

# FORUM

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## THE RECOGNITION OF TRUSTS AND THEIR USE IN ESTATE PLANNING UNDER CONTINENTAL LAWS

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## I. Introduction

The trust is a typical construction of common law jurisdictions, derived from the development of two separate bodies of rules (the common law *stricto sensu* and equity) that were first applied by two different kinds of jurisdictions.

Continental lawyers often misunderstand the peculiarities of trusts, mainly because their legal system has evolved in a different manner, without similar needs to introduce a parallel body of rules. As a result, although trusts have been used in common law jurisdictions for centuries, the continental lawyers' interest in this instrument has emerged only in the past few decades, as trusts began to reach their latitudes.

Indeed, the increasing mobility of persons and assets fuelled the use of trusts in circumstances connected to civil law countries. Given the conceptual differences between the common law and continental legal traditions, the confrontation between trusts and continental legal systems may create some problems. This is especially true in succession law, where the continental systems may have some difficulties dealing with trusts, particularly when they are designed for estate planning.

This ever-growing interest was behind the adoption by the Hague Conference's on the 1<sup>st</sup> of July 1985 of the Convention on the Law Applicable to Trusts and on their Recognition (the 'Hague Trusts Convention'). This Convention, which has now been ratified *inter alia* by Switzerland and Luxemburg, but not by France, has helped continental lawyers to understand the trust concept, heavily contributing to the recognition of trusts beyond common law jurisdictions.

The aim of the present paper is to briefly present some of the core elements of the analysis that we conducted about the relations between trusts and the laws of succession in Switzerland, France, and Luxemburg.<sup>1</sup> This presentation shall however be focused on issues arising under Swiss succession law, with some comparisons being drawn between the laws of France and Luxemburg. Given that these laws take their roots in the Roman law tradition, the developments below should easily be adaptable, *mutatis mutandis*, to the laws of other countries of civil law tradition.

Because none of these countries has introduced the trust, as understood in common law jurisdictions, into its substantive law, it is necessary to briefly present the mechanisms of trust recognition in those jurisdictions (II) and to further explain the possible problems encountered by a trust within the context of an estate governed by continental succession law (III).

## **II. Recognition of Trusts**

Even though trusts are generally unknown to the substantive law of continental jurisdictions, this does not prevent trusts from having some links with such jurisdictions, *e.g.* in the event that the settlor, the trustee, one of the beneficiaries, or part of the trust's assets become located in a continental jurisdiction. In such cases, the need to deal with trusts on the private international law level arises, entailing particularly complicated problems in countries where the trust concept is largely unknown.

As will be seen below, the Hague Trusts Convention has considerably simplified continental judges' task of dealing with trusts, enabling them to recognise a trust for what it is, without having to make it fit within the concepts of their domestic substantive laws.

Before scrutinising the recognition of trusts as provided for by the system of the Hague Trusts Convention and its implementing legislation in Switzerland (B), it is worth describing briefly how Swiss courts managed to recognise such construction before this treaty entered into force (A). We shall then briefly give some comparative elements with the French and the Luxemburg situations (C).

### **A. Recognition of Trusts in Switzerland prior to the Ratification of the Hague Trusts Convention**

Prior to the ratification of the Hague Trusts Convention, the Swiss conflicts rules had no provision relating specifically to trusts. Consequently, Swiss judges had to

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<sup>1</sup> *Le trust à l'épreuve du droit successoral en Suisse, en France et au Luxembourg – Etude de droit comparé et de droit international privé*, Ph.D. study Lausanne 2006, Comparativa n° 77 (Librairie Droz), Geneva 2006.

consider trusts within their own legal concepts and try to make them – or at least part of their elements – fit within the framework of Switzerland’s domestic concepts. Although such an approach does not enable the consideration and observance of every facet of the trust, Swiss judges have regularly taken a pragmatic approach, trying to recognise the effects of the trusts they had to deal with in the best possible way.

Indeed, even before the Swiss Private International Law Act of 18 December 1987 (the ‘SPILA’) entered into force, the Swiss Supreme Court had issued two important decisions in which trusts were given effect in Switzerland.

As early as 1936, the Swiss Supreme Court had recognised the effects of a trust, constructing it as a three-party legal relationship similar to mandate, and submitted it to the Swiss substantive law.<sup>2</sup> In its decision, the Swiss Court did not bother to analyse the particulars of the trust in detail, but merely considered that (1) it faced a question related to the execution of a contractual obligation (*‘Erfüllung einer obligatorischen Verpflichtung’*), and (2) that the obligation’s place of execution was Switzerland, so that, failing a specific indication about the applicable law, Swiss law applied.<sup>3</sup>

In 1970, the Swiss Supreme Court confirmed this method of dealing with trusts in the well-known *Harrison* case.<sup>4</sup> Even though this decision went into more detail than the 1936 case, it still analysed the trust at hand within the framework of contractual rules and, failing any choice of law clause, applied Swiss law in view of the trustee’s seat in Zurich.<sup>5</sup>

In Switzerland, the legal framework of conflicts of law was deeply modified in 1989, when the SPILA entered into force. Although this Act contained no specific trust provisions until July 2007, its preparatory works (dated 1982) suggested that its provisions regarding companies and organised estates (Art. 150 *et seq.* of the SPILA) could be applied to sufficiently organised trusts.<sup>6</sup> Even though the level of organisation in a trust needed to invoke Article 150 *et seq.* of the SPILA was not crystal clear,<sup>7</sup> the conflicts rules regarding companies and organised estates allowed for the recognition of the majority of trusts. Indeed, because the SPILA

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<sup>2</sup> Decision of the Swiss Supreme Court of 26 May 1936 in *Re Aktiebolaget Obligationensinteressenter vs Bank für Internationalen Zahlungsausgleich*, ATF 62 II 140.

<sup>3</sup> *Ibidem*.

<sup>4</sup> Decision of the Swiss Supreme Court of 29 January 1970 in *Re Harrison vs Credit Suisse*, ATF 96 II 79.

<sup>5</sup> *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.*

<sup>6</sup> Explanatory Report of the Swiss Federal Council of 10 November 1982, in: *Feuille fédérale* 1983 I 425, No. 292; see also PALTZER E.H./SCHMUTZ P., ‘Switzerland’, in: *Trusts in Prime Jurisdictions*, KAPLAN A. (ed.), 2<sup>nd</sup> ed. 2006, pp. 299 *et seq.*, at p. 300.

<sup>7</sup> MAYER T.M., *Die organisierte Vermögenseinheit gemäss Art. 150 des Bundesgesetzes über das Internationale Privatrecht, Unter besonderer Berücksichtigung des Trust*, Ph.D. study Basle, Basle etc. 1998, pp. 26-27.

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employs the incorporation theory, Article 154 provides for the application of the law under which the estate is organised, regardless of the place where it is effectively administered.<sup>8</sup>

The recognition of trusts under the SPILA system thus generally enabled the application of the law according to which they had been set up.<sup>9</sup> In practice, this allowed a settlor to choose the law according to which the trust was to be created.<sup>10</sup>

Even though the number of published decisions dealing with trusts has been low, Articles 150 *et seq.* of the SPILA have been applied to trusts on several occasions. For example, Zurich Courts applied the laws of Guernsey to a trust that had been established in writing, considering it to be sufficiently organised.<sup>11</sup> Also, in a case related to a trust established under the laws of Jersey, the Swiss Supreme Court considered that the (written) trust deed and the trust laws of Jersey were sufficient to qualify the trust as an organised estate.<sup>12</sup>

On the other hand, in the case of a constructive trust, the Swiss Supreme Court preferred to apply the law applicable to the original contractual relationship between the parties, without going into much detail about the trust relationship itself.<sup>13</sup>

In sum, the recognition of trusts in Switzerland between 1989 and June 2007 occurred generally – with regards to sufficiently organised trusts – under the rules of Articles 150 *et seq.* of the SPILA. Although the trust situation in Switzerland was to a significant extent satisfactory, it left ample room for uncertainty, particularly with regards to the scope of application of these provisions; it was indeed very difficult to decide *in abstracto* what was necessary for a trust to be deemed sufficiently organised.<sup>14</sup>

Furthermore, the links the trust structure was required to have with a foreign country (such as the country whose law was to apply to the trust) was not clearly defined by the Swiss courts. As a result, the possibility of establishing trusts whose most significant elements would be linked to Switzerland ('domestic trusts') was not unanimously admitted,<sup>15</sup> even if the *fraus legis* exception as regards companies and organised estates seemed to have been excluded by the SPILA.<sup>16</sup>

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<sup>8</sup> 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.

<sup>9</sup> PALTZER E.H./SCHMUTZ P. (note 6), p. 301; PERRIN J. (note 1), No. 237.

<sup>10</sup> VISCHER F., in: *Zürcher Kommentar zum IPRG*, Zurich 2004, No. 14 *ad* Art. 150 SPILA.

<sup>11</sup> *Re Werner K. Rey*, in: *Blätter für Zürcherische Rechtsprechung* 98 (1999), No. 52, pp. 225 *et seq.*

<sup>12</sup> Decision of the Swiss Supreme Court of 3 September 1999 in *Re Chiltern Trust*, in: *Semaine Judiciaire* 2000 I 269.

<sup>13</sup> Decision of the Swiss Supreme Court of 19 November 2001 in *Re X. vs USA*, case 5C.169/2001.

<sup>14</sup> PERRIN J. (note 1), No. 238.

<sup>15</sup> See *e.g.* PERRIN J.-Fr., 'Les sociétés fictives en droit civil et en droit international privé', in: *Semaine Judiciaire* 1989, pp. 553 *et seq.*, at pp. 564 *et seq.*; PERRIN J.-Fr., 'Théo-

As a result, even though a large part of the different possible trust structures was already widely welcomed by the Swiss legal system, there was room for uncertainty, leading to an unsatisfactory situation. In addition, the SPILA system did not allow trusts to be treated and recognised as trusts, but made it necessary to (mis)use continental law concepts.

## **B. Recognition of Trusts in Switzerland under the Hague Trusts Convention**

On the 1<sup>st</sup> of July 2007, the Hague Trusts Convention entered into force in Switzerland. In addition, the Swiss Parliament also enacted specific provisions to further specify the treatment of trusts in Switzerland. It is thus necessary, in order to have a complete overview of the current recognition of trusts in Switzerland (3), to not only present the system of the Convention (1) but also the relevant new provisions of Swiss law (2).

### **1. Overview of the Hague Trusts Convention**

#### *a) The Motives and the Goals of the Hague Trusts Convention*

In view of the differences between the structures of the different legal systems, particularly regarding the differences between the common and civil law, the Hague Conference on Private International Law decided ‘to include with priority in the Agenda of work of the Fifteenth Session the question of the international validity and recognition of trusts’.<sup>17</sup>

Without introducing the trust concept into the (continental) contracting States’ substantive law, the Convention tries to harmonise the solutions on the

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rie de l’incorporation et cohérence de l’ordre juridique’, in: *Mélanges P. Lalive*, Basle etc. 1993, pp. 141 *et seq.*, at pp. 142 *et seq.*

<sup>16</sup> 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’, in: *Aspects actuels du droit de la société anonyme – Travaux réunis pour le 20ème anniversaire du CEDIDAC*, DESSEMONTET F. *et al.* (eds.), Lausanne 2005, pp. 673 *et seq.*, at pp. 689-690.

<sup>17</sup> *Acts and documents of the Fourteenth Session – Tome I – Miscellaneous matters*, p. 64 and pp. 167 *et seq.*

conflicts of law level,<sup>18</sup> greatly increasing the legal certainty in international trust matters.<sup>19</sup>

b) *The Scope of Application of the Hague Trusts Convention*

Even if the Hague Trusts Convention's primary goal was to favour the recognition of the trust concept as developed in common law countries, its authors preferred to set out independent criteria to circumscribe the object of the Convention,<sup>20</sup> thus raising the issue of its scope of application.

According to Article 2(1) of the Hague Trusts 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*'.

The second paragraph of Article 2 further underlines some core elements of trusts, emphasising the fact that the trust assets should be held by the trustee or on his/her behalf, but should be separated from his/her own estate, as well as the fact that the trustee has the power and the duty to manage the trust assets according to the terms of the trust and the special duties imposed upon him by law.<sup>21</sup> Finally, the third paragraph indicates that the settlor's ability to reserve to himself/herself certain rights and powers and the trustee's ability to also be named as a beneficiary is not considered *per se* inconsistent with the existence of a trust.

Even if the Hague Trusts Convention's notion of trusts reveals certain differences from the usual common law conception, particularly in view of the absence of any mention of equitable or legal ownership rights over the trust assets,<sup>22</sup> the essential points of the trust structure, such as the clear segregation between the trust assets and the trustee's own estate, as well as the trustee's duty to manage the

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<sup>18</sup> GUTZWILLER P.M., *Schweizerisches Internationales Trustrecht*, Basle 2007, p. 13; THÉVENOZ L., 'Purpose, content and implementation of the Hague Convention on Trusts: Contracting States' room for manoeuvre', in: *Das Haager Trust-Übereinkommen und die Schweiz*, MARKUS A. *et al.* (eds.), Zurich etc. 2003, pp. 3 *et seq.*, at p. 7; VOGT N.P., in: *Basler Kommentar – Internationales Privatrecht*, Basle etc. 2007, No. 5 *ad* Vor Art. 149a-e SPILA.

<sup>19</sup> GUTZWILLER P.M. (note 18), p. 13.

<sup>20</sup> GAILLARD E./TRAUTMAN D.T., 'La Convention de La Haye du 1<sup>er</sup> juillet 1985 relative à la loi applicable au trust et à sa reconnaissance', in: *Rev. crit. dr. int. pr.* 1986, pp. 1 *et seq.*, at pp. 6-7.

<sup>21</sup> HARRIS J., *The Hague Trusts Convention – Scope, Application and Preliminary Issues*, Oxford, Portland 2002, pp. 116-117, who argues that it would not be sufficient for a given structure to fulfil the criteria of Article 2 HTC to qualify as a trust under the Convention. From our point of view (see PERRIN J. (note 1), No. 127), such opinion shall not be followed and the fulfilment of the requirements set out by Article 2 of the Hague Trusts Convention shall be sufficient to entail the application of this treaty.

<sup>22</sup> BARRIÈRE F., *La réception du trust au travers de la fiducie*, Ph.D. study Paris II 2004, pp. 187-188.

trust in accordance with the settlor's intent, can be found in the elements described in Article 2. One of the consequences of Article 2's divergence from the traditional English model is that its description also encompasses other legal constructions,<sup>23</sup> such as the *fiducie* of Luxembourg or the *Anstalt* of Liechtenstein. This has driven Professor Lupoi to depict the construction described by Article 2 of the Hague Trusts Convention as a 'shapeless' trust,<sup>24</sup> and to further note that the rules of this treaty, primarily developed on the basis of the traditional English model, have been extended to other structures.<sup>25</sup>

According to Article 3, the Hague Trusts Convention only applies 'to trusts created voluntarily and evidenced in writing'.

The writing requirement – which is not foreseen by the traditional English trust model – should not be seen as implying that the trust deed must be in writing in order for the trust to fall within the Hague Trusts Convention's scope; the fact that a trust can be merely evidenced in writing is sufficient.<sup>26</sup> As will be seen below, Switzerland has extended the scope of the Hague Trusts Convention to trusts that are not evidenced in writing (Art. 149c(2) SPILA).

Furthermore, the concept of 'voluntarily created' trusts is a creation of the Hague Trusts Convention, which is considered by the majority of scholars as different from the concept of express trusts.<sup>27</sup> Indeed, if it seems quite clear that express trusts shall be considered as voluntarily created and shall thus fall within the Hague Trusts Convention's scope,<sup>28</sup> the situation is not as clear regarding other trusts, some of which can also be voluntarily created. Without entering into details that lie beyond the scope of the present paper, it should be underlined that the Hague Trusts Convention should essentially apply to trusts that reflect the settlor's intent.<sup>29</sup> In this regard, the Convention excludes trusts imposed by the courts against the settlor's will as well as trusts created directly by operation of law.<sup>30</sup> On the other hand, a trust created voluntarily to comply with a judicial decision (*e.g.* to

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<sup>23</sup> See *e.g.* BARRIÈRE F. (note 22), pp. 186-187.

<sup>24</sup> LUPOI M., *Trusts: A comparative study*, Cambridge 2000 (transl. from Italian by DIX S.), pp. 333 *et seq.* See however GUTZWILLER P.M. (note 18), pp. 35 *et seq.*

<sup>25</sup> LUPOI M. (note 24), p. 334; see also GODECHOT S., *L'articulation du trust et du droit des successions*, Ph.D. study Paris II 2004, p. 176, according to whom Article 2 of the Hague Trusts Convention shall be seen as a reference provision for the international treatment of trusts, and GUTZWILLER P.M. (note 18), p. 15.

<sup>26</sup> GUTZWILLER P.M. (note 18), pp. 43-44; PERRIN J. (note 1), No. 134.

<sup>27</sup> HARRIS J. (note 21), p. 125; LUPOI M. (note 24), p. 341; *contra* BARRIÈRE F. (note 22), p. 180.

<sup>28</sup> LUPOI M. (note 24), p. 342; GUTZWILLER P.M. (note 18), p. 42.

<sup>29</sup> For further details, see PERRIN J. (note 1), Nos. 130 *et seq.*

<sup>30</sup> VON OVERBECK A., 'Explanatory Report', in: *Proceedings of the Fifteenth Session (1984) – Tome II – Trusts – Applicable Law and Recognition*, The Hague 1985, pp. 370 *et seq.*, at p. 380.



transfer assets to a former spouse under divorce proceedings) should be seen as falling within the scope of Article 3 of the Hague Trusts Convention.<sup>31</sup>

With regard to trusts declared by judicial decisions (which are in principle excluded from the Convention's scope to the extent they are not voluntarily created), Article 20 provides for the possibility for the contracting States to extend the application of the Hague Trusts Convention to such structures.<sup>32</sup> Even if such extension would allow for a wider range of constructions to fall within the scope of the Hague Trusts Convention, it does not seem to encompass trusts implied by law that would not already have been somehow recognised through a judicial decision.<sup>33</sup>

According to Article 4, the Hague Trusts Convention does not apply to preliminary issues relating to the validity of the acts by virtue of which the assets are transferred to the trustee. Accordingly, the law applicable to the trust will govern the questions relating to the trust's creation, but not the question of the validity of the act transferring the assets to the trustee.<sup>34</sup> It is thus only provided that the transfer of assets is valid under the relevant applicable law (as reserved by Art. 4) that the question of the trust validity should be scrutinised (under the law applicable to the trust).<sup>35</sup>

Article 5 of the Hague Trusts Convention foresees that this treaty shall not apply if its conflicts rules would lead to the application of a law that does not provide for trusts or the category of trusts involved.<sup>36</sup> As will be seen below, Switzerland has also widened the scope of the Hague Trusts Convention here, by declaring that it shall nevertheless apply the Convention in the circumstances contemplated in Article 5 (Art. 149c(2) SPILA).

Further, it should be mentioned that, as a matter of principle, the Hague Trusts Convention applies irrespective of the law applicable to the trust, without any condition of reciprocity,<sup>37</sup> even if Article 21 of the Convention permits a contracting State to limit its scope to trusts governed by the law of another contracting State.<sup>38</sup> Lastly, according to Article 22, the Hague Trusts Convention applies to trusts even if those trusts were created before the Convention entered into force in the relevant contracting State, unless the relevant State provides otherwise, as specifically allowed under the second paragraph of Article 22.

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<sup>31</sup> VON OVERBECK A. (note 30), p. 380.

<sup>32</sup> For further details about Article 20 of the Hague Trusts Convention, see PERRIN J. (note 1), Nos. 135 *et seq.*

<sup>33</sup> HARRIS J. (note 21), pp. 402-403.

<sup>34</sup> VON OVERBECK A. (note 30), p. 381; GUTZWILLER P.M. (note 18), p. 45.

<sup>35</sup> GODECHOT S. (note 25), pp. 177 *et seq.*; GUTZWILLER P.M. (note 18), p. 49.

<sup>36</sup> For further details about this provision, see *e.g.* GUTZWILLER P.M. (note 18), pp. 50 *et seq.*

<sup>37</sup> GUTZWILLER P.M. (note 18), pp. 16-17.

<sup>38</sup> GUTZWILLER P.M. (note 18), p. 17.

c) *The Rules of Conflicts of the Hague Trusts Convention*

As a matter of principle, Article 6(1) of the Hague Trusts Convention states that '[a] trust shall be governed by the law chosen by the settlor'. According to this provision, it is unnecessary for such a choice to be made expressly; it is sufficient that the settlor's choice be somehow evidenced and/or implied through the material evidencing the trust and in light of the circumstances of the case.<sup>39</sup> The Convention has further taken a very liberal approach concerning the law to be chosen by the settlor, since there is no requirement whatsoever for the trust to have any link with the chosen law.<sup>40</sup>

In the event that the chosen law does not provide for trusts or the category of trusts involved, Article 6(2) requires the choice of law to be disregarded<sup>41</sup> and foresees the application of the law applicable under the objective criteria of Article 7.

In such cases, as well as in the absence of a choice of law within the meaning of Article 6(1), the applicable law shall be determined pursuant to the system of Article 7, which provides for the application of the law most closely connected to the trust.<sup>42</sup> Article 7's list for determining the applicable law is not exhaustive and does not prohibit a judge from considering other factors to determine the law applicable to the trust.<sup>43</sup> This system gives a judge important manoeuvrability in determining the law applicable to the trust, room that in our view must be used, whenever possible, to favour the validity of the trust structure at hand.<sup>44</sup>

According to Article 17 of the Hague Trusts Convention, the law designated by Article 6 or 7 must be the substantive law in question, without its conflicts rules. Further, by using the phrase '*rules of law in force in a State*', Article 17 makes it clear that the Convention does not authorise the choice of a non-State law, such as the Principles of European Trust Law.<sup>45</sup>

Article 8, which also contains a non-exhaustive list, describes the scope of the law applicable to the trust.<sup>46</sup> In this regard, it shall be mentioned that the Hague

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<sup>39</sup> BÉRAUDO J.P./TIRARD J.M., *Les trusts anglo-saxons et les pays de droit civil – Approche juridique et fiscale*, Genève 2006, p. 377; GUTZWILLER P.M. (note 18), pp. 59-60.

<sup>40</sup> BÉRAUDO J.P./TIRARD J.M. (note 39), pp. 376-377; GAILLARD E./TRAUTMAN D.T. (note 20), p. 17; HARRIS J. (note 21), p. 179.

<sup>41</sup> VON OVERBECK A. (note 30), p. 385.

<sup>42</sup> HARRIS J. (note 21), p. 215; JAUFFRET-SPINOSI C. 'La Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance (1<sup>er</sup> juillet 1985)', in: *Clunet* 1987, pp. 23 et seq., at p. 46; THÉVENOZ L., *Trusts in Switzerland: Ratification of The Hague Convention on Trusts and Codification of Fiduciary Transfers*, Zurich 2001, p. 197.

<sup>43</sup> BÉRAUDO J.P./TIRARD J.M. (note 39), p. 377; HARRIS J. (note 21), p. 218; GUTZWILLER P.M. (note 18), p. 68.

<sup>44</sup> PERRIN J. (note 1), No. 148.

<sup>45</sup> HARRIS J. (note 21), pp. 185-186; PERRIN J. (note 1), No. 150.

<sup>46</sup> THÉVENOZ L. (note 42), pp. 198.

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Conference decided that the formal validity of the trust should not be governed by the Convention.<sup>47</sup>

Article 9 of the Hague Trusts Convention provides for the possibility of applying different laws to different aspects of the trust, such as matters related to its administration.<sup>48</sup>

As regards the question of whether the applicable law could be modified, Article 10 indicates that the law applicable to the validity of the trust also governs this issue.<sup>49</sup>

### *d) The Recognition of Trusts under the Hague Trusts Convention*

Articles 11 and 12 of the Hague Trusts Convention indicate the elements of a trust that a contracting State must recognise. First, Article 11(1) requires that '*a trust created in accordance with the law specified by the preceding chapter shall be recognized as a trust*'. Indeed, the main goal of the Convention is to avoid any transformation, adaptation, translation, or other conversion of trusts into a different construction known by the *lex fori*<sup>50</sup> and to ensure that trusts would be recognised as trusts.<sup>51</sup>

The second paragraph of Article 11 establishes minimum consequences that must arise from the recognition of trusts, which must be granted by the contracting States regardless of whether or not such consequences are provided for by the law applicable to the trust.<sup>52</sup> Such minimal consequences are (1) the recognition of the segregation of the trust assets from the trustee's own estate and (2) the fact that the trustee may act in his/her own capacity in judicial proceedings and before authorities or persons acting in an official capacity.<sup>53</sup>

Article 11(3) further provides that the recognition of the trust shall also imply the recognition of other consequences, to the extent that they are provided for or required by the law applicable to the trust at hand.<sup>54</sup> This provision – which is not exhaustive<sup>55</sup> – emphasises the separation of the trust assets from the trustee's own estate, making it clear that such segregation has to be recognised by the con-

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<sup>47</sup> VON OVERBECK A. (note 30), p. 388.

<sup>48</sup> HARRIS J. (note 21), pp. 281 *et seq.*

<sup>49</sup> THÉVENOZ L. (note 42), p. 198.

<sup>50</sup> GUTZWILLER P.M. (note 18), p. 88.

<sup>51</sup> BÉRAUDO J.P./TIRARD J.M. (note 39), p. 383.

<sup>52</sup> HARRIS J. (note 21), p. 313; LUPOI M. (note 24), p. 354; PERRIN J. (note 1), No. 158. Article 11(2) of the Hague Trusts Convention should therefore be seen as a material provision, with the consequence that, provided the trust falls within the Convention's scope, the trust assets will constitute a separate fund and that the trustee shall be able to act in his/her capacity as trustee.

<sup>53</sup> GUTZWILLER P.M. (note 18), pp. 91 *et seq.*

<sup>54</sup> JAUFFRET-SPINOSI C. (note 42), pp. 56 *et seq.*; LUPOI M. (note 24), p. 354.

<sup>55</sup> GUTZWILLER P.M. (note 18), p. 93; PERRIN J. (note 1), No. 159.

tracting States, to the extent provided for under the applicable law. If letters (a) to (c) of Article 11(3) are self-explanatory,<sup>56</sup> it is worth mentioning that Article 11(3)(d) provides for the recognition of tracing, indicating however that the rights and obligations of any third party who holds trust assets (such as a bank) is not to be governed by the law applicable to the trust, but by the law determined by forum's conflicts rules, even as regards its non-mandatory provisions.<sup>57</sup> Accordingly, tracing is recognised by the contracting States to the extent provided for by the applicable law, but its effects on third parties remain limited.<sup>58</sup>

Article 12 of the Hague Trusts Convention further entitles the trustee to register trust assets in his/her capacity as trustee or in another way that discloses the trust's existence.<sup>59</sup> As will be seen below, Switzerland has enacted a specific provision in this regard, allowing the trust relationship to be mentioned in the relevant registers (Art. 149d of the SPILA).

In the event that the significant elements of a trust would be more closely connected with '*States which do not have the institution of the trust or the category of trust involved*', Article 13 gives the contracting States the option not to apply the rules of the Hague Trusts Convention to such a construction.<sup>60</sup> In this regard, it should be mentioned that even if the application of Article 13 may lead to difficult questions,<sup>61</sup> the provision merely provides for the possibility for the contracting States to deny recognition to trusts that would be more closely connected to a non-trust State; on the other hand, each contracting State also remains free not to make use of such provision,<sup>62</sup> be it by way of a specific provision (such as Article 149c(2) of the SPILA in Switzerland) or through case law (like in Italy). More generally, it is to be noted that the Convention applies even without a true international dimension of the structure at hand, as soon as it is qualified as a trust.<sup>63</sup>

In opposition to the rule in Article 13 of the Hague Trusts Convention, Article 14 clearly expresses the goal of the Convention, namely to promote the recognition of trusts, by allowing each contracting State to provide for more favourable rules on this issue.

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<sup>56</sup> GUTZWILLER P.M. (note 18), p. 93.

<sup>57</sup> VON OVERBECK A. (note 30), p. 401.

<sup>58</sup> JAUFFRET-SPINOSI C. (note 42), pp. 58-59.

<sup>59</sup> JAUFFRET-SPINOSI C. (note 42), p. 59.

<sup>60</sup> GAILLARD E./TRAUTMAN D.T. (note 20), p. 12; HAYTON D.J., 'International Recognition of Trusts', in: *International Trust Laws*, GLASSON J. (ed.), 1: Commentary, C3 – 1 *et seq.*, Update 31, July 2007, p. 10 ; JAUFFRET-SPINOSI C. (note 42), pp. 62-63.

<sup>61</sup> GUTZWILLER P.M. (note 18), pp. 99 *et seq.*

<sup>62</sup> GAILLARD E./TRAUTMAN D.T. (note 20), p. 12.

<sup>63</sup> GUTZWILLER P.M. (note 18), p. 16.

e) *General Clauses*

Under the title 'General clauses', the Hague Trusts Convention contains various provisions affecting the recognition of trusts.

In particular, Article 15(1) makes it clear that trusts cannot be used to circumvent the mandatory provisions of the law designated by the forum's conflicts rules to apply to other subject matters.<sup>64</sup> Indeed, this provision explicitly states that the Convention shall not prevent the mandatory provisions of the designated law from applying, listing particular laws encompassed by this rule, such as the law relating to the personal and proprietary effects of marriage (lit. b) and succession rights, both testate and intestate (lit. c). According to Article 15(2) of the Hague Trusts Convention, in the event that the recognition of a trust would be prevented by the application of Article 15(1), the judge shall try to give effect to the objects of that trust by using other means.

Article 16(1) of the Hague Trusts Convention further preserves the application of *lex fori*'s provisions that must be applied in international situations, irrespective of the rules of conflicts (so-called '*lois de police*').<sup>65</sup> The second paragraph of Article 16 also allows for the application of foreign *lois de police* where the circumstances of the case are connected to such law.<sup>66</sup> Finally, Article 16(3) enables a contracting State to indicate that it will not apply the second paragraph of Article 16.

As regards public policy ('*ordre public*'), Article 18 of the Hague Trusts Convention foresees that the Convention's provisions are not to be applied if the result would be manifestly incompatible with public policy.<sup>67</sup>

Article 19 provides that the Convention shall not prejudice the powers of the contracting States in tax matters.<sup>68</sup>

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<sup>64</sup> HAYTON D.J., 'The Hague Convention on the Law applicable to Trusts and on their Recognition', in: *I.C.L.Q.* 1987, pp. 260 *et seq.*, at pp. 277-278.

<sup>65</sup> This provision is very similar to Article 18 of the SPILA or Article 7 of the Rome Convention of 1980.

<sup>66</sup> In a similar way than what is done by Article 19 of the SPILA and Article 7 of the Rome Convention of 1980, this provision is aimed at avoiding that the decision taken in a country would be deprived of its effects in the country with which the case is connected; BUCHER A./BONOMI A., *Droit international privé*, 2<sup>nd</sup> ed., Basle etc. 2004, No. 502.

<sup>67</sup> HAYTON D.J. (note 60), p. 18.

<sup>68</sup> The present paper is not intended to cover tax issues, which are however of primary importance in the field of estate planning; in this regard, it should be mentioned that the Swiss Tax Conference (on the level of the Cantons) issued a Circular Letter on 22 August 2007 to deal with the taxation of trusts; this Circular has been extended to the Federal Level by Circular Letter of 27 March 2008 of the Swiss Tax Administration.

Among the numerous publications written on this subject, see *e.g.* CRETTI S.G., *Le trust – Aspects fiscaux*, Basle etc. 2007; DANON R.J., 'L'imposition du private express trust – Analyse critique de la Circulaire CSI du 22 août 2007 et proposition d'un modèle d'imposition de lege ferenda', in: *Archives de droit fiscal suisse* 2008, pp. 435 *et seq.*

As mentioned above, Article 20 of the Hague Trusts Convention provides for the possibility for the contracting States to extend the scope of application of the Convention to ‘trusts declared by judicial decisions’.<sup>69</sup>

As indicated above, Article 21 allows the contracting States to limit the Convention’s scope to trusts governed by the law of another contracting State, whereas Article 22(2) authorises States to limit the Convention’s application to trusts created after it entered into force in the relevant country. According to the information available to us, none of the contracting States to the Hague Trusts Convention has made use of any of these two provisions as of today.<sup>70</sup>

Articles 23 and 24 of the Hague Trusts Convention deal with issues related to States having several territorial units, each of them having its own trust law.

Article 25 reserves the application of other international instruments on matters governed by the Convention.

Lastly, Articles 26 *et seq.* contain the final clauses of the Convention, which are self-explanatory, and shall therefore not be treated herein.

f) *Recognition of Trusts Falling Outside the Scope of the Hague Trusts Convention*

As seen above, the Hague Trusts Convention does not apply to all trusts, even if its scope would have been extended under Article 20. With regard to trusts falling outside such scope of application, the question of their recognition thus arises. This is especially the case for non-trust jurisdictions, where the national rules of conflicts do not generally contain any provision as regards trusts. Fundamentally, the contracting States would be at liberty to extend the conventional provisions to other trusts (Art. 14 HTC), but they could also apply their former case law in this regard.<sup>71</sup>

g) *Conclusion on the Hague Trusts Convention*

Even though it does not solve every problem and does not have a clear scope of application, the Hague Trusts Convention’s major advantage is the introduction of specific provisions related to the international treatment of trusts in the private international laws of the (non-trust) contracting States, with the result that it is no longer necessary for such States to distort trusts, thus clearly improving legal certainty.<sup>72</sup>

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<sup>69</sup> For further details on this provision, see *e.g.* GUTZWILLER P.M. (note 18), pp. 127 *et seq.*

<sup>70</sup> See also GUTZWILLER P.M. (note 18), pp. 131 and 132.

<sup>71</sup> PERRIN J. (note 1), No. 180.

<sup>72</sup> GAILLARD E./TRAUTMAN D.T. (note 20), pp. 22-23.

When compared to the prior system of Swiss private international law, which already largely provided for the recognition of trusts, the Hague Trusts Convention offers numerous advantages in legal certainty, offering increased predictability for the use of trusts in Switzerland.<sup>73</sup>

## **2. The Swiss Implementing Legislation to the Hague Trusts Convention**

As seen above, the Hague Trusts Convention entered into force in Switzerland on the 1<sup>st</sup> of July 2007. To ensure that the application of the Convention could take place in an effective manner, the Swiss Parliament also amended the SPILA as well as the Swiss Debt Enforcement and Bankruptcy Act (the ‘SDBA’).<sup>74</sup> The purpose of the present section is to briefly present these new provisions to provide a complete overview of the international private law treatment of trusts in Switzerland.

### *a) Overview of the New Provisions of the SPILA*

The entry into force in Switzerland of the Hague Trusts Convention paralleled the introduction of a new Chapter 9a into the SPILA and a modification of its Article 21, which introduced the concept of the ‘seat’ of a trust, defining it in a similar manner as is provided for with regards to companies.<sup>75</sup> As a matter of principle, Article 21(3) of the SPILA provides that the seat of the trust shall be deemed to be located at the place of management of the trust, as defined in writing in the trust instrument (or in another form that can be evidenced in writing) or, failing such designation, at the place where the trust is effectively managed.

The first provision of the new Chapter 9a of the SPILA, Article 149a, intends to define the trust in the perspective of the Swiss rules of conflicts and to this effect refers to the definition given by the Hague Trusts Convention, regardless of whether or not the trust can be evidenced in writing. In this regard, Switzerland considered that it would not have been a reasonable solution to have different outcomes at the private international law level on the basis of whether or not a trust was evidenced in writing.<sup>76</sup> As a consequence, Chapter 9a of the SPILA has widened the scope of the Convention in Switzerland, without however extending it to trusts created by judicial decisions. Given this extension, the rules of the Convention will also apply to orally set up trusts.<sup>77</sup>

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<sup>73</sup> SWISS FEDERAL COUNCIL, *Message concernant l’approbation et l’exécution de la Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance*, in: *Feuille fédérale* 2006, pp. 561 *et seq.*, at pp. 584 *et seq.*

<sup>74</sup> GUTZWILLER P.M. (note 18), p. 146.

<sup>75</sup> SWISS FEDERAL COUNCIL (note 73), pp. 597-598.

<sup>76</sup> SWISS FEDERAL COUNCIL (note 73), pp. 598-599; GUTZWILLER P.M. (note 18), p. 154.

<sup>77</sup> On this point, see GUTZWILLER P.M. (note 18), pp. 157-158.

As indicated above, the practice prior to the Convention's effectivity in Switzerland allowed sufficiently organised trusts to fall under the system of Articles 150 *et seq.* of the SPILA; as a consequence, it is highly probable that the majority of the constructions falling within the scope of Article 149a of the SPILA (and thus consequently under the scope of the Hague Trusts Convention) would also meet the criteria of Article 150 of the SPILA. In such a case, the rules of the new Chapter 9a (together with the Hague Trusts Convention) will take precedence, as *lex specialis*, in trust matters.<sup>78</sup>

Further to the opinion expressed by Dr Gutzwiller, one should consider that when a given structure meets the criteria of Articles 2 and 3 of the Hague Trusts Convention (together with those of Art. 149a of the SPILA), it shall be considered as a trust for the purposes of Swiss private international law, even if it could be compared to constructions relating to (Swiss) succession or property laws; it is here to be recalled that such qualification shall not prevent the application of the mandatory provisions of the applicable succession or property laws (*see* Art. 15 of the Hague Trusts Convention).<sup>79</sup>

Since the Hague Trusts Convention does not contain provisions regarding jurisdiction in trust law related matters, it was necessary to determine the conditions under which the jurisdiction of Swiss courts would be given in cases not covered by the Lugano Convention of 16 September 1988.<sup>80</sup> Article 149b of the SPILA is focused on the internal relations within the trust, but does not apply to jurisdiction issues regarding the rights of third parties (such as heirs, creditors, etc.), except as regards Article 149b(3)(c) and Article 149b(4) of the SPILA.<sup>81</sup>

Article 149b(1) of the SPILA allows a settlor to make a written choice of jurisdiction in trust law related matters, which shall be deemed exclusive unless otherwise provided.<sup>82</sup> Article 149b(2) indicates that the designated court may not deny its jurisdiction if certain elements (one of the parties, the trust, the trustee, or a large portion of the trust assets) are linked to Switzerland.<sup>83</sup> In the absence of any choice of jurisdiction (or in the event where such choice would not be exclusive), Article 149b(3) provides that the Swiss courts at the defendant's domicile (or habitual residence) or at the seat of the trust (or to a given extent at its place of establishment) shall have jurisdiction in trust law related matters. Finally, para-

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<sup>78</sup> GUTZWILLER P.M. (note 18), p. 155; VOGT N.P. (note 18), No. 4 *ad* Art. 149a SPILA.

<sup>79</sup> GUTZWILLER P.M. (note 18), pp. 155-156; VOGT N.P. (note 18), Nos. 9 *et seq.* *ad* Art. 149a SPILA.

<sup>80</sup> The Lugano Convention contains provisions in respect to trusts at its Articles 5(6), 17(2 and 3). As regards the relationships between the Lugano Convention and Article 149b of the SPILA, *see e.g.* GUTZWILLER P.M. (note 18), pp. 164 *et seq.*

<sup>81</sup> GUTZWILLER P.M. (note 18), pp. 160-161 and 166.

<sup>82</sup> SWISS FEDERAL COUNCIL (note 73), pp. 600 *et seq.*

<sup>83</sup> SWISS FEDERAL COUNCIL (note 73), p. 601; GUTZWILLER P.M. (note 18), pp. 163-164.



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graph 4 of Article 149b of the SPILA contains an additional forum for liability linked with public offering of securities or debt instruments.

In this context, it is worth mentioning that the question of arbitration of trust disputes should be worth scrutinising, in particular in view of the discretion of such proceedings.<sup>84</sup>

As regards the law applicable to trusts, Article 149c(1) of the SPILA refers to the provisions of the Hague Trusts Convention, whose Articles 6 and 7 shall apply in this regard. Article 149c(2) further extends the application of the Hague Trusts Convention to cases where, pursuant to Article 13 of the Hague Trusts Convention, Switzerland would have the ability to deny recognition to trusts and where, in application of Article 5 of the Hague Trusts Convention, the Convention would in principle not be applicable.

The extension provided for as regards Article 13 of the Hague Trusts Convention makes it clear that Switzerland shall not deny recognition to a trust on the basis that its main elements would be connected to a non-trust State.<sup>85</sup> In view of the private international law solutions prevailing with regards to companies,<sup>86</sup> the application of Article 13 of the Hague Trusts Convention by Swiss authorities would have led to the undesirable result that recognition would have been denied to trusts that would have been recognised under the former system.<sup>87</sup> During the consultation procedure, the question of whether trusts whose elements would be linked only to Switzerland ('domestic trusts') should also be recognised was an important point of discussion. In this regard, the first governmental project, issued in 2004, suggested a variant in which the recognition of domestic trusts would not be encompassed in the scope of the Convention. This variant, however, was suppressed, mainly because of the fact that Articles 4, 15, 16, and 18 of the Hague Trusts Convention have been considered to be a sufficient protection against the possibility of eluding the application of Swiss law.<sup>88</sup> Consequently, there is no longer any doubt as regards the admissibility of domestic trusts in Switzerland.<sup>89</sup>

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<sup>84</sup> WÜSTERMANN T., 'Arbitration of Trust Disputes', in: *New Developments in International Commercial Arbitration*, MÜLLER C. (ed.), Zurich 2007, pp. 33 *et seq.*; VOGT N.P. (note 18), Nos. 72 *et seq.* *ad* Vor Art. 149a-e SPILA, noting that it could be argued that an arbitration clause contained in the trust deed could be seen as sufficient to bind the beneficiaries, which should take the benefit granted to them with a possible charge. Expressing doubts, GUTZWILLER P.M. (note 18), pp. 166-167.

<sup>85</sup> VOGT N.P. (note 18), Nos. 8-9 *ad* Art. 149c SPILA.

<sup>86</sup> Decision of the Swiss Supreme Court of 17 December 1991 in *Re C. Inc. vs F. Inc., X. and Y.*, ATF 117 II 494; in this decision, the Swiss Supreme Court clearly decided that there was no room for the theory of the fictive registered office.

<sup>87</sup> THÉVENOZ L. (note 42), p. 300.

<sup>88</sup> SWISS FEDERAL COUNCIL (note 73), p. 605; GUTZWILLER P.M. (note 18), p. 171.

<sup>89</sup> PALTZER E.H./SCHMUTZ P. (note 6), p. 304; VOGT N.P. (note 18), Nos. 41-42 *ad* Vor Art. 149a-e SPILA and No. 10 *ad* Art. 149c SPILA.

On the other hand, the application of the Hague Trusts Convention in cases where its Article 5 would in principle render it inapplicable is less understandable and may lead to absurd consequences.<sup>90</sup>

As regards immovable assets (or other registered assets) that are to be placed in a trust, Article 149d of the SPILA provides for a mechanism where the trust relation would be mentioned in the relevant register. Even if such mentioning is not mandatory, its absence shall entail the protection of *bona fide* third parties (Art. 149d(3) of the SPILA).<sup>91</sup> Article 149d does not however deal with the question related to the protection of third parties when unregistered (movable) assets are involved. As a consequence, pursuant to Article 11(3)(d) of the Hague Trusts Convention, such a question is governed by the law designated by the ordinary rules of conflicts. In the event where Swiss law would apply on this matter, Articles 933 and 973 of the Swiss Civil Code (hereinafter: the 'SCC') would govern the protection of *bona fide* third parties.<sup>92</sup>

A further problem that arises in connection with real estate located in Switzerland relates to the rules pertaining to the acquisition of such real estate by foreigners, which generally requires authorisation. As regards trusts, this may entail some serious difficulties in the event that one of the (potential) beneficiaries would not be able to acquire real estate in Switzerland without authorisation and could become entitled to a benefit in a trust related to such real estate. In such a case, there is a strong risk that the inscription of the transfer of title to the trustee would be denied by the competent authority.

Finally, Article 149e of the SPILA relates to the recognition in Switzerland of foreign judgments in trust law related matters, a problem that is not dealt with by the Hague Trusts Convention. This provision contains a self-explanatory list of foreign jurisdictions admitted by Switzerland for recognition purposes. In this context, it should not be forgotten that the relevant provisions of the Lugano Convention (whenever applicable) should take precedence over the rules of Article 149e of the SPILA.<sup>93</sup>

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<sup>90</sup> See further the opinions of GUTZWILLER P.M. (note 18), pp. 169-170 and of VOGT N.P. (note 18), Nos. 3 *et seq.* *ad* Art. 149c SPILA.

<sup>91</sup> On this matter, see the Guidelines regarding the treatment of matters related to trusts issued by the Swiss Federal Office for Land Registry and Land Law on the 29<sup>th</sup> of June 2007, available (in French) at <[http://www.registre-foncier.ch/download/fr/Trust\\_lignes\\_directrices.pdf](http://www.registre-foncier.ch/download/fr/Trust_lignes_directrices.pdf)>.

<sup>92</sup> PERRIN J. (note 1), No. 261. See also VOGT N.P. (note 18), Nos. 18 and 21 *ad* Art. 149d SPILA.

<sup>93</sup> GUTZWILLER P.M. (note 18), p. 179; VOGT N.P. (note 18), Nos. 2 *et seq.* *ad* Art. 149e SPILA.

b) *A Look at the New Provisions of the Swiss Debt Enforcement and Bankruptcy Act*

The primary goal of the new provisions of the SDBA is to ensure the segregation of the trust assets from the trustee's own estate.<sup>94</sup>

Consequently, Article 284a of the SDBA foresees that, as regards the debts for which the assets of a trust are liable,<sup>95</sup> the enforcement proceedings shall be directed against a trustee as the 'representative' of the trust (para. 1),<sup>96</sup> and that they shall be continued by way of bankruptcy,<sup>97</sup> which shall be limited to the trust assets (para. 3). As a matter of principle, the enforcement proceedings have to be initiated at the seat of the trust (as per Art. 21 of the SPILA) or, failing a seat in Switzerland, at the place where the trust is effectively managed (Art. 284a(2) of the SDBA).<sup>98</sup>

Article 284b of the SDBA further protects the trust assets from enforcement proceedings directed against the trustee personally. In the event of the trustee's bankruptcy, the segregation of the trust assets from the trustee's own estate shall occur *ex officio*.<sup>99</sup> Even though it is not expressly foreseen in the SDBA, a similar segregation also occurs when the trustee would not be subject to bankruptcy but to seizure proceedings, pursuant to Articles 2(2)(a) and 11(3)(a) of the Hague Trusts Convention.<sup>100</sup>

### 3. *Recognition of Trusts in Switzerland Today*

Even though the recognition of trusts was to a large extent already ensured under the former Swiss rules of conflicts (in particular through Art. 150 *et seq.* of the

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<sup>94</sup> For further details on this point, see PEYROT A./BARMES M., 'Les trusts et l'exécution forcée en Suisse', in: *Journée 2007 de droit bancaire et financier*, Zurich 2008, pp. 129 *et seq.*

<sup>95</sup> As pointed out by GUTZWILLER P.M. (note 18), p. 182, the question whether a liability has to be borne by the trust or by the trustee personally has to be solved according to the (foreign) law applicable to the trust; see further PEYROT A./BARMES M. (note 94), pp. 132 and 137.

<sup>96</sup> In the event that there would be several trustees, the wording of the provision would enable the creditors to direct the proceedings against one of them; PEYROT A./BARMES M. (note 94), p. 142.

<sup>97</sup> See, critical about the choice to use the bankruptcy way, THÉVENOZ L., 'L'avant-projet suisse de ratification de la convention sur les trusts', in: *Le trust en droit international privé – Perspectives suisses et étrangères – Actes de la 17<sup>ème</sup> journée de droit international privé du 18 mars 2005 à Lausanne*, Geneva etc. 2005, pp. 93 *et seq.*, at pp. 97 *et seq.*

<sup>98</sup> PEYROT A./BARMES M. (note 94), pp. 142-143.

<sup>99</sup> GUTZWILLER P.M. (note 18), p. 187. See also PEYROT A./BARMES M. (note 94), p. 136, considering that this is a direct consequence of the segregation between the trust assets and the trustee's own estate.

<sup>100</sup> VOGT N.P. (note 18), No. 85 *ad Vor* Art. 149a-e SPILA.

SPILA), the entry into force of the Hague Trusts Convention in Switzerland has clearly enhanced the level of legal certainty in this context. The most significant change is, probably, that Switzerland will now recognise trusts as trusts, without any need to translate them into national concepts.

Furthermore, Article 149c of the SPILA's exclusion of the application of Article 13 of the Hague Trusts Convention makes it clear that domestic trusts will be recognised by Swiss authorities, which is a further element favouring legal certainty, and is particularly justified in view of the fact that trusts are often set up for an important period of time, with the result that their elements often move during the existence of the trust.<sup>101</sup>

The other provisions of the Swiss implementing legislation, in particular those regarding debt collection proceedings, also ensure a clear recognition of the segregation between the trust assets and the trustee's own estate.

However, specific legislation was not adopted or introduced in fields similar to trusts, such as the *fiducie*, or to deal with the relations between trusts and matrimonial or succession issues. Even if that probably allowed a quick ratification of the Convention, many problems remain unsolved, in particular concerning the articulation of trusts and other fields of Swiss law.

### C. Elements of Comparison with France and Luxemburg

The private law of both France and Luxemburg is still today governed to a large extent by the *Code Napoléon*, although each of these countries have of course modified and updated this text as well as enacted new laws. In particular, both of these countries have recently introduced in their substantive law the concept of the *fiducie*; however, it is here to be noted that if the Luxemburg structure is quite open-ended, the French is very limited and not available for gratuitous acts.

On the private international law level, neither of these countries have a specific set of provisions dedicated to the conflict of laws, with the result that their private international law is more case law driven than in Switzerland. As regards the recognition of trusts, this is however no longer the case in Luxemburg, which ratified the Hague Trusts Convention, but has driven French courts to deal with trusts by trying to adapt them to French legal concepts.

#### 1. Overview of the Recognition of Trusts in France

Even if French law does not have specific rules regarding the recognition of trusts, French authorities could be described as quite friendly towards them.<sup>102</sup> Even if it was one of the very first non-trust law countries to sign the Hague Trusts Convention, France has not ratified it as of today. As a result, the treatment of trusts in

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<sup>101</sup> THÉVENOZ L. (note 42), p. 298.

<sup>102</sup> BÉRAUDO J.-P./TIRARD J.-M. (note 39), p. 333.

France depends upon the circumstances of each case, and occurs in most of the occurrences without an analysis of the trust construction as a whole, but merely by giving effects to the feature that was important in the case before the court.<sup>103</sup>

The French decisions dealing with trusts have sometimes analysed the trust according to the rules of conflicts relating to contracts, with the result that the principle of autonomy of the parties ('*loi d'autonomie*') could be applied in the particular case.<sup>104</sup> This approach has the advantage of generally submitting the trust relationship to the law according to which the trust was set up and recognising (some of) the effects of the particular trust under such law, even if such treatment cannot be seen as completely satisfactory in view of the unilateral nature of trusts.<sup>105</sup>

In some cases, the French courts had to deal with trusts set up either in a matrimonial or in a succession context and were thus tempted to analyse them in view of their goal, rather than autonomously.<sup>106</sup> Even if such an approach is not perfectly satisfactory, it has generally driven the courts to recognise the main effects of the relevant trust, as shall be seen below with regards to French succession laws.

Further, trusts have also given rise to inconsistent decisions on the question of whether the trustee or the beneficiaries were to be considered as the owner of the trust assets, either in cases of enforcement of debts proceedings or in cases where the question arose about who was entitled to sell trust property.<sup>107</sup>

As can be seen from the above, the recognition of trusts in France is generally quite satisfactory, even if it is not governed by homogeneous rules and therefore allows room for uncertainty. In this regard, the ratification of the Hague Trusts Convention would certainly be an important step in favour of trusts. The argument of the French Government, according to which the Convention should not be ratified failing a comparable institution introduced in French substantive law,<sup>108</sup> has no further relevance because of the introduction of the *fiducie* in the French Civil Code (Art. 2011 *et seq.* FCC) by the law No. 2007-211 of the 19<sup>th</sup> of February 2007,<sup>109</sup> even if the scope of the new *fiducie* is limited, (not allowing *e.g.*

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<sup>103</sup> BÉRAUDO J.-P./TIRARD J.-M. (note 39), p. 333; GODECHOT S. (note 25), pp. 50-51.

<sup>104</sup> See *e.g.* the decision of the Paris Court of Appeal of 10 January 1970, in *Re de Ganay*, in: *Clunet* 1973, p. 207; and the decision of the *Cour de Cassation* of 20 February 1996, in *Re Zieseniss*, in: *Rev. crit. dr. int. pr.* 1996, p. 692.

<sup>105</sup> For further details, see PERRIN J. (note 1), Nos. 274 *et seq.*

<sup>106</sup> For further details, see BÉRAUDO J.-P./TIRARD J.-M. (note 39), pp. 347 *et seq.*; PERRIN J. (note 1), Nos. 278 *et seq.*

<sup>107</sup> See PERRIN J. (note 1), Nos. 287 *et seq.*; see also BÉRAUDO J.-P./TIRARD J.-M. (note 39), pp. 334 *et seq.*, analysing the situation under the view of the recognition of the trustee's powers.

<sup>108</sup> BARRIÈRE F. (note 22), p. 174.

<sup>109</sup> Published in the *Journal Officiel* of 21 February 2007, pp. 3052 *et seq.*, and recently modified by the law No. 2008-776 of the 4<sup>th</sup> of August 2008, which widened the circle of persons allowed to set up a *fiducie*.

gratuitous acts, see Art. 2013 FCC).<sup>110</sup> This notwithstanding, there does not seem to be any current steps taken towards ratification of the Convention by France.<sup>111</sup>

## 2. Overview of the Recognition of Trusts in Luxembourg

Even if the private international law of the Grand Duchy of Luxembourg remains to a large extent uncodified, the situation regarding the treatment of trusts has become much clearer when this country ratified the Hague Trusts Convention (as of the 1<sup>st</sup> of January 2004), pursuant to the law of the 27<sup>th</sup> of July 2003 on Trusts and Fiduciary Contracts (Art. 1 of the law),<sup>112</sup> which also introduced new rules on *fiducie* in Luxembourg law (Art. 4 *et seq.* of the law).

Making use of Article 20 of the Hague Trusts Convention, Luxembourg has extended the scope of the Convention to trusts declared by judicial decisions (Art. 3(3) of the law of 27 July 2003). Luxembourg has also declared that it would not apply Article 16(2) of the Convention (Art. 3(2) of the law).<sup>113</sup>

Consequently, Luxembourg authorities must apply the Hague Trusts Convention to trusts falling within its scope of application. As regards Article 13, even if Luxembourg did not mention anything about its applicability, it shall be noted that Luxembourg should no longer be considered as a non-trust State within the meaning of this provision, given that the *fiducie* introduced by the 27<sup>th</sup> of July 2003 law shall be seen as falling within the scope of Article 2 of the Hague Trusts Convention.<sup>114</sup>

Even if the range of the Hague Trusts Convention has been widened by the Grand Duchy, it cannot be seen as covering every situation in which a trust may arise. As regards trusts not covered by the Convention, it could be admissible in view of Article 14 of the Hague Trusts Convention to also apply the solutions of

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<sup>110</sup> On this law, see the *Dossier* coordinated by BARRIÈRE F., in: *Recueil Dalloz* 2007, pp. 1347 *et seq.* According to WITZ C., 'La fiducie française face aux expériences étrangères et à la convention de La Haye relative au «trust»', in: *Recueil Dalloz* 2007, pp. 1369 *et seq.*, at p. 1374, the French *fiducie* would meet the criteria of Article 2 of the Hague Trusts Convention.

<sup>111</sup> However, it is to be noted that the French Senator Philippe Marini requested the French Minister of Justice to examine the possibility of ratifying the Convention; see written question No. 06210, published in the *Journal Officiel Sénat* of 13 November 2008, p. 2258.

<sup>112</sup> Published in the *Mémorial A* - No. 124 of 3 September 2003, pp. 2619 *et seq.*

<sup>113</sup> Critical on such declaration, see PRÜM A./REVET T./WITZ C., 'La ratification de la Convention de La Haye par le Grand-Duché de Luxembourg', in: *Trust et fiducie – La Convention de La Haye et la nouvelle législation luxembourgeoise*, PRÜM A./WITZ C. (eds.), Paris 2005, pp. 53 *et seq.*, at pp. 60-61.

<sup>114</sup> HAYTON D.J., 'The distinctive characteristics of the Trust in Anglo-Saxon law', in: *Trust et fiducie – La Convention de La Haye et la nouvelle législation luxembourgeoise*, PRÜM A./WITZ C. (eds.), Paris 2005, pp. 1 *et seq.*, at pp. 12 *et seq.*

this treaty, but it cannot be excluded that the courts of Luxemburg would prefer applying other rules.<sup>115</sup>

#### **D. Conclusion on the Recognition of Trusts**

The specific nature of trusts has been the source of many difficulties for civil lawyers attempting to understand them. For many decades, this has driven to the need to translate or adapt trusts into different civil law concepts, often with the intention of giving effects to them, but in a quite unsatisfactory and uncertain way.

The Hague Trusts Convention offers uniform rules for the recognition of trusts, enhancing the legal certainty both in civil and common law jurisdictions. Its ratification by non-trust countries enables them to recognise trusts in a satisfactory manner, without however preventing them from applying mandatory rules in other fields of law. Luxemburg and Switzerland have well understood the importance of enhancing the recognition of trusts and have thus recently ratified the Hague Trusts Convention, becoming attractive jurisdictions for trusts. Even though numerous scholars and some politicians agree that the ratification would also be a step forward in France, this country as yet has not ratified the Convention.

### **III. Relations between Trusts and Continental Succession Laws**

The flexibility of the trust makes it a very useful and effective instrument in estate planning. Consequently, the usage of trusts in a familial context has always been important, in particular within trust jurisdictions. Within the framework of a liberal succession law, such as the laws of England and Wales, such usage did not cause major problems, mainly due to the absence of strict protective provisions in favour of the heirs of the deceased. On the other hand, the confrontation of trusts with continental laws very rapidly gave rise to difficulties in certain areas, especially in succession law.

#### **A. Trusts and Swiss Succession Law**

To study the articulation between trusts and Swiss succession law, it should first be determined when Swiss law applies to succession matters (1); this would allow us to determine whether the construction of the trust could be used in connection with the provisions of Swiss succession law (2). Further, the effects of limitations on the tying up of property (3), of the rules related to inheritance agreements (4), and of the provisions pertaining to forced heirship (5) shall be scrutinised.

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<sup>115</sup> PERRIN J. (note 1), Nos. 308 *et seq.*

## 1. *Applicability of Swiss Succession Law*

In the event that Swiss courts have jurisdiction in succession matters,<sup>116</sup> Article 90(1) of the SPILA provides that, as a matter of principle, Swiss law shall govern the succession of a person having his/her last domicile (within the meaning of Art. 20 of the SPILA) in Switzerland.

However, Article 90(2) enables foreign nationals (who do not have Swiss nationality) to submit their succession to their national law, thus avoiding the application of Swiss law to their estate. This applies even with regards to the mandatory provisions of Swiss inheritance law, such as rules about forced heirship, and without any requirement for such persons to have any real link with the country of their nationality.<sup>117</sup>

Further, Swiss law should not in principle apply as regards real estate located in countries claiming to have exclusive jurisdiction over such real estate (Art. 86(2) of the SPILA).<sup>118</sup>

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<sup>116</sup> Pursuant to Article 86(1) of the SPILA, Swiss authorities shall regard themselves as having jurisdiction over the estate of persons dying with their last domicile in Switzerland. As a matter of principle, this jurisdiction shall extend to all the assets of the estate, wherever located; however, Article 86(2) of the SPILA provides that the exclusive jurisdiction claimed by given countries (such as France or Canada) over real estate located in their territories shall be observed, with the consequence that Swiss authorities shall not deal with such immovable assets. Article 87 of the SPILA further provides for the jurisdiction of Swiss authorities as regards the succession of Swiss citizens living abroad, under given circumstances, whereas Article 88 of the SPILA deals with the jurisdiction of Swiss courts regarding assets located in Switzerland. Finally, Article 89 of the SPILA deals with the jurisdiction of Swiss authorities as regards interim measures.

<sup>117</sup> In this regard, it is worth mentioning that the *professio juris* can even occur implicitly, case law and scholars considering it to be sufficient for the testator's will to appear unambiguously, e.g. through the use of a specific institution of his/her national law; see the Decision of the Swiss Supreme Court of 3 September 1998 in *Re B. vs A.*, ATF 125 III 35, para. 3c. Further, the fact that the *professio juris* leads to inapplicability of the provisions regarding compulsory shares and thus to the failure to protect the heirs has been considered by the Swiss Supreme Court (albeit under the former law) not to be contrary to Swiss public policy (see the Decision of the Swiss Supreme Court of 17 August 1976 in *Re Hirsch vs Cohen*, ATF 102 II 136, para. 4; WILHELM C./PERRIN J., 'Le trust et le droit suisse des successions internationales – Utilisation multiple d'une institution juridique étrangère', in: *L'Expert-comptable Suisse* 9/2006, pp. 683 et seq., at p. 684). It should be underlined that the possibility to submit one's succession to one's national law exists only for foreign citizens that do not have (and do not acquire until death) Swiss nationality (see e.g. CHAPPUIS B., 'L'utilisation de véhicules successoraux dans un contexte international et la lésion de la réserve héréditaire', in: *Semaine Judiciaire* 2005 II 37 et seq., at pp. 50-51). On the other hand, in the event that a testator has various foreign nationalities, he/she would be entitled to choose freely among them, without the need to have an effective link to the country in question (see the Decision of the Swiss Supreme Court of 17 August 1976 in *Re Hirsch vs Cohen*, ATF 102 II 136, para. 3a).

<sup>118</sup> In such cases, even if the solution is not clear, several scholars express the view that even though Swiss courts do not have jurisdiction over such real estate, they should take



Lastly, in the event that Swiss authorities have jurisdiction pursuant to Article 87 of the SPILA, Article 91(2) provides, as a matter of principle, for the application of Swiss law.<sup>119</sup>

## 2. *Availability of the Trust Structure*

As has been seen above, Swiss conflicts rules in succession matters are mainly based on the criterion of the last domicile of the deceased. In view of the ever increasing mobility of persons, it is therefore possible that a person whose succession will be governed by Swiss law has set up a trust during his/her lifetime or wishes to set up such a trust by will. Given that the question of admissibility of *inter vivos* trusts has to be treated differently from the question of the admissibility of *mortis causa* trusts, where specific problems may arise due to the application of Article 4 of the Hague Trusts Convention, it is first necessary to distinguish between these two categories from the standpoint of Swiss succession law.

### a) *Distinction between inter vivos and mortis causa Trusts in the Eyes of Swiss Succession Law*

The flexibility of the trust structure can lead to difficulties concerning its qualification under Swiss succession laws. Indeed, if it seems clear that a trust set up during the settlor's lifetime, without any possibility for him/her to revoke it or to benefit from such structure, would be qualified as an *inter vivos* act and a trust established by will would be qualified as a testamentary act, there are also many variants between these two opposites, where the qualification issue could appear to raise more difficulties.

However, it is our opinion that the fulfilment of a formal criterion should suffice to entail the *inter vivos* qualification of a trust; indeed, as soon as the settlor's estate is modified by the establishment of a trust during his/her lifetime, the trust should be qualified as an *inter vivos* settlement.<sup>120</sup> In this context, the mere fact that the settlor is to be one of the beneficiaries of the trust or retains certain rights or powers, such as the ability to revoke the trust, should not alter the fact that the settlor's estate is modified during his/her lifetime, with the result that the trust shall become independent and thus be qualified as an *inter vivos* act. However, the cases where the trust structure is abused to create a 'sham' trust will, of course, be treated differently.<sup>121</sup> In conclusion, only a trust that would have no effect what-

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into account the way such real estate is dealt with abroad as regards the division of the (remaining) assets submitted to Swiss jurisdiction; see e.g. DUTOIT B., *Droit international privé Suisse – Commentaire de la loi fédérale du 18 décembre 1987*, 4<sup>th</sup> ed., Basle etc. 2005, No. 4 ad Article 86 SPILA.

<sup>119</sup> See PERRIN J. (note 1), No. 462.

<sup>120</sup> PERRIN J. (note 1), Nos. 466 *et seq.*

<sup>121</sup> PERRIN J. (note 1), No. 471.

soever over the settlor's patrimony during his/her lifetime shall be deemed – in the eyes of Swiss succession law – to be a *mortis causa* trust.<sup>122</sup>

b) *Admissibility of inter vivos Trusts*

In view of the Hague Trusts Convention's effectivity and implementing legislation in Switzerland, there is no longer any room for uncertainty as regards the availability of an *inter vivos* trust as an option in estate planning from a Swiss perspective. In this regard, the mere fact that Swiss law may govern the settlor's succession should not impact on the availability of this option during the settlor's lifetime, since Article 4 of the Hague Trusts Convention would not entail the application of Swiss succession law to the act that transfers the assets to the trustee.

On the other hand, given that Article 15 of the Hague Trusts Convention preserves the application of the mandatory rules of the law applicable to the settlor's succession, it is clear that the relevant provisions of that law may be decisive in given circumstances. This is particularly true for forced heirship rights and could limit the effectiveness of a trust structure, as shall be seen below.

c) *Admissibility of mortis causa Trusts*

Even though trusts are not specifically testamentary acts, they may also be set up by will. In the event that a trust only produces its effects upon the death of the settlor, the law applicable to the succession shall determine whether or not the establishment of such a structure is admissible (Art. 4 of the Hague Trusts Convention and 92(1) of the SPILA).<sup>123</sup> In the event that the succession of the settlor is governed by the law of a trust State and the relevant assets are in a jurisdiction that allows a property transfer through a trust, no particular problems should arise; on the other hand, in the event that the succession is governed by the law of a non-trust State (such as Swiss law), difficulties can occur.

Under Swiss succession law, scholars generally consider that possible testamentary dispositions are exhaustively listed in the Swiss Civil Code, with the result that it is not possible to admit other *mortis causa* dispositions.<sup>124</sup> Given the fact that trusts are unknown under Swiss substantive (succession) law, this has led several authors to express the opinion that it would be impossible to establish a testamentary trust within the framework of a succession governed by Swiss law.<sup>125</sup>

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<sup>122</sup> PERRIN J. (note 1), No. 471.

<sup>123</sup> PERRIN J. (note 1), Nos. 482 *et seq.*

<sup>124</sup> See *e.g.* PIOTET P., *Traité de droit privé suisse IV: Droit successoral*, Fribourg 1975, pp. 77 *et seq.*

<sup>125</sup> SCHÖMMER H.-P./BÜRGI U., *Internationales Erbrecht – Schweiz*, Munich 2006, No. 899; SELER M., *Trust und Treuhand im schweizerischen Recht – unter besonderer Berücksichtigung der Rechtsstellung des Trustees*, Ph.D. study Zurich 2005, p. 96; THÉVENOZ L. (note 42), p. 215.

In this context, it should however be noted that the *numerus clausus* of testamentary dispositions is aimed at limiting only dispositions that are exclusively successorial (such as the naming of an heir, the legacy, or disinheriting a potential heir); on the other hand, acts made by will that are not only successorial (such as the creation of a foundation) should not be seen as limited.<sup>126</sup> Indeed, as for foundations, trusts can be set up (unilaterally) either by an *inter vivos* act or by will, and their structure will then be recognised regardless of the way they were created.<sup>127</sup>

Given that trusts are not exclusively *mortis causa* acts, establishing them by will under Swiss succession law should not, in the author's opinion, be prevented by the *numerus clausus* of testamentary dispositions.<sup>128</sup> In such cases, Swiss succession law would apply to the act that transfers the assets to the trustee (Art. 4 of the Hague Trusts Convention). This act should also comply with the *numerus clausus* and take the form of naming of an heir, a legacy, or another permitted act, such as for the transfer to a foundation or like entity. Once the assets are validly transferred to the trustee, the law applicable to the trust would govern the trust issues.<sup>129</sup>

It should be mentioned that the formal requirements of Swiss succession law would apply to the creation of testamentary trusts, with the consequence that it would be very difficult for secret trust structures to be admitted.<sup>130</sup>

### **3. Trusts and the Limits on the Tying Up of Property**

Trusts can be used to achieve results similar to those of family foundations or *fidéicommissum* ('*substitution fidéicommissaire*'), according to which the testator can impose onto an heir the duty of holding assets during his/her own lifetime and transferring those assets to another person. Given that Swiss law has strongly limited the use and duration of both these constructions (Art. 335 and 488 of the SCC), the question arises whether or not such limitations would also apply to trusts.

In our opinion, the scope of such rules should be limited to the constructions they are focused on and should not be extended to trusts, whose structure is entirely different.<sup>131</sup> Consequently, the application of such limitations to trusts can

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<sup>126</sup> MAYER T., 'Das Haager-Trust Übereinkommen – Auswirkungen und Vorteile einer Ratifikation aus rechtlicher Sicht', in: *Pratique juridique actuelle* 2004, pp. 156 *et seq.*, at p. 161; PERRIN J. (note 1), No. 490.

<sup>127</sup> PERRIN J. (note 1), No. 491.

<sup>128</sup> See also MAYER T. (note 126), p. 161. As suggested by this author, even if it were to be admitted that the *numerus clausus* applies to acts that are not exclusively successorial, Article 493 of the SCC (enabling the establishment of a foundation by will) should be interpreted broadly as also permitting the creation of foreign legal structures.

<sup>129</sup> PERRIN J. (note 1), No. 491.

<sup>130</sup> PERRIN J. (note 1), No. 487.

<sup>131</sup> LAPORTE C., *La titrisation d'actifs en Suisse (Asset-Backed Securitisation)*, Ph.D. study Geneva 2005, p. 179.

only be made indirectly, provided they would be considered as the expression of a general rule of Swiss public policy prohibiting wealth from being tied up to a family for an indefinite (or long) duration. This application seems nowadays to be highly dubious.<sup>132</sup>

In any event, such a question would arise only in the event that the trust structure under consideration would not be limited by a rule against perpetuities contained in the law applicable to the trust. Indeed, presuming that a trust law includes a rule against perpetuities that applies to trusts, such rule should be seen as sufficient to limit a trust's duration in a manner compatible with the objectives pursued by Articles 335 and 488 of the SCC.<sup>133</sup>

#### 4. *Trusts and Inheritance Agreements*

As seen above, continental courts have often considered trusts in a contractual context. In the event that Swiss law would be applicable to the succession of the settlor, the question arises of whether a trust that would be effective on the settlor's death must meet the requirements pertaining to the validity of inheritance agreements ('*pactes successoraux*').

However, given the unilateral character of trusts, there should be no need to establish them by way of an inheritance agreement, even in the case of purely testamentary trusts, which would be effective only upon the settlor's death; on the other hand, the use of an inheritance agreement to set up a trust should be perfectly possible.<sup>134</sup>

#### 5. *Trusts and Forced Heirship*

Probably the most important point regarding the articulation between trusts and Swiss succession law is that of the forced heirship rights (compulsory share) of the settlor's heirs. Indeed, within the context of estate planning, trusts are usually established without the settlor receiving any consideration in exchange for the property placed into the trust; this may result in the disappointment of some of his/her heirs.

The purpose of the present section is to determine to what extent the creation of a trust could be subject to claw-back ('*réduction*'), as the application of

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<sup>132</sup> SUPINO P.P., *Rechtsgestaltung mit Trust aus Schweizer Sicht*, Ph.D. study St-Gallen 1994, pp. 109-110; THORENS J., 'L'article 335 CCS et le trust de common law', in: *Mélanges H.-R. Schüpbach*, BOLLE P.-H. (ed.), Basle etc. 2000, pp. 155 *et seq.*, at pp. 164-165; VOGT N.P. (note 18), No. 96 *ad Vor Art.* 149a-e SPILA. See also the SWISS FEDERAL COUNCIL (note 73), p. 593.

<sup>133</sup> THORENS J. (note 132), p. 161; VOGT N.P. (note 18), Nos. 62 and 95 *ad Vor Art.* 149a-e SPILA.

<sup>134</sup> PERRIN J. (note 1), No. 500.

## *Recognition of Trusts and Their Use in Estate Planning*

rules regarding forced heirship is expressly reserved by Article 15(1)(c) of the Hague Trusts Convention.<sup>135</sup>

In this regard, testamentary and *inter vivos* trusts shall be compared (a), some procedural issues shall then be scrutinised (b), and finally the question of the heirs' right to information shall be examined (c).

### *a) Testamentary Trusts vs Inter Vivos trusts*

Faced with a testamentary disposition that tries to establish a trust, the heirs would generally be in a comfortable situation. They should, in principle, be in a position to invoke their protected rights against the trustee (Art. 522 of the SCC).<sup>136</sup> Indeed, under Swiss succession law, the assets of the deceased vest automatically (through operation of law, see Art. 560 of the SCC) into the heirs at the time of the death, with the result that it would generally be necessary for the trustee to request delivery of the assets intended to be put into the trust before the trust could come into existence.

Even if heirs are listed as the beneficiaries of a trust structure, it should not prevent them from opposing the establishment of such trust to the extent it would exceed the freely disposable share, since it is accepted that they should receive their compulsory share free of all charges.<sup>137</sup>

On the other hand, *inter vivos* trusts create a situation where the trust assets are already in the hands of the trustee or beneficiaries at the time of the settlor's death, since they are established during the settlor's lifetime. In such a case, the heirs' attempts to recover their compulsory share may be more complicated, even if Swiss succession law also protects them against *inter vivos* acts infringing upon their compulsory share.

Indeed, Article 527 of the SCC allows the heirs to request the claw-back of given donations made by the deceased during his/her lifetime, to the extent such gifts infringe upon their compulsory share. In particular, gifts made in favour of some of the heirs as advances on their succession rights, provided that they are not brought back by the heirs into the estate (Art. 527(1) of the SCC), the gifts made to heirs in exchange for relinquishing any or all of their succession rights (Art. 527(2) of the SCC), revocable gifts or gifts made within five years prior to death (Art. 527(3) of the SCC), and gifts made with the intention of depriving the heirs of their compulsory share (Art. 527(4) of the SCC) shall be subject to possible claims by disgruntled heirs.

Consequently, in the event that the creation of a trust falls within one of these categories, it could be subject to the attacks of the settlor's heirs to enforce their forced heirship rights. In practice, the most important cases of application with regards to trusts should be those foreseen under Article 527(3-4) of the SCC.

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<sup>135</sup> KÜNZLE H.R., 'Einleitung', in: *Praxiskommentar Erbrecht*, Basle 2007, No. 51.

<sup>136</sup> PERRIN J. (note 1), No. 512.

<sup>137</sup> PERRIN J. (note 1), No. 511.

Pursuant to Article 527(3) of the SCC, gifts made by the deceased where he/she either (1) reserved the right to revoke it during his/her lifetime or (2) made it within five years of his/her death are subject to claw-back. Even if Article 527(3) of the SCC uses the term ‘gifts’, which could lead to the conclusion that only bilateral acts would be encompassed within its scope of application, it is accepted that it also applies to unilateral acts, such as the creation of a foundation (Art. 82 of the SCC) or of a trust structure.<sup>138</sup>

As regards the transfer of assets made with the intention of depriving the heirs of their compulsory share, Article 527(4) of the SCC provides that it shall be subject to claw-back without any time limitation. This provision, broader in scope than Article 527(3), is clearly applicable to trusts that would have been set up with the intention of the settlor to deprive his/her heirs of their forced heirship rights.<sup>139</sup> In this regard, it should be noted that Article 527(4) might apply as soon as the settlor contemplates the possibility that an heir’s compulsory share would, everything proceeding normally, be infringed and accepted such possibility (*dolus eventualis*).<sup>140</sup> According to case law, it is at the moment when the transfer is made that the intention of the settlor is to be examined.<sup>141</sup> Consequently, where the transfer occurs at a time when the settlor does not have any presumptive heir or when he/she is domiciled in a country where the succession law does not contain any protective provisions (provided that there was no indication that the circumstances would change), it would be difficult to conclude that he/she had the intention of infringing the rules on the compulsory share.<sup>142</sup>

Some scholars have argued that the fact that the settlor would have retained important rights or powers over the trust fund would mean that there was the intent to deprive one’s heirs from their forced heirship rights.<sup>143</sup> In our opinion, however, even if such a reservation of powers over the trust is viewed as an indicator of the settlor’s intent to circumvent an heir’s forced heirship claims, that fact alone should not be sufficient *per se*, particularly when the structure created serves other goals, such as the protection of the family wealth.<sup>144</sup> Further, it is to be recalled that in the event that the settlor has a power to revoke the trust, such a trust would in any event be subject to claw-back pursuant to Article 527(3) of the SCC, irrespec-

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<sup>138</sup> EITEL P., *Die Berücksichtigung lebzeitiger Zuwendungen im Erbrecht – Objekte und Subjekte von Ausgleichung und Herbasetzung*, P.D. study, Berne 1998, p. 457; PERRIN J. (note 1), No. 516; THÉVENOZ L. (note 42), p. 219, at fn. 129.

<sup>139</sup> THÉVENOZ L. (note 42), p. 219.

<sup>140</sup> Decision of the Swiss Supreme Court of 14 June 2002 in *Re B. vs K.*, ATF 128 III 314, para. 4; PIOTET P. (note 124), p. 413.

<sup>141</sup> Decision of the Swiss Supreme Court of 14 June 2002 in *Re B. vs K.*, ATF 128 III 314, para. 4.

<sup>142</sup> PERRIN J. (note 1), No. 517.

<sup>143</sup> SUPINO P.P. (note 132), p. 114; THÉVENOZ L. (note 42), p. 219.

<sup>144</sup> PERRIN J. (note 1), No. 517.

tive of any intention of the settlor to deprive his/her heirs of their forced heirship rights.<sup>145</sup>

In the event an *inter vivos* trust is subject to claw-back, Article 528 of the SCC limits the restitution duty of a good faith beneficiary to the value of his/her enrichment at the date of the settlor's death. Further details about this provision shall be given under the analysis of procedural issues (b).

In comparing an heir's ability to challenge both *inter vivos* and *mortis causa* trusts, it seems to be easier for an heir to challenge the *mortis causa* act, given that the trust structure would not yet exist in such a case. This is further reinforced by the fact that Article 532 of the SCC foresees that claw-back must be directed first towards *mortis causa* acts, and that *inter vivos* settlements should only be challenged in the event that the reduction of the testamentary acts would not be sufficient for the heirs to recover their compulsory share.<sup>146</sup>

In this context, it is worth reminding the reader that a foreign citizen domiciled in Switzerland would be entitled to avoid the application of these Swiss provisions by making a choice of law in favour of the succession laws of the country of his/her nationality; furthermore, Swiss case law would not consider the fact that such choice leads to the absence of protection of the heirs to be contrary to Swiss public policy.<sup>147</sup>

*b) Procedural Issues: Capacity to Sue and to Be Sued*

As a matter of principle, an heir deprived of his/her forced heirship rights would be in a position (if he/she so wishes) to file a claw-back claim ('*action en réduction*') against the person who has benefited from the generosity of the deceased.<sup>148</sup>

Confronted with testamentary dispositions, the disgruntled heir would of course be entitled to a claw-back claim directed against the person who should receive assets according to the deceased's will; however, since in such a case the assets subject to the testamentary disposition should normally be part of the deceased's estate, such heir could also simply interject an exception to the request for delivery of the assets. In the case of a testamentary trust, the trustee only would be in a position to request the delivery of the assets to be put into trust; consequently, the disgruntled heir would in such a case interject an exception to the request for delivery by the trustee, based upon the infringement of his/her compulsory share.<sup>149</sup>

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<sup>145</sup> PERRIN J. (note 1), No. 517.

<sup>146</sup> PERRIN J. (note 1), No. 520.

<sup>147</sup> See the decision of the Swiss Supreme Court of 17 August 1976 in *Re Hirsch vs Cohen*, ATF 102 II 136, para. 4 (rendered before the entry into force of the SPILA); and PERRIN J. (note 1), No. 522.

<sup>148</sup> GUINAND J./STETTLER M./LEUBA A., *Droit des successions*, 6<sup>th</sup> ed., Zurich 2005, No. 150.

<sup>149</sup> PERRIN J. (note 1), No. 524.

As regards *inter vivos* settlements, the recovery of the assets from the person benefiting from the deceased's generosity is only possible if the heir also files a claim in restitution of the assets subject to claw-back.<sup>150</sup> In the case of trusts, since the claw-back claim must be directed against the persons to whom rights were transferred by the deceased, it shall be directed against both the trustee and against the beneficiaries for assets still held upon trust, to the extent that the beneficiaries would be entitled to fixed rights on the trust assets.<sup>151</sup> Indeed, failing a specific provision stating the contrary, it would not be sufficient to act only against the trustee, except in the event of a trust where the beneficiaries would not have fixed rights or where it would be impossible for the heirs to know the beneficiaries.<sup>152</sup> As regards assets already distributed, the beneficiaries should be sued. In this vein, it should be mentioned that Article 528 of the SCC generally protects the trustee regarding distributions that have already been made to the beneficiaries, since the trustee is no longer enriched in such cases, an exception however being made in case of the trustee's bad faith.<sup>153</sup>

c) *Right to Information of the Heirs*

One of the major problems for heirs confronted with trust structures is the difficulty they may have in obtaining information about those trusts and the assets contained therein.

Indeed, once the trust has been put into place, the assets are transferred into the hands of the trustee and removed from the settlor's patrimony. The settlor's heirs, in the event they are not beneficiaries of the trust, are generally not entitled to any information from the trustee under the applicable trust law. As a matter of principle, the majority of the trust laws would even consider that the trustee would be under a duty not to disclose any information to the heirs, since this would endanger the trust itself.<sup>154</sup>

Under Swiss succession law, the heirs are automatically entitled to all the rights to which the deceased was entitled and that are not extinguished through death (Art. 560 of the SCC), including the possible right to information that the deceased would have been entitled to from a third party depository.<sup>155</sup> In this regard, it is generally accepted that the heirs are entitled to information from the bank regarding transactions that have occurred in the ten years prior to the settlor's death.<sup>156</sup>

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<sup>150</sup> STEINAUER P.-H., *Le droit des successions*, Berne 2006, p. 406.

<sup>151</sup> PERRIN J. (note 1), No. 525.

<sup>152</sup> PERRIN J. (note 1), No. 525.

<sup>153</sup> PERRIN J. (note 1), No. 526.

<sup>154</sup> THÉVENOZ L. (note 42), p. 224.

<sup>155</sup> CHAPPUIS B. (note 117), pp. 54-55.

<sup>156</sup> LOMBARDINI C., *Droit bancaire suisse*, Zurich etc. 2002, p. 642.



## *Recognition of Trusts and Their Use in Estate Planning*

As regards *inter vivos* trusts, the situation can be quite complicated. Even though the heirs shall in all likelihood be able to obtain information about the transfer of assets from the settlor to the trustee, provided that such transfer occurred within ten years prior to the settlor's death, their right to obtain information about the account opened in the name of a trustee is less certain. Indeed, after the trust has been established, the settlor generally loses all rights with regards to the trust assets; in particular, the settlor should not be entitled to any information from the bank where the trust assets are deposited, since he/she will be a third party to the banking relationship, regardless of whether he/she is a beneficiary of the trust.<sup>157</sup> Indeed, given that the beneficial owner concept under Swiss banking law and practice is of a purely administrative nature, the beneficial owner of a bank account is considered a third party to the banking relationship, with the result being that he/she is not be entitled to obtain any information from the bank.<sup>158</sup> As a consequence, the settlor cannot transmit any right whatsoever to his/her heirs in relation to information about the trust assets.

However, case law and scholars believe that there is some room for manoeuvre when the settlor was the beneficial owner of the account (*i.e.* the beneficiary of the structure) during his/her lifetime, even though the settlor would not have been personally entitled to any information.

In this matter, Geneva case law, which is to a very large extent unpublished, has given rise to comments and articles by scholars, which has allowed for some decisions to be revealed.<sup>159</sup> Despite the fact that bank secrecy is generally very difficult to overturn in private law matters under Geneva procedural law (as opposed to criminal proceedings),<sup>160</sup> the Geneva Court of Justice considers that information must be provided by the bank to the heirs of the deceased if (1) the bank was aware that the settlor was a beneficial owner of the structure, (2) the heirs bring sufficient evidence showing that succession assets are in the structure and (3) that their forced heirship rights are likely to be breached by such a construction.<sup>161</sup>

When these requirements are met, the bank must provide the heirs with information not only about the balance of the account at the time of the settlor's death, but also the bank statements of the last ten years, including the names of the persons who benefited from transfers out of the account.<sup>162</sup>

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<sup>157</sup> CHAPPUIS B. (note 117), pp. 59-60; LOMBARDINI C. (note 156), p. 137.

<sup>158</sup> Decision of the Swiss Supreme Court of 1 July 1974 in *Re FLN*, ATF 100 II 200, para. 8; decision of the Swiss Supreme Court of 23 July 2002 in *Re X. SA vs Y. SA*, Case No. 4C.108/2002, para. 3c; STANISLAS G., 'Ayant droit économique et droit civil: Le devoir de renseignements de la banque', in: *Semaine Judiciaire* 1999 II 413 *et seq.*, at p. 428.

<sup>159</sup> CHAPPUIS B. (note 117), pp. 55 *et seq.*; STANISLAS G. (note 158), pp. 441-442.

<sup>160</sup> BERTOSSA B./GAILLARD L./GUYET J./SCHMIDT A., *Commentaire de la loi de procédure civile genevoise*, No. 3 *ad* Art. 227 LPC.

<sup>161</sup> See the different decisions of the Geneva Court of Justice (and relevant commentaries by scholars) quoted under footnotes 1265 and 1267 of PERRIN J. (note 1), No. 530.

<sup>162</sup> CHAPPUIS B. (note 117), pp. 56-57; STANISLAS G. (note 158), pp. 452 *et seq.*

Even though these court decisions have been the object of some criticism, it currently seems accepted by the majority of scholars that information must be provided to the heirs of the settlor in the event they make it plausible that their compulsory share has been violated and that the settlor was beneficial owner of the account.

In the event that the settlor would not have had any beneficial entitlement to the assets, the situation should in principle be treated the same as the case of a third party to the account, with the consequence that no information should be provided to the heirs.<sup>163</sup> In this context, the settlor's power to revoke the trust shall not modify the solution.<sup>164</sup>

As regards other cantons, we are not aware of many (published or reported) decisions in this context.<sup>165</sup> However, it should be mentioned that some procedural laws, such as the law of the Canton of Vaud, seem less reluctant to uphold banking secrecy in civil matters,<sup>166</sup> the result being that it seems likely that information shall at least be provided in the same circumstances as under Geneva case law.

In relation to the settlor's heirs' right to information, it should be mentioned that the procedure leading to the establishment of a provisional inventory ('*inventaire conservatoire*' – Art. 553 of the SCC) as well as the procedure known as 'subject to inventory' ('*bénéfice d'inventaire*' – Art. 580 *et seq.* of the SCC) should in principle not give the heirs sufficient means to require information with regards to trust assets. Indeed, the measure provided for under Article 553 of the SCC extends only to assets held by the deceased at the time of his/her death, but not to gratuitous acts made during his/her lifetime,<sup>167</sup> whereas the measure provided for under Articles 580 *et seq.* of the SCC, even though covering *inter vivos* acts,<sup>168</sup> does not encompass assets that were not held in the name of the deceased.<sup>169</sup>

In conclusion, the heirs will often encounter some difficulty in obtaining information about *inter vivos* settlements of the deceased, even when case law would give them a right to information.<sup>170</sup>

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<sup>163</sup> STANISLAS G. (note 158), p. 442 and the two quoted decisions.

<sup>164</sup> Decision of the Swiss Supreme Court of 4 August 1994, Case No. 4C.470/1994, quoted by AUBERT M./HAISLY B./TERRACINA J., 'Responsabilité des banques suisses à l'égard des héritiers', in: *Revue suisse de jurisprudence* 1996, pp. 137 *et seq.*, at p. 140.

<sup>165</sup> See however the Decision of the Ticino Court of Appeal of 27 September 2002 (12.2002.00090).

<sup>166</sup> Decision of the Appeal Chamber of the Cantonal Tribunal of Vaud of 16 April 1998 in *Re Philippe Mayor*, in: *Journal des Tribunaux* 1998 III 66.

<sup>167</sup> Decision of the Swiss Supreme Court of 16 July 1992 in *Re F. Treuhand*, ATF 118 II 264, para. 4b.

<sup>168</sup> Decision of the Swiss Supreme Court of 14 August 1992, Case No. 5P.104/1992, in: *Pratique juridique actuelle* 1996, pp. 730 *et seq.*

<sup>169</sup> PERRIN J. (note 1), No. 534.

<sup>170</sup> MORIN A., 'Les devoirs des tiers de renseigner les héritiers sur le patrimoine du défunt', in: *Mélanges publiés par l'Association des Notaires Vaudois à l'occasion de son centenaire*, BIANCHI F. (ed.), Zurich 2005, pp. 91 *et seq.*, at pp. 98 *et seq.*

Despite Professor Thévenoz's proposal to enact a specific legal provision regarding the right of the settlor's heirs to obtain information,<sup>171</sup> the Swiss implementing legislation to the Hague Trusts Convention does not include any rule in this regard, and it is apparently not anticipated to enact such a provision.<sup>172</sup>

## **B. Elements of Comparison with French and Luxemburg Succession Laws**

Both French and Luxemburg conflicts rules make a distinction between the succession over immovable assets and the succession over movable assets, submitting the former to the *lex rei sitae* and the latter to the law of the deceased's last domicile.<sup>173</sup>

As regards international successions, both French and Luxemburg laws have a peculiarity: they protect the succession share of French/Luxemburg heirs under French/Luxemburg law over all the assets, wherever located. In the event that a national heir should not receive abroad the share that he/she should have received under the national law, he/she shall be entitled to take in France/Luxemburg a corresponding amount of assets, in order for him/her to get globally what was to be received in the event that the national law would apply to the whole succession ('*droit de prélèvement*').<sup>174</sup>

As regards the distinction between *inter vivos* and *mortis causa* trusts, the application of French or Luxemburg law fundamentally leads to the application of similar criteria as provided for under Swiss law, the result being that only trusts without any effect during the settlor's lifetime will be considered as testamentary trusts.<sup>175</sup> In a similar way to what happens under Swiss succession law, it is more problematic to establish a testamentary trust in French or Luxemburg law that it is to create an *inter vivos* trust.<sup>176</sup>

As under Swiss law, the limits regarding the tying up of property do not seem to be directly applicable to trusts and therefore should not create any obstacles to such settlements.<sup>177</sup> However, it cannot be totally excluded (especially

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<sup>171</sup> THÉVENOZ L. (note 42), pp. 224-225.

<sup>172</sup> SWISS FEDERAL COUNCIL (note 73), p. 593.

<sup>173</sup> For French law, see *e.g.* LOUSSOUARN Y./BOUREL P./DE VAREILLES-SOMMIÈRES P., *Droit international privé*, 9<sup>th</sup> ed., Paris 2007, Nos. 429-430. For Luxemburg law, see SCHOCKWEILER F., *Les conflits de lois et les conflits de juridictions en droit international privé luxembourgeois*, 2<sup>nd</sup> ed. by WIWINIUS J.-CL., Luxemburg 1996, pp. 104 *et seq.*

<sup>174</sup> In France, such peculiarity is provided for by the law of 14 July 1819; see *e.g.* BOULANGER F., *Droit international des successions – Nouvelles approches comparatives et jurisprudentielles*, Paris 2004, pp. 39 *et seq.* In Luxemburg, a similar solution is provided for by the law of 29 February 1872; see SCHOCKWEILER F. (note 173), p. 105.

<sup>175</sup> See *e.g.* the decision of the French Cour de cassation of 20 February 1996 in *Re Zieseniss*, in: *Rev. crit. dr. int. pr.* 1996, p. 692.

<sup>176</sup> PERRIN J. (note 1), Nos. 554 *et seq.* (France) and 589 (Luxemburg).

<sup>177</sup> GODECHOT S. (note 25), p. 184.

for France which has not ratified the Hague Trusts Convention) that some courts would consider a trust to infringe upon such limits and thus to declare it void, in particular where it would not be governed by a law containing a rule against perpetuities.<sup>178</sup>

Under the French and Luxemburg succession regimes, a specific problem may arise in relation to Articles 906 and 911 of their respective Civil Codes. Pursuant to the first of these two provisions, the person benefiting from a gratuitous act must be alive (or at least conceived) at the time of the act. Even though it has been argued that such a provision would not allow the recognition of trusts having unborn beneficiaries, it seems to be now admitted that Article 906 of the French/Luxemburg Civil Code is not infringed when a trust structure enters into play, given that the assets are in the hand of the trustee and not deprived of any owner<sup>179</sup>. On the other hand, the rule contained in Article 911 of the French/Luxemburg Civil Code, prohibiting a benefit from being bestowed upon a person otherwise unable to benefit through the interposition of another person, could potentially apply to trusts.<sup>180</sup> In France, this could lead to some problems,<sup>181</sup> whereas in Luxemburg, in view of the application of the Hague Trusts Convention, this limitation should not apply to trusts falling within the scope of the Convention.<sup>182</sup>

In view of the fact that a trust is established unilaterally, the general prohibition contained both in French and Luxemburg law regarding inheritance agreements (Art. 1130 of both the FCC and LCC<sup>183</sup>) is not a direct obstacle to trusts. On the other hand, it prevents trusts from being set up by way of (prohibited) inheritance agreements; it is to be noted that in such a case, it shall not be the trust itself that would fall under the prohibition, but rather the preliminary act establishing the trust.<sup>184</sup>

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<sup>178</sup> See the decision of the Civil Tribunal of the Seine of 9 March 1895, in: *Clunet* 1895, p. 628.

<sup>179</sup> GORÉ M., *L'administration des successions en droit international privé français*, Paris 1994, p. 72; GODECHOT S. (note 25), p. 184. See however HÉRON J., *Le morcellement des successions internationales*, Paris 1986, p. 141. Belgian case law (as regards a similar provision) also admits such solution, see the decision of the Civil Tribunal of Brussels of 27 November 1947 in *Re Evans vs Evans*, in: *Pasicrisie Belge* 1948 III 51.

<sup>180</sup> GRIMALDI M., *Droit civil – Libéralités, Partages d'ascendants*, Paris 2000, p. 92.

<sup>181</sup> PERRIN J. (note 1), No. 571.

<sup>182</sup> PERRIN J. (note 1), No. 595. This solution is based on the fact that Article 911 of the LCC shall not be encompassed in the scope of either Article 4 or Article 15 of the HTC.

<sup>183</sup> Even though the law of 23 June 2006 has made room for certain inheritance agreements under French law, thus amending the text of Article 1130 of the FCC, they remain prohibited as a matter of principle; see FAVIER Y., 'Le principe de la prohibition des pactes successoraux en droit français', in: *Les pactes successoraux en droit comparé et en droit international privé*, BONOMI A./STEINER M. (ed.), Geneva 2008, pp. 29 *et seq.*

<sup>184</sup> PERRIN J. (note 1), Nos. 566 *et seq.* (France) and 592 (Luxemburg).

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As regards the protection of forced heirship rights, the situation in France and Luxemburg is to a large extent similar to the situation prevailing under Swiss succession law. It should however be mentioned that both French and Luxemburg laws extend the protection of the compulsory share to all gratuitous acts made by the deceased during his/her lifetime (Art. 920 FCC and LCC), without any similar time limitations to those provided under Swiss law. Consequently, *inter vivos* trusts are not to be considered as *jura singularia successionis*<sup>185</sup> and are subject to the possibility of claw-back to the extent necessary for the heirs to recover their compulsory share.

Notwithstanding that the order in which different *inter vivos* settlements could be the object of claw-back claims by the heirs should normally be determined on the basis of the effective date of such settlements,<sup>186</sup> the French *Cour de Cassation*, as regards a trust where the settlor was beneficiary and had the power to revoke, decided that the trust was to be considered as the last *inter vivos* gift and thus to be subject to claw-back immediately after the testamentary dispositions.<sup>187</sup>

As regards the settlor's heirs' right to information in relation to an *inter vivos* trust, the situation is not very clear in France, even if there is a likelihood that the courts will not give the heirs any right that the settlor did not have.<sup>188</sup> In Luxemburg, the situation seems to be quite similar; indeed, a 1994 decision denied a *légataire universel* any right to information, considering that the latter could not overturn banking secrecy owed to a trustee.<sup>189</sup>

### **C. Conclusion on Trusts and Continental Succession Laws**

Given that the Hague Trusts Convention is not intended to prevent the application of any mandatory provisions of the applicable succession law, the articulation of trusts with continental succession laws highlights some of the problems that may arise from the collision between trusts and civil law concepts.

In this context, it is currently difficult to predict with certainty how testamentary trusts will be dealt with by civil law jurisdictions within the framework of successions governed by continental law, with the consequence that the creation of *inter vivos* settlements should be favoured.

The duration of trusts is another point deserving consideration, in particular when the applicable trust law does not contain a rule against perpetuities.

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<sup>185</sup> GODECHOT S. (note 25), pp. 315-316.

<sup>186</sup> PERRIN J. (note 1), No. 575. See however GODECHOT S. (note 25), pp. 326 *et seq.*, according to whom the order shall be determined in view of the acquisition of the gifts by the beneficiary.

<sup>187</sup> Decision of the French *Cour de Cassation* of 20 February 1996 in *Re Zieseniss*, in: *Rev. crit. dr. int. pr.* 1996, p. 692.

<sup>188</sup> PERRIN J. (note 1), No. 582.

<sup>189</sup> Order of the District Court of Luxemburg of 10 January 1994 in *Re Moortgat vs Octave Trust*, available under <http://observatoire.codeplafi.lu>.

Finally, it is clear that trusts cannot be used to circumvent the application of forced heirship provisions, and that disgruntled heirs are often in a position to limit the effectiveness of a trust infringing upon their compulsory share, even if they will probably encounter some practical difficulties.<sup>190</sup>

## **IV. General Conclusion**

Even if originally developed in common law jurisdictions, trusts are being used in more and more situations having some connections to one or more civil law jurisdictions. The peculiarities of trusts have given rise to difficulties with regards to their recognition in continental countries; the Hague Trusts Convention constitutes an important step forward in this regard, enhancing the legal certainty surrounding trust recognition in the contracting States.

Nevertheless, the use of the trust structure within the framework of a succession governed by a continental law such as Swiss, French or Luxemburg law, raises some substantial questions. This is mainly because trusts have been developed in a common law context, where the protection of the heirs does not occur through mechanisms as rigid as the system of compulsory shares. However, it seems clear that the use of trusts is to a large extent possible in such situations, and that the heirs' rights should be protected, even if the location of the trust assets and of the trustee can lead to some problems at the enforcement stage.

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<sup>190</sup> It is here to be mentioned that some offshore jurisdictions have enacted specific provisions to protect their trusts against attack from disgruntled heirs. As regards such anti-forced heirship rules, whose study would lie outside the scope of the present paper, see PERRIN J. (note 1), Nos. 605 *et seq.*, and quoted references.