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| **Action to be Taken** | For Decision ☒<br>For Approval ☐<br>For Discussion ☐<br>For Action / Completion ☐<br>For Information ☐ |
| **Annexes** | Annex I – List of Institutions Potentially Analogous to Trusts |
| **Related Documents** | N/A |

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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.[1] In March 2021, the Permanent Bureau (PB) provided updates to the Council on General Affairs and Policy (CGAP) on the HCCH 1985 Trusts Convention and proposed future work on the Convention.[2] CGAP noted the PB's report and encouraged the PB to leverage the 30th anniversary of the entry into force of the HCCH 1985 Trusts Convention when planning research activities and events.[3] It also mandated the PB to continue to make arrangements for the 2022 Commercial and Financial Law Conference.[4] As a follow up to Preliminary Document No 15 , this Preliminary Document provides a more in-depth overview of the analogous institution concept which is central to the Convention. It also suggests topics for future work.

## II. Background and operation of the Convention

2 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.[5]

3 Chapter II of the Convention lays down the applicable law rules for trusts. It adopts a principle of "party autonomy" for trusts:[6] 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 sub-paragraphs (a) to (d), in an implicit hierarchy.[7] *Dépeçage* is provided for (Art. 9) in that a settlor may pick and choose different laws to govern different aspects of the trust.

4 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 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).[8]

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1 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 signed the Convention without ratifying.

2 "The HCCH 1985 Trusts Convention: Updates and Possible Future Work", Prel. Doc. No 15 of December 2020, available on the HCCH website <www.hcch.net > under "Governance" then "Council on General Affairs and Policy" then "Archive (2000-2021)".

3 "Conclusions and Decisions of the Council on General Affairs and Policy of the Conference (1-5 March 2021)", C&D No 39, available on the HCCH website www.hcch.net, see path indicated *supra* note 2.

4 C&D No 38 of CGAP 2021.

5 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.

6 Explanatory Report, para. 63.

7 *Ibid.*, paras 20, 72 and 77.

8 *Ibid.*, paras 21-22.

## III. Institutions analogous to trusts

5 Delegates at the Fifteenth Session (8-20 October 1984) decided not to limit the scope of the Convention to "Anglo-American"[9] trusts.[10] As a result, the Convention applies to trusts and to institutions analogous to trusts as long as the criteria established in its Article 2 are met.

6 According to Article 2, for any analogous institution to be included within the Convention, it must have 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 on him by law.

7 Article 2 further notes that "the reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust".[11]

8 The inclusion of the notion of institutions analogous to trusts in Article 2 resulted in a wide scope for the Convention. Such an expansion in scope also means that benefits of accessions are two-way: common law jurisdictions can ensure that their Anglo-American trusts are recognised in civil law jurisdictions, just as those civil law jurisdictions which have their own analogous institutions can ensure recognition in a common law State or another civil law State which does not recognise this type of institution.

9 Furthermore, joining the Convention enhances legal predictability and simplifies the judicial task in both major legal traditions. 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 common law jurisdictions that would not have encountered the characterisation problem, 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.

## IV. Developments relating to institutions analogous to trusts

10 In light of the importance of the "analogous institutions" concept, the PB has gathered information on potential institutions analogous to trusts from jurisdictions representing a variety of legal traditions. Particular focus was placed on civil law countries that have adopted trusts and the intuition of *waqf* existing in many jurisdictions with Islamic law traditions. Annex I includes a list of the jurisdictions and potential analogous institutions examined.

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9 The term Anglo-American trusts refers to those that developed in the courts of equity of countries with common law traditions, notably England and the USA. The existence of trust-like institutions in countries that lacked a historical division between courts of law and courts of equity is one of the theoretical challenges of the scope of the Convention and the idea of analogous institutions.

10 Explanatory Report., para. 26.

11 HCCH 1985 Trusts Convention, Art. 2.

### A. New trust instruments introduced by civil law jurisdictions into their domestic law

11 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.

12 With the objective of providing structures for investment that serve the purpose of holding properties for the benefit of beneficiaries, France adopted the *fiducie* in 2007.[12] While not acceding to the Convention, Belgium revised its private international law rules in 2004 to include provisions that are substantially similar to the Convention.[13] In Italy, where internal trusts (see para. 21 below) have been recognised under the Convention since the mid-1990s, the Civil Code was amended in 2006 to include a "bond of purpose" analogous to trusts.[14] Switzerland, with its sophisticated wealth management sector, recognised trusts even before ratifying the Convention; ratification in 2006 added more certainty to the practice without the introduction of an analogous institution into domestic law.[15] Japan originally enacted trusts legislation in 1922 and modernised the institution in 2006.[16] Each of these developments in Japan influenced the Republic of Korea's introduction of trust legislation in 1961 and subsequent revision in 2011.[17] Moreover, as explored in the next sub-section, some States with Islamic law traditions are reforming the religious institution of *waqf* to bring it closer to the institution of trusts, or have adopted the institution of trusts outright.

### B. Relationship between trusts and *waqf* in jurisdictions with Islamic law traditions

13 *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".[18] 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. While this might appear to be an analogous institution at first glance, further consideration of their characteristics reveals several key areas of divergence between *waqf* and trusts, as follows:

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. Some States, such as Egypt, view the ownership as being retained by the *waqif* while only the usufruct right is assigned.[19] Others, like Jordan, consider that, once the *waqf* is created, the property can no longer be owned by anyone.[20] The United

12 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. 24. While not a new development, it may be interesting to note that Quebec introduced the *fiducie* in its Civil Code in 1879, see René Dussault, « La fiducie dans le droit québécois », Les Cahiers de droit, Volume 5, numéro 2, avril 1963, Editeur(s) Faculté de droit de l'Université Laval, online at https://www.erudit.org/fr/revues/cd1/1963-v5-n2-cd5000913/1004177ar.pdf (last accessed 1 December 2021).

13 Belgian Private International Law Code, Arts 122-124.

14 M. Graziadei (2012), "Recognition of common law trusts in civil law jurisdictions under the Hague Trusts Convention with particular regard to the Italian experience", in *Re-imagining the Trust: Trusts in Civil Law* (ed. Lionel Smith), CUP, pp. 79-82.

15 P. Panico (2018), "New Trust Legislation in Civil Law Jurisdictions", *Zeitschrift für vergleichende Rechtswissenschaft : einschließlich der ethnologischen Rechts- und der Gesellschaftsforschung,* Vol. 117, Issue 3, pp. 92-93.

16 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.

17 Y.-C. Wu (2013), "Trust Law in South Korea: Developments and Challenges", in L. Ho and R. Lee (eds.) *Trust Law in Asian Civil Law Jurisdictions a Comparative Analysis*, Cambridge, Cambridge University Press, 2013, pp. 46-51.

18 S. Baqutayan and others (2018), "Waqf Between the Past and Present", *Mediterranean Journal of Social Sciences*, Vol. 9, Issue 4, p. 149.

19 M. Papa, M. Santostasi (2019), "Real Estate, Usufruct Right and the Issue of the Waqf Assets in Egypt", *European Journal of Islamic Finance*.

20 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.

Arab Emirates,[21] Qatar,[22] and Oman[23] consider the *waqf* as a separate legal entity. In all three cases, the assets do not stand "in the name of the trustee or in the name of another person on behalf of the trustee" as required by Article 2(b) of the Convention. On the other hand, Malaysia has enacted a model that is closer to the common law model of trusts in which the law "requires that every *waqf* shall be registered in the name of the Islamic Religious Council as proprietor".[24] Yet this structure in Malaysia highlights another divergence between *waqf* and trusts, the role of governmental bodies in managing the endowed assets.

b. *Administration*: In a *wakf*, the administrator (*mutawalli*) is almost always a governmental authority under the name of "Ministry of *Awqaf*" or "General Directorate of *Awqaf*", among other titles.[25] 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".[26]

c. *Purpose:* Finally, while trusts are known in a variety of forms,[27] *waqf* can only be created for charitable or pious purposes either to the benefit of the general public or for specific individuals.[28] 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".[29]

14 Many States with Islamic law traditions have witnessed a decline in the *waqf* for several reasons[30] and have modernised their legal orders in a way that accommodates common law trusts. Some States that have found interest in the institution of trusts, such as Pakistan,[31] Bahrain[32] and the United Arab Emirates (UAE),[33] have enacted legislation to incorporate them into their national law. Member States of the Gulf Cooperation Council (GCC), such as Qatar and the UAE, have seen the rise of financial free zones on their territories. These free zones are geographical areas that comply with their own laws and regulations and are not bound by certain national laws, such as commercial laws, of the States in which they are created.[34] Trusts have become an important part of the legal and regulatory framework in these free zones as a tool to attract businesses and foreign investments.[35] The legal predictability that comes with acceding to the Convention could enhance the attractiveness of these free zones to foreign direct investment.

## V. Issues relating to the "Anglo-American" trust

15 Article 2 of the Convention, which includes both trusts and institutions analogous to trusts, has been criticised for diluting the Anglo-American trust concept. According to one commentator, the

21 Federal Law of the UAE No 5 of 2018, Art. 10.
22 Qatari Law No 8 of 1996 with respect to Endowment (Waqf) 8/1996, Art. 7.
23 Omani Royal Decree 65/2000 on Awqaf, Art. 2.
24 M. Obaidullah and others (2014), "Islamic Social Finance Report", Thompson Reuters, Ch. 4.
25 M. Kahf, M. (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.
26 I. Sandor (2015), "Fiduciary Property Management and the Trust", Historical and Comparative Law Analysis, Hvg-orac Publishing Ltd.
27 I. Gvelesiani (2020), "The Trust and the Waqf (Comparative Analysis)", *Trusts & Trustees*, Vol. 26, Issues 8-9, p. 737.
28 *Ibid*. p. 742.
29 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.
30 S. Mohamed, S. Baqutayan and others, (2018) "Waqf Between the Past and Present", 9 *Mediterranean Journal of Social Sciences*, p. 149.
31 Trust Act of Pakistan 1882.
32 Bahraini Legislative Decree No 23 of 2016 in respect of Trusts.
33 Federal Decree-Law of the UAE No 19 regarding trusts.
34 'Laws' <https://www.mof.gov.ae/en/lawsAndPolitics/govLaws/pages/financialfreezones.aspx> accessed 30 September 2021.
35 Trust Law DIFC Law No 4 of 2018 (for the Dubai International Financial Centre); QFC Trust Regulations No 12 of 2007 (for the Quatar Financial Centre).

desire to extend the scope of the Convention to "analogous institutions" has caused Article 2 to be too vague and loose, to the extent of producing the "shapeless trust".[36]

16 Furthermore, it has been noted that essential characteristics of the Anglo-American trust concept are not fully captured by Article 2. For example, Article 2(b) refers to the trustee's control of the trust assets as one essential characteristic of the trust. This does not imply that the settlor no longer owns the assets under the trustee's control. As a result, this fails to capture the idea of "divestiture"[37] essential to the Anglo-American trust.[38]

17 There is a further criticism that the recognition provisions (Chapters III and IV) do not guarantee effective recognition of the trust. Given the multitude of escape and mandatory law clauses in the Convention, there is room for a forum State to be freed from its obligation to recognise a trust. For example, Article 15 is a particular concession to the recognising State's internal laws of title, security, bankruptcy, insolvency, and good faith purchase. When invoked, Article 15 appears capable of negating many of the implications of recognition in relation to insolvency, divorce, or death of a trustee listed in Article 11.[39]

18 One particular complaint has been that the Convention is not sufficiently protective of beneficiary's rights, as it does not always provide for the ability to trace, into the hands of knowing recipients of the trust, if a trustee is to give the trust assets away in breach of the trust. Article 11(3)(d) excludes tracing into the hands of a third party when the transfer to third parties takes place in a civil law jurisdiction.[40] This contrasts with the common law position where the beneficiaries' rights are generally of a proprietary nature and persist against third parties who are not *bona fide* purchasers for value without notice.[41]

19 Despite the foregoing criticisms, equally, there are commentators who think that Article 2 succeeds in capturing very clearly the idea of separation of ownership and control.[42] The Convention was able to accommodate the Anglo-American trust's division between legal and equitable ownership through Article 2(a)-(c). On the one hand, Article 2(a) makes essential the condition that trust assets be distinct from the trustee's own assets. This means that the trust assets are not available to execution by the trustee's own creditors in bankruptcy, do not form part of the trustee's estate on death, and are not subject to the trustee's matrimonial regime. In other words, the trustee is denied the economic benefits of the trust assets. On the other hand, the idea of legal ownership is conveyed through Article 2(b) and 2(c), which gives the trustee the *locus standi* to sue and be sued, to register assets in their own name as a trustee, and to dispose of such assets. For some commentators, this definition is sufficient and successful in capturing the essence of the Anglo-American trust.

## VI. Settlor autonomy and "internal trusts"

20 During the Convention's negotiation, several delegations expressed opposition to granting the settlor unlimited freedom over the choice of governing law.[43] In the end, it was decided that there was no need for further connections with the State, the law of which has been chosen, to validate

36 M. Lupoi (1995), "The Shapeless Trust", *Trusts & Trustees*, 1 (3), pp. 15-18.
37 Divestiture in the context of trusts refers to the fact that traditionally the settlor has lost all ownership in the trust assets.
38 M. Lupoi (1998), "Effects of the Hague Convention in a Civil Law Country", *Trusts & Trustees*, 4, Issue 7, pp. 15-22.
39 D. Hayton (1987), "The Hague Convention on the Law Applicable to Trusts and on their Recognition", *The International and Comparative Law Quarterly,* Vol. 36, Issue (2), pp. 260-282.
40 Explanatory Report, para. 113.
41 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*, p. 331.
42 K. Lipstein (1999), "Trusts", *International Encyclopedia of Comparative Law*, (JCB Mohr, Eds), Vol. III, Issue 23, pp. 3-41.
43 M. Lupoi (1998), "Effects of the Hague Convention in a Civil Law Country", *supra* note 38, pp. 15-22; (quoting *Proceedings of the Fifteenth Session*, p. 145 (Netherlands); p. 146 (Sweden); p. 147 (Commonwealth Secretariat); p. 159 (International Union of Latin Notaries), p. 211 (Italy); p. 231 (Greece)).

the choice expressed by the settlor. Article 6 allows for the settlor to choose a foreign governing law of the trust without requiring any objective connection at all between the trust and that foreign jurisdiction. The compromise was reached by the insertion of Article 13, which allows a State to refuse to recognise a trust the significant elements of which are more closely connected with States that do not have the institution of the trust or the category of trust at issue. Article 13 serves to ensure that any abusive use of the trust with the intention to evade the jurisdiction of local law can be blocked, as courts can invoke Article 13 to refuse to recognise a trust.

21 The experience of Italy, which has been a Contracting Party to the HCCH 1985 Trusts Convention since 1992, shows that, with respect to "internal trusts", Article 13 has consistently been interpreted as a right, and not an obligation, to refuse recognition. Courts in Italy embraced the use of Article 6 to select a foreign law even for "internal trusts" and interpreted Article 13 as an escape clause to be used exceptionally in cases of abuse.[44] In the vast majority of cases, the settlor's intention is upheld.[45]

## VII. Possible topics for inclusion in the programme of the 2022 Commercial and Financial Law Conference

22 The PB has collated the following list of topics for inclusion in the programme of the 2022 Commercial and Financial Law Conference. This list is by no means exhaustive, but provides an overview of the issues that have been recently raised or discussed:

- Analogous institutions in civil law jurisdictions: How would institutions analogous to trusts in civil law jurisdictions benefit from the recognition and enforcement provisions in the HCCH 1985 Trusts Convention? What comparative law work should further be done to study civil law institutions analogous to the trust?
- Self-declarations: Where the settlor declares that they now hold certain of their own assets as trustee for certain beneficiaries, is this a "transfer" in the meaning of Article 4 and, therefore, capable of being excluded by the Convention's scope?
- Competitiveness for international trusts business: How does the HCCH 1985 Trusts Convention help traditionally "on-shore" jurisdictions develop into favourable trusts jurisdictions for wealthy settlors?
- "Off-shore" trusts jurisdictions: Given the recent accessions by Panama and Cyprus, would other off-shore trusts jurisdictions, which are already attractive international trusts business centres, have an interest to accede to the HCCH 1985 Trusts Convention?

## VIII. Proposal for CGAP

23 Following the mandate given to the PB, the PB invites CGAP to consider the issues described in this document in relation to the Trusts Convention, which will be further discussed in the programme of the 2022 Commercial and Financial Law Conference. The PB will continue to prepare for the 2022 Commercial and Financial Law Conference, with a view to including the questions raised in this document in the programme of the Conference.

24 The PB also proposes that CGAP consider mandating the PB to develop a promotional document on the Trusts Convention, with a view to increasing its visibility and the number of Contracting Parties to it.

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44 See, *e.g.*, Trib. Chieti, 10 March 2000, T&AT, 2000, 372; Trib. Bologna, 18 April 2000, T&AT, 2000, 372; M. Lupoi, *La giurisprudenza italiana sui trust dal 1899 al 2009*, (2009), Wolters Kluwer, Milan.

45 M. Graziadei (2012), "Recognition of common law trusts in civil law jurisdictions under the Hague Trusts Convention with particular regard to the Italian experience", in *Re-imagining the Trust: Trusts in Civil Law* (ed. Lionel Smith), CUP, pp. 71-78.

# Annex

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

| Countries | Local Institution | Is this an "analogous institution" according to Article 2? | Source of argument[1] | Is this Country a Contracting Party to the Convention? |
|---|---|---|---|---|
| Bahrain | Trusts[2] | Yes | (3) | No |
| Bangladesh | Waqf | No | (4)[3] | No |
| Canada (Quebec) | Quebec fiducie[4] | Yes | (1), (2),[5] (2) | Yes (but not Quebec) |
| China, People's Republic of | Trusts[6] | Yes | (4)[7] | No (cf Hong Kong) |
| Colombia | Fiducia[8] | Yes | (4)[9] | No |
| Czech Republic | Trust[10] | Yes | (4)[11] | No |
| Egypt | Charitable trust | Yes | (1)[12] | No |
| Egypt | Waqf | No | (4)[13] | No |
| Ethiopia | Fideicommis[14] | Yes | (4)[15] | No |
| France | Fiducie[16] | Yes | (4)[17] | No |
| Germany | Treuhand[18] | Yes | (2)[19] | No |
| Indonesia | Wakaf | No | (4)[20] | No |

1 Sources of Argument: (1) At the Fifteenth Session, the delegation representing this country sought inclusion of this local institution within the scope of "analogous institution" of the Convention, (2) "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"), (3) domestic law, (4) academic source.

2 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 (…)."

3 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."

4 Civil Code of Quebec, Arts 1260-1298.

5 D. Hayton (2016), "Reflections on The Hague Trusts Convention after 30 years", *Journal of Private International Law*, Vol. 12, Issue 1, pp. 7-8.

6 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).

7 D. Clarry (2014), "Fiduciary Ownership and Trusts in a Comparative Perspective", *International and Comparative Law Quarterly*, Vol. 63, pp. 915-916.

8 Commercial Code of Columbia, Arts 1226-1235.

9 D. Clarry (2014), *supra* note 7, p. 912.

10 The Civil Code of the Czech Republic (Act No 89 / 2012), pp. 1448-1474.

11 L. Tichy (2016), "Recognition of a Trust as a Specific Problem in Private International Law", *European Review of Private Law - Revue Europeenne de Droit Privé*, Vol. 24, Issue 6, pp. 1165-1166.

12 The Egyptian delegate indicated in the Fifteenth Session that Egypt has the equivalent of the charitable trust (Explanatory Report, p. 375).

13 M. Papa, M. Santostasi (2019), "Real Estate, Usufruct Right and the Issue of the Waqf Assets in Egypt", *European Journal of Islamic Finance*.

14 Civil Code of Ethiopia (1960), *The Federal Negarit Gazeta*, Year No 2, Proclamation No 165/1960, Arts 516-544.

15 M. Lupoi (1995), "The Shapeless Trust", *Trusts & Trustees,* Vol. 1, Issue 3, pp. 15-18.

16 French Civil Code, Arts 2011-2030.

17 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.

18 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 Fiduciae, Trust and Treuhand in Historical Perspective (Duncker & Humblot, Berlin, 1998), pp. 31-39).

19 The Dyer/Van Loon Report, p. 38 (arguing that "the *Treuhand* perhaps comes closest to being a true trust".)

20 M. Obaidullah and others (2014), *supra* note 3. "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".

| | | | | |
|---|---|---|---|---|
| Israel | Trust[21] | Yes | (2)[22] | No |
| Italy | Bond of purpose[23] | Yes | (4)[24] | Yes |
| Japan | Trusts/ 'Shintaku'[25] | Yes | (1), (2), (4)[26] | No |
| Jordan | Waqf[27] | No | (4)[28] | No |
| Korea, Republic of | Trusts[29] | Yes | (4)[30] | No |
| Kuwait | Waqf | No | (4)[31] | No |
| Liechtenstein | Treuhanderschaft[32] | Yes | (1), (2) | Yes |
| Luxembourg | Fiducie[33] | Yes | (4)[34] | Yes |
| Malaysia | Wakaf/charitable trusts[35]<br>Trusts[36] | Yes<br>No | (4)[37] | No |
| Netherlands | Bewind | No | (2)[38] | Yes |
| Oman | Waqf[39] | No | (3) | No |
| Pakistan | Trusts[40]<br>Waqf | Yes<br>No | (4)[41] | No |
| Peru | Fideicomiso[42] | Yes | (4)[43] | No |
| Poland | Charitable trust[44] | Yes | (1) | No |
| Qatar | Waqf[45] | No | (3) | No |

21 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". Section 5 and 14 protect the beneficiary against ultra vires transactions by the trustee with third parties.

22 Dyer/Van Loon Report, p. 33.

23 Italian Civil Code, Art. 2645-ter.

24 L. Franciosi (2013), "Italy: Trust and the Italian Legal System: Why Menu Matters", *Journal of Civil Law Studies*, Vol. 6, Issue 2.

25 Trust Act of Japan, Act No 108 of 2006.

26 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.

27 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".

28 M. Al Manaseer, M. and Matarneh, B. (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".

29 Act No 10924 of 2011, revising the South Korean Trust Act, Act No 900, Dec. 30, 1961.

30 Y.-C. Wu (2013), "Trust Law in South Korea: Developments and Challenges", in L. Ho and R. Lee (eds.), *Trust Law in Asian Civil Law Jurisdictions – a Comparative Analysis*, Cambridge, Cambridge University Press, 2013, pp. 46-62.

31 Kuwaiti Law of Waqf al-Istirshadi 2014, Art. 23. Once created, waqf becomes a legal entity.

32 1926 Statute, Art. 897 of the *Personen und Gesellschaftsrecht*.

33 The Law of 27 July 2003 relating to trusts and fiduciary contracts.

34 D. Waters (2005), "The Hague Trusts Convention twenty years on" in *Commercial Trusts in European Private Law*, pp. 91-92.

35 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."

36 Malaysian Act 100, Trust Companies Act 1949.

37 M. Obaidullah and others (2014), *supra* note 3. "Malaysian law requires that every waqf shall be registered in the name of the Islamic Religious Council as proprietor".

38 According to the Dyer/Van Loon Report, the bewind is different from the trust because ownership is vested in the beneficiaries.

39 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*.

40 Trust Act of Pakistan 1882.

41 M. Obaidullah, and others (2014) "Islamic Social Finance Report", Thompson Reuters, ch. 4. *supra* note 3.

42 Art. 314 of the Ley general de Bancos.

43 M. Lupoi (1995), "The Shapeless Trust", *supra* note 15, pp. 15-18.

44 The Polish delegate indicated in the Fifteenth Session that Poland has the equivalent of the charitable trust.

45 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."

| | | | | |
|---|---|---|---|---|
| South Africa | Trust[46] | Yes | (2), (4)[47] | No |
| Sri Lanka | Fideicommissum[48] | Yes | (2), (4) | No |
| UAE | Waqf[49]<br>Trusts[50] | No<br>Yes[51] | (2) | No |
| Venezuela | Fideicomiso[52] | Yes | (1), (2), (4) | No |
| Offshore jurisdictions | Non-charitable purpose trusts<br>▪ Cayman Islands 'STAR trusts'<br>▪ British Virgin Islands 'VISTA trusts'<br>▪ 'Jersey Trust' (according to Trust Law of Jersey of 31 May 1983 and 14 March 1984) | 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[53]. | (4)[54] | Not the Bahamas or the Cayman Islands<br>In force in British Virgin Islands, Gibraltar, Jersey, Cyprus and Panama |

46 Trust Property Control Act 1988 (South Africa) No 57 of 1988.

47 D. Clarry (2014), "Fiduciary Ownership and Trusts in a Comparative Perspective", *International and Comparative Law Quarterly*, Vol. 63, p. 911.

48 Trust Ordinance No 9 of 1917, L.E. Cap 89, amended by Acts No 7 of 1968 and No 30 of 1971.

49 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."

50 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."

51 D. Russell QC, (2021) "Trusts and Foundations Move Onshore in the Gulf, *Oxford University Press*, Vol. 27, Issue 4.

52 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).

53 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.

54 D. Hayton (2016), "Reflections on The Hague Trusts Convention after 30 years", *supra* note 5, p. 20.