



**University of
Zurich**^{UZH}

Faculty of Law

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A Trust Law for Switzerland?

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A Trust Law for Switzerland?

- I. Introduction and Background
- II. Recognition of Trusts in Switzerland
- III. Introduction of a Swiss Trust?
- IV. What Could a Possible Swiss Trust Look Like?
- V. Résumé and Outlook



A Trust Law for Switzerland?

I. Introduction and Background

- Swiss estate planning landscape
 - Civil law country
 - Testamentary freedom vs. forced shares (with clawback provisions)
 - Classic estate planning vehicles exist (succession pacts, shareholder agreements, foundations)
- Swiss foundation types and models
 - Legal personality
 - Classic foundation, if tax law criteria of a “charity” are met with tax exemption
 - Business holding foundation (pure or mixed)
 - Family foundation



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I. Introduction and Background

- Swiss family foundation as a suitable planning instrument?
 - Some privileges: no state supervision, no audit requirement
 - Problem of Art. 335 CC: pure maintenance or enjoyment purposes are “not allowed” (according to the jurisprudence of the Federal Supreme Court, which is heavily criticized in literature and practice)
 - Long-lasting attempts to liberalize family foundation (e.g. by allowing maintenance purposes for a certain period of time or to a certain percentage)
 - Instead: New duty to register in the commercial register since 2016 (with a 5 year transition period until Dec. 31th, 2020)



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II. Recognition of Trusts in Switzerland

- 2007: Ratification of the Hague Trust Convention (HTC)
- Trusts are recognized in Switzerland
 - “as trusts” (Art. 11 HTC)
 - Applicable law is the chosen (foreign) trust law (Art. 6 HTC)
 - Certain limitations (Art. 4, 15, 16, 18 HTC);
however: Art. 335 CC is not considered a “*loi d’application immédiate*” (BGE 135 III 614 E. 4.3.3)
 - Jurisdiction for the chosen (Swiss) court
- However: No substantive “Swiss trust law”



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III. Introduction of a Swiss Trust?

- Recent developments
 - Since 2010: repeated attempts by Members of Parliament to consider the introduction of a substantive trust law (largely unsuccessful)
 - 2015: Liberal Party submits a motion (*Postulat*) to examine the possible introduction of a Swiss trust law (successful)
 - 2016: Parliamentary initiative by MP Regazzi to introduce the trust into Swiss substantive law (successful)
 - 2018/2019: Parliament adopts a motion mandating the Swiss Federal Council to take the lead on the legislative project to introduce the trust into Swiss law



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III. Introduction of a Swiss Trust?

- Recent developments
 - Expert commission is drawing up a list of desired legal effects of a Swiss trust as well as developing different “regulatory models” for such a trust law
 - External group is conducting a Regulatory Impact Assessment examining the likely economic and societal implications of a Swiss Trust
- Next steps
 - Summer 2019: Expected publication of the results of the Regulatory Impact Assessment



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III. Introduction of a Swiss Trust?

- Arguments *in favor* of a Swiss Trust
 - Strengthens Switzerland’s financial center
 - Enables Swiss banks and asset managers to offer a broader range of services
 - Bridges the gap between Switzerland and financial centers which have their own trust laws
 - Creates a level playing field between Switzerland and offshore jurisdictions (esp. in times of increased fiscal transparency)
 - Traditional confidential nature of trusts is in line with Swiss banking traditions



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III. Introduction of a Swiss Trust?

- Arguments *in favor* of a Swiss Trust
 - Enables private citizens to choose from a wider array of options to plan and structure their estate and to pass on their assets to the next generation
 - Provides additional organizational options for private enterprises
 - Switzerland has already adapted to and “learned” how to deal with trusts by recognizing trusts established in another jurisdiction
 - Introducing a Swiss trust would therefore not require too many changes to the regulatory environment
 - Having its own trust law would make it easier to supervise and govern their administration



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III. Introduction of a Swiss Trust?

- Arguments *against* a Swiss Trust
 - Political arguments
 - Bad timing: The current political climate demands tighter regulation of financial markets and increased fiscal transparency – a Swiss trust might therefore be inopportune
 - Inconsistency: Supporting stricter regulation of offshore financial centers while copying their financial instruments is contradictory
 - Trusts are deemed “prone to abuse”
 - Debatable, as abuse of financial instruments is primarily an issue of applicable financial regulations and mutual legal assistance



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III. Introduction of a Swiss Trust?

- Arguments *against* a Swiss Trust
 - Legal arguments
 - “Classic” Anglo-Saxon trust law is incompatible with the Swiss legal system
 - E.g.: separation of legal title and beneficial title is unknown in civil law countries, therefore difficult to “translate”
 - Swiss courts are unfamiliar with common law traditions and the importance of case law, therefore unable to fulfil the role typically assumed by courts in the administration of trusts

→ a Swiss Trust would have to take these factors into account and be “custom-made”

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III. Introduction of a Swiss Trust?

- Arguments *against* a Swiss Trust
 - Legal arguments
 - Swiss law already provides for a variety of comparable estate planning devices
 - E.g.: foundations, consecutive heirship, usufruct, fiduciary contracts
 - Conflicting values: Art. 335 CC prohibits pure maintenance or enjoyment purposes in the context of family foundations
 - The reasoning behind art. 335 CC is incompatible with trusts created to benefit family members

→ A Swiss Trust would necessitate the amendment of Art. 335 CC, which would render the family foundation more attractive and diminish the need for a trust

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III. Introduction of a Swiss Trust?

- Arguments *against* a Swiss Trust
 - Practical arguments
 - The current regulatory environment makes the creation and administration of a trust more complex and cumbersome
 - A new Swiss Trust would likely lack several of its traditional advantages (due to formal requirements, increased supervision of trustees, trust register etc.)
 - A Swiss Trust might not turn out to be as attractive and frequently-used as expected
 - Unfavorable cost-benefit ratio
 - Amendment of art. 335 CC is much simpler and likely to fulfil many of the needs addressed by a hypothetical Swiss Trust



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IV. What Could a Possible Swiss Trust Look Like?

- Purposes of a Swiss Trust
 - Scope of application most likely confined to that of express trusts
 - Objectives of other types (e.g. constructive trusts, resulting trusts) are already being met by other legal concepts
 - Private purposes, e.g.:
 - Wealth management
 - Estate planning
 - Public / charitable purposes?
 - Unlikely – under Swiss law, public purposes are typically fulfilled by “classic” foundations



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IV. What Could a Possible Swiss Trust Look Like?

- The “Common Law Model”
 - Modeled after a “traditional” trust law found in a common law jurisdiction
 - Comes with numerous difficulties:
 - Introduction of split ownership into the Swiss legal system likely impossible
 - Several concepts (legal/equitable title, tracing etc.) will require “translation” into categories already found in Swiss law
 - Role of courts unclear
 - Personal opinion: “literal translation” of a common law trust into Swiss law is not impossible, but not probable due to too many incompatibilities



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IV. What Could a Possible Swiss Trust Look Like?

- The “Foundation Model”
 - Based on existing recognized categories of foundation law
 - E.g. modeled after so-called “dependent foundations” (foundation-like endowment attached to another legal entity, with own purpose but without legal personality)
 - The details are largely unclear
 - Necessity of a “rule against perpetuities” (already discussed in the context of dependent foundations, but not solved)
 - Nature of the relationship between the parties involved likely to be a mix of foundation and contract law



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IV. What Could a Possible Swiss Trust Look Like?

- The “Fiduciary Contract Model”
 - Based on a codification of the (already judicially recognized, but uncodified) fiduciary contract
 - Mimics the legal effects of the trust by means of contractual concepts
 - Challenges include, inter alia, how to shape the relationship between the parties involved (i.e. ensuring independence of the fiduciary from the “settlor” and safeguarding the beneficiary’s interests)
 - Seemingly most favored by Swiss practitioners and academics



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V. Résumé and Outlook

- Currently prospects unclear
- Working group with possible favorable evaluation
- Final result, if any, probably less attractive than expected
- In any case, introduction of a trust without liberalization of the family foundation does not make much sense → Attempts to introduce the family foundation into the project agenda
- What will be the result?
 - Modernized family foundation “must have”
 - New Swiss trust “nice to have”
- We keep on working on a favorable estate planning environment



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Thank you for your attention

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