

<b>Title</b>	1985 Trusts Convention: Updates and possible future work
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<b>Annexes</b>	Annex I – List of Institutions Potentially Analogous to Trusts
<b>Related Documents</b>	Prel. Doc. No 3A, Annex I of December 2022 Prel. Doc. No 10A of December 2022

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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* (hereinafter “HCCH 1985 Trusts Convention” or “the Convention”) entered into force on 1 January 1992 and is to date in force in 14 jurisdictions.<sup>1</sup>
- 2 In fulfilment of Conclusion and Decision (C&D) No 33 and following the mandate of the Council on General Affairs and Policy (CGAP) in March 2022,<sup>2</sup> the inaugural HCCH Conference on Commercial, Digital and Financial Law Across Borders (the CODIFI Conference) was successfully held online from 12 to 16 September 2022. One of the six tracks of the CODIFI Conference discussed matters related to the Trusts Convention, informed by the requests of Members who had responded to a survey distributed by the Permanent Bureau (PB) in late 2021.<sup>3</sup> This Preliminary Document reports on the discussions on the Trusts Convention and suggests possible topics and areas for future work. The report of the CODIFI Conference is provided as Annex I to Preliminary Document (Prel. Doc.) No 3A.<sup>4</sup>
- 3 Very broadly, the Convention can be understood to have a two-fold objective: 1) to determine the law applicable to trusts and 2) to govern the recognition of trusts through spelling out the effects of recognition.<sup>5</sup>
- 4 Chapter II of the Convention lays down the applicable law rules for trusts. It adopts a principle of “party autonomy” for trusts:<sup>6</sup> the choice of law by the settlor provides the subjective connection (Art. 6); subsidiarily, failing a settlor choice (or if such a choice is ineffective), an objective connection to the law with which the trust is mostly connected (Art. 7) is provided in subparagraphs (a) to (d), in an implicit hierarchy.<sup>7</sup> Chapter III of the Convention sets out what the recognition will consist of at a minimum (Art. 11) and specifies the form in which the trust may appear in public registers. Together with Chapter IV, the Convention’s provisions permit the non-recognition of certain trusts which may appear improper (Arts 13, 15, 16, 18) while preserving rules more favourable to the recognition of trusts than are those of the Convention (Art. 14).<sup>8</sup>

## II. The Scope of the Convention: Article 2 and Institutions Analogous to Trusts

- 5 Article 2 provides that, for any analogous institution to be included within the Convention, it must have the following characteristics:

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<sup>1</sup> 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, Panama, San Marino, Switzerland and the United Kingdom (including 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.

<sup>2</sup> C&D No 33 of CGAP 2022; see also C&D No 38 of CGAP 2021, available on the HCCH website [www.hcch.net](http://www.hcch.net) under “Governance” then “Council on General Affairs and Policy” then “Archive (2000-2022)”.

<sup>3</sup> Focused Circular No 47 of 14 December 2021.

<sup>4</sup> “Digital Economy and the HCCH Conference on Commercial, Digital and Financial Law Across Borders (CODIFI Conference): Report”, Prel. Doc. No 3A of December 2022 for the attention of CGAP 2023, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Governance” then “Council on General Affairs and Policy”.

<sup>5</sup> A.E. von Overbeck, “Explanatory Report on the 1985 Hague Trusts Convention” (hereinafter “Explanatory Report”), 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.

<sup>6</sup> Explanatory Report, para. 63.

<sup>7</sup> *Ibid.*, paras 20, 72 and 77.

<sup>8</sup> *Ibid.*, paras 21-22.

- a. the assets constitute a separate fund and are not a part of the trustee's own estate;
  - b. the 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 on him by law.
- 6 The broad criteria in Article 2 results in a wide scope of institutions that can fall under the Convention. The wide scope also means that benefits of accessions are two-way: jurisdictions that recognise the institution of trusts, such as common law jurisdictions, can ensure that their Anglo-American trusts are recognised in other jurisdictions which do not recognise trusts. Similarly, jurisdictions that have their own analogous institutions not explicitly named as trusts, such as civil law jurisdictions, can ensure recognition in another jurisdiction that does not recognise this type of institution.<sup>9</sup>
- 7 Further, joining the Convention enhances legal predictability and simplifies the judicial task. For example, a court within the civil law tradition, when presented with a case involving a trust, must make an applicable law analysis that would previously have required characterisation of the trust relationships as contractual, proprietary, obligational, or testamentary in order to determine and analyse the relevant connecting factors. The Convention streamlines and standardises this process, allowing these courts to simply recognise a trust as a trust. Even in jurisdictions that would not have encountered the characterisation problem, such as the common law jurisdictions, unification of the scope of the settlor's autonomy to choose the governing law and harmonising the connecting factors to use in the absence of the settlor's choice promotes certainty and predictability.
- 8 Although the HCCH 1985 Trusts Convention did not intend to introduce the trust concept into the domestic law of States that did not already have it, the Convention did result in a growth of interest in trusts in civil law jurisdictions. This has resulted in the Convention having a variety of different impacts in numerous jurisdictions. Fourteen years after Switzerland ratified the HCCH Trusts Convention, it is now consulting on a draft bill that proposes to introduce the trust concept into domestic law.<sup>10</sup> The trust will be governed by the provisions of the Swiss Code of Obligations.<sup>11</sup> Brazil is considering a bill which aims to regulate trusts, particularly aiming to address property and fiduciary titles, and to provide rules for replacement of the trustee and revocation of the trust.<sup>12</sup> A draft bill was under consideration by the lower house of the Parliament in November 2022, where the primary rule would recognise the choice of law made by the settlor.<sup>13</sup> A list of jurisdictions and

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<sup>9</sup> Prel. Doc. No 14 of November 2021 for CGAP 2022, see "Institutions analogous to trusts" and "Issues relating to the 'Anglo-American' trust" for further discussions of Art. 2.

<sup>10</sup> F. Nosedá (2022), "The New Swiss Trust: Is it a Trust? Practical Considerations," *Trusts & Trustees*, Vol. 28, Issue 7, p. 638.

<sup>11</sup> D.W. Wilson (2022), "Swiss Trust: Preliminary Draft," Schellenberg Wittmer, available at [https://www.swlegal.com/media/filer\\_public/16/04/1604e3db-84c3-40f3-a1be-39d49b39aa3f/sw\\_swiss\\_trust\\_law\\_12012022\\_english.pdf](https://www.swlegal.com/media/filer_public/16/04/1604e3db-84c3-40f3-a1be-39d49b39aa3f/sw_swiss_trust_law_12012022_english.pdf).

<sup>12</sup> L. Macedo (2020), "Project Provides for Regulation of Trust Contracts in Brazil", *Camara Dos Deputados*, available at <https://www.camara.leg.br/noticias/703456-projeto-preve-regulamentacao-dos-contratos-de-fiducia-no-brasil/>.

<sup>13</sup> Draft Federal Bill 145/2022 regulating the applicable law to trusts, their validity and tax treatment, presented for consideration on 23 November 2022, available at [https://www.camara.leg.br/proposicoesWeb/prop\\_mostrarintegra;jsessionid=node0dvu43xpn34pd1az3g5a63rpej578901.node0?codteor=2217489&filename=PLP+145/2022](https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra;jsessionid=node0dvu43xpn34pd1az3g5a63rpej578901.node0?codteor=2217489&filename=PLP+145/2022).

potential analogous institutions, updated with respect to the findings presented in March 2022, is provided in Annex I.

## A. Divergences in Legal Traditions

- 9 As Article 2 provides a set of features rather than an explicit definition of trusts, some challenges emerge based on the scope of Article 2 and the core nature of trusts. One commentator has noted difficulties faced in some civil law jurisdictions which interpret the dual interests of the trustee and the beneficiary as a two-tiered system of proprietary rights, incompatible with local law. Such jurisdictions resist this system which, ostensibly, “splits ownership”.<sup>14</sup> Case decisions from Germany<sup>15</sup> and Spain<sup>16</sup> illustrate this interpretation.
- 10 In contrast, cases of common law jurisdictions show that courts view the “equitable ownership” of beneficiaries as akin to a right against the trustee, providing a potential remedy for the beneficiary who otherwise has no direct right to the trust assets.<sup>17</sup> This remains true even as “courts and commentators tend to refer to ‘proprietary remedies’ or a ‘proprietary interest’ of the beneficiaries”,<sup>18</sup> where “proprietary” has the sense of *pertaining to the property* rather than identifying a form of ownership.
- 11 Additionally, the use of the word “patrimony” in Article 2 could be revisited to address the possible different interpretations of the English and French versions of the Convention. In civil law jurisdictions, “patrimony” is a term used in regard to the protection of a trustee’s personal assets (personal patrimony) against claims made by creditors of the trust.<sup>19</sup> However, common law jurisdictions such as England do not distinguish between a trustee’s personal and fiduciary capacities, so that a trust does not limit the liability of a trustee.<sup>20</sup> Experts at the CODIFI Conference recommended updating the Trusts Convention to include an outline of trustee duties or fiduciary

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<sup>14</sup> F. Nosedá (2022), “Equitable ownership, butter and donkeys: Setting out a vision for the future of the Hague Trust Convention”, *Trusts & Trustees* (forthcoming). See also Z. Wu (2014), “Transplant of the Quistclose trust into Chinese law: a critical assessment”, *China-EU Law Journal*, p. 260; R. Wibier (2011), “Can a modern legal system do without the trust?”, *Law and Financial Markets Review*, p. 40; The Society of Trust and Estate Practitioners STEP (2018), “The Hungarian Trust”, available at <https://www.step.org/tqr/tqr-march-2018/hungarian-trust>.

<sup>15</sup> F. Nosedá, *ibid.* The author notes a decision of the German Supreme Court, IVaZR 196/82 (at p. 21) and recent cases describing the incompatibility of German law with the “two legal systems” of Anglo-Saxon law and equity.

<sup>16</sup> F. Nosedá, *op. cit.* note 14. In the case of 30 April 2008 (STS 1632/2008 - ECLI:ES:TS:2008:1632), the Spanish Supreme Court referred to the Hague Trusts Convention and acknowledged the use of trusts in common law jurisdictions. However, the Court reiterated that trusts are incompatible with Spanish succession law. Spanish law was applied in this case due to lack of sufficient proof of the foreign applicable law (Arizona, USA). The Court did not provide specific commentary on split ownership in trusts.

<sup>17</sup> F. Nosedá, *op. cit.* note 14, p. 6, summing up principles from the cases *JSC Mezhdunarodniy; Akers v. Samba; Webb v. Webb*.

In *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2017] EWHC 2426 (Ch) the English and Wales Court of Appeal held that a beneficiary under a discretionary trust does not have any property interests.

*Akers v. Samba Financial Group*, [2017] UKSC 6, [2017] AC 424. The case considered the effects of a Cayman trust in relation to shares in five Saudi Arabian banks. Saudi Arabia does not have the concept of trust and therefore it was not possible for the trustee to own the shares as trustee in Saudi. Nevertheless, the UK Supreme Court felt that the trust was valid and binding because the obligations of the trustee and the jurisdiction of the court of the trustee are *in personam*. The trustee has an obligation to hold assets in a certain way. This case went to the issue of split ownership, recommending use of such terminology “with caution” for the confusion it causes about ownership of trust property.

*Webb v. Webb* CJEU, C-294/92, ECLI:EU:C:1994:193, which considered equitable ownership in immovable property. The court held that to succeed under Art. 16(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the action must be based on a right *in rem* and not on a right *in personam*.

<sup>18</sup> F. Nosedá, *op. cit.* note 14, p. 8.

<sup>19</sup> Trusts Convention, Art. 11, French version.

<sup>20</sup> See, for example, *Investec v. Glenalla* [2018] UKPC 7.

duties<sup>21</sup> and to identify circumstances where the terms of the trust do not impose duties on the trustee.<sup>22</sup>

- 12 In sum, this possible confusion in the language of the Trusts Convention, as well as its possible role in justifying incompatibility between common law trusts and local law, is an issue that merits attention. Further work may seek to identify more cases supporting or refuting this interpretation and to eliminate any misconceptions that may hinder greater acceptance of the Convention.

## B. Foundations and Endowments

- 13 There is support in academia to regard private foundations and endowments as institutions analogous to trusts; at the very least, a connection may exist as “the working of a foundation is not dissimilar to that of the express trust”,<sup>23</sup> particularly regarding the holding and protection of assets. However, most foundations and endowments have different legal structures than the common law trust. For example, a private foundation has no participants in its ownership, and its beneficiaries are of peripheral importance. Moreover, a foundation is an autonomous juridical person, and a trust is not.<sup>24</sup> Examples include: the Liechtenstein foundation,<sup>25</sup> Panama foundation,<sup>26</sup> Austria *Privatstiftung* (private foundation),<sup>27</sup> Netherlands Antilles foundation,<sup>28</sup> Luxembourg foundation,<sup>29</sup> Abu Dhabi foundation<sup>30</sup> and Russia private foundation.<sup>31</sup> Further research on foundations and endowments law may be necessary to assess whether these developments may fall within the scope of “analogous institutions” under the Convention and / or to assess whether jurisdictions lacking domestic trusts law tend to prefer foundations and endowments structures and, if so, for what reasons.

## C. Relationship Between Trusts and *Waqf* in Jurisdictions with Islamic Law Traditions

- 14 *Waqf* has been defined as “a financial charitable act established by withholding immovable and movable properties to perpetually spend its revenue to fulfil public or family needs, based on the preferences and conditions set by the founder”.<sup>32</sup> To create a *waqf*, the owner of the property (*waqif*) declares his intention to dedicate the revenues of his property to a beneficiary (*mawquf alayh*) and assigns an administrator (*mutawalli*) over these assets. It should be noted that some characteristics of *waqf* reveal several key areas of divergence between *waqf* and trusts:

<sup>21</sup> CODIFI, H.B. Mahfoudh, “Opening of the HCCH Trusts Convention Track”, 12 September 2022; CODIFI, D. Beckner, “Attitudes Towards Trusts and Analogous Institutions”, 14 September 2022.

<sup>22</sup> CODIFI, D. Beckner, *ibid.*

<sup>23</sup> D. Waters, Q.C., “Private Foundations (Civil Law) Versus Trusts (Common Law), *Estates, Trusts & Pensions Journal*, Vol. 21, No 4, p. 294.

<sup>24</sup> *Ibid.*, p. 312.

<sup>25</sup> *Ibid.*

<sup>26</sup> E. Gonzales, “The Panamanian Foundation as an Alternative to Trusts” (2001), 7:8 *Trusts & Trustees* 32.

<sup>27</sup> D. Waters, Q.C., *op. cit.* note 23.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, p. 294.

<sup>30</sup> CODIFI, H.B. Mahfoudh, *op. cit.* note 21.

<sup>31</sup> Baker McKenzie (2021), “Russia creates domestic alternative to foreign trusts and foundations”, available at: <https://insightplus.bakermckenzie.com/bm/tax/russia-creates-domestic-alternative-to-foreign-trusts-and-foundations>; see also Debevoise & Plimpton (2021), “Private Foundations in Russia: Are They an Alternative to Trusts and Foreign Personal Foundations?”, available at: <https://www.debevoise.com/-/media/files/insights/publications/2021/08/20210811-private-foundations-in-russia-eng.pdf>.

<sup>32</sup> S. Baqutayan and others (2018), “Waqf Between the Past and Present”, *Mediterranean Journal of Social Sciences*, Vol. 9, Issue 4, p. 149.

- a. *Ownership*: The structure of *waqf* is distinct from the trust in 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.
- b. *Administration*: In a *waqf*, the administrator is almost always a governmental authority under the name of "Ministry of *Awqaf*" or "General Directorate of *Awqaf*", among other titles.<sup>33</sup> The competent authority has the power of an administrator, which entails a "right to build, preserve or rent out the property, to plant, collect and distribute income from the property, and to carry out the legal representation of the property".<sup>34</sup>
- c. *Purpose*: While trusts are known in a variety of forms,<sup>35</sup> a *waqf* can only be created for charitable or pious purposes either to the benefit of the general public or for specific individuals.<sup>36</sup> Thus, only two forms of *waqf* exist: "the *waqf Khairi* – an endowment for an object of a religious or public nature – and the *waqf ahli* or *dhurri* – a family endowment".<sup>37</sup>

15 Many States with Islamic law traditions have witnessed a decline in the number of establishments of *waqf* for several reasons<sup>38</sup> and have modernised their legal orders in a way that accommodates common law trusts. Some States with Islamic legal traditions that have found interest in the institution of trusts, such as Pakistan,<sup>39</sup> Bahrain<sup>40</sup> and the United Arab Emirates (UAE),<sup>41</sup> have enacted legislation to incorporate trusts into their national law. Member States of the Gulf Cooperation Council, such as Qatar and the UAE, have seen the rise of financial free zones on their territories, which use trust arrangements to attract businesses and foreign investments.<sup>42</sup> The legal predictability that comes with acceding to the Convention could enhance the attractiveness of these free zones to foreign direct investment.

16 In addition to the above, an expert at the CODIFI Conference noted two other methods of implementing and developing the concept of trusts within Islamic law traditions in the Arab region.<sup>43</sup> The first is a hybrid method with alternative wealth structuring options that features, for example, foundations being utilised as a mechanism to hold assets on trust. The second method is the indirect incorporation of trust-like mechanisms which generate an effect on the legal framework. For example, Tunisia does not have direct regulation of trust institutions and mechanisms; rather, it has three main regulatory frameworks that generate an effect towards trusts and fiduciaries that are created and established abroad under a foreign legal framework.<sup>44</sup> In order to encourage more States with Islamic legal traditions to join the Convention, an Experts' Group could be invited to address the legal issues created by both the hybrid structure (including clarification of trustee

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<sup>33</sup> M. Kahf (2003), "The role of Waqf in improving the ummah welfare", Waqf as a private legal body [international seminar] Islamic University of North Sumatra, Medan, Indonesia.

<sup>34</sup> I. Sandor (2015), "Fiduciary Property Management and the Trust", *Historical and Comparative Law Analysis*, Hvg-orac Publishing Ltd.

<sup>35</sup> I. Gvelesiani (2020), "The Trust and the Waqf (Comparative Analysis)", *Trusts & Trustees*, Vol. 26, Issues 8-9, p. 737.

<sup>36</sup> *Ibid.* p. 742.

<sup>37</sup> M. Gaudiosi (1988), "The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College", *University of Pennsylvania Law Review*, Vol. 136, Issue 4, p. 1233.

<sup>38</sup> S. Mohamed, S. Baqutayan and others, (2018) "Waqf Between the Past and Present", 9 *Mediterranean Journal of Social Sciences*, p. 149.

<sup>39</sup> Trust Act of Pakistan 1882.

<sup>40</sup> Bahraini Legislative Decree No 23 of 2016 in respect of Trusts.

<sup>41</sup> Federal Decree-Law of the UAE No 19 regarding trusts.

<sup>42</sup> 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).

<sup>43</sup> CODIFI, H.B. Mahfoudh, *op. cit.* note 21.

<sup>44</sup> Law No 2018-46 of 1 August 2018, on the declaration of assets and interests, the fight against illicit enrichment and conflict of interest in the public sector; Law No 2015-26 on Combating Terrorism and the Suppression of Money Laundering; Law No 2018-52 of 29 October 2018 relating to the national registry of establishments.

duties and practical implementation issues), as well as the indirect incorporation method. The Experts' Group could also address the motivations for the transition away from *waqf* towards institutions analogous to common law trusts.

#### **D. Decentralised Autonomous Organisations (DAOs)**

- 17 DAOs are a tool to achieve decentralised governance within distributed ledger technology platforms, using coded smart contracts to build community management features including pooling of tokens, voting, audits and multisignature wallets.<sup>45</sup> Experts participating in the CODIFI Conference have suggested that assets held in a DAO have the potential to be characterised as a trust form, or at least to use the trust form as the closest analogy that may limit the liability of DAO members in the absence of a corporate form.<sup>46</sup> Trusts as a potential legal holding structure for assets of DAOs, as well as the legal recognition of DAOs as institutions analogous to trusts, may be the subject of future work that is timely and desirable. Experts speaking at the CODIFI Conference have also identified the mechanisms of the Trusts Convention as a potential method of providing legal recognition of DAOs across borders,<sup>47</sup> relying on common characteristics such as being composed of community members with a common purpose; creation in a digital environment; and management through distributed governance among the members of the community.<sup>48</sup>

#### **E. Further Work on the Scope of “Analogous Institutions”**

- 18 In light of the above discussions, in particular taking into account the recommendations of the experts participating in the CODIFI Conference, further work on the scope of “analogous institutions” in Article 2 of the Trusts Convention may be timely and desirable. In particular, developments and expert opinions may point to a necessary focus on:
- a. clarifying the divergences in interpretation between the English and French versions of Article 2 in order to avoid confusion in its operation; and
  - b. exploring whether “analogous institutions” would include foundations and endowments, institutions and developments relating to *waqf* in Islamic legal traditions, and DAOs and other similar structures.

### **III. Other Matters for Review**

- 19 Legal experts participating in the CODIFI Conference outlined several other areas for review of the Trusts Convention. These include:
- a. examining how the Convention applies to a trust by declaration,<sup>49</sup> for example by refining Articles 4 and 15(d);<sup>50</sup>

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<sup>45</sup> A “multisignature wallet” (also referred to as a “multisignature wallet”) refers to a cryptocurrency wallet that requires authentication from multiple parties to complete a transaction, which is the type of cryptocurrency wallets commonly used in DAOs, see, e.g., M. di Angelo and G. Salzer (2020), “Characteristics of Wallet Contracts on Ethereum”, *IEEE*, pp. 1-2.

<sup>46</sup> CODIFI, F. Guillaume, “Digital Economy Relationships / Decentralised Autonomous Organisations”, 15 September 2022; C. Reyes (2019), “If Rockefeller Were a Coder”, 87 *George Washington Law Review*, p. 379.

<sup>47</sup> CODIFI panel, “Digital Economy Relationships / Decentralised Autonomous Organisations”, 15 September 2022.

<sup>48</sup> CODIFI, S. Riva, “Digital Economy Relationships / Decentralised Autonomous,” 15 September 2022; see also C. Santana and L. Albareda, “Blockchain and the emergence of Decentralized Autonomous Organizations (DAOs): An integrative model and research agenda”, *Technological Forecasting and Social Change*, Vol. 182, September 2022.

<sup>49</sup> CODIFI, D. Beckner, *op. cit.* note 21; CODIFI, M. Lupoi “Attitudes Towards Trusts and Analogous Institutions”, 14 September 2022.

<sup>50</sup> CODIFI, A. Chong, “Trends in Jurisprudence Interpreting the Trusts Convention”, 14 September 2022.



- b. examining the Convention in light of recent case law, for example, how the courts have applied Article 7 of the Convention;<sup>51</sup>
- c. fostering predictability and certainty by adding a list of trustee fiduciary duties;<sup>52</sup> and
- d. examining who can fill the role of the trustee when digital finance users make use of trusts.<sup>53</sup>

One expert noted that in a survey amongst legal practitioners, the results revealed that choice of domestic law is most often preferred even if that country is a signatory to the Trusts Convention.<sup>54</sup>

#### IV. Proposal for CGAP

20 The PB invites CGAP to note the issues described in this document in relation to the Trusts Convention and the outcomes of the CODIFI Conference relevant to trusts. Having in mind the limited resources at the PB and the work programme assigned to the International Commercial, Digital and Financial Law Division, the PB proposes the following Conclusions and Decisions for CGAP's consideration:

CGAP mandated the establishment of an Experts' Group to study the interpretation of the term "analogous institutions" in Article 2 of the 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 Islamic legal traditions, and DAOs and other similar structures.

Subject to available resources, CGAP mandates the PB to continue monitoring developments relating to the Trusts Convention in order to identify areas for review and future work, and to develop promotional documents on the Trusts Convention. The Experts' Group and the PB are to report to CGAP at its next meeting in March 2024.

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<sup>51</sup> CODIFI, A. Chong, *ibid.*

<sup>52</sup> CODIFI, D. Beckner, *op. cit.* note 21.

<sup>53</sup> CODIFI, G. Grisel, "Attitudes Towards Trusts and Analogous Institutions", 14 September 2022.

<sup>54</sup> CODIFI, G. Grisel, *ibid.*

## **ANNEX**

## Annex I – List of Institutions Potentially Analogous to Trusts

Jurisdictions	Local Institution	Could this potentially be an “analogous institution” according to Article 2?	Source of argument	Is this a Contracting Party to the Convention?
Bahrain	Trusts <sup>1</sup>	Yes	Domestic law <sup>2</sup>	No
Bangladesh	Waqf <sup>3</sup>	No	Academic source <sup>4</sup>	No
Brazil	Trusts <sup>5</sup>	Yes	Domestic law (draft) <sup>6</sup>	No
Canada (Quebec)	Quebec fiducie <sup>7</sup>	Yes	HCCH Fifteenth Session meeting; <sup>8</sup> HCCH Fifteenth Session report <sup>9</sup>	Yes (but not Quebec)
China, People’s Republic of	Trusts <sup>10</sup>	Yes	Academic source <sup>11</sup>	No (cf. Hong Kong SAR)
Colombia	Fiducia <sup>12</sup>	Yes	Academic source <sup>13</sup>	No
Czech Republic	Trust <sup>14</sup>	Yes	Academic source <sup>15</sup>	No
Egypt	Charitable trust	Yes	HCCH Fifteenth Session meeting <sup>16</sup>	No
Egypt	Waqf <sup>17</sup>	No	Academic source <sup>18</sup>	No
Ethiopia	Fideicommiss <sup>19</sup>	Yes	Academic source <sup>20</sup>	No
France	Fiducie <sup>21</sup>	Yes	Academic source <sup>23</sup> Domestic law (draft) <sup>24</sup>	No
	Trust <sup>22</sup>	Yes		
Germany	Treuhand <sup>25</sup>	Yes	HCCH Fifteenth Session report <sup>26</sup>	No
Hungary	Trust <sup>27</sup>	Yes	Domestic law <sup>28</sup>	No
Indonesia	Wakaf <sup>29</sup>	No	Academic source <sup>30</sup>	No
Iran	Bonyad <sup>31</sup>	No	Academic source <sup>32</sup>	No
Israel	Trust <sup>33</sup>	Yes	HCCH Fifteenth Session report <sup>34</sup>	No
Italy	Bond of purpose <sup>35</sup>	Yes	Academic source <sup>36</sup>	Yes
Japan	Trust/Shintaku <sup>37</sup>	Yes	Academic source <sup>38</sup> ; HCCH Fifteenth Session meeting <sup>39</sup> ; HCCH Fifteenth Session report <sup>40</sup>	No

Jurisdictions	Local Institution	Could this potentially be an “analogous institution” according to Article 2?	Source of argument	Is this a Contracting Party to the Convention?
Jordan	Waqf <sup>41</sup>	No	Academic source <sup>42</sup>	No
Korea, Republic of	Trusts <sup>43</sup>	Yes	Academic source <sup>44</sup>	No
Kuwait	Waqf <sup>45</sup>	No	Academic source <sup>46</sup>	No
Liechtenstein	Treuhanderschaft <sup>47</sup>	Yes	HCCH Fifteenth Session meeting <sup>48</sup> ; HCCH Fifteenth Session report <sup>49</sup>	Yes
Luxembourg	Fiducie <sup>50</sup>	Yes	Academic source <sup>51</sup>	Yes
Malaysia	Wakaf/charitable trusts <sup>52</sup>	Yes	Academic source <sup>54</sup>	No
	Trusts <sup>53</sup>	No		
Netherlands	Bewind <sup>55</sup>	No	HCCH Fifteenth Session report <sup>56</sup>	Yes
Oman	Waqf <sup>57</sup>	No	Domestic law <sup>58</sup>	No
Pakistan	Trusts <sup>59</sup>	Yes	Academic source <sup>61</sup>	No
	Waqf <sup>60</sup>	No		
Peru	Fideicomiso <sup>62</sup>	Yes	Academic source <sup>63</sup>	No
Poland	Charitable trust	Yes	HCCH Fifteenth Session meeting <sup>64</sup>	No
Qatar	Waqf <sup>65</sup>	No	Domestic law <sup>66</sup>	No
South Africa	Trust <sup>67</sup>	Yes	Academic source <sup>68</sup> ; HCCH Fifteenth Session report <sup>69</sup>	No
Spain	Protected patrimony <sup>70</sup>	No	Academic source <sup>72</sup> ; Domestic legislation <sup>73</sup>	No
Spain (autonomous region of Catalonia)	Autonomous protected patrimony <sup>71</sup>	Yes		

Jurisdictions	Local Institution	Could this potentially be an “analogous institution” according to Article 2?	Source of argument	Is this a Contracting Party to the Convention?
Sri Lanka	Fideicommissum <sup>74</sup>	Yes	Academic source; HCCH Fifteenth Session report <sup>75</sup>	No
UAE	Waqf <sup>76</sup> Trusts <sup>77</sup>	No Yes	HCCH Fifteenth Session report <sup>78</sup>	No
Venezuela	Fideicomiso <sup>79</sup>	Yes	Academic source <sup>80</sup> ; HCCH Fifteenth Session meeting <sup>81</sup> ; HCCH Fifteenth Session report <sup>82</sup>	No
Offshore jurisdictions	Non-charitable purpose trusts <ul style="list-style-type: none"> <li>• Cayman Islands ‘STAR trusts’</li> <li>• British Virgin Islands ‘VISTA trusts’</li> <li>• ‘Jersey Trust’ (according to Trust Law of Jersey of 31 May 1983 and 14 March 1984)</li> </ul>	Yes - but traditional Trusts States may still be able to refuse recognition of non-charitable purpose trusts on the basis of Article 13, or public policy grounds. <sup>83</sup>	Academic source <sup>84</sup>	No: The Bahamas; Cayman Islands.  In force in British Virgin Islands, Gibraltar, Jersey, Cyprus and Panama

<sup>1</sup> Bahraini Legislative Decree No 23 of 2016 In respect of Trusts, Art. 2. “A Trust is a legal relationship created by a Settlor whereby a Trust Property is held in the name of the Trustee, or another Person on behalf of the Trustee, to exercise in relation thereto the duties and powers in accordance with the provisions of the proper law of the Trust and the Terms of the Trust for any of the following (...).”

<sup>2</sup> *Ibid.*

<sup>3</sup> The Waqfs Ordinance, 1962.

<sup>4</sup> M. Obaidullah and others (2014), "Islamic Social Finance Report", *Thompson Reuters*, Ch. 4. “The situation is quite different in India, Pakistan and Bangladesh where the state plays a supervisory role devoid of actual ownership or direct management of waqf assets.”

- 5 Draft Federal Bill 145/2022 regulating the applicable law to trusts, their validity and tax treatment, presented for consideration on 23 November 2022, available at [https://www.camara.leg.br/proposicoesWeb/prop\\_mostrarintegra;jsessionid=nodeOdvu43xpn34pd1az3g5a63rpej578901.node0?codteor=2217489&filename=PLP+145/2022](https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra;jsessionid=nodeOdvu43xpn34pd1az3g5a63rpej578901.node0?codteor=2217489&filename=PLP+145/2022).
- 6 *Ibid.*
- 7 Civil Code of Quebec, Arts 1260-1298.
- 8 At the Fifteenth Session, the delegation representing this country sought inclusion of this local institution within the scope of "analogous institution" of the Convention.
- 9 "Report on trusts and analogous institutions", A. Dyer and H. van Loon, Prel. Doc. No 1 of May 1982, *Proceedings of the Fifteenth Session* (1984), Tome II, *Trusts – applicable law and recognition* (hereinafter the "Dyer/Van Loon Report"); D. Hayton (2016), "Reflections on the Hague Trusts Convention after 30 years", *Journal of Private International Law*, Vol. 12, Issue 1, pp. 7-8.
- 10 Trust Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., 28 April 2001, effective 1 October 2001).
- 11 D. Clarry (2014), "Fiduciary Ownership and Trusts in a Comparative Perspective", *International and Comparative Law Quarterly*, Vol. 63, pp. 915-916.
- 12 Commercial Code of Colombia, Arts 1226-1235.
- 13 D. Clarry (2014), *op. cit.* note 11, p. 912.
- 14 The Civil Code of the Czech Republic (Act No 89 / 2012), pp. 1448-1474.
- 15 L. Tichy (2016), "Recognition of a Trust as a Specific Problem in Private International Law", *European Review of Private Law - Revue Européenne de Droit Privé*, Vol. 24, Issue 6, pp. 1165-1166.
- 16 At the Fifteenth Session, the delegation representing this country sought inclusion of this local institution within the scope of "analogous institution" of the Convention; the Egyptian delegate indicated in the Fifteenth Session that Egypt has the equivalent of the charitable trust (Explanatory Report, p. 375).
- 17 Ministry of Endowments, (27 Feb. 2020), available at <https://ar.awkafonline.com/?p=87240>.
- 18 M. Papa, M. Santostasi (2019), "Real Estate, Usufruct Right and the Issue of the Waqf Assets in Egypt", *European Journal of Islamic Finance*.
- 19 Civil Code of Ethiopia (1960), *The Federal Negarit Gazeta*, Year No 2, Proclamation No 165/1960, Arts 516-544.
- 20 M. Lupoi (1995), "The Shapeless Trust", *Trusts & Trustees*, Vol. 1, Issue 3, pp. 15-18.
- 21 French Civil Code, Arts 2011-2030.
- 22 Le ministère de la Justice (2022), "Consultation sur le projet de code de droit international privé", available at: <http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/consultation-sur-le-projet-de-code-de-droit-international-prive-34487.html>.
- 23 J. Douglas (2012), "Trusts and Their Equivalents in Civil Law Systems: Why Did the French Introduce the Fiducie into the Civil Code in 2007? What Might its Effects Be?", *QUT Law Review*, Vol. 13, Issue 1, p. 28.
- 24 [http://www.textes.justice.gouv.fr/art\\_pix/projet\\_code\\_droit\\_international\\_prive.pdf](http://www.textes.justice.gouv.fr/art_pix/projet_code_droit_international_prive.pdf).
- 25 The Treuhand has roots in canon law and customary law and legal practice. "The frequent use of trusts in order to pass family property from one generation to the next upon terms different from those established by the customary law of succession has ... been noted" (Helmholz and Zimmermann (eds), *Itinera Fiduciaee, Trust and Treuhand in Historical Perspective* (Duncker & Humblot, Berlin, 1998), pp. 31-39).
- 26 Dyer/Van Loon Report, *op. cit.* note 9, p. 38 (arguing that "the Treuhand perhaps comes closest to being a true trust").
- 27 Act V of 2013 Promulgating the Civil Code 6:310-6:330, available at [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=96512&p\\_country=HUN&p\\_count=937&p\\_classification=01.03&p\\_classcount=4](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=96512&p_country=HUN&p_count=937&p_classification=01.03&p_classcount=4); Hungary Act XV of 2014 on trustees and the rules governing their activities, available at [https://archiv.njt.hu/translated/doc/J2014T0015P\\_20180701\\_FIN.pdf](https://archiv.njt.hu/translated/doc/J2014T0015P_20180701_FIN.pdf).
- 28 *Ibid.*
- 29 Bank Sentral Republik Indonesia (7 May 2021), available at [https://www.bi.go.id/id/publikasi/ruang-media/news-release/Pages/sp\\_2312021.aspx](https://www.bi.go.id/id/publikasi/ruang-media/news-release/Pages/sp_2312021.aspx).
- 30 M. Obaidullah and others (2014), *op. cit.* note 4. "The central authority responsible for all aspects of awqaf in Indonesia is called the Badan Wakaf Indonesia, which does not own or directly manage the waqf assets, but plays a supervisory role".
- 31 E. Sune, "The Role of Para-Governmental and Paramilitary Organizations in the International Political Economy of Iran", *Journal of Gazi Academic View*, 12 (24) pp. 45-63.
- 32 *Ibid.*
- 33 Israeli Trust Law 5739-1979 provides a legal framework for private and public trusts in general. Section 1 states that "a trust is a relationship to property by virtue of which a trustee is bound to hold the same or to act in respect thereof in the interest of a beneficiary or some other purpose". Sections 5 and 14 protect the beneficiary against ultra vires transactions by the trustee with third parties.
- 34 Dyer/Van Loon Report, p. 33, *op. cit.* note 9.
- 35 Italian Civil Code, Art. 2645-ter.
- 36 L. Franciosi (2013), "Italy: Trust and the Italian Legal System: Why Menu Matters", *Journal of Civil Law Studies*, Vol. 6, Issue 2.
- 37 Trust Act of Japan, Act No 108 of 2006.
- 38 M. Arai (2013), "Trust law in Japan: inspiring changes in Asia, 1922 and 2006", in L. Ho and R. Lee (eds.), *Trust Law in Asian Civil Law Jurisdictions a Comparative Analysis*, Cambridge, Cambridge University Press, 2013, pp. 27-31.
- 39 At the Fifteenth Session, the delegation representing this country sought inclusion of this local institution within the scope of "analogous institution" of the Convention.
- 40 Dyer/Van Loon Report, *op. cit.* note 9.

- 41 Jordanian Waqf Law No 32/2001, Art. 2. Definition of Waqf: "withholding the property of the owner for Allah the Almighty in order to allocate its benefits for charity and for good deeds".
- 42 M. Al Manaseer and B. Matarneh (2014), "Waqf and Its Role in the Social and Economic Development of the Hashemite Kingdom of Jordan", *European Journal of Economics, Finance and Administrative Sciences*, Issue 64, p. 59. "This means removing ownership of this particular property such that it cannot be owned by anyone".
- 43 Act No 10924 of 2011, revising the South Korean Trust Act, Act No 900, 30 December 1961.
- 44 Y.-C. Wu (2013), "Trust Law in South Korea: Developments and Challenges", in L. Ho and R. Lee (eds.), *op. cit.* note 38, pp. 46-62.
- 45 Kuwait Government Online 16 July 2016) available at <https://e.gov.kw/sites/kgenglish/Pages/eServices/AWQAF/OnlineWaqf.aspx>.
- 46 Kuwaiti Law of Waqf al-Istirshadi 2014, Art. 23. Once created, waqf becomes a legal entity.
- 47 1926 Statute, Art. 897 of the *Personen und Gesellschaftsrecht*.
- 48 At the Fifteenth Session, the delegation representing this country sought inclusion of this local institution within the scope of "analogous institution" of the Convention.
- 49 Dyer/Van Loon Report, *op. cit.* note 9.
- 50 The Law of 27 July 2003 relating to trusts and fiduciary contracts.
- 51 D. Waters (2005), "The Hague Trusts Convention twenty years on" in *Commercial Trusts in European Private Law*, pp. 91-92.
- 52 Malaysian Act 505 Administration of Islamic Law (Federal Territories) of 1993, s. 62. "(1) All properties subject to the provisions of section 61 and situated in the Federal Territories shall without any conveyance, assignment or transfer whatsoever, and, in the case of immovable property, upon registration under the relevant written laws relating to land, vest in the Majlis, for the purposes of the trust, wakaf or nazr 'am affecting the same."
- 53 Malaysian Act 100, Trust Companies Act 1949.
- 54 M. Obaidullah and others (2014), *op. cit.* note 4. "Malaysian law requires that every waqf shall be registered in the name of the Islamic Religious Council as proprietor".
- 55 Title 19 Book 1 of the Netherlands Civil Code.
- 56 According to the Dyer/Van Loon Report, *op. cit.* note 9, the bewind is different from the trust because ownership is vested in the beneficiaries.
- 57 Omani Royal Decree 65/2000 on Awqaf, Art. 2. Once created, the waqf has its own legal personality. The ownership of the assets is transferred from the waqif (settlor) to the waqf.
- 58 *Ibid.*
- 59 Trust Act of Pakistan 1882.
- 60 The Islamabad Capital Territory Waqf Properties Act, 2020 (Act No. XXIX of 2020).
- 61 M. Obaidullah and others (2014), *op. cit.* note 4.
- 62 Art. 314 of the *Ley general de Bancos*.
- 63 M. Lupoi (1995), *op. cit.* note 20.
- 64 At the Fifteenth Session, the delegation representing this country sought inclusion of this local institution within the scope of "analogous institution" of the Convention.
- 65 Qatari Law No 8 of 1996 with respect to Endowment (Waqf) 8/1996, Art. 7. "The Endowment shall have a legal personality from inception, and shall enjoy the rights and duties of a legal person in accordance with the Law."
- 66 Qatari Law No 8 of 1996.
- 67 Trust Property Control Act 1988 (South Africa) No 57 of 1988.
- 68 D. Clarry (2014), *op. cit.* note 11, p. 911.
- 69 Dyer/Van Loon Report, *op. cit.* note 9.
- 70 *Ley 41/2003 de protección patrimonial de las personas con discapacidad*.
- 71 P.I.B. Hermosa and N. Malumian, "Trust in Spain?", *Trusts & Trustees*, 26 (10), pp. 950-955.
- 72 *Ibid.*
- 73 *Ley 10/2008, de 10 de julio, del libro cuarto del Código Civil de Cataluña, relativo a las sucesiones; Ley 25/2010, de 29 de julio, del libro segundo del Código civil de Cataluña, relativo a la persona y la familia, Artículo 227-1 and 227-2; Ley 41/2003 de protección patrimonial de las personas con discapacidad y de modificación del Código Civil, de la Ley de Enjuiciamiento Civil y de la Normativa Tributaria con esta finalidad*.
- 74 Trust Ordinance No 9 of 1917, L.E. Cap 89, amended by Acts No 7 of 1968 and No 30 of 1971.
- 75 Dyer/Van Loon Report, *op. cit.* note 9.
- 76 Federal Law of the UAE No 5 of 2018, Art. 10. "Effects of Registration of Endowment The registration of the Endowment in the Record shall entail the following: 1- Acquisition of legal entity, financial and administrative independence, and right of litigation in this capacity. 2- Transfer of ownership and possession of the Endowed to the Endowment and it shall not be disposed of throughout the period of Endowment in any type of disposal of transfer of property or restriction of the benefit of its revenues, such as sale, mortgage or donation."
- 77 Federal Decree Law of the UAE No 19 regarding trusts, Art. 13. "The Settlor shall be committed to the following: (a) Undertake transfer of the properties to the Trust, and to transfer the powers and authorities in respect of the Trust Property to the Trustee within a period not exceeding (6) six months from the date of registration of the Trust in the Register, unless otherwise provided by the Trust Instrument."

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- <sup>78</sup> Dyer/Van Loon Report, *op. cit.* note 9; D. Russell QC, (2021) "Trusts and Foundations Move Onshore in the Gulf", *Oxford University Press*, Vol. 27, Issue 4.
- <sup>79</sup> In 1956, Venezuela introduced a notion of trust with no restrictions as to its range of applications. It also permitted banks, insurance companies, and financial companies to perform as fiduciaries for certain operations within their respective industries (D. Figueroa (2007), "Civil Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America", *J. Ariz, Int'l & Comp. L.* 24, 701 (citing Lupoi, "Trusts, A Comparative Study", Simon Dix trans., Cambridge University Press 2000, at pp. 290-291)).
- <sup>80</sup> D. Figueroa (2007), *op. cit.* note 79.
- <sup>81</sup> At the Fifteenth Session, the delegation representing this country sought inclusion of this local institution within the scope of "analogous institution" of the Convention.
- <sup>82</sup> Dyer/Van Loon Report, *op. cit.* note 9.
- <sup>83</sup> A. Chong (2020), "Bridging the common law—civil law divide? The 1985 Trusts Convention", *The Elgar Companion to the Hague Conference on Private International Law*, pp. 323-335.
- <sup>84</sup> D. Hayton (2016), *op. cit.* note 9, p. 20.