



**Universität
Zürich^{UZH}**

Rechtswissenschaftliches Institut

Foundations and Trusts

Block 2

Spring Semester 2026

RA Dr. iur. Michelle Kalt, LL.M.



Administrative matters

- **Reading materials** are available on the chair website:
<https://www.ius.uzh.ch/de/staff/professorships/alphabetical/jakob/lehre/Unterlagen-FS-2026/Foundations-and-Trusts.html>
 - use your discretion!
- **Questions** are VERY welcome and preferably answered during class
- If you have a question about the contents of this class **at a later stage**, please send me an e-mail (michelle.kalt@uzh.ch) explaining what materials you have consulted so far
- **Breaks**



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**Universität
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Part I: Introduction to Trusts

Lecture: Foundations and Trusts

Spring Semester 2026

RA Dr. iur. Michelle Kalt, LL.M.



I. What is a Trust?

Where did the trust originate?





I. What is a Trust?

Origins

- Most commonly utilised in **common law jurisdictions** (England & Wales, Australia, New Zealand, USA, India, etc.)
 - But: popularity in civil law countries is increasing
- What is “**common law**”?
 - Originally: “*law common to the people of England*”
 - Today, it depends on the context:
 - Common law vs. civil law
 - Common law vs. statutory law
 - Common law vs. Equity
 - Common law vs. Canon law



I. What is a Trust?

Origins

- **No legal definition** but numerous attempts have been made to describe the concept
- Historically developed through **case law** (as opposed to statutory law) of the courts of Medieval England
 - How did it happen? Well...



I. What is a Trust?

Origins – «Story I»

- When the Crusades started, men left real property behind at home
- Their wives and daughters could not own property, so the men had to transfer it to another man to take care of, who became the legal owner of the property under the common law
- Upon return, the men wanted their property back but did not have any legal claim to it under the common law
- The **common law** did not provide relief – that's when **equity** came in...



I. What is a Trust?

Origins – a Note on Equity

- Aggrieved parties under the common law would call on the King for justice, who would pass on the appeals to the **Lord Chancellor**
- Over time, the Lord Chancellor would develop his own court, the “**Court of Chancery**”
- Equity then became the **branch of law** that used to be administered by the Court of Chancery (as opposed to the King’s courts)
- Equity evolved as separate body of law to achieve justice **overcome the rigours and deficiencies of the common law**
- NB: the rules of equity are now almost as technical and rigid as those of the common law!



I. What is a Trust?

Origins – «Story II»

- Tenants of land had to **pay feudal relief** to the overlords under certain circumstances («feudal incidents», namely upon inheriting the land from the previous landholding tenant)
- Only the eldest son could inherit the land from the landholding tenant → custom of **male primogeniture**
- Land-holding would **escheat** (= revert permanently to the overlord) if the tenant died without a legal heir
- To prevent this, the tenant would transfer the land to a group of «**feoffees**» who would hold the land «**to the use of**» the original landholder (and, subsequently, whomever the landholder would designate by will) – the «**cestui que use**»
 - No feudal incidents = no tax owed!



I. What is a Trust?

Core Characteristics

Recap: Professor David Hayton's Elephant Test

«Like an elephant, a trust is difficult to describe but easy to recognize»





I. What is a Trust?

Definition

- **No legal definition** but numerous attempts have been made at describing the concept
 - “A trust is an **equitable obligation**, binding a person (called a **trustee**) to deal with property (called **trust property**) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called **beneficiaries** [...]), of whom he may himself be one, and any one of whom may **enforce** the obligation.”
- HAYTON/MATTHEWS/MITCHELL, Underhill and Hayton, Law of Trusts and Trustees, 19th edn., London 2016, p. 2



I. What is a Trust?

Definition

«For the 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**.

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;

[...]»

– Hague Trusts Convention, Article 2



I. What is a Trust?

Definition

«[...]

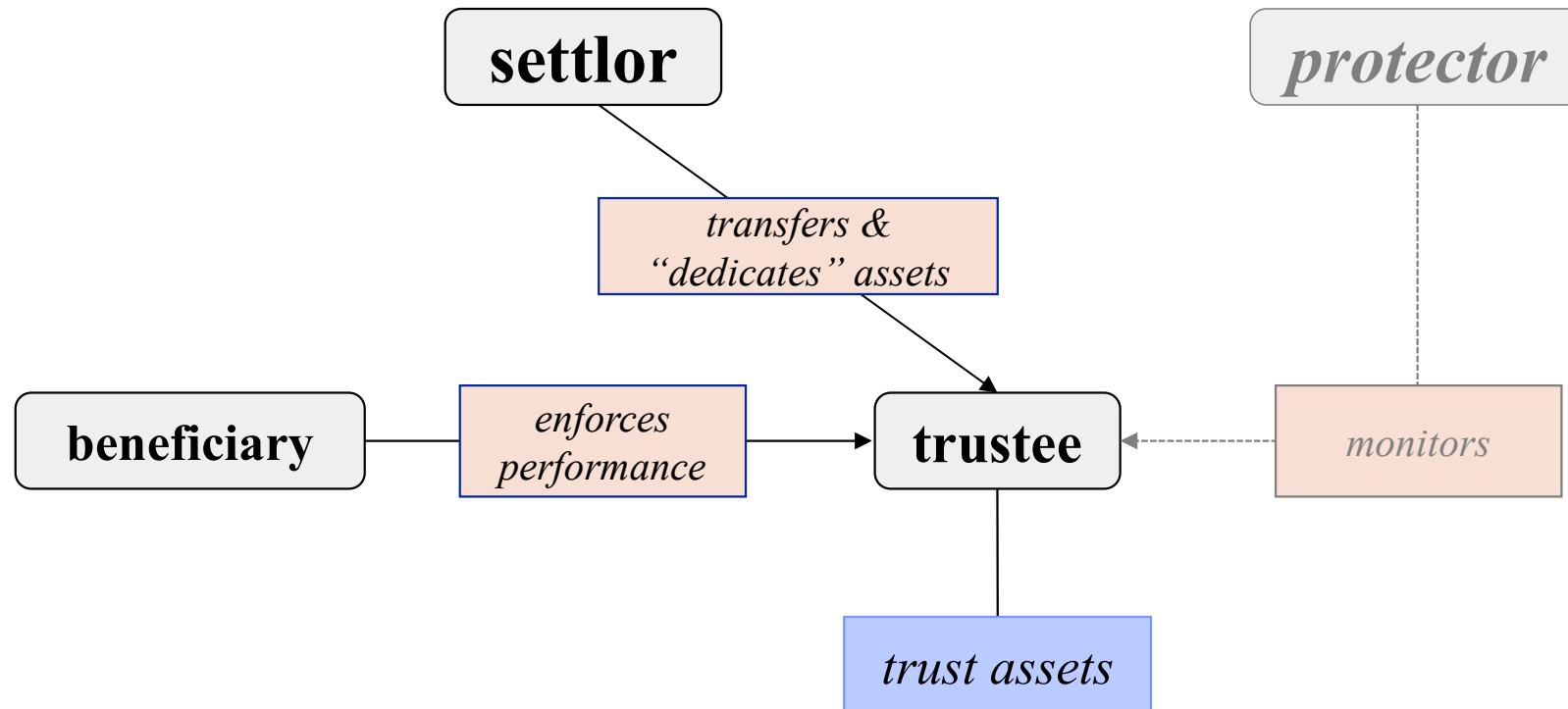
c) the trustee has the **power and the duty**, in respect of which he is accountable, to **manage, employ or dispose of the assets in accordance with the terms of the trust** and the special duties imposed upon him by law.

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.»

– Hague Trusts Convention, Article 2



I. What is a Trust?





I. What is a Trust?

Parties Involved

- **Settlor:** Establishes the trust by transferring the legal title in movable or immovable assets to the trustee «*in trust*». The settlor may declare himself a beneficiary or trustee
- **Trustee:** Holds «legal title» in the trust property, manages and uses the trust property in accordance with the terms of the trust for the benefit of the beneficiaries. A trust can have one or more trustees (co-trustees)
- **Beneficiary:** Enjoys the benefits of the trust property; holds «beneficial interest» in the trust property
- **Protector (optional):** Monitors the trustee's actions, has often the power to replace the trustee



I. What is a Trust?

Core Characteristics

- **No legal personality**: the trust (unlike the foundation) does not have legal personality; the trustee holds title in the trust property
- **No contractual (mandate) agreement** between the trustee and other parties: the trustee is **independent** from other parties involved
- **Split ownership** of the trust property (**cave: in E & W**)
 - The trustee is the **legal owner** of the trust property (holder of the *legal title*), which is held separately from the trustee's private assets
 - Beneficiaries are **beneficial owners** of the trust property, i.e. holders of the *beneficial interest*, a right *in rem* with legal effect *erga omnes* («towards all»)



I. What is a Trust?

Core Characteristics

- Flexibility (cf. next few slides)
- **Wide variety of uses:** wealth and estate planning, asset protection, pensions, insurance, charitable ventures, banking, etc.
- **International significance** esp. for Switzerland as an international banking and financial services centre
- Finite duration: «**Rule against perpetuities**» in most jurisdictions



I. What is a Trust?

What types of trusts do you know?



I. What is a Trust?

Types of Trusts

- **Private trust**

A trust for the benefit of a named individual or a named class of individuals; can be *fixed* or *discretionary* in nature

- **Public (charitable) trust**

A trust that benefits charity (either a named charity or a charitable purpose)



I. What is a Trust?

Types of Trusts

– Express trust

A trust established **deliberately** (and usually in writing) by the settlor

- **Irrevocable trust** (cannot be revoked by the settlor)
- **Revocable trust** (can be revoked by the settlor; right to revoke expires upon the settlor's death)
- **Discretionary trust** (beneficiaries' rights to the trust property are largely within the trustee's discretion)
- **Fixed trust** (beneficiaries' individual shares have been specified by the settlor)



I. What is a Trust?

Types of Trusts

- Resulting trust

A trust that results automatically when legal title in property is transferred **without consideration** («equity assumes bargains not gifts») *or* when the settlor of an express trust fails to dispose of the entire equitable interest

- Constructive trust

A trust imposed to ensure **good conscience** when one party has been wrongfully deprived of its rights

- Implied trust

A trust not established expressly but rather by conclusive action or by operation of law (sometimes used as a collective term for resulting and constructive trust)



I. What is a Trust?

Types of Trusts

- Statutory trust

A trust imposed by statute (e.g. joint ownership in land, bankruptcy, conveyance of land to a minor)

- Testamentary trust

An express trust arising upon the death of the settlor which is specified in the settlor's will

- Pension trust

A private trust rooted in a contractual relationship between employee and employer



I. What is a Trust?

Types of Trusts

- Spendthrift trust / protective trust
A trust created to protect the beneficiary (often a minor) from themselves by preventing the beneficiary (spendthrift) from wasting the trust property through mismanagement or overspending
- Asset protection trust
A discretionary trust set up to shield the assets from the beneficiary's creditors, e.g. in the case of bankruptcy, divorce or to avoid taxation



I. What is a Trust?

Types of Trusts

- Blind trust

A trust in which the beneficiaries have no knowledge of the holdings of the trust, and no right to intervene in their handling

- Sham trust

A trust where the settlor did not *actually* have the intention to create a trust but does so for an **unlawful purpose** while retaining **factual control** over the assets (e.g. to evade taxes) – sham trusts are considered **void**



I. What is a Trust?

Setting up an Express Trust

- Two-prong process
 1. Act/instrument to subject the assets to a trust (**declaration of trust**)
 2. Transfer of property (movable or immovable) to a trustee or declaration of self as trustee by the settlor (**trust constitution**)
- **Part 1: Declaration of trust**
 - **Unilateral** declaration (*inter vivos* or *mortis causa*)
 - Does not need to be *received* nor *accepted* by the trustee («a trust never fails for want of a trustee»)
 - Must fulfil the «**three certainties**»
 - Optional: letter of wishes



I. What is a Trust?

Quick recap:

How do you set up a Swiss foundation?



I. What is a Trust?

Setting up an Express Trust

- Setting up a trust is a **two-step process**:
 - **Step 1**: Declaration of trust
 - The act/instrument subjecting the assets to the trust
 - **Step 2**: Trust constitution
 - Transfer of property to a trustee
 - Alternatively: Declaration of self as trustee



I. What is a Trust?

Setting up an Express Trust

- **Part 1: Declaration of trust**
 - Usually **in writing** and signed by the trustee
 - Written form is usually not required but serves evidentiary purposes (art. 3 HTC, art. 149a PILA)
 - **Exceptions** to lack of formal requirements depend on the jurisdiction
 - Does not need to be *received* or *accepted* by the trustee
- No infinite trusts
 - **Rule against perpetuities** prohibits a duration «beyond lives in being plus 21 years» (dynasty trust)



I. What is a Trust?

Setting up a Trust

- The «**three certainties**»
 - Certainty of intention
 - Certainty of subject matter
 - Certainty of objects
- Certainty of **intention**
 - Settlor must intend to establish a trust as opposed to another legal relationship
 - Precatory words («in the hope that», «I desire that» etc.) are not sufficient; court looks for imperative words
 - Intent is more important than form (typically there is no need to declare a trust in writing)
 - The word «trust» is recommended but not absolutely necessary nor sufficient



I. What is a Trust?

Setting up a Trust

- The «**three certainties**»
 - Certainty of intention
 - Certainty of subject matter
 - Certainty of objects
- Certainty of **subject matter**
 - Settlor must identify what is to be the subject of the trust (i.e. the **trust property**) and provide the means by which the interests of the beneficiaries may be ascertained
 - E.g. «whatever is left» of an estate is sufficient
 - **Tangible trust property** (something which has physical form, e.g. gold) must be segregated from the other property
 - If fixed trust: each beneficiary's share must be allocated



I. What is a Trust?

Setting up a Trust

- The «**three certainties**»
 - Certainty of intention
 - Certainty of subject matter
 - Certainty of objects
- Certainty of **objects**
 - Beneficiaries (objects of the trust) must be **certain or capable of being rendered certain**
 - Fixed trusts: each and every beneficiary must be ascertainable
 - Discretionary trusts: a specific class of beneficiaries suffices
 - If certainty of objects is missing: trust property is held on resulting trust for settlor



I. What is a Trust?

Setting up a Trust

- **Part 2: Trust constitution**
 - Usually by means of a **transfer** (conveyance) **of property** to the trustee
 - The **proper method** depends on the type of property involved
 - Only after the trust property has **vested** in the trustee is the trust said to be «completely constituted»
 - Settlor must have taken **all the necessary steps** in their control to convey the legal interest in the property to the trustee



I. What is a Trust?

After the Trust's Constitution

- Settlor no longer holds a role in the trust's administration
 - Exception: revocable trust or if the settlor is also a trustee
- Administration of the trust property **falls on the trustee**
- Enforcement of the terms of a private trust falls (in principle) on the beneficiaries (the **beneficiary principle**)



I. What is a Trust?

After the Trust's Constitution

- The **beneficiary principle**
 - For a trust to be valid it must have a beneficiary by whom the trust can be enforced
 - Exception: public (charitable) trusts
 - Private purpose trusts are therefore **void**
- Role of the **trustee**
 - Central figure in the administration of the trust – duty to protect the trust property, give rise to the settlor's instructions and promote the interests of the beneficiaries
 - **Fiduciary duty** imposed by equity is central to the trustee's role
 - obligation of **loyalty and faithfulness**



I. What is a Trust?

After the Trust's Constitution

- Role of the **trustee**
 - Central figure in the administration of the trust – duty to protect the trust property, give rise to the settlor's instructions and promote the interests of the beneficiaries
 - **Fiduciary duty** imposed by equity is central to the trustee's role
 - obligation of **loyalty and faithfulness**
 - **What does this mean in practice?**



I. What is a Trust?

After the Trust's Constitution

- Role of the **trustee**
 - Must carry out their duties with utmost **diligence**, otherwise the trustee may be personally liable for **breach of trust**
 - **Exoneration clauses** in trust instruments may limit liability
 - Court may **remove** any trustee upon the application of a beneficiary (or on its own volition during proceedings) if the terms of the trust are violated
 - **Appointment of new trustees** can fall on the settlor (if reserved), the current trustee(s), personal representatives (e.g. executors), the beneficiaries or any other person nominated by the trust instrument, and – as a last resort – the court
 - Appointment of new trustees requires **vesting** of trust property in new trustees



I. What is a Trust?

After the Trust's Constitution

- Role of the **trustee**
 - Must carry out their duties with utmost **diligence**, otherwise the trustee may be personally liable for **breach of trust**
 - **Breach of trust** = a trustee **wrongfully exceeding the authority** conferred upon them by the trust instrument or the law
 - E.g.: gaining unauthorized profit, failing to act with care and skill in the administration of the trust property, unauthorized delegation of duties, and misapplications of trust property
 - **Remedies** against breaches include:
 - Liability for losses and personal gains
 - Proprietary claims, following and tracing
 - Injunctions (against anticipated breaches)



Extended break

**Please take 5 – 10 mins to skim through the Hague Trusts
Convention**



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Part II: Recognition of Trusts in Switzerland

Lecture: Foundations and Trusts

Spring Semester 2026

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II. Recognition of Trusts in Switzerland

Quick recap:

What is private international law (conflict of laws)?



II. Recognition of Trusts in Switzerland


Recap: Conflict of Laws – the Basics

- What is «conflict of laws» (aka private international law)?
 - Legal rules that determine which **court has jurisdiction** and which **substantive law applies** to a case
- Necessary whenever a case has ties to **more than one jurisdiction**
 - Cf. art. 1(1) PILA: applies to «**international matters**»
- A court will always apply the private international law rules of the *lex fori*
 - E.g. in Switzerland: PILA, Lugano Convention, HTC



II. Recognition of Trusts in Switzerland

Recap: Conflict of Laws – the Basics

- When is a case an «**international matter**»?
 - Depends on the **nature of the dispute**
 - **Trust matters**: usually international by virtue of the applicable foreign law (in Switzerland!) 
 - **Inheritance matters**: «international element» e.g. a decedent's foreign nationality, assets located abroad, or a decedent's last domicile abroad and assets located in Switzerland
- How do you decide whether ties to another jurisdiction are relevant?



II. Recognition of Trusts in Switzerland

Recap: Conflict of Laws – the Basics

- **Example:** an English citizen dies, having had their last legal domicile in Zurich
 - Inheritance matter → art. 90 et seq. PILA (re: applicable law)
 - Art. 90(1), 91(1) PILA: Swiss domicile = Swiss law applies in principle, but foreign nationals may choose another law
 - Art. 91(1) PILA relies on foreign citizenship → foreign citizenship is a sufficient international element in inheritance matters!
- **Example 2:** an English citizen domiciled in Basel buys a pair of shoes from an Italian citizen domiciled in Zurich
 - Contract matter → art. 116 et seqq. PILA (re: applicable law)
 - E.g. Art. 120 PILA (re: consumer contracts): law at the consumer's place of habitual residence applies to the contract
 - Foreign citizenship not a sufficient international element for contracts!



II. Recognition of Trusts in Switzerland

Conflict of Laws – Main Issues

- **Example:** an English citizen dies, having had their last legal domicile in Zurich, having submitted their estate to **English law** (art. 91(2) PILA) and leaving behind **two adult children** (who also live in Switzerland)
 - **Scope** of the applicable inheritance law: English law will govern what belongs to the estate and who is entitled to it (art. 92(1) PILA)
 - English succession rules allow testators to pass on their estate to **whomever they please** (exception: Family Provision Claims)
 - What about **mandatory portions** of spouses and children pursuant to the Swiss Civil Code?



II. Recognition of Trusts in Switzerland

Recap: Conflict of Laws – the Basics

- **Example:** an English citizen dies with their last legal domicile in Zurich, having submitted their estate to English law (art. 91(1) PILA), leaving behind two adult children (who also live in Switzerland) and **leaving their entire estate to a Swiss charitable foundation**
 - The PILA contains **exemption clauses** allowing the court to deviate from the rules of the PILA
 - Art. 17 PILA: *The application of provisions of foreign law is excluded if such application leads to a result that is **incompatible with Swiss public policy***
 - Art. 18 PILA: *Mandatory provisions of Swiss law which, **by reason of their special purpose**, are applicable regardless of the law referred to by this Act are reserved*



II. Recognition of Trusts in Switzerland

Background

- What would happen if we did not have conflict of law rules (for inheritance matters, family matters, contract matters...)?
- Why would that be a problem?
- Why is **recognizing trusts** important for Switzerland?



II. Recognition of Trusts in Switzerland

Background

- Trusts have always been of crucial importance to Switzerland as an **international financial centre**
- **Increased global mobility** made the issue of recognition even more pressing in recent years
- Pre-PILA (until 31 Dec 1988): Trusts were typically considered **contractual agreements** (cf. BGE 96 II 79, *Harrison*)
- Post-PILA, pre-HTC (until 30 June 2007): Typically subsumed under art. 150 para. 1 PILA («**organized units of assets**»), leading to the application of company law rules
 - Trusts were accordingly governed by the law under which they were «organized» (art. 154 PILA)
 - However: lack of legal certainty



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- Concluded on 1 July 1985 – in force in Switzerland since 1 July 2007
- Why is the HTC so important?
- HTC is not just beneficial to non-trust jurisdictions
 - Conflict of law rules **vary among trust jurisdictions** too
 - Art. 2 HTC employs a **broad definition of «trust»**, which includes legal concepts known in civil law jurisdictions (e.g. investment funds and fiduciary agreements)



II. Recognition of Trusts in Switzerland

Recap: Definition of «Trust» per the Hague Trusts Convention

«For the 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.

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;

[...]»

– Hague Trusts Convention, Article 2



II. Recognition of Trusts in Switzerland

Recap: Definition of «Trust» per the Hague Trusts Convention

«[...]

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.»

– Hague Trusts Convention, Article 2



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- Basic legal effect: **Recognition** of foreign-law trusts **as such** («implantation»), cf. article 11 HTC
 - No transposition into a company or contract
- In Contracting States, the HTC applies to **all trusts established voluntarily and evidenced in writing**, including those established before its conclusion (art. 3, 22)
 - Cf. for Switzerland art. 149a PILA
 - Option to extend scope of application to trusts declared by judicial decision (art. 20), exercised e.g. by the UK
- What about trusts that do not fall within the scope of the HTC?
 - Contracting States are free to extend the application to other trusts or to apply their previous case or statutory law



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- HTC has legal effect *erga omnes*
 - HTC applies to all trusts, incl. those that were established in accordance with the law of a **non-contracting state** – no condition of reciprocity
 - Ability of Contracting States to restrict this effect (art. 21)
 - Contracting States include Australia, Canada, UK, USA, Hong Kong, Cyprus but presently exclude **most offshore jurisdictions**
 - Due to the *erga omnes* nature, this is not an issue for Switzerland



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- Applicable law – cascade
 - Art. 6 HTC: law chosen by the settlor
 - However, see art. 5 HTC re: invalidity of the settlor's choice of law (and art. 149c(2) PILA)
 - See also art. 13 HTC (and why it is problematic) and art. 149c(2) PILA
 - Art. 7 HTC: Law with which the trust is most closely connected (subsidiary application)
 - E.g. place of administration, location of the trust assets, place of residence or business of trustee
 - What is the issue with this provision?



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

«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.»

– Hague Trusts Convention, Article 7



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- Art. 17 HTC: the trust law determined by art. 6 and 7 HTC is the **substantive law**, excluding the conflicts of law rules (and excl. non-state laws)
- Applicable law – **scope of application**
 - Art. 8(1) HTC: applicable law applies to the **validity of the trust**, its construction, effects and administration, including, in particular:
 - Appointment, resignation and removal of trustees, capacity to act as a trustee, and devolution of the office of trustee
 - Rights and duties of trustees among themselves
 - Right of trustees to delegate duties and powers



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- Applicable law – **scope of application**
 - Art. 8(1) HTC: applicable law applies to the **validity of the trust**, its construction, effects and administration, including, in particular (cont'd):
 - Power to administer the trust assets
 - Power to invest the assets
 - Restrictions of the trust's duration and to accumulate income
 - Relationship between trustees and beneficiaries, as well as personal liability of trustees towards beneficiaries
 - Variation and termination of the trust
 - Distribution of the trust assets
 - Duty to account for administration
 - **Severability**



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- Applicable law – **scope of application**
 - Art. 9, 10 HTC: **severable aspects** of the trust may be governed by a different law; severability is up to the law applicable to its **validity**
 - Art. 4 HTC: HTC does **not** apply to ***preliminary issues relating to the validity of wills or other acts*** by virtue of which assets are transferred to the trustee
 - «The rocket and the launcher»
 - Cf. e.g. art. 90, 91 PILA (law applicable to the estate), 93 PILA (law applicable to the form of wills and other testamentary dispositions)
- A trust **created in accordance with the applicable law** will be recognized ***as a trust***.



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- **Recognition** – what does it entail?
 - HTC contains specific provisions re: what effects of the trust must be recognized and enforced *as a minimum*
 - Art. 11(2) HTC: **Minimum** = separate fund, capacity to act, sue and be sued in the capacity of a trustee
 - Art. 11(3) HTC: *If the applicable law so provides*, additional effects reinforcing the notion of separation of trust assets and trustee's personal assets as well as the concept of *tracing*
 - Art. 11(2) and 11(3) mirror art. 2(1) HTC
 - **In essence**: Recognition means no «conversion», «translation» or «transposition» into a similar or parallel legal concept known to the recognizing Contracting State



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- **Limitations and reservations:** art. 15, 16, 18 HTC
 - Purpose: allowing Contracting States to protect their **fundamental institutions** – why is this important?
 - Why do we need art. 15, 16 and 18 HTC when we have art. 17 and 18 PILA?



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- **Limitations and reservations:** art. 15, 16, 18 HTC
 - Art. 18 HTC: reservation of public policy of the forum (mirrors art. 17 PILA)
 - Art. 16 HTC: reservation of *lois d'application immédiate* of the forum (art. 16(1) HTC) as well as of another state sufficiently connected to the case (art. 16(2) HTC) (mirrors art. 18 and 19 PILA)
 - Art. 15 HTC: reservation 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”



II. Recognition of Trusts in Switzerland

Hague Trusts Convention – Limitations and Reservations

«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;

[...]»

– Hague Trusts Convention, Article 15



II. Recognition of Trusts in Switzerland

Hague Trusts Convention – Limitations and Reservations

«[...]

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.»

– Hague Trusts Convention, Article 15



II. Recognition of Trusts in Switzerland

Hague Trusts Convention

- **Limitations and reservations:** art. 15 HTC
 - Provisions of the law designated by the **conflicts rules of the forum** (not: the substantive law of the forum)
 - Insofar as such provisions cannot be **derogated from** by **voluntary act**
 - What does that mean?
 - Lois d'application immédiate? (-)
 - Unilateral derogation impossible? (+) (probably)



II. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Following its ratification, Switzerland amended the PILA (addition of **Chapter 9a** and amendment of art. 21 PILA) and the Debt Enforcement Act (DEA)
 - Chapter 9a takes precedence over the company law provisions of Chapter 10 (*lex specialis*)
 - Art. 21 PILA: «seat» of the trust is its place of management (per the trust instrument or where the assets are effectively managed)
- On the other hand, Switzerland did **not** amend the Civil Code or the Code of Obligations
 - Accordingly, which rules take precedent over the trust law based on art. 15 HTC is largely for the courts and scholarship to determine



II. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Rules taking precedence over the trust statute (art. 15 HTC), namely:
 - Art. 15 b): the personal and proprietary effects of marriage;
 - Art. 15 c): succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives
- Swiss marital law: applies, inter alia, when both spouses are domiciled in Switzerland (art. 48 PILA); **matrimonial property regimes** are subject to choice of law by the spouses (art. 52(1) PILA)
- Swiss inheritance law: applies whenever the decedent had their **last domicile in Switzerland** (art. 90 PILA), choice of law only available to foreign citizens (art. 90(2) PILA)



II. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Rules taking precedence over the trust statute (art. 15, 16 HTC)
- **Tricky subjects include:**
 - Art. 488 CC
 - Art. 335 CC
 - Availability of trusts *mortis causa*



II. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Trust recognition vs. art. 488 para. 2 CC

¹ The testator is entitled in his or her dispositions to require the named heir, as provisional heir, to deliver the estate to a third party, as remainderman.

² No such obligation may be imposed on the remainderman.

³ The same provisions apply to legacies.

- Prevents a testator from burdening more than one succession of heirs with holding assets and delivering them to another person (who also becomes a – subsequent – heir)
- Goal: “freeing up” assets after a certain amount of time



II. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Trust recognition vs. art. 488 para. 2 CC

¹ The testator is entitled in his or her dispositions to require the named heir, as provisional heir, to deliver the estate to a third party, as remainderman.

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³ The same provisions apply to legacies.

- Should art. 488 CC take precedence over trust statute based on art. 15 HTC?
 - Art. 488 CC cannot be derogated from (unilaterally or bilaterally), is meant to protect heirs
 - Still, (likely) no precedence if trust law contains rule against perpetuities



II. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Trust recognition vs. art. 335 CC

¹ A body of assets may be tied to a family by means of a family foundation created under the law of persons or inheritance law **in order to meet the costs of raising, endowing or supporting family members or for similar purposes.**

² **It is no longer permitted to establish a fee tail.**

- Prohibition of pure maintenance foundations and fee tails (*fideicommissa*)



II. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Trust recognition vs. art. 335 CC

¹ A body of assets may be tied to a family by means of a family foundation created under the law of persons or inheritance law **in order to meet the costs of raising, endowing or supporting family members or for similar purposes.**

² **It is no longer permitted to establish a fee tail.**

- Swiss Supreme Court deemed value system behind art. 335 CC outdated
 - Art. 335 CC does not constitute a *loi d'application immédiate* pursuant to art. 18 PILA (and by extension art. 16 HTC)
 - Should not take precedence even based on art. 15 HTC, as increased global mobility of assets and availability of legal instruments illustrate that concept is out of time



II. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Availability of trusts *mortis causa*
 - When is a trust a *mortis causa* trust?
 - Art. 4 HTC: **Validity** of act by which assets are transferred to the trustee is not governed by the trust statute (accordingly, assets transferred to a trustee by will can be a matter of Swiss succession law, art. 92(1) PILA)
 - NB that the **formal validity** of such wills and succession pacts may be subject to a different law (as determined by the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, art. 93 PILA)



II. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Availability of trusts *mortis causa*
 - Issue: *numerus clausus* of testamentary provisions available under Swiss law
 - Swiss law does not explicitly list the creation of a trust as an available option *mortis causa* (but it does so for foundations)
 - Scholarship is divided (but majority appear in favour)
 - *Mortis causa* trusts should be possible given that – like foundations – trusts may be established both *inter vivos* and *mortis causa* and are therefore not “succession-specific”
 - Act of transfer can take the form of legacy or naming an heir (trustee becomes heir or legatee)



II. Recognition of Trusts in Switzerland

Conclusion and Outlook

- Trusts are recognized in Switzerland will **full legal effect**
 - Switzerland is trust-friendly and respects settlor's will
- No introduction of a substantive trust law into the Swiss legal order
 - No amendment of the Civil Code or the Code of Obligations
- However: Recent political attempts at **introducing the trust into substantive Swiss law**
 - Motion (18.3383) «Introduction of the trust into the Swiss legal order» dated 26 April 2018: approved
 - An expert report came to the conclusion that there was «regulatory failure» in the area of international estate planning due to the necessity to utilize foreign trusts



II. Recognition of Trusts in Switzerland

Conclusion and Outlook

- Recent political attempts at **introducing the trust into substantive Swiss law**
 - A pre-draft of a «Swiss trust law» was published in January 2022 and opened for consultation until April 2022
 - Stakeholder feedback **vaguely positive** re: planned amendments to Swiss private law, but **highly critical** of planned tax law provisions
 - Scholars and practitioners expressed strong preference towards **modernisation of Swiss family foundation** (rather than introducing an entirely new legal instrument)
- Federal Council **abandoned the project in September 2023**



Questions?

**Thank you for your attention & see you
next week!**