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A Matter of Trust

Solicitor MICHAEL BULA explains the complexities of buying French property through an Australian trust or self-managed superannuation fund.

Can my Australian trust purchase a French property?

The short answer is "yes, with limitations" by navigating a not-so-simple process.

The Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition entered into force on 1 January 1992, the date it also entered into force in Australia. While France became a signatory to the Convention on 26 November 1991, it has failed to ratify the Convention and therefore have its provisions enter into force in domestic French law, unlike its Australian counterpart.

For the purpose of this discussion, testamentary or will trusts following the death of a testator are excluded.

For any one of a number of Australian trusts – discretionary, unit or hybrid – to simplify discussion, such trusts are not recognised or recognised as entities at French law. Hence the conundrum if an Australian purchaser wishes to acquire French property through, say, a family discretionary trust, which is often the case.

French law will view the trust usually in the following manner. While the trust operates without restriction in the Australian jurisdiction, in practice, French law will take the trustee of the trust to be the full and sole beneficial owner, without looking behind the trustee to the trust deed or the notion of trust itself.

Most trustees are company or corporate trustees, which would become the foreign company purchaser of property at French law.

The provisions of Australian trust law and specifically the deed of trust cannot be operative on a number of principles.

It becomes more complicated with an individual or natural legal person acting as a trustee of a family trust. Unlike in Australia, when

such person resigns or is replaced or dies, French law will treat the real property as that trustee's personal estate, to the exclusion of all notions of trust and the provisions of the trust deed. This situation must always be avoided, otherwise, French succession law will be imposed and in the case of death of an individual trustee, a full succession will commence and have to be dealt with including legal and fiscal consequences under the Napoleonic Code. For resignation or removal, this will also be problematic, as French law will regard the person as the absolute owner and will not recognise the operation of trust provisions from the trust deed in these circumstances.

In Australia, the trust provisions will prevail in this jurisdiction. In the case of a corporate trustee, this may go some way to creating the flexibility of a remote-controlled trust from Australia. Prospective purchasers should seek specific legal and tax/accounting advice.

Does my self-managed superannuation fund (SMSF) have the right to buy?

The SMSF is after all a trust construct so the same principles as for the trust listed above will apply to the SMSF.

Some purchasers consider that if Australian law and specifically tax law can apply for this investment it is worth navigating the difficulties at French law.

If an SMSF acquisition were contemplated, the additional cost should also be reviewed.

As a corporate trustee, it would be necessary to translate the constitution and possibly the SMSF deed, prepare notarial deeds of good standing and of course if a borrowing were contemplated, tax rules would need to be fully complied with. This is also the issue for "personal use" rules. Specific advice again is needed for any such project.

In both cases, there is an additional layer of complexity and cost in terms of recognition, translation fees and of course international and Australian legal and accounting advice. The French notary would need a full comprehensible brief from his Australian legal counterpart, even before such project were realised.