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The HCCH 1985 Trusts Convention: Updates and Possible Future Work

I. Introduction

1 The *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (Trusts Convention) entered into force on 1 January 1992 and currently has 14 Contracting Parties.[1] Interestingly, they have different legal traditions. In 2017, Panama became the latest State to accede to the Convention, following on the ratification of Cyprus that same year.

2 In March 2020, recalling Conclusion and Recommendation (C&R) No 44 adopted at its 2019 meeting, the Council on General Affairs and Policy (CGAP) invited the Permanent Bureau (PB) "to commence research and preparations in relation to the commercial and financial law questionnaire and the possible international conference to be held in late 2022, coinciding with the 30th anniversary of the entry into force of the Trusts Convention".[2] The mandate of CGAP was provided in response to the commitment of the PB to promote interest in the HCCH commercial and financial instruments.

3 This Preliminary Document provides a brief background of the Trusts Convention, followed by an overview of the current challenges to, and opportunities for, the more widespread adoption of the Convention. In researching the broad challenges to the Trusts Conventions, it was found that, from a comparative law perspective, there were fundamental differences in the understanding of the sorts of institutions that fall within the scope of the Convention. Interestingly, discussions relating to these differences in understanding have their roots in the preparatory work of the Convention. Although the final adopted text of the Convention took into consideration the inclusion of analogous institutions that Member States of civil law tradition brought to the discussion, the debate continues in relation to the difficulties of conceptualising trusts from a comparative law perspective. Another factor to consider is that, since the adoption of the Convention, the membership of the HCCH has expanded considerably, bringing with it the opportunity to discuss the issue from a more global perspective. This Preliminary Document summarises the main thrusts of these discussions, and suggests an open list of possible topics for future work relating to the Trusts Convention.

II. Background of the Convention

4 The main objective of the Trusts Convention is to establish common provisions on the law applicable to trusts and their recognition. The unique purpose of the Convention is to bridge the gap between civil law and common law traditions, the latter being much more familiar with the institution of trusts. The Convention applies to trusts and to institutions analogous to trusts,[3] as long as the criterion established in its Article 2[4] is met. Therefore, the scope of the Convention is

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1 Australia, Canada, People's Republic of China, Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Panama, San Marino, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America.

2 C&D No 39 of CGAP 2020.

3 See para. 36 of the Von Overbeck Explanatory Report, on Art. 2: "This provision may appear as a definition of a trust. In reality, article 2 simply tries to indicate the characteristics which an institution must show – whether this is a trust from a common law country or an analogous institution from another country – in order to fall under the Convention's coverage."

4 Art. 2: "For the purposes of this Convention, the term "trust" refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.
A trust has the following characteristics – a) the assets constitute a separate fund and are not a part of the trustee's own estate; b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.
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."

not limited to common law or "Anglo-American" trusts,[5] but includes other institutions that share their main characteristics with those of a trust, and which establish the same type of legal relationship as detailed in Article 2 of the Convention.[6]

5 During the preparatory work that led to the Trusts Convention, a debate took place as to whether institutions analogous to trusts should be included within the scope of the Convention. The main document of reference was the "Report on trusts and analogous institutions", drawn up by Adair Dyer and Hans van Loon[7] and the corresponding "Conclusions drawn for the discussions of the Special Commission of June 1982 on trusts and analogous institutions".[8] The Report noted that there were significant conceptual difficulties relating to institutions analogous to trusts that had been adopted in jurisdictions that were not based on English law and equity. At the time, it was concluded that some of these conceptual difficulties were "academic" and overtaken by the practical developments in the application of trusts.[9]

6 The Special Commission originally limited the preliminary draft text of the Convention to "Anglo-American" trusts.[10] This limitation was later removed at the Fifteenth Session (8-20 October 1984) due to the intervention of Member States from the civil law tradition, which wanted their analogous institutions to be included in the Convention.[11] A point of note is that the delegates also indicated that attempting to define "trusts" in the Convention, even solely from a common law perspective, would have been an impossible task.[12]

7 The Special Commission established with a view to developing the Convention held three meetings, in 1982, 1983 and 1984, respectively, and included the participation of experts of Member States representing both civil law and common law traditions.[13] The final text of the Convention was unanimously adopted by the Fifteenth Session on 19 October 1984. The studies conducive to the discussion, in particular, the Dyer-Van Loon Report, focused on the institutions existing in the Member States.[14] It should be noted, however, that in 1984, the HCCH membership was comprised of only 30 countries, the majority of which were European States.

III. Current challenges and opportunities

8 Nearly 40 years have elapsed since the discussions leading to the adoption of the Trusts Convention took place. In that time, there have been developments that indicate that the Convention might play an important role in bridging the law applicable to trusts and the recognition

5 See para. 25 of the Von Overbeck Explanatory Report.
6 See para. 26 of the Von Overbeck Explanatory Report.
7 Prel. Doc. No 1 of May 1982, *Proceedings of the Fifteenth Session (1984),* Tome II*, Trusts – applicable law and recognition*.
8 Prel. Doc. No 6 of September 1982, *op. cit*. note 7.
9 See Prel. Doc. No 1 of May 1982, *op. cit*. note 7, para. 33.
10 See note 5 above.
11 See the Von Overbeck Explanatory Report, para. 26: "[…] the Egyptian Delegate and the Polish Delegate indicated that their countries have the equivalent of the charitable trust; the Delegates of Japan and of Luxembourg wanted their countries' institutions to be encompassed. The Delegate of Venezuela pointed out that his country had introduced the trust in 1956 but that the institution was rarely utilized. A number of delegates from other countries were also favourable to the inclusion of analogous institutions, an inclusion which finally was accepted without a formal vote."
12 See the Von Overbeck Explanatory Report, para. 37.
13 Argentina, Australia, Austria, Canada, Denmark, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.
14 See para. 33 of Prel. Doc. No 1 of May 1982: "We will now examine briefly the way in which the trust was adopted in systems not based on English law and equity. Our examination will not only be brief, but necessarily incomplete, as systematic comparative research is still largely lacking. Our main attention will be focussed on systems existing in the Member States of the Hague Conference, though some attention will be given to the introduction of the trust into a few other jurisdictions."

of trusts in different legal systems and traditions[15]. Discussions and questions regarding the similarities and differences between trusts and other analogous institutions continue both in recent enquiries received from Members by the PB, and in recent publications on the topic.[16] This shows that the conceptual difficulties were not as "academic" as had been thought at the time of the preparatory work for the Convention and that these have in fact had an impact on the practical developments relating to the Trusts Convention. These discussions also point to a possible continuing misunderstanding of, or incompatibility between, civil law and common law concepts of trusts and other analogous institutions.

9 A survey may be necessary to analyse the extent to which such questions interfere with the proper scope and application of the Convention. Work on the developments in financial and commercial law is also necessary in order to ensure that the application of the Trusts Convention remains practicable and relevant. Moreover, the number of HCCH Members is now almost triple what it was at the time the Trusts Convention was discussed, and encompasses jurisdictions the input of which would be invaluable in increasing the rate of accession to the Trusts Convention. For these reasons, further work on the current state of play in relation to trusts and other analogous institutions is timely and necessary.

IV. Possible topics for future work

10 In the course of preparing for the commercial and financial law questionnaire and the possible international conference to be held in late 2022,[17] the PB has collated the following list of possible topics for future work. This list is by no means exhaustive, but provides an overview of the issues that have been recently raised or discussed:

- A survey of "analogous institutions": What are the institutions available in the different jurisdictions that are equivalent or analogous to trusts?
- Scope of the Trusts Convention: Which institutions meet the criteria of the Convention and thus fall into its scope, and which do not? Are these institutions specific to civil law or common law traditions? To what extent do they vary across the different jurisdictions of the same legal tradition?
- Interpretation: What are the main challenges in relation to the interpretation of the characteristics of a trust provided for in Article 2 of the Convention? How can these challenges be addressed?
- Recognition: What are the challenges in relation to the recognition of different types of trusts in civil law jurisdictions? Can these challenges be addressed by making a distinction between *inter vivos* and *causa mortis* trusts?
- Recognition: Have there been challenges to the recognition of commercial trusts in civil law jurisdictions?
- Applicable law, recognition and enforcement: How has jurisprudence / case law developed in regard to the recognition of foreign trusts? Are there any developing trends?

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15 See for example the different initiatives in Latin America to regulate the *fideicomiso inter vivos*, cited in J.P.O. Biazi (2019*), As dificuldades acerca da figura do negócio jurídico fiduciário e do trust*, Academia Brasileira de Direito Civil, V. 3, N. 1, Edição Ordinária. See also the developments in the jurisprudence in Brazil, cited in J. Martins-Costa (2017), *O trust e o Direito Brasileiro*, Revista de Direito Civil Contemporâneo, Vol. 12, ano 4, pp. 165-209.

16 See, for example, A. Braun, *The state of the art of comparative research in the area of trusts*, p. 29, In: M. Graziadei, & L. Smith, (ed.) (2017), Comparative Property Law: Global Perspectives, Edward Elgar Publishing Ltd.; M.J. Rufas Vallés, (2017*), Análisis de figuras similares al trust anglosajón: las Fundaciones de Interés Privado de Panamá y los Stiftung y Anstalt de Liechtenstein. Los fideicomisos latinoamericanos,* Cuadernos de Formación, Volumen 21/2017; J.P.O. Biazi, (2019), *op. cit* note 15.

17 See C&D No 39 of CGAP 2020.

- Recognition: Can foreign trusts be recognised by jurisdictions that do not natively recognise or use the institution? If so, was the recognition of the relevant trust achieved by way of analogy? Which legislation was invoked, if any, to allow for such practical recognition?

V. Proposal to CGAP

11 The PB has recently seen a renewed interest in the use of trusts and other analogous institutions. Following on the mandate given to the PB by CGAP in 2020, the PB invites CGAP to consider future work on the issues described in this document, with a view to informing the commercial and financial law questionnaire and reporting at the international conference envisaged to be held in late 2022.