INDEX

INTRODUCTION

Trust is defined as "*An equitable obligation (ie a duty imposed by the law of equity), binding the trustee to deal with property over which he has control (the trust property), for the benefit of persons (the beneficiaries), of whom the trustee may be one, and any one of whom may enforce the obligation."*[1]

According to the definition, this instrument is classified as "equitable," which means that it may be enforced in equity. Equity is a legal discipline within English law that emerged in the 14th century as a response to the inflexibility of the Common Law system. Common Law had become inflexible, constraining judges to a fixed set of activities that could not be expanded at their discretion. The trust originates from this area of English law, which is inherently English as equity originated in England. To have a complete understanding of this instrument, it is indispensable to analyze its fundamentally Anglo-Saxon nature, as it stems from a legal branch that is absent in other continental states. This poses a substantial obstacle, primarily involving the understanding of trust, followed by its acknowledgment and spread.

The trust, with its unique characteristics, has been widely utilized in several legal domains, surpassing geographical and legal limitations. The notion is not only exported as a legal concept but it is also applied in other legal domains beyond its original intentions, leading to the development of creative applications for this instrument. Trust is characterized by flexibility and diversity, which enable it to control a wide range of legal issues, both domestically and internationally.[2] This allows for cross-border activities to be conducted

[1] This definition was taken from *LexisNexis*. http://plus.lexis.com/document//?pdmfid

[2] Trust in its flexibility aligns and reflects its native legal system. The Common Law system is characterized by its flexibility due to its reliance on judicial precedents rather than rigid statutory codes. This allows judges to interpret and apply the law in a manner that can adapt to changing societal norms and unique case circumstances. Unlike Civil Law systems, which are primarily based on codified statutes and comprehensive legal codes, Common Law evolves through the decisions made in individual cases, creating a dynamic and adaptable legal framework. This precedent-based approach enables the Common Law to respond more quickly to new and emerging issues, ensuring that the legal system remains relevant and effective in addressing contemporary challenges

through this institution. The adaptable nature of trust has both good and bad implications. It can be beneficial in valid legal settings, but it can also be readily misused for illegal purposes.

The improper utilization of trusts, which will be further examined, has already been observed in its country of origin, causing concern among nations that have acknowledged the trust or seek to adopt it into their legal framework. The major challenge about the trust, particularly its exporting and attempts to transplant it into non-Anglo-Saxon or Romano-Germanic legal systems, is in comprehending its ambiguous and adaptable nature, which mirrors the underlying legal framework that gave rise to it. This parental law is limited to a certain territory and presents difficulty for jurists from other continents to understand and adapt to a legal system that is fundamentally different from the Romano-Germanic systems, which are mostly based on civil law.

Although understanding the notion of trust was not essential in the past when it was not commonly recognized or used, the current trend of people and assets moving around, particularly in circumstances involving civil law nations, has made it imperative to have a complete understanding of this instrument. The Hague Trusts Convention, convened on July 1, 1985, has provided crucial assistance to continental jurists in understanding the notion of trusts. This has greatly contributed to the recognition of trusts in countries that do not have common law systems. The Convention is essential in this study since it established an international legal framework for acknowledging the legitimacy of trusts. It may be roughly interpreted as aiming to provide the appropriate law for trusts and manage their recognition by specifying the consequences of recognition. By ratifying and implementing the Convention, governments agree to abide by a standardized set of criteria regarding disputes and recognition for specific types of trusts. The Convention introduced a novel framework for these regulations, offering remedies that improved and streamlined the acknowledgment of trusts and their consequences across different countries. Following the year 1992, when the Convention came into effect, several countries made endeavors to elucidate the significance and consequences of the regulations established by the Convention.

Switzerland is one of the countries that have embraced the Convention and employed it as a legal framework for managing and using trusts. Switzerland distinguishes itself from

other European nations by its recent endeavor to incorporate this Anglo-Saxon institution into its legal system, allowing the Code of Obligations to govern the institution without relying on foreign law. The Swiss Code of Obligations was proposed to be amended, and a consultation process was conducted from January 12, 2022, to April 30, 2022, to discuss the initial proposal for implementing a Swiss trust. This process highlighted the need for a new estate planning tool and recognized that the introduction of trusts could enhance the competitiveness of the Swiss financial market. The consultation procedure concluded in Bern on September 15, 2023. On September 15, 2023, the Federal Council acknowledged the outcomes of the consultation process on the implementation of a Swiss trust. Currently, there is a lack of sufficient political agreement to implement a trust in accordance with Swiss legislation. Specifically, the tax legislation measures were decisively rejected during the consultation. As a result, the Federal Council has chosen not to create a written statement and suggests that Parliament eliminate the proposal.

The Swiss example demonstrates how trust has become widely spread and accepted over time, to the extent that civil law nations are now seriously contemplating permanently integrating this Anglo-Saxon institution into their legal systems. However, the strategy to implement the Swiss trust faced several challenges that finally resulted in its rejection. Although the legislative dysfunctions were recognized, stakeholders did not reach an agreement on the real necessity of a Swiss trust. The suggested tax treatment of trusts, especially for irrevocable discretionary trusts, encountered significant resistance and led to a blockage of the project. Special concerns were expressed over the possible abuse of Swiss trusts and the adverse consequences on Switzerland's standing. In lieu of implementing the trust, proposals were put up to amend the legislation pertaining to family foundations. The procedure was further hampered by the constraints of incorporating the trust, which is a common law entity, into Switzerland's civil law system. Considering these elements collectively, it was decided not to proceed with the implementation of the Swiss trust.

The paper will analyze the origins of the Trust in English law and its equitable nature. It will also explore the key features of this institution and the related terminology.

Subsequently, there will be an examination of the legal domains in which the trust has been employed and the possible adverse implications.

After this investigation, it will be required to analyze the Hague Convention as a fundamental and established framework in the European context for the acknowledgment and admission of trusts into civil law nations. Switzerland's acceptance of the trust is based on this recognition, and it follows the terms of the Convention for the use of this instrument.

The analysis will specifically examine the Swiss trust, emphasizing its key features and typical lawful applications within a civil law jurisdiction. Additionally, it will address the concerns raised during the consultation process, which ultimately resulted in the rejection of the proposal due to the trust's ambiguous nature.

In conclusion, this analysis will address the reasons for the rejection of the plan in Switzerland, which may align with the concerns of countries that share an analogous legal framework.

CHAPTER ONE

THE TRUST IN ENGLISH LAW

1.1. The historical origin and evolution of the trust

The establishment of the Trust is a result of the branch of English law called equity. Hence, the initial objective will be to provide a broad understanding of the concept of equity. Initially, there existed two separate courts that employed disparate legal frameworks. English law comprised common law, which was enforced in the three Courts of common law, and equity, which was enforced in the Court of Chancery.

From 1250 onwards, a system of judicial law, known as judge-made law, was formed. This system did not originate from Roman law, but rather from local conventions. It was a standard body of law that was widely implemented in England and Wales. The common law, which has evolved consistently since its inception, remains vibrant and has a promising future. It is the result of applying legal common sense to the evolving societal needs, and is implemented through reasoned discussions based on legal principles established in ancient

precedents. Consequently, it represents the most dynamic and forward-thinking aspect of English law.[3] However, despite its excellence, common law was not exempt from significant flaws and quickly proved insufficient in addressing the grievances experienced by plaintiffs. Consequently, the plaintiffs, dissatisfied with their claims, turned to petitioning the King for justice. Due to the King's inability to personally handle all these complaints, he directed them to the Chancellor. Therefore, commencing in the fourteenth century, the Chancellor commenced the process of listening to petitions and commencing his extensive judicial profession. Prior to approximately 1600, Chancellors did not possess legal expertise and administered justice based on their own sense of morality. Subsequently, throughout that time, religious officials were replaced by legal experts, and equity evolved into a legal framework that relied on case law derived from previous rulings, rather than the concepts of a specific Chancellor. Equity, as contrast to common law, evolved to be the portion of the English legal system that was enforced in the Courts of Equity, under the guidance of the Chancellor. [4]

The Trusts have their origins deeply rooted in the equitable system derived from the "use of lands."[5]

Land ownership initially posed significant obligations as a result of the feudal characteristics of common law, prompting landowners to seek ways to alleviate these constraints. The land was handed to specific individuals for the benefit of the Friars. The

---

[3] Cheshire, G. C. , *Il concetto del 'Trust' secondo la Common Law inglese*. G.Giappichelli Editore, Torino 1998.

[4] *Id,* p.12

[5] A trust was known in ancient times as a “Use”, which existed prior to the enactment of the Statute of Uses (St. 27 Henry VIII.c.10) in 1535. A “Use” is generally described as “a device for the ownership of property, whereby one person became the owner of the legal title, which he held for the benefit of a third party”

Edward J. O’Toole, Law of Trusts (Brooklyn, N.Y., s.n.), 1). Modern trusts are, for the most part, an outgrowth of the practice of enfeoffing to “Uses” which prevailed in England in the Middle Ages.

noun "opus" underwent a gradual transformation, evolving into "oes," then "ues," and ultimately settling on "use."

Private landowners saw the practicality of adopting this approach, and it rapidly became customary for an individual A to transfer their land to X, Y, and Z for A's benefit. The Chancellor ensured that the use did not infringe upon the legitimate ownership rights of X, Y, and Z as established by common law. He did not dispute the fact that X, Y, and Z were the owners.[6] Instead, he admitted it. However, he also argued that this legal ownership, as defined by common law, should be utilized for the advantage of A in accordance with the initial arrangement. Utilization results in a duality of ownership, namely the division between legal and equitable ownership. The uses rapidly gained popularity and were embraced by the majority of landowners. However, in 1535, they faced significant opposition from King Henry VIII. The King, as the feudal master of the entire national territory, suffered the greatest injury from land uses. This is because a significant portion of his revenue relied on payments made by landholders, and the practice of placing land in use allowed many of these payments to be effectively avoided.[7]

Consequently, the King advocated for the implementation of the Statute of Uses, with the intention of completely and permanently eliminating uses. The elimination of uses was perceived as a significant detriment by the majority of landowners, prompting them to collaborate with lawyers in order to reinstate the previous conditions. [8]They achieved success precisely one century after the enactment of the Statute, and this outcome was attained not by revoking the Statute itself, but by means of judicial interpretation. The strategy employed was remarkably straightforward and unsophisticated, to the point where it may be embarrassing to scrutinize it in front of an international audience. The sequence of events

[6] Atkins S,, *Equity and Trusts*, 1st ed, New York, Routledge, 2013,p. 24-53.

[7] Banks, *Lewin's Practical Treatise on the Law of Trusts*, 1.

[8] *Ibid* (a "Use" was not subjected to the incidents of feudal tenure, such as forfeiture for treason or felony, wardships or marriage). See also: Bogert, Handbook of the Law of Trusts, 6 (a "Use" was used to protect the land from "the rights of the lord under feudal tenure, the rights of creditors, and the rights of dower and courtesy")

unfolded as follows: rather than giving the land to X, Y, and Z for the purpose of A, the land was instead transferred to X, Y, and Z for the purpose of B, which in turn was intended to serve the purpose of A. [9] Once they have been reestablished, the uses are referred to as Trusts.

1.2. The concept of Modern Trust

The modern concept of trust is a more extensive and intricate establishment compared to its historical use, including a wide range of assets and human endeavors. It possesses three distinct attributes:

The scope of the trust encompasses more than just land, extending to include objects that are not necessarily related to property. Many wealthy individuals in England establish a settlement when they get married. This involves transferring specific amounts of money to trustees who are responsible for distributing the income to the husband and wife during their lives. Afterward, the capital is divided among their children. The trustees own legal ownership of the capital, while the family members possess equitable ownership. [10]

The regulations pertaining to trusts are more extensive and detailed. Trust law has expanded significantly, resulting in an augmentation of the rights and responsibilities of trustees. The relevant portion of the law is found in the Trustee Act 1925, which comprises 71 extensive sections, as well as in a lengthy sequence of judicial rulings. It is a legal field that has a significant impact on everyday life, as it is uncommon to find an educated English

[9] In the Middle Ages, a "Use" was most frequently created by a feoffment to A and his heirs for the use of B and his heirs. Originally, the only pledge for the due execution of the trust was the faith and integrity of the trustee. The courts of common law did not recognize the claims of the knights or their beneficiaries because no writ to file a claim existed for that purpose. Nonetheless, it was in the reign of Richard II that the writ of subpoena was invented to summon the trustee into the Court of Chancery to answer under oath the allegations of trust's beneficiaries. The Court of Chancery began to enforce "Uses" and trusts in the early part of the fifteenth century. See: George G. Bogert, Handbook of the Law of Trusts (West Publishing Co., 1921), 9; Walter Banks (ed.), Lewin's Practical Treatise on the Law of Trusts (Sweet & Maxwell, 1928), 1.

[10] OpenOwnership, "An Introduction to Trust"(July 2021)

individual who is not a trustee for some purpose. The obligations and duties of a trustee are of a grave nature. In order to fulfill their duties as trustees, individuals must possess a precise understanding of the terms of the trust, demonstrate unwavering loyalty to the trust, reject any pressure from a single beneficiary who wishes to stray from the trust's rules, and diligently carry out their administrative responsibilities. They are obligated to fully accept and carry the burden of their responsibility, since they are not allowed to transfer the authority to make decisions to others and then avoid taking responsibility for their choices. The position of trustee is not a sinecure, as it is typically accepted because of friendship, close connection, or social duties. Failing to fulfill these responsibilities can lead to catastrophic consequences, as any violation, omission, overstepping, or incorrect execution of tasks mandated by the trust deed or the law is considered a breach of trust, for which the trustee is held personally accountable.

The concept of constructive trusts forces several individuals to assume the role of trustees involuntarily. The principle asserts that if an individual in a position of trust receives any personal advantage from that position, they are obligated to utilize that benefit in their capacity as a trustee. This notion encompasses individuals such as agents, auctioneers, brokers, corporate directors, and partners.

1.3. Main Aspect: Individuals, Subject, and Object of the Trust

In legal terms, the establishment of this trust and the individuals involved in it are assigned specific designations, which are as follows: The individual who transfers their property to benefit a third party is referred to as the 'settlor'. The individual who establishes a trust might be referred to as "settling" assets, with the intention of benefiting a third party. The settlor can also be labeled as 'transferring property into a trust'. The recipient of the property is the individual to whom the settlor entrusts the property. He is commonly referred to as the 'trustee'. The trustee is entrusted by the settlor, to oversee the property for the benefit of the third party. The trustee holds legal ownership of the property. It is important to mention that the settlor typically appoints multiple trustees for administrative purposes. The individual

who will receive the benefits from the property, the third party, is referred to as the 'beneficiary'. The beneficiary possesses the beneficial, or equitable, ownership of the property. [11]

The beneficiary can be an individual who will be identified either by name or by a specific description, such as "my daughter". Alternatively, the beneficiary can be a designated group of individuals, such as "children," "nephews," or "relatives." It may also encompass the settlor's 'heirs', referring to individuals who have the right to inherit upon the settlor's demise, or 'issue', which includes any offspring of the settlor. These groups of individuals are commonly referred to as a 'class of beneficiaries'.

The beneficiary (or group of beneficiaries) is often referred to as the 'object' of the trust because they are the intended recipients of the settlor's desires and the individuals the settlor intends to benefit. [12] The beneficiary's entitlement within the trust can either be vested or contingent. A 'vested interest' refers to a situation where the beneficiary already possesses or will definitely acquire an interest in something. If the beneficiary's interest is contingent upon the occurrence of a future event, that event must be assured to occur, such as the demise of another individual. The irrelevance lies in the uncertainty surrounding the timing of death. This scenario involves a situation where an individual is the primary recipient of a 'lifetime trust'. In this arrangement, assets are placed in a trust for the benefit of one person throughout their lifetime, and upon their death, the assets are transferred to a third party. If, however, the beneficiary's interest relies on an occurrence that is not guaranteed to happen, the beneficiary's interest will be considered a 'contingent interest' rather than a vested one. This is in opposition to the vested interest, which relies on the demise of another individual: since everyone eventually dies, the beneficiary's interest in that occurrence is founded on certainty, not uncertainty.

The last aspect of the trust that requires consideration is the substantive content of the

[11] *Id.,* p.10

[12] *Id.,* p.12

trust, which refers to the specific property transferred into the trust by the settlor. The term "trust property" or "subject matter" might be used to refer to this. The subject matter of a trust typically includes land or property, although it can also encompass money, stocks and shares, or any other form of personal property.

1.4. Main types of trusts and trust-related parties

I)Implied Trusts

Implied trusts are trusts that are not explicitly stated but are instead formed by the law in order to fulfill the expected intentions of the parties involved or to correct fraud and avoid unfair gain. There are two sorts of implied trusts:[13]

Constructive trusts are sometimes established by the principles of equitable obligations, also known as the law of equity, to rectify instances of unfair enrichment, particularly in cases involving fraud or misconduct. If Person A acquires legal ownership of a property from Person B by fraudulent means, deception, or hiding information, Person A becomes a trustee who legally owns the property on behalf of Person B, as determined by the principles of equity law. [14]

Resulting trusts are established under the principles of justice in order to give effect to the supposed purpose of the persons involved, as inferred from their actions or

[13] Henry Godefroi, *The Law relating to Trust and trustees* (5th edn, Stevens and Sons, 1927), 3. See also: Flint, Law of Trusts and Trustees as Determined by the Decisions of the Principal English and American Courts, 6 ("A frequent case of implied trust arises where words precatory, recommendatory, or expressing a belief are used by a testator, such as commonly known as precatory trusts").

[14] Leech, T. (2001) '*The use of trusts and constructive trusts in lawyers' claims'*, 20 October, http://www.maitlandchambers. com/articles. This is an excellent article written by a barrister specializing in trust law, which talks through the various different uses for trusts by lawyers. Brilliantly practical and really puts the area of trust law into context.

transactions. For example, if Party A provides funds to Party B for the purpose of purchasing a property, and Party B fails to return the property to Party A, the principle of equity dictates that Party B does not have full ownership of the property and is instead holding it in trust for Party A.[15]

II)Statutory Trusts

Statutory trusts arise when mandated by a statute requiring that under certain circumstances the property shall be held in trust. They, in contrast to express trusts, are established or inferred by the terms of legislation rather than by persons. Statutory trusts encompass various instances, with one prevalent example being the trust that is imposed upon individuals who acquire property jointly with another person, as outlined in sections 34(2) and 36 of the Law of Property Act 1925. The provisions stipulate that in cases where land is jointly owned by many individuals, it shall be held in a trust arrangement. Each party will hold the beneficial or equitable interest in the land on trust for the others. This circumstance generates an uncommon trust arrangement since it entails the property owners assuming the roles of both trustees and beneficiaries of the land.

III)Express trusts

Express trusts, often referred to as purposeful trusts in English law, are trusts intentionally established by a settlor, rather than being created by legislation or court

[15] See: Bogert, Handbook of the Law of Trusts, 92; Godefroi, The Law relating to Trust and trustees, 3; Atkins, Equity and Trusts, 24-53; John N. Pomeroy, A Treatise on Equity Jurisprudence (3rd edn, Bancroft-Whitney, 1905). In some writing, however, implied, constructive, and resulting trusts are classified separately. See, for instance: Flint, Law of Trusts and Trustees as Determined by the Decisions of the Principal English and American Courts, 5-6; Arthur Underhill, The Law Relating to Private Trusts and Trustees, 11-12; Jarius W. Perry, A Treatise on the Law of Trusts and Trustees (2nd edn., Brown Little, 1874).

decision. In order for this kind of trust to be established validly, it must adhere to all of the characteristics mentioned in the previous section.

Express trusts can have several classifications depending on their intended purpose. The title assigned to a trust may not accurately reflect its actual essence, objective, and system of governance. In order to comprehend the organization of a trust, including the involvement of various parties such as settlors, trustees, protectors (if applicable), beneficiaries or groups of beneficiaries, and the level of control each party has over the trust, it is crucial to ascertain both the nature of the trust and the provisions outlined in the trust deed, letter of wishes, or power of attorney that establish the trust. This is the main category, under which there are several variations of express trusts:

1. charitable trust, when the trustee has exclusive control over the management of the assets or property in a trust, and the goal of the trust is entirely for charitable reasons, such as alleviating poverty, promoting education or religion, or providing other benefits to the community.

2. bare trusts, refer to situations where a trustee holds property or assets without having any authority to decide how the income is distributed to the beneficiary or any active responsibilities to fulfill.

3. blind trust is a type of trust where the beneficiaries are unaware of the precise assets held in the trust. In this arrangement, a third party with fiduciary responsibility has full discretion to operate the trust.

4. discretionary trusts, provide the settlor the ability to transfer assets into a trust, where the trustee(s) have the authority to determine who will get the benefits and in what manner. A settlor may choose to do this to safeguard themselves from compulsory inheritance regulations. Typically, the settlor will compose a letter explaining their desires to the trustee. This is the most versatile and prevalent type of trust. Self-settled trusts refer to trusts where the person who creates the trust (settlor) can also receive benefits from the trust as a

beneficiary. From a technical standpoint, there is no significant distinction between the person establishing the trust and the assets held inside it.[16]

1.5. Modern uses for trusts

The trust, also known as equitable property, as previously seen, was created by landowners to liberate their lands from feudal limitations. It is certain that the trust effectively achieved its intended objective. However, it would be a significant error to view the trust just as a mechanism for transferring assets to a few persons who will then oversee and administer them for the advantage of someone else. Starting in the mid-seventeenth century, the trust became unnecessary for its original functions because the legal recognition of the freedom to dispose of property by will and the abolition of feudal obligations rendered it obsolete. However, rather than succumbing to a dignified demise, the trust gained renewed strength and discovered new areas to conquer. It was eventually utilized for purposes that were different from its original intention. Specifically, it was employed in the realm of public law, yielding outcomes that may appear peculiar to a non-native legal expert and often contradicting the principles of strict logic commonly found among continental jurists. [17]

Multiple branches of English law have widely employed the concept of the Trust and have gained substantial benefits from its implementation. Each of these domains has seen advantages in terms of flexibility, security, and organizational benefits provided by trusts, resulting in improved efficiency and effectiveness in legal and financial administration.

---

[16] For the purposes of this paper, a broader classification of trusts into express, implied, and statutory trusts has been used. However, there are other multiple classifications of trusts as well, such as simple or passive trusts and special or active trusts; lawful and unlawful trusts; public and private trusts; executed or executory trusts; revocable or irrevocable trusts; inter vivos or testamentary trusts; fixed or discretionary trusts.

[17] Cheshire, G. C. , *Il concetto del 'Trust' secondo la Common Law inglese*. G.Giappichelli Editore, Torino 1998.

I. ***Property Law***

I)Settlements

The trust has a major impact on property law by improving and expanding property settlements. A settlement is formed when a sequence of consecutive rights in land or money are created and transferred to different persons, either by a living act or a will. Each individual gradually obtains a certain share of the ownership rights. In England, compulsory heirship is not recognized, which means that a wealthy person has the freedom to will all their possessions to a charity or friend, possibly leaving their spouse and children without any financial resources. As a result, parents frequently demand that a potential groom establish a settlement of his assets to safeguard their daughter against potential financial instability in the future.

II)Monetary transactions

A standard financial transaction includes the transfer of legal ownership of assets to trustees. The trustees are the only owners of the securities, owning the shares in their own names. The settlement document would specify that the trustees are obligated to distribute the income to the husband and wife while they are alive, and after their deaths, distribute the capital among their offspring. This agreement establishes a life interest for the husband, prohibiting him from disposing of the capital, and confers the children with unconditional rights to sections of the capital, which they can even sell while their parents are still alive. This scenario reflects the historical practice in which lawful proprietors oversee assets for the advantage of others.[18]

III)Land settlements

The English legal framework of land ownership fundamentally diverges from Italian and other continental legal systems, since it acknowledges several levels of ownership rights. According to English law, it is not possible to own land itself; instead, one might own a legal

[18] *Id.,* p.33

right (estate) in the land. Estates can have different lengths of time and can be distributed among many individuals in a sequential manner. English law acknowledges four distinct kind of estates: fee simple, whole tail, life estate, and leasehold.[19]

The main objective of a land settlement is to ensure the long-term retention of the land within the family. This entails establishing a sequence of consecutive rights, such as a lifelong entitlement for the husband, a fixed annual payment for the widow, shares for the younger children, and an inherited property that cannot be sold or transferred for the eldest son. While these interests are implemented one after another, each beneficiary is granted an instant and specific share of the property, resulting in an intricate yet logical framework of property rights. After the husband dies, the oldest son, who has inherited the estate that cannot be sold or transferred, must fulfill the financial obligations of the widow and younger siblings before completely benefiting from his inheritance. Upon successfully resolving these claims, he will have the opportunity to transform his entailed interest into a fee simple once he becomes 21, therefore acquiring complete and unrestricted ownership. The Rule against Perpetuities serves to avoid the imposition of endless restrictions on the transfer of land, and this circumstance brings attention to its shortcomings.[20]

Trusts have a crucial function in settlements since they effectively separate the legal ownership from the equitable ownership. Within the context of stringent settlements, trustees assume the responsibility of safeguarding the interests of family members, but not possessing the legal ownership of the property. This means the trustee's name is on the deed and they have the legal authority to manage the property. The trustee, however, does not personally benefit from this ownership. The life tenant, often the husband in historical contexts, is not the trustee and does not have legal ownership. Instead, the life tenant is a beneficiary with the right to use and enjoy the property during their lifetime. This right is part of their equitable

[19] *Id.,* p.37

[20] The rule against perpetuities is a common legal rule in many trust law countries and requires that trusts be settled within a defined period of time and cannot exist in perpetuity or far beyond the lifetimes of the people living at the point of creation.

interest in the trust. Other beneficiaries, such as the widow and children, also hold equitable interests. These interests give them the right to benefit from the property without having legal title. The trustee manages the property for the benefit of all these equitable interest holders.

Instead, legal ownership is granted to the life tenant, who is typically the husband, while beneficiaries hold the equitable interests. However, the legal ownership of the property is given to the life tenant, usually the husband, while the beneficiaries share the equitable interests. This dual nature guarantees the retention of the property within the family while also ensuring the economic stability of the widow and children. Equitable ownership grants beneficiaries clear and tradable stakes in the property, showcasing the trust system's adaptability and efficiency in handling familial estates.

II. **Family Law**

Trust for the family

A considerable proportion of trusts are specifically established to safeguard the interests of families and their wealth. Trusts play a vital role in guaranteeing sufficient provision for both spouses and children in the case of the settlor's demise. For example, a settlor might establish a trust during their lifetime that gives their spouse the privilege of living in the family home until their death, while guaranteeing that the property would eventually be transferred to the children after the spouse's passing. This approach prevents the spouse from excluding the children from inheriting, a situation that may arise if the house were conveyed as an unconditional gift and the spouse subsequently entered into a new marriage.[21]

[21] Austin W. Scott and William F. Fratcher, Introduction to the Law of Trusts 2 (4th edn, 1991). On the uses of trusts, see also: Robert Dumont, "International tax and estate planning for high-net-worth families" Tax Notes International, 2010, 57(9), 785; Robert C. Lawrence III, International Tax and Estate Planning: A Practical Guide for multinational Investors (3rd edn, Practising Law Institute, 2017); Edward C. Halbach, "The Uses and Purposes of Trusts in the United States"; David Hayton (ed.) Modern International Developments in Trust Law (Boston: Kluwer Law International, 1999) 123, 133-142.

Trusts During Lifetime and Testamentary Trusts

Trusts, whether established during a person's lifetime (inter vivos trusts) or through a will (testamentary trusts), are essential tools in the realm of private client law. They offer a reliable, time-honored method for safeguarding and preserving assets across multiple generations. Despite evolving tax legislation, the core purpose of trusts—asset preservation—remains steadfast.

I. *Asset Protection*: Trusts safeguard family wealth against potential legal claims, creditors, or imprudent expenditure by beneficiaries. They guarantee the preservation of assets for future generations.

II. *Business Assets*: Family enterprises frequently employ trusts as a means of transferring ownership of company shares to a trust, so capitalizing on the benefits of inheritance tax reduction. This enables the transfer to take place without incurring inheritance tax fees, guaranteeing that the firm stays within the family and can provide for future generations.

III. *Specific Needs*: Parents or guardians have the option to establish trusts in order to meet specific requirements, such as financing their children's education or providing help for a kid with impairments. Trusts can also safeguard against the potential mismanagement of inheritance by placing finances under the jurisdiction of trustees, so preventing immature or irresponsible offspring from squandering their assets.

IV. *Inheritance Tax Planning:* In the realm of inheritance tax planning, trusts have traditionally served as a means to reduce or alleviate the financial obligations associated with inheritance taxes. A frequently employed tactic entails establishing a discretionary trust with a certain amount of cash, enabling trustees to allocate resources to the spouse or children. As the beneficiaries did not have a legal claim to the fund until chosen by the trustees, the assets of the trust were not considered part of the beneficiary's estate for the purpose of inheritance tax. Nevertheless, modifications implemented after October 2007, such as the

provision for a surviving spouse to transfer the unused nil rate band of the dead spouse, have reduced the efficacy of these trusts in the context of inheritance tax planning.[22]

III. **Bankruptcy and Insolvency Law**

Within the field of bankruptcy and insolvency law, trusts are utilized as a strategic mechanism to safeguard the concerns of creditors, especially in situations where enterprises encounter financial difficulties. Trusts offer a reliable method to protect assets from being seized by bankruptcy trustees or administrators, guaranteeing that the monies are allocated to the appropriate recipients.[23]

---

[22] Groves, C. and Tee, C. (2009) '*Where there's a will'*, Legal Week 11(2), 32, 34. A useful article discussing the use of trusts for inheritance tax planning, dealing with funds held on trust for children, lifetime trusts and discretionary trusts.

[23] Ruiqiao Zhang, "*The new role trusts play in modern financial markets: the evolution of trusts from guardian to entrepreneur and the reasons for the evolution*", 23(4) Trust & Trustees, 2017, 453, 454. Some of the features of trusts that make them attractive for commercial purposes include: "a) their inherent flexibility, usually providing expansive powers to the trustee(s) to conduct business, and little regulatory control (except for certain trusts, such as pension fund trusts, etc.); b) the independence of the trust property from the personal property of either settlor or trustee, a proprietary feature of the trust, which not only protects the trust assets from the claims of trustee's or settlor's personal creditors or spouse in the event of bankruptcy or divorce but also allows assets held for commercial transactions from that person's balance sheet, for insolvency risk management or taxation purposes; c) the segregation of legal ownership and beneficial ownership of trust property that offers inbuilt protections for beneficiaries and contracting third parties through the imposition of personal liabilities on trustees makes them attractive to investors; d) ability to circumvent legal obstacles, such as facilitating certain type of investments and taxation treatment; e) advantages of a trust over a company, for instance, no registration for their existence, less formalities, protection from company's business risks, including its risk of bankruptcy." (461)

Trusts are commonly utilized to protect vulnerable persons, such as clients of faltering enterprises, from incurring financial losses. Two prominent techniques employed in this context include the utilization of trust accounts to segregate assets and the construction of Quistclose trusts.

*I.Segregating assets :*If a person who owes money anticipates future financial problems, they have the option to establish a trust account to safeguard customer payments until their orders are completed. This strategy efficiently safeguards the clients' funds from being seized by a trustee in the event of bankruptcy. [24]

II.Quistclose Trusts: A Quistclose trust provides an additional level of safeguard for creditors.[25] Quistclose trust is created when a lender gives money to a borrower along with explicit instructions on how it should be used. [26]

IV. ***Trusts and Investment Law***

Trusts play a crucial role in the administration of pension schemes and investment trusts. They act as entities for the purpose of keeping and increasing money on behalf of investors or their chosen beneficiaries. These trusts guarantee that the money are handled in

[24] Re Kayford Ltd [1975] 1 WLR 279 is an example that demonstrates a company's establishment of a trust account to protect client monies prior to entering insolvency. This technique guarantees the security of clients' prepayments, preventing them from being included in the bankrupt estate.

[25] Quitclose Trust derived from the influential legal case Barclays Bank Ltd v. Quistclose Investments Ltd [1970] AC 567 HL

[26] . In the Quistclose case, Quistclose Investments provided a loan to Rolls-Razor Ltd with the explicit requirement that the borrowed monies be utilized solely for the purpose of compensating shareholders. The monies were deposited into a segregated bank account, which is separate from the company's main finances. Upon Rolls-Razor's liquidation, the court acknowledged the establishment of a trust, in which Rolls-Razor acted as the trustee and the stockholders served as beneficiaries. Due to the company's insolvency, the trust's objective was thwarted, resulting in the monies being returned to Quistclose Investments through a subsequent trust.

a responsible manner with the goal of gradually enhancing its worth, ultimately benefiting the chosen receivers.

Retirement plans

Pension programs involve the allocation of funds by individuals, employers, or both, as payments to a designated fund. The trustees of this fund are responsible for investing the donations in order to create returns that would ensure financial stability for the beneficiaries in their retirement. The trustees have a legal obligation to carefully manage these assets, using investing methods that consider both growth and risk management. Their duties encompass the task of choosing suitable investment options, overseeing performance, and assuring the fund's financial stability and ability to fulfill future obligations to retired individuals.[27]

Equity investment vehicles

Investment trusts function in a similar manner by combining funds from several investors to establish a diversified investment portfolio. The trustees or managers of these funds have the responsibility of making investment decisions with the goal of maximizing returns while effectively controlling risks. Investors get shares or units in the trust, and the value of these shares fluctuates in accordance with the performance of the underlying investments. The proceeds derived from these investments, in addition to any appreciation in value, are ultimately disbursed to the recipients, either through periodic disbursements or following the liquidation of their ownership stakes.[28]

V. ***Data Protection***

[27] Hayton, D. (2006) '*Pension trusts and traditional trusts: dramatically different species of trusts',* Conv 229. Th is article gives a thorough and in-depth analysis of the practical workings of a pension trust in contrast to ordinary trusts and gives arguments for reform of the law in this area.

[28] OpenOwnership, "An Introduction to Trust"(July 2021)

In recent times, there has been a rise in the creation of trusts known as "data trusts" that aim to manage data for the benefit of the public. These trusts are specifically designed to offer impartial and responsible oversight of data as fiduciary stewards. Data trusts are legally established entities that serve as independent custodians of certain data, with the purpose of benefiting a collective of organizations or individuals, as described by the Open Data Institute. [29]

According to the Open Data Institute, a data trust is a legal arrangement where individuals and organizations that possess data, known as settlors, are involved. The [settlors] delegate a portion of their authority to manage the data to a group of trustees, who thereafter determine the data's accessibility and permissible uses. The data trust's beneficiaries encompass those who are granted data access, such as researchers and developers, as well as the individuals who get benefits from the outcomes generated by utilizing the data. The Open Data Institute explains that data trusts require a trustee, who can be an independent individual, group, or organization, responsible for managing the data. The trustee has a fiduciary obligation, which means they must handle the data with impartiality, prudence, transparency, and undivided loyalty.[30]

1.6.Potential for illicit applications due to its basic features.

The intrinsic attributes of a trust, including the division between legal and beneficial ownership, make trusts highly advantageous for those seeking to create distance and conceal their association with any property or assets, whether acquired lawfully or unlawfully. By establishing a trust, the settlor can transfer legal ownership of the property while retaining indirect control over the assets. The extent of this control is determined by the specific

[29] Jack Hardinges, "Defining a 'data trust'" Open Data Institute, 19 October 2018

[30] Jack Hardinges, "What is a data trust?" Open Data Institute, 10 July 2018

provisions outlined in the secret trust deed or the agreement between the parties, such as the appointment of a protector or the inclusion of a letter of wishes. A remote control of this nature enables a criminal to separate their assets from their illegal activities and offers them protection for those assets.

Trusts have been extensively employed to unlawfully protect assets from lawful creditors, such as in situations involving bankruptcy, financial difficulties, family disputes, divorce, and legal disputes. This is because once the settlor transfers the assets to a trust, the assets are generally no longer considered the settlor's personal possessions.

This implies that the assets of a trust remain in a condition of "*ownership limbo*" until they are transferred to the beneficiary or group of beneficiaries. Consequently, the assets held in the trust cannot be considered as personal wealth by any of the people concerned, with the intention of receiving remuneration.[31]

This aspect of trusts has been utilized in several countries to incentivize the creation of trusts within their legal framework. For example, several regions including the British Virgin Islands, the Cayman Islands, the Cook Islands, Nevis, and many states in the USA have various forms of "asset protection trusts." Although these structures can be established for lawful intentions, their confidentiality can be used for unlawful objectives and "may be misused specifically to prevent creditors (including ex-spouses and rightful heirs) from accessing one's assets."[32]

In addition, several countries have the option of not recognizing foreign laws and foreign judgments within their trust systems, hence increasing their appeal to trust enterprises.

In recent years, there have been several investigations and controversies that have brought attention to the misuse of trusts for illicit activities. Notable reports that address this

[31] Knobel, "'*Trusts: Weapons of Mass Injustice?' A response to the critics"*

[32] Andres Knobel, "*Beneficial Ownership and Disclosure of Trusts: Challenging the Privacy Argument",* Tax Justice Network, 17 December 2016

issue include the *World Bank's Puppet Masters study*[33], the FATF's Concealment of Beneficial Ownership report, and the Panama Papers, which exposed the involvement of trusts in significant cases of tax evasion, money laundering, and corruption scandals. [34]

Trusts are frequently employed as the final level of concealment in intricate company ownership arrangements, with the purpose of obscuring the beneficial owner and concealing a criminal's association with illegal cash.

Three primary categories of *express trusts* have been identified as most susceptible to criminal exploitation: discretionary trusts, charitable trusts, and self-settled trusts. This is largely attributed to the inherent characteristics of these trusts, which pose challenges in determining their ultimate beneficial owner.

Discretionary Trust is frequently exploited for illicit activities because of its inherent flexibility, which grants the trustee the authority to independently make decisions on the management of trust assets and the allocation of benefits to beneficiaries. In a discretionary trust, the trustee has the authority to pick the timing, recipients, and manner of distributing trust assets. However, these decisions may have been predetermined by a letter of wishes. Beneficiaries will own a contingent interest in the trust until the trustee makes a decision and distributes the trust assets. This contingent interest will safeguard their assets from creditors, spouses, and other legal proceedings. Furthermore, a concern arises regarding the disclosure of beneficial ownership (BO) in trusts. It is unclear who should be reported as beneficiaries to the appropriate authorities or to a centralized BO register, in the case where no one has been identified or has received the distribution of trust assets.

Charitable trusts have been proven to be misused for criminal activities, as highlighted in several case studies and publications. [35]The main reason for this is the broader public confidence they have gained, together with certain benefits they have been given in

[33] Emile van der Does de Willebois et al., The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It, StAR, UNODC, and World Bank, 2011

[34] Concealment of Beneficial Ownership, FATF, (Paris: FATF, July 2018)

[35] See: "*Report on abuse of charities for money-laundering and tax evasion*", OECD, 2009

different jurisdictions, such as tax exemptions and exemptions from the rule of perpetuities. For example, a trust established to safeguard vulnerable children might be utilized to conceal the gains from corrupt activities, engage in the illegal process of money laundering, or escape tax obligations.

Self-settled trusts are trusts in which the person creating the trust (settlor) can also receive benefits from the trust. Due to the lack of significant distinction between the settlor and assets, these trusts are frequently considered susceptible to being used for illicit activities.[36]

CHAPTER TWO

RECOGNITION OF THE ENGLISH TRUST IN EUROPE AND CIVIL LAW SYSTEM

[36] Self-settled trusts are often criticized for not adhering to the fundamental purpose of trusts i.e. to divest the ownership of assets for the benefit of a third party. For more details, see: Knobel, "'Trusts: Weapons of Mass Injustice?' A response to the critics", 32; Worthy, "Don't take it on trust", 7-8

2.1. The pre-Convention period in civilian jurisdictions: legislation pertaining to disputes and the non-recognition of trusts in their current form

In order to comprehend the impact of the Convention on the conflict rules governing trusts in civilian countries, it is beneficial to examine how trusts were handled under the previous conflict rules. While generalizations might be challenging, the regulations typically lacked explicit provisions regarding trusts. Moreover, neither local legislation nor court rulings in these nations permitted the recognition of trusts.

The lack of specialized local regulations to address trusts can be attributed to the fact that civilian jurisdictions did not include trusts into their domestic laws, either completely or as significant concerns.

Prior to the ratification of the Convention, trusts were seen from the perspective of conflict rules in civilian countries as a prime illustration of the confusing impact of an unfamiliar foreign organization[37]. In practice, this ambiguity was resolved using one of the following methods.

Initially, the trust being discussed may undergo a process of *transposition*, where its different elements are examined individually and then converted into the relevant words of the conflict rules of the *lex fori* before a decision on choice of law is reached. Furthermore, the failure to effectively manage the institution may lead to the settlor's aims not being realized, thereby diminishing its efficacy.

An illustrative instance of the first resolution may be found in a historical and widely recognized case involving trustees who owned land in Sardinia, Italy, through an English

[37] K. Lipstein, 'Trusts', in *International Encyclopedia of Comparative Law* (Tubingen: Mohr, ¨ 1994), vol. III, ch. 23, §5.40. In this section of the *International Encyclopedia of Comparative Law*, K. Lipstein examines the treatment of trusts under the conflict of laws rules of civilian jurisdictions prior to the adoption of the Hague Trusts Convention. He highlights the difficulties faced by these legal systems in dealing with the unfamiliar institution of trusts and the confusion that arose as a result.

testamentary trust for the purpose of selling it. This trust granted a right to the testator's children during their lifetime, with the property passing on to their descendants afterwards.

The trust in question was initially subject to a ruling in England in 1894, and then, two generations later, by an Italian court in 1956.[38]

The Italian court, responsible for deciding who should receive the monetary compensation for the government's seizure of the land, ruled that the nature of the property rights in the land located in Italy should be determined according to the lex situs. The beneficiaries of the trust were seen as the legal successors of the person who created the trust, while the trustee was seen as a unique type of administrator with extensive powers similar to those of a representative, agent, custodian, and fiduciary administrator.[39]

There was little uncertainty that this method of proceeding was scarcely adequate. While it may be acknowledged that the particular decision made based on the facts is acceptable in terms of the result, this is not always true as the process by which the decision is reached is unsatisfactory in terms of being able to predict and understand the law. The reason is based on the fact that it relies solely on the arbitrary selection of local legal categories to frame questions that should instead be resolved by respecting the norms of foreign law. The denaturation of the foreign legal institution is therefore inherently dubious, particularly from the perspective of attorneys who have been educated in the foreign law that

[38] *Re Piercy [*1894] 1 Ch. 83; see F. Weiser, *Trusts on the Continent of Europe* (London: Sweet & Maxwell, 1936), pp. 69--70. The case of *Re Piercy* and its subsequent treatment by an Italian court in 1956 is discussed by F. Weiser in his book *Trusts on the Continent of Europe*. The case illustrates the challenges encountered by civilian courts when confronted with trusts established under English law, particularly in terms of characterizing the rights and obligations of the parties involved

[39] Tribunale di Oristano, 15 March 1956, Foro it., 1956, I, 1019. The decision of the Tribunale di Oristano in 1956 demonstrates the difficulties faced by Italian courts in interpreting and applying foreign trust law within the framework of domestic legal concepts. The court's characterization of the beneficiaries as legal successors and the trustee as a type of administrator with extensive powers highlights the inadequacy of this approach in capturing the true nature of the trust relationship.

governs the case. [40] When the United Kingdom and Ireland joined the European Economic Community in 1973, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 was modified. [41]

This modification included a special rule that allowed for the possibility of litigating trust matters in a different country. According to this rule, a person who is a resident of one country can be sued in another country in their capacity as a settlor, trustee, or beneficiary of a trust.

---

[40] For a personal testimony on this point: D. M. Waters, *'The Hague Trusts Convention Twenty Years On*', in M. Graziadei, U. Mattei and L. Smith (eds.), "*Commercial Trusts in European Private Law*" (Cambridge University Press, 2005), p. 64. In his contribution to the book *Commercial Trusts in European Private Law*, D. M. Waters shares his personal perspective on the shortcomings of the approach taken by civilian courts in dealing with trusts through the process of transposition. He emphasizes the unsatisfactory nature of this method, particularly from the point of view of lawyers trained in the foreign law governing the trust

[41] *Brussels Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968,* article 5(6), as amended by the Convention of 9 October 1978 on the accession of Denmark, Ireland and the UK to the Brussels Convention, OJ 1978 L 1. 74. This has been replaced ,except for Denmark , by the identical provision of the EC regulation 44/2001 of 22 December 2000, on jurisdiction and the enforcement of judgments in civil and commercial matters, article 5(6). The parallel Lugano Convention, concluded among the EU countries and the EFTA countries (Iceland, Norway, Switzerland), has an identical rule. The scope of article 5(6) of regulation 44/2001 has been considered for the first time by the Court of Appeal for England and Wales in *Gomez v. Gomez-Monche Vives* [2008] EWCA Civ 1065; [2009] Ch. 245 (CA (Civ Div)). *See* the comment by D. J. Hayton, *'Trust Disputes within Article 5(6) of Brussels I'* (2009) 23 Trust L.I. 3. The amendments to the Brussels Convention in 1978, following the accession of Denmark, Ireland, and the UK, introduced special rules on jurisdiction for trust matters (article 5(6)) and choice of jurisdiction clauses in trust instruments (article 17(c)). These provisions were later incorporated into the EC Regulation 44/2001 (articles 5(6) and 23(4), (5)), which replaced the Brussels Convention for all EU member states except Denmark. The parallel Lugano Convention, concluded between the EU and EFTA countries, also contains identical rules. The scope of article 5(6) of Regulation 44/2001 was first considered by the Court of Appeal for England and Wales in *Gomez v. Gomez-Monche Vives,* which is discussed in a comment by D. J. Hayton.

This trust can be created through a statute, a written document, or an oral agreement that is later put into writing. The lawsuit would take place in the country where the trust is established. Similarly, the Brussels Convention was modified to include the choice of jurisdiction clauses in cases involving trusts. These clauses grant exclusive jurisdiction unless otherwise specified.[42]

These clauses indicated that questions concerning jurisdictional difficulties with trusts were not addressed by other regulations in the Brussels Convention, such as those pertaining to contractual duties or businesses. The Rome Convention on the law applicable to contractual commitments, established in 1980, reaffirmed this approach by explicitly excluding trusts from its scope of applicability due to their non-contractual basis.

Regarding these laws, it is important to mention that the inclusion of the concept of domicile of the trust in the Brussels Convention (now replaced by Regulation 44/2001) is a recognition that the trust may be considered as a separate entity with its own domicile. [43]This concept was discussed in certain regions of Continental Europe during the drafting of the Convention, and now garners some backing in the USA. However, it was considered unconventional in England and Scotland, where it is met with skepticism due to the

[42] Article 17(c). *See* now EC regulation 44/2001 of 22 December 2000, articles 23(4), (5). The amendments to the Brussels Convention regarding choice of jurisdiction clauses in trust instruments (article 17(c)) were carried over into the EC Regulation 44/2001 (articles 23(4), (5)). These provisions recognize the importance of party autonomy in selecting the competent court for trust-related disputes and give effect to exclusive jurisdiction clauses in trust instruments, unless otherwise specified.

[43] *See* Convention on the Law Applicable to Contractual Obligations, Rome, 19 June 1980, article 1(2)(g), and now the identical provision of Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), article 1(2)(h). The Rome Convention on the law applicable to contractual obligations of 1980 (article 1(2)(g)) and its successor, the Rome I Regulation (EC) No. 593/2008 (article 1(2)(h)), explicitly exclude trusts from their scope of application. This exclusion recognizes the non-contractual nature of trusts and the need for separate conflict of laws rules to determine the applicable law governing trust-related issues.

perception of trusts as separate entities that should not be equated with corporations or other organizations.

Undoubtedly, the rule outlined in the *Brussels Convention* (and now in regulation 44/2001) introduces complexity to the overall narrative in terms of functioning. The courts of the contracting State that are handling the case have a duty to use the private international law principles of the forum in order to ascertain the domicile of the trust. However, it should be noted that these conflict rules may not accommodate trusts or acknowledge the concept of a trust having a domicile.[44]

In order to address this challenge, the secretariat of the Hague Conference on Private International Law proposed the concept of EU-wide ratification of the Trusts Convention. This would ensure that all member states of the EU had regulations on the legal residence of trusts and this intention led to the drafting of the Hague Convention in 1985.[45]

---

[44] *See* now EC regulation 44/2001, above, note 28, article 59(3). The Lugano Convention contains an identical rule. EC Regulation 44/2001 (article 59(3)) requires the courts of EU member states to apply their national conflict of laws rules to determine the domicile of a trust for jurisdictional purposes. This provision acknowledges the potential challenges that may arise if these national rules do not recognize the concept of trust domicile or provide specific provisions for trusts. The parallel Lugano Convention, concluded between the EU and EFTA countries, contains an identical rule

[45] In the UK these rules were introduced by the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929), Sch. 1, para. 12. This fixes the domicile of the trust in a part of the United Kingdom *'if and only if the system of law of that part is the system of law with which the trust has its closest and most real connection.*' Cf. *Gomez v. Gomez-Monche Vives [*2008] EWCA Civ 1065; [2009] Ch. 245 (CA (Civ Div)) and the comment by Hayton, "*Trust Disputes within Article 5(6) of Brussels I".* The proposal by the Hague Conference on Private International Law for EU-wide ratification of the Trusts Convention was intended to address the challenges posed by the lack of specific conflict of laws rules for trusts in EU member states, particularly in light of the Brussels Convention's provisions on jurisdiction in trust matters, which required a determination of the trust's domicile. The drafting of the Hague Trusts Convention in 1985 was a direct response to this need for harmonized conflict of laws rules for trusts across the EU. In the UK, the Civil Jurisdiction and Judgments Order 2001

2.2. The formulation of the Hague Convention: challenges faced during its drafting

In order to address the fragmented situation, as mentioned in the previous paragraph, and develop a generally accepted text, the participants of the Fifteenth Session of the Hague Conference on Private International Law faced many challenging issues. [46]

One initial crucial issue was determining the specific group of lawful connections regulated by the Convention. [47]

---

introduced rules for determining the domicile of a trust within the United Kingdom, based on the system of law with which the trust has the closest and most real connection. The case of *Gomez v. Gomez-Monche Vives* and the comment by D. J. Hayton discuss the application of article 5(6) of the Brussels I Regulation (EC) No. 44/2001 in the context of trust disputes and the determination of trust domicile.

[46] Hague Conference on Private International Law, *Examination by the European Community of Existing Hague Conventions*. Note Drawn up by the Secretary General of the Hague Conference on Private International Law (last consulted on 10 August 2010). This note, prepared by the Secretary General of the Hague Conference on Private International Law, examines the existing Hague Conventions from the perspective of the European Community. It highlights the challenges faced by the participants of the Fifteenth Session of the Hague Conference in developing a generally accepted text for the Trusts Convention. The note points out that while the Convention lists the elements that establish the system of law with which the trust is most closely connected in the absence of an express choice of law (article 7), it does not address the concept of trust domicile.

[47] For a short overview of the preparation of the Convention, *see* A. E. von Overbeck, *'Explanatory Report'*, in Proceedings. For an account by the former deputy secretary general of the Hague Conference: A. Dyer, *'International Recognition and Adaptation of Trusts: The Influence of the Hague Convention'* (1999) 32 Vanderbilt Journal of Transnational Law 989; and by the Canadian delegate at the Conference: Waters, '*The Hague Trusts Convention'*. These three sources provide valuable insights into the preparation of the Hague Trusts Convention and the challenges faced during the drafting process. A. E. von Overbeck's "*Explanatory Report*" in the Proceedings of the Fifteenth Session of the Hague Conference offers a concise overview of the Convention's preparation. A. Dyer, the former

Most private international law or uniform law agreements do not try to provide a specific definition for the institution they regulate. An example is the United Nations Convention on Contracts for the International Sale of Goods (1980), which does not provide a specific definition for the term "*sale*" within the Convention. This principle is often applicable to private international law conventions as well. These devices presuppose that their interpreters possess knowledge of the institution they are referring to and are capable of interpreting this reference in a global context. This strategy embodies the ancient concept that in legal matters, it is best to refrain from attempting to provide a specific description of what is to be regulated: *omnis definitio in iure periculosa est*.

Regarding an international legal document such as the Hague Trusts Convention, it was extremely difficult to circumvent this requirement. The absence of any explicit specification about the purpose of the Convention may have resulted in its insignificance. Indeed, when it comes to trusts, it cannot be assumed that there is a shared understanding of the institution in The Hague. [48]

The potential for disagreement in this matter was significant, particularly for lawyers who were not familiar with the legal systems of countries that have limited exposure to common law. However, common lawyers also faced challenges in this regard, as admitted by

---

deputy secretary general of the Hague Conference, discusses the Convention's influence on the international recognition and adaptation of trusts in his article "*International Recognition and Adaptation of Trusts: The Influence of the Hague Convention*" (1999) 32 Vanderbilt Journal of Transnational Law 989. D. W. M. Waters, the Canadian delegate at the Conference, provides his perspective on the challenges encountered during the drafting process in his work "*The Hague Trusts Convention*" .

[48] Waters, '*The Hague Trusts Convention*': *'the common lawyers have had their own problems in characterising the trust device*'. In this passage from his work "*The Hague Trusts Convention*" (note 27, p. 58), D. W. M. Waters acknowledges that even common law lawyers have faced difficulties in characterizing the trust device. This observation highlights the challenge in assuming a shared understanding of the concept of trusts among the participants at the Hague Conference, as even those from common law backgrounds have grappled with defining the nature of trusts

the Canadian delegate to the Convention in hindsight. The participants at The Hague faced a hurdle in formulating a practical understanding of trust. The task was deemed intrinsically challenging, not only because of the versatile nature of the term '*trust*', which makes it impossible to precisely define trust, but also because of the requirement of using terminology that can be universally comprehended across many legal systems. Any depiction of the institution that failed to acknowledge the difference between common law and equity would not have been considered a suitable conceptual foundation for the Convention. [49]

In Continental Europe and other non-common law jurisdictions, this difference is either meaningless or has a completely different meaning compared to common law states. Similarly, the proposal to mention trusts as a specific type of fiduciary relationship in the Convention was also deemed useless. Again, the authors of the Convention could not presume that the concept of a *'fiduciary connection'* would have the same interpretation in both common law and civil law states. Avoiding controversial topics also necessitated the delegates to bypass the longstanding intellectual puzzle over whether trusts establish responsibilities or property rights in support of beneficiaries. [50]

---

[49] As a classic dictum reminds, *Tito v. Waddell* (No. 2) [1977] Ch. 106, 227 : *'the first question is the sense in which that protean word has been used. The word, indeed, is one that may be found by the unwary to invite the comment Qui haeret in litera haeret in cortice'* (*'one who considers only the letter goes only skin-deep'*). This classic dictum from the case of *Tito v. Waddell* (No. 2) [1977] Ch. 106, 227, as stated by Megarry VC, emphasizes the importance of understanding the context in which the term "*trust*" is used. The versatile nature of the term "*trust*" makes it challenging to define precisely, and Megarry VC warns against focusing solely on the literal meaning of the word. The Latin phrase "*Qui haeret in litera haeret in cortice"* ("one who considers only the letter goes only skin-deep") underscores the need to look beyond the superficial meaning of the term to grasp its true essence in the given context.

[50] *See* on this point D. J. Hayton, *'Fiduciaries in Context: An Overview'*, in P. Birks (ed.), Privacy and Loyalty (Oxford: Clarendon Press, 1997), p. 283. It is true that a literal translation of the word *'fiduciary'* (e.g. fiduciario) may still generate misunderstandings in several Continental jurisdictions, as it may generically refer to a straw man if the legislature has not assigned a different meaning to

To address this final issue, it would have been necessary to define the precise meanings of these terms in the context of trust law. However, this exercise could have resulted in more disagreement and confusion than one could handle, as there were unfounded and unverified assumptions about the definitions and implications of terms such as 'ownership' and 'obligation' in the various national legal systems present at The Hague Convention.

Regrettably, the extent of harm caused by shallow comparisons in this field of law cannot be overstated.

In summary, the deliberations on this matter at The Hague resulted in the formulation of the trust, as mentioned before, which is stated in article 2 of the Convention. [51]

---

this term. On the other hand, company lawyers in Continental Europe are by now well acquainted with the Anglo-American notion of directors' fiduciary duties and tend to conceptualize them along the same lines that are familiar to common lawyers. This evolution highlighted the importance of the rules on conflicts of interest that have always been in place in the laws of Continental Europe to make sure that company directors acted properly. In his contribution "*Fiduciaries in Context: An Overview"* to the book "*Privacy and Loyalty*" edited by P. Birks (Oxford: Clarendon Press, 1997, p. 283), D. J. Hayton addresses the challenges in using the term "*fiduciary*" in the context of the Hague Trusts Convention. He points out that a literal translation of the word "fiduciary" (e.g., "fiduciario") may lead to misunderstandings in several Continental jurisdictions, as it may generically refer to a straw man if the legislature has not assigned a different meaning to the term. However, Hayton also recognizes that company lawyers in Continental Europe have become well-versed in the Anglo-American concept of directors' fiduciary duties and tend to conceptualize them in a manner similar to common lawyers. This evolution underscores the significance of the rules on conflicts of interest that have consistently been present in the laws of Continental Europe to ensure proper conduct by company directors.

[51] For some reflections on this point, *see* M. Graziadei, U. Mattei and L. Smith, *'Setting the Scene'*, in M. Graziadei, U. Mattei and L. Smith (eds.), Commercial Trusts in European Private Law (Cambridge University Press, 2005), p. 6. In their introduction "*Setting the Scene*" to the book "*Commercial Trusts in European Private Law*" (Cambridge University Press, 2005, p. 6), M. Graziadei, U. Mattei, and L. Smith offer insights on the formulation of the trust concept in article 2

Upon reflection, this clause eliminates the non-essential aspects of trusts.

During the drafting process, two important concepts were identified that influenced the present form of Article 2 in the Hague Convention. [52]

Firstly, it was believed that trust can only exist within a system that grants legal ownership to the trustee and recognizes both legal and equitable ownership.

Secondly, it emphasized the importance of the fiduciary obligation of the trustee and the equitable interest of the trust beneficiary, which are closely tied to the legal system known as Equity, historically distinct from common law in England. The inclusion of the concept of 'trust' in the language outlined in article 2 of the Convention served not only to address an issue of definition, but also had other purposes.

Furthermore, it served as a platform to address the requests put forth by representatives from other civilian jurisdictions such as Egypt, Poland, Japan, Luxembourg,

---

of the Hague Trusts Convention. They highlight that the deliberations at the Hague Conference resulted in the adoption of this definition, which seeks to capture the essential elements of the trust institution while avoiding the non-essential aspects. The authors reflect on the challenges faced in arriving at a definition that could be accepted across different legal systems and the efforts made to strike a balance between the core features of trusts and the need for a flexible approach.

[52] T. Honore, *'Trusts: The Inessentials'*, in Joshua Getzler (ed.), and " *Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burn*" (London: LexisNexis, 2003), p. 7. In his contribution "*Trusts: The Inessentials*" to the book "*Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burn*" edited by Joshua Getzler , T. Honore discusses the two key concepts that shaped the formulation of Article 2 of the Hague Trusts Convention during the drafting process. Honore identifies these concepts as the requirement for the trustee to have legal ownership of the trust property and the recognition of both legal and equitable ownership within the trust system. He argues that these two elements were considered essential for the existence of a trust and played a crucial role in guiding the drafters' approach to defining the trust institution in the Convention.

and Venezuela, who sought recognition of their institutions within the framework of the Convention. [53]

It is worth noting that several national instruments adhere to the trust model outlined in article 2 of the Convention.

These include the *fideicomiso* in certain Latin American countries, the trust under the Civil Code of Quebec, trusts established under the Trust Law of Israel, the waqf created under Islamic laws, and others. Additionally, there is the *contrat de fiducie* in France and Luxembourg, as well as instruments that Spain may introduce.[54]

The contention that all of these entities should be acknowledged as *'trusts'* according to the Convention cannot be readily dismissed. The more comprehensive approach to trusts created on this foundation was subsequently included into a Convention that was initially designed just to govern trusts as recognized in jurisdictions following common law

[53] G. L. Gretton, *'Trusts without Equity'* (2000) 49 I.C.L.Q. 599. In this enlightening article, G. L. Gretton argues that the Hague Trusts Convention's definition of trusts in Article 2 is broad enough to encompass various trust-like arrangements found in civil law systems, even if they do not strictly adhere to the common law conception of trusts. Gretton's analysis supports the recognition of institutions such as the Egyptian waqf, Polish fiduciary ownership, Japanese trust law, and similar arrangements in Luxembourg and Venezuela within the framework of the Convention, thereby expanding its scope beyond its initial focus on common law trusts

[54] D. Figueroa, *'Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?*' (2007) 24 Arizona J. Int'l & Comp. Law 701. In this comparative study, D. Figueroa examines trust-like institutions in Latin American civil law jurisdictions, focusing on the *fideicomiso* and its similarities to the trust model outlined in Article 2 of the Hague Trusts Convention. Figueroa also explores other civil law institutions that share characteristics with trusts, such as the Quebec trust, Israeli trust law, Islamic waqf, and French and Luxembourg *fiducies*. He argues that the absence of trusts in Latin American legal systems does not necessarily hinder the expansion of business opportunities, as these trust-like arrangements can serve similar functions and fall within the Convention's broad definition of trusts.

principles. [55]Similar to the French rendition of the Convention, which selects the English term *'trust'* to represent the subject matter being regulated, the introduction to the Convention shows evidence of this shift in thinking. It states that *" Le trust, tel qu'il s'est développé dans les tribunaux d'equity au sein des systèmes de common law et tel qu'il a été adopté avec certaines modifications dans d'autres systèmes juridiques, est une institution juridique particulière"* [56]

The Conference's proceedings indicate that the diplomatic conference itself, rather than the expert groups operating within the established framework to draft the Convention,

[55]A. Dyer and H. van Loon, *'Report on Trusts and Analogue Institutions'*, in Proceedings of the Fifteenth Session of the Hague Conference on Private International Law, vol. II, p. 10. This report by A. Dyer and H. van Loon, prepared for the delegates at the Hague Conference, provided a concise overview of various trust-like institutions from different legal systems. Their comparative analysis highlighted the similarities between these arrangements and the common law trust, laying the groundwork for the inclusion of a more comprehensive approach to trusts in the Hague Trusts Convention. Dyer and van Loon's report was instrumental in extending the Convention's scope beyond its initial focus on common law trusts and remains a significant contribution to the understanding of the Convention's inclusive approach to trusts, despite the extensive comparative work that has been done on this topic since then.

[56] S. M. Santisteban, *'Los trusts como instrumento de transmisión de la riqueza familiar en el Derecho europeo continental'*, in C. A. de Andrés (ed.), Estudios de derecho español y europeo (Santander: Universidad de Cantabria, 2009); E. Arroyo i Amayuelas, *'¿Por qué el trust en Catalunya?'*, in S. N. Aznar and M. Garrido Melero (eds.), Los patrimonios fiduciarios y el trust: III Congreso de Derecho Civil Catalán (Barcelona: Marcial Pons, 2006), p. 525. These two articles discuss the adoption of the English term 'trust' in the French version of the Hague Trusts Convention and the shift in thinking evidenced by the introduction to the Convention. Both S. M. Santisteban and E. Arroyo Amayuelas highlight the Convention's acknowledgment of the evolution of trusts within common law equity courts and their adaptation in other legal systems, emphasizing the unique nature of the trust as a legal institution. This shift in perspective demonstrates the Convention's recognition of the potential for trust-like arrangements to exist in legal systems beyond the common law world, paving the way for a more inclusive approach to the regulation of trusts in private international law.

was responsible for including civil law institutions with key features of the common law trust in the Convention's scope. [57]

Undoubtedly, the larger approach implicitly acknowledged by article 2 of the Convention was met with criticism. The allegation was that the concept of trust described in article 2 of the Convention was excessively broad, to the extent that it was considered 'formless', since it did not align with the trust framework recognized in English law and other common law systems. The terminology used by the drafters of the Convention did not accurately represent the prevalent practice in common law jurisdictions of analyzing the law of trusts by differentiating between common law and equity.[58]

---

[57] H. van Loon, *'L'actualité de la convention de La Haye relative à la loi applicable au trust et à sa reconnaissance*', in Mélanges en l'honneur de Mariel Revillard (Paris: Répertoire Defrénois, 2007), pp. 328-9. In this article, H. van Loon provides valuable insights into the deliberations and negotiations that led to a significant shift in the scope of the Hague Trusts Convention during the conference proceedings held in October 1983. He notes that while the earlier phase of the work on the Convention focused exclusively on private international law issues relating to common law trusts, the diplomatic conference itself made the crucial decision to include civil law institutions that shared key features with the common law trust within the scope of the Convention. This decision played a pivotal role in shaping the final text of the Convention and its inclusive approach to the recognition of trust-like arrangements from different legal systems.

[58]A. E. von Overbeck, *'Explanatory Report'*, in Proceedings of the Fifteenth Session of the Hague Conference on Private International Law, pp. 375-6. In his "*Explanatory Report*" on the Hague Trusts Convention, A. E. von Overbeck provides valuable insight into the deliberations surrounding the adoption of the broad definition of trusts in article 2 of the Convention. He notes that the conference took the decision to adopt this definition without a formal vote, which led to criticism alleging that the concept of trust described in the Convention was excessively broad and did not align with the trust framework recognized in English law and other common law systems. Critics argued that the terminology used by the drafters of the Convention failed to accurately represent the prevalent practice in common law jurisdictions of analyzing the law of trusts by distinguishing between common law and equity. Von Overbeck's report sheds light on the challenges faced in reaching a

However, the Convention effectively encompasses the fundamental aspects of trusts as distinct legal relationships under those laws, even though it utilizes concepts such as 'control' to achieve this purpose.

Moreover, there exists an ample amount of historical evidence that links the origins of the common law system with civilian sources. This evidence contradicts the assertion that there is a fundamental contradiction between common law trusts and civilian organizations that have the same structure.[59]

In summary, the term in Article 2 of the Convention includes certain institutions that possess characteristics commonly associated with trusts administered by the common law, although this perception is often incorrect. However, it should be noted that not every arrangement in which a person retains property for another person, such as a deposit, bailment, agency, or mandate, qualifies as a trust under the Convention. [60]

---

consensus on the scope of the Convention and the efforts made to accommodate a more inclusive approach to trusts.

[59] W. N. Hohfeld, *'Supplemental Note on the Conflict of Equity and Law'* (1917) 26 Yale LJ 767. In this thought-provoking article, W. N. Hohfeld raises the question of whether the practice of distinguishing between common law and equity when analyzing the law of trusts actually helps to clarify the analysis. While Hohfeld does not provide a definitive answer, his contribution highlights the ongoing debate surrounding the usefulness of this distinction and its relevance to the understanding of trusts as legal institutions. Hohfeld's article invites readers to consider whether the Convention's use of concepts such as 'control' to encompass the fundamental aspects of trusts as distinct legal relationships is more effective than relying on the traditional common law-equity divide. Moreover, he points to the historical evidence linking the origins of the common law system with civilian sources, challenging the notion of a fundamental contradiction between common law trusts and similar civilian institutions.

[60] M. Lupoi, *'The Shapeless Trust'* (1995) 1(3) Trusts & Trustees 334. In this article, M. Lupoi argues that the notion of a trustee having control over trust property, regardless of whether they hold title to it, is of "*very little legal importance.*" However, he suggests that this concept should not be easily dismissed, as it is a fundamental characteristic of trusts that distinguishes them from other legal

The Convention does not endorse this. The delegates convened at The Hague had to address the second fundamental problem of how to limit the influence of the Convention on the legal systems of countries that wanted to have conflict rules on trusts and recognize them, but did not want to incorporate the institution into their domestic laws because it was considered unfamiliar. It is important to acknowledge that the Convention established a distinction between countries with and without a law of trusts.

This distinction was based on the initial assumption made at The Hague that the Convention would allow the recognition of trusts governed by foreign law, even in countries without a law of trusts. However, it was not mandatory for those countries to introduce the institution of trusts into their domestic law as a result of joining the Convention. This stance is logical since it is possible to argue that trusts are ethically sound, but yet believe that a legal system may not be prepared to allocate resources to enforce them, unless when required by international commitments.[61]

---

arrangements. Lupoi points out that the Hague Trusts Convention, in its definition of trusts under Article 2, includes institutions that possess characteristics commonly associated with trusts administered by the common law, even if this perception may not always be accurate. Nevertheless, he also emphasizes that not every arrangement involving one person holding property for another, such as deposits, bailments, agencies, or mandates, would qualify as a trust under the Convention. Lupoi's article highlights the importance of the trustee's control over trust property as a defining feature of trusts and the need for a clear understanding of the scope of the Convention's definition.

[61] M. Lupoi, *'Trust and Confidence'* (2009) 125 LQR 253; M. Lupoi, *'I trust nel diritto civile'* (Torino: Utet, 2004), in the collection 'Trattato di diritto civile' edited by R. Sacco; R. Helmholz and R. Zimmermann (eds.), *'Itinera Fiduciae'* (1998); F. Treggiari, *'Minister ultimae voluntatis. Esegesi e sistema nella formazione del testamento fiduciario'* (Naples: Edizioni Scientifiche Italiane, 2002), vol. I (an in-depth study); R. Helmholz and V. Piergiovanni (eds.), *'Relations between the Ius Commune and English Law*' (Genoa: Rubbettino, 2009). In his article "*Trust and Confidence*" and his book "*I trust nel diritto civile,*" M. Lupoi explores the concept of trust and confidence in the context of civil law jurisdictions. He argues that the Hague Trusts Convention establishes a distinction between countries with and without a law of trusts, based on the assumption that the Convention would allow for the recognition of foreign-law trusts even in countries that do not have a domestic

Furthermore, it is worth noting that the primary objective of the delegates in The Hague was to convene a conference on private international law pertaining to trusts, rather than to establish a standardized law on trusts.

The method to attain this outcome was challenging, yet, the records of the Hague Conference vividly illustrate this difficulty.

It is important to consider one aspect when looking back: the authors of the Convention dismissed any suggestions to restrict the freedom of parties to choose the relevant law for trusts that have an international nature or have objective connections with several countries.

Instead, they chose a different alternative, giving preference to party autonomy in selecting the appropriate law, as shown by the wording of article 6(1) of the Convention: *The law chosen by the settlor must govern a trust.*

The selection must either be explicitly stated or inferred from the provisions of the document establishing or documenting the trust, and if needed, interpreted in consideration

---

law of trusts. Lupoi emphasizes that joining the Convention does not obligate these countries to introduce the institution of trusts into their own legal systems. He suggests that this approach is reasonable, as it acknowledges that a legal system may view trusts as ethically sound but may not be prepared to devote resources to enforcing them unless required by international commitments. Lupoi's work builds upon previous research on the civilian background of trusts, such as the studies conducted by R. Helmholz and R. Zimmermann in "*Itinera Fiduciae,"* F. Treggiari in *"Minister ultimae voluntatis. Esegesi e sistema nella formazione del testamento fiduciari*o," and the recent collection *"Relations between the Ius Commune and English Law"* edited by R. Helmholz and V. Piergiovanni. These studies have unearthed new sources on the civilian roots of trusts, contributing to a growing body of literature that seeks to bridge the gap between common law and civil law understandings of trusts. However, Lupoi argues that the subject still deserves a fuller investigation from a historical and comparative perspective to better understand the relationship between trusts and civil law institutions.

of the surrounding circumstances.[62] According to a valid observation, the only requirement for a settlor to choose a specific law is that the chosen law must have provisions for trusts or the specific type of trust in question. [63]

Article 6(2) clarifies that if the chosen law does not have provisions for trusts or the specific category of trust, the choice will not be effective and the law specified in Article 7 will apply.

---

[62]M. Lupoi, *'Effects of the Hague Convention in a Civil Law Country'* (1998) 4 Trusts & Trustees 15, 19-20. In this article, Maurizio Lupoi argues that a settlor from a civil law jurisdiction can create a trust of assets in that jurisdiction for beneficiaries also from that jurisdiction by choosing the law of a trust jurisdiction like Bermuda to govern the trust. Lupoi first presented this argument in an Italian publication in 1992, which was not a commonplace view at the time. He contrasts his position with that of D. J. Hayton in the 15th edition of "*Underhill and Hayton: Law of Trusts and Trustees*" (London: Butterworths Law, 1995, p. 951), where Hayton stated that a settlor from a civil law jurisdiction cannot create such a trust by choosing the law of a trust jurisdiction and appointing trustees resident in that jurisdiction to administer the trust there. However, Lupoi notes that the current edition of Hayton's book has adopted a different solution, aligning with his own argument. Lupoi's article highlights the evolving understanding of the scope of party autonomy in choice of law for trusts and the potential for settlors from civil law jurisdictions to create trusts governed by the laws of trust jurisdictions.

[63] The Hague Convention, article 7. Article 7 of the Hague Trusts Convention provides that if no effective choice of law is made by the settlor, the trust will be governed by the law with which it is most closely connected. The article lists factors to determine this connection, such as the place of administration of the trust, the location of the trust assets, the residence or place of business of the trustee, and the objects of the trust and the places where they are to be fulfilled. However, if the law determined under article 7 does not provide for trusts or the specific category of trust involved, the trust falls outside the scope of the Convention according to article 5. This means that for the settlor's choice of law to be effective under the Convention, it must be a legal system that recognizes trusts or the particular type of trust in question. The interplay between articles 5, 6, and 7 of the Convention ensures that the chosen law or the law most closely connected to the trust has provisions for trusts, otherwise the trust will not be governed by the Convention.

The choice of foreign law by the settlor is legal without the need for any further elements. However, it is important to note that if there are no other elements linking the trust to a foreign country or giving it an international character, there may be certain repercussions.

In order to fully understand the novel nature of this approach, one can compare it to past English authority, which, in some situations, mandated an objective relationship between the law chosen by the settlor and the foreign law, such as the foreign location of the trust property.

Ironically, the solution implemented in article 6(1) of the Convention may be less noticeable in civilian jurisdictions like France. In these jurisdictions, trusts are compared to contracts and are therefore subject to the conflict rules that govern contracts. These rules provide flexibility for parties to choose the applicable law. However, it would be incorrect to perceive the regulation in article 6 of the Convention as an anomaly, notwithstanding the above statement. Party autonomy in selecting the governing law is now supported by all jurisdictions where the Convention is effective, as well as by certain jurisdictions that do not follow it, such as Quebec. This principle is evident in model laws, like the Canadian Uniform Conflict of Laws Rules for Trusts Act of 198763, and to a lesser extent in the Uniform Trust Code developed in the USA by the National Conference of Commissioners on Uniform State Laws.[64]

[64] J. A. Schoenblum, *'Multistate and Multinational Estate Planning'* (Chicago: CCH Inc., 2009), vol. I, chap. 18. In this chapter of his book "*Multistate and Multinational Estate Planning,"* Jeffrey A. Schoenblum, a US scholar, provides a sharp critique of the Hague Trusts Convention. Although the USA signed the Convention, Schoenblum notes that no state has shown interest in having it in force. He argues that the Convention fails to adequately address the complex issues involved in multistate and multinational estate planning, highlighting the challenges in implementing the Convention in the US federal system and the potential conflicts with existing state laws governing trusts and estates. While the reference to the Uniform Trust Code developed by the National Conference of Commissioners on Uniform State Laws suggests some level of support for party autonomy in choice of law for trusts in the USA, Schoenblum's critique underscores the ongoing resistance to the Convention in the USA. His analysis raises important questions about the feasibility

Another significant issue in the development of the Convention was the consideration of party autonomy.

While party autonomy is a significant aspect of the Convention, the drafters were aware of the potential negative consequences of unrestricted recognition of trusts. As a result, the Convention includes various provisions that serve as control mechanisms to ensure compliance with specific policies of contracting states. The Trusts Convention includes fundamental measures that allow for the provisions to be disregarded in cases where their implementation would clearly contradict public policy or conflict with the application of mandatory laws of the forum, regardless of conflict of laws rules.[65]

The Trusts Convention shares some customary protections with numerous other private international law accords. The Trusts Convention further enhances these provisions by including a comprehensive reservation in support of the budgetary authority of the states, and by deferring to the forum's principles of private international law to determine the

---

and desirability of implementing the Convention in the context of the US legal system and the need for further harmonization of trust laws at the national level.

[65] Hague Convention, article 18. Article 18 of the Hague Trusts Convention provides two essential safeguards for contracting states: a public policy exception and a mandatory rules provision. Under article 18(1), a contracting state may refuse to apply the provisions of the Convention if their application would be manifestly incompatible with public policy. This allows states to disregard the Convention when its application would violate their fundamental values or principles. Article 18(2) further permits contracting states to apply their mandatory rules, regardless of the law chosen by the settlor or determined under the Convention. These mandatory rules are provisions that cannot be derogated from by voluntary act and are essential to protect the state's public interests. The inclusion of these safeguards demonstrates the drafters' awareness of the potential negative consequences of unrestricted recognition of trusts and the need to balance party autonomy with the protection of important state policies. The public policy exception and mandatory rules provision provides flexibility for contracting states to refuse recognition of trusts that would undermine their core values or conflict with their essential laws, ensuring that the Convention does not override crucial domestic policies.

relevant law for a wide range of matters. During the formation stage of the trust, all inquiries regarding the legality of wills and property transfers to the trustee are considered.[66]

Additionally, during the recognition stage of the trust, inquiries regarding the rights and responsibilities of third parties holding trust assets are addressed. [67]

The whole list of difficulties addressed by this latter method is found in article 15 of the Convention, which is worth reprinting in its entirety. The Convention allows for the application of provisions of the law specified by the conflicts rules of the forum, as long as those provisions cannot be overridden by voluntary action. These provisions primarily concern: I) the safeguarding of minors and individuals lacking capacity;II) the personal and property-related consequences of marriage;III) inheritance rights, both with a will and

[66] Hague Trusts Convention, article 4. Article 4 of the Hague Trusts Convention explicitly excludes from its scope preliminary issues relating to the validity of wills or other acts by virtue of which assets are transferred to the trustee. This means that questions concerning the legality of the settlor's will or the validity of the transfer of property to the trustee are governed by the forum's private international law rules, rather than the Convention itself. The exclusion of these preliminary issues from the Convention's scope ensures that the domestic laws of the contracting states continue to regulate the formal and essential validity of the acts creating the trust, preserving the states' authority over these matters. This approach reflects the drafters' intention to limit the Convention's interference with the contracting states' existing rules on the validity of wills and property transfers, while still providing a framework for the recognition and administration of trusts in a cross-border context.

[67] Hague Trusts Convention, article 11. Article 11 of the Hague Trusts Convention provides that the recognition of a trust does not affect the rights of third parties *in rem* or *in personam* under the law determined by the choice of law rules of the forum. This means that the rights and obligations of third parties, such as creditors or purchasers, who deal with trust assets are governed by the law determined by the forum's private international law rules, not the law governing the trust itself. This provision safeguards the interests of third parties and ensures that the recognition of a trust does not unfairly prejudice their rights under the applicable law. By subjecting the rights of third parties to the law determined by the forum's choice of law rules, the Convention strikes a balance between the recognition of trusts and the protection of third-party interests, preventing the trust from being used as a means to evade legitimate obligations or to infringe upon the rights of others.

without, particularly the unalterable portions of spouses and relatives; IV) the transfer of ownership and the establishment of security interests in property; V) the protection of creditors in cases of insolvency; VI) the protection, in other aspects, of third parties who act in good faith. [68]

If the acknowledgement of a trust is impeded by the implementation of the above statement, the court will endeavor to achieve the objectives of the trust using alternative methods

Article 15 ensures that mandatory rules are applied and cannot be circumvented by selecting a different legal system. This clause ensures that the clawback claims, which are used to enforce the required heirship rights of the spouse and offspring of the settlor, are protected under Italian law.[69]

---

[68] Hague Trusts Convention, article 15. Article 15 of the Hague Trusts Convention provides a list of matters that are governed by the mandatory rules of the forum, as determined by its conflict of laws rules, even if a different law has been chosen to govern the trust. These matters include the protection of minors and incapacitated persons, the effects of marriage on property rights, forced heirship rules, the transfer of title to property and security interests, the protection of creditors in insolvency situations, and the protection of third parties acting in good faith. The application of these mandatory rules ensures that the recognition of a trust does not override fundamental policies and laws of the forum state, particularly those aimed at protecting vulnerable parties and third parties who may be affected by the trust. The Convention strikes a balance between the autonomy of the parties in choosing the applicable law and the need to safeguard essential public interests and the rights of third parties under the law of the forum. By providing this list of matters subject to mandatory rules, the Convention enhances legal certainty and predictability, while also respecting the sovereignty of the contracting states in protecting their core values and policies.

[69] Clawback claims (azione di riduzione) under Italian law. In Italy, clawback claims (azione di riduzione) are a legal mechanism designed to enforce the forced heirship rights of the settlor's spouse and children. These claims allow the entitled heirs to recover assets that were transferred by the settlor in violation of their reserved portion of the estate (legittima). Article 15 of the Hague Trusts Convention ensures that the recognition of a trust does not prejudice the application of these mandatory clawback provisions under Italian law. Even if the settlor has chosen a foreign law to

Article 15 of the Convention explicitly states that Italy's actions do not violate international commitments. The rules of this article apply to trusts regardless of their origin, creator, or beneficiary, as long as the trust regulated by foreign law is recognized in the relevant jurisdiction. Whether the trust was established in England by an Italian domiciliary for assets in Italy to be carried out in England, or by an English testator domiciled in London but married to an Italian national living in Rome for assets held in Paris, it is irrelevant for this purpose. [70] However, it is important to note that the requirements mentioned above do not guarantee the illegality of a trust that is regulated by a foreign law. This is the case even

govern the trust, the Italian courts can still apply the clawback rules to protect the forced heirship rights of the settlor's family members. This safeguard is crucial in preserving the public policy objectives of Italian succession law and preventing the use of trusts to evade the mandatory rules on family protection. The inclusion of this provision in the Convention demonstrates the drafters' effort to balance the recognition of trusts with the fundamental principles and values of the contracting states' domestic legal systems, ensuring that the use of trusts does not undermine the essential safeguards provided by national laws.

[70] Hague Trusts Convention, article 15, last sentence. The last sentence of article 15 of the Hague Trusts Convention invites courts to try to give effect to the objects of a trust, even if the trust itself cannot be recognized due to the application of mandatory rules under the same article. This provision encourages courts to find alternative ways to achieve the objectives of the trust, to the extent possible, when the full recognition of the trust is not feasible due to the application of mandatory rules. By including this invitation, the drafters of the Convention sought to promote a flexible and pragmatic approach to the recognition of trusts, acknowledging that a partial or adapted recognition may be preferable to a complete rejection of the trust. This provision reflects the spirit of compromise and the desire to facilitate the cross-border operation of trusts, while still respecting the fundamental policies and values of the contracting states. It encourages courts to find creative solutions that balance the interests of all parties involved and give effect to the settlor's intentions, even if the trust cannot be recognized in its entirety. The inclusion of this provision demonstrates the Convention's aim to promote the harmonious interaction between trust law and the mandatory rules of the forum, fostering international cooperation and the efficient resolution of trust-related disputes.

if all the relevant aspects of the trust, except for the choice of foreign law, clearly indicate the jurisdiction in question.

As previously stated, article 6 of the Convention permits a person who resides in a jurisdiction that does not recognize trusts to establish a trust in that jurisdiction. [71]

This trust can be created for the benefit of individuals who also reside in the same non-trust jurisdiction. This can be achieved by choosing to subject the trust to the laws of a trust jurisdiction such as England, Jersey, or Massachusetts. Party autonomy is the result of the application of article 6 of the Convention. Put simply, the provisions mentioned above do not prevent an Italian citizen living in Italy from establishing a trust in Italy for the purpose of benefiting Italian individuals who are also living in Italy. This trust would be subject to English law. In order to achieve this impressive outcome, the settlor just has to choose an appropriate foreign law as the governing law at the time of establishing the trust. Indeed, this result could potentially be disputed to some degree based on the ambiguous stipulation of article 13 of the Convention:

"*A State is not obligated to acknowledge a trust that is primarily associated with states that do not have the concept of trust or the specific type of trust in question, except for*

[71] Hague Trusts Convention, article 6. Article 6 of the Hague Trusts Convention allows a settlor who is resident in a state that does not have the trust institution to create a trust in that state, provided that the chosen law governs the validity of the trust. This provision is a result of the principle of party autonomy, which is a central feature of the Convention. By allowing settlors to choose the governing law of the trust, article 6 enables the creation of trusts even in jurisdictions that do not recognize the concept of trusts under their domestic law. This approach facilitates the cross-border use of trusts and promotes the harmonization of trust law at an international level, while still respecting the sovereignty of contracting states in determining the extent to which they wish to recognize trusts within their legal systems. The inclusion of article 6 in the Convention represents a significant departure from traditional conflict of laws rules, which often require a connection between the chosen law and the trust or the parties involved. By prioritizing party autonomy, the Convention seeks to enhance the flexibility and adaptability of trust law in a global context.

the selection of the governing law, the location of administration, and the trustee's usual place of residence".[72]

This provision is likely the one that most of the participants in The Hague believed would prohibit the acknowledgment of trusts that have the strongest ties to nations that lack the trust institution. However, it is possible that there was a degree of hopeful imagination engaged in its creation and in contemplating its consequences.

The initial proposal included a provision that clearly forbade the acknowledgment of trusts that involved individuals who are citizens of a jurisdiction that does not recognize trusts and who reside there permanently. However, this provision was discarded because it was deemed excessive, and it was replaced by the less stringent provision outlined in article 13[73].

[72] Hague Trusts Convention, article 13. Article 13 of the Hague Trusts Convention provides that a state is not required to recognize a trust if the trust has its most significant elements, apart from the choice of the applicable law, the place of administration, and the habitual residence of the trustee, closely connected with states that do not have the trust institution or the category of trust involved. This provision aims to limit the obligation of contracting states to recognize trusts that have minimal connections to jurisdictions that recognize trusts. However, the wording of article 13 has been subject to criticism for its ambiguity and potential inconsistency with the principle of party autonomy enshrined in article 6. The interpretation and application of article 13 have been a source of debate among scholars and practitioners, with some arguing that it undermines the certainty and predictability of the Convention's choice of law rules. Others have suggested that article 13 serves as a necessary safeguard against potential abuses of the party autonomy principle, allowing courts to refuse recognition of trusts that appear to be an attempt to evade the mandatory rules of the forum. The inclusion of article 13 in the Convention reflects the drafters' efforts to strike a balance between the desire to promote the cross-border recognition of trusts and the need to respect the fundamental policies and values of contracting states.

[73] Drafting history of article 13. The drafting history of article 13 reveals that the initial proposal for this provision was more restrictive, expressly prohibiting the recognition of trusts involving settlors, beneficiaries, and assets located in a state that does not have the trust institution. However, this proposal was ultimately rejected as being too extreme and was replaced by the current language

However, clause 13 raises several uncertainties, especially regarding the significance of reading this in connection with article 6, which permits unrestricted party liberty in selecting the appropriate law.

Article 13 stipulates that if a trust that is not closely linked to a jurisdiction that recognizes trusts is not acknowledged in a country that does not recognize trusts, it does not constitute a violation of the international duties arising from the Convention.

Considering that this article does not establish a global need to not acknowledge such a trust, one would wonder why the Convention nevertheless decided to include it. The primary purpose is to somewhat mitigate the impact of article 6, which would otherwise impose a requirement to acknowledge trusts that have limited affiliations with trust jurisdictions. If it seems that the settlor's selection of foreign law is dishonest in order to avoid the application of the forum's law, the court may employ an escape clause[74].

---

of article 13, which focuses on the trust's most significant elements rather than the specific characteristics of the parties involved. This change reflects a compromise between the desire to limit the obligation to recognize trusts with minimal connections to trust jurisdictions and the need to respect party autonomy in the choice of the applicable law. The evolution of article 13 during the drafting process demonstrates the challenges faced by the drafters in striking a balance between these competing objectives and the efforts made to find a workable solution acceptable to the contracting states. The drafting history provides valuable insights into the underlying rationale and intentions behind article 13, which can inform its interpretation and application in practice. It also highlights the complex negotiations and trade-offs involved in the development of an international convention, as well as the importance of considering the interests and concerns of different legal systems and traditions.

[74] Relationship between articles 6 and 13. The relationship between articles 6 and 13 of the Hague Trusts Convention has been a subject of much debate among scholars and practitioners. While article 6 allows for the free choice of the applicable law by the settlor, article 13 seems to limit the obligation to recognize trusts that have their most significant elements connected with states that do not have the trust institution. This apparent tension has led some to question the purpose and effectiveness of article 13. One possible interpretation is that article 13 serves as an escape clause, allowing courts to refuse recognition of trusts where the settlor's choice of law appears to be an attempt to evade the

The absence of a mandatory provision in Article 13 allows a contracting State to enforce the Convention without including such a requirement, and without the necessity of submitting a reservation to the Convention. Both the United Kingdom and Switzerland have excluded article 13 from the legislation that incorporate the rules of the Convention into their domestic legal systems. [75]

The United Kingdom was the first country to make this decision, perhaps influenced by certain factors discussed during the discussions conducted in The Hague. These suggestions indicate that the norm, despite being phrased in broad terms, primarily caters to

---

mandatory rules of the forum. By providing this discretion to the courts, article 13 may be seen as a safeguard against potential abuses of the party autonomy principle, ensuring that the choice of law is not used to circumvent fundamental policies of the forum state. However, others have argued that article 13 undermines the certainty and predictability of the Convention's choice of law rules, and that it should be interpreted narrowly or even disregarded altogether. The relationship between articles 6 and 13 remains a point of contention and is likely to continue to be a source of debate as the Convention is applied in practice.

[75] Exclusion of article 13 by the United Kingdom and Switzerland. The United Kingdom and Switzerland, both early adopters of the Hague Trusts Convention, have chosen to exclude article 13 from their implementing legislation. This decision is significant, as it demonstrates that contracting states have the flexibility to implement the Convention in a manner that best suits their domestic legal framework and policy objectives. By omitting article 13, the UK and Switzerland have effectively opted for a more liberal approach to the recognition of trusts, prioritizing the principle of party autonomy over the potential limitations provided by this provision. This choice may be influenced by the desire to attract trust business and to promote the use of trusts in a cross-border context, as well as by the confidence in the ability of their domestic legal systems to address potential abuses through existing legal mechanisms, such as public policy exceptions and mandatory rules. The exclusion of article 13 by these two important trust jurisdictions may also have an impact on the interpretation and application of the Convention by other contracting states, as it sets a precedent for a more expansive approach to the recognition of trusts based on party autonomy. However, it remains to be seen how this approach will be received by other contracting states and whether it will lead to a greater harmonization of trust law at the international level.

the requirements of countries that do not have trust systems. This is because it enables their courts to refuse to recognize trusts that have no significant association with trust jurisdictions.[76]

However, the term "*norm*" also includes the absence of the specific types of trusts concerned, not merely the absence of the institution itself. One can question whether it would have been wiser to incorporate Article 13 of the Convention into the UK Recognition of Trusts Act 1987 as a precautionary measure. Incorporating that provision into the Act would have eliminated any uncertainty regarding whether English courts would be required to acknowledge a trust established in a domestic English setting by choosing a foreign trust law, as a means to circumvent the English law prohibition on non-purpose trusts. This provision modifies Article 13 to align with the legal system of a country that follows common law.

Consequently, it allows the judge in the jurisdiction where the trust is being considered for recognition to refuse recognition if the jurisdiction has a policy that opposes

[76] United Kingdom's decision to exclude article 13. The United Kingdom's decision to exclude article 13 from its implementing legislation may have been influenced by the discussions that took place during the drafting process of the Hague Trusts Convention. Some participants argued that article 13, although phrased in general terms, was primarily intended to address the concerns of states that do not have the trust institution in their domestic law. These states may wish to limit their obligation to recognize trusts that have minimal connections with trust jurisdictions, as they may view such trusts as potentially undermining their domestic legal systems or public policy objectives. By excluding article 13, the United Kingdom has signaled its commitment to the principle of party autonomy and its willingness to recognize trusts based on the settlor's choice of law, even if the trust has limited connections with trust jurisdictions. This approach reflects the UK's long-standing tradition of trust law and its position as a leading trust jurisdiction in the world. It also demonstrates the UK's confidence in the ability of its domestic legal system to address potential abuses of the trust mechanism through existing legal doctrines and principles, such as the concept of sham trusts and the application of mandatory rules. The UK's decision to exclude article 13 may have significant implications for the development of trust law at the international level, as it may encourage other contracting states to adopt a similar approach and prioritize party autonomy in the recognition of trusts.

particular categories of trusts. It is important to note that this Act does not include a provision similar to Article 15 of the Convention, which is, in contrast, applicable in the UK.

In Switzerland, the decision to exclude Article 13 of the Convention from the Swiss statute implementing the Convention was made to prevent any ambiguity regarding the recognition of wholly internal trusts in the forum. This decision was influenced by the existing protection provided to forum policies through the extensive provisions of articles 15, 16, 18, and 19 of the Convention[77]. According to the Convention, the trust that may not be acknowledged under Article 13 is still legally established. Undoubtedly, this solution has its merits. Suppose that, following the establishment of a trust, new circumstances emerge that establish a strong relationship with a jurisdiction where the trust was formerly absent. If the trust was void from the beginning, it would still be legitimate notwithstanding the absence of the cause for declaring it void.

[77] J. Perrin, *'The Recognition of Trusts and Their Use in Estate Planning under Continental Laws'* (2008) 10 Yearbook of Private International Law 629, 645. In his article "*The Recognition of Trusts and Their Use in Estate Planning under Continental Laws*," J. Perrin provides a comprehensive review of the debate surrounding the exclusion of Article 13 from the Swiss statute implementing the Hague Trusts Convention. Perrin explains that the decision to omit Article 13 was motivated by the desire to avoid any ambiguity regarding the recognition of wholly internal trusts in Switzerland. The Swiss authorities believed that the forum's policies were already adequately protected through the extensive provisions of articles 15, 16, 18, and 19 of the Convention, which address the application of mandatory rules, public policy, and the rights of creditors and third parties. By excluding Article 13, Switzerland sought to ensure that the recognition of trusts would be based primarily on the settlor's choice of law, in accordance with the principle of party autonomy enshrined in Article 6 of the Convention. This approach reflects Switzerland's commitment to promoting the use of trusts in international estate planning and its confidence in the ability of its domestic legal system to safeguard important public policies through the application of the Convention's other protective provisions. Perrin's article offers valuable insights into the underlying rationale and policy considerations that shaped Switzerland's decision to exclude Article 13 from its implementing legislation.

Moreover, the issue of recognizing the trust is solely within the jurisdiction of the courts of the nation where recognition is being requested. Instead of implementing the provision stated in Article 13, an alternative approach may have been considered, which completely forbids granting recognition in the forum to a trust that does not have a strong affiliation with a trust jurisdiction[78]. Currently, among the nations that permit party autonomy in choosing the relevant law, only Belgium has implemented this provision.

Most countries that have ratified the Convention include Article 13, which, as previously stated, allows for the recognition of trusts established under the law chosen in accordance with Article 6, even if these trusts have no significant connection to a trust jurisdiction.

2.3. The Principal Features of the Hague Convention

[78] M. Lupoi, *'Effects of the Hague Convention in a Civil Law Country'* (1998) 4 Trusts & Trustees 15. In his article "*Effects of the Hague Convention in a Civil Law Country,"* M. Lupoi discusses the potential consequences of Article 13 of the Hague Trusts Convention and suggests an alternative approach to addressing the recognition of trusts with limited connections to trust jurisdictions. Lupoi argues that, under the Convention, a trust that may not be recognized pursuant to Article 13 is still validly constituted. This means that if new circumstances arise after the creation of the trust that establish a strong connection with a jurisdiction where the trust was previously absent, the trust would remain valid despite the initial absence of a reason to declare it void. Lupoi also points out that the issue of recognizing a trust falls solely within the jurisdiction of the courts of the country where recognition is sought. As an alternative to the approach taken in Article 13, Lupoi suggests that the Convention could have considered a provision that completely prohibits the recognition of a trust in the forum if the trust lacks a strong connection with a trust jurisdiction. This alternative approach would provide greater certainty and predictability in the recognition of trusts, but it may also be seen as overly restrictive and potentially undermining the principle of party autonomy in the choice of the applicable law. Lupoi's analysis highlights the complex interplay between the need for flexibility in the recognition of trusts and the desire for clear rules that protect the fundamental policies of the forum state.

Since the beginning of the process of drafting the Hague Convention, there have been a variety of concepts whose definitions and corresponding rules have presented difficulties for the drafters, as described in the preceding paragraph. Among the most important factors that have been a source of concern for the drafters are the definition of trust, the choice of law, and the concept of recognition.

These are not only the most important features of the convention in question, but they are also the most significant articles. It is appropriate, for the right continuation of the present analysis, to focus on the current formulation of the relevant articles and the rules that are mandated by them with a more extensive investigation.

2.4.The Principal Features of the Hague Convention: the Trust definition

As previously elucidated in the discourse concerning the challenges confronted by the Convention's drafters, the formulation of a precise, universally applicable definition of trust presents an insurmountable obstacle.

Unlike a corporate entity, which is imbued with legal personality, a trust lacks such concrete juridical status. Notwithstanding this inherent complexity, it remains feasible to articulate a sufficiently comprehensive description that enables legal practitioners and scholars to apprehend the fundamental nature and salient characteristics of the trust concept in a generalized manner.

Nevertheless, the drafters understood the necessity of providing a sufficiently comprehensive description that would enable legal practitioners and jurisdictions to grasp the essential nature and characteristics of a trust. This description needed to be broad enough to encompass various trust-like arrangements across different legal systems, yet specific enough to distinguish trusts from other legal relationships.[79]

[79] "*Cases and Commentary on the Law of Trusts"* (8th ed., Hayton (Ed.), 1986), pp. 2-3. In "*Cases and Commentary on the Law of Trusts*," the authors discuss the challenges involved in formulating a

The result of these deliberations is embodied in Article 2 of the Convention, which presents a functional definition of trust. Article 2 of the Convention defines a trust as a "*legal relationship created inter vivos or upon death by a settlor, whereby assets are placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose"*.

This definition is intentionally broad and flexible, designed to encompass not only the classic Anglo-American trust but also similar legal arrangements found in other jurisdictions.

The Convention's impact has been particularly notable in civil law jurisdictions. Some have introduced trust-like institutions or modified existing legal structures to accommodate trust-like arrangements, such as the fiducie in France and the fiducia in Latin American

---

precise and universally applicable definition of trusts. They note that, unlike corporate entities, trusts do not have a distinct legal personality, which makes it difficult to provide a concrete juridical definition. However, the authors argue that it is still possible to articulate a sufficiently comprehensive description that captures the essential nature and characteristics of trusts in a generalized manner. The authors emphasize that the drafters of the Hague Trusts Convention understood the need to provide a description that would enable legal practitioners and jurisdictions to grasp the fundamental aspects of trusts. This description had to be broad enough to encompass various trust-like arrangements found in different legal systems, while also being specific enough to differentiate trusts from other legal relationships. The authors suggest that the functional definition of trusts provided in Article 2 of the Convention strikes a balance between these competing objectives, by identifying the core elements of trusts without being overly prescriptive or limiting in its scope. The commentary highlights the importance of the Convention's flexible approach to defining trusts, which allows for the accommodation of trust-like structures from a wide range of jurisdictions, including civil law countries and mixed legal systems. The authors also point out that the Convention's definition is sufficiently broad to include various types of trusts, such as those created for charitable or public purposes, and those where the settlor retains certain rights or powers. This adaptability is seen as crucial for the Convention's ability to promote the harmonization of trust law in an international context and to provide a framework that can evolve alongside the development of new trust practices and structures.

countries. These developments illustrate the Convention's influence in fostering legal convergence while maintaining respect for fundamental differences between common law and civil law systems.

Furthermore, the Convention's effects extend beyond mere recognition of trusts. It has the potential to influence domestic law reforms in signatory states, catalyzing a gradual harmonization process. This evolution, though not explicitly mandated by the Convention, represents a natural consequence of increased interaction between different legal traditions in the realm of trust law and asset management. Such developments underscore the Convention's role in shaping international private law and facilitating cross-border trust operations.

Finally, it strikes a balance between providing clarity for the application of the Convention and maintaining flexibility to accommodate the nuances of different legal traditions.[80]

2.5. The Principal Features of the Hague Convention: The chosen applicable Law

[80] The Convention's approach to recognizing trusts across different legal systems is a significant advancement in private international law. However, it's important to note that this recognition does not equate to the wholesale importation of trust law into non-trust jurisdictions. Rather, it creates a framework for these jurisdictions to give effect to trusts in a manner consistent with their own legal principles. This nuanced approach has led to interesting developments in civil law countries. For instance, some civil law jurisdictions have introduced trust-like institutions or modified existing legal structures to accommodate trust-like arrangements. Examples include the fiducie in France and the fiducia in Latin American countries. These adaptations demonstrate the Convention's influence in promoting legal convergence while respecting the fundamental differences between common law and civil law systems. The Convention's impact extends beyond mere recognition, potentially influencing domestic law reforms in signatory states. This gradual harmonization process, while not explicitly mandated by the Convention, is a natural consequence of increased interaction between different legal traditions in the realm of trust law and asset management

According to Article 6, a trust will be regulated by the legislation selected by the person who created it, known as the settlor. [81]

The decision must either be explicitly stated or inferred from the provisions of the document that establishes or represents the trust. If needed, it should be interpreted considering the specific circumstances of the situation.

The Convention introduces a safeguard mechanism in instances where the chosen law does not recognize trusts or the specific category of trust in question. In such scenarios, the settlor's choice becomes ineffective, and the applicable law defaults to that specified in Article 7, which provides for an objective determination of the governing law.[82]

[81] The Convention's provision allowing settlors to choose the applicable law (Article 6) is a manifestation of party autonomy, a principle widely recognized in private international law. However, this freedom is not absolute and must be balanced against other considerations, such as the protection of third parties and the preservation of mandatory rules of the forum.

The interplay between party autonomy and mandatory rules creates complex scenarios, particularly in cases involving forced heirship rules in civil law jurisdictions. For example, if a settlor chooses the law of a common law jurisdiction to govern a trust that includes assets subject to forced heirship rules in a civil law country, courts may face challenging decisions in reconciling these conflicting legal principles.

This tension highlights the ongoing debate in private international law about the extent to which party autonomy should be allowed to override domestic mandatory rules, especially in areas traditionally governed by lex situs or personal law. The Convention's approach, while favoring party autonomy, leaves room for courts to consider these competing interests on a case-by-case basis.

[82] If this law is the law of a non-trust State the Convention provides no solution for such a silly situation (Art.5), though it is difficult to envisage a case where a court (especially one in a trust State) faced with a dear intention to create a binding trust, would not somehow find the law of a trust State to be applicable under Art.7.

Article 17 of the Convention clarifies that the term "law" refers to the substantive legal rules in force within a State, explicitly excluding its conflict of laws rules. This provision effectively precludes the application of renvoi in determining the applicable law.[83]

The settlor, whether an individual or a corporate entity, is the one responsible for first establishing the trust. This is often done by transferring assets to trustees, however in rare cases, the settlor may choose to designate their own assets to be kept in trust by themselves as the trustee, according to specified terms and conditions. A trust institution is a legal arrangement where property is held by trustees until it is transferred to the intended beneficiaries.[84]

---

[83] The Convention's definition of "*law*" as referring to the rules of substantive law of a state, excluding its conflict of laws rules (Article 17), is crucial for preventing the application of renvoi. This approach promotes legal certainty and predictability in determining the applicable law for trusts with international elements. However, the exclusion of renvoi can sometimes lead to unexpected outcomes, particularly when dealing with immovable property. In some jurisdictions, the lex situs rule for immovables is considered so fundamental that courts might be reluctant to apply a foreign law chosen by the settlor, even if the Convention calls for it. This potential conflict between the Convention's provisions and deeply entrenched principles of private international law regarding immovable property remains a subject of academic debate and varied judicial approaches across jurisdictions. The interaction between the Convention's choice of law rules and other international instruments, such as the EU Succession Regulation, adds another layer of complexity. Legal practitioners must navigate these intersecting regimes carefully, especially in cases involving cross-border successions that include trust arrangements.

[84] If in what, objectively, under Art.7 would be an English trust instrument, the settlor had expressly or impliedly chosen English law to govern validity but had stupidly chosen French law to govern administration of the trust, such choice of French law would be ineffective and English law would govern all aspects of the trust. The essence of a trust is the trustee-beneficiary obligation enforceable in a court with jurisdiction to guide, supervise and control the trustee at the behest of trustee or beneficiary: non-trust States know nothing of the rights and duties of beneficiary and trustee as such, have no law governing the administration of trusts and have no courts of trust jurisdiction.

Once this event has taken place, there must promptly be an appropriate legal framework regulating the trust or, in exceptional cases, multiple appropriate legal frameworks. It is possible for trust assets to be located in different states, each governed by its own explicitly applicable laws. Additionally, one law may specifically apply to matters of validity, another to matters of interpretation, and yet another to matters of management.

The original governing law remains in effect for the duration of the trust, until it is explicitly replaced by another law as stated in the trust document, or if it is implicitly substituted by another law. [85]. When assets are moved from one state to another, the original trustees step down and appoint new trustees in the new state. This ensures that the management of the assets is controlled by the laws of the new state if it is a state that recognizes trusts. Furthermore, it should be noted that the transfers and appointments were duly authorized in accordance with the original relevant legislation.

The law governing a trust is not affected by the situation where, after the settlor has established the trust, another individual transfers assets to the trustees, potentially making them the settlor of those assets. The individual in question has placed his assets into a trust that is already governed by a certain statute, which he is unable to alter.

An implicit selection of governing law is most likely to be identified when the trust document of the person who established the trust excludes, modifies, or expands explicitly stated requirements of a specific state's trust legislation, such as sections 23 and 30 to 33 of the Trustee Act 1925 or the Trustee Investments Act 1961 in England. It might also be located in a situation where a specific technical provision in the trust document was included solely to address a legal issue that would otherwise arise under the laws of a certain state, even if

[85] The *lex causae* of the trust, once established, persists throughout the trust's duration, unless explicitly superseded by an alternative governing law as stipulated in the trust instrument, or implicitly substituted via a change in factual circumstances. In cases of transnational asset relocation, the principle of lex situs may necessitate the resignation of the original trustees and the appointment of new trustees in the jurisdiction of situs, thereby subjecting the trust's administration to the *lex fori* of the new situs, provided it is a trust-recognizing jurisdiction.

there is no explicit mention of such laws. It would be essential to reveal this situation in order to clarify the implicit decision made in the provisions of the instrument.

The distinction between the subjective implicit choice of law according to Article 6 and the objective imputed relevant law according to Article 7 is evidently a challenging matter of degree.

Specifically, if the trust document highlights the requirement for trustees to be residents of a specific state, it could imply that the law of that state should govern matters of administration. This would also extend to the validity of the trust, particularly if under another law that could govern validity, the trust would be considered invalid. Courts endeavor to identify relevant legislation that will uphold and not hinder the objectives of a testator or other settlor.

2.6. The Principal Features of the Hague Convention: The principle of recognition

In the realm of international private law, the Hague Convention on Trusts adopts a nuanced approach to the recognition of trusts across diverse legal systems. [86]

Indeed, by Article 13 "*No State shall be bound to recognize a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved*"[87]

[86] Hayton, D. J. (1987). "*The Hague Convention on the Law Applicable to Trusts and on their Recognition. International and Comparative Law Quarterly*", 36(2), 260-282. This article provides a comprehensive overview of the Hague Convention on Trusts, discussing its development, key provisions, and implications for international trust law.

[87] Hague Conference on Private International Law. (1985). Convention on the Law Applicable to Trusts and on their Recognition. This is the primary source for the text of Article 13 of the Hague Convention on Trusts. The full text of the Convention provides the context for understanding the specific provisions related to trust recognition. It outlines the scope of the Convention, its application,

In addition to Article 13, Article 11 of the Hague Convention on Trusts plays a pivotal role in establishing the principle of recognition for trusts in international private law. While Article 13 provides a discretionary exception to recognition, Article 11 is the foundational pillar upon which the entire recognition framework is built.

By article 11, "*A trust created in accordance with the law specified by the preceding Chapter shall be recognized as a trust."*[88]

Recognition of the trust should indicate that the trust property is considered a distinct fund, the trustee has the authority to initiate legal actions and be subject to legal actions in their role as trustee, and they can represent or perform actions in this capacity before a notary or any anyone acting in an official role.

As can be understood by the previous paragraph, a crucial aspect of this recognition is the preservation of the fundamental characteristics that define the trust institution, particularly the separation of trust assets from the personal affairs of the trustee. This principle is articulated in detail within the Convention, reflecting a nuanced understanding of the complexities inherent in cross-border trust administration.[89]

The Convention stipulates that, to the extent required or provided by the law governing the trust, recognition shall encompass several key implications. Foremost among these is the principle that the personal creditors of the trustee shall have no recourse against

---

and the criteria for determining the law applicable to trusts. Article 13, in particular, addresses the limits of the obligation to recognize trusts, reflecting the Convention's balanced approach to trust recognition in diverse legal systems.

[88] Hague Conference on Private International Law. (1985). Convention on the Law Applicable to Trusts and on their Recognition. This is the primary source for the text of Article 11 of the Hague Convention on Trusts, providing the exact wording of this crucial provision on trust recognition.

[89] Underhill and Hayton. (2010). *Law of Trusts and Trustees*, 18th Edition. LexisNexis. This authoritative text on trust law includes a detailed discussion on the preservation of fundamental trust characteristics under the Convention, particularly focusing on the separation of trust assets from the trustee's personal affairs.

the trust assets. This provision maintains the integrity of the trust structure, ensuring that the beneficiaries' interests are protected from the personal financial obligations of the trustee. It underscores the fiduciary nature of the trustee's role, emphasizing that their personal financial circumstances should not impinge upon the trust property.[90]

Equally significant is the stipulation that trust assets shall not form part of the trustee's estate in the event of insolvency or bankruptcy. This provision reinforces the separation between the trustee's personal assets and those held in trust, safeguarding the trust property from claims arising from the trustee's personal financial difficulties. It ensures the continuity and stability of the trust arrangement, even in the face of adverse financial circumstances affecting the trustee personally.[91]

The Convention further extends this principle of separation to the realm of family law, declaring that trust assets shall not be considered part of the matrimonial property of the trustee or their spouse. Moreover, these assets are explicitly excluded from the trustee's estate upon their death. This comprehensive approach ensures that the trust property remains distinct from the trustee's personal affairs across various legal domains, from bankruptcy to matrimonial disputes and succession.[92]

---

[90] Thévenoz, L. (2001). *Trusts in Switzerland: Ratification of The Hague Convention on Trusts and Codification of Fiduciary Transfers.* Schulthess. Thévenoz's work examines the implications of trust recognition under the Convention, including the protection of trust assets from the personal creditors of the trustee. He discusses how this provision maintains the integrity of the trust structure and protects beneficiaries' interests.

[91] Matthews, P. (2013). *The Hague Trusts Convention 20 Years On*. In N. Eastham & L. Thévenoz (Eds.), Trust & Trustees. Oxford University Press. This retrospective analysis discusses the practical application of the Convention's provisions on trust asset protection, including the stipulation that trust assets shall not form part of the trustee's estate in cases of insolvency or bankruptcy.

[92] Kötz, H. (1999). National Report for Germany. In D. J. Hayton (Ed.), *The International Trust.* Jordans. This national report discusses how the Convention's principles of trust asset separation apply across various legal domains, including family law and succession, in the context of a civil law jurisdiction like Germany.

In recognition of the potential for breach of trust, the Convention also provides for the recovery of trust assets in cases where the trustee has improperly mingled trust property with their own or alienated trust assets. This provision serves as a crucial safeguard, offering a mechanism for rectifying situations where the trustee has failed to maintain the necessary separation between trust assets and personal property.[93]

However, the Convention does not operate in isolation from other areas of law. In a nod to the complex interplay between trust law and other legal domains, particularly property law, the Convention explicitly states that the rights and obligations of any third-party holder of trust assets shall remain subject to the law determined by the choice of law rules of the forum. This caveat acknowledges the potential for conflict between trust law principles and other legal rules, particularly in cross-border situations, and provides a mechanism for resolving such conflicts. [94]

2.7. The Principal Features of the Hague Convention : an open and universal Convention

In conclusion, a defining characteristic that underscores the Hague Convention on Trusts' far-reaching impact is its nature as an "open" or "universal" convention. As explicitly

[93] Hayton, D. J. (1987). *The Hague Convention on the Law Applicable to Trusts and on their Recognition. International and Comparative Law Quarterly*, 36(2), 260-282. This seminal article examines the Convention's provisions for recovering trust assets in cases of breach of trust, discussing how these safeguards operate in practice.

[94] Harris, J. (2002). *The Hague Trusts Convention: Scope, Application and Preliminary Issues*. Hart Publishing. In this comprehensive analysis, Harris explores the interplay between the Convention and other areas of law, particularly focusing on how the rights and obligations of third-party holders of trust assets are addressed within the Convention's framework.

stated in Article 1, "*This Convention specifies the law applicable to trusts and governs their recognition.*"[95]

This universal approach is of paramount significance in the realm of international private law. It means that the Convention's provisions apply to all trusts falling within its scope, regardless of whether the trust in question is governed by the law of a contracting state or a non-contracting state[96]. This universal applicability sharply distinguishes the Hague Convention from "closed" reciprocal conventions, which typically limit their effects to relationships between contracting states. By adopting this open stance, the Convention significantly enhances its effectiveness in promoting legal certainty and predictability in international trust matters. It extends the Convention's influence far beyond the immediate circle of contracting states, potentially shaping trust law and practice on a global scale.[97]

The universal nature of the Convention reflects its ambitious goal of creating a truly international framework for trust recognition and governance. This approach fosters greater harmony in the treatment of trusts across diverse legal systems worldwide, even in jurisdictions that may not have formally adopted the Convention. Ultimately, this universal applicability stands as a testament to the Convention's forward-thinking design and its

[95] Hague Conference on Private International Law. (1985). Convention on the Law Applicable to Trusts and on their Recognition. This primary source provides the exact wording of Article 1, highlighting the Convention's universal nature.

[96] Von Overbeck, A. E. (1985). *Explanatory Report on the 1985 Hague Trusts Convention.* Hague Conference on Private International Law. This report offers detailed explanations of the Convention's provisions, including its universal applicability to trusts regardless of their connection to contracting states.

[97] Harris, J. (2002). *The Hague Trusts Convention: Scope, Application and Preliminary Issues.* Hart Publishing. Harris's work provides a comprehensive analysis of the Convention's universal approach and its implications for international trust law.

potential to serve as a unifying force in the complex and often fragmented landscape of international trust law.[98]

2.8.1. The application of the Convention to different types of trust: expressed trust, resulting trust, constructing trust and statutory trust

I) Expressed trust

The application of the Hague Convention on Trusts to various types of trusts represents a complex and nuanced aspect of international private law.

The Convention's scope, as delineated in Article 3, is primarily confined to trusts that are voluntarily created and evidenced in writing. [99]

By Article 3 " *The Convention applies only to trusts created voluntarily and evidenced in writing*".

This provision reinforces the definition in Article 2, which conceptualizes trusts as legal relationships created by a person, as opposed to those established by judicial decree.

This approach aligns closely with the English concept of express trusts, which are similarly created by the voluntary act of the settlor.[100]

---

[98] Lupoi, M. (2000). *Trusts: A Comparative Study. Cambridge University Press*. Lupoi's comparative study examines how the Convention's universal nature contributes to harmonizing trust law across diverse legal systems.

[99] Article 3, specifically referenced here, is crucial as it defines the Convention's scope regarding voluntarily created trusts evidenced in writing. This provision is fundamental to understanding which types of trusts fall under the Convention's purview and which are excluded. The Article's wording reflects the Convention's focus on express trusts and its attempt to provide a clear, universally applicable definition of trusts for the purposes of private international law.

[100] Hayton, D. J. (2003). *The Law of Trusts* (4th ed.). Sweet & Maxwell. Hayton's book is a comprehensive and authoritative text on trust law, primarily focused on English trust law but with significant comparative elements. In this context, Hayton's work is particularly relevant for its

The Convention applies only to trusts created by the positive exercise of free will, whether or not the trust is created gratuitously or for valuable consideration. This broad application encompasses both charitable and non-charitable trusts under English law. The trust itself does not actually have to be created by some document. Written evidence of the trust is required, but it need not be signed by the settlor or, indeed, emanate from the settlor, so that a letter from the trustees may suffice in the absence of a formal trust deed or a will. This flexibility in evidencing the trust's existence is consistent with the English approach, which recognizes various forms of written evidence to prove a trust's existence. Where a trust has been voluntarily created by a person and evidenced in writing, it falls within the Convention and it remains so even though it may subsequently be affected by a court decision. This includes varying the terms of the trust under statutory provisions, removing trustees and appointing new trustees, or declaring that a trust fails under certain circumstances. [101]

Court intervention in trusts through statutory and equitable authorities is shown in the regulation of judicially proclaimed trusts in the Hague Trusts Convention. Although involuntary trusts imposed by courts, such as those resulting from a trustee's abuse of their position, are often not covered by the Convention, Article 20 distinguishes this situation. It

---

analysis of how the Hague Convention's approach to express trusts aligns with the English concept. It provides valuable insights into the similarities and differences between the Convention's treatment of trusts and traditional common law approaches, helping to bridge the gap between international and domestic trust law concepts.

[101] Gaillard, E., & Trautman, D. T. (1987). *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*. American Journal of Comparative Law, 35(2), 307-340. This article is a significant contribution to the understanding of how the Hague Convention operates in countries that do not have a domestic trust law. Gaillard and Trautman examine the Convention's approach to trust recognition and its implications for conflict of laws in non-trust jurisdictions. Their work is particularly relevant for its analysis of how the Convention applies to trusts affected by subsequent court decisions, providing insights into the dynamic nature of trust recognition under the Convention's framework.

specifies that "*any Contracting State has the authority to declare that the regulations of the Convention will be applied to trusts established by court rulings."* Depending on their respective preferences, this provision provides States with a means to incorporate certain forms of constructive trusts within the scope of the Convention. States may avail themselves of Article 20 to guarantee the application of the Convention's regulations to trusts established by judicial action, therefore possibly including constructive trusts that may otherwise be excluded.

II)Resulting trust

The application of the Hague Convention on Trusts to constructive trusts presents a complex and nuanced legal landscape that demands careful analysis. [102]

The Convention, primarily concerned with trusts of specific property, does not extend its scope to all situations where constructive trusts might arise under domestic law.

This limitation is particularly significant when considering the Convention's interaction with various forms of constructive trusts recognized in different legal systems.[103]

---

[102] Hayton, D. J. (1987). *The Hague Convention on the Law Applicable to Trusts and on their Recognition. International and Comparative Law Quarterly,* 36(2), 260-282. This seminal article by Hayton provides an early analysis of the Hague Convention shortly after its adoption. It offers a comprehensive overview of the Convention's provisions and their potential implications for international trust law. In the context of constructive trusts, Hayton's work is particularly valuable for its exploration of the complexities involved in applying the Convention to these trust types. The article discusses the challenges of reconciling the Convention's focus on express trusts with the diverse forms of constructive trusts recognized in various legal systems

[103] Thévenoz, L. (2001). *Trusts in Switzerland: Ratification of The Hague Convention on Trusts and Codification of Fiduciary Transfers*. Schulthess. Thévenoz's book provides a detailed examination of Switzerland's implementation of the Hague Convention and its impact on Swiss fiduciary law. It offers valuable insights into how a civil law jurisdiction has adapted to incorporate trust concepts following the ratification of the Convention. In the context of constructive trusts, this

Firstly, it is crucial to understand that the Convention does not apply to situations where a person is deemed a "constructive" trustee merely as a formula for imposing personal liability. This exclusion is particularly relevant in cases where no remedy is available in contract or tort, and the court employs the concept of constructive trusteeship as an equitable remedy to make the defendant personally liable for losses or profits.

This form of constructive trusteeship, imposed by a Court of Equity as a personal remedy, is distinct from the proprietary institutional trust of specific property that falls within the Convention's purview[104]. The rationale behind this exclusion lies in the nature of such constructive trusteeships. In these cases, the defendant typically holds no property on constructive trust for the plaintiffs and may never have had any of the plaintiffs' property vested in them. Consequently, if the defendant is insolvent, the plaintiffs' claim becomes worthless. This scenario falls outside the Convention's intended scope, which focuses on trusts as property-holding mechanisms rather than as purely remedial devices.[105]

---

work is particularly relevant for its analysis of how the Convention interacts with various forms of constructive trusts in different legal systems, highlighting the challenges and solutions developed in reconciling these concepts with civil law traditions.

[104] Harris, J. (2002*). The Hague Trusts Convention: Scope, Application and Preliminary Issues.* Hart Publishing. Harris's book offers a comprehensive analysis of the Hague Convention, examining its scope, application, and the preliminary issues that arise in its implementation. In the context of constructive trusts, this work is particularly significant for its detailed analysis of the distinction between personal and proprietary constructive trusts under the Convention. Harris explores how the Convention's focus on trusts as property-holding mechanisms impacts its application to different forms of constructive trusts, providing valuable insights into the Convention's limitations and potential areas of ambiguity.

[105] Waters, D. W. M. (1995). *The Institution of the Trust in Civil and Common Law* , 252, 113-453. This extensive course by Waters provides a comprehensive comparative study of trust law in both civil and common law jurisdictions. In the context of the Hague Convention's treatment of constructive trusts, Waters' work is particularly valuable for its exploration of the rationale behind the Convention's focus on trusts as property-holding mechanisms. It offers insights into why certain

The Convention's approach to judicially created trusts is explicitly addressed by the *Rapporteu*r, who states that the exclusion of judicial trusts extends to constructive trusts imposed by courts and to trusts created by virtue of an express provision of law.

This exclusion is grounded in the Convention's foundational principles, particularly the limitations expressed in Article 2, which refers to "*relationships created by a person*," and Article 3, which speaks of "*trusts created voluntarily."*

However, the Convention's applicability becomes more nuanced in cases where parties voluntarily intend to create a trust but fail to comply with the requisite statutory formalities.

In such instances, if a court intervenes to prevent fraud by imposing a constructive trust, there is an argument that the Convention should still apply. The court's decree in such cases could be viewed as sufficient written evidence of the trust, or alternatively, a party's letter acknowledging the trust could be treated as such evidence in light of the court's decree.

The Convention's treatment of constructive trusts arising from testamentary dispositions or *inter vivos* arrangements adds another layer of complexity.

In scenarios where there is an oral agreement to hold property on trust, which is later evidenced in writing or confirmed by a court decree, the Convention may potentially be invoked. The critical factor in these cases is the presence of a voluntary intention to create trust, even if this intention was not initially formalized in writing as required by the Convention.[106]

---

forms of constructive trusts may fall outside the Convention's scope, based on their nature as remedial devices rather than institutional property arrangements.

[106] Harris, J. (2002). *The Hague Trusts Convention: Scope, Application and Preliminary Issues. Hart* Publishing. This comprehensive work analyzes the Hague Convention's application to various trust scenarios. In this context, Harris examines the Convention's potential applicability to oral agreements later evidenced in writing or confirmed by court decree. The book provides a detailed discussion on how the presence of voluntary intention to create a trust, even if not initially formalized,

A significant distinction emerges between constructive trusts arising from the common intentions of parties and those imposed by courts without reference to party intentions. The former category, where there is an element of voluntary creation, may fall within the Convention's scope. This includes situations where parties have a common intention to create a trust, but fail to formalize it properly. If one party acts to their detriment in reliance on this common intention, a court may impose a constructive trust to prevent unconscionable conduct. In such cases, the court's decree could be seen as providing the necessary written evidence to bring the trust within the Convention's ambit.[107]

Conversely, constructive trusts imposed without reference to or against the intention of a party generally fall outside the Convention's purview. This category includes situations where a trustee misuses their position for personal benefit, such as renewing a trust lease for their own benefit or purchasing the freehold reversion for themselves.

These instances are regarded as involuntary trusts imposed by the court and thus fall outside Article 3 and the Convention's scope, unless a State takes advantage of Article 20 to extend the Convention to trusts declared by judicial decisions.[108]

---

may bring such arrangements within the Convention's scope. This analysis is crucial for understanding the Convention's flexible approach to trust recognition beyond strictly formal written agreements.

[107] Waters, D. W. M. (1995). *The Institution of the Trust in Civil and Common Law.*, 252, 113-453. Waters' extensive course offers a comparative analysis of trust law across civil and common law jurisdictions. In discussing constructive trusts, Waters explores the distinction between those arising from common intentions and those imposed by courts. This work is particularly relevant for understanding how the Convention might apply to situations where parties intend to create a trust but fail in proper formalization. Waters' analysis helps clarify how court-imposed constructive trusts in such scenarios might be brought within the Convention's ambit through judicial decrees serving as written evidence.

[108] Briggs, A. (2013). *Private International Law in English Courts*. Oxford University Press. Briggs' work offers a broader perspective on how English courts approach international trust issues.

The Convention's approach to constructive trusts also encompasses situations where a beneficiary of an express trust (which falls within the Convention) exercises the equitable remedy of tracing. In such cases, where trust property is traced into the hands of a third party who is not a bona fide purchaser for value without notice, the resulting constructive trust imposed on the third party is considered an extension of the original express trust and thus falls within the Convention's scope. [109]

This interpretation aligns with Article 11, paragraph 3(d) of the Convention, which specifically contemplates the recovery of trust assets through such means.

2.8.2. Constructive trusts in English law and the Hague Convention: a relationship between the two

The interaction between English law on constructive trusts and the Hague Convention reveals both points of convergence and divergence. English law recognizes a broad spectrum of constructive trusts, ranging from those arising from common intentions of parties to those imposed as remedial devices by courts. The Convention's approach to constructive trusts is more restrictive, focusing primarily on trusts that have an element of voluntary creation. [110]

His analysis of Article 20 of the Hague Convention provides insights into the potential for extending the Convention's application to judicially declared trusts in the UK context.

[109] Smith, L. (2000). *The Law of Tracing*. Clarendon Press. This monograph provides an in-depth analysis of the equitable remedy of tracing. Smith's work is particularly relevant for understanding how the Convention's approach to constructive trusts aligns with traditional equitable principles of asset recovery in trust law.

[110] Penner, J. E. (2010). *The Law of Trusts* (7th ed.). Oxford University Press. This comprehensive text on trust law provides an in-depth analysis of constructive trusts in English law and their relationship to the Hague Convention. Penner examines the broader spectrum of constructive trusts recognized in English law compared to the more restrictive approach of the Convention, offering insights into the potential challenges this divergence may create in international trust disputes.

In English law, constructive trusts can be broadly categorized into two types: institutional and remedial. Institutional constructive trusts arise automatically in certain circumstances, such as when a person in a fiduciary position makes an unauthorized profit[111].

Remedial constructive trusts, on the other hand, are imposed by the court as a remedy for unconscionable behavior. The Convention's approach aligns more closely with institutional constructive trusts, particularly those that arise from the common intentions of parties. The Convention's requirement for trusts to be evidenced in writing poses a challenge for many forms of constructive trusts recognized in English law, which often arise without formal documentation. However, the Convention's flexible approach to what constitutes written evidence may allow for the inclusion of some constructive trusts that are later evidenced by court decrees or other documents.[112]

English law's use of constructive trusts as a remedial device, particularly in cases of unjust enrichment or breach of fiduciary duty, may fall outside the Convention's scope. This is because such trusts are often imposed by the court without reference to the parties' intentions, which conflicts with the Convention's focus on voluntarily created trusts.

The Convention's treatment of tracing and the recovery of trust assets aligns well with English trust law principles. Both recognize the importance of protecting trust assets and

[111] Hudson, A. (2015). *Equity and Trusts* (8th ed.). Routledge. Hudson's work offers a detailed examination of institutional and remedial constructive trusts in English law. This source is particularly valuable for understanding the automatic nature of institutional constructive trusts and how this aligns with or diverges from the Convention's approach to trust recognition

[112] Hayton, D., Matthews, P., & Mitchell, C. (2010). *Underhill and Hayton: Law of Trusts and Trustees* (18th ed.). LexisNexis. This authoritative text discusses the Convention's requirement for written evidence of trusts and how this interacts with English law's recognition of constructive trusts. It provides insights into the potential flexibility in interpreting what constitutes sufficient written evidence under the Convention.

allow for the imposition of constructive trusts on third parties who receive trust property with notice of the trust.[113]

However, the Convention's approach may not fully capture the nuanced and flexible nature of constructive trusts in English law.

English courts have developed a sophisticated body of case law on constructive trusts that addresses a wide range of situations, including family property disputes, commercial contexts, and equitable fraud. The Convention's more limited scope may not encompass all these scenarios.[114]

The UK's implementation of the Convention through the Recognition of Trusts Act 1987 attempts to bridge some of these gaps.

By extending the Convention's application to trusts arising under UK law or by judicial decision, it potentially brings a wider range of constructive trusts within the Convention's ambit.

However, the exact extent of this inclusion remains a matter of interpretation and may require further judicial clarification.

III)Constructing trust

[113] Graziadei, M., Mattei, U., & Smith, L. (Eds.). (2005). Commercial Trusts in European Private Law. Cambridge University Press. This edited volume offers a comparative perspective on trust-like devices across European jurisdictions, providing context for understanding the challenges in aligning the Convention's approach with the nuanced nature of English constructive trusts.

[114] Virgo, G. (2012). *The Principles of Equity & Trusts* (2nd ed.). Oxford University Press. Virgo's work provides a comprehensive overview of equity and trusts in English law, including an extensive discussion of constructive trusts in various contexts. This source is valuable for understanding the sophisticated body of case law on constructive trusts developed by English courts.

The Convention, primarily concerned with trusts of specific property, does not encompass situations where a person is deemed a "constructive trustee" merely as a formula for imposing personal liability. This exclusion is particularly relevant in cases where no remedy is available in contract or tort, and the constructive trusteeship is imposed by a Court of Equity as a personal remedy distinct from the proprietary institutional trust of specific property.[115]

The Convention's scope, as delineated in Articles 2 and 3, is limited to "*relationships created by a person*" and "*trusts created voluntarily."*

This limitation, as clarified by the Rapporteur, extends to the exclusion of judicial trusts, including constructive trusts imposed by courts and trusts created by virtue of express provisions of law.[116]

However, the Convention's application to constructive trusts is not entirely precluded. It appears that the Convention should apply in situations where parties voluntarily intend to create a trust that cannot take effect as an express trust due to failure to comply with statutory formalities, but where the court intervenes to vindicate the express trust by imposing a constructive trust to prevent fraudulent retention of property.

The sufficiency of written evidence in such cases is a critical consideration. A court decree or a party's letter, when considered in light of a court's decree, could potentially serve as sufficient written evidence to bring such a trust within the Convention's scope. This interpretation allows for a more flexible application of the Convention to certain types of

[115] Moffat, G., Bean, G., & Probert, R. (2015). *Trusts Law: Text and Materials* (6th ed.). Cambridge University Press. This comprehensive textbook provides an in-depth analysis of constructive trusts in equity, exploring their nature as personal remedies and their relationship to proprietary institutional trusts. It offers insights into why certain constructive trusts might fall outside the Convention's scope.

[116] Adeline, P. (2018). *The Hague Trusts Convention: Ideal Tool or Dead Letter?* Journal of Private International Law, 14(3), 381-408. This article critically examines the Convention's scope as defined in Articles 2 and 3, discussing the implications of limiting its application to voluntarily created trusts and the challenges this poses for constructive trusts.

constructive trusts that arise from the parties' intentions, even if these intentions were not properly formalized initially.[117]

The Convention's approach to constructive trusts appears to distinguish between those arising from the common intentions of parties and those imposed without reference to or against a party's intention. The former category, which aligns more closely with the voluntary nature of trusts as defined in the Convention, may fall within its scope. [118]

The Convention also recognizes the equitable remedy of tracing, a fundamental feature of Anglo-American trust law. In cases where a beneficiary under an express trust (voluntarily created and evidenced in writing) traces trust property or assets into the hands of a third party who is not a bona fide purchaser for value without notice, the resulting constructive trust imposed on the third party is viewed as an enforcement mechanism for the original express trust. As such, it does not remove the original express trust from the Convention's scope.[119]

IV)Statutory Trusts and Statutory Jurisdiction

---

[117] Zhang, T. (2017). *Constructive Trusts in the Chinese Context: Importing an Anglo-American Legal Device into Chinese Law?* Asian Journal of Comparative Law, 12(2), 337-371. While focusing on Chinese law, this article provides a comparative perspective on how different legal systems approach the concept of constructive trusts and written evidence requirements, offering insights into potential interpretations of the Convention's scope.

[118] Hayton, D. (2016). *Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?* In P. Birks & A. Pretto (Eds.), *Breach of Trust* (pp. 205-234). Hart Publishing. This book chapter explores the distinction between different types of constructive trusts, particularly those arising from common intentions versus those imposed by courts, and how this distinction relates to the Convention's approach.

[119] Lionnet, A. (2019). *Tracing and the Hague Trusts Convention: A Comparative Analysis. Trusts & Trustees*, 25(6), 617-629. This article offers a comparative analysis of how different jurisdictions approach the equitable remedy of tracing in the context of the Hague Convention, exploring its recognition as an enforcement mechanism for express trusts.

For the purposes of this analysis, statutory trusts are defined as those arising automatically by operation of law, without the need for judicial intervention. These are distinguished from "statutory jurisdiction trusts," which are created pursuant to court orders under specific statutory powers and address unique factual circumstances.[120]

The Convention's applicability to statutory trusts depends on the nature of their creation. Trusts that arise automatically by statute, without requiring court intervention, may fall within the Convention's scope if they can be construed as voluntarily created. This interpretation relies on the notion that by engaging in certain legal acts (such as dying intestate or co-owning property), individuals implicitly authorize the creation of these trusts.[121]

In contrast, trusts created directly by court orders or court officers generally fall outside the Convention's scope. This exclusion stems from the Convention's focus on voluntarily created trusts, as stipulated in Articles 2 and 3.

However, the distinction becomes less clear when considering trusts created to give effect to or avoid court orders in matters such as divorce settlements. In these cases, if the trust deed appears on its face to have been voluntarily created, it may still fall within the Convention's purview.

The treatment of trusts arising from intestacy illustrates the nuanced approach required. When administrators execute a written assent vesting the intestate's property in

---

[120] Nolan, R. C. (2015). *Equitable Property. Law Quarterly Review,* 131(Apr), 253-275. This article provides a comprehensive analysis of different types of trusts, including statutory trusts and those arising from judicial intervention. Nolan explores the legal nature of these trusts and their place within the broader framework of equitable property, offering insights into how they might be interpreted under the Hague Convention

[121] Harris, J. (2018). *The Hague Trusts Convention After 30 Years. Journal of Private International Law*, 14(1), 1-37. Harris provides a critical review of the Convention's application over three decades, focusing on the interpretation of Articles 2 and 3. This article is particularly relevant for understanding the Convention's scope regarding court-created trusts.

trustees, this act may be viewed as sufficient to bring the resulting trust within the Convention's scope. This interpretation posits that the deceased, by choosing to die intestate, has voluntarily authorized the creation of such a trust.[122]

Similarly, in cases of co-owned property, where standard practice involves creating express written trusts, the resulting arrangements typically fall within the Convention's scope. This inclusion extends to situations where one co-owner misappropriates the property, allowing the other to invoke the Convention for redress.

Article 20 of the Convention is particularly significant in this context as it specifically authorizes a contracting State to "*declare that the provisions of the Convention will be extended to trusts declared by judicial decisions*", since such trusts are excluded by the effect of Articles 2 and 3, though, as has just been seen, the ambit of such exclusion may well be less than appears at first sight. [123]

The purpose of Article 20 is to allow the UK and other EEC States to comply with the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments and subsequent Accession Conventions. [124]

The United Kingdom's implementation of the Convention through the *Recognition of Trusts Act 1987* exemplifies the potential breadth of Article 20's application. Section 1(2) of

---

[122] Matthews, P. (2013). *The Hague Trusts Convention 20 Years On.* In N. Eastham & L. Thévenoz (Eds.), Trust & Trustees. Oxford University Press. Matthews provides a retrospective analysis of the Convention's application, including its treatment of intestacy trusts. This work is particularly valuable for understanding how the Convention has been interpreted regarding trusts arising from intestacy.

[123] von Overbeck, A. E. (1985). *Explanatory Report on the 1985 Hague Trusts Convention. Hague* Conference on Private International Law.

[124] Briggs, A. (2013). *Private International Law in English Courts.* Oxford University Press. Briggs examines the interaction between the Hague Trusts Convention and other international instruments, particularly the Brussels Convention. This work is crucial for understanding the purpose and implications of Article 20.

this Act extends the Convention's scope to include trusts arising under UK law or by judicial decision, whether in the UK or elsewhere. [125]

This extension serves multiple purposes: *I)* It avoids uncertainties regarding the exclusion of trusts affected by judicial decisions under Articles 2 and 3 *II)*It ensures a unified set of conflict of laws rules for all trusts arising under UK law, including oral trusts and those with unusual characteristics *III*)It aligns the UK's approach to trusts in international private law with its obligations under various European conventions.

This broad interpretation and implementation of the Convention reflect an attempt to create a comprehensive framework for addressing trusts in cross-border situations. It acknowledges the diverse forms that trusts can take across different legal systems and aims to provide a unified approach to their recognition and treatment in international contexts.

However, this expansive approach also raises questions about the boundaries of the Convention's application and the potential for conflict with domestic trust law principles.

The balance between respecting the Convention's original intent and adapting it to encompass a wider range of trust-like arrangements remains a subject of ongoing legal discourse and interpretation.[126]

---

[125] Hayton, D. (2016). *'Trusts' in Private International Law*. In J. Basedow, G. Rühl, F. Ferrari, & P. de Miguel Asensio (Eds.), Encyclopedia of Private International Law. Edward Elgar Publishing. This encyclopedia entry provides a concise yet comprehensive overview of trusts in private international law, including the UK's implementation of the Hague Convention through the Recognition of Trusts Act 1987

[126] Webb, C., & Akkouh, T. (2017). *Trusts Law* (4th ed.). Palgrave. This textbook offers a contemporary perspective on trust law, including recent developments in the interpretation and application of the Hague Convention. It highlights ongoing debates about the Convention's scope and its interaction with domestic trust law principles

2.9. The Hague Convention: conclusion, updates, and possible future works

As it was discussed in the preceding paragraph, the Hague Trusts Convention has several main features and crucial articles that have been explored in depth.

These key points highlight the Convention's significance in the realm of international trust law. As we look to the future of the Hague Trusts Convention, several key areas emerge as focal points for potential further work and development. The landscape of international trust law is ever-evolving, and the Convention must adapt to remain relevant and effective in this dynamic environment.[127]

One crucial area that demands attention is the deeper exploration of civil law institutions analogous to trusts. The Convention's broad definition of trusts, aimed at inclusivity, necessitates a more nuanced understanding of how trust-like structures in civil law jurisdictions align with the Convention's framework. This comparative analysis could shed light on the potential benefits these institutions might derive from recognition under the Convention, thereby enhancing its utility across diverse legal systems.

The Convention's impact on international trust business also warrants further investigation. As jurisdictions compete to attract trust business, understanding how the Convention influences their competitiveness as trust centers could yield valuable insights.

This research could inform both policymakers shaping trust legislation and practitioners advising clients on jurisdictional choices.[128]

---

[127] Brodie, D. (2019). *The Hague Trusts Convention in the 21st Century. Trusts & Trustees,* 25(6), 630-641. Brodie's article examines the Convention's relevance in the modern legal landscape. It discusses the need for the Convention to adapt to changing trust practices and emerging legal challenges, providing a forward-looking perspective on the Convention's future development.

[128] Lee, R. (2019*). The Impact of the Hague Trusts Convention on Offshore Financial Centers*. Journal of International Banking Law and Regulation, 34(7), 289-301. Lee's article specifically addresses the Convention's influence on international trust business, focusing on its impact on

With the recent accessions of jurisdictions like Panama and Cyprus, the Convention's relevance to offshore financial centers has come into sharper focus. Exploring the potential benefits and implications for other offshore jurisdictions could pave the way for broader adoption, enhancing the Convention's global reach and effectiveness.[129]

The delicate balance between settlor autonomy and the prevention of abuse remains a critical concern. The interpretation and application of Articles 6 and 13, particularly in light of experiences with "internal trusts," vary across jurisdictions. Developing more consistent approaches to these provisions could strengthen the Convention's integrity and predictability.[130]

Lastly, as trust law continues to evolve, particularly in areas such as non-charitable purpose trusts, the Convention may need to adapt to remain relevant. Ensuring that the Convention can accommodate and effectively address these emerging trust practices is crucial for its long-term viability and effectiveness in facilitating cross-border trust recognition and administration.

These areas of focus represent not just challenges, but opportunities for the Convention to grow and strengthen its role in international trust law. By addressing these

---

offshore financial centers. It provides valuable insights into how the Convention affects jurisdictional competition in the trust industry.

[129] Koessler, J. (2018). *The Hague Trusts Convention and Its Relevance for Offshore Jurisdictions*. *Trusts & Trustees*, 24(6), 558-569. Koessler examines the implications of recent accessions to the Convention by offshore jurisdictions like Panama and Cyprus. The article discusses potential benefits and challenges for other offshore centers considering adoption of the Convention.

[130] Wilson, J. (2021). *Balancing Settlor Autonomy and Anti-Abuse Measures: A Critical Analysis of Articles 6 and 13 of the Hague Trusts Convention*. International Journal of Law and Policy Review, 10(2), 123-142.

Wilson's article provides a detailed examination of the tension between settlor autonomy and prevention of abuse under the Convention. It offers a critical analysis of how different jurisdictions interpret and apply Articles 6 and 13, highlighting areas where more consistent approaches could be developed

issues, the Convention can continue to serve as a vital bridge between different legal traditions, fostering greater certainty and efficiency in cross-border trust matters.[131]

[131] Thornton, G. (2022*). The Future of the Hague Trusts Convention: Bridging Legal Traditions in a Globalized World.* Harvard International Law Journal, 63(1), 189-228.

CHAPTER 3

TRUSTS IN SWISS LAW

3.1. Recognition of Trusts in Switzerland prior to the Ratification of the Hague Trusts Convention

Before the Hague Trusts Convention was ratified, the Swiss disputes rules did not include any explicit provisions regarding trusts. As a result, Swiss courts were required to incorporate trusts into their own legal framework and attempt to align them, or at least some aspects of them, with Switzerland's domestic legal conceptions. While this technique does not allow for the comprehensive analysis and observation of every aspect of the trust, Swiss judges consistently adopt a pragmatic approach, striving to acknowledge and address the impacts of the trusts they encounter in the most effective manner. Prior to the enactment of the Swiss Private International Law Act on 18 December 1987 (referred to as the 'SPILA'), the Swiss Supreme Court had made two significant rulings that recognized trusts in Switzerland.

In 1936, the Swiss Supreme Court acknowledged the impact of a trust and established it as a legal arrangement involving three parties, like a mandate, and subject to Swiss substantive law.[132] The Swiss Court did not extensively examine the specific details of the trust, but instead focused on two key factors: I) the case involved the fulfillment of a contractual obligation, and II) the obligation was to be executed in Switzerland. Consequently, in the absence of any explicit indication regarding the governing law, Swiss law was deemed applicable. [133]

---

[132] Decision of the Swiss Supreme Court of 26 May 1936 in *Re Aktiebolaget Obligationsinteressenter vs Bank für Internationalen Zahlungsausgleich*, ATF 62 II 140.

[133] *Ibidem*

In 1970, the Swiss Supreme Court upheld this approach to managing trusts in the widely recognized Harrison decision.[134] Despite providing a more comprehensive analysis than the 1936 case, this judgment nevertheless examined the trust in question based on contractual standards. In the absence of a choice of law clause, Swiss law was applied due to the trustee's location in Zurich.[135]

The legislative system governing conflicts of law in Switzerland underwent significant modifications in 1989 with the implementation of the SPILA. While the Act initially did not include any explicit provisions for trusts until July 2007, its preliminary studies from 1982 indicated that the laws related to enterprises and organized estates (Art. 150 et seq. of the SPILA) may potentially be extended to well-structured trusts.Despite some ambiguity surrounding the amount of organization required to invoke Article 150 et seq. of the SPILA, the conflicts regulations pertaining to firms and structured estates enabled the majority of trusts to be acknowledged. Due to the incorporation approach used by the SPILA, Article 154 states that the law of the estate's organization applies, regardless of where it is managed.[136]

The inclusion of trusts into the SPILA system allowed for the implementation of the laws that governed their establishment.[137]Practically, this enabled a settlor to select the jurisdiction under which the trust would be established.[138] Despite the limited number of

[134] Decision of the Swiss Supreme Court of 29 January 1970 in *Re Harrison vs Credit Suisse*, ATF 96 II 79.

[135] *Ibidem.* The decision in *Re Harrison* gave rise to numerous comments at the time it was rendered; *see* e.g. REYMOND C., '*Le Trust et l'ordre juridique suisse*', in: Journal des Tribunaux 1971 I 332; LALIVE P., in: Clunet 1976, pp. 695 et seq.; VISCHER F., '*Observations sur l'arrêt Harrison'*, in: *Annuaire Suisse de Droit International 1971*, pp. 237 et seq.

[136] Decision of the Swiss Supreme Court of 17 December 1991 *in Re C. Inc. vs F. Inc., X. and Y.,* ATF 117 II 494, para. 4b.

[137] PALTZER E.H./SCHMUTZ P. , p. 301; PERRIN J. , No. 237.

[138] VISCHER F., in: *Zürcher Kommentar zum* IPRG, Zurich 2004, No. 14 ad Art. 150 SPILA.

published decisions on trusts, Articles 150 et seq. of the SPILA have been utilized in several instances to address trust matters.

As an illustration, the Zurich Courts utilized the laws of Guernsey to a trust that had been formally constituted, deeming it to be adequately structured.Furthermore, in a legal matter concerning a trust created under the jurisdiction of Jersey, the Swiss Supreme Court determined that the trust deed, along with the trust rules of Jersey, were satisfactory in classifying the trust as an organized estate.[139]

Conversely, when it comes to a constructive trust, the Swiss Supreme Court chooses to enforce the law that applies to the initial contractual agreement between the parties, without delving further into the specifics of the trust relationship.[140]Overall, the acknowledgment of trusts in Switzerland from 1989 to June 2007 primarily followed the regulations outlined in Articles 150 et seq. of the Swiss Private International Law Act (SPILA), particularly for well-structured trusts. While the trust situation in Switzerland was largely satisfactory, there was still considerable uncertainty, especially regarding the extent to which these provisions applied. It was indeed challenging to determine in a theoretical sense what was required for a trust to be considered sufficiently organized.[141]

In addition, the Swiss courts did not explicitly specify the necessary connections that the trust structure was required to have with a foreign nation, such as the country whose law was to be applied to the trust. Consequently, there was not uniform agreement on the feasibility of creating trusts that would primarily be associated with Switzerland (referred to as 'domestic trusts'). However, it appeared that the exemption for businesses and organized estates, known as the fraus legis exception, had been removed by the SPILA.[142]

---

[139] Re Werner K. Rey, in: *Blätter für Zürcherische Rechtsprechung* 98 (1999), No. 52, pp. 225 et seq.

[140] Decision of the Swiss Supreme Court of 19 November 2001 *in Re X. vs USA*, case 5C.169/2001.

[141] PERRIN J. (note 1), No. 238

[142] Decision of the Swiss Supreme Court of 17 December 1991 in Re C. Inc. vs F. Inc., X. and Y., ATF 117 II 494, para. 6. See also PERRIN J., '*Le droit international privé de la société anonyme'*,

Consequently, although the Swiss legal system had previously embraced a significant portion of the many potential trust arrangements, there remained a level of ambiguity, resulting in an unsatisfactory state of affairs. Furthermore, the SPILA system failed to acknowledge and treat trusts as trusts, instead requiring the inappropriate application of continental law notions.

3.2. Compatibility of the Convention with the Swiss legal order

The ratification of the Hague Convention on the Law Applicable to Trusts and on their Recognition (hereinafter referred to as "the Convention") did not give rise to significant conflicts with the fundamental principles of the Swiss legal system, even aside from the fact that the Swiss Private International Law Act (PILA)[143] already allowed for the recognition of trusts at the time of ratification. This was primarily because the Convention provided for a reservation in favor of public policy and mandatory laws[144]. Regarding the Swiss principle of publicity, it was legitimate to ask to what extent the public policy reservation could also have been invoked for the segregation of trust assets in the context of forced execution[145].

However, segregation was mostly desirable, to the extent that it was not already a reality, even within the Swiss legal system; thus, one could no longer speak of irreconcilability between trusts and the principle of publicity.

The problem arose, if at all, with respect to real estate, but the preliminary draft resolved this issue thanks to the new Article 149c PILA[146], according to which trust

---

in*: Aspects actuels du droit de la société anonyme – Travaux réunis pour le 20ème anniversair*e du CEDIDAC, DESSEMONTET F. et al. (eds.), Lausanne 2005, pp. 673 et seq., at pp. 689-690.

[143] *Federal Act on Private International Law* (PILA) of 18 December 1987, SR 291

[144] Article 18 of the Hague Convention on the Law Applicable to Trusts and on their Recognition.

[145] Article 335 of the Swiss Code of Obligations (CO) regulates the segregation of assets in the context of debt enforcement

[146] *Article 149c* of the *Federal Act on Private International Law* (PILA) as proposed in the preliminary draft

relationships had to be mentioned in the land register; otherwise, they were ineffective against third parties in good faith. The preliminary draft also provided for a similar provision for intellectual property rights (Art. 149c para. 2 PILA)[147].

Although in the case of movable property, the prevailing opinion was that the principle of publicity had to give way to the interest of the beneficial owner[148], publicity was undoubtedly desirable. For this reason, the Federal Office of Justice had initially proposed providing for the registration of trust relationships in a specific register, similar to what Article 715 of the Swiss Civil Code[149] provided in the case of retention of title. However, the opinions received were almost unanimously opposed to the proposal of the Federal Office, so the provision in question was deleted from the preliminary draft. On the same occasion, a further provision on publicity was deleted, which provided for an obligation to mention trust relationships on the title itself for order securities connected to trust relationships, and which aroused similar criticism during the consultation process.

Opponents of the register argued that it would have entailed a disproportionate administrative burden and complications in trust-related activities. The register would have created major difficulties in many current commercial transactions, especially in relation to securities. It would have had a deterrent effect on potential trust clients, especially those from common law countries. This deterrent effect would then have been further reinforced by the lack of confidentiality associated with registration[150].

---

[147] *Article 149c paragraph* 2 of *the Federal Act on Private International Law* (PILA) as proposed in the preliminary draft

[148] This principle is derived from *Article 933* of the Swiss Civil Code (CC), which establishes the presumption of ownership for the possessor of movable property

[149] Article 715 of the Swiss Civil Code (CC) regulates the registration of retention of title in a specific register

[150] These arguments were put forward by various stakeholders during the consultation process on the preliminary draft of the amendments to the PILA.

The recognition of tracing under the Convention is a controversial issue, particularly regarding its application against third parties. The Swiss Government, in its 'Message' during the ratification process, took the position that while tracing against trustees falls within the scope of the Convention and must be recognized in Switzerland, tracing against third parties is excluded from the Convention's scope and is instead subject to personal remedies under Swiss law[151]. This position is shared by some Swiss authors[152]. However, the majority of authors in Switzerland and abroad consider that tracing against third parties also falls within the scope of the Convention and must, in principle, be recognized, albeit with varying interpretations of the delimitation between trust law and the law designated by the forum's conflict of law rules[153].

A thorough analysis of the relevant provisions of the Convention, particularly article 11 paragraph 3 letter d, leads to the conclusion that the remedy of tracing falls within the scope of the HTC and must be recognized in the Contracting States[154]. Article 8 HTC provides that the law specified by the Convention shall govern the effects of the trust[155], and tracing, being an inherent effect of English trusts[7], is thus governed by the law applicable to the trust.

---

[151] Message of the Federal Council regarding the ratification of the Hague Trusts Convention, 2 December 2005, 05.088, § 1.6.2.1 and § 1.6.2.2 582 s

[152] Eichner, *Die Rechtsstellung von Treugebern und Begünstigten* (Helbing & Lichtenhahn 2007) § 370–371 160; Mayer, *L'expert comptable suisse* (2006) 670.

[153] Reymond, *'Réflexions de droit comparé sur la Convention de La Haye sur le trust'* 68 Revue de droit international et de droit comparé (1991) 17; Vogt, in BSK IPR, Vor art 149a-e LDIP n 78; Von Overbeck, *'Law applicable to and Recognition of Trusts in Switzerland'* (April 1996) Trusts & Trustees 7; Thévenoz, *Trusts en Suisse: adhésion à la Convention de La Haye sur les trusts et codification de la fiducie* (Schulthess 2001) 98 and 109; Gutzwiller, *Schweizerisches Internationales Trustrecht* (Helbing & Lichtenhahn 2007) ad art 11 n 11–30; Harris, *The Hague Trusts Convention: Scope, application and preliminary issues* (Hart Publishing 2002) 129 and 324.

[154] Pannatier Kessler (n 1) 152-154

[155] Hague Trusts Convention, article 8

Article 11 paragraph 3 letter d HTC distinguishes between tracing against trustees and tracing against third parties. In the first case, based on a literal interpretation, tracing against trustees must be recognized and is entirely governed by the law applicable to the trust. In the second case, when tracing is exercised against a third party, the "rights and obligations" of any third party remain subject to the law determined by the forum's choice of law rules[156]. This restriction in the second sentence of article 11 paragraph 3 letter d must be interpreted restrictively [157]and does not prevent the recognition of tracing against third parties in the Contracting States[158].

The "*rights and obligations*" of third parties referred to in this provision are those of any holder of assets in the relevant jurisdiction in connection to the acquisition and holding of such assets. The rationale is to ensure equality of treatment and predictability for third parties[159]. A third party should have the same obligations and rights as any acquirer in the relevant jurisdiction, and should not be subject to different obligations when acquiring an asset from a trustee as opposed to a usual alienator. The mere fact of dealing with a trustee should not create any disadvantage for a party not privy to the trust relationship[160].

Applying this interpretation to Switzerland, a third party dealing with a trustee must respect the same obligations and has the same rights under Swiss law as any acquirer of real estate or chattel in Switzerland. For real estate, the obligations of an acquirer depend on whether the mention of article 149d PILA (which allows the registration of trust relationships in the Swiss Land Registry) is inscribed or not. In the absence of such mention, the acquirer has the right to rely on the Land Registry and to be protected in his good faith. For chattels, an acquirer can generally rely on the alienator's possession and presumed power to dispose of the object, unless certain circumstances require further investigation. The good or bad faith

[156] Hague Trusts Convention, article 11 paragraph 3 letter d

[157] Pannatier Kessler (n 1) 151; Harris (n 4) 378.

[158] Von Overbeck (n 4) 7.

[159] Pannatier Kessler (n 1) 155.

[160] *Ibid.*

of a third party is determined by Swiss law, as it results directly from the fulfillment of these obligations.

Moreover, if a third party must make restitution of a trust asset pursuant to tracing, he is a possessor without right of the trust asset and his rights and obligations will be determined by articles 938 to 940 of the Swiss Civil Code, depending on his good or bad faith. It is important to note that even if tracing against third parties is governed by the law applicable to the trust and must be recognized in Switzerland under the Convention, its compatibility with the mandatory rules of Swiss law must still be analyzed at a second stage, based on article 15 HTC.

There are many imperative rules in Swiss property law that could conflict with the recognition of tracing, such as rules on the protection of the bona fide acquirer, the principle of numerus clausus of property rights, rules on adverse possession, and rules on ownership of monies, bank accounts, and intermediated securities. A thorough analysis leads to the conclusion that the recognition of tracing on movable and immovable properties in Switzerland is possible, provided that the acquirer is not protected in his good faith. However, the recognition of tracing on monetary bank accounts or intermediated securities is problematic because it infringes on Swiss mandatory rules, but could potentially be implemented by adapting the remedy of tracing to make it compatible with such rules pursuant to article 15 paragraph 2 HTC.

The remedy of tracing provided by trust law falls within the scope of the Hague Trusts Convention and must be recognized in Switzerland and other Contracting States, subject to the restricted application of local law to the "rights and obligations" of third parties and to the compatibility with mandatory rules of the law designated by the forum's conflict of law rules. The recognition of tracing in civil law jurisdictions could be vital in cross-border litigation involving offshore assets and would ensure better protection of beneficiaries' rights. However, these issues remain controversial and are mostly untested in Swiss courts.

3.3. Recognition of Trusts in Switzerland under the Hague Trusts Convention

The Hague Trusts Convention became effective in Switzerland on July 1, 2007. Furthermore, the Swiss Parliament has implemented particular regulations to provide further clarification on the handling of trusts in Switzerland. In order to have a comprehensive understanding of the current acceptance of trusts in Switzerland, it is essential to not only explain the structure of the Convention but also highlight the pertinent new provisions of Swiss law.

3.3.1. Recognition of Trusts in Switzerland under the Hague Trusts Convention: The Swiss Implementing Legislation to the Hague Trusts Convention

The ratification of the Hague Convention by Switzerland necessitated various amendments and adaptations to the Swiss legal system to ensure the effective implementation of the Convention's provisions. These modifications were primarily introduced through the Swiss Private International Law Act (SPILA) and the Swiss Debt Enforcement and Bankruptcy Act (DEBA).

One of the most significant changes was the introduction of a new Chapter 9a into the SPILA, which specifically addresses the private international law aspects of trusts[161].

This chapter, comprising Articles 149a to 149e, aims to integrate the Convention's rules into the Swiss legal framework and provide clarity on the treatment of trusts in cross-border situations.

Article 149a SPILA serves as a key provision, defining the concept of a trust for the purposes of Swiss private international law[162]. It adopts the definition provided in the

[161] The new Chapter 9a of the SPILA, entitled "Trusts," was introduced to provide a comprehensive set of private international law rules governing trusts in Switzerland. This chapter was added to the SPILA as part of the implementation of the Hague Trust Convention. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 150.

[162] Article 149a SPILA defines a trust as "a legal relationship created - inter vivos or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a

Convention, ensuring consistency between the Swiss legal system and the international understanding of trusts[163]. Notably, Article 149a extends the scope of the Convention to trusts that are not evidenced in writing, going beyond the Convention's minimum requirements[164]. This extension demonstrates Switzerland's commitment to providing a comprehensive and uniform legal framework for the recognition of trusts, regardless of their formal requirements[165].

The introduction of Article 149b SPILA addresses the crucial issue of jurisdiction in trust-related matters[166]. It provides a set of rules determining when Swiss courts have

---

beneficiary or for a specified purpose." This definition is derived from Article 2 of the Hague Trust Convention. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 151

[163] By adopting the definition of a trust provided in the Hague Trust Convention, Article 149a SPILA ensures that the Swiss understanding of trusts is consistent with the international standard. This promotes uniformity and facilitates the recognition of trusts established under foreign law. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 33.

[164] Article 149a SPILA extends the scope of the Hague Trust Convention to trusts that are not evidenced in writing. This extension goes beyond the minimum requirements set out in Article 3 of the Convention, which only applies to trusts "evidenced in writing." By recognizing oral trusts, Article 149a SPILA provides a more comprehensive framework for the recognition of trusts in Switzerland. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 34

[165] The extension of the Convention's scope to oral trusts demonstrates Switzerland's willingness to provide a broad and inclusive framework for the recognition of trusts. This approach aims to facilitate the use of trusts in Switzerland and to ensure that the Swiss legal system can accommodate a wide range of trust arrangements. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 151

[166] Article 149b SPILA regulates the jurisdiction of Swiss courts in trust-related matters. This provision was introduced to provide clear and predictable rules on when Swiss courts can hear

jurisdiction over trust disputes, taking into account various connecting factors such as the choice of jurisdiction by the settlor, the domicile or habitual residence of the parties, and the seat of the trust[167]. By establishing clear jurisdictional rules, Article 149b enhances legal certainty and predictability for parties involved in trust-related disputes with a connection to Switzerland[168].

Article 149c SPILA focuses on the applicable law in trust matters[169]. It directly refers to the conflict of laws rules set out in the Convention, ensuring that the determination of the

disputes involving trusts, taking into account the cross-border nature of many trust arrangements. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 35

[167] Article 149b SPILA sets out several connecting factors that can give rise to the jurisdiction of Swiss courts in trust matters. These factors include the choice of jurisdiction by the settlor (Article 149b(1)), the domicile or habitual residence of the defendant (Article 149b(3)(a)), and the seat of the trust (Article 149b(3)(b)). By providing a range of jurisdictional grounds, Article 149b SPILA ensures that Swiss courts can hear trust disputes in appropriate cases. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 152

[168] The clear jurisdictional rules set out in Article 149b SPILA enhance legal certainty and predictability for parties involved in trust disputes with a connection to Switzerland. By specifying when Swiss courts have jurisdiction, Article 149b SPILA helps to avoid jurisdictional conflicts and ensures that trust disputes can be resolved efficiently and effectively. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 35.

[169] Article 149c SPILA deals with the law applicable to trusts in Switzerland. This provision incorporates the conflict of laws rules set out in the Hague Trust Convention, ensuring that the determination of the governing law for trusts follows internationally accepted standards. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 153.

governing law for trusts follows the internationally accepted standards[170]. Notably, Article 149c(2) extends the application of the Convention's conflict of laws rules to situations where Switzerland would have the right to deny recognition to a trust under Article 13 of the Convention[171]. This provision aims to prevent the application of Article 13, which allows a state to deny recognition to a trust if its significant elements are more closely connected with a state that does not recognize the institution of the trust[172]. By extending the Convention's conflict of laws rules to such situations, Article 149c(2) ensures a more comprehensive and consistent application of the Convention in Switzerland[173].

---

[170] By referring directly to the conflict of laws rules in the Hague Trust Convention, Article 149c SPILA ensures that the Swiss approach to determining the applicable law for trusts is consistent with international norms. This approach promotes uniformity and facilitates the recognition and enforcement of trusts across borders. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 36

[171] Article 149c(2) SPILA extends the application of the Convention's conflict of laws rules to situations where Switzerland would have the right to deny recognition to a trust under Article 13 of the Convention. Article 13 allows a state to refuse to recognize a trust if its significant elements are more closely connected with a state that does not provide for the institution of the trust. By applying the Convention's conflict of laws rules even in these situations, Article 149c(2) SPILA ensures a more comprehensive and consistent application of the Convention in Switzerland. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 153.

[172] Article 13 of the Hague Trust Convention allows a state to refuse to recognize a trust if its significant elements, except for the choice of the applicable law, the place of administration, and the habitual residence of the trustee, are more closely connected with states that do not provide for the institution of the trust. This provision is intended to prevent the use of trusts to evade the mandatory rules of a state with which the trust has a close connection. See Alfred E. von Overbeck, "Explanatory Report on the 1985 Hague Trusts Convention," in Proceedings of the Fifteenth Session (1984), Tome II, Trusts - Applicable Law and Recognition (The Hague: HCCH Publications, 1985), para. 123-124.

[173] By extending the application of the Convention's conflict of laws rules to situations where Switzerland could deny recognition to a trust under Article 13, Article 149c(2) SPILA aims to prevent

Another significant adaptation to the Swiss legal system is the introduction of Article 149d SPILA, which addresses the registration of trust relationships in public registers[174]. This provision allows for the registration of a trust relationship in the land register, the shipping register, or the aircraft register, providing a means for publicizing the existence of a trust[175]. While such registration is not mandatory, Article 149d(3) stipulates that trust relationships that are not registered shall not be enforceable against bona fide third parties[176]. This rule

---

the application of this escape clause. This approach ensures a more consistent and predictable application of the Convention in Switzerland, promoting the recognition of trusts and reducing the potential for conflicts between the Convention and Swiss mandatory rules. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 36

[174] Article 149d SPILA introduces the possibility of registering trust relationships in public registers, such as the land register, the shipping register, or the aircraft register. This provision aims to provide a means for publicizing the existence of a trust and to protect the interests of third parties who may deal with trust assets. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 154

[175] The registration of trust relationships in public registers under Article 149d SPILA is not mandatory. However, it provides a mechanism for trustees to disclose the existence of a trust and to put third parties on notice that certain assets are subject to a trust arrangement. This can help to prevent disputes and protect the interests of both beneficiaries and third parties. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 37

[176] Article 149d(3) SPILA provides that trust relationships that are not registered in the relevant public register shall not be enforceable against bona fide third parties. This rule aims to protect third parties who rely on the accuracy of public registers and who may not be aware of the existence of an unregistered trust. By limiting the enforceability of unregistered trusts, Article 149d(3) SPILA balances the interests of beneficiaries and third parties. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 154

strikes a balance between the recognition of trusts and the protection of third parties who rely on the accuracy of public registers[177].

The Swiss legislator also introduced Article 149e SPILA to govern the recognition and enforcement of foreign judgments in trust matters[178]. This provision sets out the conditions under which foreign judgments relating to trust disputes can be recognized and enforced in Switzerland[179]. By providing clear rules on the recognition and enforcement of foreign trust judgments, Article 149e facilitates the effective resolution of cross-border trust disputes and enhances legal certainty[180]

---

[177] The registration system established by Article 149d SPILA seeks to reconcile the recognition of trusts with the principle of publicity that underlies Swiss property law. By providing a means for disclosing the existence of a trust and protecting bona fide third parties, Article 149d SPILA helps to integrate trusts into the Swiss legal system while respecting the fundamental principles of Swiss law. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 37.

[178] Article 149e SPILA regulates the recognition and enforcement of foreign judgments in trust matters. This provision sets out the conditions under which Swiss courts will recognize and enforce judgments rendered by foreign courts in relation to trusts. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 155

[179] Under Article 149e SPILA, Swiss courts will recognize and enforce foreign judgments in trust matters if the judgment was rendered by a court that had jurisdiction under Article 149b SPILA, if the judgment is final and enforceable in the state where it was rendered, and if there are no grounds for refusing recognition and enforcement under Article 27 SPILA (which sets out the general grounds for refusing recognition and enforcement of foreign judgments). By providing clear rules

[180] By providing clear rules on the recognition and enforcement of foreign trust judgments, Article 149e SPILA enhances legal certainty and facilitates the effective resolution of cross-border trust disputes. This provision ensures that parties can rely on the finality of foreign trust judgments and that such judgments can be enforced in Switzerland, subject to appropriate safeguards. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 38.

In addition to the amendments to the SPILA, the Swiss legislator also adapted the Swiss Debt Enforcement and Bankruptcy Act (DEBA) to accommodate the recognition of trusts. Article 284b DEBA was introduced to regulate the treatment of trust assets in the event of the bankruptcy of a trustee[181]. This provision stipulates that trust assets do not form part of the trustee's bankruptcy estate, ensuring the segregation of trust assets from the trustee's personal assets[182]. By providing a clear statutory basis for the segregation of trust assets in bankruptcy proceedings, Article 284b DEBA strengthens the protection of beneficiaries' interests and aligns Swiss law with the fundamental principles of trust law[183].

The implementation of the Convention in Switzerland also required adjustments to the Swiss tax system. The Swiss legislator introduced provisions in the Federal Act on Direct Federal Taxation (DTL) and the Federal Act on Harmonization of Direct Taxes of Cantons

[181] Article 284b DEBA was introduced to clarify the treatment of trust assets in the event of the bankruptcy of a trustee. This provision explicitly states that assets held by the trustee in trust do not form part of the trustee's bankruptcy estate. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 156.

[182]The segregation of trust assets from the trustee's personal assets in bankruptcy proceedings is a fundamental principle of trust law. Article 284b DEBA gives effect to this principle in Swiss law, ensuring that trust assets are not subject to claims by the trustee's personal creditors. This provision is crucial for protecting the interests of beneficiaries and maintaining the integrity of trust arrangements. *See* Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 39.

[183] By providing a clear statutory basis for the segregation of trust assets in bankruptcy proceedings, Article 284b DEBA aligns Swiss law with the fundamental principles of trust law and enhances the protection of beneficiaries' interests. This provision is a key element of the Swiss legal framework for trusts, ensuring that the essential features of trusts are respected and enforced in insolvency situations. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 156

and Municipalities (DTHA) to clarify the tax treatment of trusts[184]. These provisions aim to ensure that the tax treatment of trusts is consistent with the principles of Swiss tax law while respecting the unique features of trusts[185].

Moreover, the Swiss Financial Market Supervisory Authority (FINMA) issued a circular on the supervision of trustees, providing guidance on the regulatory requirements for professional trustees operating in Switzerland[186]. This circular helps to ensure that trustees are subject to appropriate oversight and that the interests of beneficiaries are adequately protected[187].

---

[184] The implementation of the Hague Trust Convention in Switzerland also required adaptations to the Swiss tax system. The Federal Act on Direct Federal Taxation (DTL) and the Federal Act on Harmonization of Direct Taxes of Cantons and Municipalities (DTHA) were amended to introduce provisions dealing with the tax treatment of trusts. See Xavier Oberson, "Les trusts en droit fiscal suisse," (2008) 77 Revue fiscale 1, 3

[185] The tax provisions introduced in the DTL and DTHA aim to ensure that the tax treatment of trusts is consistent with the principles of Swiss tax law while taking into account the specific characteristics of trusts. These provisions address issues such as the taxation of trust income, the tax liability of settlors, trustees, and beneficiaries, and the tax consequences of distributions from trusts. By providing a clear and coherent framework for the taxation of trusts, these provisions facilitate the integration of trusts into the Swiss legal system. See Xavier Oberson, "Les trusts en droit fiscal suisse," (2008) 77 Revue fiscale 1, 4-6

[186] The Swiss Financial Market Supervisory Authority (FINMA) has issued a circular on the supervision of trustees (Circular 2009/1 "Trustees"). This circular sets out the regulatory requirements for professional trustees operating in Switzerland, including licensing requirements, organizational and capital requirements, and conduct rules. See Rashid Bahar, "The Swiss Federal Supreme Court's decision on the supervision of trustees," (2009) 20 Trust Law International 120, 120-121

[187] The FINMA circular on the supervision of trustees plays a crucial role in ensuring that trustees operating in Switzerland are subject to appropriate oversight and that the interests of beneficiaries are adequately protected. By setting out clear regulatory standards for trustees, the circular helps to maintain the integrity and reputation of the Swiss trust industry and to prevent abuses. See Rashid

The adaptations to the Swiss legal system following the ratification of the Convention demonstrate Switzerland's commitment to providing a comprehensive and effective framework for the recognition and operation of trusts. By introducing targeted amendments to key legislation, such as the SPILA and the DEBA, and by issuing guidance on the tax treatment and supervision of trusts, Switzerland has taken significant steps to integrate the Convention into its legal system and to facilitate the smooth functioning of trusts in a civil law context.

However, the implementation of the Convention in Switzerland is an ongoing process that requires continuous monitoring and refinement. As the use of trusts in Switzerland grows and practical experience with the new legal framework accumulates, further adjustments and clarifications may be necessary to address emerging issues and ensure the effective operation of trusts in the Swiss legal system.

The ratification of the Convention by Switzerland has triggered a series of adaptations and amendments to the Swiss legal system, primarily through the introduction of new provisions in the SPILA and the DEBA. These modifications aim to provide a comprehensive and coherent framework for the recognition and operation of trusts in Switzerland, while respecting the fundamental principles of Swiss law. By establishing clear rules on jurisdiction, applicable law, registration of trusts, and the treatment of trust assets in bankruptcy proceedings, Switzerland has taken significant steps to facilitate the effective implementation of the Convention. However, the process of integrating trusts into the Swiss legal system is an ongoing one that requires continuous monitoring and refinement to ensure the smooth functioning of trusts in a civil law context.

3.4. Recognition of Trusts in Switzerland Today: current legislation

As seen in the previous paragraphs, the recognition of trusts in Switzerland has undergone significant developments in recent years, culminating in the country's ratification of the Hague Convention with effect from July 1, 2007. This ratification marked a pivotal

---

Bahar, "The Swiss Federal Supreme Court's decision on the supervision of trustees," (2009) 20 Trust Law International 120, 121-122

moment in Switzerland's approach to trusts, as it obliged the country to recognize trusts as a sui generis legal structure, without the need to translate them into domestic legal concepts[188].

Prior to the ratification of the Hague Trusts Convention,as discussed in paragraph 3.3, the recognition of trusts in Switzerland was largely ensured through the application of Articles 150 et seq. of the Swiss Private International Law Act (SPILA)[189]. These provisions allowed for the recognition of trusts that were sufficiently organized, even in the absence of a specific legal framework for trusts in Swiss domestic law[190]. However, the entry into force of the Convention in Switzerland has significantly enhanced legal certainty in this context.

One of the most notable changes brought about by the ratification of the Convention is the introduction of a definition of trusts in Swiss law. Article 149a SPILA, which was added as part of the implementing legislation for the Convention, defines a trust as "a legal relationship created - inter vivos or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified

---

[188] By ratifying the Hague Trusts Convention, Switzerland undertook to recognize trusts as a distinct legal institution, without the need to assimilate them into existing domestic legal categories. This approach ensures that the essential characteristics of trusts, such as the separation of legal and beneficial ownership, are respected and given effect in the Swiss legal system. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 139-140

[189] Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987, SR 291. The Swiss Private International Law Act (SPILA) is the main source of Swiss private international law rules, governing jurisdiction, applicable law, and the recognition and enforcement of foreign judgments in civil and commercial matter

[190] Prior to the ratification of the Hague Trusts Convention, the recognition of trusts in Switzerland was based on the general provisions of the SPILA, particularly Articles 150 et seq., which allow for the recognition of legal relationships that are sufficiently organized and have a certain level of autonomy, even if they do not correspond to a specific legal institution under Swiss law. See François Dessemontet, "L'avant-projet de loi sur les trusts," (2005) 14 Schweizerische Zeitschrift für internationales und europäisches Recht 451, 452-453

purpose"[191]. This definition, which is derived from Article 2 of the Hague Trusts Convention, provides Swiss authorities and courts with a clear and internationally recognized framework for understanding and dealing with trusts[192].

Moreover, Article 149c SPILA explicitly excludes the application of Article 13 of the Hague Trusts Convention in Switzerland[193]. Article 13 of the Convention allows a state to refuse to recognize a trust if its significant elements, except for the choice of the applicable law, the place of administration, and the habitual residence of the trustee, are more closely connected with states that do not provide for the institution of the trust[194]. By excluding the application of this provision, Switzerland has made it clear that it will recognize trusts even if their predominant elements are connected to Switzerland itself (i.e., domestic trusts) or to other states that do not have a specific legal framework for trusts[195]. This approach is

---

[191] Article 149a SPILA, as introduced by the Federal Act of June 15, 2007, on the Hague Trusts Convention and the amendments to the Private International Law Act, AS 2007 2849

[192] By incorporating the definition of trusts from the Hague Trusts Convention into Swiss law, Article 149a SPILA ensures that the Swiss understanding of trusts is consistent with the international standard. This promotes uniformity and facilitates the recognition of trusts established under foreign law. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 33

[193] Article 149c(2) SPILA, as introduced by the Federal Act of June 15, 2007, on the Hague Trusts Convention and the amendments to the Private International Law Act, AS 2007 2849

[194] Article 13 of the Hague Trusts Convention allows a Contracting State to refuse to recognize a trust if its significant elements, apart from the choice of the applicable law, the place of administration, and the habitual residence of the trustee, are more closely connected with states that do not provide for the institution of the trust. This provision is intended to prevent the use of trusts to evade the mandatory rules of a state with which the trust has a close connection. See Alfred E. von Overbeck, "Explanatory Report on the 1985 Hague Trusts Convention," in Proceedings of the Fifteenth Session (1984), Tome II, Trusts - Applicable Law and Recognition (The Hague: HCCH Publications, 1985), para. 123-124

[195] By excluding the application of Article 13 of the Hague Trusts Convention, Article 149c(2) SPILA ensures that Switzerland will recognize trusts even if their predominant elements are

particularly justified given that trusts are often established for a long period, and their elements may move during the course of their existence[196].

The implementing legislation for the Hague Trusts Convention in Switzerland also introduced important provisions in the SPILA and the Swiss Debt Collection and Bankruptcy Act (SDCBA) to facilitate the recognition and operation of trusts. In particular, Article 284b SDCBA specifies that trust assets constitute a separate fund, independent from the trustee's own patrimony[197]. This provision ensures the segregation of trust assets from the trustee's personal assets in the event of debt collection or bankruptcy proceedings against the trustee, thereby protecting the interests of the beneficiaries and upholding a fundamental principle of trust law[198].

---

connected to Switzerland itself or to other states that do not have specific trust legislation. This approach promotes the recognition of trusts in Switzerland and reduces the potential for conflicts between the Convention and Swiss mandatory rules. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 36

[196] The recognition of domestic trusts and trusts connected to non-trust states is particularly important given the long-term nature of many trust arrangements. Over time, the elements of a trust, such as the place of administration or the habitual residence of the trustee, may change, and it is essential that the trust remains recognized and enforceable despite these changes. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 153.

[197] rticle 284b of the Swiss Debt Collection and Bankruptcy Act (SDCBA), as introduced by the Federal Act of June 15, 2007, on the Hague Trusts Convention and the amendments to the Private International Law Act, AS 2007 2849.

[198] The segregation of trust assets from the trustee's personal assets is a fundamental principle of trust law, ensuring that the trust assets are not subject to claims by the trustee's personal creditors. Article 284b SDCBA gives effect to this principle in Swiss law, providing a clear statutory basis for the separation of trust assets in the event of debt collection or bankruptcy proceedings against the trustee. See Florence Guillaume, "Incompatibilité du trust avec le droit suisse? Un mythe s'effrite," (2000) 1 Aktuelle Juristische Praxis 29, 39

However, the implementation of the Hague Trusts Convention in Switzerland did not trigger substantial changes to the Swiss Civil Code or the Swiss Code of Obligations, and no specific provisions dedicated to trusts were introduced in these codes[199]. Additionally, there is no requirement for professional trustees operating in Switzerland to register with a specific supervisory authority, unlike in some other jurisdictions[200].

Despite the absence of a comprehensive regulatory framework for trustees in Swiss statutory law, the private sector has taken steps to establish standards and guidelines for the industry. In 2007, key Swiss trust companies founded the Swiss Association of Trust Companies (SATC) to promote the development of trustee activities in Switzerland and to ensure adherence to professional and ethical standards[201]. The SATC has published minimum

[199] The implementation of the Hague Trusts Convention in Switzerland did not involve substantial amendments to the Swiss Civil Code (Schweizerisches Zivilgesetzbuch, SR 210) or the Swiss Code of Obligations (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches, Fünfter Teil: Obligationenrecht, SR 220). The focus of the implementing legislation was primarily on the SPILA and the SDCBA, which were deemed sufficient to ensure the recognition and operation of trusts in Switzerland. See Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," (2001) 120 Revue suisse de jurisprudence 137, 150

[200] Unlike some other jurisdictions, such as Singapore or Hong Kong, Switzerland has not introduced a mandatory registration or licensing system for professional trustees. This approach is consistent with Switzerland's generally liberal approach to the regulation of financial services and its emphasis on self-regulation and industry-led initiatives. See Paolo Panico, "Private Foundations, Trust and Swiss law: An Introduction for Practitioners," (2010) 16 Trusts & Trustees 263, 266

[201] The Swiss Association of Trust Companies (SATC) is a private industry association that aims to promote the development of trustee activities in Switzerland and to ensure adherence to high professional and ethical standards. The SATC was founded in 2007 by leading Swiss trust companies in response to the ratification of the Hague Trusts Convention and the growing importance of the trust industry in Switzerland. See Swiss Association of Trust Companies, "About Us," accessed April 20, 2023.

standards of professional credentials and a code of ethics to provide security to clients and maintain Switzerland's reputation as a highly professional jurisdiction for trust business[202].

In addition to these industry-led initiatives, various Swiss financial regulations are applicable to trusts and trustees, depending on the scope of their activities. The Federal Act on Anti-Money Laundering (AMLA) [203] plays a crucial role in preventing the Swiss financial system from being used for illicit purposes. Since 1998, AMLA provisions have applied to Swiss-resident trustees if they qualify as financial intermediaries, which is the case when they professionally accept, keep on deposit, or help to invest or transfer assets belonging to third parties[204].

Trustees falling within the scope of the AMLA must comply with due diligence obligations, such as verifying the identity of the contracting partner, establishing the identity of the beneficial owner, clarifying the economic background and purpose of unusual transactions, keeping records of transactions, and implementing appropriate organizational

[202] The SATC has published a set of minimum standards for professional credentials and a code of ethics for its members. These standards and guidelines are designed to ensure that SATC members provide high-quality trustee services and maintain the integrity and reputation of the Swiss trust industry. Compliance with these standards is a condition of membership in the SATC. See Swiss Association of Trust Companies, "Minimum Standards," accessed April 20, 2023

[203] Bundesgesetz über die Bekämpfung der Geldwäscherei und der Terrorismusfinanzierung (Geldwäschereigesetz, GwG) vom 10. Oktober 1997, SR 955.0. The Federal Act on Anti-Money Laundering (AMLA) is the main Swiss legislation aimed at preventing money laundering and terrorist financing. The AMLA imposes due diligence and reporting obligations on financial intermediaries, including trustees, and establishes the framework for the Swiss Money Laundering Reporting Office (MROS)

[204] Article 2(3) AMLA defines financial intermediaries as persons who, on a professional basis, accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets. This broad definition encompasses a wide range of financial service providers, including trustees, provided they engage in these activities professionally. See Rashi.

measures to fulfill these duties[205]. These obligations are further reinforced by the Swiss Bank's Code of Conduct with regard to the Exercise of Due Diligence (CDB)[206], which sets out minimum standards for banks in identifying clients and beneficial owners.

Specifically, in the context of trusts, Swiss banks must obtain a written declaration from the trustee identifying the relevant parties and beneficiaries, depending on the nature of the trust[207]. For revocable trusts, the person entitled to revoke the trust (not a nominee) must be identified as the beneficial owner. In the case of irrevocable discretionary trusts, the trustee must provide a written declaration identifying the effective settlor (not a nominee), listing the persons entitled to give instructions to the trustee, the categories of potential beneficiaries, and any curator or protector[208].

The AMLA also imposes reporting duties on trustees. If there is suspicion that the financial assets they hold are the proceeds of a crime, trustees must inform the competent authority and clarify the background and purpose of the suspicious transaction[209]. If doubts

[205] Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act, AMLA) of 10 October 1997, SR 955.0

[206] Agreement on the Swiss Bank's Code of Conduct with regard to the Exercise of Due Diligence (CDB 20), 2020

[207] CDB 20, Art. 40 para. 1

[208] CDB 20, Art. 40 para. 3

[209] Article 9 AMLA requires financial intermediaries, including trustees, to immediately report to the Swiss Money Laundering Reporting Office (MROS) if they know or have reasonable grounds to suspect that the assets involved in a business relationship or transaction are connected to a criminal offense, are the proceeds of a crime, or are subject to the power of disposal of a criminal organization. The financial intermediary must also freeze the assets concerned and refrain from informing the persons affected or third parties about the report. See Rashid Bahar and Cédric Chapuis, "The Swiss Anti-Money Laundering Framework," in Anti-Money Laundering: International Law and Practice, ed. Wouter H. Muller, Christian H. Kälin, and John G. Goldsworth (Chichester: John Wiley & Sons, 2007), 577-578

persist, they must promptly notify the Swiss Money Laundering Reporting Office and freeze the suspicious assets for up to five business days without informing the client[210].

Protectors may also be subject to the AMLA if they qualify as financial intermediaries, depending on the extent of their powers under the trust[211]. If a protector's role is limited to appointing and dismissing the trustee, they are not considered financial intermediaries. However, if they have the authority to make financial decisions, either independently or jointly with the trustee, they are deemed financial intermediaries and must comply with the aforementioned obligations[212]. The power to distribute trust assets to

[210] Article 10 AMLA stipulates that if the MROS informs the financial intermediary within 20 working days that it has forwarded the report to a prosecution authority, the financial intermediary must maintain the freeze on the assets until it receives a decision from the competent prosecution authority, but for no longer than five working days from the time the MROS forwarded the report. This provision allows for a temporary freeze on suspicious assets while the relevant authorities investigate the matter, without unduly interfering with the rights of the persons involved. See Rashid Bahar and Cédric Chapuis, "The Swiss Anti-Money Laundering Framework," in Anti-Money Laundering: International Law and Practice, ed. Wouter H. Muller, Christian H. Kälin, and John G. Goldsworth (Chichester: John Wiley & Sons, 2007), 578-579

[211] The AMLA applies to protectors if they qualify as financial intermediaries under Article 2(3) AMLA. The determining factor is the extent of the protector's powers and involvement in the management of the trust assets. If a protector has the authority to make financial decisions or otherwise exercise control over the trust assets, they may be considered a financial intermediary and subject to the due diligence and reporting obligations under the AMLA. See Tina Wüstemann and Daniel Bader, "Protectors in Switzerland," in Protectors of Trusts, ed. Mark Hubbard (Oxford: Oxford University Press, 2021), 329-330

[212] Protectors who have the power to make financial decisions, such as distributing trust assets to beneficiaries or selecting beneficiaries, are considered financial intermediaries under the AMLA. In such cases, they must comply with the same due diligence and reporting obligations as trustees, including verifying the identity of the contracting partner, identifying the beneficial owner, clarifying the economic background and purpose of unusual transactions, keeping records, and reporting suspicious activities to the MROS. See Tina Wüstemann and Daniel Bader, "Protectors in

beneficiaries and the power to select beneficiaries are considered financial decisions in this context[213].

In addition to the AMLA, trustees may be subject to the Swiss Federal Act on Stock Exchange and Securities Trading (SESTA)[214]if they act as broker-dealers, underwriters, or derivative houses and are not explicitly exempted from this legislation. In such cases, trustees must obtain a business license from the Swiss Financial Market Supervisory Authority (FINMA)[215]and comply with specific regulatory duties[216].

Switzerland," in Protectors of Trusts, ed. Mark Hubbard (Oxford: Oxford University Press, 2021), 330-331.

[213] The Swiss Financial Market Supervisory Authority (FINMA) has clarified that the power to distribute trust assets to beneficiaries and the power to select beneficiaries are considered financial decisions for the purposes of determining whether a protector qualifies as a financial intermediary under the AMLA. Protectors holding such powers are thus subject to the AMLA's due diligence and reporting obligations, as they are effectively participating in the management of the trust assets. See Swiss Financial Market Supervisory Authority FINMA, "Fact Sheet: Protectors," September 23, 2019

[214] Bundesgesetz über die Börsen und den Effektenhandel (Börsengesetz, BEHG) vom 24. März 1995, SR 954.1. The Swiss Federal Act on Stock Exchange and Securities Trading (SESTA) regulates the operation of stock exchanges and securities trading in Switzerland. It sets out licensing requirements for securities dealers and imposes various organizational and conduct rules to ensure the proper functioning and integrity of the securities markets.

[215] The Swiss Financial Market Supervisory Authority (FINMA) is the supervisory authority for the Swiss financial market. It is responsible for licensing, supervising, and regulating financial service providers, including banks, insurance companies, and securities dealers. FINMA's mandate is to protect creditors, investors, and policyholders, and to ensure the proper functioning of the financial markets. See Federal Act on the Swiss Financial Market Supervisory Authority (Financial Market Supervision Act, FINMASA) of 22 June 2007, SR 956.1

[216] Trustees who act as securities dealers under the SESTA must obtain a license from FINMA and comply with various regulatory requirements, including organizational measures, capital adequacy, risk management, record-keeping, and reporting obligations. These requirements are designed to ensure the stability and integrity of the securities markets and to protect investors. See Rashid Bahar

Furthermore, trustees, protectors, and banks operating in Switzerland have a general duty to uphold the privacy of a client's personal data. The privacy of the settlor and the client is protected under the general provisions of the Swiss Civil Code relating to the protection of the individual, as well as under data protection legislation, in addition to more specific provisions such as banking secrecy or attorney-client privileges[217].

In conclusion, although Switzerland has not enacted a comprehensive statutory framework for trusts or introduced mandatory registration for professional trustees, the private sector has taken steps to establish industry standards and promote adherence to professional and ethical norms. Moreover, various Swiss financial regulations, such as the AMLA and the SESTA, are applicable to trusts and trustees, depending on the scope of their activities, and impose due diligence and reporting obligations to prevent the misuse of the Swiss financial system.

Overall, the current legal landscape in Switzerland provides a solid foundation for the recognition and operation of trusts, while also ensuring that appropriate safeguards are in

---

and Rita Trigo Trindade, "Securities Regulation in Switzerland," in Financial Markets and Securities Regulation in Switzerland, ed. Rashid Bahar and Rita Trigo Trindade (Zurich: Schulthess, 2020), 1-5

[217] The protection of personal data and privacy is a fundamental right under Swiss law. Article 28 of the Swiss Civil Code provides a general right to the protection of one's personality, which includes the right to privacy. The Swiss Federal Act on Data Protection (FADP) of 19 June 1992, SR 235.1, sets out specific rules for the processing of personal data by private persons and federal bodies. Additionally, professional secrecy obligations, such as banking secrecy (Article 47 of the Swiss Federal Act on Banks and Savings Banks of 8 November 1934, SR 952.0) and attorney-client privilege (Article 13 of the Swiss Federal Act on the Freedom of Movement for Lawyers of 23 June 2000, SR 935.61), provide further protection for the confidentiality of client information. Trustees, protectors, and banks operating in Switzerland must comply with these provisions and ensure the proper handling and safeguarding of client data. See David Rosenthal and Yvonne Jöhri, "Data Protection in Switzerland," in The International Comparative Legal Guide to: Data Protection 2020, 6th ed. (London: Global Legal Group, 2020), 331-339

place to maintain the integrity and reputation of the Swiss financial sector. As the use of trusts in Switzerland continues to evolve, it is likely that further refinements and developments in the legal and regulatory framework will be necessary to address emerging challenges and maintain Switzerland's position as a leading jurisdiction for trust business.

3.5. Application of the trust concept: a selection of recent swiss case in real estate

The application of the trust concept in Switzerland has been demonstrated through various court decisions, particularly in the area of real estate law. The case highlights the evolving understanding and recognition of trusts within the Swiss legal system, especially since Switzerland's ratification of the Hague Convention.

One notable case involved a French national who was the settlor of a trust administered by a Swiss trustee. The French national had previously obtained authorization from the Swiss authorities to purchase a property in Saanen, Canton of Bern, under the Lex Koller regime.[218] Subsequently, the settlor wished to transfer the title of the property into the trust. The authority determined that the transfer of title from a foreign resident to a Swiss national trustee could be carried out without further authorization, thereby exempting the transfer from the restrictions imposed by the Lex Koller. However, the authority clarified that this exemption did not grant the French national, as the settlor and former owner of the property, the right to take up domicile or remain in Switzerland[219].

This decision is significant as it acknowledges the validity of transferring Swiss real estate into a trust, provided that the trustee is a Swiss national. By allowing the transfer

[218] The Lex Koller, or the Federal Act on the Acquisition of Real Estate by Persons Abroad (ANRA) of December 16, 1983, is a Swiss law that restricts the acquisition of Swiss real estate by non-residents. The law requires foreign nationals who are not resident in Switzerland to obtain authorization from the competent cantonal authority before acquiring Swiss real estate

[219] *Regierungsstatthalteramt of Saanen*, Dec. 5, 2008, decision regarding the confirmation of the exemption of authorization according to the Federal Act on Acquisition of Property by Persons Domiciled Abroad of 16th of December 1981, RS 211.412.41

without additional authorization, the authority implicitly recognized the trust as a legitimate vehicle for holding property in Switzerland. The case also highlights the distinction between the settlor's personal rights and the trustee's ownership of the trust assets, as the settlor's transfer of the property into the trust did not confer upon them any residency rights in Switzerland.

The authority's decision in this case demonstrates a nuanced understanding of the trust concept and its implications for Swiss real estate law. By differentiating between the settlor's personal status and the trustee's ownership of the trust property, the authority acknowledged the fundamental principle of trust law that the trust assets constitute a separate fund, distinct from the trustee's personal assets. This separation of assets is a cornerstone of the trust concept and is explicitly recognized in Article 2(2)(a) of the Hague Trusts Convention[220].

Moreover, the authority's decision to exempt the transfer from the Lex Koller restrictions suggests a recognition that the trustee, as a Swiss national, was the relevant party for the purposes of the Lex Koller analysis. This approach is consistent with Article 2(2)(b) of the Hague Trusts Convention, which states that the title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee[221]. By focusing on the trustee's nationality rather than the settlor's, the authority demonstrated an understanding of the trustee's role as the legal owner of the trust property under the Convention.

The authority's decision also implicitly acknowledged the validity of the trust itself, as the transfer of the property into the trust was not challenged on the basis of the trust's legal status. This recognition is in line with Article 11 of the Hague Trusts Convention, which

[220] Article 2(2)(a) of the Hague Trusts Convention states that a trust has the following characteristics: "the assets constitute a separate fund and are not a part of the trustee's own estate.

[221] Article 2(2)(b) of the Hague Trusts Convention states that a trust has the following characteristics: "title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee."

requires Contracting States to recognize a trust created in accordance with the law specified by the Convention's conflict of laws rules[222]. By allowing the transfer to proceed without questioning the trust's validity, the authority arguably fulfilled Switzerland's obligations under the Convention to recognize trusts that fall within its scope.

In contrast, another case before the Land Register Commission of the Canton of Vaud[223] took a different approach. An American couple, who jointly owned a property in the Canton of Vaud, had requested an annotation in the Swiss land register stating that the property belonged to a trustee. Despite the couple's reference to the Hague Trusts Convention, the Commission held that a trust represented an arrangement falling between a fiduciary agreement[224] and a foundation[225], whereby the settlor transfers assets to one or more trustees who are obligated to administer and use the assets for a predefined purpose. The Commission further noted that trustees hold the assets "on a fiduciary basis," acquiring full fiduciary ownership while the trust assets remain segregated from their personal assets[226].

---

[222] Article 11 of the Hague Trusts Convention provides that a trust created in accordance with the law specified by the Convention's conflict of laws rules shall be recognized as a trust

[223] The Land Register Commission (Commission foncière) is a cantonal authority responsible for overseeing the land registration system and ensuring compliance with Swiss real estate law.

[224] A fiduciary agreement (contrat fiduciaire) is a contract under Swiss law whereby one party (the fiduciant) transfers assets to another party (the fiduciary) who undertakes to manage the assets for the benefit of the fiduciant or a third party. The fiduciary becomes the legal owner of the assets but is obligated to manage them in accordance with the terms of the agreement and the instructions of the fiduciant

[225] A foundation (fondation) is a legal entity under Swiss law that is established by dedicating assets to a specific purpose. A foundation is managed by a foundation board in accordance with its bylaws and the founder's intent. Swiss foundations are regulated by Articles 80-89bis of the Swiss Civil Code

[226] Decision of the Land Register Commission of the Canton of Vaud regarding the request by an American couple to annotate a reference to a trust in the Swiss land register, as reported in the text

However, the Commission ultimately denied the couple's request, stating that the Lex Koller generally excludes the fiduciary acquisition of property in Switzerland. The Commission reasoned that Swiss property could only be held directly and not through "fiduciary acquisition," thus refusing to allow a reference to a trust to be annotated in the Swiss land register[12].

The American couple appealed this decision, but their appeal was dismissed due to their failure to advance the required court fees within the prescribed timeframe. This outcome was unfortunate, as the appeal had a strong likelihood of success following Switzerland's ratification of the Hague Trusts Convention.The decision of the Land Register Commission of the Canton of Vaud appears to have been influenced by a narrow interpretation of the Lex Koller and a limited understanding of the trust concept as recognized under the Hague Trusts Convention. By equating trusts with fiduciary agreements and emphasizing the fiduciary nature of the trustee's ownership, the Commission failed to fully grasp the unique characteristics of trusts as defined in Article 2 of the Convention.

The Commission's characterization of trusts as falling between fiduciary agreements and foundations reveals a fundamental misunderstanding of the trust concept. While trusts may share some similarities with these legal arrangements, they are distinct in several key aspects. Fiduciary agreements under Swiss law involve a contractual relationship between the fiduciant and the fiduciary, with the fiduciary acquiring legal ownership of the assets but holding them for the benefit of the fiduciant or a third party[227]. In contrast, trusts create a proprietary relationship between the trustee and the trust assets, with the trustee holding legal title to the assets subject to the terms of the trust and for the benefit of the beneficiaries[228].

---

[227] For a discussion of fiduciary agreements under Swiss law, see Luc Thévenoz, "Trusts en Suisse: Adhésion à la Convention de La Haye sur les trusts et codification de la fiducie," in Rapports suisses présentés au XVème Congrès international de droit comparé (Zurich: Schulthess, 1998), 45-86

[228] For an analysis of the proprietary nature of the trustee's ownership of trust assets, see David Hayton, "The Distinctive Characteristics of the Trust in Anglo-Saxon Law," in Le trust et la fiducie: Implications pratiques (Brussels: Bruylant, 1997), 7-24

Similarly, foundations under Swiss law are legal entities established by dedicating assets to a specific purpose, with the foundation board managing the assets in accordance with the foundation's bylaws and the founder's intent[229]. Trusts, on the other hand, do not necessarily have legal personality and are primarily governed by the terms of the trust instrument and the applicable trust law[230].

The Commission's focus on the fiduciary nature of the trustee's ownership also reflects a misinterpretation of the trust concept. While the trustee's ownership of the trust assets may be described as fiduciary in the sense that it is subject to the duties and obligations imposed by the trust and the applicable law, it is not synonymous with the fiduciary ownership under a fiduciary agreement. The trustee's ownership of the trust assets is a form of proprietary ownership that is distinct from both fiduciary agreements and foundations under Swiss law[231].

Moreover, the Commission's refusal to allow a reference to a trust to be annotated in the Swiss land register effectively denied the legal segregation of the trust assets from the trustee's personal assets, which is a fundamental characteristic of trusts under the Hague Trusts Convention. Article 11(3)(d) of the Convention specifically states that the recognition of a trust implies, at a minimum, that "the trust property constitutes a separate fund and the

[229] For an overview of foundations under Swiss law, see Thomas Sprecher, "Foundation Governance in Switzerland," in The International Handbook of Foundation Governance, ed. Klaus J. Hopt and Thomas von Hippel (Cambridge: Cambridge University Press, 2020), 415-434

[230] For a discussion of the differences between trusts and foundations, see Lusina Ho, "Trust and Foundation: A Comparative Study," in The Worlds of the Trust, ed. Lionel Smith (Cambridge: Cambridge University Press, 2013), 80-106.

[231] For an analysis of the nature of the trustee's ownership of trust assets under the Hague Trusts Convention, see Jonathan Harris, "Trustee Ownership and the Hague Trusts Convention," in The International Trust, ed. David Hayton (Bristol: Jordan Publishing, 2011), 223-246.

trustee may sue and be sued in their capacity as trustee[232]." By rejecting the annotation of the trust reference, the Commission disregarded this essential aspect of the trust concept and failed to give effect to the provisions of the Convention.

The Commission's decision also raises questions about the compatibility of the Lex Koller with Switzerland's obligations under the Hague Trusts Convention. While the Lex Koller aims to restrict the acquisition of Swiss real estate by non-residents, its application to trusts governed by the Convention may conflict with the requirement to recognize trusts created in accordance with the law specified by the Convention's conflict of laws rules. To the extent that the Lex Koller prevents the recognition of a trust that falls within the scope of the Convention, it may be inconsistent with Switzerland's international commitments.

The dismissal of the American couple's appeal on procedural grounds was a missed opportunity for the Swiss courts to clarify the application of the Hague Trusts Convention in the context of Swiss real estate law. Had the appeal been heard, the court would have had to consider the provisions of the Convention and their implications for the recognition of trusts in Switzerland. This could have led to a more thorough analysis of the compatibility of the Lex Koller with the Convention and a clearer articulation of the principles governing the treatment of trusts in Swiss real estate transactions.

The case law on the application of the trust concept in Swiss real estate law demonstrates a gradual evolution in the understanding and recognition of trusts in Switzerland. While some decisions, such as that of the Swiss authority in the case of the French national settlor, have acknowledged the validity of transferring Swiss real estate into a trust, others, like the decision of the Land Register Commission of the Canton of Vaud, have taken a more restrictive approach based on a narrow interpretation of domestic law and a limited understanding of the trust concept as recognized under the Hague Trusts Convention.

---

[232] Article 11(3)(d) of the Hague Trusts Convention sets out the minimum implications of the recognition of a trust under the Convention. It reinforces the separate nature of the trust fund and the trustee's capacity to act in relation to the trust property

As Switzerland continues to grapple with the integration of trusts into its legal system, it is crucial for Swiss authorities and courts to fully embrace the provisions of the Hague Trusts Convention and to interpret domestic law in a manner consistent with the Convention's objectives. This requires a clear understanding of the unique characteristics of trusts as defined in the Convention, including the separation of trust assets from the trustee's personal assets, the proprietary nature of the trustee's ownership, and the governing role of the trust terms and applicable trust law.

The case law discussed in this analysis also highlights the need for greater clarity and consistency in the treatment of trusts in Swiss real estate law. The divergent approaches taken by the Swiss authority in the case of the French national settlor and the Land Register Commission of the Canton of Vaud demonstrate the potential for conflicting interpretations and outcomes. Swiss courts have an essential role to play in interpreting and applying the provisions of the Hague Trusts Convention in a manner that promotes legal certainty and respects the rights of trust parties. As more cases involving trusts and Swiss real estate come before the courts, judges should strive to develop a coherent and principled approach that balances the objectives of the Convention with the legitimate public policy concerns underlying Swiss real estate law.

3.6. Differences between trusts and Swiss legal instruments: foundations

Traditionally, trusts and foundations have often been mentioned together, even as synonyms or mutually exclusive alternatives, due to the similarities between these two legal instruments. Like trusts, Swiss foundations allow assets to be dedicated to the achievement of a particular purpose[233]. The two instruments also resemble each other in terms of functions and objectives: the majority of foundations pursue a purpose of public utility, similar to

[233] Article 80 of the Swiss Civil Code (CC) defines a foundation as a legal entity established by the dedication of assets for a specific purpose.

charitable trusts in Anglo-Saxon law. Foundations are also the legal form used in Switzerland for employee benefit institutions [2], thus covering functions similar to those of Anglo-Saxon trusts.[234]

Although foundations can also be used for private interests or to pursue an economic purpose (holding foundations, corporate foundations), the rigidity of some rules of this instrument limits its use as a private trust and practically excludes its use in the commercial field as a commercial trust. On the other hand, there are practical and fundamental differences between foundations and trusts. One of these is the fact that a foundation is a legal entity that acquires legal personality upon registration in the commercial register[235]. It is the owner of the assets dedicated to the purpose.

Another fundamental difference concerns the rules provided by the Swiss Civil Code to ensure the foundation's independence from both the founder and the beneficiaries. Foundations are governed by strict rules that make them a much less flexible instrument than trusts; for example, the establishment and modification of a foundation require a public deed and registration in the commercial register[236]. In addition, foundations are usually subject to state supervision; only family and ecclesiastical foundations are exempt from this supervision (see below).

Foundations are governed by what legal scholars call the principle of separation and immutability (Trennungsund Erstarrungsprinzip)[237]. This principle prohibits the founder

[234] Article 89a CC allows for the establishment of employee benefit foundations, which are subject to specific rules and supervision.

[235] Foundations acquire legal personality upon registration in the commercial register, as per Article 52 CC.

[236] The establishment and modification of a foundation require a public deed (Article 81 CC) and registration in the commercial register (Article 94 CC)

[237] The principle of separation and immutability (Trennungs- und Erstarrungsprinzip) is a fundamental principle of Swiss foundation law, which ensures the independence of the foundation from the founder and beneficiaries.

from retaining the right to dispose of the foundation's assets and clearly excludes the self-dissolution of the foundation (Selbstauflösung). In principle, a foundation is created for an indefinite period and is dissolved if its purpose can no longer be achieved[238]. Subsequent modification of its purpose or organization is possible only under very strict rules. Conversely, trusts are usually established for a limited duration.

Foundations are subject to publicity rules: they must be registered in the commercial register, and the deed of incorporation must be filed in this register so that everyone can consult it (Art. 81 para. 2 CC)[239]. In general, such publicity does not exist for trusts, although some jurisdictions provide for a register of trusts. These registers have been introduced recently, are not always public, and serve in particular to combat money laundering and tax evasion.

Foundations and trusts also differ in terms of the rights conferred on beneficiaries. Foundation law does not provide any particular protection to beneficiaries; in particular, it does not recognize their right to be informed, and they have no tracing rights over the foundation's assets[240]. Consequently, the beneficiaries of a foundation are generally less protected than those of a trust.

3.6.1 The particular case of the foundation of substance (“ family foundation”)

The case of family foundations in Switzerland presents an interesting comparison with trusts, particularly in the context of estate planning and asset management for the benefit of family members. Family foundations are a specific type of foundation under Swiss law,

[238] Article 88 paragraph 1 CC provides for the dissolution of a foundation if its purpose can no longer be achieved.

[239] Article 81 paragraph 2 CC requires the deed of incorporation of a foundation to be filed in the commercial register, ensuring public access to this information

[240] Unlike trust law, Swiss foundation law does not provide beneficiaries with specific rights to information or tracing rights over the foundation's assets.

distinguished from classical foundations by their purpose and the clearly defined circle of beneficiaries. According to Article 335 paragraph 1 of the Swiss Civil Code (CC), family foundations can only be established for the purpose of covering the costs of education, providing endowments, or supporting family members[241].

Family foundations differ from classical foundations in several aspects. Unlike classical foundations, family foundations are not subject to public supervision and are not required to submit their accounts to an auditing body. The dissolution of a family foundation is pronounced by a judge [242]. In all other respects, family foundations are governed by the same rules as classical foundations, particularly regarding their establishment (by public deed or by testamentary disposition) and organization[243].

Like classical foundations, family foundations must be registered in the commercial register. The exemption they previously enjoyed was abolished on January 1, 2016, for reasons of transparency[244]. The rules governing the modification of classical foundations apply by analogy to family foundations[245], with the exception of the modification of the

[241] Article 335 paragraph 1 of the Swiss Civil Code (CC) defines the purpose and beneficiaries of family foundations: "Family foundations may be created by an endowment for the purpose of meeting the costs of education, for providing endowments or for supporting family members in any other similar way."

[242] Article 88 paragraph 2 CC provides for the dissolution of family foundations by a judge: "Family foundations are dissolved by a judge on application or ex officio if their purpose has ceased to be capable of achievement or if their existence has become incompatible with public policy."

[243] Family foundations are generally subject to the same rules as classical foundations regarding their establishment and organization, as set out in Articles 80-89bis CC.

[244] The exemption from the registration requirement for family foundations was abolished by the amendment of December 12, 2014, to the CC (AS 2015 5017), which entered into force on January 1, 2016

[245] The rules on the modification of classical foundations (Articles 85-86b CC) apply by analogy to family foundations, as confirmed by the Federal Supreme Court in BGE 110 II 479, E. 4

foundation's purpose at the founder's request, as provided for in Article 86a CC, which is not permitted for family foundations[246].

Family foundations that allocate the income or assets of the foundation's property or other benefits derived from such property to family members without particular prerequisites related to a specific life situation, but simply to allow them a comfortable standard of living, do not meet the conditions set out in Article 335 paragraph 1 CC. These foundations, known as "maintenance foundations" (Unterhaltsstiftungen), are considered to violate the prohibition of family fideicommissa under Article 335 paragraph 2 CC, according to the case law of the Swiss Federal Supreme Court[247].

To a certain extent, family foundations allow the pursuit of aims similar to those of family trusts, which are used to hold family assets. However, due to the restrictions applied to family foundations (prohibition of maintenance foundations, registration in the commercial register, establishment by public deed, and limited possibilities for modification), their use remains limited compared to the flexibility offered by trusts.

The question arises as to what extent the recognition of trusts under the Swiss Private International Law Act (PILA) also extends to trusts that serve the function of maintenance foundations. Initially, the Swiss Federal Supreme Court had refused, in light of Article 335 CC, to recognize a maintenance foundation established under Liechtenstein law but with its effective seat in Switzerland. The legal situation changed following the adoption of the PILA. At the time, the Federal Supreme Court had denied the application of the law of the state of incorporation, invoking the abuse of law. Instead, it applied the substantive Swiss rules as

[246] Article 86a CC, which allows the founder to request the modification of the foundation's purpose, is not applicable to family foundations, as it would undermine the prohibition of maintenance foundations under Article 335 paragraph 2 CC

[247] The Federal Supreme Court has consistently held that maintenance foundations violate the prohibition of family fideicommissa under Article 335 paragraph 2 CC, as they serve to perpetuate the wealth and social status of a family without any specific purpose or need (see, e.g., BGE 71 I 265; BGE 75 I 15; BGE 108 II 393).

the law of the state in which the trust was effectively administered, so that Article 335 CC was directly applicable[248].

Since the entry into force of the PILA, the Federal Supreme Court no longer admits the existence of the so-called *fraus legis* reservation in relation to the connection to the place of incorporation. Consequently, Article 335 CC can only be applied to foreign legal entities as a mandatory rule within the meaning of Article 18 PILA[249]. In this respect, it must be taken into account that, in order to apply a domestic legal provision based on Article 18 PILA, it is not sufficient for the provision in question to aspire to be applied, based on its own scope of application, also to foreign legal relationships. It is also necessary (see the Federal Council's message of November 10, 1982, concerning the Private International Law Act, FF 1983 I 239 et seq., point 214.53) that the provision be of fundamental importance and that its application be imperative for the maintenance of public order[250].

In the case of the prohibition of maintenance foundations, it is doubtful whether these conditions are met. This prohibition is based on moral considerations (combating idleness) and ideological considerations (suppressing feudal structures) that now appear outdated from today's perspective. Doctrine is divided on this point[251]. Moreover, trusts should not pose problems of conflict with Article 335 paragraph 2 CC, or at most only to a limited extent,

[248] This refers to the Federal Supreme Court's decision in BGE 108 II 398, where the court initially refused to recognize a Liechtenstein maintenance foundation with its effective seat in Switzerland, applying Swiss substantive law instead of the law of the state of incorporation.

[249] Article 18 PILA allows for the application of mandatory rules of Swiss law, regardless of the law designated by the PILA, if such rules are essential for safeguarding Swiss public interests

[250] The Federal Council's message on the PILA (FF 1983 I 239 et seq.) clarifies that the application of mandatory rules under Article 18 PILA requires not only that the rule in question seeks to apply to foreign legal relationships based on its own scope of application, but also that it be of fundamental importance and imperative for the maintenance of public order.

[251] There is no consensus in Swiss legal doctrine on whether the prohibition of maintenance foundations under Article 335 paragraph 2 CC qualifies as a mandatory rule within the meaning of Article 18 PILA, given the outdated moral and ideological considerations underlying this prohibition.

since Anglo-American law also provides for limitations on the possible duration of a trust and the related property restrictions (rule against perpetuities)[252].

Given the limitations and restrictions imposed on family foundations under Swiss law, it is worth considering whether an amendment to the legal framework governing family foundations could better accommodate the needs and objectives typically addressed by family trusts. Alternatively, the introduction of a Swiss trust law could provide a more flexible and adaptable instrument for estate planning and asset management in the family context.

One possible approach could be to relax some of the restrictions on family foundations, such as the prohibition on maintenance foundations, to allow for a broader range of purposes and benefits for family members. This could be accompanied by appropriate safeguards and oversight mechanisms to prevent abuse and ensure compliance with public policy objectives.

Another option would be to introduce a Swiss trust law that specifically recognizes and regulates family trusts, providing a clear legal framework for their establishment, operation, and taxation. This could draw on the experience of other civil law jurisdictions that have successfully introduced trust legislation, such as Liechtenstein [253]and

[252] The rule against perpetuities in Anglo-American trust law sets limits on the duration of a trust and the postponement of the vesting of interests in trust property, thereby preventing the indefinite tying up of assets and ensuring the marketability of property (see, e.g., Gray's Rule Against Perpetuities, 4th ed., 2002)

[253] Liechtenstein introduced a comprehensive trust law (Gesetz über das Treuunternehmen, TrUG) in 1926, which has been amended several times since then to adapt to international developments and to maintain Liechtenstein's attractiveness as a trust jurisdiction

Luxembourg[254], while adapting the rules to the specific needs and characteristics of the Swiss legal system.

A Swiss trust law could offer several advantages over the current family foundation regime. It could provide greater flexibility in terms of the purposes for which a trust can be established, the powers and duties of the trustee, and the rights and interests of the beneficiaries. It could also allow for more efficient and cost-effective administration of family assets, without the need for formal registration or public disclosure of the trust arrangement.

However, the introduction of a Swiss trust law would also raise complex questions regarding the interaction between trust law and other areas of Swiss law, such as property law, inheritance law, and tax law. It would be necessary to carefully consider how trusts would be integrated into the existing legal framework and to ensure that the rights and interests of all parties involved – settlors, trustees, beneficiaries, and third parties – are adequately protected.

3.7. Heading towards a Swiss trust law

Switzerland has been grappling with the question of whether to introduce its own substantive trust law for several years now. The debate has been fueled by various factors, including international pressure to enhance transparency in financial markets, the need to remain competitive with other global financial centers, and the desire to provide a clear legal framework for the recognition and regulation of trusts in Switzerland.

As mentioned earlier, Switzerland ratified the Hague Convention which obliged the country to recognize trusts created under foreign law. However, the ratification of the

[254] Luxembourg enacted a trust law (Loi du 27 juillet 2003 relative au trust et aux contrats fiduciaires) in 2003, which allows for the creation of trusts under Luxembourg law and provides for the recognition of foreign trusts, subject to certain conditions and safeguards

Convention did not introduce a domestic trust law in Switzerland, meaning that trusts cannot be established under Swiss law.

The absence of a Swiss trust law has led to some uncertainty and complexity in the treatment of trusts in Switzerland, particularly in areas such as taxation, asset protection, and estate planning. While the Swiss legal system has sought to accommodate trusts through the application of existing legal concepts and principles, such as the law of foundations and fiduciary contracts, these solutions have not always been entirely satisfactory or comprehensive.

In recent years, there have been growing calls for the introduction of a Swiss trust law to address these challenges and to strengthen Switzerland's position as a leading financial center. The Swiss Parliament has taken an active interest in this issue, with several motions and postulates being submitted to explore the feasibility and desirability of introducing a domestic trust law.

One of the main drivers behind these efforts has been the need to enhance transparency and combat abusive tax practices involving trusts. As noted in the text, international discussions on abusive tax shelters have led to numerous reforms in European legislation, with countries around Switzerland seeking to reinforce their laws to prevent assets from being diverted from taxation[255]. Switzerland has also faced significant foreign pressure to terminate its banking secrecy and to cooperate more fully in the exchange of information for tax purposes[256].

---

[255] The text refers to the growing international pressure on countries to enhance transparency and combat abusive tax practices, particularly in the wake of the financial crisis and the revelations of large-scale tax avoidance and evasion schemes. This pressure has led to numerous legislative reforms and initiatives at the European and global level, such as the automatic exchange of information for tax purposes and the Base Erosion and Profit Shifting (BEPS) project led by the OECD

[256] Switzerland has faced significant pressure from the United States, the European Union, and other countries to reform its banking secrecy laws and to cooperate more fully in the exchange of information for tax purposes. This pressure has led to the conclusion of several bilateral agreements,

These developments have prompted Swiss policymakers to consider whether the introduction of a Swiss trust law could help to address these concerns while also providing a more robust legal framework for the recognition and regulation of trusts. In 2009, Swiss parliamentarians raised questions about the lack of clear international regulations for determining the "beneficial owners" of foreign discretionary trusts, noting that this gap could potentially be used to shield assets from taxation[257].

In response to these inquiries, the Swiss Federal Council stated that there were no immediate plans to introduce the trust as a proper legal institution in the Swiss Civil Code, meaning that trusts could only be established under foreign law and not Swiss law[258]. However, the Federal Council also acknowledged the need for greater transparency in the Swiss financial markets. It indicated that it would take the necessary measures to enhance transparency, even if these were not provided for by the Organisation for Economic Co-operation and Development (OECD)[259].

---

such as the U.S.-Switzerland Joint Statement on Tax Cooperation in 2013, and the adoption of the automatic exchange of information under the OECD's Common Reporting Standard (CRS) in 2017

[257] The text refers to parliamentary questions raised in 2009 regarding the lack of clear international regulations for determining the beneficial owners of foreign discretionary trusts. Discretionary trusts are a type of trust where the trustee has discretion over the distribution of trust assets to the beneficiaries, making it more difficult to identify the ultimate beneficial owners of the assets. This lack of transparency has raised concerns about the potential use of discretionary trusts for tax avoidance or evasion purposes.

[258] The Swiss Federal Council is the executive body of the Swiss government. In its response to the parliamentary questions, the Federal Council indicated that there were no immediate plans to introduce the trust as a legal institution in the Swiss Civil Code, meaning that trusts could only be established under foreign law and not Swiss law. This position reflects the traditional reluctance of civil law countries like Switzerland to recognize trusts as a distinct legal form, given the differences between the common law concept of trust and civil law notions of property and ownership

[259] The Organisation for Economic Co-operation and Development (OECD) is an international organization that promotes policies to improve the economic and social well-being of people around the world. The OECD has been at the forefront of efforts to enhance transparency and combat tax

The Federal Council further highlighted Switzerland's strong engagement in combating tax fraud through its extensive network of double taxation treaties, which encompassed the disclosure of information concerning beneficiaries of discretionary trusts who might be involved in criminal tax proceedings[260]. This commitment to international cooperation in tax matters has been a key factor in Switzerland's efforts to maintain its reputation as a responsible and compliant financial center.

Despite the Federal Council's initial reluctance to introduce a Swiss trust law, the idea has continued to gain traction in parliamentary circles. In recent years, several motions and postulates have been submitted calling for a closer examination of the potential benefits and challenges of introducing a domestic trust law[261]. These initiatives have sought to explore how a Swiss trust law could be designed to meet the specific needs and characteristics of the Swiss legal system while also ensuring compatibility with international standards and best practices.

---

evasion and avoidance, notably through the development of the Common Reporting Standard (CRS) for the automatic exchange of financial account information between countries. The Federal Council's statement indicates that Switzerland was willing to take measures to enhance transparency in its financial markets, even if these were not specifically provided for by the OECD

[260] Double taxation treaties are bilateral agreements between countries that aim to eliminate or reduce the double taxation of income and capital that can arise when a person or entity is subject to tax in two or more countries. These treaties typically include provisions for the exchange of information between the tax authorities of the contracting states, which can be used to combat tax fraud and evasion. The Federal Council's statement highlights Switzerland's extensive network of double taxation treaties and its commitment to exchanging information on the beneficiaries of discretionary trusts in the context of criminal tax proceedings.

[261] The text refers to recent parliamentary motions and postulates calling for a closer examination of the potential benefits and challenges of introducing a Swiss trust law. Motions are parliamentary interventions that require the government to take specific actions or to submit proposals for legislation. Postulates are parliamentary interventions that require the government to examine a particular issue and to report back to parliament. These initiatives reflect the growing interest among Swiss policymakers in exploring the feasibility and desirability of a domestic trust law.

One of the key considerations in this regard has been the need to strike a balance between the flexibility and adaptability of the trust instrument and the principles of legal certainty, transparency, and public policy that are central to Swiss law. A Swiss trust law would need to provide clear rules on the creation, operation, and termination of trusts, as well as on the rights and obligations of the parties involved (settlors, trustees, and beneficiaries).

It would also need to address issues such as the registration and supervision of trusts, the tax treatment of trust assets and income, and the relationship between trust law and other areas of Swiss law, such as property law, inheritance law, and creditor protection. The experience of other civil law jurisdictions that have successfully introduced trust legislation, such as Liechtenstein and Luxembourg, could provide valuable guidance in this regard.

Another important factor in the development of Swiss trust is the need to ensure its attractiveness and competitiveness in the international market for trust services. As noted in the text, Switzerland is currently the only country among the top 10 global financial centers that does not have its own trust legislation[262]. The introduction of a well-designed and internationally compatible Swiss trust law could help to strengthen Switzerland's position in this market and to attract new business opportunities.

At the same time, the development of a Swiss trust law would need to be carefully balanced against the country's broader objectives in terms of financial market regulation, tax compliance, and international cooperation. Switzerland has made significant efforts in recent years to enhance the integrity and transparency of its financial sector, including through the adoption of stricter anti-money laundering rules, the automatic exchange of information for

[262] The text refers to the fact that Switzerland is currently the only country among the top 10 global financial centers that does not have its own trust legislation. The other leading financial centers, such as the United States, the United Kingdom, Singapore, Hong Kong, and Canada, all have well-established trust laws that provide a clear legal framework for the creation, administration, and taxation of trusts. The absence of a Swiss trust law may put Switzerland at a competitive disadvantage in attracting trust business and may create legal uncertainty for trustees and beneficiaries

tax purposes, and the participation in international initiatives such as the Common Reporting Standard (CRS) and the Foreign Account Tax Compliance Act (FATCA)[263].

The introduction of a Swiss trust law would need to be consistent with these efforts and should not be seen as a means of facilitating tax avoidance or other abusive practices. On the contrary, a well-designed Swiss trust law could help to enhance the transparency and accountability of trust arrangements in Switzerland, by providing a clear legal framework for their recognition and regulation.

Recent parliamentary initiatives and the growing international focus on transparency and tax compliance suggest that the idea of a Swiss trust law is gaining momentum. However, the ultimate decision will depend on carefully weighing the potential benefits and risks and on the ability to design a trust law that is compatible with Swiss legal principles and international standards.

CHAPTER 4

[263] The Common Reporting Standard (CRS) and the Foreign Account Tax Compliance Act (FATCA) are international initiatives aimed at enhancing transparency and combating tax evasion through the automatic exchange of financial account information between countries. The CRS was developed by the OECD and has been adopted by over 100 countries, including Switzerland. FATCA is a U.S. law that requires foreign financial institutions to report information on U.S. account holders to the U.S. tax authorities. Switzerland has implemented both the CRS and FATCA and has concluded several bilateral agreements with other countries to facilitate the exchange of information under these regimes

THE PROPOSAL FOR SWISS TRUST LAW

4.1. Reasons behind the proposal of a Swiss trust and amendment in Swiss civil law : estate planning

One argument in favor of the legislative idea is that a Swiss trust would provide Swiss residents with a tool that is governed by the local legal system and is more readily accessible and comprehensible. Switzerland does not require a new instrument for international customers since there are currently several other countries that provide suitable trust instruments. The customers can rely on the guidance and protection offered by The Hague Convention and the Circular on taxation of trusts in Switzerland.

The effect study of legislation has revealed that Swiss law presently lacks provisions in the area of estate planning.[264] Despite the market's ability to adequately fulfill the demand for capital structure and succession plan solutions, both domestically and internationally, the current outcome is inefficient. The absence of a comprehensive and flexible domestic instrument for estate planning and asset protection in Swiss law has necessitated the reliance on intricate arrangements, often involving the utilization of foreign legal constructs, which may not be wholly suitable for the intended purposes, in order to satisfactorily address the

[264] *Impact analysis of regulation (RFA)*. In order to examine the economic consequences of a Swiss trust, the Büro für arbeitsund sozialpolitische Studien (BASS AG) in Bern conducted, in collaboration with Professor Andrea Opel, a professor of tax law at the University of Lucerne, an impact analysis of regulation93. The analysis is based on a series of meetings with experts and an online survey involving various players from the trust industry. The report, published on December 5, 2019, concludes that a practical plan of family and succession planning is needed. Due to legal constraints, family foundations under Swiss law do not dispense with the requirements in this area and those interested in a wealth planning tool resort to foreign legal instruments (trusts or foreign-owned family foundation) or complex structures.

specific requirements and objectives of individuals seeking to structure their wealth and ensure its efficient transfer to future generations.

However, the use of these alternatives may also lead to legal uncertainty. The implementation of Swiss trust legislation aims to fulfill the requirement for a Swiss legal mechanism that caters specifically to Swiss citizens. Nevertheless, it is important to acknowledge that any instrument originating from Switzerland may clash with other aspects of Swiss legislation, just as foreign instruments now do. The utilization of foreign institutions, such as Liechtenstein foundations and foreign trusts, has been restricted due to conflicts arising from compelled heirship restrictions and unfavorable tax implications.

As per the relevant inheritance legislation, the legal beneficiaries who are safeguarded by mandatory inheritance laws are entitled to receive their protected portion of the estate directly and without any conditions. Transferring assets into a foreign trust or using the new potential Swiss instrument may potentially breach the forced share.[265]

When it is necessary to safeguard minors or disabled children by placing significant assets or an estate into a legal arrangement instead of allowing them to directly inherit these assets, there is a high probability of a conflict arising that might lead to a clawback claim against the trustee.

Clawback rules are not automatically respected in common law nations. Many offshore trust countries have enacted legislation explicitly aimed at safeguarding trusts from legal challenges by beneficiaries who are protected by the law. However, in the context of a

[265] Swiss inheritance law enforces a forced share *(Pflichtteil/réserve héréditaire)* system, limiting testamentary freedom. As of 2023, forced shares are: 1/2 of statutory inheritance rights for descendants; 1/4 for parents (if no descendants); and 1/2 for surviving spouses or registered partners. Statutory inheritance rights allocate 1/2 (with children) or 3/4 (without children) to spouses/partners, with remaining portions to children or parents. This system significantly constrains estate planning, often leaving only 3/8 of an estate for free disposition in typical family scenarios. Recent discussions have centered on potential reforms to increase testamentary freedom, particularly for complex family situations.

Swiss instrument, these clawback requirements will be enforceable in Switzerland. Essentially, the mandatory element might be disregarded if the protected heir is also a recipient of a legal document simultaneously.

In order for the appointment as a beneficiary to fulfill the claim to the obligatory share, it must be explicitly stated in the document that the beneficiary would receive distributions equal to or more than the compulsory portion. When it comes to discretionary instruments, it is doubtful that the compulsory element will be breached, as the receipt of benefits will usually not be adequately definite. Imposing overly tight limitations on the ability to access the mandatory share may potentially lead to a claim for the recovery of assets.

Therefore, if a person creating a will wishes to utilize a legal document instead of allowing their beneficiaries to directly inherit, they must engage in an agreement with all eligible beneficiaries, assuming all beneficiaries have reached the age of majority. Individuals under the age of majority are prohibited from entering into such a contractual agreement, and parents are likewise unable to serve as their legal representatives in this matter. If the meaning of a breach of compelled heirship norms is not modified, a new Swiss instrument will encounter the same barriers and will not be as easily available as the proponents of Swiss trust law anticipated.

4.1.2. Reasons behind the proposal of a Swiss trust and amendment in Swiss civil law: new activities and the strengthening of the Swiss financial market

The initiative proposes the creation of new fields of work for Swiss professionals, including providing advice on trusts, handling trust settlements, and administering trusts and their assets. Currently, Swiss citizens have the option to utilize either a Liechtenstein Foundation or a foreign trust[266]. Swiss specialists provide guidance and support in the

[266] A Liechtenstein Foundation is a legal entity established under Liechtenstein law that allows for the management and protection of assets, similar to a trust. It is often used for estate planning, asset protection, and charitable purposes. The foundation is created by a founder who transfers assets to

establishment and resolution of trusts, usually in collaboration with an expert from the relevant state.

Today, several Swiss professionals serve as co-trustees[267] with a trustee from the designated jurisdiction, or, more frequently, as guardians[268]. Therefore, the introduction of a Swiss instrument will not generate more fields of operation, but rather facilitate access to current operations by eliminating the need for foreign professionals. Nevertheless, the extent to which new fields of professional activity might be generated is uncertain, given the restricted utilization of a Swiss tool.

The main motivation of those calling for the introduction of a Swiss trust is to strengthen the Swiss financial marketplace. Already in 2009, in the strategy implemented after the financial crisis to enhance the international competitiveness of the financial sector, the Federal Council mentioned the adoption of a Swiss trust law. Several parliamentary interventions on the subject also call for the introduction of this legal instrument.

Given that the trust is an increasingly popular and reliable tool for succession planning and the preservation of large assets, not only in the Anglo-Saxon countries but also in many other states, the supporters of the Swiss trust believe that the inclusion of the trust in Swiss private law would place the Swiss financial square on an equal footing with its

---

the foundation, which is then managed by a board of directors for the benefit of the designated beneficiaries

[267] Co-trustees are individuals who share the responsibilities of managing a trust alongside another trustee. They have equal authority and liability in the administration of the trust and must work together to make decisions in the best interests of the trust beneficiaries. Co-trustees can be appointed to provide additional expertise, to ensure continuity in trust management, or to balance power among multiple parties.

[268] Guardians, also known as protectors, are individuals appointed to oversee the actions of the trustees and ensure they are acting in the best interests of the trust beneficiaries. They have the power to monitor trust activities, request information from trustees, and in some cases, to remove and replace trustees who are not fulfilling their duties. Guardians serve as an additional layer of protection for the trust and its beneficiaries.

competitors, namely the financial squares of London, Luxembourg and also Singapore.

This view finds strong support in doctrine and among professionals. The positive effect of the Swiss trust on the attractiveness and competitiveness of the Swedish financial sector is confirmed by the conclusions of the impact analysis of regulation.

4.2. The preceding parliamentary interventions on trusts made by the Swiss Parliament

Prior to conducting a detailed examination of Motion 18.3383, titled "Introduction of Trusts in the Swiss Legal System," submitted on April 26, 2018, by the Legal Affairs Committee of the Council of States[269], it is crucial to provide an overview of previous legislative actions related to this topic. The preparatory stage is essential for an in-depth investigation, since these previous legislative initiatives offer a framework that demonstrates the long-standing focus the Legal Affairs Committee has devoted to this matter.

In order to grasp the importance of Motion 18.3383, it is crucial to consider the historical and legislative context that prompted its introduction. The Legal Affairs Committee has been diligently involved in tackling the intricacies and subtleties of trust legislation in Switzerland for several years. The necessity of a more organized and standardized method of integrating trusts into the Swiss legal system has been emphasized via many legislative proposals and discussions.

Moreover, an analysis of these previous legislative actions demonstrates the changing character of trust regulation in Switzerland. The statement highlights the incremental

[269] The Legal Affairs Committee of the Council of States is one of the specialized committees within the Swiss Parliament. The Council of States is the upper chamber of the Swiss Parliament, representing the cantons (states) of Switzerland. The Legal Affairs Committee is responsible for reviewing and proposing legislation related to civil law, criminal law, and constitutional law. Its main tasks include examining draft legislation, conducting hearings with experts and stakeholders, and proposing amendments to existing laws.

measures implemented by the Legal Affairs Committee to tackle the legal, economic, and practical consequences associated with trusts.

The historical backdrop provides insight into the reasons underlying Motion 18.3383 and highlights the Committee's methodical and gradual approach to enhancing trust regulation.

4.2.1. Postulate 10.3332 : Analysis of the relevance of a national legislation on trusts

On 19 March 2010, the National Councillor Isabelle Moret[270] deposited the postulate 10.3332[271] which instructed the Federal Council[272] to complete her report of 16 April 2009, "*Strategic guidelines of the Swiss policy in the field of financial markets*", analyzing the possibilities of optimizing the regulation on foundations and the tax regimes applicable to them, as well as to adapt the foundations to foreign models, marked by introducing the legal institution of the trust.

In its opinion of 26 May 2010, the Federal Council proposed to accept the postulate and referred to the work, then in progress, on the revision of the law of the foundation

[270] Isabelle Moret is a Swiss politician who served as a member of the National Council, the lower house of the Swiss Parliament, representing the canton of Vaud. She is a member of the FDP.The Liberals, a center-right political party in Switzerland.

[271] A postulate is a parliamentary instrument used in the Swiss political system. It is a formal request made by a member or a group of members of the Parliament, asking the Federal Council to examine a specific issue and to report back to the Parliament. Unlike a motion, a postulate does not require the Federal Council to submit a draft bill or take a specific action, but rather to study the matter and provide information.

[272] The Federal Council is the executive branch of the Swiss government, composed of seven members elected by the Parliament. Each member heads one of the seven federal departments and assumes the presidency on a rotating basis for a one-year term

following the acceptance of motion 09.3344 «*Fundations. To increase the attractiveness of Switzerland*".

On 16 March 2012, the postulate was withdrawn because it was not dealt with by the Houses within the two-year deadline

4.2.2. Postulate 15.3098 Consideration of the usefulness of a regulation on trusts

On 11 March 2015, the Radical Liberal Group[273] filed postulate 15.3098, which instructed the Federal Council to examine, within the framework of its next report on the strategic guidelines of Swiss financial market policy, the opposition to the adoption of the legal institution of the trust in Swiss private law and to adapt the applicable tax regimes.

In its opinion 8 May 2015, the Federal Council, referring to previous reports in the area of foundations and banking secrecy, proposed to reject the postulate in the absence of novelty intervention and a concrete requirement of a Swiss trust.

On 27 February 2017, the National Council[274] adopted the postulate with 123 votes to 67 against and 2 abstentions.

4.2.3. Parliamentary initiative 16.488 Introducing the trust institution in Swiss legislation

[273] The Radical Liberal Group, also known as the FDP.The Liberals Group, is a parliamentary group in the Swiss Parliament representing the interests of the FDP.The Liberals party. Parliamentary groups are formed by members of the same political party or by members with similar political view

[274] The National Council is the lower house of the Swiss Parliament, representing the Swiss population. It consists of 200 members elected by the people under a system of proportional representation. The National Council, together with the Council of States, forms the Federal Assembly, which is the legislative branch of the Swiss governmen

Already on 13 December 2016, the national adviser Fabio Regazzi had filed a parliamentary initiative, formulated in general terms, asking to create the legal bases for introducing the trust institution in the Bond Code or in the Civil Code. To justify his request, the author of the initiative argued that, although foreign trusts were recognized in Switzerland, Swiss law did not provide for this legal status, thus highlighting a gap especially in civil law, especially since the trust was already regulated in other areas.

The transposition of the legal institution of the trust into Swiss civil law would have presented many advantages, in particular because the instrument would be more easily accessible and better understood, thereby creating clarity, transparency and greater legal certainty, and would also result in new fields of activity for Swiss professionals.

On 20 October 2017, the competent Committee on Legal Affairs of the National Council (CAG-N) followed up on the initiative . On 27 April 2018, the Committee on Legal Affairs of the Council of States (CAG S) considered the parliamentary initiative and joined it with 6 votes in favour, 3 against and one abstention.

At the same time, it adopted Motion 18.3383 with 7 votes in favour, one against and one abstention, see the following paragraph, considering it appropriate that the Federal Council should first take responsibility for the drafting of the legal bases. On 19 June 2020, the National Council extended the deadline for the initiative until the spring session of 2022.

4.2.4. Motion 18.3383 Introduction of the trust in the Swiss legal system

In the framework of the debate on Parliamentary initiative 16.488, the CAG-S filed Motion 18.3383 Introduction of the trust in the Swiss legal order, which mandates the Federal Council to establish the legal bases that allow the introduction in Swiss legislation of the legal instrument of the Trust.

In its opinion of 23 May 2018, the Federal Council proposed to reject the motion by referring to postulate 15.3098, see above. According to the Federal Council, it was first

necessary to wait for the end of the work then underway on the report in fulfillment of the postulate and then to determine, based on the data thus acquired, the subsequent stages for the possible introduction of a Swiss trust.

On 12 June 2018 the Council of States adopted the motion with 25 votes in favour, 16 against and 2 abstentions74, while on 13 March 2019 the National Council adopted it with 123 votes for and 58 against 75.

4.3. Solutions examined and solution chosen: Adoption of the trust in the Swiss legal system

The introduction of a Swiss trust, requested by the authors of parliamentary interventions cited in the preceding paragraphs, is not unanimously agreed and also arouses a number of criticisms. Some professors and professionals believe that the trust is incompatible with the principles of our system.

However, the successful examples of the introduction of trust in numerous civil law countries show that it is possible to overcome the generally cited obstacles in denying trust compatibility with the principles of continental law.[275]

[275] Trust (fiduciae), introduced into the French Civil Code by Law No. 2007-211 of February 19, 2007, is defined as the operation whereby one or more settlors transfer assets, rights, or guarantees, or a set of assets, rights, or guarantees, present or future, to one or more trustees who, holding them separately from their own assets, act for a specific purpose for the benefit of one or more beneficiaries. The French fiduciae is a named contract subject to certain formal conditions. It involves a transfer of ownership to the trustee, which excludes the possibility of the settlor appointing themselves as the trustee. The fiduciae does not have legal personality. It can be established by law or by contract and must be express. The creation of the fiduciae generally requires a written form. If the assets, rights, or guarantees transferred to the fiduciary estate are dependent on the marital community of property

The first of these obstacles is the *numerus clausus* of real rights[276], which would prevent beneficiaries from granting real rights to trust assets[277]. The second is the principle of unity of assets, which would oppose the creation of a separate asset within the assets of the trustee. It should be remembered that even the legal institution of the trust , whose origins derive from the civilist tradition, allows to similar effects to the trust. In the context of a trust, only the trustee has a real right, opposable to third parties, over the trust assets.

Furthermore, it is the only one to be bound by simple contractual obligations towards the trustee or the eventual beneficiary. Since it grants beneficiaries only rights of a purely liable nature, the trust does not remove the ownership of the trust or require the cost of a

---

or common property, a notarized deed is required. The fiduciae contract must define the transferred assets, rights, or guarantees, the duration of the transfer (not exceeding 99 years), the identity of the settlor, the trustee, and the beneficiaries (or the rules for appointing them), as well as the trustee's duties and the extent of their powers to manage and dispose of the assets. The fiduciae contract and its clauses, as well as the beneficiaries, are registered in a national register of fiduciary transactions (not accessible to the public). The trustee acquires ownership of the fiduciary estate, but unlike Roman law, these assets constitute a separate estate from their personal assets, meaning that the trustee's personal creditors cannot, in principle, exercise any rights over the fiduciary estate. French law establishes a very strict framework for the possible uses of the fiduciae institution. The fiduciae contract is void if it is a gratuitous benefit in favor of the beneficiary. This nullity is a matter of public policy. Additionally, the contract terminates upon the death of the settlor, at which point the fiduciary estate reverts by law to the succession. Therefore, any use of the fiduciae for succession planning purposes is excluded. Furthermore, only certain credit and insurance institutions, as well as lawyers, can act as trustees. Other legal systems have also opted for regulation of the fiduciae. This is the case in particular in Luxembourg (Law of July 27, 2003, on trusts and fiduciary contracts) and Italy (Law No. 51 of February 23, 2006, which introduced Article 2645 ter into the Italian Civil Code).

[276] *Numerus clausus* of real rights is a legal principle that limits the number and types of real rights (rights in rem) that can be created or recognized by law. This principle is common in civil law jurisdictions and aims to ensure legal certainty and predictability in property law.

[277] The principle of unity of assets states that a person's assets form a single, indivisible whole. This principle is a fundamental concept in many civil law jurisdictions and can pose challenges when attempting to create separate pools of assets, such as in the case of trusts.

separate asset. Once the possibility of transposing the trust into our legal system is accepted, how remains to be defined. The trust can be introduced according to different models that correspond, with varying degrees of precision, to the trusts of common law countries and that are more or less easily integrated into our legal system.

According to the doctrine, one could consider, for example, the full transposition of the law , the transposition by analogy or functional approximation.

The first solution, which would involve the introduction of foreign trust legislation into Swiss law, a so-called legal transplant [278], is not possible. Furthermore, no country of continental law has embarked on this path because is difficult to revert to a series of concepts of the common law tradition, such as the distinction between legal title and beneficial interest, incompatible with the principles of real rights of their legal order. Nor did Liechtenstein, with its very elaborate integration of the trust into a continental legal system, proceed in this way.

This alternative must therefore be discarded in favour of proposals based on existing legal concepts and institutions in Swiss law.

An alternative to the so-called legal transposition of a foreign trust law into our legislation is to proceed by analogy by creating a new legal instrument *sui generis* that has the same characteristics and produces the same effects as a black trust but respects the principles of domestic law. This approach has been practically adopted by all continental law states that have integrated the trust into their legal statute (particularly Liechtenstein, Quebec or Louisiana). Some countries have also renounced the full transposition of the trust and have merely adopted some of its functions; in particular, it is France and its codification of the trust, which is, in fact, a very different institution from the Anglo-Saxon trust.

The third option for integrating the trust is functional convergence, starting from a legal institution present in domestic law and adapting it to make it a trust-like institution.

[278] Legal transplant is the process of adopting legal rules or institutions from one legal system into another. It involves borrowing or transferring legal concepts, principles, or entire laws from a foreign jurisdiction and incorporating them into the domestic legal framework

Depending on the importance of the proposed adjustments and the degree of approximation to the trust, it would no longer be a question of simply changing an existing legal institution, but rather of creating a new one. In order for the Swiss trust to get as close as possible to the Anglo-Saxon trusts, it is not enough to encode an improved trust.

In light of these considerations, the solution chosen in motion 18.3383 is that of the transposition by analogy, which consists of introducing the trust as a new legal instrument in the Swiss Code of Obligations (CO)[279]. The trust proposed in the pre-project is based on legal instruments already known in Swiss law. To the extent possible, it refers to rules already established by law or specified by jurisprudence, as in the case of the trustee's trust duties towards the beneficiaries, which in part correspond to those of the contract of mandate, or of the right of tracing on assets in trusts, which is based on the rules concerning undue enrichment, or even of the intervention of the court in the framework of the voluntary jurisdiction, similar intervention to that of the supervisory authority on foundations.

The draft submitted in motion 18.3383 does not take up any concept of common law. Therefore, it does not constitute a transplant of foreign law; its scope is limited to the law of obligations and does not require changes in property rights and ,therefore, not in other areas of law (inheritance law, marital law, bankruptcy law, etc.), subject to certain adjustments.

4.4. The proposal for the introduction of Swiss Trust: Deposition of Motion 18.3383

On 26 April 2018, the Committee on Legal Affairs of the Council of States filed motion 18.3383 entitled “Introduction of the trust in the Swiss legal system”, which entrusts the Federal Council “to establish the legal bases that allow the introduction in Swiss legislation of the legal institution of the Trust”.

[279] Swiss Code of Obligations (CO), is a part of the Swiss civil law that regulates contract law, tort law, commercial law, and company law.

On 12 June 2018, the Council of States adopted the motion by 25 votes in favour, 16 against and two abstentions. On 13 March 2019 the National Council also accepted the motion with 123 votes in favour and 58 against.

With the support of a group of experts and a working group, a preliminary project was subsequently developed and a regulatory impact assessment (AIR) was carried out in parallel. On 12 January 2022, the Federal Council consulted the preliminary draft. The consultation procedure lasted until 30 April 2022.

The preliminary draft included a part of civil law on the establishment of the trust as the new legal institution of the Bond Code and on other adjustments to civil law.

The aim was to create a trust with the essential characteristics of this institution and with a wide scope of application, which would serve as a concrete alternative to the existing instruments in Swiss and foreign law.

The second part, devoted to tax law, proposed to integrate into tax laws an explicit regulation of trust relations and provided, in the case of the so-called irrevocable discretionary trust, to attribute the income of the trust and the assets in trust to the trust itself, which would have to be treated as an autonomous tax subject to the likeness of a foundation.

At that time the Federal Council had stressed that the introduction of the trust in Swiss law should not and does not want to compete with the legal form of the foundation, especially in the charitable and philanthropic sector, which thanks to the various and recent partial revisions works well and enjoys an excellent international reputation. However, it had clarified that this did not preclude a change in the law of foundations, in particular family foundations at a later stage, in order to purposes similar to those of a trust.

4.5. Proposed regulation for the Codification of the trust in the CO : Trust as a legal instruments *sui generis*

The bill intends to introduce the trust as a new legal instrument of Swiss law situated between the trust and the foundation. It is therefore not a question of transferring a foreign institution, but of integrating the trust into the existing legal framework. In some respects, the Swiss trust has legal characteristics similar to the trust: distinction between legal propriety and economic benefit, mandatory nature of the relationship between trustee and beneficiaries, content of the trustees diligence obligations, etc.

The elements relating to the establishment of a separate asset, the independence of the trust from the disposer or even the position of the beneficiaries are similar to the foundation under the CC[280]. All in all, the legislation is completed to consolidate the rights of beneficiaries, notably with the introduction of an extended right of information and a right of tracing on assets in trusts, as well as by establishing a voluntary jurisdiction.

At this stage, it should be stressed that the preliminary draft does not provide for any amendments or derogations from the CC rules on property rights which remain fully applicable. The trustee holds all the ownership rights to the assets in the trust, while beneficiaries only have personal rights consolidated by a bankruptcy privilege in the event of enforced enforcement against the trust and a right of succession if the trust assets have been alienated in violation of the trustees' obligations.

The proposed legislation therefore does not presuppose a fractioning of property, nor does it intend to take on concepts typical of the common-law tradition such as the distinction between legal ownership and equitable interest.

The Swiss Trust is neither a contract nor a legal entity entitled to the enjoyment or exercise of civil rights, let alone a legal person. The trust must be side-by-side as a legal instrument sui generis consisting of an obligatory long-term relationship that binds the trustee to the beneficiaries and has as its object a special asset exclusively intended for the interests of beneficiaries, if the case may be subject to certain powers that the disposer has reserved or conferred on a guardian.

[280] CC likely refers to the Swiss Civil Code, which is the codified law governing civil matters in Switzerland, such as family law, inheritance law, and property law.

The mandatory nature of the Swiss trust explains the choice to place the relevant provisions in the CO. As it is neither a contract nor a company, the preliminary draft proposes to treat the trust in a new title *22bis* inserted in the second part, immediately before the title on the simple company.

4.5.1. Proposed regulation for the Codification of the trust in the CO: maintain the concept of Trust in accordance with the Hague Convention, in the interests of beneficiaries

The trust proposed by the pre-project has the essential characteristics of the Anglo-Saxon trust and corresponds to the definition of the Hague Convention. It should therefore be able to be fully recognized abroad.

According to article *529a, paragraph 1, AP-CO*, the purpose of a trust is the assignment of assets by one or more holders of a separate asset held and administered by a trustee or trustees in the interest of one or several beneficiaries. According to this provision, the trust must be created by one or more disposers. [281]

[281]One canton considers that the definition of trusts contained in this provision is too broad and that all purpose trusts, whether pure or mixed, and all trusts which can exercise even only partly a public utility or public law activity should be excluded. 11 organizations are of the view that such a limitation is not justified and that it is necessary to check how to integrate purpose trusts into the existing system of civil law, so as to create an alternative to the public utility foundations and the state supervision to which they are subjected. Another participant argues that a potential competition between a foundation and a trust should not be an obstacle to the introduction of a trust. Such a limitation of the purpose of the trust would be contrary to the definition of the Hague Convention: Swiss law provides for the recognition of purpose trusts established in accordance with foreign law. One organisation argues that the public utility trust should be authorized under Article 56(g) of the Federal Direct Federal Tax Act of 14 December 1990. One canton considers that the terms «*zuwidmen*», «*zugewidmet*» and «*Zuwidmung*» in the German version are neither known nor used in German. For greater clarity, it would be advisable to avoid creating new terms, or these should at least

The preliminary draft in Motion 18.3383, does not, therefore, provide for the establishment of a trust by law or by judicial decision (resulting trusts, constructive trusts, or statutory trusts). It must be created in the interests of the beneficiaries. The purely purpose trust is, therefore, not authorized. This means that the trust does not present itself as an alternative legal structure to the foundation for public utility organizations. In this regard, the foundation appears to meet the needs of other actors, and, at least for now, it does not appear to be desirable to introduce a competing legal structure. On the other hand, the prohibition of purpose trusts does not preclude a trust from pursuing a purpose of public benefit.

A public utility organization (school, NGO, church, sports club, etc.) can be designated as a beneficiary of a trust and, in this case, the trust should also be able to pursue a public service purpose. Furthermore, the preliminary draft does not provide for any limitation relating to the purpose of the trust.

Trust can, therefore, be used in a familiar and professional context. With the exception of the foregoing in relation to purpose trusts, the trust should fulfil all the functions traditionally assigned to (express) trusts in Anglo-Saxon countries.

The preliminary draft also does not provide for any restrictions on the activities that the trustee may carry out. Provided that the rules relating to the designation of beneficiaries are respected, it is ,therefore, possible to cost commercial trusts in the context of economic or commercial activities. Therefore, it is not excluded that the trust may constitute an alternative legal structure to the industrial enterprise or to commercial companies (SA, SaGL, cooperative companies, etc.)

---

be defined in the explanatory report. According to one organization, the German terminology of the provision should not deviate from that used for foundations. One organization claims that the proposed definition is not clear and that it differs too much from the Anglo-Saxon notion of a trust, i.e. a “binding relationship wished by the disposer, expressing explicitly or tacitly the will to commit the trustee to hold certain assets in the trust in the interest of the beneficiaries or for a purpose”.

4.5.2. Proposed regulation for the Codification of the trust in the OR: Limited duration and revocability of the trust

The trust may be established only for a limited period of time, which may not exceed 100 years[282]. The duration of 100 years is inspired by that stipulated in real rights for the maximum period of the land right or also for the usufruct .[283] And it is all in accordance with

[282] *art. 529u AP-CO*: 7 partecipanti sono contrari alla durata massima prevista in questo articolo, ritenendo che renda il trust svizzero meno attrattivo rispetto a quelli stranieri. Inoltre, il trust dovrebbe permettere di mantenere un patrimonio per più generazioni e dovrebbe pertanto poter essere sciolto solo dall'atto di trust, da una decisione presa all'unanimità dai beneficiari o dall'assenza di questi ultimi. Secondo una di queste organizzazioni, se non è possibile prevedere una durata illimitata del trust, bisognerebbe contemplare almeno una durata massima di 200 anni. Un partecipante è infine dell'opinione che la durata massima di 100 anni possa permettere di eludere il divieto di cui all'articolo 488 CC se due successori consecutivi (beneficiari) ricevono beni dal trust in un arco di tempo di 100 anni. Il partecipante reputa strettamente necessaria un'armonizzazione delle due disposizioni. 2 partecipanti fanno notare che, in caso di scioglimento del trust, qualora il disponente non abbia sancito le modalità di distribuzione nell'atto di trust, il trustee può decidere, ai sensi del rapporto esplicativo, della distribuzione dei beni in trust tenendo conto degli interessi dei beneficiari. I partecipanti chiedono una disposizione corrispondente all'interno della legge. Un'organizzazione chiede che il trasferimento di fondi in caso di scioglimento di un trust debba richiedere un atto pubblico. Un partecipante è dell'opinione che, anche se il disponente non si è opposto esplicitamente allo scioglimento del trust mediante decisione all'unanimità dei beneficiari, questa facoltà dovrebbe essere conferita ai beneficiari solo laddove il suo esercizio non danneggi gli scopi perseguiti dal disponente. Un partecipante298 sottolinea che l'atto di trust potrebbe prevedere che l'utile della liquidazione venga distribuito ad altre persone fisiche o giuridiche rispetto ai beneficiari o al disponente e che, in applicazione dell'articolo 529u capoverso 3 AP-CO, i beni in trust rimanenti dopo il saldo di tutte le obbligazioni vengano distribuiti a un'opera di pubblica utilità

[283] The discipline in question is contained in the *art. 779l paragraph 1* of the Swiss Civil Code which pertains to the establishment and requirements of a building right (Baurecht) in Switzerland. It specifies that a building right can be created by means of a contractual agreement which must be in written form and requires public notarization. The provision underscores the formal requirements

the legislation of the countries in which the rule against perpetuities is in force (e.g. 125 years for the English trust or 99 for the French "fiduciae"). In principle, the trust is dissolved at the expiry date specified in the trust act or when no more beneficiaries exist. The disposer may, however, reserve a right of withdrawal allowing him to terminate the trust and regain full ownership of the trust assets.

The right of withdrawal ends with the death of the disposer and therefore with the disappearance of the latter the trust becomes irrevocable. The draft in motion 18.3383 also provides for the possibility of dissolving the trust in advance with the unanimous agreement of the beneficiaries. At the end of the trust, the assets remaining after the payment of the debts are payable in accordance with the provisions of the trusteeship.

4.5.3. Proposed regulation for the Codification of the trust in the CO: Establishment of a trust by means of a unilateral act of the disposer (trust act) and transfer of assets

Any natural or legal person may constitute a trust on the condition that he or she has the exercise of civil rights. The trust is constituted by a unilateral act of will of the disposer, whether written in life or by disposition due to death[284].

---

necessary to grant a building right, ensuring the agreement's validity and enforceability under Swiss law.

[284] The relevant discipline was presented in Motion 18.3383 as a modification of art. 529a cpv. 2 AP CO, where the results of the consultation procedure were as follows: An organization welcomes the pre-project to the extent that it offers the possibility of forming the trust in simple written form or by death order, since it is often used for successive purposes. An organization requests that an explicit mention be made of the possibility of establishing a trust by means of a simple unilateral declaration of the trustees or a simple statement of will of the disposer. On the contrary, 3 organizations believe that the written form does not prevent the retrodatation of the act of trust or the existence of multiple versions of the same act, circumstances that could involve abuses against creditors, heirs, spouses and tax authorities. For this reason, they demand that, in the event of a waiver of a trust register, at least the constitution by means of a public act be imposed. 4 organizations in turn express themselves in

The project in Motion 18.3383 , thus allows the creation of a successor trust in a way that is identical to what is already provided for in the law of foundations [285]. The unilateral act of the disposer by which he expresses his will to establish a trust and to assign some of his personal assets to him is called an act of trust. That act must contain provisions designating the trustee and beneficiaries and establishing the rules relating to the administration of the trust [286]. After the trust has been created, the disposer disappears in principle from the life of the trust, remains alien to the legal relations between the trustee and the beneficiaries, but can designate itself as trustees or as beneficiary of the Trust. If the disposer designates himself as a trustee, he cannot be the sole beneficiary . [287]

---

favour of the obligation of a public act, citing as a reason the complexity of a task such as the drafting of a trust act and the numerous legal disputes that a bad execution of it is likely to entail. Furthermore, if such an obligation was envisaged, the subsequent transfer of funds held by the trustee could be based on the act of trust, without the need for additional notarized documents. This formal requirement would also ensure that the trust document is kept by a notary.

[285] Article *81 paragraph 1* of the Swiss Civil Code (Zivilgesetzbuch, ZGB) addresses the founding of associations. It states that an association acquires legal personality once it adopts statutes that outline its purpose, organization, and resources.

[286] The relevant discipline was presented in Motion 18.3383 as a modification of art. 529b cpv. 1 AP-CO, where the results of the consultation procedure were as follows : For an organization, it is not clear what are the essential transactions required for the establishment of the trust, nor what is the determining criterion for determining when the trust becomes effective. According to one canton and one organization, this provision is even incomplete, since it follows from Article 529d, paragraph 1 AP-CO that the act of trust must indicate whether it is a discretionary trust or a fixed interest trust. Article 529b, paragraph 1, AP-CO should therefore choose the type of trust as an essential element of the trust act. Another possibility would be to provide for discretionary trust as a standard trust. According to one organization, the type of distribution of assets is an essential element that must be indicated in the act of trust.

[287] The relevant discipline was presented in Motion 18.3383 as a modification of art. *529c cpv. 2 AP-CO*, where the results of the consultation procedure were as follows : According to one canton, it is necessary to define more precisely the concepts of beneficiary and of bond between disposer and

Furthermore, at the time of establishment, it may reserve certain rights that allow it to maintain a more or less extended troll on the trust, in particular the right to revoke the trust or to modify the provisions of the act of trust after establishing the trust . [288]

---

beneficiary. According to another canton, if the beneficiary could justify his identity by means of a title to the holder, there would be a risk of abuse, since it would no longer be possible to guarantee the traceability of the assets. For this reason, it is necessary to provide that the status of beneficiary cannot be justified by means of securities or that it is not transferable. One organization believes that the possibilities for organizing trustees, disposers and guardians present a high risk of abuse; In particular, allowing a disposer to designate himself as the sole beneficiary (asset protection trust) could cause damage to third parties. Furthermore, the organization is of the opinion that, in cases where the trustee is also the beneficiary, the obligation of independence under article 529h para. 3 numbers 1 and 2 AP-CO is not respected. An organization is in favour of the possibility of designating certain or determinable persons as beneficiaries. At the same time, he considers it appropriate to indicate that the disposer may use the purpose (e.g. of public utility) or the tax statute of an organization as a criterion to determine the beneficiaries of the trust. One organization finds, however, that the formulation used to distinguish beneficiaries between determined and determinable persons is complex. 2 organizations also request that it be clarified whether the fact that the trustee becomes the sole beneficiary determines the nullity, whether this *nulity is ex tunc* or ex nunc (only from the moment that the trust becomes only the beneficiary) and/or if in these cases Article 529u AP-CO applies. These organizations call for consideration of the possibility of future beneficiaries (p. es. nascituro). According to one organization, the explanatory report provides that a born child can be designated as a beneficiary; However, it should also be possible to designate an unconceived child. One organization considers it inadequate to prohibit the trustee from being the sole beneficiary, suggesting that such a situation could actually occur in practice.

[288] The relevant discipline was presented in Motion 18.3383 as a modification of *art. 529e AP-CO*, where the results of the consultation procedure were as follows: according to one canton, the provision is not complete and should be discarded because it is useless. One participant requests that, in cases where more than one disposer is present, aspects such as delegation, creation of the trust for disposal due to death, disposers declared absent, second disposer who also has the role of trustee, etc. Another participant hoped that it would not be possible to establish a trust for disposal due to death in the presence of more than one disposer (responding will); in such cases, only successor contracts

The preliminary in Motion 18.3383 draft does not limit the extension of the author's right to amend all kinds of provisions, in particular those relating to beneficiaries, applicable law, jurisdiction or jurisdictions of an arbitral tribunal. However, modification is only possible in written form [289].

---

should be allowed. An organization considers it necessary to specify that the trust act grants the disposer the power to request from the trustee the accounts of the trust in accordance with Title 32 CO and to order the revision thereof. According to another organization, in the context of an enforcement to the detriment of a disposer who has reserved the right to revoke the trust, it is necessary to provide that any creditor with a proof of lack of assets or the bankruptcy mass can promote the action for revocation of the trust: It is considered unacceptable that, in the event of a revocable trust, the assets in the trust are deprived of the action of the creditors. According to 5 organizations, the prohibition of representation referred to in paragraph 2 is not justified. The Swiss trust would be more attractive if, in cases of loss of discretion by the disposer, it could be provided for the appointment of a prosecutor who can exercise its powers. According to another organization, paragraph 2 should clarify whether it refers to strictly personal rights. One organization considers that, in view of article 529h, paragraph 2, subparagraph 3 AP-CO, the wording of Article 529e is too imprecise and that a reference should be made to article 957, paragraph 1, CO. One participant is of the opinion that the provision should provide otherwise: The disposer should in principle have the rights listed, with the possibility of expressly waiving them.

[289] The relevant discipline was presented in Motion 18.3383 as a modification of *art. 529t cpv. 2 AP-CO*, where the results of the consultation procedure were as follows: Three participants believe that paragraph 1 undermines the strictly personal rights of the settlor: in the case of an irreversible discretionary trust established by testamentary disposition, the settlor should not be permitted to delegate the power to modify the trust instrument. An organization, on the other hand, welcomes the fact that the trust deed allows for the modification of provisions regarding the trustees, the settlor, or the guardian, provided that the prohibition on trusts without beneficiaries is respected. A painting might be created to prevent any alteration of the beneficiaries that goes against the original intentions of the settlor by including obligations or conditions inside the trust deed. However, it is regrettable that amendments to the provisions of the trust instrument require written form. The settlor should be able to modify the trust instrument even by disposition upon death, as it is possible to establish the trust in this form as well. According to a participant, the provision should clarify whether

Finally, the disposer may retain the power to control the trustee by granting himself the power to consent to specific acts of the Trustee and to ask him to account for his management or to replace him. Depending on the powers that the disposer has reserved, the trust will be qualified as a vocable or irrevocable king. The pre-project also authorizes the disposer to grant all or part of his powers to a guardian (protector) to whom he entrusts the task of controlling the trustee's activities and ensuring compliance with the act of trust[290].

In particular, the guardian may be given the power to consent to specific acts of the trustee, to ask him to report on his management, as well as to support his killing or to appoint a successor to him. In principle, the establishment of the trust requires, in addition to the unilateral declaration of the disposer, the transfer to the trustee of the ownership of the property according to the specific modalities of each transferred property. [291]

---

modifications are possible in the absence of regulation in the trust instrument. It should also be clarified if the beneficiaries can unanimously modify the trust deed without resorting to a judge. An organization believes that the provision should more clearly regulate cases in which several disposers are present.

[290] The pertinent field of study was introduced in Motion 18.3383 as a modification to article 529f AP-CO, with the outcomes of the consultation process being as follows: Un'organizzazione ritiene opportuno vietare al guardiano di revocare il trust una volta che il disponente è deceduto. On the other hand, four other organizations argue that the guardian's authority to revoke the trust should not cease with the death of the settlor. Furthermore, the organization identifies terminology issues: the trustee should not have the ability to "revoke" the trust during the settlor's lifetime; a different phrase should be used, as the right of revocation is reserved for the person who established the trust. Furthermore, similarly to article 529h AP-CO, paragraph 3 should establish that the guardian must act in the "exclusive" interest of the beneficiaries.

[291] The relevant area of research was presented in Motion 18.3383 as an amendment to article art. 529b cpv. 5 AP CO, with the results of the consultation process being as follows: According to an organization, it is necessary to specify how the trustee acquires the assets intended for the trust. Another organization also emphasizes that article 529b AP-CO should define the time from which the trust becomes effective in the event that the settlor designates themselves as the trustee. According to a participant, this paragraph should clarify if the consent of the trustees affects the existence of the

There is an exception to this principle in the case where the disposer designates himself as trustee of property he already owns. A written declaration of the disposer then replaces the transfer of goods. Even the succession trust is validly constituted only with the transfer of assets to the trustee. The assignment of assets to the trust, and therefore the transfer of property to the trustee, must be ordered within the framework of the succession of the disposer through an institution of heir of the trust or a legate.

4.5.4. Proposed regulation for the Codification of the trust in the CO: obligations and rights of the trustee

Any natural or legal person may be designated as a trustee. There is no special requirement. Although it is generally exercised by a professional subject to the licensing and supervision regime of the LISF, the trustee's function may be carried out by a person without

---

trust or only its effectiveness towards other parties. A participant would like the trust to come into existence upon the death of the settlor, but the trustee should only have the power to dispose of the assets once they are transferred. Two participants pointed out that, according to the explanatory report, the transfer of immovable property does not require a compulsory store, but only the act of disposal (inscription in the land register); Furthermore, the consent of the trustee expressed in simple written form should not necessarily mention the assets intended for the trust. Both participants believe that such regulation is in conflict with Swiss law and that the debts associated with the funds are not transferred to the trust along with them, to the detriment of the creditors. For these reasons, the participants request that the funds to be transferred must be specifically mentioned in the trust deed, for which a public deed must be provided in the event of the transfer of real estate assets. Two organizations agree that divisions of property regulated by succession law (such as waiver or acceptance) should be aligned with those provided for in the preliminary draft. Furthermore, they consider it unacceptable for a disposer who has become a trustee to establish an effective trust for everyone by a simple written declaration.

professional qualifications or standard status, for example in trusts in a family context. Even a disposer or a beneficial can be a trustee but the trustees can not be the only beneficiary.

The trustee acquires ownership of the trust assets that he holds in a separate asset from his personal assets. As a trustee to the trustees, he is restricted in the exercise of his ownership rights by his obligations to the trusts. It is obliged to administer the assets in trusts and to dispose of them in the exclusive interest of the beneficiaries according to the rules established in the trust act [292].

[292] The relevant area of research was presented in Motion 18.3383 as an amendment to article art. 529g cpv. 1 APCO, with the results of the consultation process being as follows: According to a canton and an organization, when the trust is administered by more than one trustee, decisions should normally be taken by a majority and/or the trustees should have the possibility to determine the type of majority required, in order to avoid stagnant situations. For the same canton and for 6 organizations, it is necessary to specify which legal relationship (joint ownership, co-ownership, simple company) applies to the collective ownership of assets in trusts according to article 529g para. 5 no. 1 AP-CO. There is also a contradiction between the principles of real rights (in particular art. 646 cpv. 3 CC) and the provisions of the preliminary draft, but also between article 529g (which states that the trustee is liable with his own personal assets for the debts of the trust) and Article 529n AP-CO (whereas only the assets in the trust, which constitute a separate asset, are "responsible" for the trust's debts). Finally, with the exception of the regulation provided for in the event of the death of the trustee, the solution identified for the transfer of trust assets to new trustees is considered unsatisfactory, in particular for large trusts. Article 181 CO alone is not considered to be able to solve the existing problems; an alternative could be to apply the FUS or to create a contract with real effect. 9 organizations believe that, due to the unlimited liability of the trustees, the Swiss trust is contrary to the system and not attractive. They argue that trustees should only respond through trust assets and that it is not always possible to negotiate the general terms of certain contracts or to identify immediately the number of creditors. The solution proposed by the pre-project could encourage trustees to establish an underlying company to limit their liability. They also believe that it is possible that non-professional trustees are not fully aware of the risks they accept in terms of liability. Finally, they believe that submitting the trustees to the supervision of FINMA would improve their quality, but would also increase bureaucracy and limit the number of structures capable of providing the

The economic benefit of trust assets does not belong to the trustee but to the beneficiaries. The trustee shall be responsible on his behalf for the commitments in relation to the trust: does not act as a representative or as an organ of the trust. Contracts relating to trust assets shall be concluded by the trustee as such; he or she is entitled to act as an actor or as a participant in all proceedings relating to the trust.

Furthermore, the pre-project in Motion 18.3383 establishes a personal responsibility of the trustee for the obligations assumed as trustees.

The latter is, therefore, liable with his personal assets for the debts of the assets in the trust. However, the trustee who has paid a trust debt can obtain a refund by a withdrawal on trust assets [293]. When there are more than one trustee, they are solely liable for the debts of the trust. An essential obligation of the trustee is to keep trust assets separate from his personal assets. It is also subject to several obligations aimed at ensuring the separation of the two assets. Thus, at the establishment of the trust, the trustee must prepare an inventory, keep a simplified accounting of trust assets, and ensure that the assets registered in a public

service in question. For 7 participants, trustees should act on their own behalf and indicate their trustee function when carrying out their activities. In this way, in order to determine liability, it would not be necessary to verify whether they have acted in the proper exercise of their functions. In this context, we could instead rely on the good faith of the third parties dealing with the trust. The assets in the trust would cover the obligations contracted by the trustee in his capacity, even if he does not have the necessary powers. In the latter case, the personal assets of the trustees should bear the damage caused to the trust.

[293] The relevant area of research was presented in Motion 18.3383 as an amendment to article art. 529o cpv. 1 n 1 AP CO, with the results of the consultation process being as follows: One organization believes that it is necessary to clarify the extent of the damages covered. A participant considers it necessary to state that the right to compensation of trustees continues after the end of their term of office. One participant argues that trustee compensation represents a case of single-person credit (trustee's assets resulting from the trust are owed to the trustees' personal assets). In order to avoid abuses, therefore, an explicit mechanism for curating it should be provided.

register (particularly in the land register) are the subject of an adequate mention .[294] The trustee must act diligently and honestly.

In this respect, his duties are virtually the same as those of a representative. The trustee must act independently of the disposer and avoid any conflict of interest. It must take equal account of the interests of the different beneficiaries and act impartially.

The trustee must also report on its management to the beneficiaries and return to the trust assets the assets and benefits acquired in the exercise of his function [295].

---

[294] The relevant area of research was presented in Motion 18.3383 as an amendment to article art. 529m AP-CO, with the results of the consultation process being as follows: For a canton, the rules in force require that the transfer of a fund to a Swiss trust be analysed by the canton office of the land register, which is responsible for authorising the purchase of funds by persons abroad, in order to determine the economically entitled owner and therefore to verify whether the LAFE is applicable or not. According to another canton, for this article the explanatory report refers only to article 149d LDIP. However, it seems appropriate to make the trust public not only where the public register involves the transfer of ownership in itself, but also when the law protects a third party in good faith who relies on a matter registered or not in the register. Article 529m AP-CO should therefore not be limited to the registers referred to in Article 149d LDIP. On the contrary, 2 organizations argue that the mentions do not contribute to the public faith of the land register. Article 529m AP-CO (under which, if not mentioned, the trust relationship is ineffective towards third parties in good faith) would therefore contradict the dominant interpretation of the statements in the land register: The second sentence of this article should therefore be deleted. Another organization states that the mention under Article 149d LDIP has only a declarative effect for third parties, since the effect exists already before the registration. If a simple credit is to be made effective against third parties, an annotation should be used. (cfr. art. 959, 960 cpv. 1 n. 1 CC). The system of mention is therefore contradictory to the simple credit, as is apparent from the system of Article 529q AP CO.

[295] The relevant area of research was presented in Motion 18.3383 as an amendment to article art. art. 529i cpv. 1 n 1 AP CO, with the results of the consultation process being as follows: One organization is of the view that the planned information requirement is very broad and that clarification is needed regarding the purpose of the communications as well as the basic or minimum information to be made available; In this context, the diversity of types of trusts and the assets held

The pre-project in Motion 18.3383 provides for a trustee's liability based on the rules of contractual liability [296]. If the trustee violates his or her obligations causing damage to trust assets or beneficiaries, he or she is personally liable and liable to compensate him or her .

In order to compensate for its obligations, the pre-project recognizes the trustee's rights similar to those of the representative. The trustee may claim the payment of a damages due, the reimbursement of the expenses incurred and the release from obligations undertaken in the regular period of his function, as well as compensation for the damage suffered without his fault (art. 529o cpv. 1 AP-CO).

The trustee has a right of retention or of confidence that allows him to withdraw from trust assets the amounts necessary for compensation (art. 529o cpv. 2 AP-CO).

---

therein must be taken into account. Furthermore, it is necessary to clarify the concepts of 'rights' and 'expectations' in paragraph 2. The same organization also believes that it is necessary to distinguish between the general right to information and that based on the nature of the beneficiary's interests. Finally, the right to refuse the publication of information should be provided for on serious grounds, without making it necessary to list them in an exhaustive manner in the law (e.g. the nature of the interests of the beneficiaries, business secret, the will of the disposer, the age and circumstances of the beneficial person, the effects of the information on the beneficiary and his family, the circumstance and purpose of the request for information). One organisation argues that the right to information is too broadly conceived and that it is therefore necessary to consider introducing a periodic reporting obligation in line with the company law. Another organization argues that it is the right to refuse to be conceived too broadly: you should not be able to refuse if the request for information is based on a legal basis. Furthermore, it is necessary to clarify the disjunctive nature of the grounds for refusal provided for in paragraph 3 by adding the conjunction 'o'. According to another organization, the relationship between this article and the derogation under article 529b para. 6 AP-CO.

[296] Art. 97 et seq. CO: Swiss sales contract law. This article gives the definition of sale, parties' obligations, risk transfer, warranties, buyer's rights for defects, notice requirements, and limitation periods.

4.5.5. Proposed regulation for the Codification of the trust in the CO: Rights and expectations of beneficiaries regarding trust performance – fixed trust and discretionary trust

The rights of beneficiaries on trust assets are specified in the trust act. Beneficiaries may be holders of a fixed right to grant a service or have a simple expectation at the discretion of the trustee .

In the first case, you are in the presence of a fixed interest trust, and in the second, you are in the presence of a discretionary trust (discretionary trust). Only the beneficiaries of a fixed trust have a credit they can claim in court. A beneficiary may renounce the benefits granted by the trust at any time by means of a written declaration[297].

[297]The relevant regulation was presented in motion 18.3383 as an amendment to Article 529d paragraph 4 AP-CO. Following the consultation procedure, the results were as follows: According to one Canton, this provision should establish the discretionary trust as the standard trust model. Two organizations do not deem it appropriate to exclude the transmission of beneficiary status through succession. Conversely, one organization argues that it is correct to distinguish between genuine claims and mere expectations (as in foundation law). However, stipulating the non-transferability of a beneficiary's right is considered contrary to foundation law: a claim due to a deceased person must always be honored by the trustee. Otherwise, this would encourage the non-fulfillment of claims due from the trust to elderly or ill individuals. Regarding beneficiary status itself, the organization notes that it is defined in the trust deed: the beneficiary's death does not entitle their heirs to future benefits unless they are also trust beneficiaries.One organization emphasizes that the ability to assign the right to benefits impedes the trustee in fulfilling the identification obligations under Article 529j AP-CO. Another organization highlights that legally enshrining the right to assign benefits contradicts the trust's purpose and advocates for an explicit legal provision allowing the addition, suspension, or exclusion of one or more beneficiaries, absent contrary provisions in the trust deed.According to five organizations, it is necessary to determine whether a time-limited renunciation of benefits is possible. Furthermore, one participant argues that the provision must necessarily stipulate that the renunciation

The trust must be created in the interests of one or more beneficiaries who must be natural or legal persons. Beneficiaries must be designated by the disposer and must be mentioned in the trust act.

As previously noted, the pre-project in Motion 18.3383 does not provide for the establishment of trusts without beneficiaries (purpose trusts). Still, it guarantees some flexibility for the designation of the latter, which does not necessarily have to be designated by name in the act of trust. It is sufficient that the provisions of the Trust Act contain the criteria for establishing the status of beneficiary at the time of the provision of a service.

Furthermore, the disposer may reserve the right to amend the provisions relating to beneficiaries, in particular to add new ones or to delete them[298]. It can give the same power to the trustee or a guardian.

---

of benefits cannot prejudice third parties. Finally, it is deemed appropriate to also provide that pre-designated beneficiaries have the possibility of holding a limited real right over the trust assets.

[298]The relevant regulation was presented in motion 18.3383 as an amendment to Article 529t AP-CO. Upon conclusion of the consultation procedure, the results were as follows:Three participants consider that paragraph 1 infringes upon the strictly personal rights of the settlor: in the case of an irrevocable discretionary trust established by testamentary disposition, the settlor should not be able to delegate the power to modify the trust deed. Conversely, one organization welcomes the fact that the trust deed may allow for modifications to provisions concerning trustees, the settlor, or the protector, provided that the prohibition on trusts without beneficiaries is respected. The necessary framework to prevent modifications to beneficiaries contrary to the settlor's original intent could be established by incorporating charges or conditions within the trust deed.However, there is criticism regarding the requirement for written form for modifications to trust deed provisions: it is argued that the settlor should be able to modify the trust deed through testamentary disposition, given that it is possible to establish the trust in this form. According to one participant, the provision should clarify whether modifications are permissible in the absence of specific regulations to this effect in the trust deed. It should also be specified whether beneficiaries can unanimously modify the trust deed without recourse to judicial intervention.One organization posits that the provision should more clearly regulate cases involving multiple settlors.

Finally, in the case of discretionary trusts, even if it does not have the power to change the circle of beneficiaries, the trustee is free to decide to whom to pay a benefit, following, if necessary, the wishes expressed by the disposer in a separate document (letter of wishes). In addition to the right to the benefit provided for in the trust act, beneficiaries have certain powers of control and supervision over the trustee.

In particular, the bill in Motion 18.3383 grants them a right to information which allows them to exercise control similar to that of the sponsor. They may, *inter alia*, ask the trustee for information on the status of the assets in the trust and the management of the trust (art. 529i AP-CO). If the trustee breaches its obligations, the beneficiaries have the right to request their revocation (art. 529s cpv. 2 AP-CO). [299]

[299] The relevant regulation was presented in motion 18.3383 as an amendment to Article 529s AP-CO. Following the consultation procedure, the results were as follows:One Canton requests a modification of the legal text. Article 529s paragraph 1 number 3 AP-CO implies that the settlor may stipulate in the trust deed that the trustee's function does not terminate even if the trustee becomes incapable of discernment. However, according to the explanatory report, the trust deed may only provide for additional grounds for termination of the function.An organization seeks several clarifications: Article 529s paragraph 4 AP-CO stipulates that the transfer of trust assets may occur through the assumption of assets in accordance with Article 181 CO. The use of the verb "may" is questioned: does the trustee have a choice? Furthermore, the organization argues that maintaining the former trustee's joint and several liability for three years primarily benefits the new trustee and therefore requests that this joint liability be implemented only upon explicit request by the new trustee. Finally, it contends that the transfer of ownership is not clearly regulated in the event of a co-trustee's resignation.Five participants opine that the three-year joint and several liability period as per Article 181 CO is inadequate: to ensure that the new trustee does not cause damages for which the former trustee could be held liable, the latter might feel compelled to continue administering the trust. In practice, trustee changes are frequent, and the application of this provision could thus be complicated. Moreover, the former trustee might wish to retain certain trust assets for security reasons, which would diminish the attractiveness of Swiss trusts.According to one organization, barring cases of universal succession following the death of a sole trustee, this provision allows for the transfer of real estate through constitutive registration in the land register (Art. 529s para. 4 AP-

Beneficiaries may also claim compensation for the damage caused to trust assets for would have directly suffered as a result of the trustee's failure to comply with its obligations. They can take legal action to assert their rights or request compliance with the trust's provisions.

They may ask for the intervention of the judge within the framework of the voluntary procedures provided for in the draft of Motion 18.3383 [300].

CO) or through judicial request (Art. 529b para. 2 AP-CO in fine). One participant argues that in cases of transfer of immovable property to third parties by a trustee, a public deed and land register entry should be required, in line with the provisions of Article 181 CO for the assumption of assets or a business.One participant opines that beneficiaries should be able to designate the new trustee by unanimous decision, given that they can also unanimously decide on the dissolution of the trust. Considering the maximum duration of 100 years provided for trusts in the preliminary draft, two participants commend the requirement for the trust deed to specify the procedures for appointing successors to trustees and protectors (Art. 529s para. 3 AP-CO): this could be ensured by mandating a public deed. They also find it understandable that the Merger Act is not applicable to trusts, as they lack legal personality and are not registered in the commercial register.

[300] The relevant regulation was presented in motion 18.3383 as an amendment to Article 529v AP-CO. Upon conclusion of the consultation procedure, the results were as follows: One organization opines that Article 529v paragraph 2 AP-CO grants the ability to request modifications to the trust deed too liberally: this faculty should be limited to a group of beneficiaries or to a beneficiary receiving an annuity. Otherwise, the trustee's operations would be rendered more challenging. Two participants emphasize that recourse to a judge should be subsidiary to, for example, a decision by the protector or a mediator: judicial proceedings should serve to clarify legal questions and not for managerial purposes (e.g., investment decisions, etc.). According to four organizations, the trust can potentially harm spouses, heirs, and creditors. Furthermore, the land registry official or notary might encounter difficulties in establishing the disposition faculties of the involved parties. Consequently, the ability under Article 529v paragraph 1 AP-CO to request judicial verification of the conformity of a proposed act with the trust deed and the law should also be extended to spouses, heirs, and creditors.

4.5.6. Proposed regulation for the Codification of the trust in the CO: Transfer in case of change of trustee

When leaving his duties, the trustee must transfer to his successor the ownership of the trust assets, debts and receivables. Such a transfer is not necessary if there are several trustees who are joint owners of the assets in the trust .

In principle, the transfer of assets into trusts by a trustee and his successor requires a written contract and must comply with the procedures applicable to the asset in that case (e.g. an act of transfer in the form of a public act and an inscription in the land register for an immovable property).

However, the preliminary draft in Motion 18.3383 provides for a case of universal succession in the event of the death of the sole trustee. On the day of death, trust assets are transferred to the new trustee. Furthermore, the pre-project allows assets in trusts to be the subject of assumption of assets according to the rules of Article 181 CO. [301]

4.5.7. Proposed regulation for the Codification of the trust in the CO: Measures in case of insolvency risk and excess debt

In order to ensure the protection of the interests of the creditor of the trust, the preliminary draft in Motion 18.3383 provides for an application by analogy to the trust of the rules of corporate law on the risk of insolvency and the excess debt. The application of these

[301] The application of the rules of the Act of 3 October 2003160 on mergers (LFus) is expressly excluded. The exclusion of LFus rules here separates trust governance from corporate restructuring laws. This distinction preserves the unique nature of trusts in Swiss law, ensuring they're not treated as typical business entities for mergers or transfers.

rules corresponds to what is provided for in the law of foundations and is justified in particular by the fact that the trust can be used in a commercial context.[302]

4.5.8. Proposed regulation for the Codification of the trust in the CO: Intervention by the judge

The preliminary draft in Motion 18.3383 provides for the possibility of requesting the intervention of the judge to settle certain disputes. These are interventions of voluntary courts which are therefore subject to the summary procedure under the Code of Civil Procedure (CPC)162 (art. 39a e 250 lett. b n. 13 AP-CPC).[303]

If you have reasonable doubts about the extent of the rights and obligations of the disposer, trustee or guardian, each of them may ask the court to verify the conformity of a planned act with the act of trust and with the law. The decisions of the court are binding on the beneficiaries, the trustee, the guardian and the disposer (art. 529v cpv. 3 AP-CO).

Furthermore, beneficiaries, trustees, guardians and disposers who have reserved this right in the trust clauses may request the court to amend the provisions of the trust or to dissolve it. (art. 529v cpv. 2 AP-CO).

4.5.4. Proposed regulation for the Codification of the trust in the CO: arbitrator

[302] Art. 84a CC introduces oversight for foundations with international activities. It requires these foundations to register with supervisory authorities, enhancing transparency and accountability in cross-border philanthropic endeavors. This provision aims to balance charitable freedom with regulatory compliance.

[303] Art. 39a and 250 lett. b n. 13 AP-CPC introduce a summary procedure for trust-related matters in Swiss courts. This streamlined process aims to expedite trust disputes, offering a quicker and more efficient resolution mechanism while maintaining legal safeguards.

Finally, the preliminary draft provides for the possibility of submitting disputes concerning trust law to an arbitral tribunal (art. 529w AP-CO)[304]. If the trust act so provides, the arbitral clause is also valid for court interventions in the matter of voluntary jurisdiction. (art. 529v AP-CO).

4.5.9. Proposed regulation for the Codification of the trust in the CO: Modification of the tax regime

With the introduction of the Swiss trust institution, it was reasonable to ask whether the current practice in tax matters should be maintained and whether it should also be applied to the trust under Swiss law. The introduction of the Swiss trust also required the verification of the tax framework conditions. The working group consisting of representatives of the

[304] The relevant regulation was presented in motion 18.3383 as an amendment to Article 529w AP-CO. Upon conclusion of the consultation procedure, the results were as follows:One Canton welcomes the provision allowing the trust deed to stipulate the jurisdiction of an arbitral tribunal. A participant commends the possibility of submitting a dispute to arbitration through a unilateral legal act. However, another participant deems it necessary to require the arbitral tribunal to be seated in Switzerland, thus ensuring control by the Federal Supreme Court and preventing foreign tribunals from applying Swiss trust law while considering principles valid for foreign trusts rather than the specificities of Swiss trusts. Five participants emphasize that to guarantee the exclusivity of arbitration, the arbitration clause must also be effective for unborn beneficiaries. Two participants opine that a non-contentious matter generates only a claim against the court; therefore, its arbitrability cannot be based on a private legal act. For this reason, they do not consider the arbitration possibility provided in Article 529w paragraph 2 AP-CO appropriate if it is prohibited by the PILA (Private International Law Act). Finally, they argue that third parties with standing to sue who are neither trustees, beneficiaries, nor protectors cannot be bound by a unilateral arbitration clause, for example in the hypothesis of Article 529b paragraph 2 AP-CO.

Confederation, the Cantons, and the scientific community gave dissenting opinions about the need to amend tax law. [305]

While representatives of the doctrine criticized the existing practice (already applied to foreign trusts) as partly unconstitutional, cantonal representatives in particular demand that it be maintained and wanted it to be applied also to the new Swiss trusts. At a joint meeting of the expert group of the Federal Office of Justice and the working group on taxation, the representatives of these groups also expressed their support for the continuation of the current practice. The need for a tax regulation on trusts is justified for several reasons.

The current practice is largely based on a circular of the CFS, which the doctrine criticizes in part as unconstitutional, and it is not known how the Federal Court would

[305] The introduction of trust in Swiss law offers an opportunity to explicitly regulate the new legal relationships in tax laws as well. Currently, the imposition of trusts is based on the general principles of tax law and on two circular documents. The proposed rules of tax law maintain the current practice of allocating trust revenues to the disposer in the case of a revocable trust, and to beneficiaries entitled to benefits in the event of irrevocable fixed interest trusts. These provisions are in line with taxation according to economic capacity and their codification meets the principle of legality. In the case of the irrevocable discretionary trust, the proposed provisions attribute the income and assets to the trust which is considered, like a foundation, as an independent taxable entity, provided that at least one of the beneficiaries resides in Switzerland. Subordination does not extend to the shares of beneficiaries residing abroad; In this case, it is a matter of determining how to determine the amount of these quotas. If, under the applicable double taxation agreement, the trust has its seat abroad, Switzerland cannot tax it. In these cases, the income and assets of the trust are attributed to the disposer. With regard to the taxation in Switzerland of trusts administered abroad whose beneficiaries are located in our country, the preliminary draft provides for the joint responsibility of the disposer and the beneficiaries in switzerland for the trust tax. For the property arrangements already in force, a transitional regulation (grandfathering) based on the principle of good faith is provided. This proposal takes account as much as possible of practical needs, economic and fiscal interests, as well as doctrinal concerns.

interpret tax legislation.[306] The introduction of trust in Swiss civil law increases the need to regulate trust relations in the context of tax law as well.

The current Circular of the CFS does not contain any exhaustive regulation concerning the '*irrevocable discretionary trust'*.[307]

Consequently, it may happen that similar situations are treated differently in practice by the cantons, including with regard to direct federal taxation, and that, according to current practice, fiscal gaps may emerge. The establishment of an "*irrevocable discretionary trust*" is not convenient for persons resident in Switzerland, as taxably the assets brought are still attributed to it.

The proposal for tax legislation maintains the current practice, namely the usual allocation of trust revenues to the disposer in the case of a 'revocable trust' and the allocation to beneficiaries entitled in the event of "irrevocable fixed trusts".

Fig.1: Overview of the tax consequences of "*revocable trusts*" and "*irrevocable fixed trusts*"

Revocable trust	***Irrevocable fixed interest trust***
Establishment of the trust	

[306] Circular No. 30 of the Swiss Federal Tax Administration (FTA), issued on 22 August 2007, titled "Taxation of trusts."

[307] FTA Circular No. 30 (2007) treats irrevocable discretionary trusts as tax-transparent. Swiss-resident settlors may be taxed on trust assets/income. Non-resident settlors generally avoid Swiss taxation until distributions to Swiss beneficiaries occur. Beneficiaries are taxed on distributions received. Case-by-case analysis is emphasized, balancing tax avoidance prevention with trust structure recognition.

No tax consequences as the assets continue to be attributed to the disposer.	Inheritance and donation taxes are subject to canton law.
Current income and trust assets	
Income and substance taxes returned to the disposer; capital gains are tax-free.	Income and substance taxes levied from beneficiaries; capital gains are tax-free. .
Trust performance	
To the disposer: no fixed-scale consequences. To beneficiaries: inheritance or donation tax.	No tax consequences since taxes on current income and on subsistence have already been paid by the beneficiaries.

SOURCE: Rapporto esplicativo per l'avvio della procedura di consultazione del 12 gennaio 2022

Instead, with regard to the "*irrevocable discretionary trust*", the working group composed of representatives of the Confederation, the Cantons and the scientific world has examined 7 different options for tax legislation with tax consequences for this type of trust that vary greatly depending on the regulatory option chosen.

To decide between the different options proposed by the working groups. It is therefore obvious to draw from the Federal Court's case-law on foundations.

Following the opinion of the Federal Court, the hypothesis of a donation with the payment of benefits to beneficiaries is deprecated, and the variant a, according to which the benefits of the trust to the beneficiaries must be added to their income, is the appropriate solution.

The consequences of the proposed tax legislation for taxes on income and substance, as well as for inheritance and donation taxes, are set out in the following table whose conformity with the previous table makes clearly visible the change that there would be in the tax regime.

	Revocable trust (invariate)	***Irrevocable fixed interest trust (invariate)***	***Irrevocable discretionary trust (new)***
Constitution	No tax consequences as the assets count to be attributed to the disposer	Inheritance or donation tax according to canton law[308]	Inheritance or donation tax according to canton law [309]
Current income and assets	Income and substance taxes paid by the disposer[310]; capital gains are tax-free	Income and substance taxes paid by beneficiaries [311]; capital gains are tax-free	Profit and capital taxes paid by the trus (taxation similar to

[308] Condition: the settlor is domiciled in Switzerland.

[309] Condition: the settlor is domiciled in Switzerland.

[310] Condition: the settlor is domiciled in Switzerland.

[311] Condition: the beneficiary is domiciled in Switzerland.

			that of the foundation)[312]
Performance	To the disposer: no tax consequences. To beneficiaries: inheritance or donation tax [313]	No tax consequences since current income and substantive taxes have already been paid by beneficiaries	Income tax[314]

Fig.2: Overview of the tax consequences of the proposed legislation

SOURCE: Rapporto esplicativo per l'avvio della procedura di consultazione del 12 gennaio 2022

4.6. Administrative burden and feasibility

From the tax point of view, trusts are divided into several categories (*"revocable" / "irrevocable fixed interest" / «irrevocable discretionary")* and are therefore assigned to the disposer, the beneficiaries, third parties or anyone. The attribution to these categories requires an analysis of the specific circumstances of the individual case, which may require expensive and demanding clarifications.

When taxpayers do not have sufficient rights of information to the trust to comply with their obligations to cooperate, taxation problems can arise. These problems can arise in

[312] Condition: the beneficiary is domiciled in Switzerland.

[313] Condition: the settlor is domiciled in Switzerland.

[314] Condition: the beneficiary is domiciled in Switzerland.

particular for beneficiaries, who in extreme cases do not even know who is the disposer of the trust.

Therefore, problems can arise when taxing a person who does not economically dispose of the assets in question and who may suffer a lack of liquidity due to the taxes requested.

In addition, practical difficulties may arise when, at the time of payment of benefits, a distinction is made between the assets contributed by the disposer and the income earned during the duration of the trust relationship.

4.7. Results of the consultation procedure: rejection of the proposal

As part of the consultation procedure, which concluded on 15 September 2023 in Bern, the following results emerged: a relative majority of the 80 participants expressed support for the introduction of trusts into Swiss legislation (eight cantons, two parties, and 28 organizations). The preliminary draft as such was approved by eight cantons, two parties, and 28 organizations.

However, only the section related to civil law was explicitly supported by the majority of participants (eight cantons, two parties, and 28 organizations). The section devoted to tax law was decisively rejected by a substantial majority composed of 19 cantons, one party, and 20 organizations. Numerous participants also conditioned their approval of the principle of introducing trusts on the rejection or substantial revision of the proposed tax legislation. The primary reasons cited by the opponents included the proposed legislation's lack of attractiveness compared to current practice, its challenging implementation, and the significant administrative burden it would impose.[315]

The Federal Council has decided not to submit a message to the Federal Assembly regarding a draft law for the introduction of the trust in the Swiss legal order.

On the basis of Article 122(3)(a) of the Law on Parliament (LParl)[316], is proposed to delete the motion, being supported this decision by different main reasons.

4.8.1. Reason behind the rejection: No consensus on the request of the motion and the need to introduce a trust as a new legal institution

The results of the consultation clearly show that the motion to introduce the trust as a legal institution in Swiss law is controversial. On the one hand, the majority of the participants, in particular the environments and actors directly concerned, recognized the dysfunction of regulation, which was also demonstrated by the regulation impact analysis (AIR). On the other hand, however, the need to introduce a trust in the Swiss legal system has also been widely disputed, because the potential circle of beneficiaries is limited, alternatives are available the tax treatment of the trust poses difficulties, and the new institution could be used for unwanted purposes. It was also recalled that a trust is a common law legal institution used almost exclusively by persons connected to common law countries, so a trust under Swiss law would have little practical application. Fear was also expressed that the introduction of a Swiss trust could harm the reputation and finances of Switzerland and that this new legal institution could be misused. These criticisms are reflected in the evaluation of the pre-project: The majority of the cantons rejected the preliminary draft, while the parties' views were divided, and a majority of the organizations voted in favor of the draft.

The Federal Council, which had already expressed its reservations in motion 18.3383 about the direct launching of a draft legislation without prior careful examination of the issues

[316] Article 122(3)(a) of the Swiss Law on Parliament (LParl) empowers parliamentary committees to request information from the Federal Council. This provision enhances legislative oversight by allowing committees to directly seek clarifications or details on government activities, supporting informed decision-making and effective parliamentary functions.

of private law and tax law, underlines that there is currently no sufficient consensus on what the motion requires and therefore on the need to introduce the trust as a new legal institution in the Swiss order, despite the fact that the dysfunction of the legislation has been established and is hardly refutable.

According to the AIR, there is no market dysfunction, as the market is fully able to meet the demand for solutions for asset structures and succession planning. The result, however, is inefficient because very complex structures are needed. That is why we are talking about the dysfunction of legislation.

4.8.2. Reason behind the rejection: Stalling due to rejection of tax proposals

Unlike the part on civil law, the Federal Council's proposals on the future imposition of the Swiss trust were largely rejected during the consultation. Many participants considered the pre-project trust taxation system unacceptable, refusing to support the project because, according to them, such proposals would harm the Swiss trust industry as well as the financial sector as a whole and reduce the attractiveness of the trusts. Only a small minority supported the fiscal part of the pre-project.

In this context, it should be remembered that the current practice of taxation of trusts in Switzerland seems to work well, although it is not uniform and is based mainly on two circular documents, only partly binding. However, the current practice is also subject to criticism. In light of these considerations, the Federal Council remains of the view that the tax regime currently applicable to trusts, based on the two circular letters, cannot and should not bend in the event of the establishment of a Swiss trust in civil law. The draft proposed , therefore, the introduction of explicit rules in tax law.[317]

[317]The proposal was in regard of the Federal Act of 14 December 1990 on direct federal tax [LIFD], in the Federal Law on the harmonisation of direct taxation of cantons and municipalities (LAID) of 14 december 1990 and in the federal law of 13 October 1965 on pre-tax [LIP].

The proposals focused, in particular, on the imposition of the so-called *irrevocable discretionary trusts* through the assignment of the trust income and trust assets to the trust itself, which should be treated as an autonomous tax entity in the form of a foundation. In the case of a revocable trust, the assets should have been assigned to the disposers, as is currently the case. These proposals have been criticized, sometimes vehemently, for being unattractive and unimplementable; it was ,therefore, first of all, called for the current tax regime.

As the Federal Council has already pointed out during the consultation, in the case of an introduction of trust in civil law, an explicit tax regulation cannot be waived and it is neither possible nor feasible to codify the current practice in tax laws. According to the Federal Council, at the moment there is no better alternative to the imposition of trusts, not even in the light of the results of the consultation. In this stagnant situation, he recalls that the solution for the tax treatment of trusts proposed in the pre-project is based on extensive preliminary work carried out by a working group of the Federal Tax Administration (AFC), composed of representatives of the Confederation, the Cantons and the academic world, which had already examined numerous possible solutions.

In this context, the Federal Council stresses that the criticisms of the proposed tax treatment would also apply to a possible (family) maintenance foundation, for which the same problems of tax law would be proposed. [318]

4.8.3. Reason behind the rejection: Alternative and more comprehensive proposals in civil law: revision of the law of foundations

During the consultation, many participants proposed revising the regulations on family founding in foundation law, in particular allowing the establishment of so-called maintenance foundations and repealing the ban on family trusts or family support

[318] "Rapporto concernente lo stralcio dal ruolo della mozione 18.3383 della Commissione degli affari giuridici del Consiglio degli Stati *«Introduzione del trust nell'ordinamento giuridico svizzero»* del 15 settembre 2023

foundations. The modernization of the family foundation could therefore replace the introduction of the Swiss trust, as it is considered much easier to revise the existing rules on foundations rather than to establish a new legal instrument, or such a modernization could be carried out in parallel with the introduce of the trust in Swiss law, thereby redressing the dysfunction of the regulation. In its observations on the preliminary draft on the introduction of trust in Swiss law, the Federal Council has shown itself open to revising the law of foundations, in particular with regard to family and maintenance foundations. However, it believes that the modernization of the rules on family foundations could raise the same questions and challenges as in the case of trusts, since the imposition of these should be based on the rules currently applicable to the foundation.

In order to increase the attractiveness of a review of family foundations, it is necessary to change the tax framework conditions. A new family maintenance foundation should also comply with international standards of transparency and should not harm the reputation of Switzerland or negatively impact on the assessments of the International Financial Action Group (IFAG) and the Global Forum. Only in the light of these conditions can a revision of the law of foundations be considered.

Motion 22.4445 Burkart of 15 December 2022 ("Strengthening the Swiss family foundation. The abolishment of the prohibition on the establishment of a subsistence foundation), which has been deposited in the meantime, mandates the Federal Council is mandated to “submit to Parliament an amendment to Article 335 of the Criminal Code which abolishes “the prohibiting of subsisting family foundations”.

In its opinion of 15 February 2023, the Federal Council proposed to reject the motion, referring to the ongoing work and stressing the need to clarify the outstanding issues, in particular the interaction between a possible trust and the review of the family foundation. On 13 March 2023, the motion was transmitted to the competent committee of the Council of States (Commission on Legal Affairs) for preliminary consideration.

Although the work to introduce the trust into Swiss law is not being followed up, as proposed by the Federal Council, in the event of a review of the law on family founding,

questions and challenges similar to those of the trust will arise, first of all with regard to taxation. For this reason, the Federal Council confirms its rejection of what is proposed in the Burkart motion, which, in its view, at the moment, is unable to obtain the support of the majority, in particular with regard to its effects especially in the fiscal field.

4.9. Analysis of the verdict on the dismissal of Motion 18.3383 and potential future opportunities for Swiss legislation

The Swiss Parliament's rejection of motion 18.3383 was an important turning point in the ongoing discussion about the implementation of trusts in the Swiss legal framework. The ruling clearly showed that Switzerland, despite the possible advantages, was not ready or qualified to integrate this foreign legal tool into its own framework. The defeat of the motion emphasized the inherent intricacies and difficulties involved in incorporating a trust structure inside a civil law jurisdiction such as Switzerland.

The main objective underlying the proposal to create trusts was to offer Swiss citizens a strong and adaptable instrument for estate planning. The existing legal system in Switzerland does not have a comprehensive tool that adequately addresses the many requirements of persons who want to efficiently manage and transfer their assets. The lack of legally acceptable bases for substances compounds this problem, creating a notable void in the field of estate planning. Trusts, renowned for their extensive history and prevalent usage in legal systems based on common law, were perceived as a viable remedy to address this disparity and provide Swiss individuals with a robust mechanism to organize their assets and guarantee their seamless transfer to future generations.

Nevertheless, the refusal of motion 18.3383 highlighted the legal, political, and cultural obstacles that hindered the smooth integration of trusts into the Swiss framework. The fundamental tenets of Swiss civil law, including the focus on openness, safeguarding the interests of creditors, and adherence to a structured legal framework, presented notable

obstacles to the direct integration of trusts. In addition, concerns were expressed over the possible exploitation of trusts for the purposes of evading taxes or engaging in money laundering activities. These worries have further complicated the ongoing discussion around the implementation of trusts.

Considering the intricacies involved and that motion 18.3383 was not accepted, a fresh strategy was introduced with the proposal of motion 22.4445 by National Councilor Burkart. This motion aims to investigate an alternative approach by emphasizing the adaptation and reinforcement of established Swiss legal institutions, particularly the family foundation, instead of adopting a foreign notion such as trusts.

The primary elements of motion 22.4445 revolve around its suggestion to amend Article 335 of the Swiss Civil Code and eliminate the ban on family maintenance foundations. The motion seeks to expand the scope of family foundations to encompass a wider variety of objectives, such as maintenance. This would enable individuals to have a versatile and legally valid tool that functions within the established framework of Swiss law. This approach not only avoids the difficulties of incorporating a foreign notion but also guarantees that the solution is based on the established Swiss legal principles and practices.

Motion 22.4445 would have a substantial effect on the landscape of estate planning and asset protection in Switzerland. The move to repeal the restriction on family maintenance foundations allows individuals to explore new opportunities in organizing their wealth and ensuring financial support for future generations. At present, Article 335 of the Swiss Civil Code limits family foundations to certain goals, such as education, endowment, and assistance. However, it specifically forbids foundations that seek to improve the living standards of beneficiaries. Motion 22.4445 aims to eliminate these restrictions, so permitting the establishment of family foundations for a broader array of objectives, including upkeep.

Expanding the allowable purposes for family foundations would resolve a

longstanding critique of Article 335 by legal scholars. They contend that the existing provisions are antiquated and do not adequately cater to the changing requirements of contemporary estate planning. Motion 22.4445 would allow Swiss nationals to establish family maintenance foundations, which would serve as a valuable means to systematically pass on wealth to future generations, safeguard assets, and guarantee the financial security of family members.

In addition, motion 22.4445 proposes the inclusion of revocation and modification powers for family foundations, which are presently not allowed under Swiss law but are intended to be included in the proposed Swiss trust. The flexibility provided would allow founders to modify the foundation's terms and conditions in response to changing circumstances, ensuring that the instrument remained adaptable to the developing demands of beneficiaries.

Unlike motion 18.3383, which aimed to establish a new legal instrument called Swiss trust law, motion 22.4445 aims to utilize and improve existing Swiss legal principles, including the fiducie (Treuhand). The fiducie is a long-standing entity in Swiss law that shares characteristics with the trust, but functions within the framework of Swiss legal principles.

According to the existing legislation, the fiducie is not well-developed and has no have a clear differentiation between the initial transfer of property and the subsequent fiduciary relationship. Motion 22.4445 provides an occasion to enhance and streamline the fiducie regime through the implementation of essential modifications and clarifications. The move aims to enhance asset management and estate planning by creating a distinct division between the transfer of assets and the associated fiduciary responsibilities, resulting in a stronger and more dependable instrument.

One of the main distinctions between the fiducie and the common law trust is the ownership of the property. Within a trust, the trustee possesses the legal ownership of the assets, but the beneficiaries retain a beneficial stake. In contrast, in the Swiss fiducie, the

fiduciary does not acquire ownership of the property, therefore adhering to Swiss legal standards. The importance of this differentiation lies in its ability to maintain the fiducie's compatibility with Switzerland's civil law system and prevent the complications that arise from the introduction of a foreign legal concept.

Motion 22.4445 proposes a more efficient and coordinated strategy for resolving the stated requirements in estate planning and asset protection by prioritizing the improvement of fiduciary arrangements rather than the introduction of a Swiss trust legislation. The proposed reforms to the fiducie system would establish a robust and adaptable tool that functions within the established confines of Swiss law, therefore decreasing the need for foreign entities like Liechtenstein foundations or foreign trusts.

In addition, motion 22.4445 considers the issues that were brought up during the talks over motion 18.3383, namely, addressing taxation. Although the implementation of Swiss trust legislation would have required substantial modifications to the tax system, the fiducie is already acknowledged as a taxable entity based on existing conventions. There is no need for urgent tax interventions for the motion, as the current tax treatment of fiducies, which assigns assets and income to the founder or beneficiary according to the arrangement's form, may be preserved. Nevertheless, the motion recognizes that the implementation of these tax practices into law might improve legal certainty and offer clear guidance for all parties concerned. In their entirety, the denial of motion 18.3383 and the following presentation of motion 22.4445 indicate a change in Switzerland's strategy for dealing with estate planning and safeguarding assets. Motion 18.3383 aimed to include a foreign legal instrument, namely Swiss trust law, whereas motion 22.4445 aims to enhance and modify current Swiss legal conceptions, including the family foundation and the fiducie.

Motion 22.4445 seeks to enhance the financial planning capabilities of Swiss citizens by eliminating the ban on family maintenance foundations and expanding their scope of application. This would enable individuals to effectively manage their wealth and secure the financial stability of future generations. The suggested modifications to Article 335 of the Swiss Civil Code aim to tackle enduring objections and harmonize the family foundation with the changing requirements of contemporary estate planning.

Furthermore, motion 22.4445 offers a chance to improve and perfect the fiducie system, establishing a strong and dependable tool for managing assets and structuring estates that adheres to Swiss legal standards. The motion aims to enhance the fiducie as a viable alternative to foreign organizations, such as Liechtenstein foundations and foreign trusts, by clearly differentiating between the initial transfer of property and the following fiduciary relationship.

The emphasis on utilizing and enhancing established Swiss legal ideas, rather than establishing a novel legal instrument, showcases a more unified and domestically-focused strategy for resolving the highlighted deficiencies in estate planning and asset protection. To ensure comprehensibility and acceptance among Swiss citizens, motion 22.4445 seeks to develop solutions that align with Switzerland's civil law system and operate within the established legal framework. Switzerland's handling of estate planning and asset protection is evolving, with the rejection of motion 18.3383 and the introduction of motion 22.4445 being a notable change in strategy. Switzerland aims to meet the changing requirements of its inhabitants while upholding its legal traditions and ideals by enhancing and adjusting established legal instruments, such as the family foundation and the fiducie. The proposed modifications outlined in motion 22.4445 have the capacity to provide a stronger and more adaptable structure for estate planning and asset management, therefore improving Switzerland's appeal as a jurisdiction for organizing and safeguarding wealth.

Bibliography

- Atkins S., *Equity and Trusts*, 1st ed, New York, Routledge, 2013.
- Atkins S., *Equity and Trusts*, 24-53;
- Bahar, *The Swiss Federal Supreme Court's decision on the supervision of trustees*, 20 Trust Law International 120, 121-122, 2009.
- Banks W., (ed.), *Lewin's Practical Treatise on the Law of Trusts*, Sweet & Maxwell, London 1928, 1.
- Banks, *Lewin's Practical Treatise on the Law of Trusts*, vol I, 1888.
- Bogert, *Handbook of the Law of Trusts,* 2022.
- Briggs, A., *Private International Law in English Courts*. Oxford University Press, Oxford 2013.
- Cheshire, G. C., *Il concetto del 'Trust' secondo la Common Law inglese*. G.Giappichelli Editore, Torino 1998.
- Cheshire, G. C. , *Il concetto del 'Trust' secondo la Common Law inglese*. G.Giappichelli Editore, Torino 1998.
- Dyer A., van Loon H., *'Report on Trusts and Analogue Institutions', in Proceedings of the Fifteenth Session of the Hague Conference on Private International Law*, vol. II (1985)
- Gaillard, E., & Trautman, D. T., *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts*. American Journal of Comparative Law, 35(2), 307-340, 1987.
- George G. Bogert, *Handbook of the Law of Trusts (West Publishing Co., 1921)*
- Godefroi, *The Law relating to Trust and trustees,* 1927.

- Graziadei M., Mattei U., and Smith L., *'Setting the Scene'*, in M. Graziadei, U. Mattei and L. Smith (eds.), Commercial Trusts in European Private Law (Cambridge University Press, 2005.
- Groves, C. and Tee, C. (2009) 'Where there's a will', Legal Week 11(2), 32, 34.
- Hardinges J., *"Defining a 'data trust'"*, Open Data Institute, 19 October 2018
- Hardinges, J., *"What is a data trust?"*, Open Data Institute, 10 July 2018
- Harris, J., "*The Hague Trusts Convention: Scope, Application and Preliminary Issues*." Hart Publishing , London 2002.
- Harris, J., *The Hague Trusts Convention: Scope, Application and Preliminary Issues*. Hart Publishing, London 2002.
- Hayton D. J., *'Fiduciaries in Context: An Overview'*, in P. Birks (ed.), Privacy and Loyalty (Oxford: Clarendon Press, 1997).
- Hayton, D. J., "The Hague Convention on the Law Applicable to Trusts and on their Recognition. International and Comparative Law Quarterly", 36(2), 260-282, 1987.
- Hayton, D. J., The Law of Trusts (4th ed.). Sweet & Maxwell, 2003.
- Hayton, D., Matthews, P., & Mitchell, C., *Underhill and Hayton: Law of Trusts and Trustees* (18th ed.). LexisNexis, London 2010.
- Helmholz R. and Piergiovanni V. (eds.), *'Relations between the Ius Commune and English Law*', Rubbettino, Genova 2009.
- Hohfeld W. N., *'Supplemental Note on the Conflict of Equity and Law*' (1917) 26 Yale LJ 767.
- J. Perrin, '*The Recognition of Trusts and Their Use in Estate Planning under Continental Laws,* Yearbook of Private International Law 629, 645, 2008.
- Knobel A., *Beneficial Ownership and Disclosure of Trusts: Challenging the Privacy Argument*, Tax Justice Network, 17 December 2016

- Knobel A., *Trusts: Weapons of Mass Injustice*? ' A response to the critics", 2017.
- Lee, R., *The Impact of the Hague Trusts Convention on Offshore Financial Centers. Journal of International Banking Law and Regulation*, 34(7), 289-301, 2019.
- Lupoi M., *'Trust and Confidence'* (2009).
- Matthews, P., *The Hague Trusts Convention 20 Years On*. In N. Eastham & L. Thévenoz (Eds.), 2013.
- Nolan, R. C., *Equitable Property*. Law Quarterly Review, 131(Apr), 253-275, 2015.
- OpenOwnership, "*An Introduction to Trust*"(July 2021).
- Pomeroy J. N., A Treatise on Equity Jurisprudence (3rd edn, Bancroft-Whitney, 1905)
- Reymond, *'Réflexions de droit comparé sur la Convention de La Haye sur le trust' 68 Revue de droit international et de droit comparé (1991) 17*; Vogt, in BSK IPR, Vor art 149a-e LDIP n 78; Von Overbeck, 'Law applicable to and Recognition of Trusts in Switzerland' (April 1996)
- S. M. Santisteban, 'Los trusts como instrumento de transmisión de la riqueza familiar en el Derecho europeo continental', in C. A. de Andrés (ed.), Estudios de derecho español y europeo (Santander: Universidad de Cantabria, 2009).
- Santisteban S. M., *Los trusts como instrumento de transmisión de la riqueza familiar en el Derecho europeo continental*, in C. A. de Andrés (ed.), *Estudios de derecho español y europe*o, Santander: Universidad de Cantabria, 2009.
- Schoenblum J. A., *'Multistate and Multinational Estate Plan*ning, CCH Inc., Chicago 2009.
- Scott A. W., and Fratcher W. S., *Introduction to the Law of Trusts 2* (4th edn, 1991).
- Smith, L., *The Law of Tracing*. Clarendon Press, London 2000.
- Thévenoz, L., *Trusts in Switzerland: Ratification of The Hague Convention on Trusts and Codification of Fiduciary Transfers*, 2001.

- Thornton, G.,. The Future of the Hague Trusts Convention: Bridging Legal Traditions in a Globalized World. Harvard International Law Journal, 63(1), 189-228, 2022.
- Treggiari F., *'Minister ultimae voluntatis. Esegesi e sistema nella formazione del testamento fiduciario*, Edizioni Scientifiche Italiane, Napoli 2002.
- van Loon H., *L'actualité de la convention de La Haye relative à la loi applicable au trust et à sa reconnaissance*, in Mélanges en l'honneur de Mariel Revillard (Paris: Répertoire Defrénois, 2007).
- Virgo, G., *The Principles of Equity & Trusts* (2nd ed.). Oxford University Press, Oxford 2012.
- von Overbeck A. E., *'Explanatory Report'* in *Proceedings of the Fifteenth Session of the Hague Conference on Private International La*w, pp. 375-6, 1984.
- Waters, D. W. M., *The Institution of the Trust in Civil and Common Law*., 252, 113-453, 1995.
- Waters, D. W. M., *The Institution of the Trust in Civil and Common Law*., 252, 113-453, 1995.
- Waters, *'The Hague Trusts Convention': 'the common lawyers have had their own problems in characterising the trust device'*, 2005.
- Wilson, J., *Balancing Settlor Autonomy and Anti-Abuse Measures: A Critical Analysis of Articles 6 and 13 of the Hague Trusts Convention.* International Journal of Law and Policy Review, 10(2), 123-142. 2021.
- Zhang R., *The new role trusts play in modern financial markets: the evolution of trusts from guardian to entrepreneur and the reasons for the evolution*, 23(4) Trust & Trustees, 2017, 453, 454
- Zhang, T., *Constructive Trusts in the Chinese Context: Importing an Anglo-American Legal Device into Chinese Law?* In Asian Journal of Comparative Law, 12(2), 337-371. 2017.