THE COMMONWEALTH SECRETARIAT'S ACTIVITIES IN THE FIELD OF PRIVATE INTERNATIONAL LAW

Memorandum by the COMMONWEALTH SECRETARIAT

Introduction

In many areas of law, relevant both to private individuals and to commercial enterprises, there is a gradual diversification of legal rules within the Commonwealth. This is a natural result of the activity of different Member countries in progressively adapting their inherited common legal tradition to meet changing local circumstances. One result is that lawyers dealing with matters affecting two or more Commonwealth jurisdictions have greater needs in terms of legal information; another is that there is a growing importance for private international law (or the conflict of laws) in intra-Commonwealth legal affairs. This latter point has been well recognised at successive Meetings of Law Ministers, and is reflected in the concerns of the Secretariat.

2. Since 1973 one aspect of this concern, that of securing the ready recognition and enforcement of judgments and orders within the Commonwealth, and of providing facilities for service of process and legal assistance generally, has featured on the Agenda. Professors McClean and Patchett have continued their work in this area, and the Memorandum on the Law of Domicile prepared for this Meeting is an offshoot of that work, which has been extended to cover the question of the recognition of divorces.

3. As a result of the Barbados Meeting, a number of member countries have taken action on the Model Bills concerning Grants of Administration (Resealing), Maintenance Orders (Facilities for Enforcement) and the designation of Commonwealth Countries. It is hoped that other countries will soon feel able to take similar action, so that modern and broadly comparable legislation is widely in force.

The Hague Conference

4. As a result of discussions at the Winnipeg Meeting in 1975, the Secretariat successfully negotiated Observer status with The Hague Conference on Private International Law (which, despite its misleading title, is the leading international organisation in this specialist area) and an excellent relationship has developed with the Permanent Bureau of the Conference.

5. The Secretariat was duly represented at the Fourteenth Session of the Hague Conference in 1980. That Session produced two Conventions, one on the Civil Aspects of International Child Abduction and the second on International Access to Justice. Explanatory documentation, with advice on accession and implementing legislation, have already been circulated by the Secretariat in respect of both these Conventions. There was co-operation between the delegates from Commonwealth countries which are individual Members of The Hague Conference (Australia, Canada and the United Kingdom), and Mr. J.M. Eekelaar, who prepared a Memorandum on the subject for the Barbados Meeting, took a leading part. The Conventions are, of course, open to States whether or not they are individually Members of the Conference.

6. The same 1980 Session of The Hague Conference also produced Draft Articles on Consumer Sales for inclusion in a proposed revision of the existing 1955 Hague Convention on the Law Applicable to International Sales of Goods. This revision will take place at an Extraordinary Session of the Conference in 1985, to which all countries will be invited, and preparatory work is being undertaken by a Special Commission restricted to States which are either Members of The Hague Conference or Members of UNCITRAL (the U.N. Commission on International Trade Law).

7. The Fifteenth regular Session of The Hague Conference is due to be held in 1984, and the major topic on the Agenda will be a draft Convention on Trusts, a matter of considerable interest to Commonwealth countries. The Secretariat was represented at the first preparatory meeting on the topic, held in June 1982. The remainder of this present Memorandum is devoted to the matter.

Trusts

8. With few and limited exceptions, countries outside the common law tradition make no use of the concept of the trust. This is in sharp contrast to the position in common law jurisdictions, where the traditional importance of the trust in estate planning and as the basis of the law of charities is being supplemented by more sophisticated developments of importance in business and financial matters.

9. So, for example, trusts are used in the administration of pension schemes (and the size of some pension funds means that their managers' investment decisions are of considerable economic significance); there are other forms of investment trusts (sometimes in the form of "unit trusts"). In some jurisdictions a form of "business trust" is a type of commercial organisation, related to the joint stock company. Trusts are used in creating security interests, in tax planning, and are familiar in bankruptcy practice. Each common law jurisdiction has a slightly different pattern in the use it makes of the trust concept; that fact is itself testimony to the flexibility of the concept.

10. The result is that a lawyer in the common law tradition regards the trust as an essential piece of legal machinery. In intra-Commonwealth practice, many matters, involving investment, tax planning, or simply migration, will involve either the trustees or the whole or part of the trust property crossing legal frontiers.

11. In form at least, a civil lawyer finds the trust an alien concept. In some civil law systems, there is a closed list of "real rights", which means that an interest in property must be either absolute ownership or a limited jus in re aliena (e.g. of the easement type). A trustee is not absolute owner, because he owes duties to the beneficiaries and because the trust fund is not available to satisfy the trustee's personal debts. But equally he is more than the holder of some limited interest: the property is vested in him, not in the beneficiaries (nor in the settlor). A not unrelated feature of civil law systems arises in a succession context; in the absence of anything strictly analogous to the "administration" phase, an "heir" may find himself personally liable for the deceased's debts, a situation made more difficult when property is held, or left, "on trust".

12. In practice, and on a close examination of particular situations, a civil law jurisdiction will often be able to achieve results not dissimilar from those achieved by common law trusts. The exercise being undertaken at The Hague is designed to see whether it will be possible, generalising from that experience, to enable civil law countries (without taking trusts into their own systems) to recognise trusts governed by the law of a common law country.

13. Such a development would be of considerable help to citizens of common law countries in all the areas (e.g. succession, investment, security-interests) in which the trust is used. There would also be advantages as between different common law jurisdictions if internationally agreed rules identified the law governing a particular trust, a matter of some difficulty and doubt at present.

14. The preparatory work undertaken at The Hague in June 1982 suggested that a draft Convention on this subject could be achieved. The strategy which seemed to find favour was:

(a) to define the trust in fairly general terms;

(b) to provide that a trust, so defined, would be recognised in every Contracting State so that the trustee would enjoy certain powers and be under certain obligations in all such States;

(c) to provide a choice of law rule which would identify the law which would govern the trust and fix the precise scope of the trustee's powers; and

(d) to extend recognition to trusts governed by the law of any country, whether or not that country was a Contracting State.

Comments on these points will be found in the following paragraphs.

15. A possible definition of a trust for the purposes of the Convention would be: "a trust exists when property, whether movable or immovable, is held by a natural or corporate person or persons, further to an instrument in writing, as a fund separate from his own property, with the obligation to administer and employ that fund for the exclusive benefit of one or more persons, or for purposes, as set out in the instrument".

16. The emphasis on the presence of a written instrument is to satisfy the requirements of civil law jurisdictions as to proof of the existence and nature of the trust. (The draft Convention may contain some optional provisions for obtaining court or other official certification as to the trustee's powers and duties under the governing law). Constructive trusts will not be covered, but certain types of resulting trusts would be. There will be no attempt to specify types of trusts (charitable trusts, unit trusts, etc.) which are within the scope of the Convention; a broad definition was felt to be an easier and more readily understood approach.

17. Much discussion at The Hague centred upon the various situations in which a trustee under a trust created in a common law jurisdiction might find himself concerned with matters in a civil law country. For example:

(i) the trustees might have to recover possession of trust property detained in such a country, or recover debts due to the trust;

(ii) a dispute might arise as to the control over the trust fund as between the trustee and the beneficiaries;

(iii) (related to the last) the beneficiaries might seek to enforce the trustee's fiduciary duties;

(iv) the trustee might have to register certain property on a title or share register and to indicate the capacity in which he was registering;

(v) on the trustee's bankruptcy, his personal creditors might seek to reach trust assets in satisfaction.

18. In all these cases, the civil law delegates were satisfied that there would be no undue difficulty in recognising the position which the common law governing the trust would indicate. At present the same result can often be obtained in practice by a civil law court treating the trust as if it were some other institution (e.g. agency) known to its own law, but express recognition of the trust would be more certain in its effects (e.g., in the agency analogy the settlor or beneficiaries would be equated with principals, giving them more power than under a common law trust situation).

19. It was however clear that the recognition of the trust would have to be limited so as to protect mandatory rules of a civil law system as to succession (the legatum, e.g., under which certain fractions of an estate pass to identified heirs and cannot be disposed of by will), and as to matrimonal property regimes; and possibly other rules based on public policy (especially in the area of fideicommissary substitutions, which operate almost as entails) would also be protected.

20. The provisional view of those attending the 1982 Meeting was that a trust should be governed by its proper law, giving (perhaps qualified) party autonomy, or failing that by the law of the initial principal place of administration. This would govern the essential validity of the trust (saving the law governing succession, etc. as in the last paragraph) and the powers of the trustee, including his power to designate successors and, in certain cases, to select beneficiaries (though the latter power was felt to cause some problems for some civil law countries).

21. There was general agreement that the Convention to be drafted should be "universal", not limited to trusts governed by the law of Contracting States. In this context particular reference was made to the position of Commonwealth countries, and

warm mention was made on behalf of the Permanent Bureau of the helpful interest and participation of the Commonwealth Secretariat.

22. Much further work remains to be done, notably in the area of variation of trusts, a topic neglected in the first round of discussions, but this brief summary of progress so far will perhaps serve to indicate that the trust as a concept, and particular trusts as quasi-legal entities, may soon be more widely recognised. This would be a development of much importance, and of considerable benefit for citizens of common law countries in particular.

Appreciation

23. No review of our activities in this field would be complete without full tribute to the assistance and the scholarship so willingly given to us by Professor David McClean, in Sheffield, and Professor Keith Patchett, in Cardiff. Both have given generously of their time, despite their heavy schedules, and each has made a significant contribution to the reform of the law in this increasingly important area.