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International Recognition and Adaptation of Trusts: The Influence of the Hague Convention

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I. INTRODUCTION

The preparation of an international convention on the law applicable to trusts and on their recognition was, for the Hague Conference on Private International Law, a step into a new analytical area—that of the unknown legal institution.[1] Topics such as the adoption of children, or even divorce and legal separation, had offered some problems of characterization—or occasionally even the complete absence of the institution in question—but none had offered such a wholesale absence of a legal institution as did the trust project in 1982 with its non-trust countries (for the most part, classified for convenience as "civil law countries"). The Adoption Convention, completed in 1964, had offered the problem of characterization, or of definition, as between "plenary" adoptions and adoptions granted in some countries that had less than plenary effects.[2] Since countries that have Islamic law tend to reject, for religious reasons, any mechanism for child care that involves a change in the parent-child relationship, the model for the work in the sixties on the Adoption Convention[3] was based mainly on adoption practice in Europe. For the work on divorce, the gap in legal institutions was that a minority of the countries participating in the negotiations did not have provision for divorce in their laws, and others did not provide for legal separation. This gap was met in the Convention of June 1, 1970 on the Recognition of Divorces and Legal Separations[4] by including provisions specifically directed to the situations of countries that did not have one or the other of these institutions.[5]

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1. *See* Georges A.L. Droz, *Regards sur le droit international privé comparé: Cours général de droit international privé*, 229 COLLECTED COURSES OF THE HAGUE ACADEMY OF INT'L LAW 9, 247-49 (1991); Explanatory Report of Alfred E. von Overbeck, *in* HAGUE CONFERENCE ON PRIVATE INT'L LAW, ACTES ET DOCUMENTS DE LA QUINZIEME SESSION, PROCEEDINGS OF THE FIFTEENTH SESSION, Tome II 370, 372 (1985) [hereinafter PROCEEDINGS OF THE FIFTEENTH SESSION]; *see generally*, Emmanuel Gaillard & Donald L. Trautman, *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*, 35 AM. J. COMP. L. 307 (1987).

2. *See* Aperçu Général des Problèm de l'Adoption International, *in* CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE, ACTES ET DOCUMENTS DE LA DIXIÈME SESSION, Tome II 11, 18-21 (Before the 15th Plenary Session, in 1984, the volumes of the "Proceedings" of each session bore only the French title: *Actes et documents.*).

3. *See* Projet Adoptè par la Dixième Session, *in* ACTES ET DOCUMENTS DE LA DIXIÈME SESSION at 399-407.

4. *See* Extract from the Final Act of the Eleventh Session, *in* Conférence de la Haye de Droit International Privè, ACTES ET DOCUMENTS DE LA ONZIÈME SESSION, Tome II 201, 201-08; Convention on the Recognition of Divorces and Legal Separations, June 1, 1970, 978 U.N.T.S. 393 (1975).

5. *See* Convention on the Recognition of Divorces and Legal Separations, *supra* note 4, arts. 7, 19, 20, 21.

The broad gap between jurisdictions based on English law (together with those that have adopted by statute either a comprehensive form of trust, or trusts for use in particular areas of activity) and those jurisdictions that have never had a fiduciary mechanism such as the trust (whose legislation may even preclude the operation of such a mechanism) posed a challenge that brought about a new style of research at the Hague Conference. In addition to French, English had only been brought in as an official and working language of the Hague Conference, in 1964 when the United States joined during the Conference's 10th Plenary Session. There had only been one member of the Permanent Bureau with English as his native language and trained in the common law and equity since 1966. Now, for the first time, a member from the common law staff and a member from a civil law, non-trust jurisdiction were assigned to work together and prepare the report that would begin, and form the basis for, the initial discussions leading to the adoption of a treaty dealing with the private international law of trusts. The result was Preliminary Document No. 1, issued in May 1982 and entitled Report on Trusts and Analogous Institutions, by Adair Dyer and Hans van Loon.[6]

Fortunately, the work of the Hague Conference on a topic depends only for its start on the practical experience and analytical skills of the members of the Permanent Bureau, all of whom are to a large extent "generalists." Member states come to the rescue with distinguished specialists, both in private international law and in the subject area. From the first meeting of the Special Commission, these experts took over the shaping of a treaty text, depending on the Secretariat only for essential support services. The United States sent Professor Donald Trautman of Harvard University, who had taught trusts (as well as conflict of laws alongside Professor Arthur von Mehren), succeeding to and in consultation with Professor Austin Scott. Canada sent Professor Donovan Waters, author of the leading treatise on the Canadian law of trusts[7] as well as of a book on constructive trusts.[8] The United Kingdom sent Professor David Hayton, the legal scholar continuing the leading treatise, *Underhill and Hayton, Law Relating to Trusts and Trustees,*[9] and

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6. *See* Report on Trusts and Analogous Institutions (Preliminary Document No. 1 of May 1982) *in* PROCEEDINGS OF THE FIFTEENTH SESSION, *supra* note 1, at 10-110.

7. *See generally* D.W.M. WATERS, LAW OF TRUSTS IN CANADA (2d ed. 1984).

8. *See generally* D.W.M. WATERS, THE CONSTRUCTIVE TRUST: THE CASE FOR A NEW APPROACH IN ENGLISH LAW (1964).

9. *See generally* ARTHUR UNDERHILL, UNDERHILL AND HAYTON, LAW RELATING TO TRUSTS AND TRUSTEES (15th ed. 1995).

the leading casebook, *Nathan and Marshall.*[10] The Scottish legal system was represented at the Special Commission by the other expert designated on behalf of the United Kingdom, Professor A.E. Anton, member of the Scottish Law Commission, who participated in the work of the *ad hoc* Drafting Committee that met in November 1982 and drew up the first Draft articles.[11]

The continental European countries, for obvious reasons, had more difficulty sending experts who were known for their work in the field of trust law. Switzerland, which had a leading court decision on the treatment of a trust by a non-trust country, contributed Professor Alfred E. von Overbeck, a well-known academic expert on private international law, who was elected Reporter by the Special Commission. The host country, the Netherlands, contributed the work and long experience of C.D. van Boeschoten, a distinguished senior partner of a major law firm in The Hague, who was elected to serve as Chairman of the Special Commission. Germany designated Professor Hein Kötz, who had authored a pioneering comparative work entitled *Trust und Treuhand.*[12] Italy sent A. Gambaro, Professor of Comparative Law at the University of Turin. France sent Jean-Paul Béraudo, a magistrate then attached to the Ministry of Justice, who authored the book *Les trusts anglo-saxons et le droit français.*[13]

For the diplomatic conference, Egypt, which could take an interested role because of the Islamic legal institution, the *waqf* or *wakf,*[14] sent A. Rizk, Vice-Minister of Justice and Vice-President of the Supreme Court, together with Professor Fouad Riad of Cairo University. Japan, which had the fiduciary institution known as *Shintaku,*[15] sent its most distinguished expert on private international law, Professor Ikehara of Sophia University and Professor Emeritus of the University of Tokyo. Australia sent Professor Michael Pryles to the diplomatic session, alongside Trevor Bennett of the Attorney General's Department, who had participated in the Special Commission's work. Cyprus, which had just joined the Hague Conference, sent Justice A. N.

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10. *See generally* DAVID J. HAYTON, HAYTON AND MARSHALL: CASES AND COMMENTARY ON THE LAW OF TRUSTS (9th ed. 1991).

11. *See* Draft Articles on the Law Applicable to Trusts and their Recognition, *in* PROCEEDINGS OF THE FIFTEENTH SESSION, *supra* note 1, at 141-43. The other members of this committee were Messrs. Béraudo (France) and Wiesbauer (Austria). *See id.*

12. HEIN KÖTZ, TRUST UND TREUHAND; EINE RECHTSVERGLEICHENOE DARSTELLUNG DES ANGLO-AMERIKANISCHEN (1963).

13. JEAN-PAUL BÉRAUDO, LES TRUSTS ANGLO-SAXONS ET LE DROIT FRANÇAIS (1992).

14. *See* Report on Trusts and Analogous Institutions (Preliminary Document No. 56), *supra* note 6, at 39.

15. *See infra* notes 109-11 and accompanying text.

Loizou of its Supreme Court. Of course, many other experts, including governmental lawyers and magistrates, participated actively in the work on trusts and made significant contributions to the results. It is notable that Panama for the first time sent an observer to follow the Conference's work.

It is not the purpose of this article to trace the whole history of the trusts project at The Hague, but I simply wanted to give the reader some flavor of the treaty-making process at the Hague Conference, which the Secretary General of the United Nations once referred to as "highly-structured procedures."[16] The structure comes from the Conference's Statute[17] that, since its entry into force in 1955, has provided for a diplomatic conference, in principle, once every four years, and for the first time has established a permanent intergovernmental organization[18] with a standing Secretariat, committed to the mission of working for the progressive unification of the rules of private international law. The four-year cycle imposes discipline both on the Permanent Bureau and the experts forming the delegations to complete the preparatory work in time to be able to adopt the final text of pending conventions at the next Plenary Session. The Trusts Convention conformed to this pattern and was adopted at the Hague Conference's 15th Plenary Session in October 1984.[19]

What were the reasons that led the Hague Conference to undertake this task, which Professor Waters once described as the first serious attempt in 600 years to bridge the gap of the "English" Channel (known in French as *La Manche*) in the field of fiduciary law?[20] Much can be attributed to the impact of the European Economic Community (EEC), which now has evolved into the European Union and is presently made up of fifteen countries.[21] The creation of a Common Market among six

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16. George A.L. Droz & Adair Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 NW. J. INT'L L. & BUS. 155, 209 (1981).

17. *Statute of The Hague Conference on Private International Law, Oct. 31, 1951*, 220 U.N.T.S. 121 (1955). The statute was drawn up at the Seventh Session of the Conference held at The Hague from 9-31 October 1951.

18. The Hague Conference currently has 46 member states.

19. *See* Procès-verbal No. 3 (Meeting of Friday, 19 Oct. 1984), *in* PROCEEDINGS OF THE FIFTEENTH SESSION, *supra* note 1, at 359-68. The English text of the Convention has also been published at 23 I.L.M. 1388 (1984) and 31 NETH. INT'L L. REV. 447 (1984).

20. Approximation of a remark heard by the author of this article c. 1982-84. *See* Donovan W.M. Waters, *The Institution of the Trust in Civil and Common Law*, 252 COLLECTED COURSES OF THE HAGUE ACADEMY OF INT'L LAW 113, 129-30 (1995).

21. *See generally* Droz & Dyer, *supra* note 16, at 208.

continental European countries[22] starting in 1957 had made it feasible for businesses from Britain, the United States and Canada to establish multinational operations in Western Europe on a much broader scale than had been possible in the past. This process was accelerated when Great Britain, Ireland, and Denmark joined the EEC in 1973, and business people came to be based and domiciled in a country other than that of their nationality for many years. The reverse process for continental European business people accelerated with the entry of Great Britain and Ireland into the EEC. English, Irish, and U.S. citizens tended nonetheless to do their estate planning in their traditional way (i.e., by setting up *inter vivos* trusts or trusts in their wills), while acquiring property in non-trust countries. Some of the continental European executives living in England or the United States learned to like the flexibility of the trust mechanism and began to use it while still owning or inheriting property in non-trust countries. Notaries and, occasionally, courts in some of the non-trust countries began to be confronted with the existence of an unknown and unrecognized player in the context of the settlement of an estate—the trustee.

This growing problem was posed in a limited but important way in a legal text in 1978. The original six Member States of the EEC—all non-trust jurisdictions on the continent of Europe—had drawn up a treaty on jurisdiction and on the recognition and enforcement of judgments, reciprocal as among them, in 1968. This treaty is known as the Brussels Convention,[23] and it performs a role among the countries of the European Union analogous to that which the "full faith and credit clause" of the U.S. Constitution plays among the fifty states of the union in regard to mutual respect for the judgments of each other's courts.[24] The entry of Great Britain and Ireland into the EEC meant that, for the first time, when these new member states acceded to the Brussels Convention, litigation involving trusts and trustees would have to be dealt with in, or excluded from, the scope of this treaty. The solution adopted in the Accession Convention of 1978 was to insert a new clause specifying a special jurisdictional basis for lawsuits involving the internal

22. France, the Federal Republic of Germany, Italy and the three "Benelux" countries—Belgium, Luxembourg and the Netherlands.

23. Original text in French, German, Dutch and Italian. English translation may be found at *European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial* Maters, 8 I.L.M 229 (1969). A consolidated and updated version, following the 1989 accession of Spain and Portugal, appears at 29 I.L.M. 1413 (1990). The so-called "Lugano Convention," designed to extend the system of the Brussels Convention to Member States of the European Free Trade Area (EFTA), appears at 28 I.L.M. 620 (1989).

24. U.S. CONST. art. IV, § 1.

relationships created by a trust (actions against trustees, beneficiaries or settlors), as well as to amend the clause on choice of forum (described by the Scottish legal term "prorogation"[25]) in order to provide the possibility for the settlor to choose an exclusive forum for internal litigation[26] involving the trust relationships in the trust instrument itself.

The Brussels Convention, as amended by the Accession Convention of 1978,[27] still included its general basis for jurisdiction over lawsuits, which is the domicile of the defendant (or any defendant in case they are alleged to be jointly and severally liable), but now added a special "connecting factor" for jurisdiction over litigation concerning any of the internal relationships among settlor—trustee and beneficiary. This special jurisdiction was said to exist, in the absence of an exclusive choice for another forum by the settlor in the trust instrument, at the "domicile" of the trust. "Domicile" was a word that, before 1978, was apparently used with reference to a trust only in the law of Scotland.[28] The use of this undefined term in Article 5 of the Brussels Convention, as amended by the Accession Convention of 1978, posed definitional problems for all participating jurisdictions except Scotland. [29] For the seven EEC member states (out of nine total members at that time) that did not have trusts in their law, there was no concept or practical experience from which to start an interpretative process, much less principles or rules of private international law[30] from which the "domicile" of a trust might be deduced.

This evident lack of the tools with which jurisdiction over lawsuits concerning trust relationships might be determined, together with the growing practical need for guidance as to what law governs a trust that has property both in trusts and non-trust jurisdictions, led the Hague Conference to include the topic of the law applicable to trusts, as the project with priority in the

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25. *See* A DICTIONARY OF MODERN LEGAL USAGE 706 (2d ed. 1995).

26. *See* A.E. ANTON, CIVIL JURISDICTION IN SCOTLAND § 7.27 at 116-17 (1984).

27. *See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 18 I.L.M. 21 (1979).

28. *See* ANTON, *supra* note 26, § 5.52 at 83 (citing the *Schlosser Report* at 106-07).

29. In the Civil Jurisdiction and Judgments Act 1982, which implemented the Brussels Convention, as amended, in the United Kingdom, the following definition was set out in § 45(3): "A trust is domiciled in a part of the United Kingdom if and only if the system of law of that part is the system of law with which the trust has its closest and most real connection." Civil Jurisdiction and Judgments Act 1982 § 45(3), 22 I.L.M. 123 (Jan. 1983).

30. "In order to determine whether a trust is domiciled in the Contracting State whose courts are seised of the matter, the court shall apply its rules of private international law." 18 I.L.M. 21, art. 53 para. 2 at 32 (1979).

agenda for its 15th Plenary Session.[31] The "highly-structured procedures"[32] started with the issuance of the report in May 1982.[33] Almost seventeen years later, all or substantial parts of the territories of seven countries are covered by the Convention's rules and principles[34]—as well as a significant number of offshore jurisdictions.[35] Two large countries, France and the United States, one not having trusts and the other having them, signed the Hague Convention and then hesitated, for very different reasons.[36]

The evolution of the practice, especially in offshore jurisdictions, is driven by changes in political, social, and economic conditions of the world. Yet, the English trust mechanism retains its basic simplicity and flexibility in the midst of complex motivations and applications. In many respects, stemming from the historical-political accident of the creation of special courts of chancery or equity alongside the common law courts in medieval England, it has become the keystone of a legal system that, through the meanderings of colonial expansion, has spread to all corners of the globe. The principles of equity and the trust device have become rooted in legal systems that, as is the case in Texas, have never had separate chancery courts. The Hague Convention was intended to contribute some multinational bridging and mutual understanding to this long flow of the history of trust and equitable fiduciary principles. It was not

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31. *See* Final Act of the Fourteenth Session, *in* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, Tome I I-28, I-64, § E(3) (stating the Fourteenth Session's decision "to include with priority in the Agenda of work of the Fifteenth Session the question of international validity and recognition of trusts.").

32. Droz & Dyer, *supra* note 16.

33. *See* Adair Dyer & Hans van Loon, Report on Trusts and Analogous Institutions, *in* PROCEEDINGS OF THE FIFTEENTH SESSION, *supra* note 1, at 10-110.

34. Australia, Canada (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Prince Edward Island, and Saskatchewan only), China (Hong Kong Special Administrative Region only), Italy, Malta, the Netherlands (the Kingdom in Europe), the United Kingdom of Great Britain and Northern Ireland, and the United States. *See* Convention of 1 July 1985 on the Law Applicable to Trusts and Their Recognition (last updated Nov. 18, 1998) <http://www.hcch.net/e/status/stat30e.html>. The Conference's internet homepage gives the current status of signatures, ratifications and accessions, together with reservations and declarations. *See id.*

35. Isle of Man, Bermuda, British Antarctic Territory, British Virgin Islands, Falkland Islands (coverage contested by Argentina under name of Islas Malvinas), Gibraltar, Saint Helena, Saint Helena Dependencies, South Georgia and the South Sandwich Islands, United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus, Montserrat, the Bailiwick of Jersey, the Island of Guernsey (but not the Islands of Alderney and Sark), and the Turks & Caicos. *See id.*

36. *See id.*; *see also* discussion *infra* Part III.

intended to solve all problems, or meet all possible variations in the trust practice. Most especially, it was not intended to control the practices of the tax authorities in the different countries, although its analytical framework may have some influence in the direction of rationalization of such practices in non-trust countries.

Finally, the question of the ratification of or accession to the Hague Trusts Convention by a non-trust country is independent of the question of whether such a country should itself adopt a form of trust in its domestic law.

The answer to the latter question depends on assessments of the degree to which existing fiduciary practices in that country fulfill the needs of its current-day and future economic and social systems and, conversely, the extent to which introduction of a trust-like device might disrupt the functioning of that system.

The answer to the first question relates mainly to the smooth functioning of transnational economic and social activity, and an assessment of the extent to which improvements brought to such functioning by adherence to the Hague Convention's rules and principles might outweigh any inconveniences to the application of domestic law that might result from the Convention's application. Those inconveniences are, of course, much smaller in scope and weight for a jurisdiction that has English-style trusts in its law and equity principles applied regularly by its courts. Implementation of the Hague Convention in a non-trust country may require careful consideration in advance of the issues that will be raised in domestic law, but the benefits of adherence to a transnational framework of cooperation may be well worth the effort required.

II. THE RECOGNITION OF MULTINATIONAL TRUSTS UNDER THE HAGUE CONVENTION

A. *The Scope of the Hague Convention*

The Hague Conference on Private International Law has as its statutory mission "to work for the progressive unification of the rules of private international law."[37] Private international law, in the traditional European sense, includes the conflict of laws, conflicts of jurisdiction (both the principles governing assumption of jurisdiction in cases involving transnational

37. Statute of the Hague Conference on Private International Law, Oct. 31, 1951, 220 U.N.T.S. 121.

elements, and those governing the recognition and enforcement of foreign judgments), international judicial cooperation, and, under some views, the status of aliens.[38] While a treaty unifying substantive law in a particular field might possibly be viewed as an instrument falling within the scope of private international law,[39] the preparation of such treaties has not been considered to be a part of the Hague Conference's mission. The Conference has only occasionally included a particular unifying substantive provision in one of its treaties as a matter of perceived necessity in dealing with the private international law issues of a specific area. The unification of substantive law on a global basis has otherwise been left to the Conference's sister institution in Rome, the International Institute for the Unification of Private Law (UNIDROIT)[40] and, more recently, in the commercial area to the United Nations Commission on International Trade Law (UNCITRAL).[41]

Thus, the unification of fiduciary law as among countries—for example, by the creation of a generalized trust concept allowing civil law countries to align their law with that of the common law countries—would not fall within the Hague Conference's mission. In fact, UNIDROIT in the 1950s undertook research with a view to determining whether such a project would be feasible within its mission,[42] but it concluded in 1959 that further study should be limited to "the application, in the continental legal systems, of some general principles deriving more or less directly from the peculiar and distinctive aspect of trust in the field of the management of investments in stocks and shares, according to the various specifications of the well-known investment trusts."[43]

The Hague Convention, therefore, is in essence an effort to unify the international rules of conflict of laws for trusts. If there is anything in it that might be viewed as touching on the

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38. *See* Droz & Dyer, *supra* note 16, at 155-56.

39. *See id.* at 156 (citing F. MAJOROS, LE DROIT INTERNATIONAL PRIVÉ 10-12 (2d ed. 1981)).

40. 22 U.S.C. § 269g (1990).

41. *See, e.g.*, United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, S. TREATY DOC. NO. 98-9 (1983), 1489 U.N.T.S. 3.

42. *See* Geoffrey Hornsey, *Report on Possible Uses of Certain Principles of the Trust in Civil Law Countries (I)*, INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW [hereinafter UNIDROIT] 1957 Y.B. 44; Ludovico Mattew Bentivoglio, *Investment Trusts (I)*, UNIDROIT 1957 Y.B. 44, 105; Mario Matteucci, *The Activities of the International Institute for the Unification of Private Law*, UNIDROIT 1959 Y.B. 24, 41.

43. Adair Dyer, *Introductory Note on the Hague Convention on the Law Applicable to Trusts and Their Recognition*, 1 UNIFORM L. REV. 274, 276 (1985) (citing and quoting UNIDROIT 1960 Y.B. at 39); *cf.* Dyer & van Loon, *supra* note 33, at 35, n. 52.

unification of substantive fiduciary law, it is to be found among the minimum elements of the "recognition" of a trust as set out in Article 11. However, the effects of this provision are attenuated (to the extent necessary in order to protect the operation of the mandatory rules of the law designated by the conflicts rules of the forum to govern certain non-trust questions) by the categories laid down in Article 15 and the thrust of the second paragraph of Article 15.

B. *The Hague Trusts Convention in the Crucible of Varying Concepts of Property Law*

An effort towards unifying the substantive principles of fiduciary law within Europe has recently been made by a group of distinguished experts that, in 1996, formed the International Working Group on European Trust Law. This body, operating under the auspices of the Business and Law Research Center of the University of Nijmegen (The Netherlands), in January 1999 issued a book entitled *Principles of European Trust Law*,[44] including a general commentary and certain national commentaries—the first volume of a series entitled *Law of Business and Finance*. This effort is to be commended, and the results show how far the intra-European discussions in this area of law have progressed[45] since the pioneering inquiries of UNIDROIT in the 1950s. The developments have been fueled by the overall unification efforts of the EEC and the European Union,[46] but I would suggest that the Hague Conference's work in the 1980s on the law applicable to trusts and their recognition moved the ball significantly forward and broadened the discussions to include Canada, Japan, the United States, Australia, a number of Latin American countries, as well as ultimately China (including the Hong Kong Special Administrative Region).

The Permanent Bureau's original research had identified the divergent concepts of ownership as a primary stumbling block for

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44. BUSINESS AND LAW RESEARCH CENTER OF THE UNIVERSITY OF NIJMEGEN, PRINCIPLES OF EUROPEAN TRUST LAW (David J. Hayton et al. eds., Kluwer Law International, forthcoming 1999). A copy of this work was presented to Hans van Loon, Secretary General of the Hague Conference on Private International Law, on January 15, 1999, during a seminar held at the Peace Palace. *See* The Hague Conference Homepage, 1999 News & Events (last visited Sept. 20, 1999) <http://www.hcch.net/e/events/events.html>.

45. Because it only recently came to hand, very little account could be taken of this book's valuable contents in this article.

46. Note here the specific impact of the Accession Convention of 1978 modifying the Brussels Convention. See *supra* note 27 and accompanying text.

work on a trusts and trust-like devices international treaty.[47] Commentators, both from civil law countries and from common law jurisdictions, had referred to "dual ownership" as a characteristic of the trust mechanism—the "legal ownership" of the trustee and the "equitable ownership" of the beneficiary.[48] While this distinction might have some practical illustrative value, it tended simply to paper over and obscure the different ideas of ownership.[49] Moreover, the fundamental function of the trust mechanism seemed to consist of a separation between the control of the assets making up a trust fund and the right to the economic benefits ultimately deriving from such assets. In this context, the idea of a division of ownership seemed irrelevant, and even dangerous, since some civil law systems had a comprehensive definition of "ownership" as an absolute concept while in some common law systems this was not a term of legal art. In common law systems, litigation concerning property tends to reduce itself to questions of who has the better title or who is entitled to a particular interest in the asset, as interests are capable of being subdivided in time and space. Trust instruments frequently create future and contingent interests in ways that may contradict basic concepts of ownership in non-trust countries.

These considerations caused the Hague Conference, in the course of its work to adopt a definition of a "trust" in Article 2 of the Convention that (1) is not comprehensive in nature, (2) refers to legal relationships rather than to any obligations of the trustee, and (3) is keyed to the control of assets by the trustee rather than to any idea of ownership. The resulting text has been referred to as a "gateway"[50] definition: an image that caters to the need for judges and lawyers in non-trust countries to be able to identify trust-like devices operationally from their specific characteristics, rather than having to view them as a whole and try to fit them within a comprehensive definition.[51]

It is notable that Article I of the *Principles of European Trust Law*,[52] entitled "Main characteristics of the trust," also constitutes something of a "gateway" definition rather than a comprehensive definition. This is in line with the approach of the Hague Conference, as indeed is most of the text of the Principles.

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47. *See* Dyer & van Loon, *supra* note 33, at 15-17.
48. *See id.* at 17.
49. *See id.* at 17, 35.
50. *See* Waters, *supra* note 20, at 130, 437-48.
51. *See* Explanatory Report by Alfred E. von Overbeck, *supra* note 1, no. 36, at 378 ("Article 2 simply tries to indicate the characteristics" that an institution must have to be covered by the Convention).
52. *See supra* note 44.

Perhaps the most significant difference is in paragraph (1) of Article I, which states that the trustee owns assets. This difference may be attributable to the divergent purposes of the two texts—the Convention and the Principles. The Principles seem to be directed towards the unification of substantive law while the Convention is an operational instrument intended to bridge the gap between differing systems of fiduciary and property law. Moreover, the Principles use the verb "to own" only with reference to the trustee, employing the expressions "personal rights" and "proprietary rights" in regard to the beneficiary. Thus, the concept of dual ownership, which is misleading at the level of comparative law because of the differing ideas as to what constitutes ownership and because ownership is a term of legal art in some systems but not in others, has been avoided.[53]

The point may be illustrated by quoting part of the definition of ownership in *A Dictionary of Modern Legal Usage*:

> The word *ownership* is subject to nearly the same doubleness of meaning as *property* (q.v.): While it is usual to speak of *ownership of land,* what one owns properly is not the land, but rather the rights of possession and approximately unlimited use, present or future. In other words, one owns not the land, but rather an estate in the land. This is, in some degree, true of any material thing. One owns not the thing, but the right of possession and enjoyment of the thing.[54]

The same dictionary defines a trust in four senses:

> (1) the confidence reposed in a person who looks after property for another's use or benefit; (2) an equitable estate committed to the charge of a fiduciary (trustee) for a beneficiary; (3) the relationship between the holder of the property and the property so held; or (4) a combination that aims at a monopoly.[55]

What is interesting about these four senses of the term and the more elaborate gateway definitions employed in the Convention and the Principles is that only one of them, sense (4), suggests the existence of any legal entity arising from the relationships or

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53. This point was elaborated upon in the initial report by Dyer and van Loon. *See* Dyer & van Loon, supra note 33, at 15-17. In a *preadvies* (report) offered to the Netherlands Branch of the International Law Association in June 1983, this author referred to the idea of dual ownership as being a "red herring" in the context of preparation of an international treaty. This comment gave rise to a discussion at the annual meeting of that organization held in Delft on June 18, 1983, as reported in VERSLAG VAN DE ALGEMENE LEDENVERGADERING, Juni 1983, No. 88, Mei 1984 at 28-30. The author quoted DONOVAN W.M. WATERS, THE LAW OF TRUSTS IN CANADA, 11-12 (1974).

54. A DICTIONARY OF MODERN LEGAL USAGE 633 (2d ed. 1995) (quoting 1 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY § 2, at 4 (Basil Jones ed., 3d ed. 1939)).

55. *Id.* at 892.

the separate trust fund. Sense (4) stemmed from the employment of the trust device for the purpose of creating monopolistic holding companies in the United States in the latter part of the 19th century. This practice stimulated the adoption of the so-called "antitrust" laws, but ceased very quickly when it became possible under the laws of certain states for one corporation to hold shares of others. One of the educational tasks of the Hague Conference's work was to explain that, in the 20th century, antitrust law had nothing to do with trusts.[56] Another task was to make it clear, despite much loose usage of the word "trust," that a trust in the technical sense is not a legal entity.

Now, it is not for me in this article to express an opinion as to whether any legal relationship known to Italian law would fall within the confines of the definition in the Hague Convention. This is a point that Professor Maurizio Lupoi may wish to address.[57]

The failure of Article 2 of the Convention to require that the trustee own the assets in the trust fund is counterbalanced by the statement therein of the legal conclusion or characteristic that "the assets constitute a separate fund and are not a part of the trustee's own estate."[58] Moreover, another stated characteristic is that "title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee."[59] The latter hypothesis means, in my opinion, that shares of an incorporated company held and traded by the trustee through a broker in *street name* still form part of the separate trust fund within the meaning of the Convention. Presumably, the Principles would reach the same result through interpretation of the verb "owns" in Article I, paragraph (1). However, the relationship between the trustee and the broker is an agency relationship rather than a trust relationship. Modern applications of the trust mechanism frequently call for trustees, as a matter of economic efficiency, to carry out many or even most of their operations through the intermediary services of agents.

The proposal in France to create a trust-like device for certain purposes—to be known as the *fiducie*—posed the question of whether the device in question, characterized as a contract, could fall within the Hague Convention's definition and thus be entitled to recognition abroad. As will be discussed below, I believe that the contract in question was not a trust, but that the

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56. *See* Dyer & van Loon, *supra* note 33, at 21-23.

57. *See* Maurizo Lupoi, *The Civil Law Trust*, 32 VAND. J. TRANSNAT'L L. 967, 987 (1999).

58. *See* Proceedings of the Fifteen Session, *supra* note 1, art. 2(a).

59. *See id.*, art. 2(b).

contract would have given rise to legal relationships that would have been in the nature of a trust as envisaged in the Hague Convention. Regrettably, the proposal fell victim to opposition by the French fiscal authorities,[60] and the project to ratify the Hague Convention went to the back-burner—a result that did not necessarily follow from the failure to adopt a trust-like device in domestic law.

In the Netherlands, it was clear that no existing legal mechanism of Dutch law would qualify as a trust within the meaning of the Convention. This type of division of the ownership of property was forbidden by Article 84 of Book 3 of the Civil Code, which sets the requirements for a valid transfer of an asset and declares that a transaction that has the purpose of transferring an asset for security does not have the effect of transferring valid title to the asset. This rule was so fundamental to protecting the comprehensive definition of ownership[61] (*eigendom*) in Dutch law that legislators were unwilling to change it at the domestic level. Proposals to change the Dutch *bewind* so as to extend it and bring it within the Trusts Convention were officially withdrawn.[62]

Article 4 of the Dutch Law on Conflicts Rules for Trusts (WCT), however, sets aside the constraints of Article 84 in the

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60. *See* Waters, *supra* note 20, at 391-96; *cf.* Ph. Rémy, *National Report for France*, PRINCIPLES OF EUROPEAN TRUST LAW, *supra* note 44, at 131-32.

61. NEW NETHERLANDS CIVIL CODE: PATRIMONIAL LAW (PROPERTY, OBLIGATIONS AND SPECIAL CONTRACTS) arts. 1-3, book 5, tit. 1 (Peter Haanappel & Ejan Mackaay trans., Kluwer Law and Taxation Publishers 1990).

> Art. 1
> 1. Ownership is the most comprehensive right which a person can have in a thing.
> 2. To the exclusion of everybody else, the owner is free to use the thing provided that this use not be in violation of the rights of others and that it respects the limitations based upon statutory rules and rules of unwritten law.
> 3. Without prejudice to the rights of others, the owner of the thing becomes owner of the fruits once separated.
>
> Art. 2
> The owner of a thing is entitled to revendicate it from any person who detains it without right.
>
> Art. 3
> To the extent that the law does not provide otherwise, the owner of a thing is owner of all its component parts.

Id.

62. *See* M.E. KOPPENOL-LAFORCE, HET HAAGSE TRUSTVERDRAG (The Hague Trusts Convention) (Kluwer-Law and Taxation Publishers 1997) 270 (English summary); *cf.* KORTMANN & VERHAGEN, *National Report for the Netherlands*, PRINCIPLES OF EUROPEAN TRUST LAW, *supra* note 44, at 203-05.

context of the recognition of a trust under Article 11 of the Convention, and leaves the recognition of a trust unhindered by the provisions of Dutch law protecting creditors in case of insolvency. Dr. M.E. Koppenol-Laforce raises the question, in Chapter 5 of her dissertation, "whether the Trusts Convention together with art. 4 WCT . . . introduces some sort of trust in the Netherlands."[63] She concludes that it is possible to create a trust with respect to property situated in the Netherlands.

I think that Dr. Koppenol-Laforce's position on this point is correct—to the extent that the provisions of the Convention's Article 11, reinforced in domestic law by Article 4 of the WCT, result in a substantive unification of law as to certain aspects of a trust, overriding several escape clauses set out in the Convention's Article 15. Dr. Koppenol-Laforce herself, however, opines that Article 4 of the WCT "does not have the intention to set aside Dutch rules on transfer and mingling if it concerns a trust."[64] The "Netherlands trust" created by recognition under the Convention, therefore, does not have all of the attributes of the trust created under a foreign law; it has only those attributes flowing from the application of the Convention's Article 11 and Article 4 of the WCT.

C. *What Does "Recognition" of a Trust Mean?*

The Netherlands delegations to the Special Commission and to the Conference's 15th Plenary Session opposed the inclusion in the Convention of provisions dealing with the "recognition" of a trust, on the grounds that uniform provisions on the law applicable to a trust would be sufficient or, at most, specification of "the effects of" recognition would suffice.[65] The Netherlands' implementing legislation (the WCT) has nonetheless keyed on Article 11—the first article in the Recognition chapter—in order to set not only the minimum limits up to which the foreign applicable law will be applied, but also, by inference, the areas in which Dutch mandatory rules may prevail. The main advance in the field of property law arising from ratification of the treaty is that the assets transferred to the trustee will constitute a separate fund, even in the face of restraints upon transfers for

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63. KOPPENOL-LAFORCE, *supra* note 62, at 270.

64. *Id.* at 271.

65. *See* Comments of the Governments and International Organizations, *in* PROCEEDINGS OF THE FIFTEENTH SESSION, *supra* note 1, at 145 (Preliminary observations of the Netherlands delegation); Working Document No. 27, *in* PROCEEDINGS OF THE FIFTEENTH SESSION, *supra*, at 234 (Proposal of the Netherlands delegation); Procès-verbal No. 7 *in* PROCEEDINGS OF THE FIFTEENTH SESSION, *supra*, at 279-80.

the purpose of creating security interests or provisions protecting creditors in case of insolvency.

The WCT is short and to the point. It concentrates on the central issue for non-trust countries—the extent to which effect will be given to a foreign trust that is recognized under Article 11 of the Convention, and the extent to which the provisions of Article 15 will attenuate the effects of such recognition. It constitutes a thoughtful, yet relatively simple approach to these questions, and it is to be hoped that this legislation will bring about the desired effects at the transnational level while effecting only minimal intrusions into domestic law.

"Recognition" of a trust within a non-trust jurisdiction, therefore, will include in most instances a measure of adaptation. However, attribution of the status of a separate fund for many types of property—especially immovable property—will not be enough, because registers of ownership in many non-trust countries offer no possibility for registration of ownership by a trustee in that capacity. This capacity is unknown in the legal systems of those countries. Thus, Article 12 in the "Recognition" chapter of the Hague Convention entitles a trustee to register assets "in his capacity as trustee or in such other way that the existence of the trust is disclosed, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought."[66] By ratifying or acceding to the Convention, the civil law contracting states agree to recognize a new legal category previously unknown to them and bring into play a specific new legal person—the trustee.[67]

Article 12 of the Convention has been fully and faithfully implemented by the Netherlands in Article 3 of the WCT, so that there is no prohibition of, or inconsistency with, the forms of registration envisaged. There have as yet been no difficulties with the application of these registration provisions. A trustee may be registered as the owner of assets "in his capacity as trustee or in such other way that the existence of the trust is disclosed."[68] The application of this provision is not limited to public registers but also extends to private registers having a public function such as a shareholders' register.[69]

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66. Report of the Special Commission by Alfred E. von Overbeck, *in* PROCEEDINGS OF THE FIFTEENTH SESSION, *supra* note 1, art. 12, at 192.

67. *See* Droz, *supra* note 1, at 248.

68. *Id.*

69. *See* Explanatory Report by Alfred E. von Overbeck, *supra* note 1, at 396. Article 3 of the WCT seems to envisage this type of register, since it applies to entries which can be made *in een ingevolge de wet gehouden register* (in a register maintained in accordance with the law) (The English translation of this phrase has been made by the author of this article.).

A trustee is not required by the Convention to disclose the capacity in which she acts or the existence of the trust, but may do so officially if the law applicable to the trust, or its rules on commingling of assets, require her to do so or make such disclosure advisable.

D. *What Advantages Can Be Derived from Recognition?*

Six basic situations can be envisaged, as follows:

(1) Trust created in a common law jurisdiction is to be recognized in a common law jurisdiction of another country.
(2) Trust created in a common law jurisdiction is to be recognized in a non-trust country.
(3) Trust created in a common law jurisdiction is to be recognized in a jurisdiction in another country, which jurisdiction has adopted a form of trust by statute.
(4) Trust created in a jurisdiction that has adopted a form of trust by statute is to be recognized in a common law jurisdiction of another country.
(5) Trust created in a jurisdiction that has adopted a form of trust by statute is to be recognized in a non-trust country.
(6) Trust created in a jurisdiction that has adopted a form of trust by statute is to be recognized in a jurisdiction of another country, which jurisdiction has adopted a form of trust by statute.

Situation 1 (e.g., British Columbia and England) offers no particular advantage since a common law jurisdiction should have no difficulty recognizing foreign trust relationships and giving them the traditional effects, without the need for an international treaty. The provisions of the Trusts Convention dealing with the applicable law, however, may be useful for guidance, especially the provision recognizing the settlor's power to select the applicable law (Article 6) and allowing a severable aspect of the trust to be governed by a different law (Article 9). The settlor's choice of the applicable law, under Article 6, "must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case."[70] In practice, the scope of Article 7 may be rather limited since Article 6 offers

70. *Id.* at 384.

broad possibilities for finding an implied choice where no express choice has been made.

Professor Jeffrey A. Schoenblum has pointed out that "even common law jurisdictions could refuse to enforce a trust on public policy grounds," citing the decision of the Nebraska Supreme Court in *First National Bank v. Daggett.*[71] Thus, even without the provisions of the first paragraph of Article 16 and Article 18 of the Hague Trusts Convention, a court in a common law jurisdiction can invoke public policy in the face of a choice of law by the settlor, in order to protect its mandatory rule applying the law of the *situs* to govern trust validity with regard to immovables.[72] The inclusion in the Convention of these two provisions, which were primarily intended to allay the fears of civil law jurisdictions confronting the unknown legal configuration known as the trust, should also go far towards meeting the concerns of those title examiners who think that the Hague Trusts Convention would completely eliminate the *situs* rule—even in states where this is considered to be a mandatory rule or a matter of public policy.[73]

Situation 2 (e.g., Australia and the Netherlands) offers the classic advantages that were sought in drawing up the treaty: the acceptance of the essential effects of the trust in countries which do not have this category in their laws. Thus, the position of the trustee is to be recognized, and property in such a country that forms part of a foreign trust will be dealt with as a coherent part of the trust fund, in so far as this does not clash with the local mandatory rules. Obviously, implementing the treaty thoughtfully, as has been done in the Netherlands, will help to avoid such clashes.

Situation 3 (e.g., Alberta and Louisiana) is trickier. The jurisdiction asked to recognize the trust does not work from a blank slate. It has achieved adoption of a statutory form of trust without the benefit of having chancery courts or the general principles of English equity practice to offer a well-tested background. Nonetheless, the thoughtful effort of analysis required in order to implement the Hague Trusts Convention should offer benefits in bringing its own practice closer to multinational standards. The recognizing country may need to

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71. Jeffrey A. Schoenblum, *The Hague Convention on Trusts: Much Ado About Very Little*, 3 J. INT'L TR. & CORP. PLAN. 5, 7 n.19 (1994) (citing First Nat'l Bank v. Daggett, 242 Neb. 734, 497 N.W.2d 358 (1993)).

72. *See id.* at 10 n.37 (citing the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 278 (1971)).

73. *But see id.* at 11 (in Professor Schoenblum's opinion Article 7 would "totally destabilize American choice of law," and regarding recognition of trusts, "matters are left extremely murky"); *cf.* discussion *infra* Part II.E.

resort to some of the provisions of the Convention's Article 15 in dealing with a common law trust since its own statutory version of the trust may have been better adapted to the specific needs of its legal system than is the traditional trust developed within common law jurisdictions and supported by the general principles of equity practice in those jurisdictions.

Situation 4 (e.g., Quebec and Texas) offers what may become an unexpected benefit. Common law jurisdictions may find the various statutory versions of the trust to be strange and difficult to comprehend. The effort at analysis generated by the process of treaty implementation may bring into existence materials that will aid in comprehension and, thus, lead to more faithful application of the statutory trust principles at the transnational level.

Situation 5 (e.g., Japan and Italy) offers the same potential advantages as Situation 2 along with the analytical advantages of Situation 4. If Professor Lupoi is correct in thinking that Italy has trusts-like devices that fall within the Convention's definition,[74] then the Japan/Italy relationship would come under Situation 6.

Situation 6 (e.g., Louisiana and Quebec) would seem to offer few cases in practice. However, again, the analytical effort may bring unexpected benefits.

All of these situations reflect the spread of trusts and trust-like devices across the globe—both following and promoting the globalization of business activities and wealth transfers. The advantages of joining in these flows of wealth are considerable. The detriments for a jurisdiction that tries to keep its property system isolated from the broad transnational developments in this field may outweigh the inconveniences of trying to understand the varying forms of trusts and trust-like devices and reconcile these with each other and analogous methods of meeting fiduciary needs.

E. *What are the Principal Disadvantages of the Obligation to Recognize?*

For jurisdictions that do not have trusts in their law, the disadvantages relate to the difficulty for the local legal system of implementing the essential features of the trust institution. Since there is no domestic trust law, the domain of the applicable foreign law and the scope given to recognition will be coextensive. Thoughtful implementation, as in the Netherlands, will minimize the intrusions of this foreign legal institution into the domestic legal system.

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74. *See* Lupoi, *supra* note 57, § 1 (Outline), § 4 (Trusts in Italy).

For common law jurisdictions, recognition of a trust from a common law jurisdiction abroad will normally be a simple task. The foreign law to be applied will have many familiar features, and the rules for finding the objectively applicable law (Article 7) are flexible. In the case of the "subjectively applicable law," where the settlor has made an express choice (Article 6), the matters set out in Article 8 will be governed by that law. These matters are the validity of the trust, its construction, its effects, and its administration. A number of the elements of administration, including "the variation or termination of the trust," are mentioned specifically by way of illustration.

The important point is, however, that the Convention deals only with trust law. Article 4 states, "The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee."[75]

Thus, assets are only covered by the Convention after they have been validly included in the trust fund, by a will that is valid under the law applicable to it or by an *inter vivos* transfer such as an assignment or a deed. The negotiators employed the image of the "rocket and the launcher,"[76]—the trust being the rocket that only goes into orbit if the launcher, the transfer instrument, has duly fired off and released it. Thus, the scope of a foreign law that might be chosen by a settlor, or determined to be applicable under the criteria of Article 7, does not go to the question of whether the will, deed or assignment executed by the settlor has the effect of transferring the assets covered by it to the trustee, or whether the transfer can be set aside because of fraud.

Concerns expressed in some jurisdictions, which traditionally apply domestic law to all aspects of the title to land located in the jurisdiction, about the possible inconveniences arising from the application of foreign law, have some measure of validity. The subject needs to be studied further. However, the fact that the law applicable to a trust under the Convention, chosen by the settlor or determined objectively, only applies to trust questions, may reduce the scope of any possible inconvenience. If the assignment of assets to a trustee, or a will purporting to create a trust, is invalid under the law of the *situs*, including its conflict of laws rules, then the foreign trust will never come into existence in

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75. Extract from the Final Act of the Fifteenth Session, art. 4, *in* Tome II of the PROCEEDINGS OF THE FIFTEENTH SESSION, *supra* note 1, at 362 (including the text of the Final Act as adopted by the Convention). *See also supra* note 19.

76. This image is recounted in the Report of the Special Commission by Alfred E. von Overbeck, in Tome II of the PROCEEDINGS OF THE FIFTEENTH SESSION, *supra* note 1, at 178 (no. 30) and the Explanatory Report by Alfred E. von Overbeck, *id.* at 381 (No. 53).

respect of those assets. It seems rather unlikely that a transfer of real property to a trustee that is valid at the *situs* of the real property will be voided because the foreign law applicable to the trust would invalidate the particular trust. Public policy of the *situs* might even take over under Article 18 of the Hague Trusts Convention in order to validate the trust under local law. [77]

Formal requirements of the law of the *situs* relating to the registration of title or the recording of instruments affecting the title would continue to apply, as would the procedural rules for foreclosure under a deed of trust or a trust indenture. Moreover, by applying Article 18 or the first paragraph of Article 16 of the Hague Trusts Convention, a court could retain the *situs* rule in the face of a choice of foreign law to govern the trust.[78]

It is conceivable that any difficulties involved in resolving questions of validity or internal questions that arise under a trust governed by a foreign law might be mitigated if all jurisdictions that are covered by the Hague Trusts Convention were to be bound by an international treaty, such as the Brussels Convention,[79] providing for special jurisdiction over internal questions involving relationships between trustees and beneficiaries and providing for exclusive jurisdiction over such questions at the place specified by the settlor in the trust instrument. The work currently going on at The Hague—directed towards the preparation of a worldwide convention on jurisdiction and recognition and enforcement of judgments—envisages the inclusion of a clause giving exclusive jurisdiction to the courts of:

(1) the state designated expressly for this purpose in terms of the trust instrument; or
(2) if none is designated, the state in which is situated the principal place of administration of the trust in question; or
(3) if such a place cannot be determined, the state in which is situated the place with which the trust has the closest and most substantial connection.[80]

In ascertaining "the place with which the trust has its closest and most substantial connection," weight would be given in particular to:

(1) the place or places where the trust is administered;

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77. *See supra* notes 71-73 and accompanying text.
78. *See id.*
79. *See supra* note 23.
80. *See infra* note 81; *but see infra* note 82.

(2) the places of residence or business of the trustees;
(3) the place or places where the purposes of the trust are to be fulfilled.[81]

This text has not yet been adopted, or even discussed in detail, by the Special Commission working on this project at The Hague,[82] and thus it is far from being in final form. The criteria discussing the place of the closest and most substantial connection, in the absence of a choice of forum or an identifiable "principal place of administration," overlap to a very large extent with the criteria mentioned in Article 7 of the Hague Trusts Convention in regarding applicable law, as well as with those mentioned in the U.K.'s legislation implementing the Brussels Convention in connection with determining the "domicile" of a trust.

F. *Public Policy and Mandatory Rules of the Forum*

Article 18 of the Hague Trusts Convention provides that "[t]he provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (*ordre public*)."[83]

The French expression is intended to show that the scope is somewhat broader than the traditional English concept of public policy. The official texts of all conventions drawn up by the Hague Conference were in French only until 1960. Most of the modern series of conventions, drawn up at the Seventh Plenary Session in 1951 or thereafter, allowed for an exception to the

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81. Included in Hague Conference Information Document No. 2 of September 1998, prepared by the Permanent Bureau entitled Preliminary Draft Outline to Assist in the Preparation of a Convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commerical Matters at 18 (Article 12—Trusts) (on file with author). This document was sent by Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law at the U.S. Department of State, in a letter on September 14, 1998, to invited persons of the third public meeting of the Study Group on Judgments, of the Secretary of State's Advisory Committee on Private International Law, held October 2, 1998. The fourth meeting of this Study Group was scheduled to be held on May 7, 1999 at the U.S. Department of State.

82. The Special Commission's fourth meeting was held at the Peace Palace in June 1999. A changed and incomplete text on trusts was included as Article 12 of the Preliminary Draft Convention on jurisdiction and the effects of judgments in civil and commercial matters, adopted provisionally by the Special Commission on June 18, 1999. This document is available on the Hague Conference's website at www.hcch.net under the heading "Work in Progress" and the link "Jurisdiction and the Effects of Judgments."

83. Extract from the Final Act of the Fifteenth Session, *supra* note 75, art. 18, at 364.

application of the treaty's provisions for reasons of *ordre public.*[84] The first Hague Convention to have an English version simply referred therein to *ordre public,* without bringing in the English expression "public policy."[85] Beginning with the Hague Divorce Convention,[86] the use of the expressions from both languages in the English version whenever there was a reference to public policy became standard drafting practice. In the two most recent conventions drafted by the Hague Conference, the French expression was dropped from the English versions and a substantive gloss ("taking into account the best interests of the child") was added to the reference, with an equivalent gloss in the French version.[87] This expression in the Hague Trusts Convention is therefore at least as broad as the usage of the term "public policy" by the Nebraska Supreme Court in *First National Bank v. Daggett.*[88] A court, whether in a civil law system or a common law system, may apply Article 18 in order to apply its public policy of always applying the law of the *situs* to questions involving immovables. What it cannot do is refuse to accept the idea that trusts form a *sui generis* category.[89]

The first paragraph of Article 16 provides as follows: "The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws."[90]

This provision has its source in European theories of the conflict of laws pursuant to which certain types of legal rules—usually those which have an inherently territorial nature—escape from any choice-of-law analysis and are simply applied directly.

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84. *See, e.g.,* Convention sur la loi applicable aux ventes a caractère international d'objets mobiliers corporels du 15 juin 1955, art. 6, *in* CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, DOCUMENTS RELATIFS À LA HUITIÈME SESSION, 3 AU 24 OCTOBRE 1956, at 226.

85. Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, Oct. 5, 1961, art. 7, 510 U.N.T.S. 175, 179.

86. Convention on the Recognition of Divorces and Legal Separations, Jun. 1, 1970, art. 10, 978 U.N.T.S. 393, 401.

87. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, art. 24, *reprinted in,* 32 I.L.M. 1134, 1142 (1993); Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, art. 22, *reprinted in* 35 I.L.M. 1391, 1399 (1996).

88. *See supra* notes 71-73 and accompanying text.

89. *Cf.* Georges A.L. Droz, *Regards sur le droit international privé comparé,* 229 Recueil des cours 13, 248 (1991); Adair Dyer, *Introductory Note on the Hague Convention on the Law Applicable to Trusts and on their Recognition,* 1 UNIFORM L. REV. 274, 280 (1985).

90. Extract from the Final Act of the Fifteenth Session, *supra* note 75, art. 16, at 365.

They may be referred to as mandatory rules, or in some cases as *lois de police.* While most North American theories of conflict of laws would not employ such an analysis, this does not prevent courts in the United States or Canada from applying the law of the *situs* to issues concerning immovables as a mandatory rule of a primary nature in its law. In fact, it would seem that the *situs* rule in those jurisdictions that retain it in its purest form is not a conflicts rule but rather a provision, in the words of Article 16, "which must be applied even to international situations, irrespective of rules of conflict of laws."[91]

This approach would be reinforced by European principles of jurisdiction in the Brussels and Lugano Conventions, which assign exclusive jurisdiction over questions involving rights *in rem* in immovable property to the courts of the *situs* of such immovables.[92] The first paragraph of Article 16 of the Hague Trusts Convention offers a more structured analysis for application of the *situs* rule in jurisdictions that consider it to be included among "provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws."[93] It would not be necessary, then, to resort to the more amorphous idea of public policy,[94] the use of which is discouraged by the formulation of the relevant clause in the Hague Conventions. The restrictive words "manifestly incompatible with public policy" are intended to discourage frequent resort to this concept.

III. EFFORTS TO ADOPT TRUST-LIKE DEVICES IN CIVIL LAW COUNTRIES

The principal countries in which consideration has been given to the idea of adopting a trust-like device which would fit within the definition set out in Article 2 of the Hague Trusts Convention are France and the Netherlands. Even though the idea was eventually abandoned in both jurisdictions, these efforts are instructive because the process hindered the efforts to ratify the Hague Trusts Convention in one, but not the other. In fact, it

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91. *Id.*

92. *See, e.g.,* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, art. 16.1(a), 1988 O.J. (L 319) 9, 13. These grants of exclusive jurisdiction tend to confirm the perception that the "forum" applying the first paragraph of Article 16 of the Hague Trusts Convention, as well as the forum applying its public policy under Article 18, will be, where rights *in rem* to immovables are concerned, the competent court of the place where the immovables are situated.

93. *See supra* notes 90-91.

94. *See* Explanatory Report by Alfred E. von Overbeck, *supra* note 1, at 404 (no. 150).

had been clear from the beginning that the Convention's purpose was not to introduce the trust into the civil law countries but rather to furnish judges and practitioners with the elements that would allow them to understand this legal institution more clearly.[95]

A. *The French Proposal to Adopt Legislation on the Fiducie*

A fiduciary practice known as the *fiducie* had existed long before the adoption of the Civil Code (1804), but the practice had fallen into disuse.[96] The Hague Trusts Convention was signed by France on November 26, 1991.[97] The prospect of French ratification of this treaty led business lawyers in France to favor not simply the recognition of foreign trusts, but also the creation of a French legal institution that could offer the same advantages.[98] This resulted in a proposal by the Ministry of Justice in Paris looking to the adoption of a new law.[99]

This proposal was in the end abandoned due to opposition from the French fiscal authorities,[100] and the proposal to ratify the Hague Convention has languished since then. This is unfortunate, since the lack of a trust-like device in a country's domestic law is an additional reason for joining a treaty which creates a category for dealing with trusts created under a foreign law.

Some doubt was expressed as to whether the draft law would have authorized the creation of trusts within the meaning of the Hague Convention's definition (Article 2), especially since the *fiducie* was characterized therein (Article 2062) as a contract. Because the draft legislation has been withdrawn, I will not undertake a detailed analysis of its provisions. However, for the record, I wish to state my conclusion, reached after discussions with a very well-informed doubter, that the contract in question

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95. *See* Mariel Revillard, *La Convention de La Haye du 1er juillet 1985,* DROIT INTERNATIONAL PRIVÈ ET PRATIQUE NOTARIALE (Rèpertoire du notariat Defrenois 1986), 691, art. 33731.

96. *See* Dyer & van Loon, *supra* note 33, at 37 n.62; *cf.* Béraudo, *supra* note 13, at 28-32, *see generally,* Michel Grimaldi, *La fiducie: réflexions sur l'institution et sur l'avant-projet de loi qui la consacre,* REPERTOIRE DU NOTARIAT DEFRENOIS, 15 septembre 1991, 1 re partie, art. 35085 et la suite, art. 35094.

97. *See* Hague Conference on Private International Law, Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition (last updated Nov. 18, 1998) <http://www.hcch.net/e/status/stat30e.html>.

98. *See* Béraudo, *supra* note 13, at 1-2 n. 64.

99. Text (in French only) published as an annex to the article by Michel Grimaldi, *supra* note 96, art. 35094 at 992-96. *See also* Rémy, *in* PRINCIPLES OF EUROPEAN TRUST LAW, *supra* note 44, at 131, 143-47.

100. *See* Waters, *supra* note 20, at 391-96.

would not have been a trust, but the relationships created would have been entitled to recognition under the Hague Convention.

B. *The Dutch Considerations on an Adaptation of the Bewind*

In the Netherlands, during the preparatory work undertaken with a view to ratification of the Hague Convention, thought was given to adapting the well-known fiduciary institution called the *bewind* so that it would qualify as a trust under the Convention's definition.[101] This article has already discussed some of the difficulties posed by the definition of "ownership" set out in Article 1 of Title 1, Book 5, of the New Netherlands Civil Code, as well as by the restrictions on the transfer of assets set out in Article 84 of Book 3 thereof.[102] It seems that the problems associated with inserting a trust-like institution into the system of the Civil Code, rather than tax considerations as such, brought about the abandonment of the idea of adapting a Dutch legal configuration. Professor Koppenol-Laforce has expressed the opinion that the possibilities for doing this should be revisited.[103]

C. *The Fideicomiso-Trust in Panama*

The Panamanian trust is governed by Law No. 1 of January 5, 1984.[104] This act substantially modified Law 17 of 1941, which itself had taken the place of Law 9 of 1925. The introduction of an English-style trust had been favored by the eminent Panamanian jurist, Ricardo J. Alfaro, in remarks published in 1925.[105] The 1984 law defined the *fideicomiso* as an unilateral act, eliminating the mandate (*mandato*) concept that had existed before then in Law 17 of 1941.[106]

The characteristics of the Panamanian trust are described by Professor Boutin in his article *The Conflict of Laws and Trusts in Panama*, published in *Trusts & Trustees*.[107] In the same article, Professor Boutin states, "A comparative chart between The Hague

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101. *See generally* Waters, *supra* note 20, at 388-391 (assuming a bond with one person and not successive generations).

102. *Cf.* M.E. KOPPENOL-LAFORCE, HET HAAGSE TRUSTVERDRAG (The Hague Trusts Convention), *supra* note 62, at 270-72 (English summary).

103. *See id.* at 277.

104. The text of this law (in Spanish) is reprinted in GIBLERTO BOUTIN I., EL FIDEICOMISO PANAMEÑO EN EL DERECHO INTERNACIONAL PRIVADO Y L CONVENCION DE LA HAYA (1985) RELATIVA A LA LEY APLICABLE AL TRUST Y A SU RECONOCIMIENTO (Editores Asociados, Tradinco S.A. Montevideo, Uruguay 1990).

105. *See id.* at 19.

106. *See id.* at 20.

107. *See* <http://www.trusts-and-trustees.com/library/boutin-06-96-01.html>.

Professor Boutin states, "A comparative chart between The Hague Convention, 1985, and the Law 1, January 5, 1984 of Panama, would show that there are no incompatibilities."[108]

D. *The Trust (Shintaku) in Japan*

The Hague Trusts Convention has stimulated considerable scrutiny in Japan, where a form of trust, called *shintaku,* was introduced in 1922 into what was essentially a civil law system. The initial report entitled *Report on Trusts and Analogous Institutions*, by Adair Dyer and Hans van Loon, was translated into Japanese and published in the trusts periodical *Shintaku.*[109] A Japanese translation of Professor von Overbeck's Explanatory Report and the text of the Convention were subsequently published in the same periodical.[110] Significant collections of articles have subsequently been published in Japanese.[111]

Though the ratification of the Hague Convention by Japan does not seem to be imminent, the continuing interest shown there in the Hague Trusts Convention, as well as in the domestic institution, may presage an effort to reconcile the Convention and *shintaku* at some time in the future.

E. *China*

When the People's Republic of China resumed the exercise of sovereignty in what is now known as the Hong Kong Special Administrative Region (SAR), it formally confirmed the continuation in force in the SAR of numerous treaties that were then in force—including the Hague Trusts Convention.[112] China is considering the possibility of adopting trust legislation that would be applicable on the mainland.[113]

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108. *Id.* at 4-5 (copy on file with the author).

109. Report on Trusts and Analogous Institutions, *supra* note 36, *translated and reprinted in* 142 SHINTAKU 45 (1985).

110. Explanatory Report of Alfred E. von Overbeck, *supra* note 1, *translated and reprinted in* 153 SHINTAKU 44 (1988).

111. *See generally* SHINTAKU-HO KEN'KYU (Study of Law of Trust), at 3, 5, 31, 65, 97, 110 (S. Ikehara ed. 1990).

112. *See The Position of the People's Republic of China and the United Kingdom on Multilateral Treaties Applying to the Hong Kong Special Administrative Region*, 36 I.L.M 1675, 1676, 1680-81, 1684 (1997) (communications on June 20, 1997 submitted to the United Nations by the Permanent Representatives of these two countries).

113. *See* Adair Dyer, *International Recognition of the Trust Concept*, 3 TRUSTS & TRUSTEES 24 (June 1997).

IV. POSSIBLE EFFECTS ON TAXATION OF TRUSTS IN CIVIL LAW COUNTRIES

When the Hague Trusts Convention was first signed by Italy, Luxembourg and the Netherlands, I already had the following to say:

> Care was taken to assure the tax authorities of the various States that they would not in any way be bound by the provisions of this Convention, which are directed to the effects of trusts in civil law but not in public law. Article 19 Provides: "Nothing in the Convention shall prejudice the powers of States in fiscal matters." It is to be hoped, however, that the effort towards analysis of the trust device and its relationships which has been involved in the preparation of the Hague Convention will be of some assistance to the fiscal authorities of States which do not have trusts in their own law, in determining appropriate ways to approach trust interests for tax purposes.[114]

Only two continental European countries with civil law systems have ratified the Convention so far: Italy and the Netherlands.

In the Netherlands, according to Jan H.W. Schipper, the Under-Secretary of Finance "informed the tax authorities, in a public notification, of the manner in which they must approach the legal entity [*sic*] of a trust."[115] The Ministry's body responsible for dealing with activities concerning trusts is called Co-ordination Group to Combat Fiscal Structures.[116] A specific task force set up within the Inland Revenue, called the Mortmain Property Task Force, has the authority to make advance rulings under certain conditions.[117]

It seems clear that the increase in the number of trusts having some connection with the Netherlands—as well as the creation of a category for them in Dutch civil law by the ratification of the Hague Trusts Convention—are stimulating an effort at analysis on the part of the Netherlands' fiscal authorities and courts, including four recent decisions by the Third Chamber of the Netherlands' Supreme Court.[118]

Case No. 31.756[119] involved irrevocable discretionary trusts set up by a person living in the Netherlands with the Rabobank Trust Company (Jersey) Ltd., under a trust instrument executed

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114. Dyer, *Introductory Note, supra* note 43, at 281.

115. Jan H.W. Schipper, *Some Dutch Fiscal Aspects Regarding Trusts*, 3 TRUSTS & TRUSTEES 21 (May 1997). This notification by dating the Under-Secretary of Finance was made public in a decision dated June 22, 1995. *See id.* at 22.

116. *See id.*

117. *See id.*

118. [Plaintiff/Defendant], HR 18 Nov. 1998, 31.756, 31.757, 31.758, 31.759.

119. A copy of this decision (in Dutch), rendered November 18, 1998 is on file with the author.

Trust Company (Jersey) Ltd., under a trust instrument executed in London and designating Jersey law as applicable. A protector (who was, initially, the father of the settlor) had powers that included the right to designate additional persons as beneficiaries, as well as to remove the trustees. The trustees had the power to make distributions to the various beneficiaries as they decided. The Supreme Court, overturning the decision of the lower court in The Hague, found that the trusts were to be viewed as being valid under the Hague Trusts Convention, and that Article 13 was not to be utilized so as to avoid recognition of them. Article 19 preserved the powers of the Netherlands' tax authorities. The Court applied the trust law as determined by the lower court in order to determine the effects of the trust under applicable law and then characterized these effects in terms of the Dutch tax laws.[120] It found that the settlor had irrevocably transferred the property to the trustee, thus that a taxable gift of the property by a person living in the Netherlands had been made under the view of the Netherlands' tax law, but the named beneficiaries had no vested right which could cause them to be taxed as recipients of the gift. It found that Netherlands law had a concept of property dedicated to a specific purpose (*doelvermogen*), which was not considered as belonging to anyone and thus was dealt with as an independent legal entity, and the trusts in question fell within this category. Thus, it concluded that the amounts transferred were subject to gift tax at the rate charged for gifts to non-relatives and that the trustee was responsible for payment of the tax. The State Secretary of Finance lost the appeal, and the assessments levied against the beneficiaries were annulled.

I am no expert in the taxation of trusts and thus cannot express an opinion as to the soundness of the "dedicated property" concept that the Netherlands Supreme Court has used in this case. On its face, this approach seems to be faithful to the idea of a separate trust fund. Whether this concept can be employed to bring about sound results, both from a civil law perspective and from that of taxation, in other contexts remains to be seen. Tentatively, it seems that the modest hope that this author expressed in 1985[121] is being reflected in the practice, and that the courts are also participating in this effort.

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120. This was an approach that had been recommended by Hans van Loon in a *preadvies* (report) that he delivered before the Netherlands Branch of the International Law Association in June 1983. *See* A. DYER & J.H.A. VAN LOON, ANGLO-AMERIKAANSE TRUSTS EN HET NEDERLANDSE RECHT 92 (Deventer, 1983).

121. *See* Dyer, *Introductory Note*, *supra* note 43, at 281.

V. CONCLUSION

The process of bringing English-style trusts into systems that do not have a similar device is fraught with difficulties. This is especially true with respect to efforts directed towards the creation of a domestic trust law within such a system, but it is also true about the adaptation of legal institutions that is necessary in order to recognize trusts created under foreign law, in accordance with Article 11 of the Hague Trusts Convention. Thus far, it can be said that no country that did not have trusts before the Hague Trusts Convention has reacted to the Convention by adopting a brand new domestic form of trust. Panama and Japan had already introduced trusts into domestic law in the 1920s—as had Mexico and Liechtenstein—while the Venezuelan trust law dates from the 1950s. In France, the failure of the proposal to create a domestic form of trust had the unfortunate effect of setting back the ratification of the Hague Convention. This, in turn, may have slowed the process in the United States and certain provinces of Canada, where the perceptions as to certain problems of implementation might have been outweighed by the advantages if more large civil law countries had ratified in the early, break-in period.

The trust, however, has been around a long time, and its evolution to the present state of practice has required centuries of thought and analysis. It has been seen as the most characteristic contribution of the English-language legal systems to law around the world. It has been described by Professor J. Limpens as "a synthesis of the law of fiduciary relationships," comparable to Rome's synthesis of the law of contract and France's synthesis of tort law.[122] Professor Limpens went on to say, "It must be believed that a fundamental synthesis requires such an amount of cleverness and tenacity that one civilisation can hardly realise more than one at the same time."[123]

In this context, the publication of the *Principles of European Trust Law*[124] is a signal event. One can say that a fundamental synthesis will always find its response, and the response reflected in these Principles is a most impressive concurrence of thinking among leading experts.

The fifteen-year anniversary of the adoption of the Hague Trusts Convention's text (three *lustra* in the Dutch count) in October 1999 represents a very short period in the life of the

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122. J. Limpens, *Foreword* to CHRISTIAN DE WULF, THE TRUST AND CORRESPONDING INSTITUTIONS IN THE CIVIL LAW 8, 10 (Brussels Establishments Émile Braylant 1965).

123. *Id.*

124. *See supra* note 44.

English trust as a legal institution. It is too soon to say whether the synthesis of the law of fiduciary relationships achieved through centuries of English practice will in the long run be found to be adaptable to, and needed in, a wide range of civil law systems. The steps taken in Italy and the Netherlands of ratifying and implementing the Hague Trusts Convention show a remarkable willingness of non-trust countries to accept and understand foreign trusts. They form two rather different laboratories for testing the feasibility of giving transnational effect to the intentions of settlors. The United Kingdom, seven Canadian provinces, Australia, and a number of offshore jurisdictions—including Hong Kong SAR, Jersey and Malta—are joined in this effort. It would be helpful if more common law and civil law jurisdictions would ratify or accede to the Hague Trusts Convention, which remains the centerpiece of the move towards mutual understanding in the field of fiduciary law.

TOPIC VI

Money-Laundering and Ethical Considerations for the Lawyer and Trust Officer in Dealing with the International Trust

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