

France's new trust law



David Anderson, solicitor and chartered tax adviser at Sykes Anderson LLP, a City of London law firm, discusses France's new fiduciary law. Sykes Anderson LLP is involved in establishing such French "trusts" and the analysis of their tax treatment both under English and French law.

Please note that tax law is a complex subject and you should not rely on this article without professional advice on the facts of your case.

"Aux armes citoyens!" – "Quoi! des cohortes étrangères, feraient la loi dans nos foyers"

Trust law has effectively not existed in France since the Revolution (1789 to 1799) abolished feudalism and created a principle in French law that ownership of property cannot be divided into various rights. In a recent worrying trend the Republic's governing "First Estate" has had a change of heart, and dropped some of its *esprit révolutionnaire* in favour of interpreting *la constitution republicaine* as permitting a form of trust vehicle to be recognised in French law. There has been little academic protest about this, which shows how bourgeois *les intellectuels français* have become. Instead however of simply adopting the Anglo-Saxon trust vehicle, which has been developed and served well for a millennium, the French law makers have developed further the Roman law concept of a fiduciary or *fiduciare*. Little do they know that this is a Trojan Horse out of which will spring uncertainty which, will undermine the Civil Code.

Impact of new law

The new law allows trustees to purchase French assets direct in a similar way to investing in English assets. As such it greatly simplifies the process for trusts based in English law derived jurisdictions including offshore trusts and pension funds. It also allows the trusts to borrow by way of a mortgage secured on the French asset. This is a major break through, as previously French banks were very reluctant to lend to trust vehicles in case the trust vehicles were held not to have any legal existence under French law and as such could not be required to repay the loan. This is likely to lead to more trust money entering the French property market with trusts, by their nature, targeting more desirable properties.

Basic definition

The new law which came into full effect as a result of a Decree of 2nd March 2010 can be found in Articles 2011 to 2030 of the Code Civil. The definition is contained in Article 2011 which provides that the fiduciary is an operation by which one or more *constituants* (settlers) transfer assets be they present or future, to one or more fiduciaries (trustees) who keep them separate from their own assets and act in a pre agreed way to benefit the beneficiaries. The settlor or the trustees can also be the

beneficiary (article 2016). So far the structure looks similar to an English trust. But from here on it is very different.

Must be expressly created

The fiduciary must be created by law or by contract. It must be expressly created. In a bizarre provision (Article 2012) if assets to be transferred into a fiduciary come from property jointly owned by spouses either co-owned or subject to a marriage contract (prenuptial agreement) then the fiduciary contract must be created by a notary or it is void. It will be interesting to see how this is dealt with in the context of fiduciaries settled by English residents and indeed how an existing English family trust will be recognised. In this article the English expressions “settlor” and “trustee” will be used interchangeably with the French “constituant” and “fiduciary”.

No intention to make a gift

The fiduciary must not have an *intention libérale* (Article 2013). This means there must be no intention to create a gift when you set the fiduciary up. There can be no problem if the object is to benefit the settlor. This is the case in pension arrangements in which money is paid in on the basis that it will be paid back to the settlor later. It is a problem with trusts designed to pass assets to the next generation. The French legislator was mindful here of devices to avoid France’s forced heirship laws and inheritance taxes. It reduces the application of the fiduciary considerably. Whether the fiduciary can have powers to amend the beneficiaries or some form of discretion will have to be worked out over the coming years. It will have to be worked through in the context of English tax law as to the nature of the transfer made and the classification in English law of the fiduciary vehicle.

Trustees

The definition of who can be a trustee is in Article 2015 and is very restrictive. Avocats, which will include English solicitors and barristers, can be trustees but strangely not notaires. Credit institutions and insurance companies also qualify. This concept which effectively imposes a regulator on trustees is interesting and could be something to be considered in English law.

When dealing with third parties the trustee is deemed to have full powers unless it can be shown the third parties were aware of legal limitations imposed on the trustees. Any liquidation or other procedure involving the trustee does not affect trust assets.

Trustees are personally liable on their own assets for any faults committed as trustees. There are provisions for removing trustees if the interests of beneficiaries are in danger.

Protector

Article 2017 allows the settlor to nominate a protector at any time who does not have to be qualified in any way to look after his interests. The fiduciary contract can expressly exclude the same. If the settlor is an individual he can renounce this right.

Trust deed

The trust deed must state the assets being put in and if they are future assets they must be determinable. The trust can only exist for 99 years from signature of the deed. The settlor and trustees must be identified and the beneficiaries must be defined or there must be rules allowing them to be “designated”. The object of the trustees must be stated and their powers of administration and sale. It is possible for the settlor to transfer assets into the trust and continue using them himself.

The trust deed cannot be revoked or modified once the beneficiary has “accepted” the trust without the beneficiary’s agreement or a court order. This may throw up some interesting private international law questions for non French trusts.

Registration

The trust must be registered within one month of creation with the French tax authorities. If French land is purchased the notaire will make mention of this in the transfer. Any dealing in trust property must be done by the trustee with an express statement that it is trust property. This includes any transfer of trust assets involving registration.

Termination

The trust ends on the death of the settlor in which case the trust assets must form part of the settlor’s estate (Article 2030). This is a fundamental difference to the usual position in English law in which the main reason for setting the trust up is to deal with succession. This stops any attempt to avoid French forced heirship.

The trust can also end by the time it is set up for expiring, or the fulfilment of the objectives for which it was established. It can also end if all the beneficiaries so agree.

Taxation

Specialist advice is advisable on how French trusts will be taxed both in France and in England. Sykes Anderson LLP has the necessary expertise to assist.

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