



Trusts

August 2010

It is not surprising in a country where the vast majority of residents are foreigners (of about 35,500 people only 7,650 are Monegasque) that foreign law plays an important part in the lives of many.

Monaco, unlike its French neighbour, regularly refers to an individual's "national" law to determine issues. For example, on death an individual's national law will determine succession to movable property.

The above principle is subject to two reservations:-

- Monaco's public policy rules may prevail over the national law; and
- The national law may provide that the internal laws of Monaco (as the place of domicile) should in fact determine the matter.

These reservations gave rise to concerns among certain Monaco residents, typically British and American, who were used to being able to establish trusts and to dispose of their assets freely on death. In

response to those concerns Monaco enacted a law in 1935 designed to:-

- Create a legal framework allowing certain people to take advantage of their national law to enable them to create trusts, during their lifetime or by Will;
- Generate some revenue;
- Put in place some checks, balances and controls on Trusts created by Monaco residents.

The 1935 law was itself revised in 1936, by Law 214, but otherwise has been unchanged until July 1999. On 7th July 1999, Law 1,216 modified Law 214 in various ways. Essentially, Law 1,216 is designed to make the process of establishing a trust easier and more confidential. It is no longer necessary to read out aloud the text of the Law 214 Trust before four witnesses and a notary; rather a testator or settlor will simply deliver his or her written and executed text in a sealed envelope to a notary in the presence of witnesses, so that he or she avoids the process of reading out the document and revealing its contents to strangers.



Law 214 is also designed to encourage Monaco residents to "transfer" foreign trusts to Monaco. In Monegasque terms such foreign trusts may be void, although they will be recognised under Monaco law if they are "transferred" to Monaco and appropriate duty is paid.

Monaco's Internal Succession Law

Monegasque succession law is similar to French succession law in that certain close relatives of the deceased, primarily children, are entitled to a certain proportion of the deceased's estate and any provisions in a Will to the contrary may be set aside. Likewise, lifetime gifts made by the deceased which, when aggregated with the estate on death to form what is known as the *masse successorale*, can also be set aside, to the extent that they infringe the rights of the relatives in question ("the reserved heirs").

The other principal feature of Monaco succession law is that reserved heirs must take absolutely. It is not possible to provide for a reserved heir's share to be postponed or the enjoyment of that share to be otherwise fettered or restricted.

It can readily be appreciated that these principles can cause difficulties for a wealthy foreigner who establishes himself in Monaco. Such a person will often wish to prevent his children from inheriting substantial amounts of capital at too early an age, or at all. He would prefer his wealth to be retained in trust after his death, so that his children can enjoy its benefits without the burdens of ownership and management.

Law 214 of 1936

Law 214 prevents a renvoi to Monegasque internal succession law by specifically authorising appropriate foreigners to create trusts governed by their national law.

Section 1 of Law 214 reads as follows:

"Those persons who, by virtue of their personal status, have the right to determine how their property will pass either during their lifetime or after their death by means of a chosen system of trusts may exercise that right in the Principality with the assistance and support of local institutions."

Thus an Englishman resident and domiciled in Monaco can establish a Will, pursuant to Law 214, governed by English law. A duly qualified English lawyer must certify that the terms of the Will are valid in accordance with the national law. However, formal validity, as opposed to essential validity, is governed by Monaco law.

Section 2 of Law 214 (as amended by Law 1,216) provides that:-

"A trust should be set up, failing which it will be void, insofar as testamentary trusts are concerned in accordance with the formal rules required by Monegasque law for wills made by public or mystic deed, and insofar as inter-vivos trusts are concerned in accordance with the formal rules required for inter-vivos gifts"

Who Can Take Advantage of Law 214?

It will be noted that Section 1 of Law 214 is phrased in very broad terms but in practice only Monaco residents can qualify. A Monaco notary will not deal with the relevant formalities unless the settlor or testator provides satisfactory evidence that he or she is resident in Monaco.

The other important test of eligibility is that Law 214 is generally interpreted in such a way that only nationals of countries where the legal system includes a domestic trust law can qualify. Thus British, Australian and Canadian nationals clearly qualify as would American citizens. The law does not deal expressly with countries such as the United Kingdom and the United States of America, where trusts are governed not so much by British or American law but rather by constituent jurisdictions within those countries, such as England or New York state. The practical approach is for an individual to adopt, as his national law, the law of the jurisdiction with which he has in the past been most closely connected.

Although certain civil law countries, such as Italy, have enacted laws designed to recognise foreign trusts, since trusts are not an intrinsic feature of Italian domestic law, an Italian could not take advantage of Law 214.

What are the Dangers of Failing to Respect Law 214?

As a result of Section 2 of Law 214, arguably any Will which seeks to create a trust and which is subject to Monegasque

law is void, having no effect as a Will whatsoever, unless it is made in accordance with the strict formalities of Law 214. Such a point can certainly be made by those seeking to overturn a Will, and these will include those persons otherwise entitled to assets on an intestacy.

Who Can Act as Trustees?

Section 3 (as amended) provides:-

"May act as trustees only those companies, and eventually as co-trustees or as local representatives, those individuals who feature on a special list drawn up and updated by the first President of the Court of Appeal at the instigation of the *Procureur Général*."

A co-trustee may be designated by the settlor/testator, even if the co-trustee's name does not feature on the list of trustees, provided the co-trustee acts only in respect of that one trust. In this way, a testator's spouse often acts as co-trustee.

The primary requirement, however, is for a corporate trustee, which is duly registered on a list maintained by the Monaco authorities, to act as trustee. The list currently includes many well-known trust companies, the majority of which are established outside Monaco.

Transfer Of Foreign Trusts Into Monaco

As indicated earlier, Law 214 also provides for the "transfer" of foreign trusts into the Monaco Law 214 system. The transfer involves the appointment of a duly qualified corporate trustee and the registration of the trust deed pursuant to Law 214, accompanied by payment of the appropriate duties. It is perhaps difficult to envisage circumstances where this transfer process will prove to be attractive.

Protection Of Foreign Trusts

Of course, many residents of Monaco will establish trusts in appropriate foreign jurisdictions, as part of their general estate planning. If such people die domiciled in Monaco then, if the general principles of Monaco succession law apply, their heirs will have the right, under Monaco law, to set aside those trusts and claw back the trust assets into the estate. Of course, many offshore jurisdictions have enacted laws designed to thwart such claims but those laws might not always provide full protection and

obviously will not cover assets distributed to beneficiaries who reside in a jurisdiction sympathetic to such forced heirship claims.

However, if the Monaco resident establishes his Will under Monaco Law 214, creating appropriate trusts which might well mirror the terms of his existing offshore trust, the risk of attack is virtually eliminated. If the heirs of someone who has died leaving a Law 214 Will Trust succeed in setting aside lifetime gifts, whether to trusts or to individuals outright, such assets form part of the trust fund governed by the Law 214 Will Trust and do not vest in the claimant heirs.

Costs

There will clearly be trustee costs for the 214 Will Trust (which will start to apply pursuant to death) to be agreed with the testator. Duties on the trust are set out in Section 7 of Law 214 and range between 1.3% and 1.7% although the duty may be converted into an annual tax of 0.2% if the testator so requests in the Will Trust.

In addition to trustee fees and 214 duty the notary before whom the Will Trust was executed will, on the testator's death, impose his standard 1.5% charge over the trust value. Depending upon the circumstances this may be slightly more than the notary would have charged in the context of a standard form Will.

The testator will be exposed to charges for creation of the Will Trust and provision of the necessary certificate (e.g. Lawrence Graham's preparation fees).

Registered Trustees pursuant to the 1999 amendment will have to pay a Government fee for registration on the list.

Representative Office

The authorities now require each 214 corporate trustee to designate a representative office in the Principality.

Non Law 214 Trusts

Very few Trusts are made subject to Law 214 relative to all other trusts made outside the ambit of that Law.

In an attempt to show that generally non Law 214 Trust assets may be held comfortably in Monaco banks, and that Monaco trustees can operate with the backdrop of understanding for the subject, Monaco acceded in September 2008 to the Hague Convention on the Law

applicable to Trusts and their Recognition of 1985.

Conclusion

It is unlikely that people who have moved to Monaco from common law countries will find that standard Monegasque law suits their testamentary purpose. Even if they have no wish to prevent one or more of their children from enjoying their estate, they frequently wish to favour a spouse, an older child, or provide for the protection of a child for longer than the child's minority. Law 214 allows them to do so.

Law 214 also confers additional protection on foreign trusts which a Monaco resident individual has already established.

It is rare in international estate planning for an equitable institution such as a trust to receive a seal of approval from a civil law country of domicile. Those Monaco resident individuals who qualify should look to take advantage of Law 214, for greater flexibility and for the better protection of their intended beneficiaries.

How can we help?

Our office has existed in the Principality since 1979. We are the only English based international law firm in the Principality. Between our Monaco, Dubai, Moscow and London offices we have the strength and depth to offer a full legal service to both local and international clients. We aim to advise our clients in an efficient and cost effective manner and with a particular emphasis on commerciality and confidentiality.

We speak a number of languages including English, French and Icelandic. We have a client base which includes entrepreneurs, entertainers, financial or banking services companies, fund managers, trust companies, sporting personalities and international families from many jurisdictions.

Beyond its London, Dubai, Moscow and Monaco offices LG has strong relationships with law firms throughout the US, Asia and around the world. These relationships enable us to advise comprehensively on any matters with an international dimension.

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