The Hague Trusts Convention five years on: the Swiss Federal Supreme Court's decision in *Rybolovlev v Rybolovleva*

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Abstract

On 26 April 2012 the highest court in Switzerland handed down judgment in *Rybolovlev v Rybolovleva*. This was one of the first since Switzerland's ratification on 1 July 2007 of the Hague Convention on the Law Applicable to Trusts and on their Recognition to consider foreign trusts in the context of its matrimonial property regime. It serves as an important signal of the country's willingness to respect the settlor's chosen law. It is likely that the judgment will be viewed as a disappointment. Whilst the Swiss Courts considered the trusts were valid, they concluded that the husband was the sole beneficial owner or in a position of control. The reason for these conclusions is not properly explained, making it impossible to divine whether these conclusions are confined to the facts of the case, or might be of wider application. Cypriot trusts law, which is supposed to determine questions over the nature and extent of a beneficiary's interest under a trust, was overlooked. Basic consideration of Cypriot trust concepts suggest that the husband did not own or control trust property. The Federal Court invoked Article 15 of the Hague Trusts Convention when there must be some basis for doubting whether this article was engaged. The Federal Court applied concepts of Swiss law that relate to companies, but the Royal Court's decision in *Re Esteem* suggests that these have no application to trusts. The Federal Court paid little or no regard to the interest of third parties, such the trustees or the other beneficiaries of the trusts. Swiss Courts have moved—from 'fortress Switzerland'—onto the other end of the spectrum, assuming exorbitant jurisdiction, and disregarding norms of comity.

Introduction

On 26 April 2012 the highest court in Switzerland (the Federal Supreme Court) handed down judgment in *Rybolovlev v Rybolovleva*. This was one of the first since Switzerland's ratification on 1 July 2007 of the Hague Convention on the Law Applicable to Trusts and on their Recognition ('the Hague Trusts Convention') to consider foreign trusts in the context of Switzerland's matrimonial property regime. The Hague Trusts Convention was thought to foster certainty and stability[1] and has doubtless contributed to Switzerland's success over the intervening five years as

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1. For example, see press release of Swiss Federal Department of Justice and Police dated 4 April 2007:

> the recognition of trusts is being given a firmer foundation and greater legal certainty for all concerned. [. . .] There is also a significant economic interest in greater legal certainty, in particular, as a firm legal foundation creates a better climate for the setting-up and administration of trusts in Switzerland, and thereby boosts the country's appeal as a business location.

See also Alfred von Overbeck, (1996) 2 Trusts & Trustees 9, who advocated Swiss ratification and explained it would

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The appeal arose out of a decision of the Court of Justice of the Canton of Geneva ordering attachment of foreign (ie non-Swiss) property belonging to Cypriot trustees who were neither parties to the Swiss proceedings (and against whom the wife had no claims) nor subject to the court's jurisdiction. The reason the trust property was relevant was not that the Swiss court has a jurisdiction similar to Section 25 of the Matrimonial Causes Act 1973 requiring it to establish the couple's financial resources, which the English Court of Appeal in *Charman v Charman*[2] considered extended to the husband's interests in a Bermuda trust. In the Rybolovlev case, the trust property was relevant by reason of Article 181 of the Civil Code. This provides that—in default of agreement selecting another regime—a married couple are subject to a regime known as participation in *acquêts* (or acquisitions). The husband did not contest that the property which had been transferred—many years beforehand—to trustees fell within the wide definition of *acquêts* found in Articles 197 and 198 of the Civil Code (which covers all property acquired during the marriage, other than by inheritance of gift[3]). This meant that, by reason of Article 208 of Civil Code,[4] the transfers to the trustees had to be taken into account[5] in assessing the size of the matrimonial patrimony and thus in determining the size of the balancing payment to the wife on dissolution of the matrimonial property regime, following divorce.[6] Article 208 does not invalidate transfers onto trust. On the contrary, Article 201[7] expressly provides that they are valid. The Federal Court's judgment records the wife claimed the balancing payment due to her on liquidation of the regime would be CHF 6 billion. She suggested the only way the husband could satisfy an award of this size would be by accessing the trust property.

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The Federal Court found that the court below had not acted arbitrarily in treating the husband to be the 'economic owner' of the property transferred to trusts and considering 'the assets transferred to the trusts

lead to more security and simplicity in the conflict of laws process by introducing clear rules on applicable law and by giving the settlor a large freedom of choice as to the applicable law. It should decisively promote the effect of trusts in civil law countries. The Convention has built a bridge between common law and civil law systems.

See also Richard Pease, (2004) 11 Trusts & Trustees at 17:

> The increased legal certainty which would follow ratification of the Convention would ensure that Switzerland would remain a competitive wealth management centre and would prevent the outflow of business to other financial centres, such as Singapore.

2. [2007] EWCA 503.

3. Article 200 provides that absent proof to the contrary, all property shall be deemed to be acquisitions.

4. Article 208 provides:

> To acquisitions are added, in value (1): donations of acquisitions made during the marriage, which a spouse has made without the other spouse's consent during the last five years before the matrimonial property system was dissolved, with the exception of ordinary gifts; (2) the divesting of property which a spouse has carried out during the duration of a matrimonial system of participation in acquisitions, in order to encroach upon the participation claim of the other spouse.

5. Article 214 of the Civil Code provides they be valued at the date of the transfer.

6. Article 215 of the Civil Code provides that the wife's claim is equivalent to half of the value of her husband's acquisitions, less half of the value of her own acquisitions; the spouses' mutual claims are set off.

7. Article 201 of the Code which simply provides:

> Within the legal limits each spouse administers and uses his or her own acquisitions and his or her own property and disposes of them in his or her right.

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continue to belong economically to [the husband]'.[8] There are two possible ways the Federal Court might have reached this conclusion. First, on the basis that the transfers of property from the husband to the trustees were invalid for some reason, so that it in fact continued to belong to the husband. Second, on the basis that the property was held on the terms of the trusts, which were valid, but that the powers conferred on the husband enabled him to control the trust property. The two are necessarily mutually exclusive.

Whilst the Federal Court's judgment contains a fleeting reference to the wife's challenge to the validity of the Trusts, it is clear that the Federal Court did not consider invalidity was the basis for attaching trust assets. First, the Federal Court did not refer to Article 4 of the Hague Trusts Convention, which provides that preliminary issues (sometimes said to do with whether the rocket has launched) are outside the Convention's scope.[9] Instead the Federal Court's judgment refers to Article 15 of the Hague Trusts Convention (which presuppose there being a valid trust). Second, the Federal Court's judgment refers repeatedly to the assets having been 'transferred to the trusts'. Third, the Federal Court stated that:

> the assets thus transferred fell within the scope of Art. 208 of the Swiss Civil Code and could be included among his acquêts.

Article 208 only applies to gifts which are effectively made.

It is clear that the Federal Court did not consider invalidity was the basis for attaching trust assets

It logically follows from the fact that the Federal Court considered that the property had been validly transferred to trustees that the question facing the Federal Court was whether the court below acted arbitrarily in deciding, in the context of the Swiss matrimonial property regime, that the husband remained the sole beneficial owner of trust property or had power to control trust property. The husband's interests in trust property and his control depend on the nature and extent of his rights and powers under the trusts. Article 8 of the Hague Trusts Convention provides that questions about a beneficiary's rights under the trust should be decided by reference to the governing law of the Trust.[10] Article 6 allows settlors to choose the governing law. The chosen law in this case was that of the Republic of Cyprus with its International Trusts Law 1992.

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The Federal Court's judgment contains a very brief consideration of the terms of the Trusts. They are said to be discretionary and the husband is described as a beneficiary. The judgment does not deal with the value of the trust fund, the nature and scope of the trustees' dispositive powers, the nature of the husband's expectation, the number and identity of other beneficiaries and the nature of their expectations, the existence and terms of any letters of wishes and other relevant considerations, making it

8. Paragraph [5].
9. Article 4 provides:

> 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.

Professor von Overbeck explains at para 54 of his report on the Hague Trusts Convention that:

> the law designated by the Convention applies only to the establishment of the trust itself, and not to the validity of the act by which the transfer of assets is carried out.

10. Article 8 of the Convention required the Swiss court to apply Cypriot law to determine the 'the validity of the trust, its construction, its effects'. The 'effects' will include questions as to the resulting relationship between the trustee and the beneficiaries; and how the trust is operated in practice. This is reinforced by art 8(2) (g) that states that the governing law of the trust applies to 'the relationships between the trustees and the beneficiaries'.

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difficult to understand the extent of the husband's interest. The Privy Council's decision in *Schmidt v Rosewood Trust*[11] demonstrates that under general common law principles, a discretionary beneficiary such as the husband would have no equitable proprietary interest which would be capable of assignment, or which would be amenable to attachment or freezing orders or could be the subject of enforcement action. This is because his rights are confined to merely requiring the trustees to consider the exercise of their discretions in his favour. Absent evidence that the trustees had not exercised these discretions properly (the judgment contains no such suggestion) the husband was wholly dependent on the exercise of the trustees' discretion and is therefore said to have a mere *spes* or hope of receiving a benefit under the trusts. Such principles suggest that the husband's position as a discretionary beneficiary do not provide an obvious basis for treating him, for the purposes of the Swiss matrimonial property regime, as the economic owner of the trust property.

The husband is described as protector of the trusts with powers to add and remove beneficiaries and remove and appoint trustees. He is also said to hold a power to give directions to trustees in relation to their voting rights in relation to shares in one of the companies that formed part of the trust property, as this had been designated a special company. The judgment contains no analysis of these powers. All that can be said is that they would seem unexceptional in modern discretionary trusts. *Ex Parte Gilchrist*[12] establishes that powers of appointment do not give the holder a proprietary interest in the assets of a trust. The question was whether they gave the court below acted arbitrarily in deciding the husband exercised control over trust assets. The judgment does not consider the nature and extent of the powers, whether the husband had sought to exercise these powers and if so for what reason and to what effect, making it difficult to assess whether the husband exercised control. Cypriot law would govern the scope of the husband's powers and duties as protector. Under common law principles a protector's powers will normally be fiduciary in nature, so that they have to be exercised in the best interests of the whole class, and thus could not be used by the husband to promote his own interests.[13] This therefore does not provide an obvious basis for saying that, for the purposes of the Swiss matrimonial property regime, the husband had control.

The Federal Court concluded that the:

> the trusts are merely an instrument in the hand of [the husband] who maintained extensive powers of management and appears to be the primary beneficiary thereof.

There is no explanation for how they reached these conclusions, making it difficult to divine whether they are confined to the facts of the case, or are of wider application. The Federal Court's judgment does not consider Article 2 of the Hague Trusts Convention,[14] which contemplates that a settlor (the husband in this case) might reserve powers to himself.

11. [2003] UKPC 26.

12. (1886) 17 Ch D 521 at 530–31 Fry LJ famously dealt with the distinction as follows:

> No two ideas can well be more distinct the one from the other than those of 'property' and 'power'. This is a 'power', and nothing but a 'power'. A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property' than the power to write a book or to sing a song.

13. Underhill and Hayton, *Law of Trusts and Trustees* (18th edn, LexisNexis Butterworths 2010) at para 1.79:

> The particular powers conferred upon a protector normally are fiduciary powers intended to enable him to play a fiduciary role (unless expressly or necessarily implied otherwise in the trust instrument or from the circumstances, as where the settlor or a beneficiary is a protector with power to protect his own selfish interests). The fiduciary powers are to enable the protector to safeguard the trust from various hazards, whether relating to the trustee (e.g. exorbitant charges, inadequate investment performance, unsatisfactory exercise of distributive functions vis a vis discretionary beneficiaries) or to beneficiaries (e.g. disputing what the trustees might do on their won) or to the trust arrangement.

14. Article 2(3) provides that:

> 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.

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More significantly, the judgment contains no analysis of Cypriot trust law, such as the rights of discretionary beneficiaries, or the duties of protectors. In treating the assets transferred to the trusts as belonging to the husband the Federal Court gave no consideration to the position of other beneficiaries, who are not mentioned anywhere in the judgment.

The Federal Court concluded that the 'the trusts are merely an instrument in the hand of [the husband] who maintained extensive powers of management and appears to be the primary beneficiary thereof'

In reaching this conclusion, the Federal Court followed the court below in applying Swiss law in relation to receivership[15] and Durchgriff (described as the transparency principle'). Durchgriff is employed to pierce the veil of incorporation. This is something that can be done to companies. There is no explanation for how, or why, these principles should apply to these trusts, which of course do not have a separate legal personality. The Royal Court of Jersey rejected the application of such principles in *Re Esteem.*[16] The headnote summarizes their conclusions as follows:

> Although the court could pierce the veil of a company where the controlling shareholder used the company to conceal the true facts of his own impropriety, the principle did not apply to allow the piercing of the veil of a trust where the settlor had managed to assume substantial and effective control of the trust and had dominated the trustees improperly. The beneficiaries' interests could not be affected by such a breach of the trustees' fiduciary duties which permitted the settlor to control and misuse the trust. The appropriate proprietary remedies could be used to remove any benefit the trust had derived from such misuse but there was

15. The Federal Court judgment explains (at 14):

> As for the case law published in Federal Court Ruling 126 III 95, the appellant gives it a scope that it does not have in an attempt to justify its non-relevance in this particular case. In this judgment, the Swiss Federal Supreme Court limited itself to specifying (on the principles: Federal Court Ruling 107 III 33, recit. 2, p. 35) under what conditions a creditor can obtain a receiving order for assets formally in the names of third parties. For example, it ruled that reference to the third party is indispensible, as the creditor cannot merely indicate all the assets belonging to the debtor while adding, without details, whether they are in the debtor's name or in that of a third party. It noted however that this requirement does not mean that those who avoid their creditors by transferring their assets to frontmen, shell companies or professional agents that dispose of collective deposits are protected. It held that, indeed, in such cases, the degree of plausibility of the debtor's ownership of the assets, required by the judge, must take the fraudulent situation into account and that all evidence to this effect must be duly taken into consideration. In other words, if it seems plausible that the debtor is hiding behind the legal duality of persons in order to shirk its obligations, there are grounds to exclude them and to order the receivership. It does not appear untenable to apply these principles by analogy to the attachment of assets formally in the names of third parties handed down by virtue of Art. 178(2) Swiss Civil Code.

16. In the matter of the Esteem Settlement (Abacus (CI) Limited as Trustee [2003 JLR 188]. The headnote deals with the points as follows:

> (7) The absence of any such principle in trust law could be explained by the differences between the position under a trust and that in respect of a company, not only in terms of the legal basis on which assets were held but also the degree of legal control that needed to be exercised. Under company law, a shareholder had lawful control over the company, whereas under a trust the settlor had no power to give any directions to the trustee unless the power were conferred by the trust deed. Moreover, when piercing the corporate veil, the necessary level of control was that of a controlling shareholder, and not a lower threshold (such as might, for example, be appropriate at an interlocutory stage). This level of control could only be attained by the settlor over the trustee where he had abdicated his fiduciary duties, as such control would be improper (paras. 105–106; paras. 124–125).
>
> (8) Moreover, it could not be right to pierce the veil where the settlor had gained control of the trust following the trustee's breach of his fiduciary duties, as it would mean that the court would be effecting a notional transfer to the settlor in circumstances in which, if the transfer were made by the trustee without an order of the court, it could be set aside (para. 106).
>
> (9) By art. 10(1) of the Trusts (Jersey) Law 1964, the only grounds on which a trust could be held invalid were set out in art. 10(2). These did not cover the present Settlement, which was a perfectly normal discretionary trust in favour of a defined class of beneficiaries. Moreover, it was not possible to argue that the veil of a valid trust could be pierced, as the trust would still exist even though the property had disappeared, since when assets were held for specified beneficiaries it was wholly inconsistent with the recognition and enforcement of that trust to order the transfer of those assets to another, unless there were an allegation of sham or other fraudulent circumstances (paras. 107–109).
>
> (10) Nor was it practicable to consider piercing the veil of Esteem Ltd. rather than that of the Settlement in order to recover the assets. Even if the company's veil were pierced, the only outcome would be to treat its assets as those of the shareholder, which was the Settlement. It was not possible to pierce its veil so as to treat the assets as belonging to someone other than the shareholder, and so unless the plaintiffs were able to pierce the veil of the trust, piercing the veil of Esteem Ltd. would not assist them (para. 114).
>
> (11) Even if the court were wrong and the doctrine of piercing the veil did apply to trusts, the claim failed on the facts because the settlor did not have ''substantial or effective control'' of the Settlement. The necessary degree of control could only exist if the trustee had abdicated his fiduciary responsibilities. It was not sufficient to show that the trustee, in exercising his discretionary powers, never disagreed with the requests of the settlor, if he considered those requests genuinely and in good faith. There was no evidence that the trustee had abdicated his fiduciary responsibilities here (para. 124).

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then no residuary procedure which allowed the court to ignore the terms of the trust and transfer the remaining assets from the beneficiaries back to the settlor (for the ultimate benefit of his creditors).

Under Swiss principles, Durchgriff usually involves consideration of the foreign law under which a company was incorporated. In this case, the Federal Court considered this unnecessary and that the court below had not acted arbitrarily in applying Swiss law,[17] it seems because provisional measures are dealt with on a summary and urgent basis.

The Federal Court justified the application of these Swiss principles by reference to Article 15 of the Hague Trusts Convention. Their justification for this was based on inheritance type clawback provided for under Article 220 of the Civil Code[18] designed to prevent abuse of rights.

This does not bear scrutiny for at least three reasons. First, Article 15 is an exception to the general principle that beneficiaries' rights should be assessed by reference to the chosen governing law. Therefore, the proper starting point is to ask what the governing law is and examine the position under that law. Then, and only then, should the court consider the application of the exception in Article 15. The Federal Court skipped over Cypriot law and jumped straight to Article 15. Second, Article 181 of the Swiss Civil Code provides that the regime of sharing in the *acquêts* is the default regime in the absence of agreement to apply another regime by means of a marriage contract. It follows that spouses are free to contract out of the default regime and therefore it cannot be a rule which 'cannot be derogated from by voluntary act'.[19] Third, Article 220[20] gives spouse a right to pursue clawback claims against third parties. This right only arises if and when the husband fails to satisfy the monetary award in the wife's favour. The court had not conducted the account, so the sum payable by the husband to the wife had yet to be determined. It follows that at the time, the wife had no 'rights' in relation to trust property which could have been abused. For these reasons, it must respectfully be doubted that Article 15 of the Hague Trusts Convention was engaged.

It seems that the reason the Federal Court gave the Hague Trusts Convention such short shrift was because they considered the husband lacked standing because these were points for the trustees.[21] This seems questionable for three reasons. First, any breach of the injunction was stated to be punishable under Article 292 of the Criminal Code with criminal sanctions. The order is directed against the husband but attached trust property. Second, the wife appeared to challenge the validity of the Trusts. If successful the assets would be held on resulting trust for the husband. Since the husband maintained the trusts were valid, the Federal Court seemed to think that he could not have it both ways, and could not rely on the wife's validity challenge to establish his standing.

17. 'Swiss judges may apply Swiss law in the lieu and stead of the foreign law that would be topical on the merits' (14).

18.

> On Art. 15 of the Hague Convention of 1 July 1985 relating to the law applicable to trusts and their recognition (RS 0.221.371; CLHT) reserving the application of the mandatory provisions designated by the choice-of-law rules of the lex fori, i.e. more especially on the principle of the restriction of the abuse of right which it deemed was part of positive public policy reserved by Art. 18 Swiss Federal Act on Private International Law. In this respect, it deemed that the transfer of acquêts to a trust by a spouse under conditions enabling application of Art. 208, Swiss Civil Code and subsequently of Art. 220, Swiss Civil Code, an action comparable to an action to reduce the value of inheritance rights, constitutes a situation that would be an abuse of right if the wronged spouse were denied the option of attaching as a precautionary measure the assets that would secure the latter's share in the profit.

19. Article 15 refers to:

> 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. . ..

See Professor Jonathan Harris, *The Hague Trust Convention, Scope, Application and Preliminary Issues* at 364–5.

20.

> Article 220(1). Where the property of a spouse who is liable or of his or her succession does not cover the claim of participation in the matrimonial profit due at the division of the matrimonial property, the spouse who has a legitimate claim or his or her heirs can collect from the favoured third parties allocations, which are then to be added to the acquisitions, the extent of the shortfall. The right to bring action expires one year after the spouse or his or her heirs have cognizance of the violation of their right, but in any case ten years after the dissolution of the matrimonial property system. Furthermore the provisions regarding the successoral action for reduction apply analogously, with the exception of those relating to the place of jurisdiction.

21. [7.2].

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Third, the problem with the Swiss Court's narrow technical approach was that the trustees were neither parties to the proceedings (Swiss procedure did not at the time permit joinder of other parties, such as trustees) nor amenable to the Swiss court's jurisdiction. This meant that the trustees would never be in a position to raise the Hague Trusts Convention points.

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Comity and private international law

Since the trust property was situate outside Switzerland, and owned by trustees who were domiciled in Cyprus, the rule of international law which Lord Millett described as 'near universal' applies—that is to say that since sovereignty is territorial, it may only be exercised 'in relation to persons and things within the territory of the state'.[22] Similarly, Lawrence Collins LJ in *Masri v Consolidated Contractors*[23] held:

> The execution of a judgment is an exercise of sovereign authority. It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries.

He continued saying that this:

> was why Lord Donaldson of Lymington MR confirmed that the Mareva injunction should not conflict with 'the ordinary principles of international law' and that 'considerations of comity require the courts of this country to refrain from making orders which infringe the exclusive jurisdiction of the courts of other countries': *Derby & Co Ltd v Weldon* (No's 3 and 4) [1990] Ch 65, 82. It was for this reason also that it has been suggested that the extension of the Mareva jurisdiction to assets abroad was justifiable in terms of international law and comity provided that the case had some appropriate connection with England, that the court did not purport to affect title to property abroad, and that the court did not seek to control the activities abroad of foreigners who were not subject to the personal jurisdiction of the English court.

Later he stated:

> it was concerns of international comity which led the Court of Appeal in *Babanaft International Co SA v Bassatne* to limit the effect of the Mareva injunction on third parties abroad who may have notice of the injunction, by what became known as the Babanaft proviso, which Kerr LJ described, at p 37, as 'the internationally appropriate course' and which Lord Donaldson MR indicated was designed to avoid 'an excess of jurisdiction': *Derby & Co Ltd v Weldon* (No's 3 and 4) [1990] Ch 65, 82–83. The reason, as Nicholls LJ said in *Babanaft International Co SA v Bassatne* [1990] Ch 13, 44, was that 'It would be wrong for an English court, by making an order in respect of overseas assets against a defendant amenable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction. That, self-evidently, would be for the English court to claim an altogether exorbitant, extra-territorial jurisdiction.'

The Federal Court found these issues more troubling than the Hague Trusts Convention issues. They stated that the:

> particularity of this case resides in the fact that the restriction of the power of disposal and the

22. *Societe Eram Shipping Co Ltd v Compagnie Internationale de Navigation* [2004] 1 AC 260.
23. [2008] EWCA Civ 303 at [54].

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> attachment relate to assets located abroad and formally in the names of third parties, companies or trusts.

The Federal Court noted that the Court of Appeal referred to an earlier authority (SJ 1990, 196) where the Swiss court considered it was incompetent to grant a freezing injunction in relation to assets situated outside Switzerland because the assets were foreign and had foreign owners. Conversely, orders of foreign courts freezing Swiss *situs* property would not be amenable to recognition and enforcement in Switzerland.

The Federal Court's judgment refers to unspecified criticism of the 1990 line of authority and seems to have thought that the Court of Appeal was justified in departing from it. Again, the reasoning is not entirely clear, so again we are unsure if this conclusion is limited to these particular facts. The judgment states:

> As part of the settlement of rights in property arising out of the matrimonial relationship, the spouses' claims to the assets relate to all the matrimonial assets regardless of their location. Therefore it does not appear inconceivable that the restriction of the power to dispose of them (*ad personam* measure) also relates to assets located abroad. Failing this, the scope of the protection that Art. 178, Swiss Civil Code is supposed to afford to the spouse whose claims are threatened (see judgment 5A_852/2010 dated 23 March 2011, recit. 3b published in the SJ 2012 I, p. 34) would be reduced. The attachment (in rem measure) appears to be a security measure intended to ensure the effectiveness of the restriction of the power of disposal and to prevent the assets from being acquired by third parties . . .. It seeks to 'immobilize' the valuables to which the restriction of the power of disposal applies (see in this sense: Federal Court Ruling 120 III 67, recit. 2b, p. 70). Hence, it is not untenable to acknowledge that, at the provisional measures stage, the attachment of assets located abroad can be ordered (in this sense, in the context of provisional measures ordered by virtue of Art. 62, Swiss Federal Act on Private International Law: Andreas Bucher, *Loi sur le droit international privé* [Act on private international law] – Lugano Convention, in *Commentaire romand,* 2001, no. 17 re Art. 62, Swiss Federal Act on Private International Law). The issue of the enforcement of this decision and of the channel that must be used for this purpose is another matter.[24]

The Federal Court upheld the order attaching the trustee's property. Not only was the order not subject to the equivalent of a '*Babanaft* proviso' (making it clear that the order did not make third parties abroad subject to the contempt powers of the Swiss court, or equivalent criminal sanctions) but the order had proprietary effect, as it sought to attach the trust property.

Buckley LJ explained the difference between a freezing/Mareva order and attachment in *Cretanor Maritime Co Ltd v Irish Maratime Ltd*[25] as follows:

> [I]t is, I think, manifest that a *Mareva* injunction cannot operate as an attachment. 'Attachment' must, I apprehend, mean a seizure of assets under some writ or like command or order of a competent authority, normally with a view to their being either realised to meet an established claim or held as a pledge or security for the discharge of some claim either already established or yet to be established. An attachment must fasten on particular assets. . .

Buckley LJ said that the injunction 'must be capable of having ambulatory effect' so as to apply to assets from time to time coming within its ambit. One of the leading texts explains:

> a Mareva injunction does not confer on the claimant a pre-trial attachment or any form of security. This is because this is not the purpose of the jurisdiction. It is

24. Paragraph 7.3.2.1 of Fed Court's judgment dated 26 April 2012.
25. [1978] 1 WLR 966.

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> also not the effect of the words used in the order. Mareva relief does not confer on the claimant any proprietary right or security over assets which fall within its ambit.[26]

Since the Swiss order affected foreign property owned by foreign third-party owners, it could be said, for reasons described earlier, that the Federal Court had exceeded the bounds of comity and exercised exorbitant jurisdiction. In view of this, and the general principles on recognition and enforcement of *in rem* judgments, reflected in Dicey rule 40,[27] there may be real doubt as to whether the Swiss order would be recognised and enforced in Cyprus. The words of the Royal Court of Jersey in *Re the Fountain Trust*[28] are apposite:

> the court regards it as unlikely that an English Court would so exceed the normal bounds of comity as to purport to vary a settlement governed by Jersey law administered in Jersey by Jersey trustees which have no connection with England save that some of the beneficiaries resided there.

Conclusion

This was one of the first opportunities since Switzerland's ratification of the Hague Trusts Convention for the Federal Supreme Court to consider and apply foreign trusts. It therefore serves as an important signal of the country's willingness to respect the settlor's chosen law. It is likely that the judgment will be viewed as a disappointment. The fanfare that greeting Switzerland's ratification of the Hague Trusts Convention rings a little hollow. Whilst the Federal Court considered the trusts were valid, it concluded that the Court of Appeal had not acted arbitrarily in deciding, for the purposes of the matrimonial property regime, that the husband could be considered to be the sole beneficial owner or in a position of control. The reason for these conclusions is not fully explained, making it difficult to divine whether these conclusions are confined to the facts of the case, or might be of wider application. Cypriot trusts law, which is supposed to determine questions over the nature and extent of a beneficiary's interest under a trust, was overlooked. Basic consideration of Cypriot trust concepts suggests that the husband did not own or control trust property. The Federal Court invoked Article 15 when, respectfully, there must be some basis for doubting whether this article was engaged. The Federal Court applied concepts of Swiss law that relate to companies, and have no obvious application to trusts. The Federal Court considered it unnecessary to apply foreign law when considering provisional measures—because of the urgency and summary procedure. It remains to be seen whether this establishes a general principle in all applications for provisional measures. The Federal Court paid little or no regard to the interest of third parties, such the trustees or the other beneficiaries of the trusts. It defied Article 11 of the Hague

26. Gee on Commercial Injunctions (5th edn, published 2004) at 3.001 and cases cited in footnote 3. See also *Babanaft International Co SA v Bassatne*. [1990] Ch 13 at 32 where Kerr LJ held at 32, that:

> there can be no question of such orders operating directly upon the foreign assets by way of attachment, or upon third parties, such as banks, holding the assets. The effectiveness of such orders for these purposes can only derive from their recognition and enforcement by the local courts, as should be made clear in the terms of the orders to avoid any misunderstanding suggesting an unwarranted assumption of extraterritorial jurisdiction.

Similarly, Nicholls LJ [1990] Ch 13 at 46 held:

> The enforcement of the judgment in other countries, by attachment or like process, in respect of assets which are situated there is not affected by the order. The order does not attach those assets. It does not create, or purport to create, a charge on those assets, nor does it give the plaintiff any proprietary interest in them. The English court is not attempting in any way to interfere with or control the enforcement process in respect of those assets.

27. *Dicey Morris & Collins* (14th edn published 2006) at rule 40 (14R-099):

> A court of a foreign country has jurisdiction to give a judgment *in rem* capable of enforcement or recognition in England if the subject-matter of the proceedings wherein that judgment was given was immovable or movable property which was at the time of the proceedings situate in that country. (2) A court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovable situate outside that country.

28. [2005] JRC 099.

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Trusts Convention.[29] Swiss Courts have moved—from 'fortress Switzerland'—onto the other end of the spectrum, assuming exorbitant jurisdiction and disregarding norms of comity. What we can say, in the light of this, is that Switzerland is the place for those seeking worldwide Mareva relief. It is likely to encourage settlors, and their advisers, to seek ways of avoiding Swiss Courts.

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29. Which provides:

> A trust created in accordance with the law specified by [in this case Article 6 – the law chosen by the settlor] shall be recognised as a trust.