



**Universität
Zürich^{UZH}**

Rechtswissenschaftliches Institut

Part III: Recognition of Trusts in Switzerland

Lecture: Foundations and Trusts

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III. Recognition of Trusts in Switzerland


Recap: Conflict of Laws – the Basics

- What is «conflict of laws» (aka private international law)?
 - Legal rules that determine which **court has jurisdiction** and which **substantive law applies** to a case
- Necessary whenever a case has ties to **more than one jurisdiction**
 - Cf. art. 1(1) PILA: applies to «**international matters**»
- A court will always apply the private international law rules of the *lex fori*
 - E.g. in Switzerland: PILA, Lugano Convention, HTC



III. Recognition of Trusts in Switzerland

Recap: Conflict of Laws – the Basics

- When is a case an «**international matter**»?
 - Depends on the **nature of the dispute**
 - **Trust matters**: usually international by virtue of the applicable foreign law (in Switzerland!) 
 - **Inheritance matters**: «international element» e.g. a decedent's foreign nationality, assets located abroad, or a decedent's last domicile abroad and assets located in Switzerland
- How do you decide whether ties to another jurisdiction are relevant?



III. Recognition of Trusts in Switzerland

Recap: Conflict of Laws – the Basics

- **Example:** an English citizen dies, having had their last legal domicile in Zurich
 - Inheritance matter → art. 90 et seqq. PILA (re: applicable law)
 - Art. 90(1), (2) PILA: Swiss domicile = Swiss law applies in principle, but foreign nationals may choose another law
 - Art. 90(2) PILA relies on foreign citizenship → foreign citizenship is a sufficient international element in inheritance matters!
- **Example 2:** an English citizen domiciled in Basel buys a pair of shoes from an Italian citizen domiciled in Zurich
 - Contract matter → art. 116 et seqq. PILA (re: applicable law)
 - E.g. Art. 120 PILA (re: consumer contracts): law at the consumer's place of habitual residence applies to the contract
 - Foreign citizenship not a sufficient international element for contracts!



III. Recognition of Trusts in Switzerland

Conflict of Laws – Main Issues

- **Example:** an English citizen dies, having had their last legal domicile in Zurich, having submitted their estate to **English law** (art. 90 para. 2 PILA) and leaving behind **two adult children** (who also live in Switzerland)
 - **Scope** of the applicable inheritance law: English law will govern what belongs to the estate and who is entitled to it (art. 92(1) PILA)
 - English succession rules allow testators to pass on their estate to **whomever they please** (exception: Family Provision Claims)
 - What about **mandatory portions** of spouses and children pursuant to the Swiss Civil Code?



III. Recognition of Trusts in Switzerland

Recap: Conflict of Laws – the Basics

- **Example:** an English citizen dies with their last legal domicile in Zurich, having submitted their estate to English law (art. 90 para. 2 PILA), leaving behind two adult children (who also live in Switzerland) and **leaving their entire estate to a Swiss charitable foundation**
 - The PILA contains **exemption clauses** allowing the court to deviate from the rules of the PILA
 - Art. 17 PILA: *The application of provisions of foreign law is excluded if such application leads to a result that is **incompatible with Swiss public policy***
 - Art. 18 PILA: *Mandatory provisions of Swiss law which, **by reason of their special purpose**, are applicable regardless of the law referred to by this Act are reserved*



III. Recognition of Trusts in Switzerland

Background

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

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

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

A trust has the following characteristics -

a) the assets constitute a **separate fund** and are not a part of the trustee's own estate;

b) title to the trust assets stands **in the name of the trustee** or in the name of another person on behalf of the trustee;

[...]»

– Hague Trusts Convention, Article 2



III. Recognition of Trusts in Switzerland

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

«[...]

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

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

– Hague Trusts Convention, Article 2



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

- HTC has legal effect *erga omnes*
 - HTC applies to all trusts, incl. those that were established in accordance with the law of a **non-contracting state** – no condition of reciprocity
 - Ability of Contracting States to restrict this effect (art. 21)
 - Contracting States include Australia, Canada, UK, USA, Hong Kong, Cyprus but presently exclude **most offshore jurisdictions**
 - Due to the *erga omnes* nature, this is not an issue for Switzerland



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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

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

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

– Hague Trusts Convention, Article 7



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention – Limitations and Reservations

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

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

[...]»

– Hague Trusts Convention, Article 15



III. Recognition of Trusts in Switzerland

Hague Trusts Convention – Limitations and Reservations

«[...]

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

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

– Hague Trusts Convention, Article 15



III. Recognition of Trusts in Switzerland

Hague Trusts Convention

- **Limitations and reservations:** art. 15 HTC
 - Provisions of the law designated by the **conflicts rules of the forum** (not: the substantive law of the forum)
 - Insofar as such provisions cannot be **derogated from** by **voluntary act**
 - What does that mean?
 - Lois d'application immédiate? (-)
 - Unilateral derogation impossible? (+) (probably)



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Rules taking precedence over the trust statute (art. 15, 16 HTC)
- **Tricky subjects include:**
 - Art. 488 CC
 - Art. 335 CC
 - Availability of trusts *mortis causa*



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Trust recognition vs. art. 488 para. 2 CC

¹ The testator is entitled in his or her dispositions to require the named heir, as provisional heir, to deliver the estate to a third party, as remainderman.

² No such obligation may be imposed on the remainderman.

³ The same provisions apply to legacies.

- Prevents a testator from burdening more than one succession of heirs with holding assets and delivering them to another person (who also becomes a – subsequent – heir)
- Goal: “freeing up” assets after a certain amount of time



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Trust recognition vs. art. 488 para. 2 CC

¹ The testator is entitled in his or her dispositions to require the named heir, as provisional heir, to deliver the estate to a third party, as remainderman.

² No such obligation may be imposed on the remainderman.

³ The same provisions apply to legacies.

- Should art. 488 CC take precedence over trust statute based on art. 15 HTC?
 - Art. 488 CC cannot be derogated from (unilaterally or bilaterally), is meant to protect heirs
 - Still, (likely) no precedence if trust law contains rule against perpetuities



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Trust recognition vs. art. 335 CC

¹ A body of assets may be tied to a family by means of a family foundation created under the law of persons or inheritance law **in order to meet the costs of raising, endowing or supporting family members or for similar purposes.**

² **It is no longer permitted to establish a fee tail.**

- Prohibition of pure maintenance foundations and fee tails (*fideicommissa*)



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Trust recognition vs. art. 335 CC

¹ A body of assets may be tied to a family by means of a family foundation created under the law of persons or inheritance law **in order to meet the costs of raising, endowing or supporting family members or for similar purposes.**

² **It is no longer permitted to establish a fee tail.**

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



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Availability of trusts *mortis causa*
 - When is a trust a *mortis causa* trust?
 - Art. 4 HTC: **Validity** of act by which assets are transferred to the trustee is not governed by the trust statute (accordingly, assets transferred to a trustee by will can be a matter of Swiss succession law, art. 92(1) PILA)
 - NB that the **formal validity** of such wills and succession pacts may be subject to a different law (as determined by the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, art. 93 PILA)



III. Recognition of Trusts in Switzerland

Hague Trusts Convention in Switzerland

- Availability of trusts *mortis causa*
 - Issue: *numerus clausus* of testamentary provisions available under Swiss law
 - Swiss law does not explicitly list the creation of a trust as an available option *mortis causa* (but it does so for foundations)
 - Scholarship is divided (but majority appear in favour)
 - *Mortis causa* trusts should be possible given that – like foundations – trusts may be established both *inter vivos* and *mortis causa* and are therefore not “succession-specific”
 - Act of transfer can take the form of legacy or naming an heir (trustee becomes heir or legatee)



III. Recognition of Trusts in Switzerland

Conclusion and Outlook

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



III. Recognition of Trusts in Switzerland

Conclusion and Outlook

- Recent political attempts at **introducing the trust into substantive Swiss law**
 - A pre-draft of a «Swiss trust law» was published in January 2022 and opened for consultation until April 2022
 - Stakeholder feedback **vaguely positive** re: planned amendments to Swiss private law, but **highly critical** of planned tax law provisions
 - Scholars and practitioners expressed strong preference towards **modernisation of Swiss family foundation** (rather than introducing an entirely new legal instrument)
- Federal Council **abandoned the project in September 2023**



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Part IV: Trusts in Swiss (Inheritance) Proceedings

Lecture: Foundations and Trusts

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IV. Trusts in Swiss (Inheritance) Proceedings

Proceedings Involving Trusts – Preliminary Remarks

- **Three types** of proceedings involving trusts (cf. *Alsop Wilkinson v Neary*)
 - Trust disputes
 - Beneficiary disputes
 - Third-party disputes
- **Differences** between types of disputes
 - Applicable law (substantive & procedural)
 - Jurisdiction (esp. third-party vs. trust/beneficiary disputes)
 - Validity / applicability of jurisdiction and arbitration clauses in trust instrument



IV. Trusts in Swiss (Inheritance) Proceedings

Proceedings Involving Trusts – Preliminary Remarks

- **Three types** of proceedings involving trusts (cf. *Alsop Wilkinson v Neary*)
 - Trust disputes
 - Beneficiary disputes
 - Third-party disputes
- **Trust disputes**
 - «Hostile» trust disputes = **attacks on the trust instrument**
 - «Friendly» trust disputes = may relate, e.g., to the correct **administration** of the trust property or **construction** of the trust instrument



IV. Trusts in Swiss (Inheritance) Proceedings

Proceedings Involving Trusts – Preliminary Remarks

- **Three types** of proceedings involving trusts (cf. *Alsop Wilkinson v Neary*)
 - Trust disputes
 - Beneficiary disputes
 - Third-party disputes
- **Beneficiary Disputes**
 - Disputes between beneficiaries and the trustee
 - May relate to the trustee's actions in administering the trust, but also the existence and scope of an individual beneficiary's rights



IV. Trusts in Swiss (Inheritance) Proceedings

Proceedings Involving Trusts – Preliminary Remarks

- **Three types** of proceedings involving trusts (cf. *Alsop Wilkinson v Neary*)
 - Trust disputes
 - Beneficiary disputes
 - Third-party disputes
- **Third-party disputes**
 - Disputes between the trustee and outsiders
 - Concerning legal relationships between the trustee and third parties (e.g. contracts, torts, and most inheritance disputes)



IV. Trusts in Swiss (Inheritance) Proceedings

Proceedings Involving Trusts – Jurisdiction

- Bodies of rules re: **international proceedings** before Swiss courts
 - **Lugano Convention**
 - Applies to trust disputes, beneficiary disputes, contractual disputes, but **not** inheritance disputes
 - If Swiss courts have jurisdiction per the LC, the domestic jurisdiction (competent court within CH) is determined by PILA
 - **PILA** where LC does not apply (and to determine domestic direct jurisdiction)
 - **Swiss Code of Civil Procedure** governs jurisdiction in purely domestic cases and applies to **all actual proceedings** (once jurisdiction has been determined)



IV. Trusts in Swiss (Inheritance) Proceedings

Proceedings Involving Trusts – Jurisdiction

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



IV. Trusts in Swiss (Inheritance) Proceedings

Proceedings Involving Trusts – Jurisdiction

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



IV. Trusts in Swiss (Inheritance) Proceedings

Proceedings Involving Trusts – Jurisdiction

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



IV. Trusts in Swiss (Inheritance) Proceedings

Inheritance Proceedings – Jurisdiction

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



IV. Trusts in Swiss (Inheritance) Proceedings

Indirect Jurisdiction of Swiss Courts

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- **Indefeasible shares** pursuant to Swiss inheritance law
 - Spouse: $\frac{1}{2}$ of their **statutory share**
 - Statutory share of spouses = $\frac{1}{2}$ of the decedent's estate if sharing with offspring OR entire estate if no offspring
 - Children: $\frac{1}{2}$ of their **statutory share**
 - Statutory share of all children combined = $\frac{1}{2}$ of the decedent's estate if sharing with a spouse OR entire estate if no spouse
 - E.g. 1 child would receive $\frac{1}{2}$ of the estate, 2 children would each receive $\frac{1}{4}$ of the estate if sharing with spouse, and twice that if not sharing with a spouse



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Indefeasible shares pursuant to Swiss inheritance law
 - Calculation of indefeasible shares: Art. 474, 527 CC
 - **Starting point:** all assets in the estate at the time of death, minus debts, **plus** (for calculation purposes only):
 - the value of **advances on inheritance** (art. 527 (1) CC);
 - **revocable gifts and gifts made within 5 years** of the decedent's death (art. 527(3) CC); and
 - **assets disposed of** by the decedent **w/ the intention of diminishing the indefeasible share** (art. 527(4) CC)
 - Art. 522, 527 CC: **claw-back claim** of the entitled heir(s) against the other heirs and, subsidiarily, against recipients during the decedent's lifetime, if remaining assets of the estate do not suffice to cover the indefeasible shares



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- **Rights of information of heirs**
- Why are they important?
 - Events giving rise to inheritance claims usually happen during the decedent's lifetime, **often w/o the heirs' involvement**
 - Heirs are not privy to the relevant information at all, or
 - Some heirs have more information than others
 - At the same time, secure knowledge of the factual basis of a (presumed) claim is **essential** (to gauge whether or not lawsuit will be successful as well as to later argue it in court)
 - Rights of information exist to bridge the gap between the need for information and the notorious lack thereof



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- **Rights of information of heirs** – 3 legal bases
 1. Right of information **between heirs**: art. 607(3) and 610(2) CC
 - Everything objectively relevant to determine the amount of the estate and the division thereof
 2. Right of information **between heirs and third parties**: art. 607(3) and 610(2) CC *per analogiam*

- These rights of information are **derived from inheritance law**



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- **Rights of information of heirs** – 3 legal bases

- 3. Right of information **between heirs and third parties:**
art. 560 CC

- Decedent's rights of information (based on a contract or other legal relationship between the decedent and a third party) are transferred to the heirs by virtue of **universal succession**
 - These rights of information are derived from **contract law** (or another legal source that is not inheritance law)
 - Inheritance-based and contract-based rights to information exist **concurrently**



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

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



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

- Rights of information of heirs – **trust context**
 - **Contract law** (or other legal basis, e.g. trust law): art. 560 CC
 - If the decedent had **heritable rights of information** based on any legal relationship, these are transferred to the heirs
 - In a recent court case, the Swiss Supreme Court **limited** contractual rights to information to cases where the heirs have an inheritance law-based interest in the information (debatable)
 - In particular, heirs will have a right of information towards a **bank** re: transfers (e.g. to a trustee) if 1) the settlor-decedent was the holder of the account *from* which a payment was made or if 2) the settlor-decedent made the payment *into* an account (held by a 3rd party) with the bank from which information is sought



IV. Trusts in Swiss (Inheritance) Proceedings

Trusts vs. Swiss Inheritance and Matrimonial Property Laws

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



IV. Trusts in Swiss (Inheritance) Proceedings

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

Facts of the Case (simplified):

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



IV. Trusts in Swiss (Inheritance) Proceedings

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

Key issue: division of a marital property regime involving trusts

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



IV. Trusts in Swiss (Inheritance) Proceedings

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

Key issue: division of a marital property regime involving trusts

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



IV. Trusts in Swiss (Inheritance) Proceedings

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

Key issue: division of a marital property regime involving trusts

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

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



IV. Trusts in Swiss (Inheritance) Proceedings

Digression: Trust Arbitration in Switzerland

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



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Questions?



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Thank you for your attention!