Fourth Edition

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Jurisdictions That are Prime

Jurisdictions in Prime
1. Introduction: `implanting' the trust

Switzerland's ratification of the Hague Trust Convention' enhanced the potential for trusts to become an important estate planning instrument within the Swiss legal system. The bedrock of this potential is of course the recognition of the trust under Article 11 of the Hague Trust Convention and Articles 149a onwards of the Swiss Private International Law Act. 'Recognition' means that the Swiss legal system accepts the trust as an existing, independent legal structure which is (in principle) governed by a foreign law and whose provisions are (in principle) given legal effect within the Swiss law system. It seems, however, important to point out two consequences that arise from this basic principle: first, recognition does not mean that a trust can be set up according to Swiss law provisions – there exists no Swiss substantive law allowing for the creation of a trust, and there is no such thing as a Swiss law trust or a Swiss trust law. In fact, in Switzerland a trust can only exist as a legal entity under a foreign jurisdiction that has a trust law of its own. And second, to accept the independent nature of the trust concept means to desist from any tendency of equating the trust with Swiss law legal concepts. In particular, a trust is not the same as a Swiss law corporation or foundation. As follows from the common law trust concept, it is not the trust itself that holds – as some kind of legal person – rights or obligations, it is the trustee.

It follows from this solution that the law the trust is set up under (the proper law of the trust) and Swiss law apply to the trust in a combined manner. The proper law

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1 The Hague Convention on the Law Applicable to Trusts and on their Recognition came into effect for Switzerland on July 1 2007, cf SR 0.221.371.


3 The applicable trust statute is defined under Articles 6 onwards of the Hague Trust Convention, and principally depends on the choice of the settlor. When no applicable law has been chosen, the law that has the closest connection to the trust is applicable. In ascertaining the relevant law, criteria such as the place of administration, the situs of the assets of the trust, the place of residence or business of the trustee, and the objects of the trust are particularly relevant.
creation of a trust by wil. Although this can easily be explained by the fact that Swiss law has never known the concept of a trust, according to those who oppose the idea, it makes the creation of a testamentary trust under Swiss inheritance law inadmissible.

Other authors are ready to accept the creation of a ‘testamentary trust’ in a will under Swiss law. They either exempt the creation of a trust from the numeros clausus by limiting the numeros clausus to testamentary provisions in a narrow sense, or they equate the testamentary trust with the ‘testamentary foundation’, which is known to Swiss inheritance law (Article 493 of the Swiss Civil Code), and hold it therefore to be compatible with the numeros clausus. In our opinion this discussion is somewhat beside the point, as we regard the creation of a testamentary trust as a matter to be judged by the proper law of the trust, not the law governing inheritance. This follows from Articles 2 and 8 of the Hague Trust Convention which include the testamentary trust. Consequently, the numeros clausus does not apply to the trust, so that a testamentary trust can be accepted. Only if the numeros clausus (or parts thereof) were to be considered as a law whose application is mandatory (loi d’application immédiate) or as an issue of public policy – a feature that not even the most ardent Swiss opponents of testamentary trusts suggest – would the law governing inheritance be applicable. In any case, with respect to the intentions of the Hague Trust Convention, the recognition of trusts should include such an important element as the testamentary trust.

As long as the current uncertainties persist it may nevertheless be advisable – if Swiss inheritance law is to govern the inheritance – to prefer a trust made during the settlor’s life to a testamentary trust if such a planning option remains.

3. The trust and Article 335 of the Swiss Civil Code

3.1 The meaning of Article 335 of the Swiss Civil Code

Article 335 of the Swiss Civil Code is directed against certain ways of linking separate estates to a family. Article 335(1) prohibits foundations that grant

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4 Cf Article 8 of the Hague Trust Convention.
5 It may of course happen that the Swiss choice of law rules lead to the application of the law which is also the proper law of the trust.
6 According to Articles 86 onwards of the Swiss Private International Law Act, Swiss inheritance law applies in principle if the decedent was a Swiss citizen and/or domiciled in Switzerland. A Swiss citizen living abroad and foreign persons domiciled in Switzerland may however choose the application of a different inheritance law.
9 Article 493 of the Swiss Civil Code:
1. The testator is entitled to bequeath all or part of the disposable portion of his or her property to a foundation for any purpose of his or her choosing.
2. However, the foundation is valid only if it conforms to the legal requirements.
(For the official – albeit non-binding – English version of the Swiss Civil Code can be found at www.admin.ch/opc/en/classified-compilation/19070043/index.html.)
11 For further details, see D Jakob and P Pichl, “Trust und Nachlassplanung in der Schweiz nach Ratifikation des HTÜ” in M Martinek, P Rawert and B Weitmeier (eds), Festschrift für DIETER REUTER zum 70. Geburtstag am 16. Oktober 2010 (Berlin, 2010), at 146.
12 Article 335 of the Swiss Civil Code:
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.
maintenance payments to the members of a family without tying them to particular purposes. Article 335(2) prohibits entailments (i.e., settlements which perpetually tie up assets as special property of a particular family). By setting up those rules the legislature intended to prevent the establishment or perpetuation of feudal structures, and to keep potential beneficiaries of separate family estates from idleness.13

3.2 Impact on trusts?

Trusts can be set up in a way that is contrary to those prescriptions, in particular if they grant maintenance benefits without tying them to special purposes and if the beneficiaries belong to one family. Hence, Article 335 of the Swiss Civil Code could prevent the recognition of such trusts in Switzerland.

As Article 335 will not be part of the applicable proper law of the trust which, in principle, governs the existence of the trust, its possible prohibiting impact would need to be based upon a provision that is allowed to interfere with the law governing the trust. Article 16 of the Hague Trust Convention could be such a provision, since it allows for the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws (so-called loi d’application immédiate).

However, the discussion seems to lead to a different outcome. Scholars have criticised Article 335 of the Swiss Civil Code for the outdated purposes it pursues; the legislature is considering abolishing the provision; and the Swiss Federal Court held in 200914 that Article 335 cannot be considered as a loi d’application immédiate under Article 18 of the Swiss Private International Law Act (a provision that parallels Article 16 of the Hague Trust Convention).

Against this background - although there remain some scholars who want to afford Article 335 of the Swiss Civil Code an impact on trusts in exceptional cases - it can and should be held that the provision does not limit the creation or recognition of trusts in Switzerland.15

4. The trust and Article 488 of the Swiss Civil Code

4.1 The meaning of Article 488

Article 488(1) of the Swiss Civil Code permits the appointment of a reversionary heir, but Article 488(2) limits this capacity to one succession of a first and reversionary heir. A decedent can therefore, for instance, make a bequest to his son as first heir and his granddaughter as reversionary heir, but he cannot appoint his granddaughter’s daughter to be his (third) heir after his granddaughter’s death.

4.2 Article 488(2) of the Swiss Civil Code as loi d’application immédiate

As in the case of Article 335 of the Swiss Civil Code, the potential of trust deeds to contradict Article 488(2)16 raises the question whether the Swiss provision may, based on Article 16 of the Hague Trust Convention, limit the recognition of trusts. Attention having been centred - thus far - on Article 335, this question still needs to be finally settled.

In the authors’ opinion, Article 488(2) should not be regarded as a loi d’application immédiate under Article 16 of the Hague Trust Convention: one main goal of the provision - the prevention of quasi-feudal estates - is close to the intentions of Article 335 of the Swiss Civil Code and therefore quite arguable. Moreover, a testator has a right under Article 493 of the Swiss Civil Code that can also be shaped in ways that come into conflict with Article 488(2). However, testamentary foundations are held to be valid even if they contradict Article 488(2). A legal instrument that conflicts with Article 488(2) (here a trust) can therefore not be totally unacceptable to the Swiss legal system.17

4.3 Abuse of rights - exemption

Even if a future majority of authors comes to interpret Article 488 of the Swiss Civil Code as a provision that falls under Article 16 of the Hague Trust Convention, this cannot mean an automatic ban on all trusts foreseeing multiple reversionary beneficiaries. It is worth considering that it is the second main goal of Article 488 to ensure that a testator cannot order the treatment of his estate in perpetuity. Trusts constituted under a governing law that includes an effective rule against perpetuities do not run contrary to this intention and should be generally admissible. Where the trust is not subject to an effective rule against perpetuities, its deed still expresses the settlor’s autonomous will, and this expression deserves to be respected as far as possible. The application of Article 488(2) of the Swiss Civil Code to trusts should therefore be limited to cases involving abuse of rights. An abuse may in particular be

13 For a taxonomy of the current debate on the suitability of Article 335 of the Swiss Civil Code in a contemporary legal system and a differentiated set of possible solutions, see D Jakob, “Ein Stiftungsbegriff für die Schweiz”, Zeitschrift für Schweizerisches Recht 2013, 185, at 322; further, see by the same author, “Freiheit durch Governance – Die Zukunft des Schweizer Stiftungsrechts mit besonderem Blick auf die Familienstiftung” in D Jakob (ed), Stiftung und Familie (Basel, 2015), at 61; and with a slightly different view G Studen, “Die Familienstiftung und der gesellschaftlichen Wertezankom im Wandel der Zeiten” in D Jakob, (ed), Stiftung und Familie (Basel, 2015), at 89.

See Swiss Federal Court Decision 4A_3339/2009 of November 17 2009, E. 4.3. Although the object of the decision was a Liechtenstein-law foundation and not a trust, the conclusion that Article 335 of the Swiss Civil Code is not a loi d’application immédiate also applies to trusts. Swiss scholars almost unanimously agreed with the Federal Court, but see T Geiser, “Familienfeudalkommissar und Trusts” in H Honsell and others, (eds), Liber amicorum Nedim Peter Vogt, Privatrecht als kulturelles Erbe (Basel, 2012), 89, at 100 onwards.


15 Article 488:
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 obligations may be imposed on the remainderman.
3 The same provisions apply to legacies.

16 A settlor may for example designate as successive beneficiaries first his spouse, then his child and then his grandchildren.

constituted by the accumulation of factors that aggrieve the beneficiaries, such as the lengthy duration of the trust, a high degree of discretion for the trustee, a lack of inherent structures for securing any control or protection for the beneficiaries, the intent of the settlor to harm the beneficiaries and so on.

5. Trusts and forced heirship

5.1 Reduction of transfers to the trust property

In Switzerland the spouse or registered partner, the progeny and the parents of a decedent are entitled to a compulsory portion of a deceased's estate (Article 471 of the Swiss Civil Code). If the future decedent alienates assets (whether during his life or on death) to an extent that his remaining property is too small to cover (all of) the compulsory portions, the entitled persons can (under certain conditions) have the alienations reduced and thereby have the decedent's property augmented until the compulsory portions can be covered (Articles 522 onwards of the Swiss Civil Code). Article 82 of the Swiss Civil Code extends these reduction rules to transactions which transfer assets to a foundation. The applicable aspects of the law of inheritance, determined by Articles 86 onwards of the Swiss Private International Law, include those relating to compulsory portions. Hence, if Swiss law constitutes the applicable law of inheritance, its rules decide whether a disposal by the bequeather violates the compulsory portion rules and which mechanisms are applicable to correct such a violation.

If the transaction that violates the rules on compulsory portions lies in a transfer of assets to a trust property made during the settlor's life, unanimous opinion favours the application of forced heirship provisions in order to secure close relatives of the decedent a minimum share of the inheritance. The transaction in question can therefore be reduced under Article 527 in conjunction with Article 82 of the Swiss Civil Code. Referring to Article 527(3) and (4) of the Swiss Civil Code, alienations to a revocable trust, alienations within the five years preceding the settlor's death and alienations made with the obvious intention of evading forced heirship rules may in consequence have to be reversed.

The reduction may deprive the trust of all or a large part of its assets. Whether the trust nevertheless stays valid and (if so) whether its decreased property requires a modification of the trust should be judged by the law governing the trust and not – as some authors propose – by the (Swiss) law of inheritance. Hence, from a practical perspective, this ought not to lead to an automatic demise of the trust, especially if there are some assets left and the 'three certainties' are still fulfilled. Rather, the autonomous intention of the settlor should be considered and the trust adapted accordingly.

5.2 Installing entitled persons as beneficiaries

The wish to organise one's estate planning by means of a trust does of course not necessarily imply an intention to violate compulsory portions. It may therefore be interesting to reconcile a trust with existing rights to a compulsory portion by installing the entitled persons as beneficiaries. However, to be entitled to a compulsory portion under Swiss law implies in principle the certainty of receiving the full value of one's portion at one's free disposal. Whether or not the recipient's position as a beneficiary meets these requirements – and can therefore satisfy the statutory rights – will depend on the circumstances of each individual case. The beneficial position might only amount to a compulsory portion if the trust satisfies certain general criteria. First, the trust must be irrevocable and non-discretionary. Secondly, the equitable title has to embody the full value of the compulsory portion, and the allotment of this value may not be subject to undue delays, procedures, or other restrictions. And finally it must be established that the appointment as beneficiary was meant to satisfy the right to a compulsory portion.

In order to avoid legal uncertainties over the satisfaction of those complex criteria, it may be advisable that the trust beneficiaries waive their forced heirship rights by way of contract with the settlor and decedent.

6. The conveyance of Swiss real estate to a trust property

6.1 The legal structure of a real estate transfer

As regards the validity and the administration of a trust, it is the proper law of the trust that establishes the consequences of transferring assets to the trust property (Article 8 of the Hague Trust Convention). Whether the asset has effectively been transferred depends however on the relevant law of property (Articles 4 and 15 of the Hague Trust Convention). For real estate located in Switzerland it is Swiss law – the law of the place where the property is located – that forms the property statute (Article 99 of the Swiss Private International Law Act). Thus, the rules of Articles 656 and 657 of the Swiss Civil Code have to be considered. Article 656 draws a fundamental distinction between transfers of real estate that are based on contract, and those that are not, which includes cases of testamentary succession. In the

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19 Article 82: "A foundation may be challenged by the founder's heirs or creditors in the same manner as a gift."
21 This position should be based on Article 15(e) of the Hague Trust Convention. Therefore, an application of Article 16 of the Hague Trust Convention is not necessary.
22 Article 527:
The following are subject to abatement in the same manner as testamentary dispositions:
1 advances against a person's share of an inheritance made in the form of wedding gifts, settlements or assignments of assets, to the extent these are not subject toochastic payments in settlement of future rights of inheritance;
2 gifts that were freely revocable by the deceased or made in the five years prior to his or her death, with the exception of customary occasional gifts;
3 assets alienated by the deceased with the obvious intention of circumventing the limitations on his or her testamentary freedom.
23 The doctrine argues for the combined application of Articles 527 and 82 of the Swiss Civil Code because the transfer to a trust in some ways resembles the transfer to a foundation.
24 Article 99:
1 Interests in real property shall be subject to the law of the place where the property is located.
2 Claims arising from matters emanating from real property shall be governed by the provisions of this Code concerning torts (Article 138).
(All translations of Swiss Private International Law Act provisions refer to the translation by Umbricht Attorneys at law, Zurich; the translation can be accessed at www.umbricht.ch.)
former case, registration in the land register has constitutive effect on acquisition of the real estate, whereas in the latter it is only declaratory, but gives the acquirer the power of disposal over the property. In consequence, the estate planner will not only have to distinguish cases where the real estate is conveyed to the trust within the life of the settlor from cases where this is done on death, but also whether the real estate transfers are contractual or not.

(a) Conveyance of real estate during the settlor’s life
Under Swiss law, the transfer of real estate during the transferor’s life requires an authenticated legal instrument (such as a contract, see Article 657 of the Swiss Civil Code) and registration in the land register (Article 656(1) of the Swiss Civil Code).

Article 119 of the Swiss Private International Law Act: The law governing legal instruments under Article 657 of the Swiss Civil Code is not determined by Article 99 of the Swiss Private International Law Act, but by Article 119 of the Swiss Private International Law Act because the legal instrument itself is not governed by the law of property but by the law of obligations. Article 119(1) of the Swiss Private International Law Act states that Swiss law applies to contracts concerning Swiss real estate, and Article 119(3) adds that in that case, the form shall be governed by Swiss law, too. The parties can choose a different law according to Article 119(2). A choice of law that leads to the law of property and the law of obligations being governed by the laws of two different jurisdictions might however not be advantageous.

The trust deed as ‘legal instrument’: After the enactment of the Hague Trust Convention, it was controversial whether a trust deed could by itself constitute an authenticated legal instrument and which documents needed to be produced to the administration of the land register for the registration of the trustee.

Some authors argued for the necessity of a special contract between trustee and settlor declaring the transfer of the asset. This contract should – in their opinion – be produced to the administration of the land register.

The official – although not binding – guidelines on the administration of the

land register with regard to trusts did not require an additional contract. But, for the trustee to be registered, they demanded a certificate from a Swiss notary public confirming that the trust is effectively created, that the trustee is appointed as such, and that the estate is designated as trust property.

This dispute has been somewhat clarified through the enactment of the new Land Register Ordinance on January 1 2012. According to Article 67(1)(a) of the Land Register Ordinance, a publicly authenticated contract is a sufficient legal title for the transfer of real estate when the real estate is transferred into a trust during the settlor’s life. This underpins the authors’ opinion that there is no necessity for an asset-transferring contract in addition to the trust deed, provided the trust deed declares the transfer of the real estate and follows the formal rules on real estate transfers by being publicly authenticated. It should however remain possible for the settlor to establish an additional instrument, for example, to clarify the legal situation. As it may be difficult for a Swiss notary public to judge a foreign law trust, we consider it sufficient for the registration of a trustee to produce the trust deed, declaring the transfer of the real estate, to the administration of the land registry. If the real estate is transferred by the settlor to an already existing trust, the transfer is effectuated by a unilateral legal act and this legal act must be produced to the register.

Foreign authentication: As for the authentication requirement, some scholars question whether an authentication under foreign law can conform to the authentication required by Article 657 of the Swiss Civil Code. The majority of authors do however favour such a possibility. The authors concur with this view, provided the foreign authentication can be shown to be equivalent to the authentication required by Swiss law.

(b) Transfer on the settlor’s death
A transfer as a result of the settlor’s death takes effect by testament or intestate succession and a declaratory registration in the land register (Articles 656(2) and 657(2) of the Swiss Civil Code). With regard to a trust, it can take effect by appointing the trustee either as an heir or as a legatee. The new Article 67(1)(b) of the Land Register Ordinance states that in the case of a transfer as a result of death, legal title has to be rendered through a certificate of succession or a certification of the competent authority.

If the trustee is one of several heirs, he belongs to the community of joint heirs within the meaning of Articles 602 onwards of the Swiss Civil Code. As the co-heirs own the estate assets jointly, until partition, the transfer to the trust property is completed and the trustee acquires sole proprietorship only after partition of the estate.

If the trustee is a legatee he has a personal claim for delivery of the bequeathed asset against the heirs (Article 562 of the Swiss Civil Code).

25 Article 657:
1 In order to be binding, a contract to transfer land ownership must be executed as a public deed.
2 Testamentary disposition and marital contracts require the forms prescribed by the law of succession and marital property law.

26 Article 656: 1 The acquisition of land ownership must be recorded in the land register.
2 In the case of appropriation, inheritance, compulsory purchase, debt enforcement or court judgment, the acquirer becomes the owner even before registration in the land register but obtains the power of disposal over the immovable property only once he or she has been recorded as the owner in the land register.

27 Article 119: 1 Contracts concerning real property or its use shall be governed by the law of the State in which it is located.
2 A choice of law by the parties is permitted.
3 The form of the contract shall be governed by the law of the State in which the real property is located unless that law permits the application of another law. In the case of real property located in Switzerland, the form shall be governed by Swiss law.

28 This corresponds to most analogous regulatory decisions, eg, Article 4(1)(c) of the Rome I Regulation, which states: “a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated.”

29 Wegleitung zur grundsätzlichen Behandlung von Trustgeschäften as of June 28 2007. These guidelines were introduced in order to fill existing gaps in the previous Land Register Ordinance. Hence, after the introduction of the new Land Register Ordinance of September 23 2011, in force since January 1 2012, their relevance dwindled, as most of the decisions taken in the guidelines were overridden by the legislation.

30 Trust guidelines, at 3.
From the estate planning viewpoint, a legacy may be the best solution, because it avoids the complicated integration of a trustee into the community of joint heirs and the subsequent, potentially complicated and time-consuming, partition issues.

6.2 The implications of Article 149d of the Swiss Private International Law Act
Real estate that forms part of a trust property is registered in the name of the trustee — who is the holder of the legal title — in the land register. Article 149d(1) of the Swiss Private International Law Act provides, however, that the fact that real estate belongs to a trust can be made apparent by a ‘mention’ in the land register. According to Article 149d(3), if such a mention is omitted the trust relationship cannot be enforced against a person without notice of it. As regards a purchaser acting in good faith or a creditor of the trustee, the asset is therefore treated as property of the trustee without any restrictions relating to the trust.

In the case of a purchaser acting in good faith, Article 149d(3) interacts with the provision of Article 973 of the Swiss Civil Code39 protecting reliance in good faith on the land register. In consequence, a purchaser acting in good faith40 can validly acquire the estate and is — provided no mention has been made — protected from claims for restitution of the estate to the trust property. A creditor of the trustee can take hold of the estate by way of execution.

The lack of a mention can therefore impair the trust property and prejudice the beneficiaries. A settlor who wants to avoid such undesired effects has basically three methods at his disposal: he can — at least according to the trust guidelines41 — initiate inclusion of the mention himself at the time the asset is transferred to the trust; he can oblige or call on the trustee to initiate inclusion of the mention; or he can vest the beneficiaries or third parties with the right to include the mention.42 Yet, in order for the mention to be made upon the application of the beneficiaries or third persons, the trust guidelines require either the assent of the trustee or a judgment authorising the mention.43 If the trustee, according to the trust deed and the circumstances, is obliged to mention, the beneficiaries should have the right to force his assent by way of a legal action.

Prudent estate planning should take into account the settlor’s possibilities for ensuring a mention, and may enable the beneficiaries to initiate inclusion of a mention themselves.44

6.3 Conveyance by way of an underlying company
If a settlor wants real estate to be held in trust, he can either transfer the relevant real estate asset directly to the trust property by conveying it to the trustee, or he can transfer the asset to the trust in an indirect way by conveying it to an underlying company whose shares are held by the trustee. Even though this is often encountered in practice, the current discussion in Switzerland (and, in consequence, this chapter) focuses on the direct method of putting real estate in trust. However, the use of an underlying company may — depending on the circumstances — be a viable alternative as some of the difficulties explained above relate to the direct conveyance of the asset to the trustee and can arguably be left aside if a company acts as acquiring entity.45

6.4 The implications of the Lex Koller
One of the least settled aspects of the recognition of trusts in Switzerland is the treatment of real estate transfers to a trust property under the federal law on acquisition of real estate in Switzerland by non-residents,46 the so-called Lex Koller. This uncertainty is all the more unsatisfactory as the Lex Koller currently exerts an important influence on trust-related estate planning, especially as a possible liberalisation or abolition is becoming an increasingly remote prospect.47 The relevance of the Lex Koller is due to the fact that any trust is necessarily established under a law other than the Swiss law and that transfer of real property to the trust will therefore always imply a foreign element which triggers an examination under the Lex Koller. The main problems in this examination relate — as will be shown — to the fact that the transfer of assets to a trust property cannot easily be interpreted as a direct act of transmission from the settlor to the beneficiary. The trust, being itself a legal construct and not a physical person (although linked to the person of the trustee), is set in between the settlor and the beneficiary, and this makes it difficult to say who ‘acquires’ the asset in terms of the Lex Koller.48

(a) Loi d’application immédiate
Designed to limit foreign infiltration,49 the Lex Koller in principle makes the purchase of Swiss real estate by a foreign person subject to official authorisation, and prohibits some kinds of real estate transactions altogether. As the act can be regarded as a provision requiring application within the meaning of Article 16 of the Hague Trust Convention (ie a loi d’application immédiate) it can apply to trusts, although they are governed by foreign law (namely the proper law of the trust).

31 Article 973.
1 Any person who, relying in good faith on an entry in the land register, has acquired property or any other right in rem in reliance thereon, is protected in such acquisition.
32 This rule does not apply to boundaries of land in areas designated by the cantons as being in permanent danger of ground displacement.
33 Some scholars advocate, however, that the transfer of property has to be reversed if it was made without consideration.
34 Trust guidelines, at 3.
35 Ibid.
36 From a practical perspective, note that such a mention may entail legal consequences for the notary involved, if he fails to observe the obligation to examine the trustee’s right of disposal, see D Fannenle Kessler, ‘Die Anmerkung des Trustverhältnisses und die Pflichten des Notars’, Zeitschrift für Besitzungs- und Grundbuchrecht (2011), 73, at 84 onwards.
37 It must however be said that the creation of an underlying company, beside the effort and expense it involves, may have implications with regard to the Lex Koller situation, see Section 6.4 above.
39 A government proposal to abolish the Lex Koller was refiled by Parliament in 2008. On November 12 2012, the Federal Council published a statement recommending the retention of the law; and, on November 21 2013, it adopted a corrigilary message on the retention of the Lex Koller. The current status of the legislative procedure can be checked at www.bj.admin.ch/bj/de/home/themen/wirtschafts- gesetzgebung/lex_koller.html. Recently, though, there are signs that Switzerland might once again tighten its laws on the acquisition of real estate for non-residents.
40 See, however, the decision 2C_409/2009 of January 15 2010 of the Swiss Federal Court discussed below under Section 6.4(d).
41 Article 1 of the Lex Koller.
No automatic prohibition for transfer of non-commercial property

In principle, the transfer of commercial property to a trust does not require an authorisation, according to Article 2(2)(a) of the Lex Koller.42 However, if an estate is serving as place of residence or as holiday home, the Lex Koller and its accompanying regulations43 could be interpreted in such a way as to create an insurmountable obstacle to any transfer of that estate to a trust property: it follows from Article 2(2)(b), Article 9(1)(c) and Article 9(2) of the Lex Koller that only a personal physical person can acquire places of residence or holiday homes. Article 8 of the Lex Koller Regulation clarifies this requirement by stating that the physical person needs to acquire directly and under its own name. If neither the trustee (because he is only a kind of fiduciary) nor the beneficiaries (because they are not parties to the transfer) are seen as an acquirer, such transfers could be flatly inadmissible for lack of a physical person acting under his own name. Indeed, some initial administrative decisions have taken that stand and denied an authorisation. However, such a reading would run contrary to the intention and the wording of the Hague Trust Convention, which encompasses the transfer of real estate to trust properties.44 It must therefore be appreciated that recent administrative decisions and statements do not seem to consider the transfer of non-commercial estates as necessarily prohibited.45

Acquisition under Articles 4, 10 of the Lex Koller

When a settlor transfers real property to a trustee this act is quite clearly an ‘acquisition’ under Articles 4 and 10 of the Lex Koller. This is mainly due to the sweeping approach of the Lex Koller, which does not look at the legal construction of a transfer but considers only whether, economically, the property comes under different ownership.

Acquiring person under Article 5 of the Lex Koller

Although the acquisition requirement is fulfilled, it is far from clear how to determine the person46 who makes the acquisition (Article 5 of the Lex Koller). However, it is necessary to know which person is relevant in order to assess whether or not this person is foreign. The administrative decisions on this point were inconsistent for a long time. Some focused on the seat of the trust,47 some on the trustee, and some on the ‘protagonists’, that is, the settlor, the trustee and the beneficiaries.

In a 2010 decision, the Swiss Federal Court clarified the matter to a certain extent. It held that upon the acquisition of real estate through a trust, the question as to whether an authorisation is needed does not depend on the seat of the trust determined by analogy to Article 5(1)(b) of the Lex Koller, but rather on whether the trustees or the beneficiaries are deemed to be foreign under Article 5 of the Lex Koller.48

Foreign person under Article 5 of the Lex Koller

Having identified the relevant person, the next thing is to decide whether that person is a foreign person under Article 5 of the Lex Koller. In principle, a person is not foreign if he/she has Swiss citizenship, or is a citizen of a member country of the European Union or of the European Free Trade Association and lives in Switzerland, or is a citizen of a country not belonging to the European Union or the European Free Trade Association but has acquired the right to reside permanently in Switzerland and is effectively residing in Switzerland.

Waiver of authorisation under Articles 2 and 7 of the Lex Koller

Even if the transfer constitutes an acquisition by a foreign person, the need for an authorisation can be waived under Articles 2 and 7 of the Lex Koller, especially where: the property is used commercially (Article 2(2)(a)); where the acquirer – being a physical person – takes up residence (Article 2(2)(b)); where the acquirer is the spouse or direct line-relative of the transferor (Article 7(b)); or where the acquirer qualifies as potential heir of the transferor in the event of the latter's intestacy (Article 7(a)).

Here again it is not certain who should be looked at in order to decide whether Articles 2 and 7 of the Lex Koller apply to a trust. There have been decisions which have looked at the connection between settlor and beneficiaries and applied Article 7(a) and (b) of the Lex Koller to that connection. The Lex Koller guidelines advocate a similar perspective.49 Nevertheless, this approach cannot yet be regarded as firmly established.

Conditions for authorisation under Articles 8 to 13 of the Lex Koller

Articles 8 to 13 of the Lex Koller determine whether an authorisation will be granted or denied. Those provisions are very restrictive, and therefore the only chance to receive an authorisation in a trust context may be proof of a particularly close relationship between the relevant person and the property (Articles 8(2) and 9(1)(c) of the Lex Koller) or the allocation of a cantonal quota for holiday apartments (Article 9(2) of the Lex Koller).

An authorisation, or a declaration that an authorisation is not required, can be made subject to certain conditions (Article 14 of the Lex Koller), for example, the

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42 As for commercial property the trustee may therefore be inscribed in the land register without the cantonal administration having reviewed the transfer; in all other cases the trustee must pass through an authorisation procedure; see Articles 15 onwards of the Lex Koller, and the trust guidelines at 1.
43 Verordnung vom 1. Oktober 1964 über den Erwerb von Grundstücken durch Personen im Ausland (BewV) as of October 1 1964 (hereinafter referred to as the Lex Koller Regulation).
44 See, for instance Articles 4, 12, and 15 of the Hague Trust Convention.
45 Having regard again to the underlying company solution (see Section 6.3 above) it is however not clear whether this position applies also where the real estate is acquired by an underlying company, being an even less physical person than a trust. Among other factors it may be relevant whether the company is considered to be transparent, so that the beneficiaries are the relevant parties rather than the company.
46 We limit the present analysis to situations where settlor, trustee and beneficiaries are physical persons.
47 As regards corporations see Articles 5 and 6 of the Lex Koller.
49 A heir under a will who would, in the absence of a testamentary provision, not be an heir in the event of intestacy can acquire an estate but will have to recall it within two years if there are no other reasons for (the waiver of) an authorisation; see Article 8(2) of the Lex Koller.
50 Lex Koller guidelines, 5. According to the guidelines an authorisation is not required where the settlor himself is the (only?) beneficiary of his trust.
condition that any changes in the structure or among the beneficiaries of the trust are notified to the administration.

(h) Perspectives after Swiss Federal Court Decision 2C_409/2009

Even eight years after the implantation of the trust into the Swiss legal landscape, the Lex Koller still causes legal uncertainty with regard to real estate held by trusts. At the same time, mentions under Article 149d of the Swiss Private International Law Act that real property forms part of the trust have remained rare instances. However, even though the legislature have failed to resolve the issue, the Swiss Federal Court – in the 2010 decision mentioned above – has provided some trust-friendly guidance on how to apply the law to trusts and, additionally, some legal scholars have been able to identify at least some types of case where real estate can be acquired without authorisation.46

7. Recent developments: the recognition of trusts under Swiss matrimonial property law

7.1 The Rybolovev Case

Although trusts established under the proper law of the trust as determined by Articles 6 onwards of the Hague Trust Convention are recognised in Switzerland under Article 11 of the Hague Trust Convention, they still face considerable legal uncertainty. This is primarily due to the fact that Swiss courts seem to feel far less confident when dealing with cases involving trusts than they do when tackling cases involving legal entities created under domestic law.

An example of this effect is the case of Rybolovev v Ryboloveva,53 which involved interim measures under Swiss matrimonial property law, but with regard to a trust.45 In 2005, the Russian billionaire Dimitri Rybolovev and his wife Elena failed to agree on a marital settlement which would have declared substantial parts of their multi-billion fortune to be the individual property of Dimitri under Article 199 of the Swiss Civil Code. As their marital difficulties worsened, Dimitri established two irrevocable discretionary Cyprus trusts and transferred the fortune into those trusts without Elena’s consent.

Elena filed for divorce in 2008 and requested the Geneva Court of First Instance to freeze assets in Switzerland and abroad as an interim measure. However, the court refused to do so and an appeal ensued. In the following proceedings, the Geneva Court of Justice (the appellate court) pierced the veil of the trusts and froze the assets in an interim measure under Article 178 of the Swiss Civil Code. In its decision, that court completely ignored the Hague Trust Convention and the applicable Cyprus trust law, and solved the case by applying exclusively Swiss domestic law. In doing so, it reasoned that the husband’s actions were an attempt to diminish the property acquired during marriage to the disadvantage of his wife. Therefore, the assets were subject to an addition under Article 208 of the Swiss Civil Code, and the attempt to circumvent precautionary measures under Article 178 of the Swiss Civil Code was held to be abusive. The court added that such measures should be allowed even if the assets were only in the beneficial ownership of the husband.

Applying a restricted standard of review, the Swiss Federal Court upheld the decision as not manifestly unlawful and thus non-arbitrary. It further added that even though, in principle, decisions as to piercing of the veil should be decided under the proper law of the trust (the law governing its constitution), the application of Swiss law is justified when considering interim measures, as specific private international law principles come into play under Article 62 of the Swiss Private International Law Act.

This decision drew sharp criticism from both national and international scholars55 and may paint a fairly discouraging picture for the recognition of trusts in Swiss legal practice. However, this negative impression should be qualified; the Rybolovev Case is a typical example of a bad case producing bad law, as it encompassed a quite blatant attempt to evade marital property rules, a fact that is underscored by the overly strong control on the trusts that the husband retained throughout. Additionally, as previously mentioned, the Swiss Federal Court’s decision was limited to an appeal on interim measures and its specific principles.

The latter caveat appeared to have lost some of its force in 2014, when the first instance court rendered its decision on the substance of the case. Therein, it seemed to have ignored the establishment of the two Cyprus trusts and thus considered the total value of the assets at the time of the legal dispute in 2008 (about Sfr 8 billion), and not the value the assets had in 2005, when the trusts were established. Elena Ryboloveva was therefore allowed to avail herself of the considerable growth of the trusts’ assets (around Sfr 6.8 billion),56 and was awarded a record sum of about Sfr 4 billion. However, the second instance court reversed.57 It applied, as it seems, the rules of the Hague Trust Convention and recognized the establishment of the two Cyprus trusts under Cypriot trust law. However, as the wife did not consent to the transfer of the assets into the two trusts, it applied the rules on addition under Article 208 of the Swiss Civil Code, where the total value of the assets is considered at the time of their disposal. The court therefore took into account a value of about Sfr 1.2 billion, and subsequently awarded a ‘mere’ Sfr 564 million to Elena Ryboloveva.

The decision of the Geneva Court of Justice – which is final, as the parties settled in October 2015 – shed a more positive light on the odds for trusts to be recognised

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51 See note 48 above.
54 For an overview of the fairly complex Rybolovev Case, see D Jakob, D Dardel and M Uhl, Verein - Stiftung - Trust, Entwicklung 2012, nius.ch, (Bern, 2013), at 175 onwards.
56 Mainly due to the very successful initial public offering of Rybolovlev’s potash enterprise, Unika, and the subsequent sale of its shares.
57 Unpublished decision of the Geneva Court of Justice of June 5 2015.
under the law applicable according to the conflict rules following the application of the Hague Trust Convention.

7.2 The intertwining of trusts and Swiss marital property law

In the Rybolovlev Case, one might wonder how such a situation ought to have been solved under Swiss marital property law. The proper solution depends on whether the assets of the trusts are still to be considered part of the property acquired during marriage under Articles 197 onwards of the Swiss Civil Code or not. If they are, an array of interim measures will be taken and the spouse's assets at the time of the dissolution of the marital property regime will be defined and calculated at the time of the division (Article 214(1) of the Swiss Civil Code); whereas in the latter case, there is only the possibility of an addition under Articles 208 and 220 of the Swiss Civil Code, where, however, the valuation of the added assets is calculated on the date of their alienation (Article 214(2) of the Swiss Civil Code). In order to determine whether the assets of the trust have to be considered part of the property acquired during marriage, one has to focus on the validity of the establishment of the trust, which has to be assessed under the applicable trust law.

If the transfer of assets into the trust is legitimate, it is no longer part of the property acquired during marriage under Articles 197 onwards of the Swiss Civil Code and thus the applicable protective mechanisms of Swiss marital property law are only those in Articles 208 and 220 of the Swiss Civil Code. This means that, if the establishment of the trust and the asset transfers into it are legitimate under the trust statute (according to Articles 11 and 8 of the Hague Trust Convention respectively), Swiss marital property law does not prejudice the establishment of the trust, and its assets can only be claimed by virtue of an addition through Articles 208 and 220 of the Swiss Civil Code. From that, it follows that the value of dispositions made without consideration by one spouse without the other's consent during the last five years preceding divorce, as well as the value of assets disposed of by one spouse with the intent of diminishing the other's share, are added to the property acquired during marriage. If there is a shortfall in assets as a result of such a claim, the entitled spouse has a claim against third parties, such as trusts, to demand the return of assets from the beneficiaries. These protective measures are somewhat qualified by the fact that the value of the added assets will be calculated at the date on which the assets were transferred to the trust, and hence alienated in the sense of Article 214(2) of the Swiss Civil Code.

If, on the other hand, the establishment of the trust is found to be flawed and, as a consequence, the trust is deemed to be void, the trust assets are to be considered

as an integral part of the property acquired during marriage. Under Article 8 of the Hague Trust Convention, it is the law governing the trust that is to be used to establish whether the trust is a sham or whether a piercing of the veil is possible. The only instance where Swiss law can lead to a trust established under foreign law being void is in situations of a manifest abuse of a right; in this instance, Article 2(2) of the Swiss Civil Code applies as a loi d'application immédiate (under Article 16 of the Hague Trust Convention) or as a norm of Swiss public policy (under Article 18 of the Hague Trust Convention).

As a conclusion, Swiss courts seem to have gained a robust understanding of the interplay between the Hague Trust Convention, the relevant proper law of the trust and Swiss marital property law. Cases where courts enforce public policies by entirely disregarding matters of trusts have remained isolated instances that should not overshadow the positive attitude towards trusts in the Swiss legal landscape.

8. Conclusion

Even this short chapter has revealed many interfaces between the foreign laws under which trusts may be constituted and Swiss law. Further issues have not yet even been discussed. The ongoing process of the recognition of trusts will have to analyse areas where the laws (seem to) conflict and to find viable solutions. In our view, these solutions must be trust-friendly but they must also try to protect essential third-party interests. If the Swiss legal order manages to reconcile those aspects and to gain further familiarity with the trust concept it can – and, in the authors' opinion, will – take on board important advantages of the trust as an additional estate planning instrument.

58 For the following, see D Jakob, "Stiftung und Familie" in K Hübiger-Lugan and others, Zwischenbilanz, Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag (Bielefeld, 2015), 123, at 126 onwards.
59 As these provisions interfere with the relevant trusts, a justification for the limiting of the scope of application of the law governing the trust has to be found. This is the case with Article 15(1)(b) of the Hague Trust Convention, as Articles 208 and 220 of the Swiss Civil Code cannot be derogated from by voluntary act and fulfill an important protective function; see in detail D Jakob and P Picht, "Das Haager Trust-Übereinkommen und seine Geltungseinschränkungen – ein Fas des Danksiden?" in F Lorandi and D Stachelin, Innovatives Recht, Festschrift für Ivo Schwander (Zürich and St Gallen, 2011), at 552 onwards.
60 A recent analysis of the most recent case law confirms this finding; see Thévenaz, op cit at note 2, at 161 onwards.