

THE HAGUE CONVENTION ON TRUSTS

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The Hague Convention on the Law Applicable to Trusts and on their Recognition explained in Underhill & Hayton, *Law of Trusts & Trustees*, 18th ed (2010) at pp1309-1379 (paras 100.1 to 100.221) is in force by virtue of ratification or accession in the following States:-

Australia, Canada (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward island, and Saskatchewan, but not Ontario), Hong Kong (part of China after UK), Italy, Liechtenstein, Luxemburg, Malta, Monaco, Netherlands, San Marino, Switzerland, and the UK; but has only been signed so far by Cyprus, France and the USA.

The UK has extended the Convention to Akrotiri and Dhekelia (Cyprus sovereign bases), Bermuda, British Antarctic Territory, British Virgin Islands, Falklands, Gibraltar, Guernsey (other than Alderney or Sark), Isle of Man, Jersey, Montserrat, St. Helena, South Georgia, and the Turks and Caicos Islands.

The Justification for the Convention

With increasing wealth and mobility of individuals and increasing international trade and investment, trusts have increasingly been used to preserve family wealth and to provide structures to further trade and investment, whether in common law States that know the trust concept well or in civil law States that do not have the trust concept as part of their domestic law. How then can their private international law

("PIL") rules deal with trusts governed by the law of a common law State? How are trusts to be characterised for PIL purposes e.g. as contracts, mandate or agency, or as if a legal entity like a company or a foundation? Do trusts fall within the law of obligations or the law of property but, if the latter, a PIL Convention surely cannot have domestic or internal effects on the law of a State that does not have the concept of equitable proprietary interests.

Civil law is concerned with absolute ownership of property, the right to use, enjoy and dispose of it as one pleases, subject to a limited number, a *numerus clausus*, of real or proprietary rights less than ownership. Common law is concerned with a bundle of rights in property that Equity metaphysically allows a settlor to create as he wishes. The legal owner manages the property but the beneficial or economic rights against the owner can be divided between as many persons and in as many ways as the settlor wants.

Pressure from commercial and financial lawyers in civil law States, who used common law trust structures for matters like syndicated loans, debentures, and securitisations, and from notaries having to deal with property apparently subject to testamentary trusts led to The Hague Conference deciding to have a group of experts draft a Convention to deal with PIL rules to cope satisfactorily with trusts having connections with civil law States.

'Trusts' within the Scope of the Convention

After the first fortnight of meetings it was agreed that the trust could not be given effect to in civil law States by some analogous concept. The trust was such a unique concept that it had to be recognised as such.

The concept of a trust has arisen from rules developed by Equity, not from a definition used so as to enable rules to be deduced therefrom. Thus only a

description could be provided in Article 2 to indicate the main distinguishing characteristics of a trust:-

“The term ‘trust’ refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics –

- (a) the assets constitute a separate fund and are not a part of the trustee’s own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.”

It will be noted that, deliberately, nothing is said about beneficiaries having “equitable” rights or interests so that States having a trust concept without having the split between legal and equitable proprietary rights or interests will have their concept recognised e.g. Scotland, India, and Sri Lanka. Indeed, civil law States may well have a ring-fenced fund concept that can satisfy Art 2.

In trying to agree upon Art 2 a problem arose from two ways of viewing a trustee’s holding of trust property. The view of trust specialists is that a trust of property requires the ownership of the property to be vested in the trustee.

Nevertheless, if a trust company in the 1980s bought shares in a public company eg 5,000 ICI plc shares, it would often not own them directly in its own name but would own them indirectly via a custodian who would have legal title to the shares as registered owner. Technically, an equitable proprietary right to 5,000 shares or, rather, a fractional interest in the relevant proportion of all the ICI plc. shares owned by the custodian, would be vested in the trustee as trust property. A layman, however, would regard the trustee as being entitled to 5,000 ICI shares even though not vested in him, but placed under his control.

Pandering to laymen their view prevailed so that para 1 of Art 2 refers to assets “placed under the control of a trustee,” but this is not intended to cover placing assets under the control of an agent or bailee, as revealed by there being no provision in the Convention to deal with its relationship to the earlier Hague Convention on Agency. This is also revealed by para 2(b) which requires title to the trust assets to stand “in the name of the trustee or in the name of another person on behalf of the trustee”. If an owner, O, has merely placed his property under the control of X, title stand in O’s name on behalf of O and no one else.

Most significantly, Art 2(b) creates an “obligational trust” as opposed to the traditional proprietary trust. An obligational trust is, in essence, a ring-fenced fund, whereby the trustee’s own estate is separated from the trust fund which is only available for the trust beneficiaries, not for the trustee’s own creditors. This position is reinforced by Art 11 which spells out the effects of recognising a trust valid by its applicable law.

Article 11 states:

“A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust.

Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.

In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular –

- (a) that personal creditors of the trustee shall have no recourse against the trust assets;
- (b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;
- (c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;
- (d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.”

It will be seen that, crucially, recognition of a trust valid by its applicable law implies “as a minimum that the trust property constitutes a separate fund.” Recognition of a trust will also imply (a) that personal creditors of the trustee shall have no recourse against the trust assets (b) that the trust assets shall not form part of the trustee's estate upon his insolvency and (c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death.

A specially preferred ring-fenced obligation is thus the nature of the trust covered by the Convention, so that the Convention does not create property rights capable of binding third parties to whom the trustee had transferred property other than by a bona fide sale.

Article 3 restricts the Convention to “trusts created voluntarily and evidenced in writing”. While express trusts, resulting trusts and constructive trusts are traditional terms, “voluntarily” is not a term traditionally used in the trust context. The underlying idea is to cover express trusts arrangements that have been freely entered into rather than a trust imposed by the courts e.g. a constructive remedial trust imposed on property by USA, Canadian or Australian courts as a remedy for breach of fiduciary duty. The Convention is only concerned with substantive or institutional trusts of assets created by the owner of the assets. Because the personal liability as a constructive trustee imposed upon a stranger involved in a breach of trust gives rise to no constructive trust of assets this falls outside the Convention.

Where beneficiaries claim, as trust assets, assets that their trustee in breach of trust has acquired for himself, such assets from the date of their acquisition are treated as held on the terms of the express trust for the beneficiaries. The trustee by virtue of accepting the trusteeship has voluntarily agreed not to profit himself but to act exclusively in the beneficiaries’ best interests so that he cannot deny that the assets are held for his beneficiaries. Whether regarded as holding the assets directly on the terms of the express trust or indirectly on constructive trust to hold them on such terms, the trust of the assets falls within the Convention.

After all, the crucial ring-fenced protection of the trust property being a fund separate from the trustee’s own property would be illusory if the trustee- guardian of

the fence could easily take assets outside the ring-fence by simply taking the proceeds of sale of trust assets into his private patrimony and using the proceeds to buy assets for himself that are thus available to satisfy his private creditors' claims.

Constructive trusts arising in the cases of mutual wills, secret trusts and common intention trusts of family homes should qualify as trusts created voluntarily, though evidence in writing could be a difficulty in family homes cases unless a court order can satisfy such requirement. A constructive trust imposed in respect of property acquired by the defendant killing another person so as to inherit or otherwise benefit on that person's death will not fall within the Convention.

Also falling outside the Convention are, by Art 4, "preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee." In essence, matters relating to launching the trust rocket are outside the Convention e.g. transfer of property to trustees, validity of a will as to form and substance (so that forced heirs' claims to fixed shares could prevent their shares becoming subject to testamentary trusts).

Whether the settlor has capacity to alienate property at all needs to be distinguished from the settlor's capacity to create the trust structure with the property which he had capacity to alienate to another. In *Note re Clark and Whitehouse Joint Administrators of Rangers Football Club* [2012] CSOH 55 it was held that a person had no capacity in Scots law to create a trust for value over future assets, though permitted by the English law governing the purported trust, so that the beneficiaries only had contractual rights not proprietary rights.

Art 20 enables the Convention to be extended to trusts declared by judicial decisions, taking account of the fact that under the Brussels Convention for EC States and the parallel Lugano Convention for EFTA States judicial decisions in

such civil matters had to be recognised and enforced. As a matter of sovereign power a State is also free to extend the Convention within its own boundaries as it wishes eg to statutory trusts arising in respect of co-owned land or intestacy. In section 1(2) of the UK Recognition of Trusts Act 1987 it is stated that the provisions of the Convention set out in the Schedule “shall, so far as applicable, have effect not only in relation to the trusts described in Articles 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of any part of the UK or by virtue of a judicial decision whether in the UK or elsewhere.” This makes academic much of the debate as to what particular types of trust of property fall within Art 3.

By Art 22 the Convention applies to trusts regardless of the date on which they were created, but a Contracting State may reserve the right not to apply the Convention to trusts created before the date on which the Convention came into force in that State. The UK made this reservation out of an abundance of caution just in case the Convention rules might give rise to a different result from the position before it came into force in the UK, though this was not expected to be the case.

Section 1(5) of the Recognition of Trusts Act 1987 states, “Article 22 shall not be construed as affecting the law to be applied in relation to anything done or omitted before the coming into force of this Act” (! August 1987). Breaches of trust committed before such date are to be judged by the law applicable before that date. Lawrence Collins J (the editor of Dicey, Morris & Collins, *Conflict of Laws*) in *Chellaram v Chellaram (No 2)* [[2002] EWHC 632 (Ch) at [166], however, when dealing with pre 1987 breaches was content to assume that the Convention reflected the existing rules.

The applicable law

The position largely speaks for itself as follows:

“Article 6

A trust shall be governed by the law chosen by the settlor. The choice 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.

Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved the choice shall not be effective and the law specified in Article 7 shall apply.

Article 7

Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to -

- (a) the place of administration of the trust designated by the settlor;
- (b) the situs of the assets of the trust;
- (c) the place of residence or business of the trustee;
- (d) the objects of the trust and the places where they are to be fulfilled..

[A guide referring to no more than four indicia was required by civilian lawyers, who focused upon inter vivos trusts, ignoring testamentary trusts (where domicile, habitual residence or nationality at death are of significance, depending upon the relevant connecting factor under a forum’s choice of law rules) and special trusts like marriage settlements

and charitable trusts. Ontario's testamentary trust fears led it to stay outside the Convention, but other Canadian provinces discounted such fears: after all, regard can still be had by the forum to factors other than (a) to (d) that the forum will normally be familiar with as a common law forum, while a civil law forum can be put fully in the picture by expert evidence.]

Article 8

The law specified by Article 6 and 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust.

In particular that law shall govern –

- (a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;
- (b) the rights and duties of trustees among themselves;
- (c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;
- (d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;
- (e) the powers of investment of trustees;
- (f) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;
- (g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
- (h) the variation or termination of the trust;
- (i) the distribution of the trust assets;
- (j) the duty of trustees to account for their administration.

Article 9

In applying this Chapter a severable aspect of the trust, particularly matters of administration, may be governed by a different law.

Article 10

The law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law.”

Recognition of trusts valid by their applicable law

Article 11 has earlier been set out to emphasise the nature of a Convention ‘trust’ as a ring-fenced fund providing the beneficiaries with a preferred obligation in respect of the trustee’s fiduciary patrimony, immune from claims of the trustees’ heirs and creditors enforceable only against his private patrimony.

Paragraph (d) permits application of the tracing rules of the applicable trust law against the trustee but recognises that problems exist if trying to trace assets into the hands of third parties. It seems one should apply the relevant tracing rules but then consider the impact of the choice of law rules of the forum affecting third party transferees. In particular, taking account of Art 15(d) one must apply the *lex situs* applicable under a forum’s choice of law rules to transfers of property to persons acting in good faith.

Article 12 deals with trust assets where ownership of such assets depends upon entry in a register. In England and many other common law countries, in the interests of easy marketability of trust property, the existence of trusts is not allowed to be indicated on registers of land or of shares. Beneficiaries are protected by the

overreaching of their rights detached on sale from the land or the shares and attached to the proceeds of sale and subsequent purchases therewith.

Civil law States, however, knowing nothing of overreaching, wanted trusts of assets only to be recognised as valid trusts on the insolvency of the trustee if the register indicated that the registered proprietor was a trustee. Article 12 makes this possible.

Once it had proved totally impractical to restrict the Convention to 'international' as opposed to 'domestic' trusts it was necessary for civil law States to be able to refuse recognition to what they regarded as local trust-like arrangements in their own backyard but for becoming trusts by the choice of a foreign applicable law, a foreign trustee and a foreign administration.

Thus Article 13 makes it possible for a "trust" not to be recognised stating:

"No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved."

The language is non-discriminatory so that the Article is available to common law States as well as civil law States. The UK, however, felt no need for the protection of the Article and so excluded it when otherwise implementing the Convention in the Recognition of Trusts Act 1987. Malta and Switzerland took the same approach.

Intriguingly, in Italy there have been over a hundred cases involving the Convention but no reliance has been placed upon Article 13 to refuse to recognise the effects of a foreign trust. Indeed, Italy is in course of developing its own "*trusts*

interni” where every factor has been Italian except for the choice of a foreign applicable law eg set out in a Maltese or Jersey statute.

Mandatory application of laws other than the trust law

Trusts governed by a trust law do not exist in a vacuum but can be affected by other laws, some of which may under Article 4 prevent the launching of a trust wholly or partly. Once a trust of property has come into existence, however, it may still be affected by other mandatory laws as catered for by Article 15 which states:

“The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters –

- (a) the protection of minors and incapable parties;
- (b) the personal and proprietary effects of marriage;
- (c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;
- (d) the transfer of title to property and security interests in property;
- (e) the protection of creditors in matters of insolvency;
- (f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.”

Paragraph (a) can deal with beneficiaries becoming entitled to property under a trust when minors or otherwise lacking capacity.

Paragraph (b) can deal with the impact that the orders of a divorce court may have upon a trust, so the English Court of Appeal in *Charalambous v Charalambous*

[2004] EWCA Civ 1030, [2005] Fam 250 held that this enabled the divorce court jurisdiction under s 25 Matrimonial Causes Act 1973 to prevail over Art 8(2)(h). If, however, this requires the foreign trustees to act ultra vires they will not be permitted by their court to comply with an English court order and so such an order should not be made. Where intra vires actions are required, the trustees will normally need to approach their local court for confirmation that acting or substantially acting in accordance with the foreign court order will fall within the parameters required for the valid exercise of their discretions. As a result, the divorce court will not draw up its final order till the outcome of such proceedings or will grant liberty to apply to it to review its order if it turns out that substantial effect is not given to its order eg it could award W more of the available assets in England: *BJ v MJ* [2011] EWHC 2708 (Fam). Note that the issue of matrimonial regime property not being capable of becoming trust property without the consent of both spouses is a preliminary issue under Article 4.

In respect of paragraph (c) forced heirship rights in respect of assets not forming part of the deceased's estate at death have particular significance. Forced heirs such as three children of the deceased, D, will usually be entitled to share three quarters of D's actual estate together with the value of D's earlier gifts within a specified period ranging from 30 years to 5 years. The children can sue donees in the order of the closeness of the gifts to D's death so as to make up the appropriate amount satisfying their fixed shares.

While common law courts will treat valid gifts of D's assets located in common law countries as not part of D's estate and so not subject to the law governing succession to D's estate, civil law countries will regard such gifts as available to

satisfy forced heirship shares. Thus trustees may need to satisfy forced heirs' claims out of the trust property given earlier to them by the heirs' father or mother.

Paragraph (d) preserves the overriding impact of the *lex situs* as to the transfer of title to property, so protecting, for example, donees of English or other common law States' assets under gifts valid by the *lex situs*. It also extends to the grant of security interests in property. Note, however, that under Art 4 an arrangement purporting to be the creation of a trust may not launch a trust because its true character is that of a charge over the alleged trust assets as security for a debt.

Paragraph (e) protects creditors in matters of insolvency as where a trust can be set aside as made by a settlor with intent to prejudice his creditors. In context, it cannot enable the trust assets to be available to satisfy the trustee's creditors on his insolvency for, otherwise, the ring-fenced fund provided for in Arts 2 and 11 would be wholly illusory.

Paragraph (f) protects in other respects third parties acting in good faith e.g. in acquiring trust assets from a trustee in breach of trust.

While Art 15 concerns the domestic mandatory rules of the jurisdiction designated by the forum's choice of law rules, Art 16 requires application of the forum's international mandatory rules that apply irrespective of PIL rules. Such a rule could prevent a beneficiary from becoming entitled to a heritage object or foreign exchange or weaponry that are subject to restrictions on their import or export.

Art 16 goes on to permit the application "in exceptional circumstances" of the international mandatory rules of a State having "a sufficient close connection with a case", whose law is neither the law of the forum nor the law applicable under the forum's choice of law rules. Most States like the UK have taken advantage of a

reservation enabling them not to apply this incredibly broad second part of Art 16. In any event, if an act is illegal in the place where it is to be carried into effect an English court would not require the act to be performed.

Public Policy

Art 18 states that “the provisions of the Convention may be disregarded when their application would be manifestly contrary to public policy”- presumably just the public policy of the forum.

Use of “manifestly” indicates there that is a strong threshold before Art 18 should be applied. The fact that the forum’s trust law does not go so far as the foreign trust law does not enable the forum to invoke public policy. Thus the English Court of Appeal in *Re Fitzgerald* [1904] 1 Ch 573 recognised that a particular life interest under a Scots trust was not capable of assignment though such an interest would have been assignable under English law. This meant that the mortgage by way of assignment of the Scots life interest by the English domiciled life tenant to his English creditors was invalid.

If an Englishman transferred his English portfolio of stock and shares to a Cook Island Company whose shares he then transferred to a Cook Island trust on protective trusts for himself for life, remainder to his children it seems likely that the English court at the behest of his creditors would invoke Art 18 so as to treat him as having a simple life interest. In England and common law States it is not possible to settle one’s own property on protective trusts for oneself to protect oneself against bankruptcy. It might also be that the transfer could be set aside under English insolvency, whether by virtue of Art 4 or Art 15(e).

The fact that a trust could endure for a longer perpetuity period than the forum's 125 year period or for ever should not lead to the forum invoking Art 18 so long as all the trust assets are freely alienable. Different perpetuity periods should not apply just because trust investments are from time to time located in different States having differing perpetuity laws.

What about pure purpose trusts that are not charitable trusts and so are void under traditional trust law in the absence of special legislation as in Bermuda and the Cayman islands? Take the Cayman STAR trust where beneficiaries have no rights to enforce the trust and have no rights to any trust property unless and until the trustees transfer it to them. The trusts are enforced by appointed enforcers who have the proprietary rights via the tracing process that beneficiaries have under traditional trusts. Thus, on the face of it, there appears to be an enforceable obligation that is at the core of a trust, the enforcer(s) being able to ensure that the trustees duly perform their duties.

A STAR trust could be to use the capital and income for pure non-charitable purposes and be enforceable like a charitable trust except for the enforcer not being the Charity Commission or the Attorney-General but a private person. In such a case I see no reason why the courts of the English or other traditional trust State should not recognise the trust.

Where, however, the STAR trust is for beneficiaries (e.g. a discretionary trust for S's descendants and their spouses for ever) it seems likely to me that Art 18 could be invoked if no beneficiary is an enforcer. As Millett LJ make clear in *Armitage v Nurse* [1998] Ch 241 at 253, "There is an irreducible core of obligations owned by the trustees to the beneficiaries and enforceable by them which is

fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts” – except for the resulting trust for the settlor.

It seems that under a STAR trust the position of a beneficiary will be characterised by an English court as that of a mere object of a personal (non-fiduciary) power of appointment to whom the trustee is authorised in his discretion to distribute trust assets. Thus, since no beneficial interest is vested in the beneficiaries, there should be a resulting trust in favour of the settlor so he can countermand his gratuitous mandate whenever he wants.

As Millett LJ stated in *Orion Finance v Crown Financial Management* [1996] 2BCLC 78 at 84, “the categorisation of a document is determined by the legal effect which it is intended to have, and if when properly construed the effect of the document as a whole is inconsistent with the terminology which the parties have used, then their ill-chosen language must yield to substance.”

Similarly, if a trust is set up to hold the shares in X Ltd or to hold and manage an investment portfolio, this may be a valid trust under a State’s statutory law. Nevertheless, if the shares are in English companies it seems likely that the English courts will hold that a resulting trust for the settlor exists. It seems that all the settlor has done is to create a state of affairs: he has set up no purpose for the use of the capital and income.

Composite States with several territorial units

Art 23 provides that where a State (like the UK, Australia or Canada) comprises several territorial units each with its own trust law rules, “any reference to the law of that State is to be construed as referring to the law in force in the territorial unit in question” eg Bermuda, BVI, Jersey. Art 24 further provides that such a State

is not bound to apply the Convention to conflicts solely between the laws of its territorial units, though, despite this, the UK in the Recognition of Trusts Act 1987 has applied the Convention to UK territorial units England & Wales, Scotland and Northern Ireland.

Art 17 makes it clear that all references to the applicable law are to the domestic (or internal) law of a State not its PIL rules (thereby avoiding any *renvoi* possibilities). In preparing the 1987 Act, s 1(4) was inserted so that the reference in Art 17 to a State includes a reference to any country or territory (whether or not a party to the Convention and whether or not forming part of the UK) which has its own system of law.

Provisional Conclusions

Surprisingly, quite a few offshore jurisdictions have not sought some sort of legitimacy by implementing the Convention accepted by many non-trust civil law States who have to make a greater leap of faith than trust jurisdictions in giving effect in their backyard to such a strange chameleon concept as the trust with its business, financial and family uses. One excuse for non-implementation that I have heard is that accepting the Convention will leave offshore jurisdictions wide open to have their trusts refused recognition under Article 13 :

“ No State shall be bound to recognise a trust the significant elements of which , except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.”

This is a permissive provision, not a mandatory provision, and as the Italian experience has shown, where there is some useful purpose in having a purely local trust governed by a foreign law the courts do not invoke Article, especially when Art

15 provides much protection. If, however, there is, say, a Cayman discretionary family trust with administration in Cayman by a Cayman trust company and it holds, say, shares in a French or Greek company or a French or Greek villa, whether directly or indirectly (via holding shares in a Cayman company that owns such shares or villa), the French or Greek courts can already make the French or Greek assets available to satisfy the claims of forced heirs against inter vivos donees, the trustees. Territorial might prevails without the need to rely on Article 13, France and Greece not having implemented the Convention.

The other excuse is that offshore jurisdictions have taken legislative steps to prevent forced heirship and marital claims succeeding against their trusts and acceptance of Article 15(b) and (c) would undo such steps. It has, however, been seen that divorce court orders requiring ultra vires acts are inherently unenforceable, while orders encouraging trustees to act intra vires lead to the trustees independently choosing to act intra vires and this contravenes no local legislation. It has also been seen that inter vivos gifts of assets in common law States that are unimpeachably valid by the relevant *lex situs* are protected by Article 15(d) so that local legislation protecting against forced heirship claims remains effective. Indeed, a case can be made for public policy protection within Article 18 for the vital protection of the security of valid gifts to individuals, trustees and charities, so that donees can use the gifts in economically efficient ways without the need to retain the property against future forced heirship claims or to insure against them.

There thus seems to be a good case for States which have not implemented the Convention to implement it along the lines of the UK Recognition of Trusts Act, so that their trusts can match the respectability of UK, Canadian and Australian trusts. Civil law lawyers tend to be suspicious of trust States that are not

prepared to implement a Convention designed, as they see it, to further the interests of trust-States' trusts by requiring substantial recognition of a concept alien to the civil law culture.