

A BRIEF OVERVIEW OF TRUSTS AS A BUSINESS TOOL

The trust is a merchant contract and as such is a very useful and adequate tool for the administration of goods, assets, rights, and others (all assets or rights within the commercial area can be held in trust). It is a legal arrangement in which the grantor constitutes an autonomous patrimony, which is assigned to the fiduciary for the fulfillment of a specific purpose, and does not have the same obligations or characteristics of legal entities, such as corporations and companies. In a trust, the patrimony is administered in accordance with the terms of the contract. This is why it is of such importance to clearly determine the purpose of the trust and the faculties of the fiduciary.

Before going any further, is important to understand the elements that participate in a trust agreement, which are:

1. Grantor: Owner of the asset or right subject of the trust agreement. The grantor establishes the terms of the trust agreement.
2. Fiduciary: Administrator of the asset or right held in trust. In the execution of his functions, the fiduciary has different responsibilities, such as:
 - Fulfill the necessary acts to accomplish the purposes of the trust.
 - Execute the rights and legal actions allowed by law in defense of the trust.
 - A proper administration of the assets or rights held in trust property.
3. Trustee: The legal beneficiary of the purposes of the trust. Designated in the trust agreement.
4. Patrimony: Or trust property. Is different from any other patrimony of the parties who constitute the trust agreement. It is restricted to the particular purpose of the trust and it is out of the reach of any judicial action that may affect the other patrimonies.

It is understood that any of the parties in a trust agreement can be individual or corporations.

In Costa Rica trusts are regulated mainly by the Commercial Code (articles from 633 to 662). Its article 633 establishes the trust figure as follows: *“Through trust agreements, the grantor transfers to the fiduciary the property of assets or rights; the fiduciary is obligated to utilize them for the legal and pre-determined purposes established in the constituted act”*.

In accordance with the article number 636 of the Commercial Code, the trusts of assets subject of registration must be inscribed in the Public Registry. In order to

register the trust document, there are some requirements that have to be fulfilled. These requirements are:

- It must be in writing, through *inter vivos* or testamentary acts. (Commercial Code, Art. 635)
- Purpose of the trust.
- The designation of the fiduciary that will be responsible for the trust. The fiduciary shall be capable of acquiring rights and assuming obligations. In the case of legal entities (e.g. corporations), the statutes of the constitutive act must specifically empower them to receive by contract or testament the trust property. (Commercial Code, Art. 637)

Benefits of the trust:

- Separates the transferred assets to an independent patrimony.
- The guarantee trust offers more security and agility over other traditional options, such as mortgage, mortgage certificates, promissory note, etc.
- In case of breach of contract, the fiduciary does not have to appeal to legal procedures.
- It may imply financial advantages. However, it is also very important to clarify that if a trust generates earnings, it may be subject of taxes.
- Reduces the cost of indebtedness as long as the level of risk improves (Investment Trust).

Although the Costa Rican legislation does not classify trusts, the common practice allows us to identify at least three different categories, which can be determined as follows:

1. Administration Trust: The grantor transfers to the fiduciary certain asset or fund to be administered in accordance with the particular purpose by which the trust was constituted. The objective of this trust is given by the security and protection requested by the grantor in favor of himself or another person as trustee.
There are several types of trusts, which can be established under this category, such as testamentary, based on life or accident insurance policies, education, etc.
2. Investment Trust: The grantor gives to the fiduciary certain amount of assets to be invested in stocks in order to deliver the profits to the trustee designated in the contract. The objective of this trust is to facilitate the participation of individual investors in larger investments with more attractive profits, counting with the assistance of a professional in that field (portfolio).

The goal can be general or specific, however the main purpose is the generation of earnings and surpluses resulting from the placement of the assets held in trust in productive activities.

3. Guarantee Trust: The fiduciary receives certain right or asset in guarantee and preserves the ownership as fiduciary for a certain period of time; meanwhile the debtor (grantor) fulfills his obligation. In this case, the creditor becomes the trustee. Once the debt has been settled, the fiduciary returns the ownership of the asset to the grantor. If the debtor fails to settle the debt, the trustee requests the fiduciary sells the asset and pays him.

This trust is applicable in contracts or agreements in which one or both parties surrender the patrimony in trust and this serves as a guarantee, so the fiduciary obligates the contracting parties to comply with their commitments and obligations. Besides, it grants the advantage of avoiding judicial actions in the event of default.

So, as you can see, a trust is a broad legal act useful in all types of business transactions, transfer of properties or administrative relationships. In Costa Rica, trusts can be utilized as guarantee for fulfillment of financial obligations, to assure the fulfillment of shareholders agreements, to avoid or neutralize risks during transition stages, such as the purchase of a company, or as a guarantee in real estate developments.

In real estate developments, for example, the fiduciary holds the ownership of the property and guarantees to investors and financial entities, that the funds will be properly invested and that the development will be successfully finished.



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Plaza Roble, Edificio El Patio; Escazú, San José
Tel. (506) 201-8012 • Fax. (506) 201-8014
Palm Plaza, Local #10; Jacó, Puntarenas
Tel. (506) 643-2243 • Fax. (506) 643-2257
www.rebattorneys.com

