

The Hague Convention on Trusts and the Uniform Trust Code

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The Hague Convention on the Law Applicable to Trusts and on Their Recognition (hereinafter referred to as the “Hague Convention on Trusts” or the “Convention”) was proposed to the state parties by the Final Act of the Fifteenth Session of the Hague Conference on Private International Law on October 20, 1984 and was concluded on July 1, 1985 with the signatures of Italy, Luxembourg and the Netherlands. The Convention came into force on January 1, 1992 with the ratifications by Australia, Italy, and the United Kingdom. It has since been ratified or acceded to by Canada (partially), China (for Hong Kong only), Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, San Marino, and Switzerland. The United States of America signed the Convention on June 13, 1988 but has not yet ratified the Convention and therefore the Convention has not yet become legally binding upon or within the United States.

The Uniform Trust Code (the “UTC” or the “Code”) was first proposed for adoption by the individual states of the United States by the U.S. National Conference of Commissioners on Uniform State Laws in 2000, and has been amended several times, most recently in 2010. As discussed below, the UTC has been adopted in significant part by at least 30 states and the District of Columbia.

The primary purpose of this article is to explore ways in which the UTC fulfills and complies with the provisions of the Convention. The article compares the provisions of the Convention and the UTC on the nature of a trust, the determination of a trust’s applicable law and on the recognition of trusts. The article also highlights how several states of the United

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States, by adopting the provisions of the UTC into the law of their states, have not only adopted the provisions of the UTC that are consistent with the Convention but, in so doing, have also impliedly adopted—or even informally “ratified”—the law of the Convention in so far as it may modify traditional choice-of-law concepts, such as the requirement of substantial physical and personal ties between a trust and the jurisdiction of its chosen law. Finally, the article raises the question as to whether the widespread adoption of the UTC makes the prospect of U.S. ratification of the Convention more acceptable, politically and constitutionally, if the United States were to invoke the Convention’s federal-territorial unit extension provision, thereby giving each U.S. jurisdiction the opportunity of electing to incorporate the provisions of the Convention in its own laws. At the outset, of course, it should be noted that, under Article 24, the Convention only applies to resolving conflict-of-law issues between countries as to trusts, not between a country’s own provinces or states: “A State within which different territorial units have their own rules of law in respect of trusts is not bound to apply the Convention to conflicts solely between the laws of such units.” Nonetheless, the fact that some U.S. jurisdictions have adopted rules that are closer to the Convention rules means that, in at least some states of the United States, the more flexible norms of the Convention are being applied to domestic as well as non-U.S. trusts, notwithstanding the fact that the United States has not ratified the Convention at this time and, even if it were to ratify the Convention, these states would still not be required to apply Convention rules to intra-U.S. trusts.

1. The Nature of a Trust

The Preamble to the Convention notes that “the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution.” The UTC does not attempt to define a “trust;” however, UTC Section 102

states that the Code “applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust” and UTC Section 106 provides that “[t]he common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.”

Article 2 of the Convention provides that, “for purposes of this Convention, 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.” UTC Section 402 provides that “[a] trust is created only if ... the settlor has capacity to create a trust; ... the settlor indicates an intention to create the trust; ... the trust has a definite beneficiary or is ... a charitable trust ... a trust for the care of an animal ... or a trust for a non-charitable purpose, as provided in Section 409; ... the trustee has duties to perform; and ... the same person is not the sole trustee and sole beneficiary.”²

Article 2 of the Convention also states that a trust has the following three characteristics: “[1] the assets constitute a separate fund and are not a part of the trustee’s own estate; [2] title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; [and (3)] the trustee has the power and 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.” While the UTC does not use the phrase “separate fund,” this concept is inherent in many of its provisions. UTC Section 401, for example, provides that a trust may be created by a “(1) transfer of property to another person as trustee during the settlor’s lifetime or by will or other disposition taking effect upon the settlor’s death; (2) declaration by

² UTC Section 409 allows for noncharitable trusts without ascertainable beneficiaries as long as the trust cannot be enforced for more than 21 years.

the owner of property that the owner holds identifiable property as trustee; or (3) exercise of a power of appointment in favor of a trustee.” UTC Section 507 provides that “[t]rust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.” UTC Section 810 provides, among other matters, that “[a] trustee shall keep trust property separate from the trustee’s own property” and that “a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.” Moreover, UTC Section 1006 provides that “[a] trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance,” and UTC Section 1010 provides that “[e]xcept as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee’s fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity” and also provides that “[a] trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for environmental law, only if the trustee is personally at fault.” Finally, UTC Section 1011 expands the provisions of UTC Section 1010 by applying the same protection from personal liability to a trustee even if the trustee holds an interest as a general partner in a general or limited partnership when the trustee’s fiduciary capacity is disclosed.

It bears special note that the “official” Comment on UTC Section 507 explains that “[t]he exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices available in civil law countries.” The Comment goes on to observe that “[a] principal objective of the Hague

Convention ... is to protect the Anglo-American trust with respect to transactions in civil law countries.”

Article 3 of the Convention provides that the Convention “applies only to trusts created voluntarily and evidenced in writing.” UTC Section 407 is broader in providing that “[e]xcept as required by a statute other than this [Code], a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.” The Comment notes that oral trusts “are viewed with caution.” While the UTC allows for the possibility of an oral trust, it does not contradict the Convention in respect of written trusts. Moreover, Article 20 of the Convention provides that “[a]ny Contracting State may, at any time, declare that the provisions of the Convention will be extended to trusts declared by judicial decisions.” Perhaps such trusts could encompass oral trusts recognized by judicial decision.

Article 4 of the Convention provides that it “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.” The UTC does not contain a similar express provision limiting its scope as to the validity of wills or the manner by which property is transferred to the trustee. However, nothing in the UTC supplants the provisions of the Uniform Probate Code (the “UPC”) or other local probate law as to the manner in which wills are probated. As noted in the Prefatory Note to the UTC, “[t]he Uniform Trust Code does not limit the duration of trusts or alter the time when interests must otherwise vest, but leaves this issue to other state law.” Nowhere does the UTC prescribe rules for conveying property (whether real or personal) and the Comment to UTC Section 407 (“Evidence of Oral Trust”) notes that states with statutes of frauds or other provisions requiring that certain trusts must be evidenced in writing may wish to cite such provisions when adopting

UTC Section 407. The Comment to Section 403 (“Trusts Created in Other Jurisdictions”) states that “the section does not supercede local law requirements.”

2. Determining a Trust’s Applicable Law

Article 6 of the Convention introduces the Convention’s provisions regarding applicable law (set forth in Chapter II of the Convention). Article 6 provides that “[a] trust shall be governed by the law chosen by the settlor.” Further, it provides that, where the law chosen by the settlor 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 of the Convention provides that “[w]here no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.” Relevant factors include, “the place of administration of the trust designated by the settlor; ... the situs of the assets of the trust; ... the place of residence or business of the trustee; ... [and] the objects of the trust and the places where they are to be fulfilled.”

UTC Section 107 provides that:

[t]he meaning and effect of the terms of a trust are determined by: (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or (2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

The Comment to UTC Section 107 states that:

[t]his section is consistent with and was partially patterned on the Hague Convention on the Law Applicable to Trusts and on their Recognition, signed on July 1, 1985. Like this section, the Hague Convention allows the settlor to designate the governing law [citing Article 6 of the Convention]. Absent a designation, the Convention provides that the trust is to be governed by the law of the place having the closest connection to the trust [citing Article 7 of the Convention].

The Comment also goes on to note that Article 15 of the Convention “also lists particular public policies for which the forum may decide to override the choice of law that would otherwise apply.”³

Article 8 of the Convention lists matters to which the law specified in Article 6 or 7 of the Convention should govern. In general, these concern “the validity of the trust, its construction, its effects, and the administration of the trust.” Article 8 lists the following specific topics:

the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee; ... the rights and duties of trustees among themselves; ... the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers; ... 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; ... the powers of investment of trustees; ... restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust; ... the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries; ... the variation or termination of the trust; ... the distribution of the trust assets; ... the duty of trustees to account for their administration.

This is a very broad list that clearly encompasses issues about the validity of a trust and the administration of a trust that do not squarely fall within the scope of the choice-of-law provision of UTC Section 107, which concerns the choice of law for issues dealing with the “meaning” of the terms of a trust and the “effects” of such terms.

Under the UTC, issues regarding “whether a trust has been validly created” are determined by UTC Section 403 and “the authority of a settlor to designate a trust’s principal place of administration” (and thereby implicitly the law applicable to its administration) is

³ Section 2-703 of the UPC largely promulgated prior to the promulgation of the UTC, provides that “[t]he meaning and legal effect of a governing instrument [such as a Will including trust provisions] is determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share ... exempt property and allowances ... or any other public policy ... applicable to the disposition.”

governed by UTC Section 108(a). UTC Section 403 provides that “[a] trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation: (1) the settlor was domiciled, had a place of abode, or was a national; (2) a trustee was domiciled or had a place of business; or (3) any trust property was located.”⁴ It must be conceded then that, to the extent Article 6 of the Convention, with the application of Article 8 of the Convention, allows a settlor to designate the law of the jurisdiction to govern questions about the validity of a trust, UTC Section 403 appears to be more limiting. On the other hand, UTC Section 403 gives a range of options for the law governing the validity of a trust that is broader than the range of choices for determining, under Article 7 of the Convention, the law of the trust when the settlor has not made a direction about governing law. UTC Section 403 allows as options the law of the jurisdiction where “the settlor was domiciled, had a place of abode, or was a national” and perhaps most saliently, “the law of the jurisdiction in which the trust instrument was executed.” Thus, a settlor of an inter-vivos trust can effectively choose any law the settlor wishes to govern questions about the validity of the trust by making sure the settlor executes the trust instrument in the jurisdiction whose law the settlor prefers to govern questions of trust validity. As indicated in UPC Section 2-506 (see footnote 4), the testator can achieve the same choice with regard to a testamentary trust by executing the testator’s will in the jurisdiction whose law the testator would prefer to govern questions about the validity not only of the testator’s Will but also the trusts to be established under the Will.

⁴ As to trusts created by will, UPC Section 2-506 provides that “[a] written will is valid if executed in compliance with Section 2-502 or 2-503 [of the UPC] or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.”

UTC Section 108(a) provides that “[w]ithout precluding other means for establishing a sufficient connection with the designated jurisdiction,” a settlor’s designation of the trust’s principal place of administration is valid and controlling if “(1) a trustee’s principal place of business is located in or a trustee is a resident of the designated jurisdiction; or (2) all or part of the administration occurs in the designated jurisdiction.” UTC Section 108(b) provides that “[a] trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries” and UTC Section 108(c) allows the trustee, “in furtherance of the duty prescribed by subsection (b),” to transfer the trust’s place of administration to another jurisdiction. Again, the choices under UTC Section 108(a) are not as broad as the theoretical choices under Article 7 of the Convention but the trustee would have, under UTC Section 108(c), broad authority without court approval to move the place of administration to a place directed by the terms of the trust, at least as long as no “qualified beneficiary” objects.

It should be noted that the effectiveness of a choice of law provision under the Convention is subject to the provisions of Article 15 of the Convention, under which the Convention “does not prevent the application of provisions of the law designated by the conflicts rules of the forum”—in other words, the rules of law that the forum would apply for public policy reasons regardless of the choice of law that would otherwise apply under Articles 6 or 7—“in so far as those provisions [of the law designated by the conflicts rules of the forum] cannot be derogated from by voluntary act” These include, in particular, “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; [and] f) the protection, in other respects, of third parties acting in good faith.” Thus, even the right of a settlor of a trust to designate the governing law of a trust under Article 6 of the Convention is not absolute because the forum retains the right to apply its own laws in certain key areas of local concern.

In a similar vein, Article 16 of the Convention provides that “[t]he 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.” It appears from the Explanatory Report by Alfred E. von Overbeck (Par. 149)⁵ that the primary focus in drafting Article 16 was to address rules governing non-trust issues, such as laws intended to protect the cultural heritage of a country, public health, certain vital economic interests, the protection of employees or of “the weaker party to another contract.” Nonetheless, Article 16, by its terms, does not limit itself to non-trust issues and therefore would seem to apply also to the mandatory trust rules of a forum that has its own law of trusts. In that case, the provisions of UTC Section 105 become particularly relevant because this Section sets forth “mandatory rules” that must “prevail” over “the terms of a trust.” These provisions include, but are not limited to, rules for such topics as the requirements for creating a trust; “the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;” the requirement that a trust be for the benefit of its beneficiaries, and that the trust have a lawful purpose that is not contrary to public policy and that is “possible to achieve;” the power of a court to modify or terminate a trust (e.g., correcting mistakes, reforming a trust for tax purposes, etc.); the effect of spendthrift provisions and the rights of creditors and assignees “to reach a trust” (this being of course very much in harmony with Article 15(e) of the Convention); the

⁵ Available with the materials on the Convention on the Hague Conference on Private International Law website at www.hcch.net.

power of a court to make orders with regard to bonds; the power of a court to adjust trustees' compensation that is too low or too high; limitations on exculpatory provisions; periods of limitation for commencing judicial proceedings; the power of a court to take action in the interests of justice; and the rules of the court regarding subject-matter jurisdiction and venue. They could also include duties to notify certain beneficiaries of irrevocable trusts about the existence of the trust and other salient facts about it and the duty of a trustee to respond to certain requests for reports and other information about the trust.

Article 18 of the Convention, as is customary with most Hague Conventions, provides that “[t]he provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (*ordre public*).” This by implication would also apply to the provisions of a law chosen by the trust settlor that were contrary to public policy.

These limiting provisions contained in Article 15, 16 and 18 of the Convention, which allow the law of the forum to be applied regardless of the choice of law made applicable under Article 6 or Article 7 of the Convention, are important in considering how much the ability of a trust settlor to choose the law could compel a jurisdiction within the United States to apply the laws of another jurisdiction to issues mentioned in Article 8 such as “the validity of the trust” or certain administrative matters such as “the appointment, resignation and removal of trustees” and also in considering how much of a gap, if any, as a practical matter, exists between the UTC and the Convention on matters of choice of law. Significantly, just as the UTC seems to contemplate that different laws could apply to interpretation and effect (UTC Section 107), validity (UTC Section 403) and administration (UTC Section 108(a)), Article 9 of the Convention allows that different laws can apply to different or “severable aspect[s]” of a trust. Article 10 of the Convention appears to allow for changes in the law governing different aspects of the trust as

long as such changes are allowed by the law that is originally applicable to the validity of the trust.

3. Recognition of Trusts

Article 11 of the Convention establishes the criteria for determining what trusts a treaty jurisdiction must recognize even if the trust is established in another jurisdiction and/or the treaty jurisdiction does not have the legal institution of the trust in its own law. It provides that

[a] trust created in accordance with the law specified by the preceding Chapter [i.e., Chapter II which sets forth which applicable law governs] shall be recognized 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.

As noted above, while the UTC does not use the phrase “separate fund,” such concept is inherent in its provisions. UTC Section 811 requires that “[a] trustee take reasonable steps to enforce claims of the trust and to defend claims against the trust” and UTC Section 816(14) gives a trustee the power to “pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust.” Implicit in the power to bring claims and to sue is the power to appear before judicial authorities.

Article 11 of the Convention also lists several attributes of trusts that recognition of a trust should imply: (a) that personal creditors of the trustee do not have any recourse against the trust assets; (b) that the trust assets do not form part of the trustee’s estate upon his insolvency or bankruptcy; (c) that the trust assets do not form part of the matrimonial property of the trustee or his spouse or of the trustee’s estate; and (d) that the trust assets may be recovered when the trustee has mingled trust assets with his own property, in breach of trust. As noted above, UTC Section 507 provides that “[t]rust property is not subject to the personal obligations of the

trustee, even if the trustee becomes insolvent or bankrupt” and thus, impliedly, not subject to the claims of the trustee’s heirs either. In addition, UTC Section 810(b) mandates that “[a] trustee shall keep trust property separate from the trustee’s own property.” UTC Section 1001(b) also provides that “[t]o remedy a breach of trust that has occurred or may occur, the court may [among other matters] ... compel the trustee to perform the trustee’s duties; ... enjoin the trustee from committing a breach of trust; ... compel the trustee to redress a breach of trust by paying money, restoring property, or other means; ... order a trustee to account; ... appoint a special fiduciary to take possession of the trust property and administer the trust; ... subject to Section 1012 [protecting certain third parties dealing with a trustee], void an act of the trustee, impose a lien or a constructive trust on trust property, or trace property wrongfully disposed of and recover the property or its proceeds....”

Article 12 of the Convention provides that “[w]here the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.” As noted above, UTC Section 810 requires a trustee to keep “adequate records of the administration of the trust” and “to keep trust property separate from the trustee’s own property.” In addition, UTC Section 810(c) provides that “... a trustee shall cause the trust property to be so designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.”

UTC Section 403, which most closely corresponds to Article 11 of the Convention, predicates the question of the recognition of a trust created in a jurisdiction outside the forum state on the basis of whether a trust is valid: “[a] trust not created by will is validly created if its

creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation: (1) the settlor was domiciled, had a place of abode, or was a national; (2) a trustee was domiciled or had a place of business; or (3) any trust property was located.” UTC Section 403 does not tie the recognition of trusts only to the issue of whether the trust has been formed under the law of a jurisdiction that is permitted or mandated by Articles 6 and 7 of the Convention regarding applicable law. On the other hand, UTC Section 403 gives a very broad range of choice that come close to covering most of the options for governing law listed in Article 7 of the Convention when the settlor has not designated a governing law under Article 6. Thus, UTC Section 403 permits recognition of trusts when, as in Article 7, the place of administration of the trust designated by the settlor aligns with the jurisdiction in which the settlor has chosen to execute the trust instrument; the situs of the assets of the trust aligns with a jurisdiction where any trust property was located; or the place of business or residence of the trustee aligns with the jurisdiction in which a trustee was domiciled or had a place of business. Moreover, the place where the objects of the trust and the places where they are to be fulfilled, as also in Article 7, could well align with the preference of UTC Section 403 for the place where the settlor was domiciled, had a place of abode, or was a national; a jurisdiction where the trustee was domiciled or had a place of business; or the jurisdiction where any trust property was located.

4. Adoption of the UTC – Implicit Ratification of the Convention?

The UTC has been adopted in substantial part by the states of Alabama, Arizona, Arkansas, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont,

Virginia, West Virginia, Wisconsin and Wyoming as well as by the District of Columbia. It is of special interest to note how each adopting state has treated UTC Section 107 (governing law for meaning and effect), UTC Section 108(a) (governing law for administration) and UTC Section 403 (governing law for validity and recognition of trusts).

Twenty-six of the adopting jurisdictions appear to have adopted UTC Section 107 without any additional limiting conditions.⁶ At least two states—Ohio⁷ and Mississippi⁸—have extended the principle of freedom of choice to matters of administration and Mississippi has extended that principle to matters of validity as well⁹—thus, bringing these two states into even greater alignment with Article 6 of the Convention than Paragraph (1) of UTC Section 107 itself. West Virginia makes clear that “meaning and effect” include “terms which may provide for change of jurisdiction from time to time.”¹⁰ Nebraska adopted UTC Section 107 for purposes of all trusts, subject to the exception that Nebraska law merit the governing law for “[t]he meaning and effect of the terms of a trust that pertain to title to Nebraska real estate.”¹¹ After confirming that trusts administered in Utah for which Utah law is the governing law—and trusts that have no choice-of-law provisions that are administered in Utah—will be governed by Utah law, Utah also provides that provisions in a trust agreement of a “foreign trust” (defined as “a trust that is

⁶ Alabama, Ala. Code Section 19-3B-107; Arizona, Ariz. Rev. Stat. Section 14-10107; Arkansas, Ark. Code Section 28-73-107; District of Columbia, D.C. Code Section 19-1301.07; Kansas, Kan. Stat. Section 58a-107; Kentucky, Ky. Rev. Stat. Section 386B.1-050; Maine, Maine Rev. Stat. tit. 18-B, Section 107; Michigan, Mich. Comp. Laws Section 700.7107; Mississippi, Miss. Code Section 91-8-107; Minnesota, Minn. Stat. Section 501C.0107; Missouri, Mo. Rev. Stat. Section 456.1-107; Montana, Mont. Code Section 72-38-107; New Jersey Rev. Stat. Section 3B :31-8 ; New Mexico, N.M. Stat. Section 46A-1-107; North Carolina, N.C. Gen. Stat. Section 36C-1-107; Ohio, Ohio Rev. Code Section 5801.06; Oregon, Or. Rev. Stat. Section 130.030; New Hampshire, N.H. Rev. Stat. Section 564-B:1-707; North Dakota, N.D. Cent. Code Section 59-09-07; South Carolina, S.C. Code Section 62-7-107; Tennessee, Tenn. Code Section 35-15-107; Vermont, Vt. Stat. tit. 14A, Section 107; Virginia, Va. Code Section 64.2-705; West Virginia, W. Va. Code Section 44D-1-107; Wisconsin, Wis. Stat. Section 701.0107; and Wyoming, Wyo. Stat. Section 4-10-107.

⁷ Ohio Rev. Code Section 5801.06(B)(1).

⁸ Miss. Code Section 91-8-107(a).

⁹ *Id.*

¹⁰ W. Va. Code Section 44D-1-107.

¹¹ Neb. Rev. Stat. Section 30-3807(b).

created in another state or country and valid in the state or country in which the trust is created”) having to do with asset protection, allowing a trust to be perpetual, or any other matter not expressly prohibited by Utah law are “effective and enforceable” in Utah.¹² Somewhat analogously, Pennsylvania conditions the application of the law chosen by the settlor to the application of the provisions of UTC Section 105 regarding mandatory rules.¹³ Florida conditions the application of the law chosen by the settlor on there being a connection to the designated jurisdiction at the time of the creation of the trust or during the trust administration, including, but not limited to, the designated jurisdiction being the place of residence of the settlor, a trustee or a beneficiary.¹⁴ Maryland and Massachusetts, in what would appear to be the least receptive gestures towards the principles of Article 6 of the Convention as they are incorporated in UTC Section 107, declined to adopt UTC Section 107 at all,¹⁵ apparently preferring to leave the existing jurisprudence of their respective states on these issues in place.

With respect to Paragraph (2) of UTC Section 107, which most states have left unchanged, Mississippi provides a more “bright-line” test for determining the governing law in the absence of a controlling designation in the terms of the trust, by directing that the laws of the jurisdiction where the trust was executed should determine the validity and construction of the trust and the laws of descent applicable to it and that the laws of the principal place of administration should determine the administration of the trust.¹⁶ Pennsylvania provides, in the absence of an effective choice of law in the trust instrument, that the law of the jurisdiction in which the settlor is domiciled when the trust becomes irrevocable should control.¹⁷

¹² Utah Code Section 75-7-107.

¹³ 20 Pa. Cons. Stat. Section 7707(1).

¹⁴ Fla. Stat. Section 736.0107.

¹⁵ See Md. Code, Est. & Trusts Section 14.5-107; Mass. Gen. L. ch. 203E, Section 107.

¹⁶ Miss. Code Section 91-8-107.

¹⁷ 20 Pa. Cons. Stat. Section 7707(2).

Twenty-seven of the jurisdictions adopted Section 108(a)(1), which makes a designation of a trust's principal place of administration (and thus presumably the designation of the law of that jurisdiction to govern matters of administration) valid and controlling if a trustee's principal place of business or residence is in the chosen jurisdiction or all or a part of the administration takes place there.¹⁸ South Carolina rewrote UTC Section 108(a) to provide that, unless the trust designates otherwise, the principal place of administration is the trustee's usual place of business where the records of the trust are kept or the trustee's place of residence if the trustee does not have a place of business.¹⁹ Oregon, like most states, has adopted the limited right of the trust settlor to designate the principal place of administration of a trust (and thereby implicitly the law that would govern the administration of the trust) provided by UTC Article 108(a) but Oregon added to the criteria for the validity of such a choice that "[o]ther means exist for establishing a sufficient connection with the designated state, country or other jurisdiction."²⁰ Wisconsin is also generous but in a more precise way by adding to the criteria for the designation of the principal place of administration the place where the settlor of the trust is domiciled at the time the trust instrument is executed.²¹ Mississippi has somewhat broadened the criteria as well by specifying that the place where the trust is administered may include a place where trust records

¹⁸ Alabama, Ala. Code Section 19-3B-108(a); Arizona, Ariz. Rev. Stat. Section 14-10108(A); Arkansas, Ark. Code Section 28-73-108(a); District of Columbia, D.C. Code Section 19-1301.08(a); Kansas, Kan. Stat. Section 58a-108(a); Kentucky, Ky. Rev. Stat. Section 386B.1-060(1); Maine, Maine Rev. Stat. tit. 18-B, Section 108(1); Massachusetts, Mass. Gen. L. ch. 203E, Section 108(a); Maryland, Md. Code, Est. & Trusts Section 14.5-108(a); Michigan, Mich. Comp. Laws Section 700.7108(1); Minnesota, Minn. Stat. Section 501C.0108(a); Mississippi, Miss. Code Section 91-8-108(a); Missouri, Mo. Rev. Stat. Section 456.1-108(1); Montana, Mont. Code Section 72-38-108(1); Nebraska, Neb. Rev. Stat. Section 30-3808(a); Ohio, Ohio Rev. Code Section 5801.07(A); New Jersey Rev. Stat. Section 3B :31-8 ; New Mexico, N.M. Stat. Section 46A-1-108(A); North Carolina, N.C. Gen. Stat. Section 36C-1-108(a); North Dakota, N.D. Cent. Code Section 59-09-08(1); New Hampshire, N.H. Rev. Stat. Section 564-B:1-108(a); Tennessee, Tenn. Code Section 35-15-108(a); Utah, Utah Code Section 75-7-108(1); Vermont, Vt. Stat. tit. 14A, Section 108(a); Virginia, Va. Code Section 64.2-706(A); West Virginia, W. Va. Code Section 44D-1-108(a); Wyoming, Wyo. Stat. Section 4-10-108(a).

¹⁹ S.C. Code Section 62-7-108(a).

²⁰ Or. Rev. Stat. Section 130.022(1)(a).

²¹ Wis. Stat. Section 701.0108(1)(a)(4).

are maintained and the place where an income tax return that the trust must file is prepared.²² In addition, Mississippi appears to leave the door open to a wide choice as the law of administration by providing that “[e]xcept as otherwise expressly provided by the terms of the governing instrument specifically addressing the governing law for trust administration or by court order” that the laws of Mississippi shall govern the administration of a trust while the trust is being administered in Mississippi.²³ Pennsylvania essentially rewrote UTC Article 108 as a rule for determining the “situs” of a trust including a set of default rules that apply in the absence of a valid situs designation in the trust instrument itself.²⁴

Twenty-six of the jurisdictions incorporated the continuing duty of the trustee, imposed by UTC Section 108(b), to administer the trust at a place appropriate to its purposes, its administration and the interests of its beneficiaries and to allow the trustee, in furtherance of this duty, to transfer the place of administration to another state or to a jurisdiction outside the United States.²⁵ Three states omitted the duty imposed by UTC Section 108(b) but retained the right of the trustee to change the place of administration of a trust to another state or a jurisdiction outside the United States “that is appropriate to the trust’s purposes, its administration, and the

²² Miss. Code Section 91-8-108(a)(2).

²³ Miss. Code Section 91-8-108(b).

²⁴ 20 Pa. Cons. Stat. Section 7708.

²⁵ Alabama, Ala. Code Section 19-3B-108(b)-(c); Arizona, Ariz. Rev. Stat. Section 14-10108(B)-(C); Florida, Fla. Stat. Section 736.0108(4)-(5); Arkansas, Ark. Code Section 28-73-108(b)-(c); District of Columbia, D.C. Code Section 19-1301.08(b)-(c); Kansas, Kan. Stat. Section 58a-108(b)-(c); Kentucky, Ky. Rev. Stat. Section 386B.1-060(2)-(3); Maine, Maine Rev. Stat. tit. 18-B, Section 108(2)-(3); Maryland, Md. Code, Est. & Trusts Section 14.5-108(b)-(c); Michigan, Mich. Comp. Laws Section 700.7108(2)-(3); Minnesota, Minn. Stat. Section 501C.0108(b)-(c); Mississippi, Miss. Code Section 91-8-108(c)-(d); Montana, Mont. Code Section 72-38-108(2)-(3); Nebraska, Neb. Rev. Stat. Section 30-3808(b)-(c); New Hampshire, N.H. Rev. Stat. Section 564-B:1-108(b)-(c); New Mexico, N.M. Stat. Section 46A-1-108(B)-(C); North Carolina, N.C. Gen. Stat. Section 36C-1-108(b); North Dakota, N.D. Cent. Code Section 59-09-08(2)-(3); Ohio, Ohio Rev. Code Section 5801.07(B)-(C); Oregon, Or. Rev. Stat. Section 130.022(2)-(3); South Carolina, S.C. Code Section 62-7-108(c)-(d); Tennessee, Tenn. Code Section 35-15-108(b)-(c); Utah, Utah Code Section 75-7-108(2)-(3); Vermont, Vt. Stat. tit. 14A, Section 108(b)-(c); Wyoming, Wyo. Stat. Section 4-10-108(b)-(c).

interests of the beneficiaries.”²⁶ Massachusetts and Wisconsin permit a trustee to transfer the place of administration but do not impose an affirmative duty to do so.²⁷

Interestingly, Alabama added, at the end of its version of UTC Article 108, a default rule to apply when the principal place of administration is not designated in the trust, under which the principal place of administration would be the place “where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust,” and in the event the place of administration cannot be thereby determined and the trust has a single trustee, the principal place of administration would be the trustee’s residence or usual place of business, and if the trust has more than one trustee, the principal place of administration would be the principal place of business of a corporate trustee if there is only one corporate trustee, or the usual place of business or residence of an individual trustee who is a professional trustee if there is but one such individual and no corporate co-trustees, or these tests also failing, the principal place of administration would be the usual place of business or residence of any of the co-trustees.²⁸ New Jersey adds that “[i]n the absence of terms of a trust designating the principal place of administration, the initial principal place of administration of a nontestamentary trust shall be this State if the trust is governed by the law of this State, and the principal place of administration of a testamentary trust shall be the jurisdiction in which the decedent was domiciled at the time of death.”²⁹

Save for Florida and Nebraska, none of the other adopting jurisdictions appear to have made any change to the wording of UTC Section 403, which provides that the validity of a non-testamentary trust is governed by the law of the jurisdiction in which the trust instrument was

²⁶ Mo. Rev. Stat. Section 456.1-108(2). See also Va. Code Section 64.2-706(B) and W. Va. Code Section 44D-1-108(b).

²⁷ Mass. Gen. L. ch. 203E, Section 108(b) and Wis. Stat. Section 701.0108(3).

²⁸ Ala. Code. Section 19-3B-108(g).

²⁹ New Jersey Rev. Stat. 3B: 31-8

executed by the law of the jurisdiction where, at the time the trust was created, the settlor was domiciled, had a place of abode or was a national or where a trustee was domiciled or had a place of business or where any trust property was located.³⁰ Florida appears to require that the trust must be valid either under the law of the jurisdiction in which the trust instrument was executed or under the law of the jurisdiction where the settlor was domiciled when the trust was created.³¹ Nebraska, consistent with its amendment to UTC Article 107, appears to exclude the law of the jurisdiction where the trustee was domiciled or had a place of business as a criterion of validity for a trust holding Nebraska real estate.³²

If we give a broad application to the construction and application of Article 16 of the Convention so as to allow a forum that provides for trusts in its internal law to apply its rules of trust law that are of mandatory application, then the range of difference between the rules of the Convention regarding choice of trust law and those of the UTC become almost insignificant; indeed it can be said that those states that have adopted UTC Sections 107, 108(a) and 403 without substantive change have aligned themselves, for all practical purposes, closely with the Convention, and in that sense, could be said to have impliedly or silently “ratified” the Convention. The flexible rule of Section 107 with regard to choice of law by the settlor with regard to interpretation and effect was consciously modeled on Article 6 of the Convention.

³⁰ Alabama, Ala. Code Section 19-3B-403; Arizona, Ariz. Rev. Stat. Section 14-10403; Arkansas, Ark. Code Section 28-73-403; District of Columbia, D.C. Code Section 19-1304.03; Kansas, Kan. Stat. Section 58a-403; Kentucky, Ky. Rev. Stat. Section 386B.4-030; Maine, Maine Rev. Stat. tit. 18-B, Section 403; Maryland, Md. Code, Est. & Trusts Section 14.5-403; Massachusetts, Mass. Gen. L. ch. 203E, Section 403; Michigan, Mich. Comp. Laws Section 700.7403; Minnesota, Minn. Stat. Section 501C.0403; Mississippi, Miss. Code Section 91-8-403; Missouri, Mo. Rev. Stat. Section 456.4-403; Montana, Mont. Code Section 72-38-403; New Hampshire, N.H. Rev. Stat. Section 564-B:4-403; New Jersey Rev. Stat. 3B:31-20; New Mexico, N. M. Stat. Section 46A-4-403; North Carolina, N.C. Gen. Stat. Section 36C-4-403; North Dakota, N.D. Cent. Code Section 59-12-03; Ohio, Ohio Rev. Code Section 5804.03; Oregon, Or. Rev. Stat. Section 130.160; Pennsylvania, 20 Pa. Cons. Stat. Section 7733; South Carolina, S.C. Code Section 62-7-403; Tennessee, Tenn. Code Section 35-15-403; Utah, Utah Code Section 75-7-403; Vermont, Vt. Stat. tit. 14A, Section 403; Virginia, Va. Code Section 64.2-721; West Virginia, W. Va. Code Section 44D-4-403; Wisconsin, Wis. Stat. Section 701.0403; and Wyoming, Wyo. Stat. Section 4-10-404.

³¹ Fla. Stat. Section 736.0403.

³² Neb. Rev. Stat. Section 30-3829(2).

UTC Section 403 allows trust validity to be based on the law where the settlor signed the trust instrument—a rule almost as broad as that of Article 7 of the Convention except that it requires the settlor to validate the settlor’s choice of law, in the case of a choice of a non-domiciliary jurisdiction, by traveling to the preferred jurisdiction to sign the instrument. Similarly, the broad ability of a trustee to change the place of administration under UTC Section 108 allows the trustee to comply with a settlor’s choice of the law of administration as well when it is appropriate.

The provisions of Article 7 of the Convention to determine the choice of law when the settlor does not make a choice are broadly consistent with the options under UTC Sections 107, 108(a) and 403. UTC Section 107’s broad reference to “the law of the jurisdiction having the most significant relationship to the matter at issue” potentially encompasses all the potential connections to the trust listed under Article 7 of the Convention. UTC Section 403 contemplates connections between a trust and its settlor as well as the connections between a trust and its trustee emphasized in Article 7 of the Convention. UTC Section 108(a), dealing with law of administration, is also very consistent with Article 7 of the Convention.

5. The UTC and the Prospects for U.S. Ratification of the Convention.

The broad accommodation and even adoption of the Convention’s choice-of-law rules through enactment of the UTC may come as a surprise to many. But this phenomenon also, perhaps ironically, raises the question of why the United States has not made this process of incorporating the rules of the Convention into U.S. law much more simple and straightforward by ratifying the Convention itself.³³ The answer to that question is complex and raises issues at the heart of U.S. politics and U.S. constitutional law.

³³ For a study of the impact of U.S. ratification of the Convention before the widespread adoption of the UTC, see Michael W. Galligan, “United States Trust Law and the Hague Convention on Trusts,” NYSBA Trusts and Estates Law Section Newsletter (Fall 2000, Vol. 33, No. 3, p. 37).

It must be remembered that the United States started in 1776 as a very loose confederation of independent states. Through the adoption of the U.S. Constitution (“Constitution”) proposed to the states in 1787, the federal or central government acquired broad powers to lead and to represent the United States in foreign affairs, including the power of the President of the United States, acting with the advice and consent of the U.S. Senate, to enter into binding international treaties on behalf of the United States. The Constitution also conferred on the federal government other “express” powers to take action in matters both of domestic and international concern, but left the balance of government power to rest in and be exercised by the several states.

Throughout U.S. history there has been an ongoing debate about the implementation of the allocation of power between the federal government and the state governments, with advocates for state governments often arguing that the federal government is illegitimately encroaching on the areas of concern intended to be left to the authority of the several states. Article VI of the Constitution provides that the Constitution, together with the laws of the United States made pursuant to the Constitution “and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”³⁴ In Missouri v. Holland,³⁵ perhaps the most important U.S. Supreme Court decision on the use of the federal treaty power to affect areas of authority usually considered reserved to the states, the U.S. Supreme Court, per Justice Oliver Wendell Holmes, Jr., ruled that a treaty entered into between the United States and the United Kingdom to regulate the flight of migratory birds over the United States and Canada was a valid exercise of the treaty power, even if the regulation of

³⁴ Article I, Section 10 of the Constitution prohibits any state from entering into “any Treaty, Alliance or Confederation...,” but a state may, it appears, enter into an “Agreement or Compact with ... a foreign power” with the consent of Congress.

³⁵ 252 U.S. 416 (1920).

wildlife had heretofore generally been a matter regulated by the states. At stake was the issue of whether the Tenth Amendment to the U.S. Constitution, which reserves to the states powers not delegated to the federal government by the Constitution nor prohibited to them by the Constitution, limits the range of matters that can be the subject of treaties entered into by the U.S. federal government and federal legislation enacted to implement U.S. obligations under such treaties. The Court viewed Missouri's resort to the Tenth Amendment to limit the ability of the federal government to use the treaty power to deal with matters deemed to be of national interest skeptically, declining to be guided by "some invisible"—and thus presumably unknowable—"radiation from the general terms of the Tenth Amendment."³⁶ The Court concluded that the federal government was not constitutionally required to refrain from action under the treaty power especially when the national interest at stake (such as, in the case at hand, the protection of forests, food supplies and wildlife) could not be served by relying on the states alone. A few decades later, the Supreme Court, in Reid v. Covert,³⁷ concluded that a treaty cannot be used to countermand a protection or right afforded by the Constitution such as the right of a non-military person to trial by jury under the Fifth Amendment, but noted that "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government, and the Tenth Amendment is no barrier."³⁸

In the intervening decades, there has been continuing jurisprudential debate about the meaning of the Tenth Amendment, with several recent decisions of the U.S. Supreme Court

³⁶ Id. at 434.

³⁷ 354 U.S. 1 (1957).

³⁸ Id. at 18. According to Comment (d) to Section 302 ("Scope of International Agreements: Law of the United States") of the Restatement of the Law (Third): The Foreign Relations of the United States, "[t]he power to make treaties conferred upon the President, subject to the advice and consent of the Senate, is a power delegated to the United States and is of status equal to that of other delegated powers of the United States under the Constitution... Consequently, the Tenth Amendment, reserving to the several States the powers not delegated to the United States, does not limit the power to make treaties or other agreements."

suggesting that the Tenth Amendment not only reserves to the states areas of law and governance not expressly conferred on the federal government but prohibits attempts by the federal government to exercise or even to share such power over or with the several states.³⁹ There is, of course, no federal law of trusts, any more than there is a federal law of contracts, torts, property or estate law—all of these being areas of law considered the primary, if not exclusive, province of the states. If the Tenth Amendment does not proscribe the exercise of the treaty power over the areas otherwise presumptively left to the authority of the states under the Tenth Amendment, then U.S. ratification of the Hague Convention on Trusts should be a perfectly legitimate exercise of the treaty power. But if the Tenth Amendment effectively acts as a prohibition of federal action in the areas of law and governance reserved to the states and trust law is determined to be one of those areas of law so reserved to the states, then U.S. ratification of the Convention could be construed as unconstitutional.

Up to now, the rule of Missouri v. Holland and Reid v. Covert, continues to be authoritative judicial precedent on the question of the exercise of the treaty power in matters that impinge on areas of law usually reserved to the states, but the three concurring opinions by Justices Scalia, Thomas and Alito in the recent decision of the U.S. Supreme Court in Bond v. United States, 572 U.S. ____ (2014) (dealing with the applicability of federal legislation

³⁹ For example, in National League of Cities v. Usery, 426 U.S. 833 (1976), the U.S. Supreme Court invoked the Tenth Amendment to strike down federal legislation extending minimum wage protection to state and municipal employees, but in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), the U.S. Supreme Court reversed its National League decision. In New York v. United States, 505 U.S. 144 (1992), however, the U.S. Supreme Court invalidated a requirement of the Low-Level Radioactive Waste Policy Amendments Act that required states failing to develop adequate plans for disposing of waste generated within their own borders under certain circumstances to take title to the waste. In Printz v. United States, 521 U.S. 898 (1997), the U.S. Supreme Court invoked the Tenth Amendment to strike down provisions of the Brady Handgun Violence Prevention Act that required state law enforcement officials to run background checks on prospective hand gun purchasers. More recently, the U.S. Supreme Court invoked the Tenth Amendment, in Shelby County v. Holder, 570 U.S. ____ (2013), to invalidate provisions of the Voting Rights Act of 1965 requiring certain states to seek preclearance before making changes in their voting laws. See generally Exploring Constitutional Conflicts: Tenth Amendment Limitations on Federal Power at <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/tenth&elev.htm>.

implementing a 1993 treaty regulating the development, production, stockpiling, and use of chemical weapons to a case of domestic assault using chemical agents), suggests that there may be an appetite, at least among some Justices of the U.S. Supreme Court, to curtail the exercise of the treaty power at least in some matters usually or traditionally reserved to the states.⁴⁰ This possible trend in constitutional jurisprudence happens to coincide with political majorities in the U.S. Senate (which has the exclusive right to vote on treaty ratification), as well as within the U.S. House of Representatives, that generally seem to favor curtailment of federal power rather than its expansion and therefore are less likely to approve uses of the treaty power to coordinate or regulate areas of civil law—like the law of trusts—usually reserved to the states.

It is perhaps less well known, at least in the United States, that the Hague Convention on Trusts, like most private law conventions proposed by the Hague Conference on Private International Law and other major international legal institutions, provides a mechanism by which countries that have a federal structure like the United States can ratify or accede to the Convention on behalf of specific constituent states or provinces without necessarily binding the entire country. Article 29 of the Convention provides that

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 shall 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. Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

This provision—known officially as the federal–territorial unit extension provision—is most frequently invoked by Canada and appears to have been drafted with Canada primarily in mind, because Sections 91 and 92 of Canada’s Constitution Act of 1867 allocate powers to the federal

⁴⁰ Justice Scalia, for example, sardonically criticized the Reid Court for failing to explain why only the Tenth Amendment and not the other nine amendments has been delegated away by the treaty power. Bond v. United States, 572 U.S. ___, Slip Opinion (Scalia, J., concurrence in judgment) at 15.

and the provincial levels of government and, under Canadian constitutional law, Canada may not undertake a binding international obligation unless implementing legislation has been passed at either the federal level (in the case of treaties affecting the exercise of federal power) or the provincial level (in the case of treaties affecting the exercise of provincial power).⁴¹ In the case of the Hague Convention on Trusts, the Uniform Law Conference of Canada drafted a Uniform International Trusts Act (Hague Convention) (the “Uniform Act”) to implement the Convention.⁴² Each province that has wished to adopt the rules of the Convention has passed a version of the Uniform Act, taking into account the reservations allowed by the Convention to state parties, which have been incorporated into the Uniform Act for the consideration of each of the provinces. Upon the adoption of the Uniform Act by a province, the Canadian government then files a declaration with the Ministry of Foreign Affairs of the Kingdom of the Netherlands (the “Netherlands Foreign Ministry”), effectively ratifying the Convention for that province.

The United States has never availed itself of the federal-territorial unit extension provision of a private international law treaty. For example, the United States ratified the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), which, in Article 93, contains a federal-territorial extension provision, for the entire nation, without restriction to any particular states of the United States, even though the CISG effectively modified or amended important provisions of the commercial and contract law of many states. The U.S. State Department has generally been reluctant to consider recommending to the White House that the President give states the option of “signing on” to a private international law treaty, thinking it more effective if the United States should speak with one voice in the international arena.

⁴¹ See *Canada (AG) v. Ontario (AG)*, [1937] UKPC 6, [1937] A.C. 326 (also known as *The Labour Conventions Reference*); see generally Jamie Cameron, “Federalism, Treaties, and International Human Rights under the Canadian Constitution,” 48 *Wayne Law Review*, 1, 24-30 (2002).

⁴² The Act may be found at <http://ulcc.ca/en/component/content/article/475-josetta-1-en-gb/uniform-acts/international-trusts-act/300-uniform-international-trusts-act-hague-convention-1989>.

This author believes that U.S. adoption of the Hague Convention on Trusts would make a strong impact on the world of private international law and would spur interest among other significant jurisdictions to accede to or ratify the Convention and also believes that the exercise of the treaty power in regard to trusts is constitutionally acceptable due to the importance of trusts in international cross-border wealth transfer, finance, and commerce.⁴³

Nonetheless, as the adage has it, “the perfect should not be the enemy of the good” and it is not impossible to envisage a scenario in which the President of the United States could ratify a private international law treaty like the Hague Convention on Trusts based on a federal-territorial unit extension provision. While the U.S. Senate has exclusive authority to give its advice and consent to the ratification of treaties by the United States, it is generally accepted that it can give its advice and consent subject to conditions.⁴⁴ The President could propose to the Senate ratification of the Convention subject to the condition that the President would ratify the Convention, pursuant to Article 29, only on behalf of states that have adopted a statute to be prepared by the U.S. Uniform Law Commission that would be analogous to the Canadian Uniform International Trusts Act. The instrument of ratification could be deposited with the Netherlands Foreign Ministry upon notification to the President of the first state to enact such a statute, with additional declarations filed thereafter, as the case may be, with the Netherlands Foreign Ministry.

There are many weighty considerations that argue for U.S. ratification of the Hague

⁴³ Article I, Section 8, of the U.S. Constitution confers on Congress power “to regulate Commerce with foreign Nations” as well as “among the several states.” Interestingly, Justice Thomas, in his concurring opinion in Bond v. United States, 572 U.S. ___, Slip Opinion at 12, states that “[t]he post ratification theory and practice of treaty-making accordingly confirms the understanding that treaties by their nature relate to intercourse with other nations (including their people and property) rather than to purely domestic affairs.” (emphasis added).

⁴⁴ “The Senate may refuse to give its approval to a treaty or do so only with specified conditions, reservations or understandings.” Congressional Research Service, Library of Congress, “Treaties and Other International Agreements: The Role of the United States Senate: A Study Prepared for the Committee on Foreign Relations,” 106th Congress, 2d Session, S.Prt. 106-71, Chapter I. See also Chapter VI(C).

Convention on Trusts and that therefore justify using the Convention as a prototype for using the Convention's federal-territorial unit extension provision to advance adoption of the Convention by some, if not all, of the states of the United States: U.S. ratification would put all the major common-law jurisdictions on the table as favoring the world-wide recognition of the trust as a workable and viable legal institution. It would remove the discomfort that attends efforts to promote acceptance of the Convention in the many civil law jurisdictions of the world that do not have the trust as an indigenous legal institution and cannot comprehend why the most economically powerful common-law jurisdiction in the world refrains from participating in the Convention. It would help to make the institution of the trust—an indispensable tool for the implementation of U.S. income and estate tax planning—more widely acceptable in the world and therefore more easily used by U.S. persons who own property in non-U.S. jurisdictions and/or live in such jurisdictions in fulfilling their U.S. tax planning objectives. And it would encourage more civil law jurisdictions to consider adopting domestic legislation incorporating the trust or, in the case of some civil law jurisdictions that have adopted trust legislation such as Argentina and China, to consider revising and improving their domestic trust regimes.

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