

Title	1985 Trusts Convention: Update
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1985 Trusts Convention: Update

I. Introduction

- 1 At its March 2023 meeting, the Council on General Affairs and Policy (CGAP) mandated the Permanent Bureau (PB) to continue work, in partnership with relevant subject-matter experts, and subject to available resources, to study the interpretation of analogous institutions for the purpose of Article 2 of the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (1985 Trusts Convention), with a focus on:
 - a. clarifying the divergences in interpretation between the English and French versions of the Article; and
 - b. exploring whether analogous institutions would include foundations and endowments, institutions and developments relating to the *waqf* in the Islamic legal tradition, and decentralised autonomous organisations (DAOs) and other similar structures.¹

Subject to available resources, CGAP also mandated the PB to continue monitoring developments relating to the 1985 Trusts Convention in order to identify areas for review and future work, and to develop promotional materials on the 1985 Trusts Convention.² This Prel. Doc. reports on the work carried out in 2023 in fulfilment of this mandate.

II. Status of Work

- 2 The 1985 Trusts Convention entered into force on 1 January 1992 and is to date in force in 14 jurisdictions.³ On 27 November 2023, pursuant to Article 32, the Netherlands extended the 1985 Trusts Convention to Curaçao. In accordance with Article 30, the 1985 Trusts Convention thus entered into force for Curaçao on 1 February 2024. The 1985 Trusts Convention establishes provisions common to trusts, with the unique purpose of building bridges between different legal traditions. The main objectives of the 1985 Trusts Convention are to determine the law applicable to trusts and to govern the recognition of trusts.⁴

A. Divergences in Interpretation between the English and French Versions of Article 2

- 3 As mandated by CGAP and taking into account the limited resources available to the PB, the PB continues to study the divergences between the English and French versions of Article 2 of the 1985 Trusts Convention. In this regard, the PB has also continued to monitor developments in various jurisdictions in relation to trusts and other analogous institutions, building on the overview of jurisdictions that was presented to CGAP ahead of its 2023 meeting.⁵ Monitoring over the last year has shown that several jurisdictions around the world continue to develop, enact and consider

¹ Conclusion & Decision (C&D) No 46 of CGAP 2023, available on the HCCH website at www.hcch.net under “Governance” then “Council on General Affairs and Policy” and “Archive 2000-2023”.

² C&D No 47 of CGAP 2023, available on the HCCH website at www.hcch.net (see path indicated in note 1).

³ The Convention is in force in Australia, Canada (excluding Quebec), China (Hong Kong Special Administrative Region only), Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands (incl. extension to Curaçao), Panama, San Marino, Switzerland, and the United Kingdom (incl. extensions to 13 Crown Dependencies and UK Overseas Territories). The United States of America (USA) and France have signed the Convention but not yet ratified it. A status table detailing *inter alia* the dates of signature, ratification and entry into force of the Contracting Parties to the 1985 Trusts Convention is available on the HCCH website at www.hcch.net under “Instruments” then “Conventions and other Instruments” then “1985 Trusts Convention” then “Status table”.⁴ A.E. von Overbeck, “Explanatory Report on the 1985 Hague Trusts Convention”, in Proceedings of the Fifteenth Session (1984), Tome II, Trusts - applicable law and recognition, La Haye, Imprimerie Nationale, 1985, pp. 370-415, paras 28-29.

⁴ A.E. von Overbeck, “Explanatory Report on the 1985 Hague Trusts Convention”, in Proceedings of the Fifteenth Session (1984), Tome II, Trusts - applicable law and recognition, La Haye, Imprimerie Nationale, 1985, pp. 370-415, paras 28-29.

⁵ “1985 Trusts Convention: Updates and possible future work”, Prel. Doc. No. 10C of December 2022, available on the HCCH website at www.hcch.net (see path indicated in footnote 1).

legislation of relevance to the 1985 Trusts Convention. For example, on 25 September 2023 the United Arab Emirates (UAE) enacted a Federal Decree by Law No 31/2023 Concerning Trusts⁶ which aims to enhance clarity and introduce a framework for the administration of trusts at the Emirate level. In Brazil, a bill presented in Congress at the end of 2022 seeks to regulate trusts by indicating the law applicable to trusts created abroad, and regulating their effects in Brazil, including taxation.⁷

- 4 Subject to available resources, the PB aims to consolidate its research on this topic and to present a substantive report of its work to CGAP at its 2025 meeting.

B. Institutions Analogous to Trusts

- 5 As mandated by CGAP and taking into account the limited resources available to the PB last year, the PB also continues to study the question of whether analogous institutions would include foundations and endowments, institutions and developments relating to the *waqf* in the Islamic legal tradition, and DAOs and other similar structures.
- 6 Foundations and endowments share certain analogous characteristics with trusts in relation to the holding and protection of assets,⁸ but have the legal status of an autonomous juridical person,⁹ whereas trusts do not.¹⁰ Aside from an assessment of whether foundations and endowments may fall within the scope of “analogous institutions” under the 1985 Trusts Convention, research at the PB focuses on whether jurisdictions that do not have domestic trusts law tend to encourage foundations and endowments structures and, if so, on the reasons for doing so.
- 7 While the mechanism of *waqf* appears to be similar to that of trusts, certain key characteristics of *waqf* indicate the divergence between the two legal instruments. For instance, the structure of *waqf* is distinct from trusts in the sense that the assets do not constitute a separate fund from the trustee’s own estate, and the ownership of the assets is not transferred to the trustee as such. Moreover, whilst trusts may take on a variety of forms,¹¹ a *waqf* can only be created for charitable or pious purposes either to the benefit of the general public or for specific individuals.¹² The PB has continued to monitor the jurisdictions within the Islamic legal traditions that have some form of trusts in their national law, such as Pakistan,¹³ Bahrain,¹⁴ and the UAE,¹⁵ as well as other jurisdictions that have witnessed the rise of financial free zones on their territories that use trust arrangements to attract foreign direct investments such as Qatar and the UAE.¹⁶ An interesting example in this regard is Malaysia, where the use of laws relating to incorporated trustees in Malaysia’s federal *waqf* entity illustrates the use of a statutory vehicle under the law of trusts by

⁶ UAE, Federal Decree by Law No (31) of 2023 Concerning Trusts, 25 September 2023, superseding Federal Decree by Law No 19/2020 Concerning Trusts. The text of the Federal Decree by Law is available at: <https://uaelegislation.gov.ae/en/legislations/2120/download>.

⁷ Bill No 145/2022, “Projeto de Lei Complementar 145/2022, dispõe sobre a lei aplicável ao trust, sua eficácia e seu tratamento tributário no País.” The text of the bill and current status is available at: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2339412>.

⁸ D. Waters, Q.C., “Private Foundations (Civil Law) Versus Trusts (Common Law), Estates, *Trusts & Pensions Journal*, Vol. 21, No 4, p. 294.

⁹ *Ibid.*, p. 312.

¹⁰ P. Panico, “Private foundations and trusts: just the same but different?”, (2016), 22(1) *Trusts & Trustees* 132 at p. 134.

¹¹ I. Gvelesiani, “The Trust and the Waqf (Comparative Analysis)”, (2020) 26(8-9) *Trusts & Trustees* 737.

¹² *Ibid.* p. 742.

¹³ Trust Act of Pakistan 1882.

¹⁴ Bahraini Legislative Decree No 23 of 2016 in respect of Trusts.

¹⁵ Federal Decree Law of the UAE No 31 of 2023 Concerning Trusts, *op. cit.* note 6.

¹⁶ Trust Law DIFC Law No 4 of 2018 (for the Dubai International Financial Centre); QFC Trust Regulations No 12 of 2007 (for the Qatar Financial Centre).

the *waqf* sector. It has been commented that the law of trusts, particularly relating to incorporated trustees, is resorted to when there is a perceived gap in the law relating to *waqf*.¹⁷

- 8 DAOs are a tool to achieve decentralised governance within distributed platforms (usually based on distributed ledger technology (DLT)), managed by a community of members who have the right to propose initiatives on behalf of the DAO.¹⁸ In order to pursue a purpose with minimal human intervention,¹⁹ DAOs use coded smart contracts to set out the rules for what the purpose of the DAO is, how members agree to cooperate, how decisions are collectively taken through a voting process, how native tokens are created and distributed, and how transactions are executed once certain triggering conditions are met.²⁰
- 9 DAOs may meet the criteria to be considered as an institution analogous to trusts within the scope of Article 2 of the 1985 Trusts Convention:
- a. A separate fund: Participants can become members of a DAO by contributing assets to the DAO.²¹ A DAO has a treasury (*i.e.*, the funds held by the DAO to achieve its objectives) that is safeguarded by smart contract, which is only accessible with the DAO members' approval and smart contract operation.²²
 - b. Title: DAOs keep track of their members through the use of smart contracts.²³ In circumstances where a DAO no longer serves a given member's purpose, that member can regain control and title of all or of a portion of their contributed assets through a procedure known as the "rage quitting" process.²⁴ Since members of a DAO make decisions by voting to deploy assets for a particular purpose, and may choose to withdraw those assets if they disagree with the group's decision, they have a degree of control (and, arguably, title) over assets that they deposit into a DAO.
 - c. Accountability: In general, DAO tokens are "tied to voting power with voting rights being proportional to members' holdings".²⁵ Any action to be taken by DAOs or changes to the rules governing a DAO requires voting of its members.²⁶ Through DLT-based voting and other mechanisms, DAOs rely on smart contract to grant members the "ability to control or direct the organizations' assets either directly or indirectly",²⁷ while at the same time reducing the risk that individual members act in their own self-interest. Since DAOs are governed according to the rules defined in the code of smart contract that bars any DAO-related transaction from occurring without the express approval of multiple parties, this forms a layer of accountability in addition to the participatory voting mechanism. No single DAO member has the unilateral ability to transfer the funds or assets of the DAO, unless they are the sole member participating in the decision-making process.²⁸ This mechanism has certain analogous characteristics to the rights and obligations of a trustee, in that members of the

¹⁷ M.A. Laldin, S.Z.S. Abdul-Kader and F. Djafri, "Waqf Development in Malaysia", in A.N. Ali and U.A. Oseni (eds.), *Waqf development and Innovation, Socio-Economic and Legal Perspectives*, (Routledge:2022), 210.

¹⁸ S. Gabor and N. Walters, "Getting DAO to Business: Decentralized Autonomous Organizations Under Canadian Insolvency Law", (2022) 20th Annual Review of Insolvency Law, 2022 CanLIIDocs 4301, online, pp. 1-27, p. 2.

¹⁹ R.A. Schwinger, "[Blockchain law: DAOs enter the spotlight](#)", (2022) *New York Law Journal* 1-5, p. 1.

²⁰ R. Dobbyn, R. Morris and M. Treurnicht, "[Bridging the Gap – How Trusts Can Give DAOs a Foothold in the Traditional Economy](#)", 18 March 2022, Walkers Global.

²¹ A. Wright, "[The Rise of Decentralized Autonomous Organizations: Opportunities and Challenges](#)", (2021) 4(2) *Stanford Journal of Blockchain Law & Policy* 152, p. 158.

²² E. Naudts, "[The future of DAOs in finance - in need of legal status](#)", (October 2023) European Central Bank Occasional Paper No. 2023/331, pp. 8-9.

²³ A. Wright, *supra* note 21, p. 156.

²⁴ A. Wright, *supra* note 21, p. 162.

²⁵ R.A. Schwinger, *supra* note 19, p. 2.

²⁶ *Ibid.*

²⁷ A. Wright, *supra* note 21, p. 156.

²⁸ A. Wright, *supra* note 21, pp. 161-162.

DAO have the capacity and duty to manage, employ or dispose of assets of the organisation only in accordance with certain rules.

- 10 Subject to available resources, the PB also aims to consolidate its research on this topic and to present a substantive report of its work to CGAP at its 2025 meeting.

III. Proposal for CGAP

- 11 In light of the above, the PB proposes the following C&Ds for CGAP's consideration:

CGAP took note of the PB's work in relation to the 1985 Trusts Convention, and mandated the PB, in partnership with relevant subject-matter experts, and subject to available resources, to continue to study the interpretation of analogous institutions for the purpose of Article 2 of the 1985 Trusts Convention, with a focus on:

- a. clarifying the divergences in interpretation between the English and French versions of the Article; and
- b. exploring whether analogous institutions would include foundations and endowments, institutions and developments relating to the *waqf* in the Islamic legal tradition, and decentralised autonomous organisations and other similar structures.

Subject to available resources, CGAP also mandated the PB to continue monitoring developments relating to the 1985 Trusts Convention in order to identify areas for review and future work, and to develop promotional materials on the 1985 Trusts Convention. The PB will report to CGAP at its 2025 meeting.