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## THE CONCEPT OF A TRUST AND SPANISH SUCCESSION LAW

### WILL TRUSTS.

A trust can be created by will as a way of controlling the devolution of an estate. It is a way to transfer a person's estate subject to the provisions contained in the trust. Beneficiaries and legatees can indeed be trustees although a trustee does not necessarily have to be a beneficiary or a legatee.

The concept of a Trust as understood under English law does not exist in Spanish law. Under Spanish law it is simply a fiduciary relationship between various parties which is not properly regulated. There is an international treaty, The Hague Convention of 1 of July 1985, which covers the law applicable to trusts and the recognition of the same, the aim of which being to minimize the problems arising from legal systems that do not recognize this concept. Unfortunately Spain is not a party to the said Convention.

However, we find under the Spanish Civil law system various legal concepts similar to that of a trust under common law systems.

Article 467 of the Spanish Civil Code regulates the concept of a "usufruct" under which a situation somehow similar to that of a trust can be created. Under this concept of "usufruct" we have:

- A settlor
- A person or persons in succession who enjoy the right of "usufruct", basically the right to use the property in question and the right to enjoy the income arising from the property. These rights can be further defined in the Will creating the usufruct
- A beneficiary known under Spanish law as the person who has the "bare ownership" of the property subject to the usufruct rights.

It has also been claimed that the concept of “fideicomiso”, as enshrined in Article 781 of the Spanish Civil Code can be also very similar to that of a trust as the “fideicomisarios” are fiduciaries and can have powers similar to those of a trustee.

Other concepts such as that of “albacea”, an executor or administrator of an estate, can be parallel to that of the trustee although it should be noted that the powers of executors and trustees under English law are much wider than those of an “albacea” under Spanish law, an “albacea” being more a supervisor to ensure that the estate is administered in accordance with the testator’s wishes.

However, notwithstanding the existence of the above mentioned concepts, the concept of a trust is unknown to Spanish law and there are always problems to establish the rule of conflict applicable. Consequently, one is bound to conclude that it is not possible to fully apply the concept of a trust as understood under English law to Spanish succession law simply because the duality of ownership, legal and beneficial, which exists under English law, does not exist in Spanish law.

Another obstacle for the implementation of the concept of a trust in Spanish law is the concept of forced heirs enshrined by the Spanish Civil Code which gives succession rights to various members of the family, rights that cannot be taken away because to do so will be considered contrary to public policy.

If the “lex successionis” by the reference made by Spanish law to the testator’s national law is a foreign legal system that recognises and regulates the concept of a trust, then, notwithstanding the fact that such concept is unknown under Spanish law, there is no problem in giving full validity to the said trust. The Spanish rules governing forced heirs are of no application as these rules are not considered of international public order.

However, if the Spanish conflict rule refers the succession to a legal system that does not recognise the trust, as it is the case under Spanish law, then it must be found within the boundaries of Spanish law a concept that offers the same function as that of a trust. Normally the legal systems that do not recognise the concept of a trust are those where the forced heirs rules are mandatory. The trust must not be considered null but must be limited to that part of the estate of which the testator can be disposed with entire freedom.

Three different situations can arise:

- If the trust property is that of which the testator can freely dispose and does not include the estate which must pass to the forced heirs, the trust is perfectly valid as it does not prejudice the rights of the forced heirs.
- If the trust property comprises property subject to the rights of the forced heirs, the said trust is still valid but the trust property must be reduced as far as that part subject to the rights of the forced heirs.
- If the beneficiaries of the trust are the forced heirs and the disposal of the trust property does not affect their rights to the compulsory portions, the trust property must still be reduced as far as that part subject to the rights of the forced heirs

because of the provisions contained in Article 813 of the Spanish Civil Code which prohibit the creation of encumbrances or conditions or temporary limitations of any kind over the portions of the estate that must pass to the forced heirs. If the trust does not create any encumbrances or limitations on that part of the estate subject to the forced heirs, then the trust is perfectly valid provided of course that no portion of the estate subject to the above rights is reduced at the expense of one or more forced heirs.