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The Hague Trust Convention – 25 years on

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It is now 25 years since the Hague Trust Convention[1] ('the Convention') was adopted on July 1 1985. Its adoption was an achievement in itself, given that a number of countries represented at The Hague did not have a domestic trust law). Since then, the Convention has been ratified by nine common law[2] and seven civil law jurisdictions, four of which (Switzerland, Liechtenstein, Monaco and San Marino) have ratified it in the last four years.[3]

This chapter is not intended to be an article-by-article commentary on the Convention. Instead, its intention is to celebrate the main achievements and shortcomings of the Convention from the perspective of a lawyer who trained in a civil law country (Switzerland) but now practises law in a trust law jurisdiction (England and Wales).

- Section 1 starts by asking whether a convention of this type was really necessary, given that a number of civil law countries have been dealing with trusts relatively successfully, albeit through other means.
- Section 2 considers whether the concerns raised in the aftermath of the adoption of the Convention in 1985 have materialised in the 25 years since then. The answer is a cautious "not yet".
- Section 3 considers the clunky nature of the Convention and its effects on the legal theory (including the emergence of the 'shapeless' trust theory).
- Section 4 looks at the rules dealing with the registration of trusts, as the civil law and common rules in this area could not be any more different.
- The chapter concludes on a positive note by highlighting some opportunities (but also challenges) for estate-planning practitioners wishing to use trusts or foundations in an increasingly globalised world of fiduciary products.[4]

1. Big Bang or merely a small revolution?

It is a widely held view in the common law world that civil law countries do not

1 Full name: "Convention on the Law Applicable to Trusts and on their Recognition".

2 Including Canada and the United Kingdom. However, note that Québec and Scotland have unique systems which combine elements of Roman law with an element of common law. Comparable 'mixed' systems survive in Louisiana (which used to belong to France before Napoleon sold it to the United States in 1803) and South Africa (which has elements of Roman-Dutch law).

3 For a full status list, see: http://hcch.e-vision.nl/ last accessed on March 31 2010. At the time of writing this chapter, the Convention has been ratified by the following countries: Australia, Canada (with reservations in respect of certain provinces), Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, San Marino, Switzerland and the United Kingdom (for itself and Guernsey, Hong Kong, Jersey, Montserrat and the Turks & Caicos Islands).

recognise trusts and that the Hague Trust Convention enabled the recognition of trusts in the civil law world.

This view is based on a misunderstanding of civil law systems. What is correct is that the trust concept is alien to the domestic law of civil law countries. In this sense, civil law countries do not *know* the trust concept. However, this does not necessarily mean that those countries will not *give effect to* a foreign trust when faced with one.

A recent book[5] published in France (which has yet to ratify the Convention) has identified more than 20 judgments from the 1880s to the present day which have upheld the effects of the trust mechanism;[6] and in a recent tax case it was held that the trust fund may not be attributed to a discretionary beneficiary for the purposes of French wealth tax.[7] Similarly, the Swiss courts had to deal with trusts in a number of instances before the ratification of the Convention by that country[8] whilst the courts in Argentina (to give an example of a country that has neither signed nor

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4 Whilst this chapter focuses on the increased recognition of *trusts*, the international estate-planning landscape is also marked by the globalisation of *foundations*, with an increasing number of common law jurisdictions (including Anguilla, the Bahamas and now also Jersey) trying to wrest the initiative from traditional foundation law jurisdictions such as Liechtenstein. Unfortunately, some of these laws are based on a flawed understanding of the foundation concept. For a summary of the current trend see Noseda, "The International Foundation Law Scene in Trepidation", *Private Client Business* [2009] Issue No 2; see also "The Foundations (Jersey) Law 2009: a Civilian Perspective: Not so Plain Vanilla and a Tad Wacky", *The Jersey and Guernsey Law Review*, Vol 13, Issue 1, February 2009; see also "Liechtenstein's New Foundation Law: A Retrograde Step? Private Client Business" [2009] Issue No 3.

5 Jean-Paul Béraudo and Jean-Marc Tirard, *Les Trusts anglo-saxons et les pays de droit civil*, Academy & Finance, 2006, Geneva.

6 The validity of a (matrimonial) trust was upheld as early as 1906 in a case involving the widow of the inventor of the first commercially successful sewing machine, Isaac Singer. Throughout the twentieth century, a number of French courts have upheld the exercise of trustees' powers on French soil, including the sale, by trustees, of French immovables. In another case, the heirs of a deceased person were not allowed to obtain possession of assets belonging to the estate without the participation of the trustees appointed under the deceased's will, even though, under French law, the estate of a deceased's person vests automatically in the beneficiaries. More generally, the French courts have accepted the position that a trustee is the legal owner of the trust assets, although in some cases, their title has been treated as a legal fiction (because the trustees may not dispose of the trust property as if it were their own, but instead owe a duty of care to the beneficiaries who are the 'real' owners).

7 *Evelyne Poillot v Director of Tax Services of the Hauts de Seine Nord*, Tribunal de Grande Instance of Nanterre, May 4 2005, 0303-950; for a discussion, see Tirard, [2005] 12 *JIntP* 111.

8 For a summary of the pre-Hague Convention case law, see Noseda, "Switzerland and the Hague Trust Convention: where are we?", *Trust Law International* (2005) Vol 19, No 1. In *Harrison v Credit Suisse* (BGE 96 II 79ss), the trust deed did not contain any proper law clause. Thus, the Swiss Federal court had to decide which law to apply to the trust in hand. In the absence of specific private international law rules applicable to trusts, the court resorted to the rules applicable to contracts. At the time (1970), these rules provided that a contract was governed by the law chosen by the parties, failing which, by the law of the country of residence of the party who was to effect the characteristic performance (= trustee). As Credit Suisse (= trustee) was based in Switzerland, this led to the application of Swiss law, and as the trust concept was (and still is) foreign to Swiss law, the federal court gave effect to the 'trust' created by Mr Harrison by comparing it to a contract *sui generis* with elements of a mandate agreement, a contract for the benefit of third parties and a gift. (Under most continental European systems, a gift is a contract. This is because the common-law principle of privity of contract is unknown there.) Since the introduction of new private international law rules in 1988, the Swiss courts tend to determine the question of the applicable law by reference to the rules on companies (at least in the case of complex trusts). The main rule for companies is that corporate relations are governed by the law of the country under whose laws the company is established. Thus, in a case of 1999 concerning a trust created by a bankrupt financier (ZR 1999 Nr. 52) the district judge in Zurich applied Guernsey law (as the trust deed contained a proper-law clause in favour of that jurisdiction). Eventually, the court decided that the trust was a sham under Guernsey law.

9 *De Luca* and *Eurekian* cases – see César Levene, *El trust del Derecho común anglosajón* in Revista Argentina de Derecho Tributario (2205) 16; Javier Enrique Ayuso and Javier Martín Lemma, *El private trust angloamericano visto desde el derecho argentino – la lecciones de "De Luca" y "Eurekian"*, La Ley, T.2005-C.

ratified the Convention) dealt with trusts as recently as 2002 and 2003.[9] Back in Europe, Belgium took the unprecedented step of anchoring the recognition of trusts directly into its private international law[10] (thus by-passing the Convention). The merit of the Belgian solution is that it also deals with *jurisdictional issues* (whereas the Convention only deals with the *applicable law*).[11]

The possibility of recognising the effects of a trust without the need of a private international law instrument is confirmed by the last paragraph of Article 15 of the Convention, which provides that "if recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means". Presumably, in these circumstances the courts will characterise the trust mechanism by reference to known institutions, which is nothing new. As shown above, in many cases this should lead to the recognition of the effects of the trust.

Nevertheless, the adoption of the Hague Trust Convention represents a small revolution in that:

- It creates a *common framework* for civil law countries that wish to formally recognise trusts as such, thus avoiding any characterisation issues (which are typically very complex).[12] In addition, by outlining the extent of recognition afforded by a trust, it facilitates the international circulation of trusts and simplifies the interaction of trustees with third parties and registrars,[13] local authorities etc.
- It represents a *term of reference* for courts based in countries that do not formally recognise trusts as such but who are faced with one. A perfect example is given by a recent decision by the Spanish Supreme Court[14] which had to consider whether a testamentary trust established by a US citizen violated the forced heirship rights of the deceased's daughter. In reaching its decision, the Spanish Supreme Court held that the estate (including the Spanish estate) was governed by US law. As the deceased's will contained trust provisions, the court went on to analyse the trust concept *by reference to the Hague Trust Convention*. Eventually, the court found in favour of the deceased's daughter (on the ground that the defendant did not provide sufficient evidence as to the content of US trust law), but this is not the point. The point is that the Hague Trust Convention has become a term of reference outside the group of countries that have jumped on the trust bandwagon.

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10 See articles 122–125 of Law of July 16 2004 (Private International Law Code); an English translation can be found in Matthews, "Trusts in Belgian Private International Law" (2205) 19 *TLI* 191.

11 The Swiss private international law also contains jurisdictional rules. However, these rules were enacted as part of the process of ratification of the Hague Trust Convention.

12 Typically, the recognition of the effects of trusts in countries that have not ratified the Hague Trust Convention is achieved by comparing trusts with the domestic law institution which the trust mechanism most closely resembles – for example, a *fideicommissum*, a contract for the benefit of third parties, a gift, a company, a foundation or an "organised patrimony" (*patrimoine d'affectation, Vermögensmasse, organisierte Vermögenseinheit*).

13 Article 12 of the Convention provides that "where a trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the state where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed".

14 Tribunal Supremo Sala I de lo Civil, judgment 338/2008 of April 30 2008.

- It enhances the level of recognition of trusts *in common law countries*. Thus, traditional trust jurisdictions (such as England and Wales) will probably[15] have to recognise non-charitable purpose trusts (ie trusts without beneficiaries), although this type of trust is unknown under English law.[16]

2. One step forward, two steps back?

Whilst its adoption in 1985 represented a seminal step for the international circulation of trusts, the Convention is the result of numerous compromises, not just between civil law and common law countries, but also (as will be shown below) between different common law countries. This sparked a lively debate amongst scholars as to the usefulness of the Convention as a private international law tool.

The position of the critics is perhaps best summarised by the title of an article that appeared in 1994: "The Hague Convention on Trusts: Much Ado about Very Little".[17] According to its author, a US estate-planning professor, "the product of necessary, but unfortunate compromises, [the Convention] fails truly to clarify the status of the trust and the law governing resolution of trust issues in civil law forums". The author went on to set out:

> *a critique of several of the fatal flaws of the Convention (...) There can be no doubt that the Convention does allow the settlor, at least superficially, a great deal of freedom to choose governing law (...) These gains are largely illusory because of the numerous escape clauses afforded a forum predisposed negatively to the trust. Thus, any assumption that a stated choice of law will, in fact, be enforced requires a considerable leap of faith.*

The answer from the camp of the proponents of the Convention came in the form of an article written by the head of the UK delegation.[18] However, its title ("The Hague Convention on Trusts: a Little is Better than Nothing, but Why so Little?") is a clear indication of the opposing forces that shaped the Convention. Consensus was rendered more difficult by the emergence of differences between the delegates from the trust jurisdictions, who came to realise that their trust laws were by no means identical. This led to the realisation amongst those delegates that "in the time available, no agreement could be reached on common precise rules (it even proving surprisingly difficult to agree on the Article 2 description of trust characteristics)".

If the common lawyers could not even agree on the definition of what makes a trust a trust, one can only imagine the effect on the delegates from the civil law jurisdictions!

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15 Subject to invoking the public policy (*ordre public*) provision contained in Article 18 of the Hague Trust Convention, which is perhaps unlikely, as purpose trusts are expressly mentioned in Article 2 of the Convention.

16 With some exceptions, English law provides that a trust must be for the direct or indirect benefit of beneficiaries. The idea behind this so-called 'beneficiary principle' is that for a trust to work properly, there must be someone with *locus standi* to bring the trustee to account. If the trustee is not accountable to anyone, he is effectively in the same position as a full (rather than fiduciary) owner, which would open the door to abuse. The most important exception to the beneficiary principle is represented by charities, because in those cases the attorney general has power to enforce the trust. Increasing numbers of offshore jurisdictions have abolished the beneficiary principle and now allow the establishment of non-charitable purpose trusts. In order to ensure proper accountability, these laws require the appointment of an "enforcer".

17 Professor Jeffrey A Schoenblum [1994] 1 *JIntP* 5.

18 Professor David Hayton [1994] 1 *JIntP* 23.

It is therefore perhaps unsurprising that there are more escape clauses[19] than there are clauses dealing with the recognition of trust.[20] However, it would appear that the worst fears expressed by the critics of the Convention in the aftermath of its adoption in 1985 did not materialise.

As will be seen in other chapters, the Italian courts have upheld a number of so-called *trusts interni*, that is, trusts all the elements of which (including the settlor, the trustees, the beneficiaries and the trust assets) with the sole exception of the proper law are connected with Italy. The reason for this success is that Italy (unlike, say, Switzerland or Germany) did not have any fiduciary structure the effect of which was to create a segregated 'pot' of assets. In the meantime, the Italian courts have upheld trusts established, for example, for the protection of minors (including in the case of divorce) and the disabled. This is despite Article 13 of the Convention which provides that:

> *no State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.*

Switzerland went a step further and (following the example of the United Kingdom) did not incorporate Article 13 of the Convention into its domestic law.[21] Therefore, Swiss residents may now establish trusts in an otherwise domestic context without any risk of the courts denying them recognition on the grounds of insufficient internationality (a risk that still exists in Italy notwithstanding the widespread use of *trusts interni*). In practice, any enthusiasm for would-be Swiss settlors is likely to be dampened by tax considerations, as the guidelines issued by the Swiss tax authorities following the ratification of the Convention by Switzerland are designed to discourage the creation of trusts by or for the benefit of Swiss-resident individuals.[22] It must be said that the Hague Trust Convention (like any other Hague Convention) does not deal with tax issues,[23] but the Swiss example shows that perhaps the worst obstacle to the international circulation of trusts in the civil law world might be the taxman,[24] rather than the courts or parliaments.

3. Too little, too much

The first 10 articles of the Convention deal with the scope and the applicable law.

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19 Article 13 (closer connection), 15 (precedence of other private international law rules over trust rules) and 16 (*lois de police*, also known as *lois d 'application immédiate*) and 18 (*ordre public*).

20 Article 11, 12 and 14.

21 Article 149c of Switzerland's Private International Law provides *inter alia* that "the applicable law pursuant to [the Hague Trust Convention] shall also apply where there is no obligation to recognise a trust under Article 13 of that Convention".

22 See Noseda, "Taxation of Trusts in Switzerland: New Clouds on the Horizon", *Trust Law International*, Vol 20, No 1, 2006.

23 Article 19 provides that "nothing in the Convention shall prejudice the powers of States in fiscal matters".

24 The antipathy of the taxman towards trusts is not a Swiss phenomenon. This is best evidenced by the attack launched in 2006 by the UK tax authorities against so-called 'accumulation and maintenance' trusts (a type of trust established by grandparents to fund their grandchildren's school fees and living expenses) and life interest trusts. In addition, a number of trust law jurisdictions, including the United Kingdom and the United States, have draconian anti-deferral rules which are aimed at discouraging the accumulation of income and gains in offshore trust structures. By contrast, the Italian parliament introduced in 2007 what appears to be well-balanced legislation to deal with the taxation of trusts.

Thus far, the Hague Trust Convention is not different from any other private international law convention seeking to harmonise the connecting factors that determine the law applicable to a legal relationship that transcends borders.

However, the Hague Trust Convention is not a private international law convention like any other, as many of the countries sitting around the negotiating table did not have anything to harmonise – the absence of any domestic trust law rules in those countries translated into a complete absence of any private international law rules on their statute books. This explains Article 5 which provides that "the Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involved".[25] Another peculiarity of the Convention is that it contains a description of the trust mechanism. This would not be necessary in a convention on the law applicable to, say, contracts or wills as these are universally applied concepts.

Otherwise, most of the first 10 articles of the Convention reflect the typical structure of a private international law convention, that is, scope (Articles 1 and 3), preliminary issues (the famous 'rocket-launcher'[26] – Article 4), choice of law (Article 6) and objective 'closest connection' – rule in the absence of a choice of law (Article 7).

As mentioned above, Article 2 contains only a description and not a definition of the trust mechanisms. Given that the main aim of the Convention is to enable civil law jurisdictions to understand and recognise trusts and that civil law systems are generally characterised by a high level of abstraction, the absence of a definition may appear as a shortcoming. The Explanatory Report at paragraph 37 notes that "several delegates fought against the idea of defining trusts in the Convention. Given the numerous types of trusts and the divergent definitions offered by the authors in common law countries, this would have been moreover an impossible task". Perhaps so. However, the absence of a definition has given rise to confusion and uncertainties, with one Italian scholar celebrating the birth of the 'shapeless' trust. According to his theory, Article 2 of the Convention would cover "a 'shapeless' institution, to be found in most, if not all, the legal systems of the world".[27] Probably, this goes too far, but Professor Lupoi's theory has the merits of highlighting a

25 Similarly, the second paragraph of Article 6 which provides that "where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective".

26 Article 4 provides that "the Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee". This led Professor David Hayton to coin the distinction between the 'rocket' and the 'rocket-launcher'. The Convention only defines the law applicable to the 'rocket', that is, the trust, whereas the law applicable to the 'rocket-launcher' (ie the act by which the assets are transferred to the trustee) should be determined in accordance with the relevant private international law rules – see Underhill & Hayton: *Law of Trusts and Trustees*, 15 edn, p 946.

27 Maurizio Lupoi, "The Shapeless Trust", *Trusts and Trustees*, 1995, No 3, p 15; see also "The Civil Law Trust", *Vanderbilt Journal of Transnational Law*, 1999, Vol 32, p 1 where he wrote: "Thus, a new trust concept was born at The Hague – the 'Convention trust' or 'shapeless trust'. Convention trusts may be commonly found in civil law countries, just as in common law countries. Most management arrangements that do not allow the creditor of the manager to seize the funds he manages are convention trusts". If one followed this theory, most banking, insurance and fund-management contracts would be covered by the Hague Trust Convention rather than, say, the Rome Convention on the Law Applicable to Contractual Obligations.

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The problem becomes apparent if one compares the sections contained in Articles 2 and 11, as set out in the table below.

Article 2	*Article 11*
(...) A trust has the following characteristics: (a) the assets constitute a separate fund and are not part of the trustee's own estate; (b) title to the trust assets stands in the name of the trustees or in the name of another person on behalf of the trustee; (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law (...).	(...) Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee and that he may appear or act in his capacity before a notary or any person acting in his official capacity. In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular: (a) that personal creditors of the trustee shall have no recourse against the trust assets; (b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy; (c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death; (d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third-party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.

One cannot help but notice that Article 11 repeats and expands the description contained in Article 2. Both articles refer to the trust assets constituting a separate fund; and whilst Article 2 does not expressly mention the effects of segregation for the trustees' creditors, spouses and heirs, by saying that the assets are not part of the trustee's own estate, it lays the premises for those conclusions. In addition, the fact that the trustee may sue and be sued and may appear before notaries etc in his own capacity as trustee (Article 11) is the logical consequence of the fact that the trust assets are vested in, or under the control of, the trustee (Article 2). From a structural and systematic perspective, it looks as if the delegates from the trust law jurisdictions

started off by providing an embryonic description of the trust mechanism to enable the parties to focus on the relatively non-contentious question of the applicable law, and that once that task was accomplished the parties went back to discuss and refine the description of the trust, albeit in a separate chapter (perhaps in order not to undo what had already been agreed at the outset).

More generally, one wonders whether it was really necessary to dedicate a separate chapter to the recognition of trusts. The same objective could have been achieved by working out a detailed description of the trust mechanism at the outset, followed by a code dealing with connecting factors and the extent of the applicable law (see Article 8). Strictly speaking, a description was not necessary. As the effects of a trust are the direct result of the law applicable to it, it would have been possible to ensure a proper recognition of trusts by ensuring that Article 8 (extent of application of the governing law) mentioned the relationship between the trustee and his creditors, along the lines of Article 8 sub-paragraph g) which provides that the governing law shall govern "the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries".[28] Thus, it would have been possible to include a separate sub-paragraph providing that the governing law shall also govern "the relationships between the trustees and their creditors in respect of the trust assets" or "the rights of the trustee's creditors [spouses/heirs] in respect of the trust assets".

It is not the intention of the author to criticise the delegates who negotiated the Convention. The task of the delegates from the trust law jurisdictions to explain the trust concept to their civilian counterparts must have been gargantuan, not least in light of the existing differences amongst their respective jurisdictions' trust laws. In addition, the express description contained in Articles 2 and 11 represents a powerful educational tool, as it enables courts and practitioners of countries that do not have a domestic trust law to grasp the trust concept without having to refer to case law or commentaries (which may not be readily available in the relevant jurisdiction). The benefits of this approach should not be underestimated, as was evident in the Spanish decision mentioned above. However, it is difficult to dispel the impression that the Convention is a badly structured and somewhat clunky instrument.

28 Note that Article 8 does not deal with the liability of the trustees to the creditors of the trust. The nature and extent of the trustee's "external" liability is a matter for the law governing the relationship between the trustee and the creditor (eg a contract).

29 Under some civil law systems, possession gives rise to a (rebuttable) presumption of ownership (eg Article 930 of the Swiss Civil Code). Suppose that the owner of an asset transfers possession over that asset to another person (eg for safe custody purposes). Now, suppose that the transferee abuses his position and gifts the asset to a third party acting in good faith. In these circumstances, the interests of the bona fide recipient are given precedence over those of the owner on the grounds that the transferor contributed to his misfortune by creating the appearance of ownership (see article 933 of the Swiss Civil Code). Contrast the position where an asset is stolen. In this case, the owner is not to blame for the presumption of ownership enjoyed by the thief (or a transferee). Thus, the owner may retrieve the asset from any bona fide recipient. However, If the bona fide recipient is a purchaser for value, he may (where he acquired the asset from a tradesman or at auction) ask the owner to refund the purchase price (see article 934 of the Swiss Civil Code). The rationale of this compromise solution is that, whilst the owner is not to blame for his misfortune (the asset was stolen), the purchaser should be able to rely on the open market. Hence, his entitlement to a refund.

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4. Gems

On the other hand, the Convention contains a number of gems. The first one relates to the possibility of severing the governing law (so-called '*depeçage*') – see Article 9. In practice, this may offer interesting planning opportunities.

In addition, Article 12 contains a useful mechanism in relation to the registration of trusts, as the rules in this respect are very different in common law and civil law systems. Many civil law jurisdictions protect the bona fide *recipient* (which does not necessarily mean *purchaser for value*)[29] of an asset. In order to prove their good faith, third parties may rely on the content of registers (land registry, aeroplane registry etc). Thus, in order to protect the beneficiaries from third parties, Article 12 of the Convention provides that where the trustee desires to register assets, he shall be entitled to do so in his capacity as trustee or in such other way as the existence of the trust is disclosed. The effect of such a registration is to put the world on notice of the existence of the trust.

Contrast this with the position in, say, England and Wales. In England, trustees may not register as such with the Land Registry[30] or the registrar of a company.[31] Accordingly, a trustee may not insert any words suggesting a trust (eg "Joe Bloggs, as trustee of the Goldsmith Family Trust"). Similarly, the trustees being the legal owners have their names on the title deeds and HM Land Register. These rules were introduced to prevent the splitting of legal title which may impact on the administration of an asset (as anyone who will have dealt with a wide "community of heirs" in a civil law will know). As the existence of the trust relationship is not visible, beneficiaries in jurisdictions that follow the position that exists in England and Wales have to rely on the so-called 'doctrine of notice', which provides that a purchaser may not acquire the legal title to the property free of the equitable interests, unless he can show that he was a *bona fide purchaser for value without notice*. In other words, it is not sufficient to show that he acted in good faith (ie without any actual, constructive or imputed knowledge of the interest). Rather, he needs to show that he gave some consideration for the asset. With the introduction of a system of registration for land in 1925, the doctrine of notice was abolished (but only in respect of land). Under the rules introduced in 1925,[32] the purchaser does not have to concern himself with the existence of the trust. Instead, he acquires the legal estate from the trustees free of the beneficial interest provided he complies with the requirements as to the payment of capital money (so-called 'overreaching' of beneficial interests). This system ensures a higher degree of certainty (as the purchaser does not have to carry out extensive enquiries) and marketability of land. On the other hand, the beneficiaries are protected by the requirement (which existed under the doctrine of notice) that the purchaser provide consideration to two trustees (as two are better than one). Under the doctrine of conversion, the

30 See Section 94 of the Land Registration Act 1925 (as amended by the Trusts of Land and Appointment of Trustees Act 1996).

31 Section 126 of Companies Act 2006 ("Trusts not to be entered on register") provides that "no notice of any trusts, express, implied or constructive, shall be entered on the register of members of a company registered in England and Wales or Northern Ireland, or be receivable by the registrar".

32 Section 2(1)(ii) of the Law of Property Act 1925.

beneficiaries' interests are in the proceeds of sale and, in order to ensure proper accountability on the part of the trustees, the rules on overreaching provide that the purchaser must pay the proceeds to at least two trustees.[33]

Thus, the English system could not be more different from that which exists in most civil law jurisdiction, in that it relies heavily on title and tends to favour the marketability of assets over the interests of beneficiaries to retain an asset. To the eyes of a civilian, the prohibition of the registration of trust interests may appear as a paradoxical negation of the trust mechanism, but from an English law perspective the requirement of consideration and, where overreaching does not apply, of *bona fides* provides adequate protection to the beneficiaries. By introducing a system of registration in civil law jurisdictions, Article 12 of the Convention will increase the level of acceptance of trusts there.

5. Opportunities and challenges for practitioners

There is no doubt that the Hague Trust Convention has increased the exportability of trusts internationally, and the existence of sophisticated laws dealing with such issues as forced heirship and creditor protection may offer planning opportunities notwithstanding the constraints imposed by the escape clauses contained in the Convention, and in particular Article 15 (precedence of the conflict of law rules of the forum in relation to the rights of minors, heirs, spouses, creditors and third parties acting good faith). However, practitioners should realise that the selection of a sophisticated law promulgated in a far-flung jurisdiction may not achieve much if the settlor, trustees, beneficiaries or the assets are situated in a country that is likely to enforce the relevant escape clause. In addition, in a global world, practitioners may be forgiven for approaching an estate-planning project primarily by comparing the laws of different jurisdictions in order to select the appropriate one. The quality of the local service providers, professionals and, most importantly, the judiciary (if things go wrong) should also be taken into account. Moreover, the relevant trust law should not be looked at in isolation; the recognition of a trust is only one step in any estate planning.

The rules on jurisdiction and the enforcement of judgments is another essential element that needs to be considered. Interestingly, Italy (which was the first civil law country to ratify the Convention, in 1992) has yet to introduce rules dealing with the jurisdiction over trusts and trustees, although most *trusts interni* that the author has encountered contain an exclusive-jurisdiction clause in favour of the Italian courts. However, it remains to be seen how courts on either side of the common-law/civil-law divide will deal with such trusts. Indeed, some trust deeds split jurisdiction between Italian law for some things (eg appointment of new trustee) and foreign proper law for others (eg validity issues).

The author's understanding of the other countries that have ratified the Hague Trust Convention is that only Switzerland has introduced express rules dealing with the jurisdiction of the Swiss courts and the recognition of foreign judgments. The Swiss solution is interesting as it reflects the solution contained in the Brussels

33 Section 27(2) of the Law of Property Act 1925.

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Regulation[34] and the Lugano Convention in that it allows trust jurisdiction clauses.[35] It also follows the Brussels Regulation and the Lugano Convention in that it provides an alternative forum in the canton where a trust has its 'seat', whereby 'seat' is defined (following a representation by the author of this chapter) as "the place of administration of the trust determined in the trust instrument or otherwise in writing. In the absence of such a determination, the 'seat' of the trust shall coincide with the place of its effective management".[36] Again, following a representation made by the author of this chapter, the Swiss jurisdiction extends to construction summonses.[37] In addition, the Swiss rules provide for a liberal recognition and enforcement of judgments, the relevant connecting factors being a valid trust jurisdiction clause, the domicile of the defendant, the seat of the trust or the proper law of the trust.[38] Thus, going forward, it will be possible for a Swiss trustee of, say, a Bahamas trust, to apply to the Bahamian court for directions with a view to having any direction recognised in Switzerland. The Belgian Private International Law Rules are slightly less sophisticated, but no less interesting.

Therefore, a practitioner who is asked by a continental European client to establish, say, a Bahamas trust with an English trustee and a bank account in Switzerland (or Belgium) will have to consider the risk exposure of the trust structure in all those jurisdictions if he is to ensure its survival. Failure to do so may result in a malpractice claim against the adviser. On the other hand, those with the necessary resources in terms of legal knowledge and professional network will be able to provide their clients with highly sophisticated and, thanks to the Convention, highly secure solutions.

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34 Council Regulation (EC) 44/2001.

35 Article 149b of the Swiss Private International Law provides that "the Court on which the trust instrument has conferred jurisdiction shall have jurisdiction in any dispute concerning the validity, effects, administration, variation or termination of trusts created voluntarily and evidenced in writing according to Article 2 of the Hague Trust Convention. The indication of a court or the power to do so in the trust instrument shall be either evidenced in writing or in another form which can be evidenced in writing. Unless the trust instrument provides otherwise, the choice of jurisdiction shall be deemed to be exclusive. The relevant court may not refuse jurisdiction if (a) any party, the trust or any trustee has his/its 'domicile' [in the Swiss sense of the term] or a permanent establishment in the relevant canton; or (b) a substantial part of the trust assets are located in Switzerland" (my translation).

36 Article 21(2) of the Swiss Private International Law.

37 The term 'trust law disputes' in the Bill was substituted with the term 'trust law matters' in the final version of the law adopted by the Swiss Parliament (art 149b of the Swiss Private International Law).

38 Article 149e of the Swiss Private International Law.