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Trust Law

Notes on the Hague Convention on the Law applicable to Trusts and on their recognition.

As a result of the sweeping reforms that were introduced by the coming into force of Trusts (Amendment) Act 2004, the situation in Malta in the field of trusts has truly changed in a radical manner.

Prior to that, the situation was to a certain extent tentative, simply because the concept was unknown in our domestic law. The concept was first introduced in the late 1980's, and Maltese policy makers took a very deliberate stepped approach, initially allowing for the concept of trust only in a ring-fenced manner, reserved for so-called offshore activities by non-residents.

This allowed local professionals to start learning about the concept, and to become familiar with both the jargon and logic associated with the use and application of trusts.

The next step was taken in the mid 90's, when a decisive step was taken to go beyond the strict onshore-offshore divide in corporate matters, and further providing for the recognition and enforcement of foreign trusts by the ratification of the Hague Convention and its application through the Recognition of Foreign Trusts Act of 1994.

As from the 1st January 2005, we can now say that the Trust has finally come of age in Malta, which can now be considered as a Civil law country with a domestic trust law in its own right.

Article 5 of the Trusts & Trustees Act now provides as follows:

(1) Subject to the provisions of this Act, a trust shall be governed by its proper law and shall be interpreted and enforceable accordingly.

(2) The proper law of the trust shall be determined in accordance with this Act;

(3) The terms of a trust may provide for the proper law of the trust to be changed to the law of another jurisdiction.

Article 5A of the T&T Act confers the force of law in Malta to most of the Articles of the Hague Convention on Trusts, with the relevant provisions reproduced as a Schedule to the Act. We will analyse these in some detail shortly.

Article 6 of the T&T Act then goes on to provide that:

"6. (1) When the proper law of a trust is the law of Malta as the chosen applicable law of the trust or as determined in accordance with article 7 of the

Convention, notwithstanding the provisions of any other law, the validity of the trust, its construction, its effects and the administration of the trust shall be governed by this Act and other provisions of Maltese law on trusts.

(2) When the proper law of a trust is a foreign law as the chosen applicable law of the trust or as determined in accordance with article 7 of the Convention, notwithstanding the provisions of any other law, the validity of the trust, its construction, its effects and the administration of the trust shall be governed by such foreign law and shall be recognised and given effect to in Malta in accordance with the Convention and this Act.

(3) The administration of a trust may be regulated by a law different from the proper law of the trust."

The Hague Convention

The full formal reference to the Convention is "Convention on the Law applicable to Trusts and on their recognition, adopted by the Hague Conference on Private International Law on 20 October 1984, and which came into force on 1 January 1992."

The Hague Convention on the law applicable to trusts and on their recognition is different to many other private international law conventions, in that it was dealing with an institution, the trust, which was well known in certain Member states of the Conference, but which was, and is, unknown in the majority of the civil law states of the Members of the Conference. In this context, therefore, it was also meant as a bridge-building exercise between common law and civil law countries.

The interests of the two groups of countries for ratification of the Convention were naturally also not identical.

For those systems of law which provide for trusts, the principal interest was to have the trusts created under their laws recognised in the countries which do not have this institution. Furthermore, even among countries that provided for and understood the institution, it was felt that the conflict rules of the Convention were useful, given the diversity of their national systems of private international law.

For those (essentially civil law) countries that do not provide for trusts in their national systems, their interest was clear in defining the parameters within which a trust instrument would be recognised, thereby avoiding outright rejection, but also avoiding any perceived disadvantages brought about by blind acceptance.

According to one very interesting article which appeared in the American Journal of Comparative Law[1], there were three central considerations which emerged from the deliberation in the Hague:

[1] Gaillard & Trautman, "Trusts in Non-Trust Countries: Conflict of laws and the Hague Convention on Trusts", (1987) 35 Am.J. Comp.L 307.

1. There were not only the differing assumptions (in substantive law and choice of law) of trust and non-trust countries, but also the differences between the several trust countries themselves.

2. It was acceptable to all parties to give effect to trusts validly created elsewhere. It was not however acceptable that the Convention serve as a means of introducing the institution of trust in the domestic law of non-Trust countries.

3. The central object of the convention was the ordinary bona fide private trust, such as a trust designed to order financial arrangements of a family, and not involving any objectionable effort to evade important policies of the several jurisdictions that might be concerned.

As a matter of methodology, it is interesting to note that the Convention has the effect of introducing into the choice-of-law apparatus of civil-law countries a characterisation, trust, which is not drawn from domestic law categories. This solution was found after long discussions.

In fact, according to Gaillard & Trautman, much of the discussion during the Hague Conference centred round the question of the extent to which the trust could be assimilated or transposed onto some civil law equivalent. An example of such methodology is the decision of Swiss Federal Tribunal in the case ***Harrison v. Credit Suisse***, a 1979 decision. In this case, Harrison, an American, made an irrevocable inter vivos transfer of assets in trust to the Credit-Suisse, with the objective of creating a life annuity for his first wife and the children of their marriage. After he died domiciled in the United States, his second wife, whom he had made sole legatee, contested the validity of the trust in the Swiss courts. The court pronounced itself using a comparative method, stating that since an analogous institute to the trust did not exist in Swiss law, the Swiss juridical institutions had to be examined to determine which one most closely resembled the case at hand in its effects. In fact the Tribunal based its decision on the resemblance of the trust to an agency, a transfer of property and a stipulation for the benefit of third parties. This method was used both for determining the law applicable to the trust and, the Tribunal having come to the conclusion that Swiss law applied, for carrying out the disposition.

> *"Ultimately the negotiators of the Convention decided to repudiate such a comparative or assimilative method and to use a genuine choice-of-law method. Trusts covered by the Convention will be recognised as trusts, even in countries which do not know the institution of trust, both for choice of law and for the purpose of giving effect to the characteristics and qualities given by the law designated by the choice-of-law rules of the Convention.*

> *It is of considerable theoretical significance that the Convention thus will have the effect of introducing into the choice-of-law apparatus of civil law countries a characterisation, trust, not drawn from domestic law categories.....[It will now become] impossible for civil-law countries to proceed in the area of trust without considering the possibility of characterising the problem as one of trust rather than attempting to assimilate the trust arrangement to some domestic-law category."*

Such a statement was of primary importance in analysing the situation that applied in Malta until the end of 2004. This is of course no longer so relevant, given that we now have the concept of trust in the domestic sphere, and the concept is an integral part of the law of the land.

At any rate, the fact that a direct choice-of-law method was adopted, coupled with the problem that a large number of member states simply did not have the institute of trust, meant that the Convention itself had to deal with certain fundamental issues concerning the nature of a trust, and its effects.

Furthermore, it should be stated that the Convention is an "Open" or "Universal" Convention, in that its application is not restricted to providing for recognition of trusts only as between contracting States. However, the Convention does provide machinery for individual Member States to limit the applicability of the Recognition Articles in such a manner.

The Convention itself is divided into 5 chapters, with the first chapter dedicated to the SCOPE of the Convention's application, identifying the institutions which are covered, as well as making it clear that it would not apply where its conflict-of-laws rules (as set out in Chapter 2) lead to a law which does not provide for trusts.

The Second chapter deals with APPLICABLE LAW issues, providing primarily a subjective connection to the intent of the settlor, together with secondary connecting factors on objective criteria, where the primary subjective test fails or is inconclusive.

Chapter 3 deals with RECOGNITION and sets out the minimum implications of recognition of a foreign trust in any of the Member States. It also specifies the form in which the trust may appear in public registers. This Chapter also contains a provision, Article 13, which was interestingly enough not given the force of law in Malta as a result of the Recognition of Trusts Act. This Article provided that no State was bound to recognise a trust the significant elements of which, despite its applicable law, place of administration and habitual residence of the trustee, were more closely connected with States which do not have the institution of the trust, or the category of trust involved.

Chapter 4 contains GENERAL clauses, only some of which were seen as relevant for direct application by the Maltese legislator. Thus Articles 15 and 16 allow the application of mandatory rules which are applicable under the conflict rules of the forum and under laws of immediate application. Article 17 excludes renvoi, Article 18 provides for an overriding exception of application on the basis of fundamental public policy; and Article 19 excludes the effects of the Convention in fiscal matters. Articles 20, 21 and 22

respectively permit the Convention's provisions to be extended to trusts declared by judicial decisions, or, to the contrary, permit the application of Chapter 3 to be limited to trusts connected with Contracting states and to those created after entry into force of the Convention. Articles 23 and 24 concern States comprised of several territorial units, while Article 25 gives priority to other existing or future conventions dealing with the same matters

Chapter 5 contains the customary final clauses of the Hague Conventions, on signature, ratification, accession, entry into force and denunciation.

Malta ratified the Convention and gave the force of law to certain of its provisions by virtue of Act XX of 1994, known as the RECOGNITION OF TRUSTS ACT, 1994 (Cap 374). This has since been repealed, and all private international law issues are now directly dealt with by the Trusts & Trustees Act.

Article 5A of the Act basically reproduces what was Article 3 of Cap 374, in providing that specific Articles of the Convention, as set out in a schedule to the Act, were to have the force of law in Malta. The Articles specified are Articles 1 - 12, 14, 15, 16 (the first paragraph only), 17, 18 and 22 (the first paragraph only).

Article 5A also contains some saving and other qualificatory language when referring to particular Articles of the Convention itself, which should not be forgotten when considering the provisions of the Convention.

a. SCOPE

Article 1 of the Convention, puts simply and directly the Convention's scope, stating that it is about the specification of the law applicable to trusts, as well as the recognition of [foreign] trusts.

Article 2 is not a definition of a trust, but as you will have seen in the first term, attempts to indicate the characteristics that an institute must show (whether this is an Anglo-Saxon trust or an analogous institution from another country) in order to be covered by the Convention.

In this context, it has been said by various writers that the Convention clearly covers a number of legal relationships and institutions, which have similar characteristics as trusts, even if they are not trusts themselves. Hayton, writing in 1987[2], has suggested that the Convention may thus cover certain trust-like institutions in Israel, Sri Lanka, Japan, Egypt, South Africa, Argentina, Panama, Venezuela, Puerto Rico, Quebec and Louisiana. It would also apply to any other similar institutions which are developed in any given legal system in the future.

"Article 2

For the purposes of this Convention, the term "trust" refers to the legal

[2] Hayton, "The Hague Convention on the law applicable to Trusts and on their Recognition", (1987) 36 ICLQ, 260.

relationship 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."

- wording makes it clear that testamentary trusts are included;
- "specified purpose", according to von Overbeck[3], was included to make the inclusion of charitable trusts beyond doubt;
- the trust must be created by a person, as opposed to a court (although the convention does provide, in Article 20, for extending coverage also to judicial trusts)
- The last paragraph of Article 2 is rather interesting:

  "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."

This provision refers the reader back to the applicable law of the trust concerned, and simply states that if the proper law of the trust allows the settlor to reserve certain rights and powers, or allows the trustee to be a beneficiary of the trust, this would not necessarily invalidate the trust concerned. This is naturally subject to the recognition provisions of the Convention itself.

- ***Different types of trust***

Article 3 of the Convention states as follows:

"The Convention applies only to trusts created voluntarily and evidenced in writing."

[3] A. E. von Overbeck, "Explanatory Report", in Proceedings of the Fifteenth Session by the Permanent Bureau of the Hague Conference.

Article 5 further states that "The Convention does not apply to the extent that the law specified by Chapter II [the provisions relating to Applicable Law] does not provide for trusts or the category of trusts involved."

Art. 3 delimits in two respects the circle of the trusts covered by the convention. Clearly, therefore, the Convention is not applicable to trusts created by operation of law or by judicial decision, although Article 20 permits Contracting States to extend application to the latter. Malta did not give the force of law to Article 20, a decision which has been criticised by some local lawyers, but on the other hand Art. 5A(2) of the T&T Act provides as follows:

"(2) Those provisions *[that is the provisions of the Convention having force of law in Malta]* shall, so far as applicable, have effect not only in relation to the trusts described in article 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of another country."

As to the requirement of written evidence, you may have trusts in certain jurisdictions which are validly created without a written instrument. The Convention only applies where there is written evidence of the trust. According to the von Overbeck Report,

> *"This may even consist of a writing in which the trustee recites the intentions expressed orally by the settlor.*[4]*"*

In any case, Art. 5A(2) of the T&T Act would seem to put clarity here.

- ***Preliminary Acts***

Article 4 -

> *"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"*

In order to explain the purport of this Article, Hayton[5] (as does von Oberbeck) draws the analogy between a rocket and a rocket-launcher on the one hand, and trusts and the instruments or acts creating trusts on the other. In this sense, Article 4 restricts applicability of the Convention to the "rocket", that is the trust once it has been launched. It does not cover or apply to antecedent issues of form, capacity or validity which may vitiate the will, document or act which purports to subject assets to a trust.

This is admittedly a rather tricky area of law, since there are various circumstances where it is extremely difficult to distinguish between the rocket and the rocket-launcher. However, you should note that, essentially, the way in which the trust is settled is not a matter of concern for the Convention. Thus the validity of the transfer of assets by the settlor to the trustee, or the declaration of the trustee declaring that he is holding specific property on trust for a third party, falls outside the ambit of the Convention.

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[4] Overbeck, op.cit., at para.52.

[5] Hayton, op. cit., at pp268-269.

This area is pregnant with complex private international law questions, which are beyond the scope of this course.

b. APPLICABLE LAW

i) Autonomy of the parties - Primary Subjective test.

The Convention resorts first of all to the autonomous will of the parties, in providing for rules for the identification of the applicable law concerning trusts. Thus the first paragraph of Article 6 provides:

> *"A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case."*

This provision clearly adopts the principle of party autonomy for trusts. If the choice is not express, the implied choice of the parties must be sought, by resorting to the written evidence of the trust, and its interpretation by taking into consideration, if necessary, the circumstances of the case.

ii) Applicable law in absence of or defectiveness of choice - Secondary objective test.

In the event that there is no express or implied choice of law, or alternatively, where the express or implied choice of the parties points to a law which does not provide for trusts, or the category of trust involved, such choice is disregarded, and Article 7 provides rules for the identification of an objective imputed applicable law. Thus Article 7 provides:

> *"Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.*
>
> *In ascertaining the law with which a trust is most closely connected reference shall be made in particular to:*
>
> *(a) the place of administration of the trust designated by the settlor;*
>
> *(b) the situs of the assets of the trust;*
>
> *(c) the place of residence or business of the trustee;*
>
> *(d) the objects of the trust and the places where they are to be fulfilled;*

It is not altogether clear whether there is an order of priority among the criteria set out in the second paragraph of Article 7. However, according to the von Oberbeck Report:

> *"These criteria are all in principle on the same footing; however, the conference has given them their places by order of importance so that it might be said that there is among them an implicit hierarchy."*

It is interesting to note, therefore, that the Convention provides a double safety mechanism, through the implementation of Articles 6 and 7, favouring the recognition of trusts by civil law judges. Indeed, according to Gaillard and Trautman[6],

> *"These arrangements were intended to give the judge wide freedom to find a way to uphold a trust, even when the law applicable at first blush does not know the trust, so that he might for example even resort to assimilation of the trust into the known institutions of the forum."*

Furthermore, in the words of Hayton,[7]

> *"No doubt a court will take more account of factors connected with a trust State than factors connected with a non-trust State, and will also be influenced by the factor that a trust or power in a trust deed will be valid if governed by a particular law but void if governed by another."*

Therefore, the application of the Convention, by a combination of the various Articles involved, is extended to a maximum. Indeed, the Convention does not apply (According to Article 5) only if Chapter II of the Convention (comprising Articles 6 - 10), points to a law which does not provide for trusts or the category of trusts involved.

c) Extent of application of governing law

Article 8 specifies that the applicable law, determined by application of Articles 6 or 7, governs the validity of the trust, its construction, its effects, as well as the administration of the trust.

The Article goes on further to give a particularised, but non-exclusive list of the matters which are substantive issues, although issues of form are not expressly excluded. The issues listed are as follows:

(*a*) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;
(*b*) the rights and duties of trustees among themselves;
(*c*) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;
(*d*) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;
(*e*) the powers of investment of trustees;
(*f*) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;
(*g*) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
(*h*) the variation or termination of the trust;
(*i*) the distribution of the trust assets;

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[6] Emmanuel Gaillard and Donald T. Trautman, "Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts", (1987) 35 Am.J.Comp.L., 307.

[7] Op. cit., p.272.

(*j*) the duty of trustees to account for their administration.

d) Mandatory rules

Articles 15 and 16, on the other hand, provide for exceptions to the general principle contained in Article 8. Article 15 lists in non-exhaustive fashion a number of matters in which the applicable law in accordance with the conflicts rules of the forum, and not the proper law of the trust, is given effect by the courts, provided that they are mandatory rules which cannot be derogated from by voluntary act. Article 16 makes it clear that the mandatory rules of the forum which must be applied irrespective of the rules of conflicts of law, will also be preferred to the proper law of the trust.

It is certainly true that Articles 15 and 16 can be effectively invoked by a hostile judge to frustrate a trust or its effects in a large number of circumstances. In any case, however, where as a result of application of Article 15 a trust cannot be recognised, the court must "try to give effect to the object of the trust by other means".

We will deal with these two articles in detail after considering the general Articles concerning recognition of trusts.

e) Depecage

Article 9 goes on to accept *"depecage"*, that is the practice of subjecting certain elements of the trust to different laws, and the provision mentions the most frequent example, which is that it may be desirable to differentiate between the law applicable to the validity of the trust, and the law applicable to its administration. The text of Article 9 is as follows:

"In applying this Chapter a severable aspect of the trust, particularly matters of administration, may b***e governed by a different law."***

f) Change of proper law

Article 10 goes on to cover situations where a law initially applicable is changed and replaced by another law. This is for example possible in the case of Maltese trusts[8]. It states:

> *"The law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law."*

g) Exclusion of Renvoi

You should however note that, in the light of Article 17, the applicable law refers to the substantive law, not to the conflicts rules of the law concerned. Thus questions of *renvoi* are excluded.

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[8] see s. 5(3) of the T&TAct.

c. RECOGNITION

Article 11 contains the principle of recognition of trusts (as described in the Article 2) created in accordance with the law specified in Chapter II of the Convention. There is no limitation or qualification that the applicable law must be the law of a contracting State.

Therefore if a trust is validly created in accordance with its applicable law, it will be recognised by Contracting States (subject to what I have to say in connection with Articles 13, 15, 16 and 18).

Article 11 goes on to set out the minimum implications of such recognition. The full text of the Article reads as follows:

> "A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust. 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 this capacity before a notary or any person acting in an 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.

Article 12 covers situations where the trustee wishes to register trust assets in such a way that the trust is disclosed. The Article provides as follows:

> "Where the 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."

It must be said that registration in this manner is not mandatory. In this context, you should note the provisions of Section 32 of the T&T Act, which states that the Trustee of a Maltese trust is personally liable to a third party where he does not disclose his trusteeship. The Trustee will however have a right of recourse to the trust property by way of indemnity against such liability, unless he acted in breach of trust.

In the context of company shares held in trust, this could pose certain problems in a number of countries. In Malta, Art. 127(1) of the Companies Act has been fine tuned over the years to deal with this area in as comprehensive a manner as possible.

Article 13 was not given the force of law in Malta:

> *"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."*

This clause is clearly an escape clause in favour of States which do not have trusts. The clause will be used above all by judges who think that the situation has been improperly removed from under the application of their own laws.

The Maltese legislators chose not to give the force of law to this Article. In an explanatory memorandum accompanying the legislative proposal for the Recognition of Trusts Bill, it was said that the Article was left out:

> *"because it introduces uncertainty for no good reason, since Articles 15, 16 and 18 already provide adequate safeguards for applicable mandatory rules."*

On the other hand, **Article 14** (which was given the force of law in Malta) states that:

> *"The Convention shall not prevent the application of rules of law more favourable to the recognition of trusts."*

Clearly this provision underscores the fact that the whole purpose of the Convention was to facilitate the recognition of trusts. It was not

> *"intended to prevent States from recognising trusts, even in cases which are not covered by the Convention. As has happened for other Hague Conventions, one may imagine that in practice the Convention's solutions will be extended to trusts which are not formally covered by it."*[9]

As a result of the 2004 amendments which provided for the integration in full of the institute of trust in our civil code, together with other fiduciary relationships, considerations borne out of an analysis of Articles 13 and 14 of the Convention have lost their relevance.

d. PRESERVATION OF APPLICATION OF MANDATORY RULES

As already mentioned, the Convention is in a sense revolutionary, because it introduces a new category in the private international law systems of Countries who did not know the institute of trust. All previous practice, in the words of Gaillard & Trautman, has been to draw on domestic law for the categories used for choice-of-law purposes. This meant that most civil law states could never formulate a proper choice-of-law rule for trusts per se, and would always have to try and categorise the situation within an institute known domestically. The Harrison case, discussed earlier, is a good example of this. In ratifying the Convention, such States will

[9] von Oberbeck Report, N. 134.

"enrich their system of private international law with the category of trust, defined by Article 2 of the Convention. There will be no equivalent in their domestic law concepts."

Such insertion encounters a number of difficulties, since the trust would exist in the context of a number of legal relationships, such as marriage, contract and succession - all questions and situations which have their own choice-of-law rules. According to Gaillard & Trautman, the Convention provides a two-step mechanism in order to enable the uniform choice-of-law rules for trusts to co-exist with conflict rules in those other areas (e.g. succession, protection of minors, property) capable of coming into play in a case involving trusts.

The first step consists of identifying the laws applicable to the various issues at stake. To do this, one must consult the various applicable choice-of-law rules. Therefore, one must go to the forum to assess the validity and effects of the so-called "rocket-launcher", since Article 4 of the Convention makes it clear that the Convention does not cover this. Once it is established that the trust is validly provided for, one would then establish the law applicable to the trust, in accordance with Chapter II of the Convention. However, one would also have to decide whether there are any issues where domestic mandatory rules apply, and this is where Article 15 becomes extremely relevant. This Article states as follows:

"Article 15
The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters:
(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.

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."

Clearly, Article 15 is a powerful tool in the hands of the Courts in controlling the extent to which the instrument of trusts can impinge on situations where it was previously unknown.

Therefore, by virtue of Article 15 it may be that, irrespective of the law applicable to the trust, where the rules governing the issues listed in the Article are of a mandatory nature, and incapable of being excluded by voluntary act, it would be these rules which would prevail. Such a possibility is by way of option.

Article 16 is also given the force of law in Malta, but limited only to the first paragraph. This provides as follows:

> *"The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of conflict of laws."*

The second paragraph, which was not given the force of law, is actually worded as follows:

> *"If another State has a sufficiently close connection with a case then, in exceptional circumstances, effect may also be given to rules of that State which have the same character as mentioned in the preceding paragraph."*

There seems to be general agreement among writers that Article 16 was meant to cover mandatory rules of such fundamental importance that they need to be applied not just to domestic situations but to international situations irrespective of conflicts rules. Examples of such rules would be laws specifically designed to prevent the export of currency or of cultural heritage objects, the preservation of public health, etc.

Article 18 is the final Article referring to mandatory rules. It states:

> *The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (ordre public).*