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Trusts not recognised in some countries

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Trusts are often created to consolidate and protect assets for tax purposes and estate planning. In the case of a minor or an incapacitated adult, trusts are used as a vehicle to protect their assets and ensure they are provided for.

Strangely, many Europeans are unaware of the concept of a trust, and, in many countries, trusts do not exist and are not recognised as a special vehicle for holding assets or diluting tax.

South Africa and the United Kingdom operate under 'common law', but most European countries operate under 'civil law' derived from Napoleonic law. Civil law is codified based on Roman law and the Napoleonic Codes, and common law is based on English common law. While common law changes through judgments, precedents and legislation, civil law is codified and only changes through legislation.

This brief explanation shows how issues arise in different jurisdictions by a simple line inserted in a will without considering the consequences:

'I bequeath my estate to the testamentary trust…'

The issue of trust recognition is a conflict of law problem. In relation to immovable property, common law and civil law interpret ownership rights in different ways. Under common law, immovable property has legal and equitable rights.

Civil law however has only the legal rights relevant in civil law countries in which ownership and possession are the central concepts around which immovable property revolves.

While trusts are predominant in common law countries, the blunt assertion that the trust is alien to civil law will not withstand scrutiny any longer. Some European civil law countries (including Switzerland) have signed the Hague Convention – the Recognition of Trusts, 1985, thus recognising the trust as part of its tax law and drawing a distinction between resident and non-resident actors.

Some other European countries have created a similar entity to the trust and have adopted the concept into their civil law codes. Israel, for example, recognises the benefits of trusts and it is most advantageous to foreign beneficiaries, particularly in regard to tax consequences, Its primary requirement is that the trustees be Israeli.

Other countries to adopt the Hague Convention include Italy and France. Greece, however, is not a party to the Hague Convention and nor is the Netherlands.

Problems arise when a civil law jurisdiction is faced with a common law trust. The common law perspective views the trust as an entity created for beneficiaries and the preservation and protection of their equitable rights. In a civil law system, the most important question in inheritance cases is 'who inherits what ?'

Taking the example of Greece, a trust, as a separate legal entity, is viewed with confusion or suspicion and even as a 'specialised foreign will, capable of taking control of your right to an inheritance'.

Here trusts normally appear only as a result of the bequest being contained within a 'foreign' testamentary trust or in a will nominating an *inter vivos* or existing trust as the sole beneficiary.

Notwithstanding the failure to take any precaution to protect assets in Greece when drawing a South African will, the will must be registered with the relevant Greek probate authorities. However, if the will has a testamentary trust as the named beneficiary of immovable property, the debate becomes very intriguing. >>