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Foaming at the Mouth

In a world of limitless possibilities we need to set boundaries for ourselves or our fate will be to face mounting despair. I read words to that effect several years ago, put them on my mental shelf, and carried on. They have had to be taken down from that shelf now, however, because I have just read an article describing shapeless trusts; these trusts, apparently, can be fashioned into various forms, just like Plasticine, and have found favour in Israel. As a trust specialist, the concept for me strikes at the very roots of the relationship.

I have in recent years watched the grim progress of the changes, however slight or cosmetic, made to the edifice of that bulwark of succession planning, the English trust, and which has been exported around the world; although, it must be said, not always with universal success; in the case of some countries, like a cheap wine, it has not travelled well. But still the fundamental trust framework, enshrined in the legal maxim that requires three certainties (intention to create one as well as a clear identification of both its assets and the beneficiaries) has been sustained. No matter how elaborate or fanciful the language, this is the kernel of a trust, and for which a trustee, as steward of the assets, is needed; well, that's certainly how it once was.

Would you believe that the new interpretation stems from the very convention that was supposed to clarify the status of trusts internationally which was concluded back in 1985 and entered into force in 1992? Because the Hague Convention entitled "The Law Applicable to Trusts and on their Recognition" does not stipulate that assets have to vest in the trustee, unlike the English law does, it is argued that the creator of the trust may retain title in the assets. I should add that the trust regime in China speaks of entrusting property rights to the

trustee, but this does not mean that the settlor is required to vest them in the name of the trustee. Although there are moves afoot in Israel, as opposed to China, to change the law which has been in place since 1979, giving the trustee his rightful place, it is expected to take several years of parliamentary debate before the current position is reversed.

The argument put forward is that such innovations extend the number of options available, like an extensive restaurant menu does, and that different trust models can suit different circumstances. One defence is that for those cultures uncomfortable vesting assets in favour of a third party, diluting the trustee's role is very comforting. But if, like cell phones, we are going to see trust apps on offer, I predict that you will also see mishaps. One can only imagine the opportunities for litigation which could be encouraged by disgruntled beneficiaries and any avaricious lawyers skilled in the art of word manipulation. The solution? Use a foundation, already very popular with Latin Americans who are also sensitive about control issues, but which is far from shapeless and holds title for succession planning in its own name rather than a trustee's; importantly, it can grant generous powers to the founder that will have the Israelis and Chinese sleeping peacefully at night.

It is not just certain trust practitioners who are looking for the next big idea, but fortunately, in this fast-changing world, the durable still remains so, and can live alongside the innovative – provided you can recognise the value of both and not try to invent a better mouse trap.

One word that is important in the Hague convention is "relationship" which is used to define the link between a trust's creator and a trustee; it is not bound by a contract (which many believe it is) but its essence is the understanding between the giver and

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the receiver: remember, the nature of the English trust has its origins in ecclesiastical law which preceded the court of equity, before clerics walked across from the church to the King's chancery to confront the birth of trusts and let their consciences be their guide.

The so-called shapeless trust has been described as substance without form but to my mind you are in danger of being unable to achieve substance over foam – just froth and nothing more, which would have had the clergy foaming at the mouth.

I am uncomfortable with the argument that the trustee does not need to have the assets vested in him to have control of them, as suggested in Beijing or Beersheba. The reverse of this, of course, can, importantly, have equal application in the classic sham trust situation, where although the assets have been vested in a trustee, the settlor, effectively, continues to control them. But whether this new species of trust, this Haifa hybrid if you will, ever gains traction elsewhere, it is yet one further example of the fine line that can sometimes be drawn between the authentic and the derisory.

Trust Hits the Dust

An aftershock following the Western world's economic collapse calls on a different type of trust: trust in governments and those providing professional services, such as accountants, bankers and lawyers, along with those professions allied with them. Derision is a very apt word in this instance. Not dissimilar to the English trust model, the bankers, for example, decided to re-invent banking, while the accountants split their time between being auditors and business advisers. What about the lawyers? Well, they required no new string to their bow because their trade is the essential prop, trying to ensure that all forms of business operate within the boundaries of the law. Their principal tool is words; the right ones to get the job done. And although as a professional class their reputation is not glowing, their function cannot be circumvented, any more than a doctor's can; they are an essential part of the financial food chain, serving up on a tray their interpretation of the meaning, for instance, of "vesting"; "entrusting"; and "control".

In the mêlée, resulting from the hunt for tax evaders, to seek the definition of beneficial ownership for the

purposes of not only transparency, but tax liability too, I have to ask myself: are we on the way towards shapeless beneficial ownership? If so, will the discretionary trust beneficiary be interpreted in some countries as having a vested interest for purposes of tax?

The British chancellor of the exchequer, George Osborne, is the beneficiary of a discretionary family trust purported to be worth several millions of pounds. Will the United Kingdom's aggressive approach on how beneficiaries of trusts are to be treated have unintended consequences for him? I ask the question because regardless of any input from lawyers, the level of understanding displayed so far in the interpretation and mechanics of trusts by many members of the Organisation for Economic Co-operation and Development has been abysmal.

It is right and just that regulation demands protection from the fraudulent within the professional community, but one gets the idea that there are some functionaries in those bastions of officialdom scattered across the globe who might only associate "vest", for example, with a garment worn under a shirt.

In France the trust is as popular with the government as the Duke of Wellington was with Napoleon Bonaparte and if George Osborne decided to retire there, his discretionary trust interest, regardless of whether he derives any future benefit from it, would nonetheless be required to be reported to the French tax authorities.

Pulling Teeth

Words first uttered, as we know, can be important, just as first appearances are. The Prince, Niccolò Machiavelli's masterful treatise, which celebrated its quincentennial in 2013, labours the point and has had an influence ever since on political thought and culture, the elemental principle being that in the pursuit of power the use of immoral means can be justified. Machiavelli told Raffaello Girolami, a diplomat and ambassador to the Holy Roman emperor, that "Occasionally words must serve to veil the facts. But let this happen in such a way that no one becomes aware of it; or, if it should be noticed, excuses must be at hand to be produced immediately".



It is important to understand that whilst you can be master of your thoughts, once uttered, you become a slave of your words. So of equal importance is lucid thought, before the tongue is engaged, in order to achieve Mark Twain's imperative: "I like the exact word, and clarity of statement, and here and there a touch of good grammar for picturesqueness".

Machiavelli had fallen from favour in 1512 when the Medici family returned to power in Florence and where he had held a post in the city's chancery due to his close association with Piero Soderini, a prime Medici rival. He was immediately removed and, linked with a conspiracy to overthrow the Medicis, was later imprisoned, tortured and subsequently placed under house arrest. He died 14 years later in abject poverty, having written *The Prince* in the hope that he would gain favour and employment with the Medicis; they probably didn't even read his book.

Without doubt, Francisco Franco, the late dictator of Spain, would have been a wise prince in Machiavelli's eyes and needed no guidance from his book. Here was a man who ruled his country for almost 40 years (1939-1975), and who contrived to create a myth about himself, appearing little in public and using rhetoric and reclusiveness to great effect. He was impenetrable, sphinx-like, about whom his chaplain of 40 years once remarked that if he was cold, as many said, he didn't show it and "In fact, he never showed anything". Anger and sorrow were rarely expressed, and he signed sheaves of death sentences over dinner with absolute indifference. Adolph Hitler, after spending 9 hours with him, later told Benito Mussolini that he would rather have three or four teeth taken out.

It was luck (which Machiavelli also wrote much about), boundless optimism and low cunning that served Franco well during his lifetime; he was 83 years of age when he died whereas Machiavelli had only been 58 years old. Ironically, Machiavelli's fellow Italian, Mussolini, like himself, also played his cards very badly, eventually being brought to heel, literally, to which a rope was tied to both of them as he hung suspended and was spat at by his countrymen in 1945.

Seiko and you Shall Find

It is a good new year's resolution to try and read a selection of well-chosen books, if you do not already

do so. I subscribe to the former French President Francois Mitterand's conviction that "A man loses contact with reality if he is not surrounded by his books"; he never did, in political terms, and equalled Franco's guile. China's former premier, Wen Jiabao, for instance, was a frequent reader of history, saying that it was like a mirror; and once again, as Mark Twain so aptly put it: "The man who doesn't read good books has no advantage over the man who can't read them".

Speaking of good books, it is also true that the contents, and not the cover, is always what counts, reminding us to be wary, in fact, of first appearances. This caution has equal application when, for example, you are seeking professional help on where to either bank or invest your money. It is true, for example, that many luxury watches are very attractive and expensive, but isn't their prime purpose just to tell the time? And accurately. 44 Christmases ago, Seiko introduced its Quartz Astron 35SQ that was accurate to within one minute a year. Tokyo may not have the same cachet as Geneva does, but it is also true that today an average, reliable Chinese watch costs US\$2.

Like the lure of what I describe as commercial cosmetics, a lot of people buy up-market Swiss watches not to tell the time, but to tell other people something about themselves; status and branding reign and the purveyors of perception are well aware of the seductive attraction of both.

One of my indulgences, and a testimony to the durability of quality, is to not only buy good books (a new year's resolution that never changes) but to occasionally purchase some which are very old and are encased in lovingly-produced, hand-sewn covers. But, again, two points should be made (and also considered in the context of finance): it is the text wherein the true value lies, with the adornment only adding visual pleasure and nothing material.

I have bought most of my treasured volumes (some published at the beginning of the last century) from a bookstore in Oxford in the UK. Originally established in 1879 on Broad Street, the tiny bookshop (12 square feet) now holds some 250,000 books with a very large, used books section where some real gems are to be found. By excavating under neighbouring Trinity College Gardens an additional 10,000 square feet was made available. I



wonder if that advocate of quality, Mark Twain, visited the book shop when he was in Oxford? Trust, however, synonymous with integrity, has been the thread throughout this year's final newsletter and Niccoló Machiavelli spoke and wrote a lot about it – as have so many contemporary bankers. He found himself pursued by the Medicis, and the bankers today by regulators and depositors. I read where a town crier, mounted on a horse and using a silver trumpet to attract the attention of crowds,

was employed by the city of Florence earlier in the year to celebrate the 500th anniversary of The Prince. This got me thinking. It could be a good idea to employ the horseman's services in New York and London to draw the bankers out of their bunkers with the sound of his trumpet and then publicly denounce them, just as Machiavelli experienced – although imprisonment and torture would not, of course, be entertained.

Offshore Pilot Quarterly (independent writing for independent thinkers) has been published since 1997 by Trust Services, S. A. which is the British face of trust business in Panama where it is licensed under the fiduciary laws. It is written by Derek Sambrook, our Managing Director, who is Treasurer for the British Chamber of Commerce Panama and is a former member of the Latin America and Caribbean Banking Commission as well as a former offshore banking, trust company and insurance regulator. He has over 45 years private and public sector experience in the financial services industry about which he has written extensively and our website provides a broad range of related essays including his Latin Letter column which appears in every issue of Offshore Investment, a British professional journal published since 1986. You can also read his Latin American blog on www.privateclientadviser.co.uk.

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