The Offshore Tax Planning Review

LA FIDUCIE

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I An Overview

History

The proposed new law introducing La Fiducie into France is by no means the first time that French law has known a trust or its equivalent. As in England, where the use of trusts started in the Middle Ages, particularly in connection with the Crusades, we can find the corresponding vehicle was introduced into the law in France, known at that time as L'Affidation or L'Affidavie. The mechanism was founded on the same principles of "trust" and "confiance" as its equivalent in England but it seems that the legal entity disappeared in France when the feudal system itself fell into disuse, and when the Code Civil was drafted no trace of a vehicle equivalent to La Fiducie was included in it.

At the same time as the trust was falling into disuse in France the Anglo-Saxon jurisdictions were nurturing and developing the trust concept and it is as a result of this that the trust we know today in the Anglo-Saxon jurisdictions has developed to a high level of sophistication, whereas in France nothing exists. Indeed, over the years since the turn of the last century when first it was proposed to try and introduce some form of trust in France, the Chancellerie has consistently been opposed to the introduction of something so radical as the trust as the English law knows it, a vehicle which the majority of French lawyers have found very difficult to get to know and to genuinely understand. Regrettably, I fear, this situation still prevails today and until recently the notion of a trust, which is completely unknown to the French Code Civil, was regarded very much as a foreign intrusion.

The Hague Treaty

Why then since 1986 have the legal draftsmen of the Ministry of Justice been discussing the introduction of a form of trust in France?

The principal reason arises from the major conference on private and international law that was held in The Hague resulting in the signature by France amongst others of the Hague Treaty on 20th October 1984. Although this has not yet been

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ratified by France, the French saw very quickly that two results would follow from the introduction of this treaty. The first was that they would be forced, once the treaty had been ratified, to recognise forms of judicial entities which they could not equate to anything equivalent in their jurisdiction.

The second and perhaps more pragmatic result, and I suspect more important result, was that the French political machine could foresee the possibility that if they did not introduce some vehicle into their legislation as a direct substitute for the trust many French owners of French assets would create a trust in a jurisdiction (other than France) which recognised trusts in order to protect assets in France and give benefits to beneficiaries in France.

Another reason for introducing the law was that the French, unlike some of the other Civil Law countries who have introduced Trust Law into their legal framework by legislation, were not prepared just to adopt the Anglo-Saxon form of trust, because it was based on principles that were directly contrary to basic principles of French Law. For these reasons a detailed study was undertaken by the French Ministry of Justice and the recommendations they came up with were that a new form of legal entity should be created, similar to but not the same as a trust, which preserved the principles of French Law and which gave the French Courts and, more importantly, the French Revenue, a basis on which to view other similar vehicles when they owned or acquired property of any sort in France.

The Steps so Far

The Avant-Projet

The Avant-Projet of the Trust was produced first in 1989 and envisaged a vehicle very similar to the English form of life interest settlement. It was based on a contractual obligation between (the Constituant) the person that we would call the settlor and (the Fiduciaire) his trustee, by which the settlor laid down the duties and obligations attributed to and required of the trustee.

It was the production purely of the legal fraternity and had not at that stage been commented on or amended by any of the reviewing bodies who would be required to look at it, including the French Revenue.

Conseil des Ministres

Since the Avant-Projet was produced, it has been adopted by the Council of Ministers, which is the first reviewing body and is designed to approve the passage of the legislation in principle.

French Revenue

It has been the French Revenue who have substantially changed the original concept and it is now in process of going through the Assemblée Nationale.

II La Fiducie

Why the Delays Since 1985?

Before going on to comment on the specific provisions of the legislation, I emphasise that it is only as it stands at the moment because it is likely to be revised quite substantially in its passage through the Assemblée Nationale.

The Legal Sceptic

It is fair to say from the start that the French legal fraternity have always regarded Le Trust, as the English version is known, with suspicion and for many years - as can be seen from decided cases in the French Courts - French lawyers have either ignored it, by trying to equate it to companies or other similar vehicles known to French Law, or misinterpreted the general concept. There have been some notable exceptions. The "Le Gallais" case is perhaps the most well known one but there are others, going back as far as 1926. One of the reasons for this scepticism is that the French professionals consider that the Civil Code provided for many events a combination of means and procedures that would effectively arrive at the same result. Within France, lawyers were encouraged to use the operations and categories of ownership allowed by the Civil Code and not to consider either the advantages or disadvantages of utilising other forms of ownership.

The Revenue's Point of View

The other principal reason for delay in the introduction of a new vehicle in France has been the standpoint taken by the Revenue who, even after the Avant-Projet was produced, refused to comment on it and I think it is reasonable, without being unnecessarily critical of the French Revenue, to say that they were rather ostrich-like and hoped that if they took no notice of the new animal it would run away.

The fact is, however, that there has been a lot of pressure, not just from the Ministry of Justice, but also and probably more particularly, in the areas of professional and business organisations, who forced the introduction of the original law and wished to see it enacted. It was only last year that the Revenue finally came out with their proposals as far as taxation of the proposed Fiducie is concerned and these, I believe, are designed to discourage the use of the Fiducie in most of its more adventurous proposed areas.

What Areas is it Intended to Cover

Before going on to look at the legislation in detail, it might just be interesting to reflect on the areas that those who drafted the legislation expected it would be used in. The first and primary category of use was in the financial and banking areas largely to protect lenders. The second most important category was pension funds of one sort or another, and it is interesting to note in passing that recently there has been quite a lot of talk amongst the politicians in England that the "trust concept" is no longer a satisfactory one for pension funds in the UK. It remains to be seen whether anything will actually follow from these particular utterances.

In the so-called private field it was seen to be a convenient means to manage and organise family assets, particularly where a family owned a corporate entity. It is also interesting to note that it was from this area perhaps most of all that the pressure came to introduce something equivalent to the Fiducie because one of the problems that is arising in France at the moment is that the large French company is very much a minority and the vast majority of successful French businesses have been built up within the family with either grandfather or father starting in a small way immediately after the Second World War. Having successfully built up a very large amount of capital the successful businessman is faced with the fact that under present succession law it will have to be equally divided amongst his children (subject of course to the "quotité disponible") on his death, notwithstanding that he may not consider it desirable, nor may it be the wish of his legatees that they should in fact inherit a part of the business and therefore private industry. Advisors have been looking more and more intensively for ways to ensure that family businesses stay together. The Fiducie is seen as a possible solution to this.

The constitution of a family savings fund is another possibility where the Fiducie might be used, together also with a means of guaranteeing alimony payments after divorce.

The use of a Fiducie to ensure that appropriate assets go to a mentally defective member of a family who would otherwise have to have these assets looked after by a court (which would be expensive) is yet another possibility.

There will of course be a multitude of uses in the private sector, many of which have probably not even been thought of yet, but these are just some of the suggested uses.

Finally, the other area which is suggested as a possibility is the charitable and cultural area where it would be possible to create a form of foundation to maintain the arts or a charity which funds the arts.

None of these will surprise an Anglo-Saxon lawyer, but it is worth noting that the ideas that are put forward for the use of the Fiducie are very similar if not the same as those that we use the trust for. A notable exception is the tax planning

aspect, which of course is not something that the French see as a possibility as far as the Fiducie is concerned, largely because of the problems of the "ordre public".

The Obstacles to the Introduction of the Fiducie

I mentioned earlier that there were the legal sceptics who saw difficulties in introduction of the Fiducie and were able to demonstrate that there were similar or equivalent vehicles already incorporated in French Civil Law. There are three principles of French law which required that any new vehicle was something other than the trust. These principles affect the whole outlook and attitude in France both towards the new vehicle itself and to the way in which it will be operated and interpreted if introduced as at present proposed. The three obstacles are the following:

The Principle of Unity of Estate

A fundamental principle of French law requires that every person has his *own* estate and *only one* estate and that every estate is automatically attached to one person and that no estate can exist without a specific owner.

The idea, therefore, that there can exist a beneficial estate being separate and apart from the legal estate, which of course is the basis behind the Anglo-Saxon Trust Law, is a complete anathema to the French They have had to preserve this fundamental principle in the legislation introducing the Fiducie. Under the legislation by which the Fiducie is introduced you will see from Article 2069 that the assets in the Fiducie are specifically excluded from forming part of a deceased fiduciaire's estate and the same is also true where a corporate fiduciaire goes into liquidation. The taxation provisions which come later in the draft law also ensure that such assets are looked at as a separate taxable entity, at least so far as the estate of the Fiduciaire is concerned, with one or two exceptions, which we will touch on later. In fact, what the legislative draftsman has tried to create is a block of separate assets within the Fiduciaire's own estate. In other words, the Fiduciaire or trustee is the legal owner of the assets but they form a segregated part of his estate when it comes to his personal debts, his personal estate on death or, in most cases, for taxation purposes.

The Right of Ownership

The second and fundamental principle of French law which had to be preserved was the right of ownership of any property. Under French law, there is only one "estate" in property although this can be sub-divided into two sub-sections - what is known as the "nue-propriété" (or right to sell) and the "usufruit" (or the right to use or enjoy the income) of that property. The draftsmen of the new legislation were specifically prevented from creating a new notion of fiduciary ownership because this would have conflicted with the absolute character of the right of

ownership. They have got over this particular problem by ensuring under the terms of the legislation that the settlor divests himself of any right of ownership once he makes the contract and transfers the assets to the fiduciaire. The beneficiaire does not have any right to ownership of the assets in the fiducie until such time as the fiduciaire has accomplished his mission given to him in the contractual document and the property is distributed to the beneficiaire. After the date of the settlement, and until termination of the fiducie, the fiduciaire has the full right of ownership as required by French law.

The Ordre Public

The third and perhaps most important obstacle is the sanctity and untouchability of the French "ordre public" especially in relation to the rules of succession, and it is without doubt this obstacle that is going to affect not only the way in which La Fiducie is constituted in the law which introduces it but also the way in which it is used. All involved in introducing La Fiducie have declared themselves, to be completely immovable when it comes to changing the rules relating to the "réserve héréditaire" and to the principle of equality amongst legatees. Again, as we shall see looking at the detailed legislation, any fiducie that infringes what is known as the réserve héréditaire will be deemed to be null and void to the extent that it does infringe this, and the taxation aspects are also based on this particular concept.

Those then were the objections that caused delays in the introduction of the law since 1985 and I think may still cause problems when the law comes to be debated in the Assemblée Nationale.

III Result of the Deliberations

The Structure

The Definition

Article 2062 which is the second Article in the draft law clearly defines the Fiducie

> as a contract by which the constituant [settlor] transfers all or part of his assets and rights to a fiduciaire [the trustee] stipulating that the latter acts to achieve a pre-determined aim or aims for the benefit or in the general interests of beneficiaires.

The important word in the Article is the word "transfére" because this is the effective conveyance of the rights under French law from the constituant to the Fiduciaire. With the execution of the document, the transfer of property into the ownership of the Fiduciaire is achieved and thus the ownership passes from one to the other.

It is interesting to note that the Article specifically provides that the settlor himself can be a beneficiary. There will of course be tax consequences of this happening, but it is very much contrary to similar organisations and operations as used in the UK.

The second paragraph of this Article is also an important one in that, apart from stating specifically that the Fiducie is subject to the rules set out in the law, it also lays down that the "ordre public" is supreme and nothing either in the law or in the constitution of the Fiducie can override its principles. There are basically three main governing principles behind the Fiducie:

(1) that property transferred constitutes a separate part of the Fiduciaire's estate;

(2) that the function and responsibility of the Fiduciaire are specific and must be either specified in the contract itself or must be included in the responsibilities envisaged by the law; and

(3) that third parties should be protected as against the acts of the Fiduciaire.

Written Contract and its Registration

One of the principal changes that have been made both by the Revenue and by the Conseil des Ministres is to change the original conception of the Fiducie from something that could be concluded between two individuals either verbally or in writing to a formal written legal contract. Those readers familiar with French law will express some surprise, I suspect, that this particular provision was not included in the first place because for a transfer of property to be effected in France normally that transfer would have to be made in writing, would have to be authenticated and the document would have to be registered in some way. Curiously, although the amendment to the law has been made ensuring that the contractual side must now be in writing, it does not provide that it needs to be authenticated or registered even though the fiscal provisions require that registration tax or stamp duty should be paid. It may well be that this particular aspect will be changed in the passage through the Assemblée Nationale or possibly will have to be dealt with later once the practice becomes evident.

No Presumption: Must be Express

Because the contract has to be in writing there is no presumption of the creation of a Fiducie in circumstances where there might be some doubt, and it is specifically provided in Article 2063 that the creation of a Fiducie must be express.

Duration

Article 2063 is also the Article which deals with the duration of the Fiducie.

French law of course has no law of perpetuity, so that it has to itself express a period over which the contract can be concluded, and you will see that Article 2063 provides that this period will be for 99 years.

Nomination of Beneficiaries

Articles 2063 and 2064 deal with the nomination of beneficiaries. It is required that the beneficiaries are either nominated directly or if they are not specifically named they must be capable of identification following rules that are laid down in the Fiducie itself. It is also worth noting that once the Fiducie has been established, if its principal object is the transfer of assets or rights from the constituant to beneficiaries who are people other than the constituant himself, then the class of beneficiaries who are named or identifiable cannot subsequently be modified.

The Trustee as Beneficiary

In certain circumstances a trustee himself can be a beneficiary; this appears in Article 2065, and applies only to a Fiducie that is drawn up with a view to guaranteeing some form of loan. It is envisaged that in such circumstances, particularly if a bank were involved, that a Fiducie would be constituted under which the assets securing the loan would be vested in the lender who would himself be named as the principal beneficiary of the Fiducie.

Wide Powers to Fiduciaire: Personal Execution

Reading through the legislation you will see that the Fiduciaire can be given very wide powers because there are very few restrictions on what the constituant can or cannot ask him to do. However, he is required by Article 2066 to execute his responsibilities personally and not to delegate them, with the exception of one or two limited areas where that delegation continues to allow him to exercise his responsibility and to completely control the delegatee.

Who can be a Fiduciaire?

Article 2067 resulted from a great deal of discussion in the early stages as to whether or not only certain people should be allowed to be trustees, and at one stage it was proposed to set up a separate register of Fiduciaires who would be competent to act as such. It was generally felt by those debating the question that the risk of having a fraudulent Fiduciaire if no restriction was imposed was less than the risk of discouraging people from using the vehicle if only certain registered entities could act.

There is therefore no requirement for a Fiduciaire to be a member of a registered body, but in provisions that are similar to most of the law governing trusts no-one can be a Fiduciaire if he is prevented for any reason from being a director of any

form of corporate entity, if he is personally bankrupt, or if, as a corporate entity, he is in liquidation. There is one further disqualification, and that is that an individual will be prevented from being a Fiduciaire if he is a condemned criminal or has been condemned for dishonourable conduct or conduct against public morality.

There may also be other restrictions which would prevent a person or corporation becoming a Fiduciaire if the property owned by the Fiducie itself demands special requirements.

Removal of the Fiduciaire

There are provisions in the law for the removal of a Fiduciaire either at the request of a settlor or at the request of beneficiaries if they can show cause. These provisions are included in Article 2070-2, and such cause would have to be demonstrably one that breached the "confidence" shown in the Fiduciaire by those who had appointed him. Much emphasis is made of this particular aspect in the original discussions relating to the legislation, and it is clear that the legislators themselves were very concerned to show the equivalence of the Fiducie to the trust concept known in the Anglo-Saxon jurisdictions. Incidentally, if such action on the part of either settlor or *all* the beneficiaries is successful it will have the effect of bringing the Fiducie to an end.

Events Terminating a Fiducie

Article 2070-5 provides for a series of events which will automatically terminate the Fiducie. There are two occasions where the beneficiaries can influence the determination of the Fiducie. I have already referred to one. The second is where the Fiduciaire has effectively achieved the object for which the trust was created, and is able to distribute to all the beneficiaries.

A Fiducie After or On the Death of the Settlor

Notarial Acte Required to Constitute

Chapter 2 of the new law deals specifically with Fiducies that are created as a result of or in expectation of death. If a Fiducie is conditional on the decease of a settlor, the document creating the Fiducie must be prepared by a Notaire as a notarial acte. No provision however is made for that acte to be registered, although I presume that if passed before a Notaire, it would be authenticated because that would be the normal process.

Protection of Réserve Héréditaire

Article 1100-2 specifically protects the "réserve héréditaire" and if the value of the

Fiducie following the death of the settlor exceeds the total of the settlor's disposable quota, then the Fiducie has to be reduced by those rules which apply to the reduction of inter vivos gifts already set out under French law. This means effectively that either the trust itself will have to pay part of its assets into the réserve héréditaire or, if the "trust" asssets have already been distributed, the beneficiaries of that Fiducie may well themselves be called upon to pay back certain of the assets that they have received.

On the assumption that normally a Fiducie would be dealt with inter-family, it is probable that the drastic provisions requiring repayment would not actually or would rarely be exercised, but it is certainly worth noting that that is the position, because it means that effectively it is never going to be possible by using a Fiducie for example to favour one child over another, or for any meaningful planning to be carried out for a deceased person's estate as we would do in the UK.

Fiducie Part of Disposable Quota

Article 1100-3 specifically provides that the value of the assets and rights transferred into the Fiducie will always be deducted from the disposable quota of the estate of a settlor on death. There are detailed provisions as to how the value of the assets should be arrived at. They will be valued at the date of the death of the settlor if they have not been transferred to the beneficiaries. If they have been transferred already then they will be valued at the date on which they were actually transferred out of the Fiducie. If they have been transferred away by the beneficiaries they will be deemed to be valued at the date of the transfer away, but the fact that they have been transferred out of the hands of the beneficiaries will not relieve the beneficiaries from having to repay them.

Accounting Requirements

Chapter 3 of the legislation imposes on the Fiduciare some quite complicated accounting requirements, including the following:-

1. He must maintain detailed accounts of the value of the assets and rights including debts and credits owed to the Fiducie.

2. He must also maintain a separate profit and loss account for the Fiducie showing details of dates and payments.

In principle, his obligations will equate to the similar obligations imposed on accounting by managing directors of companies in the Code de Commerce, and the Chapter then goes on to provide for a legal right for beneficiaries to require copies of the accounts as and when they feel appropriate, and if necessary the beneficiaries may apply to the Court for the production of those accounts.

Taxation

Inevitably the most important area that one needs to look at in connection with the Fiducie is taxation, because it is this I suspect that will have the greatest effect in determining whether it is used at all or whether the provisions are so penal as to end in discouraging people from setting up Fiducies.

I have divided up the areas of taxation into five:

1) on the creation of the Fiducie
2) on the death of the Settlor
3) the wealth tax area
4) direct taxation
5) VAT and other taxes that may be charged to the Fiducie

The Creation

Gifts Tax Payable

Where a contract for a Fiducie transfers rights or assets of whatever type from a settlor to a third party who is distinct from the settlor and transfers nothing in return to the settlor, then on creation of the Fiducie the normal gifts tax (Droits de mutation à titre gratuit) will be payable.

In every other case, the Revenue will consider that the assets or rights transferred into the Fiducie and their revenues remain the property of the settlor.

Incidentally, just to confuse matters, the legislation has introduced a new definition of the person to whom the rights and assets are transferred, and he is defined as the "attributaire". In most cases he will be the same person as the "beneficiaire" but not always where special considerations apply.

Different Levels or Proportions of Tax Payable

Where the attributaire and the beneficiaire are not the same, and this will normally be in the case of a life interest trust, the beneficiaire will normally be treated as the life tenant, and the attributaire as the reversioner, and tax will be payable accordingly. Again, under the French Revenue requirements, as laid down by the Code Fiscal, there are two different levels of tax for calculating the tax due from the respective individuals.

Successive Beneficiaries

Where there are successive beneficiaries, the tax will be claimed by evaluating the rights of the first beneficiary and will not take account of any future beneficiaries. Instead, when a new beneficiary becomes entitled, his entitlement will be calculated by reference to the fraction of the value of the fund to which he becomes entitled and he will pay tax accordingly. The same principle will apply to any transfer of an interest within the Fiducie, a separate valuation will be carried out on each occasion and a value established for tax purposes; the tax will then be assessed and payable accordingly.

There is not sufficient space in the article to allow me to go into more detail on the gifts tax proposals, but there are more detailed proposals contained in the text of the law, and I strongly advise anyone considering using a Fiducie to look at these in detail before drafting it.

Creation on Death

Where the Beneficiaries are Known: Normal Gifts Tax

Where a Fiducie is created on the death of a settlor, and the beneficiaries are known, then gifts tax will be payable according to the same formula as that which applies to an inter vivos Fiducie. The settlor's assets will be valued on death and the proportions attributable to the various beneficiaries will bear their own rate of gifts tax. What is not clear from the legislation, although I have no doubt that it will be made clear at some stage, is whether or not the beneficiaries are entitled as they would be in the case of a straightforward gift on death, to make use of the free proportion of the estate attributable to each and every person on a death. At present, that amounts to some 330,000FF for a spouse and 300,000FF for ascendants or descendants and 10,000FF for other beneficiaries per individual (not per estate) and it is not clear whether the Fiducie will count as part of this free quota. If it does, then the position is clearly ameliorated to some extent, although what will happen I presume is that the share that any beneficiary inherits in a Fiducie, if he is designated and identified as such in that document, will be aggregated with any other gifts or benefits which he inherits as a result of the death.

Where the Beneficiaries are Unknown: Non-related Persons Rate

The sting in the tail however is where assets of a settlor are included in a Fiducie where no beneficiaries are ascertainable (i.e., in a structure wquivalent to a discretionary trust). In such circumstances it is specifically provided that notwithstanding that the beneficiaries eventually turn out to be members of the settlor's family, tax will be charged on the

gift as though it were a gift between non-related persons, i.e., at the most expensive rate. This means that any attempt to create a form of discretionary trust is effectively being outlawed in France by the French Revenue.

Wealth Tax

No Separate Aggregation

Article 16 of the Chapter dealing with the Revenue provisions deals with the incidence of wealth tax on assets comprised in Fiducies, and they will not escape it. Going back to the doctrine of one-estate: one-person, the Fiducie itself will not, as in the Anglo-Saxon trust, create a separate estate and therefore not be aggregated with other assets. In France, assets or rights transferred into a Fiducie will form part of the estate for wealth tax purposes of the beneficiary who is allocated "ownership" of those assets in the Fiducie. I use the word "ownership" here in inverted commas, because we have already established that in fact the assets will be in the legal ownership of the Fiduciaire.

Beneficiaries to Pay Wealth Tax Without Resort to Means

One can only hope that this particular provision will not go through as drafted, because on the face of it, a beneficiary could be assessed to wealth tax on assets that he does not own or control, and might not be able to provide any income or capital from which to pay the wealth tax in the first place. It should not be forgotten that the assets in question will almost certainly be in the hands of a Fiduciaire who, unless the Fiducie otherwise authorises him in its constitution, will be under an obligation to maintain these assets in his own hands, and the beneficiary will therefore be unable to claim any help from him towards the payment of the wealth tax. It is perfectly true that the ceiling for wealth tax in France now is some 4 million FF, so that the Fiducie would have to be a very substantial vehicle if a beneficiary were likely to be assessed to wealth tax, but the fact is it seems that is what the law provides.

No Specified Beneficiaries: Wealth Tax at Top Rate

The position is worse still if the Fiducie does not specify the beneficiaries or specifies beneficiaries who are not yet born. In these circumstances the Fiduciaire has to pay the wealth tax and no matter what the value of the Fiducie itself, he pays that wealth tax at the highest rate of wealth tax applicable, which is at present 1.5% of the capital.

If the first type of Fiducie was something of a poisoned pill in the hands of the beneficiary, it seems that the Fiducie with non-designated beneficiaries is nothing short of a suicide pill.

Direct Taxes

Stamp Duty

Where beneficiaries are known, the beneficiaries and an attributaire are liable to stamp duty on the document when it comes into effect on the death of a settlor, the stamp duty being assessed on the value of their shares at that time. In each case, the beneficiary or attributaire will be responsible for the payment of the relevant proportion of duty by reference to their share. Stamp duties are due within one month of the date of the document by which the Fiducie is created, modified or terminated, and there will be further stamp duty due in the event of a beneficiary succeeding to the Fiducie after it has already been created. There is a minimum stamp duty of 5000FF for the formation of a Fiducie and 1000FF for any subsequent acts or declarations.

Income Tax

Income tax is payable on the income derived from the Fiducie. Here again, it seems to the writer possible that a beneficiary may be liable to pay income tax on income that he never actually receives, because it is the beneficiary who is liable to pay the income tax on the reserves of the Fiducie, not the fiduciaire, and it is possible (in theory at least) that the fiduciaire would not be empowered to distribute the income to the beneficiary to enable him to pay this. It is only if the beneficiary is unknown that the fiduciaire becomes liable to pay the income tax from the funds that he receives as income to the Fiducie. The only case in which this does not happen is where the settlor himself receives the income, or his spouse or his minor children, or where the Fiducie itself is revocable. In those circumstances the settlor himself will be responsible for paying income tax on the benefits derived from the Fiducie, and again it is not difficult to see that there could be circumstances where he himself would not actually receive the money from which to pay the tax. There are quite detailed and complicated provisions relating to the taxation of various other categories of persons, and to different sorts of income.

Professional Income of the Fiduciaire

Where payments are made out of the Fiducie to a fiduciaire for acting as trustee, these will be taxable in his hands as though they were professional income and will be subject to the same provisions as apply to this in the Code Général des Impôts.

TVA and Other Taxes that may be Charged

TVA

There are no specific provisions for TVA in the legislation, but merely a reference to the fact that a Fiducie will be subject to TVA in any circumstances and in any transaction where it would be payable in other circumstances. The Fiducie itself will bear the cost of the TVA which will be payable by the Fiduciaire.

Other Taxes that may be Charged

Where the Fiducie is exploiting a business of one sort or another, then professional tax will also be charged and will be imposed on the Fiducie as a separate entity.

Capital gains tax is also payable where it would normally fall to be due on disposals from the Fiducie or by the fiduciaire of property forming part of the Fiducie.

Other Provisions in the Law

Liability of the Fiduciaire

The final section of the law relates to the various liabilities and enforcement of rights under the contract of the Fiducie. As far as the Fiduciaire is concerned, it is clearly enacted that his liability is a personal one, both to the constituant and, insofar as he has obligations imposed on him, to the beneficiaires. The law provides that this will affect the rights of claim by any beneficiary for non-performance of his duties, and as I said earlier, the Fiduciaire can have sanctions imposed on him by the Court in the event that he fails to maintain the trust or "confiance" placed in him by the constituant. Usually, an action by beneficiaries or the settlor will have the effect of terminating the contract because of the theory behind the law that it is a contractual obligation that is created. The remedies of specific performance and such-like do not of course exist in France, and consequently the only available remedies are the termination of the contract and possibly damages in the event that any of the beneficiaries or the settlor can prove loss.

Protection of Third Parties

As far as third parties are concerned, one of the principal problems in the early debates over the format of the Fiducie concerned the protection of third parties, particularly where a Fiducie was set up specifically to avoid payment of debt. The law specifically provides in Article 40 of s.5 (amongst others) that third party

rights to assets will have the effect of nullifying a transfer to the Fiducie if a third party can prove that he would otherwise have a claim against assets of the settlor. There is also the possibility that an injured third party could bring an "Action Paulienne" which alleges an "abus de droit". This would normally have to demonstrate that the "ordre public" has been breached in some way or another, and in those circumstances third parties can enforce not only the break-up of the Fiducie but also the disposal of its assets in favour of the third party should that be a suitable remedy.

Effects on Trusts

Perhaps one of the most important questions in the light of the fact that France is a signatory to the Hague Convention is what will be the effect on trusts constituted in other jurisdictions as a result of the introduction of the new law in France.

I would particularly draw your attention to Article 41 of s.5, which specifically provides that the terms of the present law will apply to any assets or rights which form part of a Fiducie **or a similar institution** (cited by the Hague Convention of 1985) subject only to the rules of territoriality provided for in the Tax Code. This is the Article that concerns me most as an Anglo-Saxon lawyer, because I believe it will be the Article that will be cited by the French Revenue to try and tax any trust or discretionary trust which attempts from now on to own property, either directly or indirectly in France. Up to now, the French Revenue have been ambivalent towards ownership of assets in France by trusts, leaving them as something which belongs to another jurisdiction, and merely treating the trustees as the legal owners. However, it seems likely, particularly in the case of substantial property holdings, that from now on, if the provisions relating to the Fiducie are applied, you could be facing some very high tax charges for any property owned by a trust (or a company which itself is owned by a trust outside France).

Just to take one simple example - supposing that you have a discretionary trust which decides to invest in a French company. The tax burden that will be faced by the trustee of that trust in so doing will be a possible tax of 60% gifts tax on the share that the investment in France represents to the beneficiaries of the trust. Bear in mind that in a discretionary trust you would be dealing with the equivalent of a Fiducie in which the beneficiaries are neither identified nor identifiable. In addition, there would be a tax on income amounting to anything up to 56.8%. On top of that, because the beneficiaries are not identified, the capital would be taxed annually for wealth tax in an amount of 1.5% (subject to the value being over the minimum level for wealth tax). All the above are supposing current levels of tax are maintained. Overall, that represents a pretty heavy tax burden and is not designed to encourage investment in France by discretionary trusts.

A colleague of mine who deals with offshore trusts for French citizens, finished a recent article that he wrote as follows:

> "The Fiducie can be a mine of innovation. The taxation risks being a minefield."

The fact is that many French professionals have been hoping for an innovative and more open attitude towards trusts and hoped that this might be included in the provisions of La Fiducie. Unfortunately, it seems that this is not to be the case, and I suspect that the hoped-for attempt to stop the drain of French assets being vested in offshore vehicles is unlikely to succeed unless, during the course of its passage through the Assemblée Nationale, the attitude of the tax authorities in France towards La Fiducie changes quite substantially.

As far as those practitioners who deal with trustees or beneficiaries in other jurisdictions thinking of investing in French property of any kind through a trust or a sub-company of a trust - You have been warned!