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Bridging the common law- civil law divide? The Convention on the Law Applicable to Trusts and their Recognition

*Adeline Chong**

A. Introduction

The Convention on the Law Applicable to Trusts and on their Recognition (hereafter the 'Hague Trusts Convention') was concluded on 1 July 1985. It has two main objectives: first, to determine the law applicable to trusts, and secondly, to govern the recognition of trusts.[1]

The Convention is said to be anomalous amongst the Hague Conventions as it deals with an institution that is unknown in most of the civil law jurisdictions of the Member States to the HCCH. In this sense, the Convention aims to 'build bridges between countries of common law and countries of civil law.'[2] However, the trust is not totally unknown in civil law jurisdictions. Liechtenstein, Japan and Korea are some of the countries which introduced trust legislation into their laws in the early to mid-20th century,[3] well before the HCCH decided to embark on a Convention on the private international law aspects of the trust. Further, the concept of the 'trust' under the Convention is more broad than the traditional common law concept and includes many civil law analogues.[4] The true dichotomy is between trust and non-trust States.

The Convention entered into force on 1 January 1992 and is to date in force in 14 jurisdictions: Australia, Canada (excluding Québec), China (Hong Kong Special Administrative Region only), Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Panama, San Marino, Switzerland and the United Kingdom (including extensions to 13 Crown Dependencies and UK Overseas Territories). France and the United States have signed, but not ratified the Convention. The modest number of ratifications and accessions is disappointing. Yet the fact that the list of Contracting States has increased very recently[5] means that it cannot quite be said to be 'an outmoded relic'.[6]

Space does not allow for a full examination of the Convention's provisions.[7] Instead the aims of this chapter are to provide an overview of the Convention and to consider some of its more significant effects and problematic issues. The underlying issue is whether the Convention can be adjudged a success in bridging the divide between trust and non-trust States.

B. Overview of the Convention

1. *The Hague Convention trust*

Maitland has described the trust as 'the most distinctive achievement of English lawyers.'[8] It expanded to the far reaches of the globe during the colonial era. From its initial roots as a means to manage land

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[1] Alfred E. von Overbeck, Explanatory Report (hereafter 'Explanatory Report'), paras 28-29.

[2] Explanatory Report, para 12.

[3] Paolo Panico, 'New Trust Legislation in Civil Law Jurisdictions' (2018) 117 ZVglRWiss 283, 296-298.

[4] See below, section B.1.

[5] It entered into force in Cyprus on 1 July 2017 and Panama on 1 December 2018. Canada extended the Convention to Ontario 12 February 2018.

[6] Jeffrey A. Schoenblum, 'The Hague Convention on Trusts: Much Ado About Very Little' (1994) 3 *Journal of International Trust and Corporate Planning* 5, 22.

[7] See generally, Jonathan Harris, *The Hague Trusts Convention: Scope, Application and Preliminary Issues* (Hart 2002).

[8] Frederic William Maitland, 'Lecture III: Uses and Trusts' in *Equity- Also the Forms of Action at Common Law- Two Courses of Lectures* (Cambridge University Press 1929) 23.

and familial wealth, its use in modern times include as part of sophisticated financial instruments and as a mechanism for collective investment. The Convention applies only to trusts that are created voluntarily and evidenced in writing.[9]

It clearly covers express trusts and also at least the automatic resulting trust.[10] However, it is possible for Contracting States to extend the operation of the Convention to 'trusts declared by judicial decisions'.[11]

It is important to note that the Hague Convention trust is a more expansive creature compared to the traditional common law trust.[12] Article 2 provides:

> 'For the purposes of this Convention, the term "trust" refers to the legal relationships created - *inter vivos* or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.
>
> A trust has the following characteristics -
>
> *a)* the assets constitute a separate fund and are not a part of the trustee's own estate;
> *b)* title to the trust assets stands in the name of the trustee 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.
>
> The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.'

Article 2 is intended as a description, rather than definition, of the trust.[13] Even so, the specificity of the phrase 'when assets have been placed under the control of a trustee' does not comport comfortably with declarations of trust by the settlor, when there is no transfer of assets from settlor to trustee.[14]

In addition, it is notable that no mention is made of the beneficiaries' rights. The omission of any mention of duality of ownership indicates that the Convention is not limited to the common law trust; it includes civil law analogous institutions. The rather broadly framed terms of reference have given

[9] Article 3.
[10] Explanatory Report, para 51.
[11] Article 20. The transposition of Article 20 into the Recognition of Trusts Act 1987 (UK) was clumsy: see Adeline Chong, 'The Common Law Choice of Law Rules for Resulting and Constructive Trusts' (2005) 54 *International and Commercial Law Quarterly* 855, 856-858.
[12] *Snell's Equity* defines an English trust as being a relationship where 'a person in whom property is vested (called the "trustee") is compelled in equity to hold the property for the benefit of another person (called the "beneficiary"), or for some legally enforceable purposes other than his own.' See John McGhee (ed), *Snell's Equity* (33rd edn 2015 Sweet & Maxwell), para 21-001. The beneficiary is recognized to have an equitable proprietary interest in the trust property which is enforceable against any subsequent holder of the property other than a bona fide purchaser for value of the legal interest without notice of the beneficial interest: *Westdeutsche Landesbank v Islington LBC* [1996] AC 669, 705.
[13] Explanatory Report, para 36.
[14] 'This language expressed the fact that the transfer of the assets is a prior condition to the creation of a trust…': Explanatory Report, para 43.

rise to what Professor Lupoi has famously called the 'shapeless trust'.[15] It is unclear just how far the reach of Article 2 is: the inclusion of agency and bailment relationships is debatable,[16] while it reasonably can be construed to include civil law instruments such as the Latin American *fideicomiso*,[17] the French and Luxembourg *fiducies* and the Islamic *waqf*.[18] Whether this is a good thing is questionable. For example, the French *fiducie* is generally characterized as being contractual in nature. While the Hague Trusts Convention adopts the contractual choice of law approach of respecting party autonomy, there are a lot more restrictions on the applicable law under the Convention compared to contract choice of law.[19]

2. *Harmonisation of choice of law rules*

Chapter II of the Convention sets out harmonized choice of law rules for trusts. Article 6 provides that a trust shall be governed by the law chosen by the settlor. The choice may be express or implied. If the chosen law does not provide for trusts or the category of trust involved, the choice is considered to be ineffective. Instead, the trust shall be governed by the law which applies in the absence of choice, which according to Article 7, is the law with which it is most closely connected. As a compromise between the flexibility with which common lawyers are accustomed and the greater precision desired by civil lawyers,[20] a list of non-exhaustive factors to which reference may be made to ascertain the law of closest connection is set out according to an implicit hierarchy.[21] The Explanatory Report suggests that a court should tend to conclude that a trust is most closely connected with a State which has the trust,[22] but the objective test set out in Article 7 does not dictate this result.[23] The applicable law as determined by either Article 6 or Article 7 governs the validity of the trust, its construction, its effects, and the administration of the trust.[24]

In Article 6, the Convention has chosen to adopt party autonomy. While party autonomy is widely accepted in the field of contractual obligations, its acceptance in the field of trusts was by no means assured given the age-old argument on whether the common law trust is primarily obligational or proprietary in nature.[25] That said, giving effect to settlor autonomy in terms of the law chosen by the settlor is firstly, in keeping with the focus of the Convention on trusts which are created voluntarily, and secondly, largely in line with the pre-existing common law choice of law for express trusts. In some cases however, the common law would only validate the chosen law if it had some connection with the trust.[26] No connection between the trust and the chosen law need be demonstrated under the

[15] Maurizio Lupoi, 'Effects of the Hague Convention in a Civil Law Country' (1998) 4 *Trusts & Trustees* 15.
[16] Maurizio Lupoi, 'Effects of the Hague Convention in a Civil Law Country' (1998) 4 *Trusts & Trustees* 15, 18; cf David Hayton, 'The Developing European Dimension of Trust Law' (1999) 10 *King's Law Journal* 48, 52.
[17] Nicolás Malumián, 'Conceptualization of the Latin American *Fideicomiso*: is it actually a trust?' (2013) 19 *Trusts & Trustees* 720, 728.
[18] Michele Graziedei, 'Recognition of common law trusts in civil law jurisdictions under the Hague Trusts Convention with particular regard to the Italian experience' in Lionel Smith (ed), *Re-Imagining the Trust: Trusts in Civil Law* (OUP 2012) 29, 49.
[19] See below, section D.2.
[20] Explanatory Report, para 77.
[21] Explanatory Report, para 72.
[22] Explanatory Report, para 61.
[23] See *Berezovsky v Abramovich* [2010] EWHC 647 (Comm), [121] and [183] (reversed on another point: [2011] EWCA Civ 153).
[24] Article 8.
[25] See eg, David Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117 *Law Quarterly Review* 96; Peter Jaffey, 'Explaining the Trust' (2015) 131 *Law Quarterly Review* 377.
[26] Jeffrey A. Schoenblum, 'The Hague Convention on Trusts: Much Ado About Very Little' (1994) 3 *Journal of International Trust and Corporate Planning* 3, 7.

Convention. The Convention's choice of law rules thus follows the approach taken for choice of law in contractual obligations, where, both at common law[27] and under the Rome I Regulation,[28] parties are generally at liberty to choose an unconnected law. However, as will be seen below, certain restrictions are placed on the scope of the applicable law.[29]

3. *Consequences of recognizing a valid trust*

While titled 'Recognition', Chapter III is more accurately concerned with the effects of recognizing a trust valid under its applicable law.[30] Its objective is to familiarize non-trust States with the effects of recognizing a trust. Article 11 provides that a trust created in accordance with the applicable law as identified under Article 6 or Article 7 'shall be recognized as a trust'. The immediate impact of Article 11 is that a hitherto unknown legal category, the trust, is introduced into non-trust States. Article 11 further sets out the minimum effects of recognizing a trust. In particular, it makes clear that the assets of the trust are separate from the assets of the trustee and that the trustee may sue and be sued and appear or act before a notary or any person acting in an official capacity *qua* trustee.

Chapter III aims to provide guidance to non-trust States facing trust issues. Even outside the Convention, non-trust States have found ways to deal with the trust.[31] For example, Germany, which has not signed up to the Hague Trusts Convention, will recognize a trust validly established under a foreign law and will give effect to it within the limits of German law.[32] However, the lack of a proper characterization category has led to some inconsistent decisions in some non-trust States.[33] The Convention assists in reducing uncertainty at the transaction stage and in the event of litigation.[34] Ratifying the Convention is thus preferable to the courts of non-trust States grappling with trust issues on an ad hoc basis.[35]

C. Unexpected effects of the Convention

The Convention has had at least two effects which were unforeseen at the time of its conclusion. First, although it was emphasized that the Convention is not intended to have an impact on the domestic laws of non-trust States, the Convention has encouraged the development of trusts or closely analogous institutions in some of those States. Secondly, the rise of the offshore trusts industry, which promotes forms of trusts which do not comport with strict traditional common law principles,[36] has

[27] *Vita Food Products v Unus Shipping* [1939] AC 277, 290.
[28] Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), Article 3.
[29] See below, section D.2.
[30] David Hayton, 'Reflections on The Hague Trusts Convention after 30 years' (2016) *Journal of Private International Law* 1, 15.
[31] Emmanuel Gaillard and Donald T. Trautman, 'Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts' (1987) 35 *The American Journal of Comparative Law* 307, 308.
[32] Jonas Hermann, 'A German View on Trusts: Selected Aspects of Trusts and their Possible Impact on the Recognition of Trusts by German Courts under Civil Law' (2018) 117 ZVglRWiss 260, 263.
[33] Prior to its ratification of the Convention, the Swiss courts had variously characterized the trust as contractual and as an organized estate: *Harrison v Credit Suisse* (ATF 96 II 79); cf *Chiltern Trust Company* (TF, SJ 2000 1 269), *Re WKR Trust* (Bezerksgericht, ZR 1999 225 No. 52-B); cases discussed at John Goldsworth, 'Switzerland and the Hague Convention' (2006) 12 *Trusts & Trustees* 1, 2.
[34] Emmanuel Gaillard and Donald T. Trautman, 'Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts' (1987) 35 *The American Journal of Comparative Law* 307, 308.
[35] Michele Graziedei, 'Recognition of common law trusts in civil law jurisdictions under the Hague Trusts Convention with particular regard to the Italian experience' in Lionel Smith (ed), *Re-Imagining the Trust: Trusts in Civil Law* (OUP 2012) 29, 42.
[36] See below, section C.2.

meant that traditional common law trust Contracting States have to recognize and give effect to trusts which would be invalid under orthodox trusts principles.[37]

1. *Development of trusts or analogous institutions in civil law systems*

Several features of civil law jurisdictions militate against the introduction of the trust into domestic laws.[38] First, the idea that ownership may be split, a key characteristic of the common law trust, goes against civilian ideas of absolute and indivisible ownership. Secondly, the numerus clausus principle in relation to property rights suggests that trusts may only be introduced into domestic law by way of legislation.[39] Thirdly, the principle that property rights have to be publicised[40] is anathema to the common law private trust. Fourthly, the inherent supervisory jurisdiction which common law courts wield over trusts must be replicated in civil law courts for the efficient administration of trusts.[41]

The trust's flexibility, which allows it to function as an unparalleled device for asset management in both family and commercial contexts, caused some misgivings that trusts would be used for insalubrious purposes such as money laundering and tax evasion. Indeed, it acquired such a 'diabolical'[42] reputation among some civilian lawyers that they requested for the Convention to cover only 'good' trusts and not 'bad' trusts.[43] That reputation, however, has changed, as can be seen from the impact which the Convention has had on some civilian domestic laws.

Italy, which was the first civil law jurisdiction to ratify the Convention, may have done so out of a misunderstanding of the full impact of the Convention,[44] but has gone on to embrace the trust by developing trusts *interni*. These are trusts over assets located in Italy, with Italian beneficiaries or for purposes which are Italian in nature, but with a foreign governing law, usually the law of Jersey,[45] which has the institution of the trust.[46] Trusts *interni* have generally been upheld by Italian courts[47] and comprehensive tax regulation has been enacted to deal with such trusts.[48]

The Convention's impact can also be seen in the domestic law of the Netherlands, which amended its laws to give effect to the principle that trust property is a separate fund ring fenced from the trustee's

[37] Relatedly, although this may not be quite unexpected, the broad description of the trust under Article 2 means that civil law analogues to the trust will also be entitled to recognition by traditional trust States under the Convention.
[38] See Ruiqiao Zhang, 'A comparative study of the introduction of trusts into civil law and its ownership of trust property' (2015) 21 *Trusts & Trustees* 902, 903-904.
[39] As has happened in eg, China and France.
[40] Stathis Banakas, 'Understanding Trusts: A Comparative View of Property Rights in Europe' [2006] 323 InDret 6.
[41] Maurizio Lupoi, 'Trusts in Italy as a living comparative law laboratory' (2013) 19 *Trusts & Trustees* 302, 304.
[42] The Hon Justice James Douglas, 'Trusts and their Equivalents in Civil Law Systems: Why did the French Introduce the *Fiducie* into the Civil Code in 2007? What Might Its Effects Be?', The WA Lee Lecture 2012, (2013) 13 *QUT Law Review* 19, 20.
[43] Justice David Hayton, 'Thoughts on future trust law developments' (2016) 22 *Trusts & Trustees* 1002, 1002.
[44] Jeffrey A. Schoenblum, 'The Hague Convention on Trusts: Much Ado About Very Little' (1994) 3 *Journal of International Trust and Corporate Planning* 5, 5.
[45] Alexandra Braun, 'The Risk of "Misusing" Trusts: Some Lessons from the Italian Experience' (2016) *European Review of Private Law* 1119, 1122.
[46] The possibility of these trusts were first suggested by Professor Maurizio Lupoi: see Maurizio Lupoi, 'The Civil Law Trust' (1999) 32 *Vanderbilt Journal of Transnational Law* 967, 983. This went against the prevalent conception of the Convention being concerned with 'foreign trusts' at the time it was concluded.
[47] See Michele Graziedei, 'Recognition of common law trusts in civil law jurisdictions under the Hague Trusts Convention with particular regard to the Italian experience' in Lionel Smith (ed), *Re-Imagining the Trust: Trusts in Civil Law* (OUP 2012) 29, 65-78 for a description of the evolution of trusts *interni* in Italian law.
[48] Paolo Panico, 'New Trust Legislation in Civil Law Jurisdictions' (2018) 117 ZVglRWiss 283, 291.

personal creditors.[49] The introduction of the *fiducie* into French law in 2007 may also owe a debt to the Convention.[50]

2. *Recognition of offshore trusts by common law systems*

The description of the trust in Article 2 includes trusts which have been set up for 'a specified purpose'. The addition of this phrase was due primarily, although not exclusively,[51] to cater for charitable trusts.[52] The addition of the phrase however means that offshore trusts fall within the Convention.

The offshore trust differs in many respects from the traditional common law trust: settlor autonomy, such as in relation to his or her capacity to create the trust, is better protected; the trust may be set up for a purpose which need not be charitable; the lack of human beneficiaries is not fatal as an 'enforcer' can be appointed to enforce the trust; and perpetuity rules allow for very lengthy periods or do not apply altogether. Apart from the offshore trust having key characteristics which differ from the traditional common law trust, offshore jurisdictions also have the reputation of being tax havens.

Traditional trust States may be able to refuse many offshore non-charitable purpose trusts on the basis of Article 13, which provides that:

> 'No State shall be bound to recognize 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.'

However, the United Kingdom chose not to enact Article 13;[53] no doubt the popularity of offshore purpose trusts was not contemplated at that time.[54] It may be possible for an English court to refuse to recognize a non-charitable purpose trust on the basis that it is against public policy.[55] Similarly, a trust which lasts forever may also be against public policy. However, to refuse to recognize an offshore trust simply because it is different from a local trust is to set a bad example to non-trust States, who have to take the larger leap of recognizing an unknown institution (and not merely an unknown category of trust subject to different rules) under their laws.

D. Particular issues

1. *Are States sufficiently incentivized to sign up to the Convention?*

For the Convention to be truly successful, it must contain elements which appeal to both trust and non-trust States. Trust states today include many offshore jurisdictions.

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[49] David Hayton, 'The Developing European Dimension of Trust Law' (1999) *King's Law Journal* 48, 55.
[50] The Hon Justice James Douglas, 'Trusts and their Equivalents in Civil Law Systems: Why did the French Introduce the *Fiducie* into the Civil Code in 2007? What Might Its Effects Be?', The WA Lee Lecture 2012, (2013) 13 *QUT Law Review* 19, 28.
[51] David Hayton, 'Reflections on The Hague Trusts Convention after 30 years' (2016) *Journal of Private International Law* 1, 4 (fn 9).
[52] Explanatory Report, para 39.
[53] As did Switzerland, although this was to avoid uncertainty about the recognition of internal Swiss trusts which are governed by a foreign law: Michele Graziedei, 'Recognition of common law trusts in civil law jurisdictions under the Hague Trusts Convention with particular regard to the Italian experience' in Lionel Smith (ed), *Re-Imagining the Trust: Trusts in Civil Law* (OUP 2012) 29, 64.
[54] 'No-one in 1983 contemplated the growth of statutory non-charitable purpose trusts in offshore jurisdictions.': David Hayton, 'Reflections on The Hague Trusts Convention after 30 years' (2016) *Journal of Private International Law* 1, 4 (fn 9).
[55] Article 18.

The Convention was designed mainly to familiarize non-trust States with the trust. It provides guidance to these States on how to deal with trust matters. As has been seen above, some non-trust States have since realised the practical and financial benefits of encouraging a regime of trusts, valid under the law of a trust State, over assets located within their jurisdictions.

It has been observed that the Convention benefits trust States by providing harmonized and clear conflict of law rules,[56] one view being that common law conflict rules are 'scanty, haphazard and uncertain.'[57] Apart from this, trust states may have less incentive to sign up to it given that the Convention has universal effect. The applicable law under the Convention need not be from a Contracting State to the Convention, unless a Contracting State lodges a reservation to apply the provisions of Chapter III only to trusts which are governed by the law of another Contracting State.[58] Absent such reservation,[59] a trust which is governed by the law of a non-Contracting State would still benefit from Chapter III, which sets out the minimum effects of recognizing a trust. A number of trust States have however signed up, no doubt to encourage their non-trust counterparts to do likewise, and indeed, one can hardly expect non-trust States to ratify the Convention if trust states themselves are reluctant to do so.

A related issue is whether the Hague Convention appeals to offshore trusts jurisdictions. On the one hand, its attractiveness to offshore jurisdictions is a double-edged sword as the Convention may acquire an unwholesome reputation of shielding tax havens.[60] On the other hand, to ignore the offshore trusts industry would be to undermine the Convention's relevance in the modern world.

It currently applies to a number of offshore jurisdictions such as the British Virgin Islands, Gibraltar and Jersey due to the extension of the Convention to the Crown Dependencies and certain UK Overseas Territories by the United Kingdom. Further, the two most recent ratifications are from Cyprus and Panama. That said, it is notable that the Convention does not apply in the Cayman Islands.

The reluctance of some offshore jurisdictions to ratify it is due to the number of restrictions which the Convention puts on the applicable law and settlor autonomy. Forced heirship claims are a prime example where the Convention's rules may be thought of as a 'strait-jacket'.[61] Article 15(1)(c) allows courts of Contracting States to apply the mandatory rules of the law designated by its choice of law rules relating to 'succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives'. Article 16 allows for the application of the mandatory rules of the forum[62] and, in exceptional circumstances, of another State which has a sufficiently close connection with a case.[63] These provisions would allow for successful forced heirship claims even if the governing law of the trust does not have forced heirship provisions. In contrast, the law of the Cayman Islands expressly excludes the operation of any foreign forced heirship rules to a trust governed by the law of the

[56] Maurizio Lupoi, *Trusts: A Comparative Study* (1997, Milan Giuffre), translated by Simon Dix (2000 Cambridge CUP), 330-331.
[57] Maurizio Lupoi, 'Effects of the Hague Convention in a Civil Law Country' (1998) 4 *Trust & Trustees* 15, 16.
[58] Article 21.
[59] None of the Contracting States so far have lodged this particular reservation.
[60] See, eg, *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [100] *per* Lord Collins of Mapesbury: '… it says much about the likely principal uses of the Convention that they include Liechtenstein, Luxembourg, Monaco, San Marino and Switzerland.'
[61] Jonathan Harris, 'The Trust in Private International Law' in James Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (OUP 2002) 185, 204.
[62] Article 16(1).
[63] Article 16(2). A number of Contracting States have entered a reservation against Article 16(2): Canada, Luxembourg, Monaco and the UK. See https://www.hcch.net/en/instruments/conventions/status-table/?cid=59 for the updated status table (accessed 3 January 2019).

Cayman Islands.[64] Some scaling back of the mandatory provisions of a law other than the applicable law of the trust would appear necessary to appeal more to offshore trusts jurisdictions.

A smaller point in relation to the Convention and offshore trusts is a terminological one. The language used in the text, for example in Article 8, should be updated to accommodate the role protectors play in offshore purpose trusts.[65]

2. *Is the Convention sufficiently protective of beneficiaries' rights?*

At common law, it is recognized that beneficiaries have an equitable proprietary right in the trust assets. The Convention however focusses on the obligational aspects of the trust: settlor autonomy in relation to the choice of the governing law of the trust is respected and there is a focus on the trustees' administrative duties. While the beneficiaries' rights in relation to the administration of the trust are given attention by the Convention, their equitable proprietary rights are not covered.

That said, the core characteristic of the trust- the separation of the trust assets from the trustee's estate- is preserved by the Convention. It is this characteristic without which it is said, rightly, that the recognition of a trust loses its meaning.[66] The notion of the segregated fund under the Convention, however, only goes so far. The proprietary nature of the beneficiaries' rights at common law confers important advantages to them: such as, the right to call for the property and terminate the trust (in a bare trust situation)[67] and for their right to persist against third parties who are not *bona fide* purchasers for value without notice.

The concern as to whether the Convention is sufficiently protective of beneficiaries' rights centre primarily on Article 11(3)(d) and Article 15. Article 11(3)(d) provides:

> '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.'

The choice of law rules of the forum will usually point towards the *lex situs*. The last sentence of Article 11(3)(d) thus apparently excludes tracing into the hands of third parties when the transfer to third parties takes place in a civil law jurisdiction. Generally, civil law jurisdictions do not accept that beneficiaries have proprietary rights that persist against all but a *bona fide* purchaser for value without notice. This has significant implications for the protection of beneficiaries' rights when the trust property is located in a non-trust jurisdiction. To an extent, this interpretation appears to be supported by *obiter* comments of Lord Mance in *Akers v Samba Financial Group*.[68] It has been suggested that a more narrow reading of Article 11(3)(d) should be adopted, ie it should be limited to the issue of whether property has been acquired by a third party *bona fide* purchaser,[69] rather than have the mere fact that the trust property is located in a non-trust jurisdiction be fatal to a beneficiary's equitable proprietary claim as against a third party.

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[64] Trusts Law (2017 Revision), section 91(b). See also section 92.

[65] David Hayton, 'Reflections on The Hague Trusts Convention after 30 years' (2016) *Journal of Private International Law* 1, 14.

[66] Explanatory Report, para 108.

[67] *Saunders v Vautier* (1841) 4 Beav 115.

[68] *Akers v Samba Financial Group* [2017] AC 424 (SC), [40]-[41].

[69] Lawrence Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn 2012 Sweet & Maxwell), para 29-056; Jonathan Harris, 'The Hague Trusts Convention after *Akers v Samba*' (2018) 24 *Trusts & Trustees* 346, 356.

Article 15(1) allows for the application of the mandatory provisions of the law designated by the conflicts rules of the forum, covering matters such as:

> "a) the protection of minors and incapable parties;
>
> b) the personal and proprietary effects of marriage;
>
> c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;
>
> d) the transfer of title to property and security interests in property;
>
> e) the protection of creditors in matters of insolvency;
>
> f) the protection, in other respects of third parties acting in good faith."

The idea behind Article 15 was largely to preserve the application of the forum's domestic mandatory laws when the forum's conflicts rules pointed towards the *lex fori*.[70] Its reach, however, is further. It also preserves the application of another law's mandatory rules when that law is designated by the conflicts rules of the forum.[71] While largely seen as a provision to placate non-trust States concerned with misuse of the trust, it also serves to protect trust States who equally have an interest in preventing the trust from being used for evasion of mandatory rules of the relevant law.[72]

Some of the above provisions seem *prima facie* at odds with the idea of segregation of the trust assets from the assets of the trustee. The language could have been clearer: sub-paragraphs 1(c) and 1(e) above should be read to be limited to the succession rights of heirs of the *testator* and the protection of creditors of the *settlor* respectively.[73] In addition, sub-paragraph 1(d) has been the subject of much concern. One issue is whether this provision allows the holder of trust assets to rely on the mandatory rules of the applicable law designated by the conflicts rules of the forum to deny the existence of the trust if that law does not recognize the trust.[74] These mandatory rules could include the civil law principles of *numerus clausus* and the indivisibility of property rights.[75] However, to allow this interpretation of sub-paragraph 1(d) would subvert Article 11 which provides that a trust that is valid according to its governing law shall be recognized as a trust.

3. *The rocket and the launcher*

Another concern is the scope of the Convention. Article 4 provides for the exclusion of 'preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.' The image of the launcher and rocket has been employed to describe Article 4 and the scope of the Convention. Acts and transfer instruments which launch the 'rocket' do not fall within the scope of the Convention while the 'rocket' itself, ie the trust, does.[76] The rocket-launcher imagery has provided fertile ground for gentle jokes on 'damp squibs' and the like, but courts have found it less

[70] Explanatory Report, para 138.
[71] Explanatory Report, para 138.
[72] If the trust cannot be recognized because of Article 15(1), Article 15(2) exhorts courts to achieve the objects of the trust by other means.
[73] David Hayton, 'The Developing European Dimension of Trust Law' (1999) 10 *King's Law Journal* 48, 55.
[74] The Netherlands amended its law to avoid this issue from arising: David Hayton, 'The Developing European Dimension of Trust Law' (1999) 10 *King's Law Journal* 48, 55.
[75] This was effectively the High Court decision in *Akers v Samba Financial Group* [2014] EWHC 540 (Ch), which was reversed on different grounds by the Court of Appeal ([2015] Ch 451 (CA)) whose decision was reversed on yet a different ground by the Supreme Court ([2017] AC 424 (SC)).
[76] Explanatory Report, para 53.

useful.[77] A clear delineation between rocket and launcher issues is not always within grasp and the scope of Article 4 is debatable.[78]

Article 4 was the subject of some attention in *Akers v Samba Financial Group* which concerned a stay application. Mr Al Sanea, a Saudi Arabian citizen and resident, declared that he held shares in five Saudi Arabian banks on trust for SICL, a Cayman Islands company. This was reportedly a device to avoid certain provisions of Saudi Arabian law, which did not permit the ownership of the shares by foreigners and required registration of the shares. The trust, or at least the traditional common law trust alleged to have been created, is not recognised under Saudi Arabian law.[79] Thereafter, Mr Al-Sanea purported to transfer the shares to Samba. SICL was wound up under Cayman Islands law and the liquidators sought a declaration that the shares belonged to SICL.

The High Court held that the transactions whereby the trust was attempted to be established fell within the expression 'transfer of title to property' within Article 15(1)(d). Accordingly, the *lex situs* of the shares, ie the law of Saudi Arabia, applied to determine title to the shares with the consequence that no trust in favour of SICL was created.[80] On appeal, focus shifted to Article 4 and the role of the *lex situs*. The issue was also complicated by the fact that *Akers* was a situation where the settlor declared himself as trustee of the property rather than a trust being created by virtue of a transfer by the settlor to the trustee. A declaration of trust by the settlor does not qualify as 'other acts by virtue of which assets are transferred to the trustee' within the meaning of Article 4. On this, the Explanatory Report states that: 'The Commission unanimously accepted that the acts by which this change in the capacity in which the assets were held was effectuated must also be envisaged by article 4 and therefore excluded from the Convention's scope.'[81] If this is the case, it would have been preferable for the language used in Article 4 to reflect this. In any event, the Court of Appeal held that the most purposive possible construction of the phrase led to the conclusion that 'the line is to be drawn once the assets have been transferred to the trustee, whether or not that distinction is entirely logical for all purposes.'[82]

Having reached this conclusion, the *lex fori's* choice of law rule to govern the validity of the declaration of trust pointed to the *lex situs*. However, was the question to be posed to the *lex situs* whether the settlor can alienate the property at all or, alternatively, whether the settlor can create that particular type of trust? Saudi Arabian law answered the first question in the affirmative but the second in the negative. The Court of Appeal held: 'Provided that the property that is made the subject of a trust can be alienated at all under the *lex situs*, questions as to the validity and effect of placing such assets in trust, even though the assets are shares in a civil law jurisdiction, can be determined by the governing law of the trust.'[83] The trust was therefore validly created and governed by, as was assumed, Cayman Islands law. The Saudi Arabian rules prohibiting ownership of the shares by foreigners and on registration did not apply to prevent the creation of the trust, but may possibly be relevant by virtue of Article 15(1)(d). However, the mandatory nature of the rules had not been established before the court and the court held that it would not be appropriate for it to determine this point on a stay or summary judgment application.

[77] *Akers v Samba Financial Group* [2015] Ch 451 (CA), [38].
[78] *Akers v Samba Financial Group* [2017] AC 424 (SC), [38].
[79] An amaana, which is similar to bailment, exists under Saudi Arabian law.
[80] *Akers v Samba Financial Group* [2014] EWHC 540 (Ch), [63].
[81] Explanatory Report, para 57.
[82] [2015] Ch 451 (CA), [50].
[83] [2015] Ch 451 (CA), [55].

At the Supreme Court, yet a different tack was taken. After some prevarication at the lower levels, it was now common ground that for the purposes of the appeal, Cayman Islands law governed the various transactions which allegedly created the trust. The Supreme Court however side-stepped the interesting issues on the intersection between the Convention and the common law. It decided the case on the basis of section 127 of the Insolvency Act 1986, namely that there was no 'disposition' of any rights of SICL in relation to the shares when the shares were transferred to Samba within the meaning of section 127. Nevertheless, it made some *obiter* comments on some of the points concerning the Convention. Importantly for the purposes of the Convention, the Supreme Court affirmed that a trust does not fall outside the Convention under Article 4 simply because its assets are located in a jurisdiction which does not recognise trusts at all, or the type of trust at issue.[84] To have reached a different conclusion on this point would have had drastic implications for the usefulness of the Convention. On the scope of Article 4, the Supreme Court stated:

> 'Even if the Court of Appeal was wrong to limit article 4 to the question whether the assets were alienable, in the sense of being capable of transferable to the trustee or anyone else …., an issue on which it is unnecessary to reach any final conclusion, there was nothing invalid about the declarations of trust.'[85]

This statement leaves it unclear what else their Lordships thought would be covered by Article 4, although at the very least, it appears that their Lordships agreed that Article 4 does cover the question of the general ability of the settlor to alienate the property. *Akers* demonstrates that the delineation between 'rocket' and 'launcher' issues needs urgent clarification.

E. Conclusion

The Hague Trusts Convention is a flawed instrument. For one, there are a number of instances of imprecise language used, some of which have been detailed above, which either do not fully reflect the consensus reached in the discussions or accurately reflect the varied ways in which a trust may be created and operated. The text is also outdated and should be modernized to take into account developments such as the popularity of offshore trusts. Clarity in terms of what sort of institutions fall within its scope, as well as matters which fall within and without the Convention, would be welcomed. It may also be questioned if the Convention is sufficiently protective of beneficiaries' rights under the traditional common law trust.

Notwithstanding its textual and substantive imperfections, the Convention's achievements must not be overlooked. The number of ratifications alone cannot be the true marker of its success: the indirect influence of the Hague Trusts Convention must not be discounted. For example, while Belgium is not a signatory to the Hague Trusts Convention, the provisions on trusts matters in its Private International

[84] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, especially [38]-[39] *per* Lord Mance JSC.
[85] [2017] AC 424 (SC), [38].

Law Code borrow heavily from the Hague Trusts Convention's provisions.[86] The influence of the Hague Trusts Convention can also be seen in the laws of Québec,[87] Romania[88] and the Czech Republic.[89]

Its provisions inevitably reflect the compromises that had to be made between trust jurisdictions and non-trust jurisdictions mistrustful of allowing 'bad' trusts to proliferate. The environment today, however, is very different from when the Convention was drafted and negotiated. There is now a warmer reception for trusts in non-trust States. The Convention has helped to foster interest in the trust in non-trust States[90] and played an educational role by increasing awareness of the trust's utility as a device for wealth management and transfer. Interestingly, trusts is the subject matter of Book X of the EU Draft Common Frame of Reference. Further, an international group of distinguished experts produced the *Principles of European Trust Law* which sets out the substantive principles of the law to assist countries interested in implementing the Hague Trusts Convention.[91] European civil law now includes a place for trusts law and that this is so is due in no small part to the Convention.

The time would appear to be ripe to update the Convention. Given the greater familiarity with the trust across board, perhaps a more precise and bolder instrument can be concluded the second time round.

[86] Belgian Private International Law Code of 16 July 2004, Chapter XII. See Paolo Panico, 'New Trust Legislation in Civil Law Jurisdictions' (2018) 117 ZVglRWiss 283, 293-294.
[87] Civil Code of Québec, Article 3107. See Michele Graziedei, 'Recognition of common law trusts in civil law jurisdictions under the Hague Trusts Convention with particular regard to the Italian experience' in Lionel Smith (ed), *Re-Imagining the Trust: Trusts in Civil Law* (OUP 2012) 29, 56-57.
[88] Romanian Civil Code, Articles 2659-2662. See Paolo Panico, 'New Trust Legislation in Civil Law Jurisdictions' (2018) 117 ZVglRWiss 283, 294.
[89] Law 91/2012 on Private International Law, § 73. See Paolo Panico, 'New Trust Legislation in Civil Law Jurisdictions' (2018) 117 ZVglRWiss 283, 294-295.
[90] Alexandra Braun, 'Trusts in the Draft Common Frame of Reference: The "Best Solution" for Europe?' (2011) 70 *Cambridge Law Journal* 327, 345.
[91] DJ Hayton, SCJJ Kortmann and HLE Verhagen (eds), *Principles of European Trust Law* (Kluwer Law International 1999).