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THE LUXEMBOURG TRUST LAW

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The New Luxembourg Trust Law of 2003

By voting the law of 27th July 2003, Luxembourg adopted the Hague Convention dated 1 July 1985 on the international recognition of Trust and revised the regulatory framework on “fiduciary contracts”, the Luxembourg equivalent of Anglo-Saxon trusts.

The Recognition of Trusts

The Hague Convention sets up a legal framework for the recognition of trust validity and the determining of the governing law. Subject to the relevant arrangement being valid and enforceable under its governing law and coming in the scope of the Convention, Luxembourg courts will recognise trusts. This is of particular interest in situations where trust assets are located in Luxembourg. Even though case-law had already developed in the direction of wider recognition, the adoption of the convention provides an increased degree of legal certainty. On the same hand, it will facilitate the recognition of the Luxembourg “fiduciary contract” in states signatories to the convention.

Under the new law, the trustees will be considered as having the legal ownership of the assets held by the trust. Should the settlor not have chosen the law applicable to the trust, the law of the country with which it has the closest link will be applicable. Such a link shall be established considering the place of administration, the location of the trust’s assets, the place of residence of the trustee, etc.

The Luxembourg “Fiduciary Contract”

The adopted convention does also apply to « assimilated products », meaning the Luxembourg fiduciary contract (FC). The FC is defined as an agreement by which the « fiduciant / settlor » agrees with another person, the « fiduciaire / trustee » to transfer him the ownership of certain assets “patrimoine fiduciaire / trust assets”, subject to the obligations and conditions agreed between the parties.

All the fiduciary assets shall be kept separately from the fiduciants’ private assets or from other fiduciary assets he might be in charge of, ensuring insolvency remoteness.



Under the Luxembourg law only a limited number of institutions are authorised to act as “fiduciary”. They are defined as being professionals from the financial sector and therefore submitted to the supervision of the Luxembourg supervisory board of the financial sector, the CSSF. Following professionals are comprised in this definition:

Credit institutions, investment undertakings, open or closed-ended investment companies, securitisation undertakings, management companies of mutual funds or securitisation funds, pension funds, insurance and reinsurance undertakings, national and international public entities exercising in the financial sector.

The Law no longer requires that the relevant entity be established in Luxembourg, thereby opening possibilities to use the Luxembourg fiduciary structure outside of Luxembourg.

The Practical Use of the Fiduciary Contract

Three main types of fiduciary agreements are the “Fiducie management”, the “Fiducie Guarantee” and the “Fiducie Liberality”.

The Fiducie Management; in this classic scheme assets are transmitted to the fiduciary for management over a certain period of time. The management instructions are laid down in the fiduciary contract at the end of which the fiduciary assets will be retransmitted to the settlor. This structure is commonly used to allow to the settlor to remain anonymous in certain operations (buying shares of a competitor...)

The Fiducie Guarantee; the Law specifically refers to the use of the fiducie as a collateral mechanism for both existing and future claims. Very few restrictions to the flexibility of the parties do apply, except that the agreement must provide that the remainder in value, after payment of the secured claims, must be returned to the principal or designated beneficiary. The express recognition by the law gives legal certainty to this mechanism.



The Fiducie Liberality; it is set up to transfer to a beneficiary the assets held by the fiduciary. The transfer will be done on the basis of a testament or a donation. However one shall keep in mind that in many civil law countries, the heirs are guaranteed a fixed part from the assets of the deceased making such a fiduciary structure illegal.

Conclusion

The new Trust Law gives greater flexibility in using the fiduciary contract making it an interesting and adaptable tool under Luxembourg law. The adoption of the Hague Convention by Luxembourg will certainly benefit the cross border recognition of the Luxembourg "fiduciary contract" and make it more appealing for foreign investors.



Who to Contact at OCRA Luxembourg



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