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Article : Why is a Trust not a contract? Never mind the "bolloques" in the "Colloques", here come the principles.

6th October, 2013.

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**The author is indebted to the able and much more diplomatic summary of the trust concept provided by David Hayton<sup>1</sup> assisted by Sue Ward.**

*The intention of this paper, not of the author's above, is to treat the continuing ignorance of the civil law proponents in Paris seeking to vilify the trust, the various civil servants advising the French Ministère de l'économie et de finances and the various Parliamentary commissions passing legislation on such a basis with the intellectual contempt that their ignorance deserves.*

*The full text of this report and a very adequate summary of the development of the trust from its feudal Norman origins as a use, then a use upon a use, to a trust can be found at <http://www.trustees.org.uk>, The Hayton Report*

A trust is not a contract like a contract for the benefit of a third party or parties or a contract of agency<sup>2</sup>.

WHY?

- (a) Once the settlor (gratuitously or pursuant to a contract with another) has made his unilateral transfer of his assets to the trustee to own as a segregated patrimony, he drops out of the picture and cannot tell the trustee what to do, *[unless he has expressly*

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<sup>1</sup> Professor David Hayton MA, LLB, LLD, is Professor of Law at King's College, London, having formerly been a Fellow of Jesus College, Cambridge and is an English barrister and Acting Justice of the Supreme Court of The Bahamas, having been a Recorder from 1984-2000. He also headed the British negotiating team for the Convention du premier juillet 1985 relative à la loi applicable au trust et à sa reconnaissance.

<sup>2</sup> The Hague Convention on the law of Agency of , which France has ratified, excludes a trust from the notion of a contract of agency for that reason, as does every single European Private International law measure taken since the accession of the Republic of Ireland and the United Kingdom to the European Communities now the Union.

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Date: 6th October, 2014

.../...

*reserved powers enabling him to do so*] : the trustee's obligations are independent obligations owed exclusively to the beneficiaries who alone have correlative rights against the trustee.

*Article 792-0 bis CGI is therefore a total fallacy, there is no "contractual" or other legal relationship between a settlor a trustee and the beneficiaries. Before defiguring a Code in such a manner, it would have been helpful, perhaps even efficient, if the idiot drafting it had actually understood what he or she was addressing. Reserved power trusts can also be provided. To talk of a trust as a tri partite contract as has been proffered by some self inflated avocat in Paris and quoted without any consideration as if it were law is an unacceptable parody not even worthy of a macaw let alone a macaque.*

- (b) The fact that the settlor later dies or becomes mentally incapacitated or discovers a breach of trust has been committed is totally immaterial.

*In other words there is no legal relationship or contract involving the settlor, again.*

- (c) The death or incapacity of the trustee does not affect the continuing existence of the trust: it only means that someone else will need to take over the office of trustee. Indeed, a trust can arise without the knowledge and agreement of the trustee (e.g. in the case of a testamentary trust or the case of property, like land or shares, that can be transferred into the name of another without the need to tell such person) but if the trustee refuses to act and disclaims, the settlor or his executor takes the property as trustee.

*Again, no contract of agency or otherwise. It is hardly surprising that the idiot drafting the article 792-0 bis CGI could not understand the subtleties of English land law or the objectionable manner in which they have defiled it.*

- (d) A breach of trust confers no right to treat the trust as terminated: it merely enables the beneficiaries to falsify or surcharge the trustee's accounts and to apply to the court to replace the trustee.

*In other words there is no breach of contract.*

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David Hayton headed up the British negotiating team addressing the Hague Convention on the Recognition of Trusts 1984 to which the French administration have had the illiterate arrogance to refer in absolute ignorance. But then of course, Englishmen never can be trusted to get English law right without some assistance from the French, now can we:

I quote Senator Pierre Marini's ill conceived attempt at an "*effet de manche*": "*mais tout le monde sait qu'un trust est un contrat*"<sup>3</sup> .... One has to admit that repeating by rote the garbage proffered by Claude Dumont Beghi in front of the Parliamentary Commission is not even quoting "*le Tout Paris*" let alone "*tout le monde*".

Curious that no one in the French Tax administration was involved in the negotiation of the Hague Convention. The artists at the Louvre deliberately abstained from any involvement, reserving comment until the last minute, at which point they scuppered the French ratification by requiring the French version to be treated as a form of legal/fiscal entity whose *fiduciaire*, as opposed to trustee, would be required to attach separate accounts to its own balance sheet. The rise in the value of shares in document delivery services in Paris was only temporary.

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<sup>3</sup> Jersey Tuesday 6th February, 2012