A35.73 Unless otherwise provided by the trust instrument, trustees should give a beneficiary with a fixed interest notice of the existence of the trust, provide him with the names and domiciles of the trustee and with an abstract of parts of the trust deed connected with his rights. Furthermore, a beneficiary should be informed of any modification of the trust deed that has an impact on his rights.

A35.74 Unless otherwise provided by the trust instrument, a beneficiary can obtain an inventory of trust assets,[37] should receive trust accounts yearly and can inspect and take copies of acts and documents that affect him as a beneficiary and his rights (but only such acts and documents).

A35.75 These rules allow the settlor to modify the duty to supply information to beneficiaries, and even allow it to be excluded.

A35.76 Where the trust instrument excludes or completely limits the above obligations, however, it must also ensure that there is always a protector who is entitled to obtain such information and authorised to take action against the trustee in case of breach of duty.[38]

A35.77 A trustee is not compelled to give notice with respect to representatives of unborn persons, unless the trust deed provides so.[39]

A35.78 Furthermore, the beneficiaries or protectors (as the case may be) are not entitled to documents that disclose trustees' deliberations as to the manner in which to exercise a power or discretion or their reasons.[40]

A35.79 Persons who are not beneficiaries or protectors generally have no right of access to information in relation to the trust unless the law or the terms of the trust provide otherwise.[41]

(m) *Not to profit from trust*

A35.80 Article 23(3) of the TL provides that: 'Unless otherwise provided by the trust instrument, a trustee cannot act in case of conflict of interest with one or more beneficiaries or the purpose of the trust.'

A35.81 However, San Marino law allows banks and financial companies acting as trustee to contract with themselves in their personal capacity in relation to matters that comprise their business activity, unless the trust deed explicitly prohibits this.[42]

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36 TL, Art 28.
37 TL, Art 27(2).
38 TL, Art 27.
39 TL, Art 27(3).
40 TL, Art 49(2).
41 TL, Art 25 and Art 52(9).
42 TL, Art 23(5).

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A35.82 Profits made by the trustee in breach of its duties are automatically deemed to be trust assets. To this end, Art 11(3) of the TL provides that: 'Trust property is also that represented by the money gained by the trustee by effect of any acts or omissions made in breach of his own obligations.'

A35.83 In this simple and practical manner, the effects of the constructive trust are reproduced in a civil law system, notwithstanding the lack of a general equitable jurisdiction or system of equity.

(n) *Not to compete with trust*

A35.84 Article 23(4) of the TL provides that: 'a trustee cannot … compete on his own behalf, or on behalf of third parties with the business activity carried out as a trustee.'

(o) *Not to purchase trust assets*

A35.85 Such a purchase would normally violate Art 23(3) in that it would amount to a transaction relating to the trust property that may result in a direct or indirect profit to the trustee.

(p) *Duties, if any, specific to San Marino law trusts*

A35.86 Subject to the terms of the trust, trustees are under a duty, so far as is reasonable, to enhance the value of the trust property.[43]

A35.87 The TL imposes a duty on the trustee (or, if any, on the resident agent) to draft the abstract to be deposited for registration in the Registry of Trusts,[44] or an abstract of any amendment to the trust deed that has to be registered in the Registry of Trusts and to require the trust's cancellation from the Registry of Trusts in case of its termination or invalidity (as discussed above).[45] The resident agent (if any) shall, at least every six months, ask the non-resident trustee to inform him whether any amendments to the elements to be registered in the Registry of Trusts occurred. The resident agent shall also notify such request to the Registry of Trusts.

A35.88 Subject to the terms of the trust, the trustee is required to perform every formality to enable the effective segregation of trust assets, by registering trust assets in the land registry, company registry or in any other public registry.[46] In all these cases the trustee shall ensure that the appropriate register records that he holds the assets as trustee.

A35.89 Although there is presently no case on the point, there is no limitation in the TL that prevents the settlor from excluding duties from the trusteeship's core duties. See below, however, for a discussion of the limitations on exoneration clauses.

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43 TL, Art 22.
44 TL, Art 7.
45 TL, Art 13(2)–(7) and Art 14(2).
46 TL, Art 12(4).

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9. Powers of trustees

(i) Generally

Trustees' powers can be conferred by the trust deed, by law or by the court. **A35.90**

The general powers of trustees are set out in Art 31(1) of the TL, which provides: 'A trustee shall exercise all powers conferred upon the owner in relation to trust assets, except for the limitations noted in the Trust Register.' **A35.91**

(ii) Administrative and dispositive powers

Unless differently stated in the trust deed, the trustees have all the administrative and dispositive powers of an absolute owner. Administrative powers of a trustee of a San Marino trust can be governed by a law different from the proper law of the trust as a consequence of the applicability of the Hague Convention. **A35.92**

(iii) Requirement of active consideration of discretions

The position in San Marino law is the same as under English law. **A35.93**

(iv) Letter of wishes

The practice in San Marino is the same as the practice under English law. **A35.94**

(v) Doctrine of fraud on a power

Since trustees are required by the TL to exercise their powers only in the exclusive interest of beneficiaries or to pursue a determined trust purpose and in accordance with the terms of the trust, it would clearly be a breach of trust for a trustee to exercise his powers for some other purpose and commit a fraud on a power. **A35.95**

(vi) Delegation of powers

(a) *Under statutory authority*

No provisions of statutory authorities deal with the trustee's delegation of powers. **A35.96**

(b) *Under power of attorney*

The TL permits trustees, by means of a power of attorney or otherwise, to employ agents to carry out administrative acts or transactions on their behalf. Pursuant to the Law on Transcriptions (Law of 19 October 1981, n 87), a restricted category of powers of attorney (general powers of attorney, not issued in reference to a specific affair) requires publicity in San Marino. **A35.97**

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(c) ***Under express authority***

A35.98 The terms of the trust may expressly restrict or widen the power of the trustees to delegate their powers and duties.[47]

(vii) **Powers conferred by statute and the general law**

A35.99 The TL confers various specific powers on the trustee, among which are the following.

(a) ***Power to delegate***

A35.100 See **35.56** above.

(b) ***Power to reimburse expenses***

A35.101 The TL provides:[48]

> 'Remuneration of the trustee shall be set by the trust instrument and be paid out of the trust fund. A trustee shall not be entitled to remuneration for the services rendered, if the trust instrument does not provide for remuneration and does not set forth the procedures for the determination of the amount.
> Sums that are needed to pay the expenses incurred by a trustee in the exercise of his office shall be taken from the trust fund.
> A trustee shall satisfy the claims arisen for his remuneration, expenses with priority given in respect of beneficiaries.'

(c) ***Power to appropriate***

A35.102 The TL does not provide for a power to appropriate. Therefore, if desired, the trust deed should provide for it.

(d) ***Power to refuse to make disclosure***

A35.103 See **35.73–35.79** above.

(e) ***Power of accumulation and advancement***

A35.104 Where the trust fund mostly comprises cash or assets that may be liquidated without difficulty, the TL confers power on the trustee, subject to the terms of the trust, to advance trust funds to a beneficiary to allow him to deal with a significant life event(s).[49]

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47 TL, Art 33(1).
48 TL, Art 38.
49 TL, Art 36.

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to remuneration for the services rendered, if the trust instrument does not provide for remuneration and does not set forth the procedures for the determination of the amount.'

A35.119 Accordingly, it is normal practice to include an express remuneration clause in trust instruments.

14. Breaches of trust

(i) Trustees' liability for losses incurred

A35.120 In case of breach of trust, a trustee is required to reimburse damage caused if he fails to prove that the cause of the damage cannot be imputed to him.[58]

A35.121 A 'breach of trust' means: a breach of any duty imposed on the trustee by the TL or by the terms of the trust.

A35.122 However, provided that a beneficiary has legal capacity, full knowledge of all material facts and is not improperly induced by the trustee to do so, the beneficiary may relieve a trustee of liability to him for a breach of trust or indemnify a trustee against liability for a breach of trust.[59]

(ii) Restriction on exoneration from breach of trust

A35.123 The TL restricts the extent to which the terms of a trust may exonerate a trustee from liability for breaches of trust. Provisions of the trust deed and agreements that pre-emptively seek to exclude or limit the liability of the trustee for fraud or gross negligence are void.[60]

A35.124 As a peculiarity of San Marino law, the TL allows a settlor to exclude causes of action that would otherwise vest in a specific beneficiary.

(iii) Extent of liability

A35.125 The TL provides that a trustee who is liable for a breach of trust shall be liable for the loss or depreciation in value of the trust property resulting from such breach and the profit, if any, that would have accrued to the trust property if there had been no such breach.[61]

A35.126 Where there are two or more breaches of trust, a trustee may not set off a gain from one breach of trust against a loss resulting from another breach of trust. Such set-off can occur only if gain and loss originate from the same breach of trust.[62]

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58 TL, Art 42(1).
59 TL, Art 45(2).
60 TL, Art 45(1).
61 TL, Art 42(2).
62 TL, Art 42(3).

(iv) Joint and several liability

A35.127 Where two or more trustees are liable in respect of a breach of trust they are liable jointly and severally.[63]

A35.128 However, the TL also provides that, unless otherwise provided by the trust instrument, a trustee shall not be liable for a breach of trust committed by a co-trustee if the former has noted his dissent in the Journal of Events and has immediately informed any person appointed in the trust instrument for this purpose or, otherwise, the beneficiaries entitled to a fixed interest and the protector, if any.[64]

A35.129 In any case, trustees shall be jointly and severally liable if, becoming aware of a breach of trust, they have not done what they could to avoid the breach being committed or to prevent or mitigate any loss arising.[65]

(v) Consent

A35.130 The TL provides that:[66] 'A beneficiary inducing, requesting or authorizing a breach of trust by a trustee shall be jointly and severally liable for it.'

A35.131 There is no requirement for the beneficiaries' consent, authorisation or request to have been in writing.

(vi) Breach of criminal law

A35.132 A breach of trust may amount to a criminal offence deriving from the common criminal law of San Marino. However, the TL provides for several criminal offences that are specific to trustees:

(a) an unlawful exercise of the office of trustee, ie without meeting the requirements envisaged by the Law, is punished by terms of second-degree imprisonment (ie from six months to three years) and a fine amounting to between €8,000 and €12,000;[67]

(b) embezzlement and misappropriation of the trust property for a trustee's own or for another's gain, is punished by terms of fourth-degree disqualification from the office of trustee (ie from two to five years);[68]

(c) acting in conflict of interest for the purpose of procuring for himself or for others an unlawful profit, causing damages to the beneficiaries of the trust or persons destined to benefit from the fulfilment of the purpose of the trust, is punished by terms of second-degree imprisonment (ie from six months to three years), a fine amounting to between €8,000 and €12,000 and second-degree disqualification from the office of trustee (ie from nine months to two years);[69]

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63 TL, Art 43(1).
64 TL, Art 43(2).
65 TL, Art 43(3).
66 TL, Art 44.
67 TL, Art 57.
68 TL, Art 58.
69 TL, Art 59.

(c) his replacement by order of the court;
(d) if he becomes subject to bankruptcy proceedings;
(e) death or incapacity to exercise the duties of the office for health reasons;
(f) liquidation if he is other than a natural person.

A35.143 A trustee may resign in any manner provided by the trust deed or, in the absence of any such provision, by means of a written communication bearing a specific date sent to his co-trustees, if any, or to the protector, if there is one, and, in the case of a beneficiary trust, to the beneficiaries with fixed interests.

(c) *Number of trustees*

A35.144 Subject to the terms of the trust, the number of trustees must be not less than one.[80]

(d) *Statutory powers of the court*

A35.145 The court has power to appoint a trustee, or to remove a trustee from office (as noted above).[81]

(ii) Powers of new trustees

A35.146 Unless otherwise ordered, a trustee and a protector appointed by a judge shall have the same rights, duties and powers as a trustee or protector appointed under the trust instrument.[82]

(iii) Vesting of trust property on change of trustees

A35.147 Article 40(1) of the TL provides that:

(a) whenever a trustee is replaced by another trustee, the trust fund is transferred by law to the new trustee;
(b) when a trustee ceases to hold his office, the trust fund remains in the ownership of the continuing trustees; and
(c) when an additional trustee is added, the trust fund passes into the common ownership of all the office-holders.

A35.148 According to Art 40(4) of the TL a new trustee shall replace the trustee who ceases to hold office in every pending legal proceeding.

A35.149 Article 40 of the TL further provides: 'When a cause of ceasing to hold office has occurred, a trustee shall without delay carry out all the acts necessary to give effect to the provisions above'[83] and 'In the case of death or

80 TL, Art 18(1).
81 TL, Art 53(1).
82 TL, Art 53(8).
83 TL, Art 40(2).

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inability of a trustee to continue in office, his heirs, legal representative or those who assist him shall fulfil such obligations without delay'.[84]

(iv) Persons proper to be appointed as new trustee (appointment of trustees outside the jurisdiction)

A35.150 There is no ban to the appointment of foreign trustees of a San Marino trust, though clearly in exercising their discretion to appoint a new or additional trustee, trustees will be under the same duties as they would be in respect of the exercise of any other power or discretion that they have as trustees.

A35.151 The office of trustee may be held by one or more persons, natural or legal, none of whom shall be a trustee of more than one trust subject to the TL, or by one or more persons, natural or legal, identified as obliged parties in the framework of the anti-money laundering regulations issued by San Marino or other states in order to implement the EU Directives or other laws substantially equivalent to them.

A35.152 The professional exercise of trusteeship in San Marino is governed by the DProTrustees.[85]

16. Termination of trusts

A35.153 A San Marino trust may be terminated in all of the circumstances in which a trust may be terminated under English law unless the trust deed prevents this.

A35.154 In fact, a rule resembling that in *Saunders v Vautier*[86] is given a statutory effect under the TL. Article 50 provides: 'Unless otherwise provided by the trust instrument, all beneficiaries with fixed interests in the trust fund or, if there are none, all beneficiaries may require the trustee to terminate the trust and transfer the trust assets to themselves or according to their indications.'[87]

A35.155 The trustee (or any protector or any beneficiaries)[88] may make an application to the court to seek directions for the distribution of the trust property, if the trust deed does not regulate such distribution or there is no agreement among beneficiaries.

A35.156 Once his final accounts and the trust fund inventory have been drawn up, the trustee must transfer the fund to the persons entitled according to the provisions of the trust instrument. If the provisions of the trust instrument

84 TL, Art 40(3).
85 TL, Art 18.
86 (1841) 4 Beav 115, 49 ER 282, [1841] Cr & Ph 240.
87 TL, Art 50(3).
88 TL, Art 53(2).

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A35.193 Capacity to settle property in an inter vivos trust will be governed – as is the capacity to enter into inter vivos legal acts – by the law where the settlor has his domicile at the time of settlement ('lex domicilii').[121]

A35.194 Capacity to settle property in a testamentary trust will be governed:

(a) by the law of the place where the settlor has his domicile at the time of settlement ('lex domicilii'), for personal property;[122]
(b) by the law of the place where the property is located, for real property ('lex rei sitae').[123]

(ii) Forced heirship issues

A35.195 As for forced heirship rights ('legittima'), they are governed:

(a) by the law of the place where the property is located ('lex rei sitae'), for real property;[124]
(b) by the statuta personalia, that is to say the law of the state where the decedent had his domicile at the time of death ('lex domicilii'), for personal property.[125]

A35.196 When San Marino law is applicable, the following rules about forced heirship in favour of decedents and spouses are applied:

(a) Decedents, in equal parts, must receive at least one-third of the decedent's entire estate if he had up to four children, or one-half of the decedent's entire estate if he had more than four children.
(b) Ascendants must receive only if no decedents are alive and, in this case, they are entitled to one-third of the decedent's entire estate.[126]

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121 See Voorda, *Tractatus de Statutis (1743–1744 circa)* translated into English by M L Hewett and P Van Warmelo, *A Treatise on Statutes* (Lex Patriae, Johannesburg/Cape Town, 1985), § 3.5.

122 See Voorda, *Tractatus de Statutis (1743–1744 circa)* translated into English by M L Hewett and P Van Warmelo, *A Treatise on Statutes* (Lex Patriae, Johannesburg/Cape Town, 1985), § 3.5; J Voet, *Commentarius ad Pandectas* (1698–1704), translated into English by P Gane, *The Selective Voet, being the Commentary on the Pandects* (1955), § 28.1.44.

123 See J Voet, *Commentarius ad Pandectas* (1698–1704), translated into English by P Gane, *The Selective Voet, being the Commentary on the Pandects* (1955), § 28.1.44.

124 See Judge of Appeals ('*Giudice delle Appellazioni*'), n 21 of 2 March 2004; Commissary of the Law ('*Commissario della Legge*'), n 104 of 26 June 2000); J Voet, *Commentarius ad Pandectas* (1698–1704), translated into Italian by A Bazzarini, *Commento alle Pandette* (1837, Venezia), § 5.2.47.

125 See J Voet, *Commentarius ad Pandectas* (1698–1704), translated into Italian by A Bazzarini, *Commento alle Pandette* (1837, Venezia), § 5.2.47; Judge of Appeals ('*Giudice delle Appellazioni*'), n 21 of 2 March 2004; Commissary of the Law ('*Commissario della Legge*'), n 104 of 26 June 2000); J Voet, *Commentarius ad Pandectas* (1698–1704), translated into English by P Gane, *The Selective Voet, being the Commentary on the Pandects* (1955), § 38.17.34; J Voorda, *Tractatus de Statutis* (1743–1744 circa), translated into English by M L Hewett and P Van Warmelo, *A Treatise on Statutes* (Lex Patriae, Johannesburg/Cape Town, 1985), § 2.2.

126 See J Domat, *Les Loix Civiks dans Leur Ordre Naturel* (Paris, 1702), translated into English by W Strahan, *The Civil Law in Its Natural Order* (London, 1722), § 3.3.2; Commissary of the Law ('*Commissario della Legge*'), n 191 of 15 September 2005.

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(c) The spouse is entitled to an usufruct on one-half of the decedent's entire estate.[127] Forced heirship rights are calculated both in respect of assets owned by the decedent at death and assets donated by him during his life.[128]

(d) Assets given in compliance with forced heirship rights must not be burdened by any other right, burden, condition or term.[129] Since these assets cannot be the object of a fideicommissum (or testamentary trust) even if in favour of the holder of forced heirship rights,[130] it is considered that for the same reason they cannot be the object of a trust.

(iii) Recognition of foreign trusts

A35.197 The Hague Convention was extended to San Marino by the DHague.

(iv) Determination of applicable law

A35.198 According to the rules of the Hague Convention.

(v) Jurisdiction

A35.199 The jurisdiction of the San Marino courts in matters relating to trusts depends both on specific rules in the matter of jurisdiction contained in TL and on the general rules about jurisdiction. Article 5 of the TL expressly confirms that jurisdiction of San Marino courts in relation to trusts exists when:

(a) the defendant has his domicile, residence or registered office in San Marino; or
(b) the trust is administered in San Marino; or
(c) the law applicable to the trust is that of the Republic of San Marino; or
(d) the parties have agreed to take the dispute to the San Marino judicial authority.

A35.200 According to the general principles about jurisdiction, San Marino courts may have jurisdiction when the trust deed is executed in San Marino and the trustee accepted office in San Marino and when the trust deed indicates that a San Marino judge should have jurisdiction.

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127 Article 138 of Law n 49 of 26 April 1986.

128 See J Domat, *Les Loix Civiks dans Leur Ordre Naturel* (Paris, 1702), translated into English by W Strahan, *The Civil Law in Its Natural Order* (London, 1722), § 3.3.3.

129 See J Domat, *Les Loix Civiks dans Leur Ordre Naturel* (Paris, 1702), translated into English by W Strahan, *The Civil Law in Its Natural Order* (London, 1722), § 3.3.3.

130 See T M Richieri, *Universa civilis et crirninalis jurisprudentia juxta seriern institutionurn ex naturali et romano jure depromta et ad usurn fori perpetuo accomodata* (1829), vol 7, § 271 ('*Fideicommissi onere legitimam gravari non posse*'); J Voet, *Commentarius ad Pandectas* (1698–1704), translated into Italian by A Bazzarini, *Commento alle Pandette* (Venice, 1837), § 5.2.63.

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