



**Universität
Zürich^{UZH}**

Rechtswissenschaftliches Institut

Foundations and Trusts

Block 2

Spring Semester 2021

RA Michelle Kalt, LL.M.



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Part III: Recognition of Trusts in Switzerland

Lecture: Foundations and Trusts

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III. Recognition of Trusts in Switzerland

Background

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

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

«For the purposes of this convention, the term <trust> refers to the **legal relationships** created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics -

- a) the assets constitute a **separate fund** and are not a part of the trustee's own estate;
- b) title to the trust assets stands **in the name of the trustee** or in the name of another person on behalf of the trustee;

[...]»

– Hague Trusts Convention, Article 2



III. Recognition of Trusts in Switzerland

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

«[...]

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

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.»

– Hague Trusts Convention, Article 2



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

- HTC has legal effect *erga omnes*
 - HTC applies to all trusts, incl. those that were established in accordance with the law of a **non-contracting state** – no condition of reciprocity
 - Ability of Contracting States to restrict this effect (art. 21)
 - Contracting States include Australia, Canada, UK, USA, Hong Kong, Cyprus but presently exclude **most offshore jurisdictions**



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

«Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to -

- a) the place of administration of the trust designated by the settlor;
- b) the situs of the assets of the trust;
- c) the place of residence or business of the trustee;
- d) the objects of the trust and the places where they are to be fulfilled.»

– Hague Trusts Convention, Article 7



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

- **Limitations and reservations:** art. 15, 16, 18 HTC
 - Purpose: allowing Contracting States to protect their **fundamental institutions**
 - Art. 18 HTC: reservation of public policy of the forum (mirrors art. 17 PILA)
 - Art. 16 HTC: reservation of *lois d'application immédiate* of the forum (art. 16(1)) as well as of another state sufficiently connected to the case (art. 16(2)) (mirrors art. 18 and 19 PILA)
 - Art. 15 HTC: reservation of “provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act”



III. Recognition of Trusts in Switzerland

Hague Trusts Convention – Limitations and Reservations

«The Convention **does not prevent** the application of **provisions of the law designated by the conflicts rules** of the forum, in so far as those provisions **cannot be derogated from by voluntary act**, relating in particular to the following matters -

- a) the protection of minors and incapable parties;
- b) the personal and proprietary effects of marriage;
- c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;
- d) the transfer of title to property and security interests in property;

[...]»

– Hague Trusts Convention, Article 15



III. Recognition of Trusts in Switzerland

Hague Trusts Convention – Limitations and Reservations

«[...]

- e) the protection of creditors in matters of insolvency;
- f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.»

– Hague Trusts Convention, Article 15



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

- **Limitations and reservations:** art. 15 HTC
 - Purpose: allowing Contracting States to protect their **fundamental institutions**
 - Art. 18 HTC: reservation of public policy of the forum (mirrors art. 17 PILA)
 - Art. 16 HTC: reservation of *lois d'application immédiate* of the forum (art. 16(1)) as well as of another state sufficiently connected to the case (art. 16(2)) (mirrors art. 18 and 19 PILA)
 - Art. 15 HTC: reservation of “provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act”



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Application of art. 488 CC
 - Art. 488 allows a testator to name an heir and burden the heir with holding the inheritance assets and delivering them to another person (subsequent heir) at a pre-defined date
 - Art. 488 prevents a testator from burdening more than one “generation” of heirs with (subsequent heir is “free”)
 - Goal: “freeing up” assets after a certain amount of time
 - Should art. 488 CC take precedence over trust statute based on art. 15 HTC?
 - Art. 488 CC cannot be derogated from (unilaterally or bilaterally), is meant to protect heirs
 - Still, (likely) no precedence if trust law contains rule against perpetuities



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Availability of trusts *mortis causa*
 - Art. 4 HTC: Validity of act by which assets are transferred to the trustee is not governed by the trust statute (accordingly, assets transferred to a trustee by will can be a matter of Swiss succession law, art. 92(1) PILA)
 - Issue: *numerus clausus* of testamentary provisions available under Swiss law
 - Scholarship is divided (but majority opinion in favour)
 - However, *mortis causa* trusts should be possible given that – like foundations – trusts may be established both *inter vivos* and *mortis causa* and are therefore not “succession-specific”
 - Act of transfer can take the form of legacy or naming an heir



III. Recognition of Trusts in Switzerland

Conclusion and Outlook

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



III. Recognition of Trusts in Switzerland

Conclusion and Outlook

- However: Recent political attempts at **introducing the trust into substantive Swiss law**
 - Majority of stakeholders are in favour of a Swiss domestic trust law
 - Model suggested by expert commission:
 - Based on the Swiss fiduciary contract and introduction into the Swiss Code of Obligations
 - Open purpose (no purely charitable trusts)
 - Max. duration: 60 years
 - Expert commission favours „invigorating“ the Swiss family foundation



III. Recognition of Trusts in Switzerland

Conclusion and Outlook

- A Swiss Trust – Pros and Cons
 - **Pros:**
 - Increased legal certainty
 - Satisfaction of a legitimate need
 - Increased domestic revenue
 - Fewer abuses (due to regulated Swiss trust)
 - **Cons:**
 - Scepticism towards an estate planning vehicle „for the rich“
 - Less discretion / secrecy with a regulated trust (less attractive to target audience)
 - Huge legislative effort
 - Unnecessary if family foundations more readily available?



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Part IV: Trusts in Swiss (Inheritance) Proceedings

Lecture: Foundations and Trusts

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IV. Trusts in Swiss (Inheritance) Proceedings

Trust Proceedings – Preliminary Remarks

- When are proceedings «international»?
- Bodies of rules governing international Swiss proceedings
 - **Lugano Convention** within its scope of application
 - I.e. trusts and contractual disputes, but not inheritance disputes
 - If LC applies and Swiss courts have jurisdiction per the LC, the domestic direct jurisdiction (competent court within CH) is determined by the PILA (not Swiss Code of Civil Procedure)
 - **PILA** in all international cases where LC does not apply (and when LC does apply, to determine domestic direct jurisdiction)
 - **Swiss Code of Civil Procedure**: to the proceedings themselves (once jurisdiction has been determined) and in purely domestic cases



IV. Trusts in Swiss (Inheritance) Proceedings

Trust-Specific Proceedings – Jurisdiction of Swiss Courts

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trust-Specific Proceedings – Jurisdiction of Swiss Courts

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trust-Specific Proceedings – Jurisdiction of Swiss Courts

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



IV. Trusts in Swiss (Inheritance) Proceedings

Inheritance Proceedings – Jurisdiction of Swiss Courts

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



IV. Trusts in Swiss (Inheritance) Proceedings

Indirect Jurisdiction of Swiss Courts

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Swiss marital property law (default regime):
 - Upon division of assets (upon divorce or death), both spouses receive $\frac{1}{2}$ of the other spouse's assets (that were accrued during marriage) (art. 215 CC)
 - Calculation of shares: Art. 208 CC: the value of (1) **dispositions within 5 years w/o consideration** by one spouse **w/o the other spouse's consent** and of (2) **assets disposed of** by one spouse **w/ the intention of diminishing the other's share** is added to the assets acquired during marriage (only calculatively)
 - Art. 220 CC: **claw-back claim** of the entitled spouse against recipient of assets per art. 208 CC if remaining assets of the debtor spouse are insufficient to cover the participation claim



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Indefeasible shares pursuant to Swiss inheritance law
 - Spouse: $\frac{1}{2}$ of their share (by default, spouses receive $\frac{1}{2}$ of the decedent's estate if sharing with offspring, $\frac{3}{4}$ of the estate if sharing with the parents of the decedent, and entire estate if no offspring and no surviving parents)
 - Children: $\frac{3}{4}$ of their share (by default, all children together receive $\frac{1}{2}$ of decedent's estate if sharing with spouse, or entire estate if no spouse)
 - Parents: $\frac{1}{2}$ of their share (together, parents receive $\frac{1}{4}$ of the decedent's estate if sharing with spouse, entire estate if no spouse [and no children])
 - Parents of the decedent do not become heirs by intestate (and accordingly have no indefeasible share) if heir had offspring!



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Indefeasible shares pursuant to Swiss inheritance law
 - Calculation of indefeasible shares: Art. 475, 527 CC: the value of (inter alia) **advances on inheritance** (art. 527 (1)), **revocable gifts and gifts made within 5 years** of the decedent's death (art. 527(3)) and of **assets disposed of** by the decedent **w/ the intention of diminishing the indefeasible share** (art. 527(4)) is added to the estate (only calculatively)
 - Art. 522, 527 CC: **claw-back claim** of the entitled heir(s) against the other heirs and, subsidiarily, against recipients during the decedent's lifetime, if remaining assets of the estate do not suffice to cover the indefeasible shares



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Rights of information of heirs
 - Right of information between heirs: art. 607(3) and 610(2) CC
 - Everything objectively relevant to determine the amount of the estate and the division thereof
 - Right of information between heirs and third parties: art. 607(3) and 610(2) CC *per analogiam*
 - Right of information between heirs and third parties based on contract law (or other legal bases): art. 560 CC
 - Decedent's rights of information (based on the contract or other legal relationship) are transferred to the heirs by virtue of universal succession
- Inheritance-based and contract-based rights to information exist **concurrently**



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Rights of information of heirs – **trust context**
 - Inheritance law: art. 607(3) and 610(2) CC, applicable *by analogy* to third parties (incl. trustees)
 - Heirs have a right to information if there is a **connection to the third party based on inheritance law** (e.g. third party holds assets that belong to the decedent's estate or that might be subject to a claw-back claim)
 - If the account holder with the bank was a trustee but the decedent was also beneficial owner of the assets in the account, the heirs have a right to information *towards the bank* (only based on inheritance, not contract law)
 - “Beneficial owner” depends on context (revocable trust = settlor, fixed interest trust = beneficiary, otherwise whoever legally controls the trustee)



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Rights of information of heirs – **trust context**
 - Contract law (or other legal basis, e.g. trust law): art. 560 CC
 - If the decedent had rights of information based on a contractual relationship, these are transferred to the heirs
 - In a recent court case, the Swiss Supreme Court **limited** contractual rights to information to cases where the heirs have an inheritance law-based interest in the information (debatable)
 - In principle, heirs will have a right of information towards a bank re: transfers (e.g. to a trustee) if 1) the decedent was the account holder from which a payment was made *or* if 2) the decedent made the payment to a third-party account with said bank (based on the fact that the settlor had such a right towards the bank)



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

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



IV. Trusts in Swiss (Inheritance) Proceedings

Case Study: Rybolovlev v. Rybolovleva (BGer 5A_259/2010)

Facts of the Case (simplified):

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



IV. Trusts in Swiss (Inheritance) Proceedings

Case Study: Rybolovlev v. Rybolovleva (BGer 5A_259/2010)

Key issue: division of a marital property regime involving trusts

- **Forum:** divorce forum or inheritance forum (depending on the occasion), art. 51 PILA
- **Applicable law:**
 - As there was no marriage contract, law of the (last) joint domicile of the spouses governs division of marital property (art. 54(1) PILA), i.e. Swiss law (domicile = Geneva)
 - The Cyprus trusts are governed by Cyprus law (art. 6 HTC)
 - Swiss marital property law is applicable against the trusts (art. 15 lit. b HTC)
- **Art. 208 CC:** value of dispositions made without the spouse's consent during the five years preceding the dissolution of the marital property regime is added to property acquired during marriage (calculatively! Transfer is not invalid, art. 201 CC)



IV. Trusts in Swiss (Inheritance) Proceedings

Case Study: Rybolovlev v. Rybolovleva (BGer 5A_259/2010)

Key issue: division of a marital property regime involving trusts

- **Art. 208 CC:** value of dispositions made without the spouse's consent during the five years preceding the dissolution of the marital property regime is added to property acquired during marriage (calculatively)
 - DR made transfers in 2005 (no consideration), ER files for divorce in 2005 – 5-year limit is respected
 - Value of trust assets is to be added to DR's property acquired during marriage (calculatively)
- **Art. 215 CC:** Each spouse receives $\frac{1}{2}$ of the other spouse's property acquired during marriage (after addition per art. 208 CC)
 - DR's remaining assets (w/o trust property) likely not sufficient to satisfy ER's claim to $\frac{1}{2}$ of his property!



IV. Trusts in Swiss (Inheritance) Proceedings

Case Study: Rybolovlev v. Rybolovleva (BGer 5A_259/2010)

Key issue: division of a marital property regime involving trusts

- **Art. 220 CC:** If the assets of the debtor-spouse or their estate are insufficient to cover the participation claim on division of the property, the entitled spouse or their heirs may demand from third-party beneficiaries the return of such dispositions as are to be added to the acquired property up to the amount of the shortfall (art. 208)
- ER can demand return of trust assets to satisfy her claim

NB: The actual case was “solved” slightly differently...



IV. Trusts in Swiss (Inheritance) Proceedings

Digression: Trust Arbitration in Switzerland

- Advantages of arbitration in trust disputes
 - **Faster** and – sometimes – more cost-effective (not always)
 - **Right to appeal** is extremely limited (cf. art. 190 PILA re: *international* arbitration)
 - Option to choose arbitrators **familiar** with trust law at hand
 - Typically increased **confidentiality** (if agreed on beforehand)
 - Easier **recognition** abroad through the New York Convention
- Downsides of arbitration
 - Not available for all types of disputes (namely in the areas of inheritance and material property law) – claim must be «pecuniary» (art. 177(1) PILA)
 - Party agreement is usually necessary (but see the new art. 178 PILA)



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Thank you for your attention!