



## Recap: Last week's key topics

### Setting up a trust

- ... is a **two step process**:
  - 1) Trust declaration (= the foundational act of the trust)
    - **Validity governed by trust law** (art. 8 HTC)
    - Must fulfil the **three certainties**
  - 2) Trust constitution (= vesting of assets in the new trustee)
    - **Validity governed by law applicable to the transfer**
    - **NOT determined by the HTC** (art. 4 HTC)
    - from Swiss POV: law applicable to transfer **determined by the PILA**
- If both steps are completed successfully, a valid trust is established, which will be recognized with full legal effect (art. 11 HTC)



## Recap: Last week's key topics

### Setting up a trust

- **Additional** asset transfers to trustees can happen at any point after the trust's establishment
- The validity of these transfers is also **not** subject to the HTC (art. 4 HTC)
  - Usually, the law applicable to these transfers will be determined by the PILA:
    - Transfer *inter vivos*: Chapter 9 (law of obligations)
    - Transfer *mortis causa*: Chapter 6 (inheritance law)

**Take-home message:** The trust itself and the asset transfers to the trustee are separate legal issues that are often subject to different substantive laws!



## Recap: Last week's key topics

### Recognition of trusts vs. other issues of Swiss law

- **Principle:** trusts are recognized with full legal effect (art. 11 HTC)
  - But sometimes, the recognition of a trust conflicts with another applicable law...
    - Right to indefeasible shares pursuant to inheritance law
    - Participation claim pursuant to matrimonial property regime
    - Right to information pursuant to inheritance law
- Art. 15, 16, 18 HTC allow some rules of other applicable laws to **exceptionally take precedence**



## Recap: Your questions

### What is the deal with “trust agreements”?

- *Separate* contract between settlor and trustee relating to the trust (but not the same as the trust declaration, the “founding document” of the trust)
- Or simply a case of “*falsa demonstratio non nocet*”

### Can you circumvent the rule against perpetuities?

The rule against perpetuities (RAP) stipulates that a property interest must vest no later than after a period of one “life in being” plus 21 years after its creation. **RAP is violated whenever it is not certain that the interest will vest within this period.**

So... no, you cannot. 😊



## Recap: Your questions

### What is art. 13 HTC / why does it not apply in Switzerland?

- Art. 13 HTC **allows** (not: requires) a Contracting State to not recognize a trust which, apart from its applicable law, place of administration, and the trustee's habitual residence, has closer ties to a non-trust country
- It essentially allows Contracting States to **discriminate against** trusts established by / for the benefit of individuals resident in non-trust countries.
- Switzerland explicitly chose to **not make use** of this liberty.

Art. 149c(2) PILA:

“The law designated by the Convention shall also apply [...] when a state is not bound to recognise a trust pursuant to Article 13 of the Convention.”



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# **Part III: Common Law Foundations**

## **Lecture: Foundations and Trusts**

### **Spring Semester 2026**

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



## III. Common Law Foundations: What are they?

### Origins

- (Relatively) recent legislative development (since the early 2000s)
- Particularly popular in **offshore jurisdictions**
- Created by **statute** (as opposed to case law, cf.: **trusts**)
- Examples of jurisdictions that have enacted foundation legislation
  - St Kitts Foundations Act 2003
  - Bahamas Foundations Act 2004
  - Antigua and Barbuda International Foundations Act 2007
  - Anguilla Foundation Act 2008
  - Jersey Foundations (Jersey) Law 2009



## **III. Common Law Foundations: What are they?**

### **Origins**

- Examples of jurisdictions that have enacted foundation legislation (cont'd)
  - Seychelles Foundations Act 2009
  - Vanuatu Foundation Act 2009
  - Belize International Foundations Act 2010
  - Labuan Foundations Act 2010
  - Isle of Man Foundations Act 2011
  - Mauritius Foundations Act 2012
  - Cook Islands Foundations Act 2012
  - Guernsey Foundations (Guernsey) Law 2012
  - Barbados Foundations Act 2012



## **III. Common Law Foundations: What are they?**

### **Origins**

- Examples of jurisdictions that have enacted foundation legislation (cont'd)
  - Gibraltar Private Foundations Act 2017
  - Abu Dhabi Global Market Foundations Regulations 2017
  - New Hampshire Foundations Act 2017
  - Cayman Islands Foundation Companies Law 2017
  - Dubai International Financial Centre Foundations Law 2018
  - Wyoming Statutory Foundation Act 2019



## III. Common Law Foundations: What are they?

### Origins

- Legal features can typically be traced back to European private foundations (e.g. Liechtenstein)
  - However, CLF acts also borrow rules from both **local trust and company laws**
- Often, the legislative goal was to create a statutory arrangement that is «not quite like the trust»
  - Rationale: to offer the **target audience of offshore financial services** additional options to hold wealth apart from the trust (e.g., for individuals domiciled in civil law jurisdictions)
  - Concerns?



## III. Common Law Foundations: What are they?

### «Two Generations»

- First wave: 2003 – 2012
  - Largely confined to offshore financial centres
  - No single «common law foundation» model
- Second wave: 2017 – now
  - Important financial centres start to adopt foundation statutes (Dubai, Abu Dhabi, USA)
  - Models increasingly different from civil law foundations (e.g. «foundation companies» in the Cayman Islands)



## III. Common Law Foundations: What are they?

### Commonalities between Foundation Models

- Independent legal entity with legal personality
  - See e.g. Guernsey, Jersey, Isle of Man
  - But no single «common law foundation» model
- Established when a person (**founder**) dedicates **assets** to a specific **purpose or object**
  - Assets leave the ambit of the founder and are henceforth «self-owned» («orphan structure»)
  - Assets, just like in a civil law foundation, **form a legal entity**, which in turn is *not* «owned» by shareholders (unlike e.g. a stock corporation)
- Assets are managed by a **foundation council**

### III. Common Law Foundations: What are they?

#### Commonalities between Foundation Models

- Registration requirements (less common for trusts and in civil law jurisdictions)
  - Cave: recent legislative changes to European foundation laws
- Use of local resident agents





## III. Common Law Foundations: What are they?

### Differences between Foundation Models

- Founder's rights
  - Broad possibilities to retain founder's rights (e.g. Jersey) vs. only specific founder's rights (e.g. Guernsey)
- Beneficiary rights
  - Beneficiary rights for enfranchised beneficiaries vs. no beneficiary rights unless founder specifies otherwise (opt-in system)
- Foundation governance
  - Use of «guardians» by default vs. use of guardians only in specific circumstances



### III. Common Law Foundations: What are they?

#### Common Law Foundations and Trusts

- CLF tend to have legal personality, trusts do not
- No «**beneficiary principle**»
  - Foundation council does not have **fiduciary duties** vis-à-vis the beneficiaries of the foundation (all duties are towards the foundation)
  - Beneficiaries do not have a «**beneficial interest**» in the foundation's assets (at most, they have *personal rights* towards the foundation)
- Registration requirements
  - CLF require registration whereas trust can be established largely without formal requirements



## III. Common Law Foundations: What are they?

### Common Law Foundations and Trusts

- CLF are outside the inherent equitable jurisdiction of the court over fiduciary offices (with some exceptions)
- CLF are created **by statute** and are not a product of equity
- No «**rule against perpetuities**» for CLF
- Foundation council can focus on preserving assets (as opposed to duties towards beneficiaries)
- No duty to diversify assets – a CLF can hold a single asset



### III. Common Law Foundations: What are they?

#### Case Study: Foundations (Jersey) Law 2009

- Can be created for **beneficiaries** or a **purpose** or both
  - Purpose may be charitable or non-charitable or a mix thereof
- Separate legal entity
- **Required documents:** foundation charter and regulations
- Foundation council of at least 1 member
  - At least 1 member of the foundation council must be a «**Qualified Member**»
- **Guardian** is required
- **Weak beneficiary rights**
- **Founder** may retain and assign **almost any right** (see section 18 of the Foundations (Jersey) Law 2009)



## III. Common Law Foundations: What are they?

### Case Study: Foundations (Guernsey) Law 2012

- Can be created for beneficiaries or a purpose or both
  - Purpose may be charitable or non-charitable or a mix thereof
  - Beneficiaries may be enfranchised or disenfranchised
- Separate legal entity
- **Required documents:** foundation charter and rules
- Foundation council of at least 2 members (subject to the terms of the foundation charter)
  - «Resident agent» is required under certain conditions



### III. Common Law Foundations: What are they?

#### Case Study: Foundations (Guernsey) Law 2012 (cont'd)

- Guardian required only for **purpose foundations** or in the case of disenfranchised beneficiaries
- **Beneficiary rights** depend on whether beneficiaries are «enfranchised» or «disenfranchised»
  - Disenfranchised beneficiaries (section 33 of the Foundations (Guernsey) Law 2012) have no rights of information
  - Enfranchised beneficiaries (section 32 of the Foundations (Guernsey) Law 2012) enjoy information rights and can make applications to the court
- **Limited founder's rights** may be retained (see section 11 of the Foundations (Guernsey) Law 2012)



## III. Common Law Foundations: What are they?

### Recognition of CLF in Switzerland – Issues

- Mixed legal nature
  - Similarities to both trusts and (civil law) foundations
- Little case law (new development)
- **Not a homogenous phenomenon** – few generic statements can be made
- Precise legal nature is largely down to the individual founder
  - Extensive founder's rights might affect recognition negatively (cf. Liechtenstein foundation)
- Determination of applicable law (statute) requires decision on whether a legal instrument is a contract, a company or other legal person or – possibly – a trust within the meaning of the HTC



## III. Common Law Foundations: What are they?

### Recognition of CLF in Switzerland – Issues

- CLF: Recognition in Switzerland under the HTC or under art. 154 *et seqq.* PILA?
    - HTC employs broad definition of «trusts», however it does appear to require the *trustee* to be the rights holder with regard to the trust property
    - legal personality of CLF indicates that CLF might not constitute a «trust» within the meaning of art. 2 HTC
    - No beneficial interest of beneficiaries in the CLF's assets – «tracing» rules of art. 11 para. 3 HTC do not fit
- HTC does not seem to be a good fit for the CLF



## III. Common Law Foundations: What are they?

### Recognition of CLF in Switzerland – Issues

- The term «company» of art. 154 PILA is very wide
  - Art. 154 et seqq. PILA apply to virtually all legal entities with a **degree of organization** – legal personality alone will usually suffice
- Plus: International legal principle of **comity** requires openness and respect towards foreign legal concepts
  - Art. 154 *et seqq.* PILA seem to be a better fit for the CLF
- All in all, recognition of CLF should not be a massive hurdle given that Switzerland recognizes trusts
- The usual caveats apply (art. 17, 18 PILA)



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# **Part IV: Trusts and Foundations in Swiss (Inheritance) Proceedings**

## **Lecture: Foundations and Trusts**

### **Spring Semester 2026**

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



## IV. Trusts in Swiss (Inheritance) Proceedings

### Proceedings Involving Trusts – Preliminary Remarks

- **Three types** of proceedings involving trusts (cf. *Alsop Wilkinson v Neary*)
  - Trust disputes
  - Beneficiary disputes
  - Third-party disputes
- **Differences** between types of disputes
  - Applicable law (substantive & procedural)
  - Jurisdiction (esp. third-party vs. trust/beneficiary disputes)
  - Validity / applicability of jurisdiction and arbitration clauses in trust instrument



## IV. Trusts in Swiss (Inheritance) Proceedings

### Proceedings Involving Trusts – Preliminary Remarks

- **Three types** of proceedings involving trusts (cf. *Alsop Wilkinson v Neary*)
  - Trust disputes (concerning the trust & its contents)
  - Beneficiary disputes
  - Third-party disputes
- **Trust disputes**
  - «Hostile» trust disputes = **attacks on the trust instrument**
  - «Friendly» trust disputes = may relate, e.g., to the correct **administration** of the trust property or **construction** of the trust instrument



## IV. Trusts in Swiss (Inheritance) Proceedings

### Proceedings Involving Trusts – Preliminary Remarks

- **Three types** of proceedings involving trusts (cf. *Alsop Wilkinson v Neary*)
  - Trust disputes
  - Beneficiary disputes (between trustee & beneficiaries)
  - Third-party disputes
- **Beneficiary Disputes**
  - Disputes between beneficiaries and the trustee
  - May relate to the **trustee's actions** in administering the trust, but also the existence and scope of an individual **beneficiary's rights** (e.g. rights to information, rights to distributions)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Proceedings Involving Trusts – Preliminary Remarks

- **Three types** of proceedings involving trusts (cf. *Alsop Wilkinson v Neary*)
  - Trust disputes
  - Beneficiary disputes
  - Third-party disputes (between trustee & third parties)
- **Third-party disputes**
  - Disputes between the trustee and “outsiders”
  - Concerning legal relationships between the trustee and third parties (e.g. contracts, torts, and **most inheritance matters**)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Proceedings Involving Trusts – Preliminary Remarks

**Direct jurisdiction** = Which court is competent to hear a case?

International jurisdiction: Which country's courts are competent?

Territorial jurisdiction: Within a country, which territory's courts are competent?  
(territory = canton, municipality, federal state, ...)

Material jurisdiction: Within a territory, which court is competent to hear this matter (e.g. criminal, administrative, general civil law, labour law, ...)?

**Indirect jurisdiction** (“recognition jurisdiction”,  
*Anerkennungszuständigkeit*) = What are the countries whose courts' decisions are recognized in Switzerland?

*The HTC covers neither direct nor indirect jurisdiction – it only deals with the applicable law!*



## IV. Trusts in Swiss (Inheritance) Proceedings

### Proceedings Involving Trusts – Jurisdiction

- Bodies of rules re: **international proceedings** before Swiss courts
  - **Lugano Convention (LC)**
    - Applies to trust disputes, beneficiary disputes, contractual disputes, but **not inheritance or most matrimonial disputes**
    - If Swiss courts have jurisdiction per the LC, the domestic jurisdiction (competent court within CH) is determined by PILA
  - **PILA** where LC does not apply and to determine domestic direct jurisdiction
  - **Swiss Code of Civil Procedure** governs jurisdiction in purely domestic cases and applies to **all actual proceedings** (once jurisdiction has been determined)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Proceedings Involving Trusts – Jurisdiction

- Direct jurisdiction of Swiss courts under the **Lugano Convention**
  - **Material scope of application**: LC is in principle applicable to all civil legal disputes, incl. disputes relating to trusts (cf. art. 1(2) LC *e contrario*)
    - However, LC *does not apply* to disputes regarding the status or legal capacity of natural persons, rights in property **arising out of a matrimonial relationship**, as well as **wills and succession**
      - LC *does not* apply to claims of heirs on the estate
      - LC *does* apply if only the **capacity to sue** is derived from inheritance law (as a **preliminary question**), not the claim itself (BGE 135 III 185)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Proceedings Involving Trusts – Jurisdiction

- Direct jurisdiction of Swiss courts under the **Lugano Convention**
  - **Territorial scope of application**: whenever the LC itself provides for a forum
    - **General jurisdiction**: a person resident in a Contracting State to be sued at their *domicile* (art. 2(1) LC)
    - **Specific jurisdiction**: a person can be sued as settlor, trustee or beneficiary of a trust in the courts of the Contracting State *where the trust is domiciled* (art. 5(6) LC)
    - **Specific jurisdiction**: contractual disputes (art. 5(1) LC)
    - **Exception** – prorogation of jurisdiction: **exclusive jurisdiction** of the courts of the Contracting State upon which the trust instrument has conferred jurisdiction



## IV. Trusts in Swiss (Inheritance) Proceedings

### Proceedings Involving Trusts – Jurisdiction

- **Direct jurisdiction** of Swiss courts under the PILA **for trust and beneficiary disputes**
  - Art. 149b(1) PILA: *choice of forum* by the settlor
  - Art. 149b(3) PILA: subsidiarily, jurisdiction of Swiss courts at the place of domicile or – sub-subsidiarily – the habitual residence of the **defendant** or the **seat of the trust**
- **Indirect jurisdiction** (recognition and enforcement of foreign judgments re: trusts): art. 149e PILA
- NB: **Lugano Convention** always takes precedence where it is applicable!



## IV. Trusts in Swiss (Inheritance) Proceedings

### Inheritance Proceedings – Jurisdiction

- **Direct jurisdiction** of Swiss courts under the PILA
  - Art. 86(1) PILA: last Swiss domicile of the decedent
  - Art. 86(2) PILA: exclusive jurisdiction of the state where the decedent held real property takes precedence
  - Art. 87 PILA: jurisdiction of Swiss authorities for Swiss citizens whose last domicile was abroad
- **Indirect jurisdiction** (recognition and enforcement of foreign judgments re: inheritance): art. 96 PILA



## IV. Trusts in Swiss (Inheritance) Proceedings

### Indirect Jurisdiction of Swiss Courts

- **Indirect jurisdiction** under the **Lugano Convention** (recognition and enforcement)
  - Switzerland will enforce any decision coming from another Contractual State, regardless of whether the issuing court had jurisdiction under the Lugano Convention (art. 33(1) LC; exceptions see art. 34 *et seq.* LC)
- **Indirect jurisdiction** under the PILA: art. 149e PILA (trust-specific decisions from Non-Contracting States of the LC), art. 96 PILA (inheritance-specific decisions)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Law

- Inherent **friction** between trust jurisdictions and civil law jurisdictions
  - Differing legal values
    - **Common law:** Freedom of disposition over a person's estate (during life and upon death)
    - **Civil law:** Preservation of a family property (*patrimoine*)
  - Result
    - **Common law:** liberal (succession) laws, «family provisions» are available to surviving children and spouses in case of need
    - **Civil law:** Indefeasible shares / forced heirship rights



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Law

- **Swiss marital property law** (default regime):
  - Upon division of assets (divorce / death), **both spouses receive ½ of the other spouse's assets** accrued during the marriage (art. 215 CC)
  - **Calculation** of shares: Art. 208 CC
    - **Starting point:** Assets acquired during the marriage (= income that has not been spent, cave: some exceptions), plus (for calculation purposes only):
      - (+) the value of dispositions within 5 years **w/o consideration** by one spouse **w/o the other spouse's consent**
      - (+) the value of assets disposed of by one spouse **w/ the intention of diminishing the other spouse's share**



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Law

- **Swiss marital property law** (default regime):
    - **Calculation** of shares: Art. 208 CC
    - **Example:** Alana and John are divorcing after having been married for 6 years. During this time, Alana earned 900k. She spent 350k on general cost of living. In 2020, she donated 100k to an animal rescue organization w/o telling John. In 2025, she gave 400k to her niece. She now has 50k left. (John has been a “house husband”, his marital assets are 0.)
    - **Starting point:** Assets acquired during the marriage: **50k**
      - (+) the value of dispositions within 5 years w/o consideration by one spouse w/o the other spouse’s consent: **niece’s 400k**
      - (+) the value of assets disposed of by one spouse w/ the intention of diminishing the other spouse’s share: **(-)**
- = **450k**



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Law

- **Swiss marital property law** (default regime):
  - **Calculation** of shares: Art. 208 CC
    - Alana's total marital assets (Errungenschaft) = 450k
    - John's total marital assets = 0k
    - John's participation claim towards Alana =  $\frac{1}{2}$  of 450k = **225k**
    - Alana's participation claim towards John =  $\frac{1}{2}$  of 0k = **0k**
  - **BUT:** Alana only has 50k to her name!
  - Art. 220 CC: **claw-back claim** of the entitled spouse against recipient of assets if remaining assets of the debtor spouse are insufficient to cover the participation claim
  - John can sue Alana's niece for the remaining 175k



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Law

- **Indefeasible shares** pursuant to Swiss inheritance law
  - Indefeasible shares are always  $\frac{1}{2}$  **of the statutory share** (art. 471 CC)
    - Statutory share of spouses =  $\frac{1}{2}$  of decedent's estate if sharing with offspring;  $\frac{3}{4}$  of the estate if no offspring but sharing with heirs of the parental line (parents/siblings); entire estate if decedent had no offspring and no heirs of the parental line (art. 462 CC)
    - Statutory share of all children combined =  $\frac{1}{2}$  of decedent's estate if sharing with a spouse; entire estate if decedent had no spouse (art. 457, 462(1) CC)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- **Indefeasible shares** pursuant to Swiss inheritance law
  - Calculation of indefeasible shares: Art. 474, 527 CC
    - **Starting point:** net assets in the estate at the time of death, **plus** (for calculation purposes only):
      - (+) the value of **advances on inheritance** (art. 527 (1) CC);
      - (+) **revocable gifts and gifts made within 5 years** of the decedent's death (art. 527(3) CC); and
      - (+) **assets disposed of** by the decedent **w/ the intention of diminishing the indefeasible share** (art. 527(4) CC)
  - Art. 522, 527 CC: **claw-back claim** of the entitled heir(s) against the other heirs and, subsidiarily, against recipients during the decedent's lifetime, if remaining assets of the estate do not suffice to cover the indefeasible shares



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- **Indefeasible shares** pursuant to Swiss inheritance law
    - **Calculation** of indefeasible shares: Art. 474, 527 CC
    - **Example:** Sergio passes away. He leaves behind an adult son he is estranged from, and net assets of 200k. Two years prior to his death, he had donated 300k to the political party “GLP”. Seven years before his death, when he and his son had a big argument, he put 700k in a Liechtenstein foundation for his sole benefit.
    - **Starting point:** net assets at the time of death = 200k
      - (+) advances on inheritance (-)
      - (+) revocable gifts / gifts made within 5 years of the decedent’s death 300k GLP donation
      - (+) assets disposed of by the decedent w/ the intention of diminishing the indefeasible share 700k FL foundation
- = 1,2 mio.



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- **Indefeasible shares** pursuant to Swiss inheritance law
  - **Calculation** of indefeasible shares: Art. 474, 527 CC
    - Sergio's net assets at time of death = 200k
    - Total calculation basis for indefeasible shares = 1,2 mio.
    - Son's statutory share = entire estate = 1,2 mio.
    - Son's indefeasible share =  $\frac{1}{2}$  of statutory share = 600k
  - **BUT:** The net estate is only 200k!
- Art. 522, 527 CC: **claw-back claim** of the entitled heir(s) against other heirs and, subsidiarily, against recipients during the decedent's lifetime, if assets of the estate do not suffice to cover the indefeasible shares
- Sergio's son can sue GLP and, subsidiarily, the FL foundation for the remaining 400k



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Law

- Enforcing indefeasible shares pursuant to Swiss law
  - What if the heirs entitled to an indefeasible share are also beneficiaries of a trust? Can a beneficial interest in a trust **satisfy an indefeasible share**?
    - Likely (+) to the degree that the heir has already received distributions (from a fixed interest or discretionary trust)
    - (-) if mere **expectancy** in assets of a discretionary trust (uncertain whether heir will actually receive trust assets)
    - Likely (-) if fixed interest trust and assets have not yet been distributed to the heir (*biens aisément négociables*-doctrine)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Indefeasible shares and marital property rights – procedural questions
  - **Jurisdiction** is determined according to PILA (inheritance / divorce forum; LC does not apply, art. 1(2)(a) LC)
  - Who must be sued?
    - **Trustee** as holder of legal title in trust assets (has the capacity to sue and be sued)
      - Debatable if together with beneficiaries in the case of fixed interest trusts (
    - **Beneficiary**, if trust assets have already been distributed to them? (cf. art. 528 and 220(3) CC re: restitution duty of a good-faith beneficiary as well as the trustee who is no longer enriched)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- **Rights of information**
- Why are they important?
  - Events giving rise to inheritance claims usually happen during the decedent's lifetime, **often w/o the heirs' involvement**
  - Heirs are not privy to the relevant information at all, or
  - Some heirs have more information than others
  - At the same time, secure knowledge of the factual basis of a (presumed) claim is **essential** (to gauge whether lawsuit will be successful as well as to later argue it in court)
  - Rights of information exist to bridge the gap between the need for information and the notorious lack thereof



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- **Rights of information of heirs** – 3 legal bases
  1. Right of information **between heirs**: art. 607(3) and 610(2) CC
    - Heirs owe each other full transparency re: everything objectively relevant to determine the amount of the estate and the division thereof
  2. Right of information **between heirs and third parties**: art. 607(3) and 610(2) CC *per analogiam*
    - These rights of information are **derived from inheritance law**



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- **Rights of information of heirs** – 3 legal bases

- 3. Right of information **between heirs and third parties:**  
art. 560 CC

- Decedent's rights of information (based on a contract or other legal relationship between the decedent and a third party) are transferred to the heirs by virtue of **universal succession**
    - These rights of information are derived from **contract law** (or another legal source that is not inheritance law) → dispute becomes contractual, not an inheritance dispute!

→ **Inheritance-based and contract-based rights to information exist concurrently!**



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Rights of information of heirs – **trust context**
  - **Inheritance law**: art. 607(3) and 610(2) CC, applicable *by analogy* to third parties (incl. trustees)
    - Heirs have a right to information if there is a **connection to the third party based on inheritance law** (e.g. third party holds assets that belong to the decedent's estate or that might be subject to a claw-back claim)
      - Heirs have a right to information towards a trustee if trustee is also an heir
      - Heirs have a right to information towards the trustee that received an asset transfer *inter vivos* from the decedent
      - Heirs have a right to information towards the trustee of a fixed trust if the decedent was a beneficiary (IMHO)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Rights of information of heirs – **trust context**
  - **Contract law** (or other legal basis, e.g. trust law): art. 560 CC
    - If the decedent had **heritable rights of information** based on any legal relationship, these are transferred to the heirs
    - In particular, heirs have a right of information towards a **bank** re: transfers (e.g. to a trustee) if 1) the settlor-decedent was the holder of the account *from* which a payment was made or if 2) the settlor-decedent made the payment *into* an account (held by a 3<sup>rd</sup> party) with the bank form which information is sought
    - It is possible that settlor had (heritable) rights of information towards a trustee as a beneficiary; enforceability of such rights is unclear (cf. *Lemos vs Coutts (Cayman) Ltd*)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Rights of information – procedural questions
  - **Forum**
    - Information rights based on **contract/trust law**: LC applies (as inheritance law is only “preliminary question”)
      - **Substantive law** applicable to the information right itself is then determined by the conflict of law rules for contracts (art. 117 PILA) or the HTC when the information holder is a trustee (art. 8 lit. g HTC – trust statute per art. 6/7 HTC)
    - Information rights based on **inheritance law**: inheritance forum per the PILA (LC does not apply, art. 1(2)(a) LC)
  - Who must be sued?
    - Whoever holds the relevant information (trustee, bank, beneficiaries [heir and non-heir])



## IV. Trusts in Swiss (Inheritance) Proceedings

### Case Study: Rybolovlev v. Rybolovleva (BGer 5A\_259/2010)

#### Facts of the Case (simplified):

- 1987: Elena and Dimitri Rybolovlev get married in Russia
- 1995: The couple move to Geneva where they establish legal domicile
- 4/2005: Dimitri Rybolovlev suggests entering into a marriage contract. Elena Rybolovlev refuses
- 6/2005: Dimitri Rybolovlev sets up two discretionary trusts pursuant to Cyprus law, transfers a big part of his billion-dollar shareholdings to the trustees
- 2008: Elena Rybolovlev files for divorce in Geneva and requests provisional measures to block a variety of Dimitri Rybolovlev's assets



## IV. Trusts in Swiss (Inheritance) Proceedings

### Case Study: Rybolovlev v. Rybolovleva (BGer 5A\_259/2010)

Key issue: division of marital property regime involving trusts

- **Jurisdiction:**
  - **LC** not applicable
  - **PILA:** divorce forum, art. 51(b) PILA (→ Swiss court at the defendant's or the claimant's domicile, art. 59 PILA)
  - Both parties were domiciled in Geneva
- **Applicable law:** marital property law rules, art. 51 et seqq. PILA
  - No marriage contract → no choice of law clause
  - Art. 54 PILA: law of the (last) joint domicile of the spouses governs division of marital property (art. 54(1) PILA)
    - Last joint domicile = Geneva → Swiss law applies



## IV. Trusts in Swiss (Inheritance) Proceedings

### Case Study: Rybolovlev v. Rybolovleva (BGer 5A\_259/2010)

Key issue: division of marital property regime involving trusts

- **Swiss law says:** Both spouses receive  $\frac{1}{2}$  of the other spouse's total marital assets (art. 215(1) CC)
- But what about the assets Dimitri transferred to Cyprus trusts?
  - Art. 208 CC provides that some dispositions w/o consideration are to be added (calulatorily) to the marital assets
  - Dimitri transferred shareholdings w/o consideration → shareholdings must be added (calulatorily) to Dimitri's marital assets
  - Elena has claim to  $\frac{1}{2}$  of Dimitri's marital assets (incl. shareholdings) → Dimitri's actual assets likely not sufficient to cover Elena's full claim → Elena can sue trustee for remainder (art. 220 CC)



## IV. Trusts in Swiss (Inheritance) Proceedings

### Case Study: Rybolovlev v. Rybolovleva (BGer 5A\_259/2010)

Key issue: division of marital property regime involving trusts

- **Swiss law says:** Both spouses receive  $\frac{1}{2}$  of the other spouse's total marital assets (art. 215(1) CC)
- But what about the assets Dimitri transferred to Cyprus trusts?
  - Trusts are governed by Cyprus law (art. 6 HTC)
  - Cyprus law (presumably) considers trusts valid
  - As Dimitri has validly transferred shareholdings to trustee, he is no longer the legal owner
- **Solution:** Art. 15(b) HTC allows marital property regime (Swiss law!) to take precedence over trust law!

(Swiss marital property regimes can only be deviated from **if both parties agree** (but not by unilateral act))



## IV. Trusts in Swiss (Inheritance) Proceedings

### Case Study: Werner K. Rey (ZR 98/1999, 225)

#### Facts of the Case (simplified):

- 1979: Werner K. Rey (**WKR**) starts building an exceedingly complex company conglomerate, made up of a large number of holding companies and trusts
- 1988: WKR establishes a discretionary Guernsey trust ("**WKR Trust**") with himself as the primary beneficiary
- 1991: WKR declares bankruptcy
- 1994–1999 : One of WKR's creditors, a bank whose shares are (ultimately) owned by the WKR Trust, files a claim in the bankruptcy proceedings against WKR; the Zurich court of appeals denies the claim, arguing that the bank is indirectly owned by WKR and thus "economically identical"



## IV. Trusts in Swiss (Inheritance) Proceedings

### Case Study: Werner K. Rey (ZR 98/1999, 225)

Key issue: Recognition of the WKR trust

- The WKR Trust is governed by Guernsey law, art. 6 HTC
- WKR established the WKR Trust as a discretionary trust, named himself the primary beneficiary, reserved the right to appoint a new trustee → all objectively valid under Guernsey law
- But: the settlor must also have the factual, subjective intention to establish a trust; if their behaviour suggests, on the whole, that the settlor **did not actually want to establish a trust**, Guernsey law considers the trust a **sham**



## IV. Trusts in Swiss (Inheritance) Proceedings

### Case Study: Werner K. Rey (ZR 98/1999, 225)

Key issue: Recognition of the WKR trust

- WKR repeatedly disposed over trust assets as if they were his own (e.g. issued POAs regarding shares held by the trust, pawned off trust assets, and otherwise took decisions that were reserved for the trustee)
- In an audit, WKR declared the WKR Trust's assets as his own
- All in all, WKR did not truly have the intention of establishing a trust;  
**Guernsey law considers the WKR Trust a sham**
- If the applicable law considers the trust to be invalid, there is no need to consider alternative legal bases (e.g. art. 15, 16, 18 HTC, 17/18 PILA) to apply an abuse of law or similar doctrine (e.g. piercing the corporate veil) to the trust
- WKR is considered the owner of the WKR Trust's assets (and therefore, the indirect owner of the claimant) – claim is denied



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**Questions?**



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**Thank you for your attention!**