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# THE HAGUE TRUSTS CONVENTION OF 1ST JUNE 1985: THE PRESENT POSITION

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The Hague Convention on the Law Applicable to Trusts and on their Recognition has been a landmark in the long march towards universal acceptance of this most Anglo-Saxon of institutions. It is not intended here to comment on the substance of the Convention, as this has already been done by others far more competent than the present writer to do so[2]. Instead, the purpose of this short article is to summarise the present international position concerning the application of the Convention.

As is well known, the Convention was the product of the fifteenth session of the Hague Convention on Private International Law held in October 1984, and was unanimously adopted by the delegates present from 32 member states. Its purpose was to standardise the private international law rules of different legal systems, being not only systems which include the trust amongst the institutions known to their domestic law ("trust systems") but also systems which do not so include it ("non-trust systems"), (a) in relation to the proper law of a given trust, and also (b) on the recognition of a trust as a distinct (if foreign) legal institution. This would enable trustees from trust systems to be recognised as such by non-trust systems. This is even more important now that there are specific rules in the Brussels and Lugano Conventions (of 1968 and 1988 respectively) on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to deal with legal actions and judgments concerning trusts and trustees[3].

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2 See (inter alia) the *Official Report* on the Convention by Von Overbeck; Hayton (1987) 36 ICLQ 260; Gaillard & Trautman (1987) 35 Am J Comp. L 318; Wallace (1987) 36 ICLQ 454; Underhill & Hayton, *The Law of Trusts and Trustees*, 14th ed. 1987, Appendix; Hayton (1992) 1 Jo of Int. Planning 3; Béraudo, *Les trusts anglo-saxons et le droit francais*, 1992; Hayton, *International Recognition of Trusts* in *EC International Trust Laws*, Ch 1; Hendrickson and Silverman, *Changing the Situs of a Trust*, para 11.09 [3].

3 See the Civil Jurisdiction and Judgments Act 1982 s.45, and Sch 1 Art 5(6), and Sch 3C Art 5(6).

The Convention is not intended to have any effect as such on the substantive domestic law of any legal system, and in particular it does not require that a subscribing state should introduce the concept of the trust into its domestic law if it does not already form part of that law. However, it is a fact that perhaps the most important - even notorious - non-trust system of all, that of France, is presently considering a draft law to introduce what is in effect a substantive law of trusts, based on an institution to be known as the "*fiducie*"[4].

The Hague Convention is what is called an "open" convention, meaning that in principle a contracting state as a party to it offers the benefits of the Convention to every other world legal system, whether a contracting state or not. Thus a trust governed by the law of a non-party state should be recognised as a legal institution by the "non-trust" legal system of a contracting state. However, Article 21 of the Convention permits a contracting state to reserve the right to apply the recognition provisions of the Convention only to trusts whose validity is governed by the law of another contracting state. It is the fear of having trusts which remain unrecognised internationally that has prompted some low tax or non-tax areas to ensure that the Convention extends to them. Other jurisdictions have preferred to enact their own private international law rules of trusts and their recognition rather than adopt the allegedly "fuzzy edges" of some of the rules of the Convention[5].

An international agreement between contracting states, such as the Hague Convention is, amounts to an undertaking by the respective contracting states towards each other[6]. In international law this may create obligations enforceable before the International Court of Justice or some other tribunal[7]. In some legal systems it may also be directly enforceable in the domestic law. This is not the case in the UK[8], or in other common law systems[9]. Thus the provisions of the European Convention on Human Rights, for example, may be directly enforceable in French law by French citizens, but without express incorporation into UK law they are not directly enforceable by British subjects before the UK courts[10]. An

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4 See (inter alia) Dyson [1992] Conv 407; Urquhart (1992/3) 3 OTPR 35; Koele in *The Trust, Bridge or Abyss*, eds. Sonnevelde and Van Mens, 1992.

5 The Cayman Islands is the best known example: Trusts (Foreign Element) Law 1987. See Hendrickson and Silverman, *Changing the Situs of a Trust*, para 11.09 [4].

6 See, e.g., *A-G for Canada v AG for Ontario* [1937] AC 326 at 347-348.

7 See *Halsbury's Laws of England*, 4th ed. Vol 18, para 1819.

8 *The Parlement Belge* (1879) 4 PD 129 at 149-155 (revsd on other grounds 5 PD 197); *A-G for Canada v A-G for Ontario*, above; *Blackburn v A-G* [1971] 2 All ER 1380 at 1382.

9 *A-G for Canada v A-G for Ontario*, above.

10 *Blackburn v A-G* [1971] 2 All ER 1380 at 1382.

Act of Parliament is required for this. In relation to the Hague Convention the UK Parliament enacted the Recognition of Trusts Act 1987, which incorporated the main provisions of the Convention directly into the domestic laws of the three internal legal systems of the UK, thereby fulfilling the government's international obligation to bring the conflict rules of its legal systems into line. It need not have done so by direct incorporation of the Convention's rules. Often an Act is passed which simply changes the substance of the existing domestic rules, without specific reference to the provisions of the Convention which it is thereby intended to comply with[11].

It is important to bear in mind that the entry into force of the Convention, as with any international agreement[12], does not happen when the text has been produced at the original conference. Far from it. The text is then opened for signature by any of the Hague Conference member states. Once signed, the state must *ratify*, *accept* or *approve* the Convention by depositing an instrument of ratification with the Dutch Foreign Ministry. This Convention, by Article 30, was to enter into force on the first day of the third month after the month in which the third state to ratify did so. Thus the signatory states so far have been Italy, Luxembourg and The Netherlands (all on 1st July 1985), the UK (10th January 1986), the USA (13th June 1988), Canada (11th October 1988), Australia (17th October 1991) and France (26th November 1991). Of these, only four have as yet ratified: the UK (17th November 1989), Italy (21st February 1990), Australia (17th October 1991) and Canada (20th October 1992). Thus the Convention came into force on 1st January 1992, after Australia, as the third state to do so, ratified the Convention.

However, one must also remember that states with several legal systems (e.g., the UK, Canada, Australia, USA) need more flexibility, and can in effect become party to the Convention in respect of some only of their legal systems. Article 29 of the Convention provides:

> "If a state has two or more territorial units in which different systems of law are applicable, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention should extend to all of its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time."

The UK is in a particularly difficult position, because although there are three separate legal systems within the UK, the UK government is also responsible for

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11 See, e.g., the Protection of Aircraft Act 1973 (consolidated in the Aviation Security Act 1982), which enabled ratification of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; and the Arbitration Act 1975, enacting new rules to enable the UK to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

12 See the Vienna Convention on the Law of Treaties, 1969 (Cmnd 4818), Arts 9, 10.

the foreign affairs of a multitude of dependencies (e.g., the Isle of Man, the Channel Islands) and colonies (e.g., Hong Kong and the Cayman Islands). Most of these have self-government to a greater or lesser extent, and the UK has therefore only undertaken the international obligation inherent in the Convention in respect of dependencies and colonies who have fulfilled or undertaken to fulfil the "minimum entry requirements" in their respective legal systems. Thus both the UK and Canada in ratifying the Convention have done so only in respect of specified territories.

In the case of the UK, the Convention was originally ratified (17th November 1989) on behalf of the United Kingdom, the Isle of Man, Bermuda, British Antarctic Territory, British Virgin Islands, Falkland Islands, Gibraltar, St Helena, St Helena Dependencies, South Georgia and the South Sandwich Islands, and the sovereign base areas of Akrotiri and Dhekalia in Cyprus. Subsequently, and pursuant to Article 29 of the Convention, the UK extended the ratification to cover Hong Kong (ratified 30th March 1990; entry into force 1st June 1990), Monserrat (ratified 10th January 1991; entry into force 1st April 1991), and Jersey (ratified 20th December 1991; entry into force 1st March 1992). In the case of the United Kingdom and Jersey, a declaration was made that the second paragraph of Article 16 would not be applied, and that the provisions of the Convention would extend to trusts declared by judicial decisions.

As has already been mentioned, the Recognition of Trusts Act 1987 incorporated the main provisions of the Convention into the domestic laws of England and Wales, Scotland and Northern Ireland as from the commencement of that Act on 1st August 1987[13], and the Act was extended to Bermuda, British Antarctic Territory, the Falkland Islands, St Helena and St Helena Dependencies, South Georgia and the South Sandwich Islands, the sovereign base areas of Cyprus and the Virgin Islands by statutory instrument[14]. Other territories, such as Gibraltar[15], the Isle of Man[16] and Jersey[17], produced their own legislation to amend the domestic law to the extent necessary to enable ratification to take place. It will be noted that many well known offshore British territories are not included, such as Guernsey, Cayman and the Bahamas[18].

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[13] See SI 1987 No 1177.

[14] See SI 1989 No 673.

[15] Trusts (Recognition) Ordinance.

[16] Recognition of Trusts Act 1988 (IOM).

[17] Trusts (Amendment No 2) (Jersey) Law 1991.

[18] These jurisdictions may nonetheless have rules in their own domestic laws dealing with the same subject-matter as the Convention and, indeed, may even comply with the Convention's minimum standards: see, e.g., the Trusts (Guernsey) Law 1989 (as amended), and the Trusts (Foreign Element) Law 1987 (Cayman).

In the case of Canada, the Convention was only ratified in relation to Alberta, British Columbia, New Brunswick, Newfoundland and Prince Edward Island, although it does extend to trusts declared by judicial decisions in those provinces. Only in respect of Alberta is the second paragraph of Article 16 disapplied. So far, the provinces of Ontario, Manitoba, Saskatchewan and Quebec and the Northern Territories are not covered at all by the Convention, although it is open to the Canadian Government to make a further declaration extending the Convention at a later date.

It will be seen that Italy is the only civil law state which has so far ratified the Convention, which by presidential decree now has the force of law there, although the domestic Italian law does not itself have a trust institution. Luxembourg and The Netherlands are no doubt waiting for the French to ratify the Convention, but this will not happen until the *fiducie* law is enacted. This may take some time, particularly given the current political uncertainty there. It is doubtful that The Netherlands will wish to introduce a similar concept: indeed, under the new Dutch Civil Code, brought into force on 1st January 1992, the domestic institution closest to the trust, the *fiducia cum amico*, was expressly *abolished*. This is a pity, because, as the experiences of South Africa[19] and Sri Lanka[20] show, the Anglo-Saxon trust can be absorbed into a Roman Dutch legal system. As for the position of the only other non-ratifying signatory, the USA, it is understood that there will need to be implementing legislation passed before ratification can take place. Unfortunately, fostering greater international recognition of European trusts may not be one of the greatest priorities of the new US administration in these early protectionist days of its period in office!

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[19] Honoré, *The Law of Trusts in South Africa*, 3rd ed. 1985.

[20] Cooray, *The Reception in Ceylon of the English Trust*, 1971.