The Hague Trusts Convention and Selected Questions in Swiss Private International Law

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The aim of this contribution is to trace the broad outlines of the Hague Convention of July 1st, 1985 on the Law Applicable to Trusts and on their Recognition ("Hague Trusts Convention" or "HTC"). Only the most important provisions of the Convention will be discussed. We will be interested exclusively in the aspects of private law, and more particularly of private international law. This presentation will make it possible to trace the existing framework in private law, in order to be used, or not, as a basis for the treatment of trusts in tax law. We will illustrate some questions raised in private law in light of Swiss law. These are traditional questions which arise in all States not familiar with trusts, in particular because it is not possible to constitute a trust in their internal law. In Switzerland, the Hague Trusts Convention recently entered into force. Its application has not yet given rise to any significant case law. Its entry into force involved an amendment of the Private International Law Act ("Swiss PILA"), but not of private law except for the Federal Debt Enforcement and Bankruptcy Act ("Swiss DEBA"). The Civil Code ("Swiss CC") in particular has, strangely enough, not yet been adapted to take trusts into account.

I. The Hague Trusts Convention

The Hague Trusts Convention entered into force on January 1st, 1992. It improves legal security at the international level by offering private international law rules applicable in the common law countries as well as in the civil law countries. In particular, it allows the States in whose legal system the trust is unknown to avoid the delicate issue of the characterisation of the trust.

The Convention has not yet achieved the success expected: it is in force today only in twelve States, the majority in Europe. It should be noted that it is not in force in the United States of America and that Hong Kong is the only place in Asia where it is in force. Although today the Hague Trusts Convention is almost 25 years old, it continues to be ratified by additional States. Everyone agrees that it is a very useful instrument in private international law, in particular, but not only for the States whose law does not provide for the trust.

A. Scope of Application of the Convention

1. Material Scope of Application

The scop of application of the Hague Trusts Convention is limited to private international law. It establishes conflicts rules in two particular fields: (1) the law applicable to trusts, and (2) the recognition of trusts (Article 1 HTC). The objectives of this Convention are to facilitate the determination of the law applicable to a trust and to allow the recognition *ipso jure* of a trust constituted in a foreign State.

The Convention can be ratified both by a State whose law allows the constitution of a trust and by a State under whose law the trust is unknown. It has no effect on the internal law of the contracting States. The fact that a State has ratified the Convention does not necessarily imply that it is possible to constitute a trust in its internal law. For example, Switzerland became a contracting State of the Convention without it being necessary to introduce the trust into Swiss internal law. It is thus not possible to constitute a trust under Swiss law, even if the institution of the trust exists at the level of Swiss private international law[1]. One finds the same situation in the Netherlands and in Italy: the Convention is in force in these two countries without it being possible to constitute a trust either under Dutch law[2], or under Italian law[3]. Other contracting States have followed another path by

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1 The introduction of trusts – or rather of the *fiducie*, which is its equivalent in the civil law countries – into Swiss law at the time of the ratification of the Hague Trusts Convention is an option which was considered for a few years. See Luc Thévenoz, *Trusts in Switzerland: Ratification of The Hague Convention on Trusts and Codification of Fiduciary Transfers*, Zurich 2001; Andrea Bonomi, "Reconnaissance des trusts, trusts "internes" et fiducie", in *Le trust en droit international privé – Perspectives suisses et étrangères*, Geneva/Zurich/Basel 2005, pp. 115-120. The Swiss legislator ultimately gave up on this idea, because it appeared that the introduction of the trust into Swiss law would have resulted in too long a delay of the entry into force of the Convention in Switzerland. See *Message du Conseil fédéral, du 2 décembre 2005, concernant l'approbation et l'exécution de la Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance*, FF 2006 561 *et seq.*, No 1.8.2.2.

2 D. W. Aertsen, *De trust – Beschouwingen over invoering van de trust in het Nederlandse recht*, Deventer 2004; S. C. J. J. Kortmann/H. L. E. Verhagen, "National Report for the Netherlands", in D. J. Hayton/S. C. J. J. Kortmann/H. L. E. Verhagen (eds), *Principles of European Trust Law*, Deventer 1999, pp. 195-215; M.E. Koppenol-Laforce/R. J. P. Kottenhagen, "The Institution of the Trust and Dutch Law", in *Netherlands reports to the fifteenth International Congress of Comparative Law*, Bristol 1998, pp. 137–153.

3 Maurizio Lupoi, *The Hague Convention, the Civil Law and the Italian Experience*, Trust Law International 2007 pp. 80-88; Vincenzo Mariconda, *Contrastanti decisioni sul trust interno: nuovi interventi a favor ma sono nettamente prevalenti gli argomenti contro l'ammissibilità*, Corriere Giuridico 2004 pp. 76-93; M. Lupoi/T. Arrigo, "National Report for Italy", in D. J. Hayton/S. C. J. J. Kortmann/H. L. E. Verhagen (eds), *Principles of European*

taking the opportunity of the ratification of the Convention to introduce the trust or a similar institution into their internal law. Such is the case for example for Luxembourg[4] and San Marino[5]. Some other States preferred to first introduce into their internal law the trust or the *fiducie* – which is its equivalent in the civil law countries[6] – before ratifying the Convention. Such is the case for example for France, which signed the Convention in 1991, but has not yet ratified it[7].

Nor does the Convention have an effect on the tax law of the contracting States (Article 19 HTC). Each contracting State can thus adopt its own tax regulation as regards trusts; the fiscal competence of the contracting States remains unchanged.

2. Territorial Scope of Application

The Hague Trusts Convention applies *erga omnes.* A State that has ratified it can apply it not only within the context of its relationship with another contracting State, but also within the context of its relationship with a non-contracting State. The contracting States may however reserve the right to recognize only trusts governed by the law of another contracting State (Article 21 HTC). To date, no contracting State has made such reservation.

The Hague Trusts Convention is in force today in the following States[8]: the United Kingdom of Great Britain and Northern Ireland (since 1992), Italy (since 1992), Australia (since 1992), the Special Administrative Area of Hong Kong (since 1992), Canada (since 1993), Malta (since 1996), the Netherlands (since 1996), Luxembourg (since 2004), Liechtenstein (since 2006), San Marino (since 2006), Switzerland (since 2007) and Monaco (since 2008). Three other States have signed the Convention but not yet ratified it: the United States of America, France and Cyprus. We should mention finally the original path followed by Belgium, which has not yet signed the Convention, but has introduced certain of the Convention's specific provisions into its Code of Private International Law[9].

3. Temporal Scope of Application

The Convention was adopted by The Hague Conference on Private International Law on October 19/20, 1984. It took seven years for it to come into force, on January 1st, 1992, following its ratification by the United Kingdom of Great Britain, Italy and Australia.

In each contracting State, the Convention applies to all trusts, regardless of the date on which they were created, as of its entry into force in that State (Article 22 (1) HTC). The contracting States may however reserve the right not to apply the Convention to a trust constituted before the date of its entry into force in that State (Article 22 (2) HTC). To date, no contracting State has made such reservation.

B. Notion of Trust under the Convention

1. Essential Characteristics of a Trust

The Hague Trusts Convention applies to trusts and all legal institutions which have the same characteristics, whatever they are called. The goal is to allow the application of the Convention not only to the traditional trusts of the common law countries, but also to other similar legal institutions of the civil law countries.

Trust Law, Deventer 1999, pp. 123-129. In 2006, a new Article 2645ter was introduced into the Italian Civil Code; this provision makes it possible to create, for a maximum duration of ninety years or until the death of the beneficiary, an estate separate from the estate of a legal entity. This form of trust can however be used only for real estate or movable assets registered in a register *(e.g.* boats or planes).

4 Loi luxembourgeoise du 27 juillet 2003 relative au trust et contrats fiduciaires.

5 Legge del 17 marzo 2005 sul'istituto del trust.

6 See for example Loi luxembourgeoise du 27 juillet 2003 relative au trust et contrats fiduciaires, and Articles 1260 *et seq.* of the Quebec Civil Code.

7 Claude Witz, *La fiducie française face aux expériences étrangères et à la Convention de La Haye relative au "trust"*, Recueil Dalloz 2007 pp. 1369-1374; Hans van Loon, "L'actualité de la Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance", in *Mélanges en l'honneur de Mariel Revillard*, Paris 2007, pp. 323-341; François Barrière, *La réception du trust au travers de la fiducie*, Paris 2004; Ph. Rémy, "National Report for France", in D. J. Hayton/S. C. J. J. Kortmann/H. L. E. Verhagen (eds), *Principles of European Trust Law*, Deventer 1999, pp. 131–158. The Loi No 2007-211 du 19 février 2007 instituant la fiducie introduced the *fiducie* into the French Civil Code (Articles 2011-2031 French Civil Code). This institution – of which the duration is limited to 33 years – is, however, reserved to legal entities subject to corporation tax. See Frédéric Zenati-Castaing/Thierry Revet, *Les biens,* 3rd ed., Paris 2008, pp. 404 *et seq.* It is possible that the entry into force of this new law will put the ratification of the Hague Trusts Convention back on the agenda in France. It should however be made clear that this question was not raised in the course of the legislative work which led to the adoption of this new law and does not appear to be a topical issue for the public authorities.

8 The status of the signatures and ratifications can be consulted on the website of The Hague Conference on Private International Law: http://www.hcch.net.

9 Articles 122-125 Belgian Code of Private International Law.

Article 2(1) HTC describes the mechanism of the trust as follows: "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". In supplementation of this description, Article 2(2) HTC specifies which are the essential characteristics that a legal institution must have to be able to be characterized as a trust within the meaning of the Convention:

- the trustee must be regarded as the owner of the assets which have been transferred to the trust by the settlor (Article 2(2)(b) HTC); a transfer of property of the assets from the settlor to the trustee is necessary; the settlor can nevertheless preserve certain prerogatives to the trust assets (Article 2(3) HTC); he can in particular indicate himself as one of the beneficiaries or reserve the right to recover all or part of the assets by revoking the trust; the Convention thus applies without regard to the fact that the trust is revocable or irrevocable;
- the trustee must put the trust assets in an estate separated from his personal estate (Article 2(2)(a) HTC); this estate is called the "trust fund"; the fact that the estate of the trust is separated from that of the trustee is a basic element, because it offers a guarantee that the trust assets are protected from the personal creditors of the trustee (Article 11(3)(a), (b) and (c) HTC); and
- the trustee has not only the power and the duty to manage the trust assets, but also the capacity to dispose of them in accordance with the terms of the trust and with the applicable law (Article 2(2)(c) HTC); the trustee must manage the trust assets in the interest of one or more beneficiaries or for a general interest; he can also be one of the beneficiaries designated by the settlor (Article 2 (3) HTC).

Only legal institutions with these three characteristics can be characterized as a trust within the meaning of the Convention[10]. Any legal institution will thus be characterized as a trust if it makes it possible for a person (the settlor) to extract assets from his personal estate and to transfer the ownership of them to another person (the trustee), who must manage these assets in the interest of a third person (the beneficiary). The settlor can appoint one or more trustees. He can also nominate a person in whom he has confidence

[10] These same three characteristics were regarded as characteristics of the trust in the Principles of European Trust Law (PETL). Article I(1) PETL reads: "In a trust, a person called the "trustee" owns assets segregated from his private patrimony and must deal with those assets (the "trust fund") for the benefit of another person called the "beneficiary" or for the furtherance of a purpose".

to ensure that the trustee does indeed act in accordance with his will (the protector).

If a legal institution does not have all three of these characteristics, it cannot be characterized as a trust within the meaning of Article 2(1) HTC. In this case, the Convention does not apply and the private international law rules of the States apply.

2. Express Trusts

Article 3 HTC specifies that "the Convention applies only to trusts created voluntarily and evidenced in writing". It thus applies in principle only to express trusts.

Trusts declared by judicial decision are excluded in principle from its scope of application. This exclusion covers constructive trusts in any case[11] and probably covers resulting trusts as well[12]. The Convention should not, in our opinion, apply to the latter, because they are declared by judicial decision on the basis of the law and thus do not result from a clear demonstration of will of the settlor. Furthermore, resulting trusts do not meet the requirement of documentary evidence of their constitution (Article 3 *in fine* HTC). One should however reserve the case in which a contracting State has declared that the Convention also applies to trusts declared by judicial decision (Article 20 HTC). To date, the scope of application of the Convention is extended to this type of trusts in Canada, Hong Kong, Luxembourg, Monaco and the United Kingdom.

[11] ALFRED E. VON OVERBECK, "Explanatory Report on the 1985 Hague Trusts Convention", in The Hague Conference on Private International Law (ed.), *Proceedings of the Fifteenth Session, Tome II: Trusts – Applicable law and recognition*, The Hague 1985, No 49. Constructive trusts are primarily remedies for unjust enrichment. They are imposed by the judge in particular when a person is acting *de facto* as a trustee. The concept of constructive trusts covers a wide range of situations. Generally, it is the expression of the principle of justice and good conscience. See GRAHAM MOFFAT, *Trusts Law*, 4th ed., Cambridge 2005, pp. 585 *et seq.*; ROBERT PEARCE/JOHN STEVENS, *The Law of Trusts and Equitable Obligations*, 4th ed., Oxford 2006, pp. 268 *et seq.*

[12] See VON OVERBECK (*supra*, note 11), No 51. However, this author appears to include resulting trusts in the scope of application of the Convention. Resulting trusts are difficult to define. A resulting trust is supposed to exist in particular cases in which it is not possible to determine with certainty on the basis of the behaviour of the parties with respect to a transfer of property – often members of the same family – who is the owner of the asset. The creation of a resulting trust makes it possible to give effect to the implicit will of the owner whose behaviour reveals that he does not wish to transfer the property to the purchaser entirely. See MOFFAT (*supra*, note 11), pp. 582 *et seq.*; PEARCE/STEVENS (*supra*, note 11), pp. 234 *et seq.*

C. Recognition of Trusts

1. Recognition *Ipso Jure* of the Existence of a Foreign Trust

The recognition of a foreign trust is a step similar to the recognition of a foreign company[13]. It makes it possible for a foreign trust to have a legal existence in the territory of the recognising State. It is a stage of the reasoning of private international law which precedes the actual determination of the law applicable to a trust, or to a company.

The Convention sets up a system of recognition *ipso jure* of trusts within its contracting States. Any foreign trust[14] created in accordance with the law designated by the Convention is recognised automatically as a trust in the contracting States (Article 11(1) HTC). Consequently, any trust constituted according to the law chosen by the settlor (Article 6(1) HTC) or according to the law with which it is most closely connected (Article 7 HTC) is recognised *ipso jure* as a trust in the contracting States[15]. It does not matter that the law applicable to the trust is not that of a contracting State, since the Convention is applicable *erga omnes*[16]. As the recognition occurs *ipso jure*, it is not necessary to obtain a decision of recognition of an authority.

When a foreign trust cannot be recognised in a State pursuant to Article 11(1) HTC, its legal existence in the territory of that State will depend on the private international law rules of that State. For example, a legal institution that cannot be characterized as a trust within the meaning of Article 2 HTC will be required to be characterized according to the legal categories existing in the private international law of the forum to determine if it can be recognised. The process of characterisation can however be avoided by applying the system of recognition *ipso jure* established by the Convention by analogy. Article 14 HTC indeed makes it possible to render more flexible the system of recognition by authorizing its application even when the conditions fixed in Article 11(1) HTC are not met. This provision thus makes it possible to recognize a trust which was not constituted according to the law designated by Articles 6 and 7 HTC, and to recognize as a trust a legal institution not falling under the concept of trust adopted in Article 2 HTC. It reflects well the main aim of the Convention: to facilitate the recognition of trusts as much as possible. The principle of *favor recognitionis* is a key principle of the Hague Trusts Convention.

13 See FLORENCE GUILLAUME, *Lex societatis – Principes de rattachement des sociétés et correctifs institués au bénéfice des tiers en droit international privé suisse*, Zurich 2001, pp. 63 *et seq.*

14 By "trust" shall be understood any legal institution falling under the concept of trust adopted in Article 2 HTC.

15 See *infra*, section I.D.1.

16 See *supra*, section I.A.2.

2. Effects of the Recognition

The automatic recognition of a trust has the effect of stating that it exists for legal purposes according to a foreign law. It should however be specified that the fact that a trust governed by the law of State A can be recognised in State B under the terms of the Convention does not prevent a subsequent dispute concerning the validity of the constitution of this same trust. Indeed, the process of recognition does not imply the confirmation of the validity of the constitution of the trust: the fact that a trust exists according to the foreign law which governs it is sufficient. The question of the validity of its constitution can be examined thereafter pursuant to the law which governs the trust. This law will be determined by means of Articles 6 and 7 HTC[17].

Recognition enables a trust in principle to have the same legal effects in the territory of the recognising State as in the territory of its country of origin. In other words, a trust governed by the law of State A will be recognised in State B with the same legal effects that it has in State A. Moreover, the Convention specifies some effects that the recognition of a foreign trust must essentially imply in the territory of all the contracting States. These specifications appeared necessary because a State can ratify the Convention without its internal law containing rules relating to trusts[18]. Since some characteristics of the trust can be completely unknown in such a State, it appeared necessary to call these particular effects to the attention of the States.

According to Article 11(2) HTC, recognition "shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity". The trustee must, in particular, be able to apply directly to the competent authority to request an entry in a public register in relation to a trust asset (Article 12 HTC). For example, if there is real estate in the trust fund, the trustee must be able to request, himself, that all the entries which must be made in the land register in relation to that real estate be made[19].

17 See *infra*, section I.D.1.

18 See *supra*, section I.A.1.

19 See FLORENCE GUILLAUME, *Trust, réserves héréditaires et immeubles*, Pratique juridique actuelle 2008, pp. 33-46.

Article 11(3) HTC specifies four particular effects which must result from the recognition of a foreign trust if the law governing this trust so requires. Three effects arise directly from the segregation of trust assets from the personal estate of the trustee (Article 2(2)(a) HTC): (1) the personal creditors of the trustee shall have no recourse against the trust assets (Article 11(3)(a) HTC); (2) the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy (Article 11(3)(b) HTC); and (3) the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death (Article 11(3)(c) HTC). The fourth effect must be seen in relation to the nature of the right of the beneficiaries to the trust assets. When a trust has been constituted according to the law of a common law country, the trust beneficiaries have "economic ownership" rights to the trust assets (from a civil law point of view). This right *in rem* enables them to request that the court order the restitution of trust assets which the trustee has disposed of without having the right to do so[20]. The existence of such right to trace trust assets depends on the law applicable to the trust.

When the law applicable to a trust provides that the beneficiaries have a right to trace the trust assets, the recognition of this trust implies that the beneficiaries can exercise this tracing right "when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets" (Article 11(3)(d), first sentence HTC). However, this tracing right – which results from the law applicable to the trust – can only be exercised by respecting the framework imposed by the law determined by the conflict of laws rules of the forum as regards the right of property (Article 11(3)(d), second sentence HTC). That means that the tracing right cannot be exercised against a third-party holder of a trust asset if he is protected by the law designated by the conflict of laws rules of the forum for the acquisition of rights *in rem*. In particular, when the trustee has sold a trust asset to a third party even though he did not have the right to make this sale according to the law applicable to the trust, a beneficiary of the trust can claim this asset in accordance with the law applicable to the trust only if the purchaser is not protected by the law applicable to the transfer of property. For example, if Swiss law is applicable to the transfer of the property of a movable – what will be the case when the movable is located in Switzerland (Article 100(1) Swiss PILA) –, the tracing right of the beneficiaries can only be exercised against the purchaser if he has acted in bad faith. In other words, the

20 The fact that the beneficiary has a right *in rem* with regard to the assets in trust is the element which makes it possible to distinguish the trust from the *fiducie*. In the *fiducie*, only the fiduciary has a right *in rem* with regard to the assets in the fiduciary estate.

beneficiaries will be able to recover the movable improperly sold by the trustee only if the purchaser knew that this asset belonged to a trust fund. If the purchaser was unaware of this fact, he is protected in his acquisition by Swiss law (Article 933 Swiss CC) and the beneficiaries cannot exercise their tracing right over this asset.

The limit on the effects of the recognition of a trust in relation to the imperative rules of the forum in the field of property rights is mentioned in Article 15 HTC[21]. According to this provision, the imperative rules of the law designated by the conflict rules of the forum can always apply, without regard to the law applicable to the trust. Such is the case in particular concerning the rules relating to the transfer of property and the protection of a third party who has acquired a trust asset in good faith (Article 15(1)(d) and (f) HTC).

3. Exception to the Recognition

Article 13 HTC lays down an exception to the recognition of the trust when its significant elements are in a closer connection with the law of a State which does not provide for the institution of the trust than with the law which is applicable under the terms of the system of connections established by the Convention. More precisely, this provision makes it possible not to recognize a trust whose significant elements, "except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved".

Article 13 HTC will be applicable specifically in the case of a domestic trust, in other words a trust whose significant elements are in a close connection with the forum. This provision will be put forward especially by the contracting States whose law does not allow the constitution of a trust. It enables them to refuse to recognize a trust that a person has constituted according to a foreign law in order to circumvent the impossibility of constituting a trust according to the law of the State of his domicile. When a trust has no connection with the law chosen for its constitution, it is thus possible to refuse its recognition by claiming that it was constituted according to a foreign law with the evident intention of circumventing the imperative provisions of the law of the forum. Article 13 HTC thus reserves the concept of *fraus legis* with regard to trusts[22]. This provision is the counter-

21 See *infra*, section I.D.3.

22 Concerning the influence of *fraus legis* with regard to companies, see GUILLAUME (*supra*, note 13), pp. 114-188.

part for trusts of the "real seat" theory or the *réserve du siège fictif* with regard to companies[23].

The question of the recognition of a domestic trust raises a fundamental subquestion: is the mere choice of a foreign law to constitute a trust enough to give it an international character and to allow the application of the Convention? A great deal of ink has been spilled over this specific question in Italy[24]. The Italian case law, which is abundant, answers it in the affirmative. *Interni trusts* constituted by a person domiciled in Italy, who has transferred assets located in Italy to a trust managed by a trustee also located in Italy in favour of beneficiaries domiciled in Italy as well, are recognised in Italy. Italian case law does not allow Article 13 HTC to be cited against the recognition of such trusts, even when the trust deed is written in Italian and is executed in Italy[25]. This case law however does not exclude the possibility that the recognition of a particular trust can be refused – on the basis of Article 13 HTC – if it transpires from the circumstances that the choice of the applicable law was intended only to evade the law designated by the Italian conflict of laws rules[26].

D. Law Applicable to Trusts

1. Determination of the Trust Law

The Convention enshrines the principle of the autonomy of will: a trust is governed in principle by the law chosen by the settlor (Article 6(1) HTC). The only limit to the autonomy of will is that the chosen law must allow the creation of a trust of the chosen category. The choice of law can be express or tacit.

If the settlor has not chosen the applicable law, or if the chosen law does not allow for trusts or the category of trust chosen, the trust is governed by the law with which it has the closest links (Articles 6(2) and 7(1) HTC). Article 7(2) HTC provides a nonexhaustive list of criteria which can be taken into account to determine this law: the place of administration of the trust designated by the settlor, the situs of the trust assets, the place of residence or business of the trustee and the places where the aims of the trust are to be fulfilled. These criteria are placed in decreasing order of importance. But it is nevertheless possible to take them into account in a comprehensive manner[27]. Article 7 HTC will apply very rarely in practice. This provision could for example apply when the settlor has chosen Swiss law to create his trust. As it is not possible to constitute a trust in Swiss law, such a trust cannot have been validly constituted and must be declared void. To avoid this outcome, it is possible to apply the law with which the trust is most closely connected according to Article 7 HTC. This example however appears rather theoretical.

The system set up by the Convention to determine the law applicable to the trust thus indicates primarily the law chosen by the settlor (Article 6(1) HTC), and on a subsidiary basis the law with which the trust has the closest links (Articles 6(2) and 7(1) HTC). It does not matter that the law designated by the Convention is not that of a contracting State, since it applies *erga omnes*[28].

If the system of connections of Articles 6 and 7 HTC indicates the law of a State which does not allow for the trust or the category of trust chosen, the Convention ceases in principle to apply (Article 5 HTC). In other words, if the law of a State not having a legal institution corresponding to the concept of trust adopted in Article 2 HTC should apply in accordance with the system of connections set up by the Convention, its application is blocked. In this case, the law applicable to the trust will be determined pursuant to the conflict of laws rules of the forum. Even if this rule is essential from a theoretical point of view, it will probably have little, if any, occasion to apply in practice. The system of connections set up by the Convention is indeed sufficiently flexible to avoid such a situation.

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23 See FLORENCE GUILLAUME, "The Law Governing Companies in Swiss Private International Law", in P. Sarcevic/P. Volken/A. Bonomi (eds), *Yearbook of Private International Law, Volume VI (2004)*, pp. 251-289, at pp. 263-278.

24 Decision of the Tribunale di Belluno of 25 September 2002, *T v. AF*, 2003, p. 255: "Il trust interno è un trust che abbia la localizzazione preponderante (o addirittura esclusiva) dei suoi beni, la sede, la sua amministrazione e la residenza dei beneficiari e del *settlor* in un ordinamento diverso da quello scelto dalle parti per disciplinarlo" (The domestic trust is a trust which has the preponderant (or indeed exclusive) location of its assets, its seat, its administration as well as the domicile of the beneficiaries and of the settlor in a State other than that which law has been chosen by the settlor).

25 See LUPOI (*supra*, note 3), pp. 83-84; MAURIZIO LUPOI, "The Application of the Hague Convention in Italy", in *Le trust en droit international privé*, Geneva/Zurich/Basel 2005, pp. 55-61, at p. 58.

26 See SERGIO MARIA CARBONE, "Trust interno e legge straniera", in Massimo Dogliotti/Alexandra Braun (eds), *Il trust nel diritto delle persone e della famiglia: atti del convegno: Genova, 15 febbraio 2003*, Milan 2003, pp. 25-36, at pp. 31 *et seq.*

27 VON OVERBECK (*supra*, note 11), No 77.

28 See *supra*, section I.A.2.

2. Scope of Application of the Trust Law

The law applicable to the trust governs in principle all the questions which relate to the validity of the trust, its interpretation, its effects and its administration (Article 8 HTC). The settlor can however subject some elements of the trust, for example the administration of the trust, to a different law (Article 9 HTC). The term "trust law" covers the law which mainly governs the trust, that is to say the law under the terms of which it was constituted.

The trust law determines whether a change of the applicable law is possible and under what conditions (Article 10 HTC). This law will specifically answer the question whether the trustee has the right to make the decision to change the law applicable to the trust or to one of its elements. A mere relocation of the place of administration of the trust does not in principle involve a change of the trust law. A new choice of law is necessary to change the law chosen initially by the settlor. The only case in which the relocation of the place of administration of the trust could involve a change of the trust law would be where the trust is governed by the law of the place of its administration (Article 7 HTC).

The Convention can only be used to determine the trust law. It is not applicable to determine the law applicable to other legal questions arising in relation to a trust. In particular, issues relating to the transfer of assets to the trustee do not fall within its scope of application (Article 4 HTC). The transfer of property of the settlor to the trustee is an essential element of the formal constitution of the trust. To be carried out validly, the parties must observe the conditions established by the law designated by the conflict of laws rules of the forum applicable to the transfer of property. This law is not necessarily the same as the trust law. For example, if real estate located in Switzerland is transferred by the settlor to the trust fund, the law designated by the Swiss conflict of laws rule for the acquisition of rights *in rem* to real estate determines the conditions which must be met for a valid transfer. Swiss law is always applicable to the acquisition of rights *in rem* to real estate located in Switzerland (Article 99(1) Swiss PILA). The transfer of the ownership of the real estate must consequently meet the conditions imposed by Swiss material law in order to be valid[29].

[29] See GUILLAUME (*supra*, note 19), pp. 40 *et seq.*

3. Imperative Rules and Public Policy

The trust law governs in principle all questions related not only to the validity of the trust, but also to the effects of the trust (Article 8 HTC). In particular, this law governs the distribution of the trust assets (Article 8(2)(i) HTC) and the duration of the trust as well as the possibility of accumulating the income of the trust (Article 8(2)(f) HTC). The Convention however provides several means to make it possible to set aside the trust law when its application is incompatible with the law of the forum or the law indicated by the conflict rules of the forum.

According to Article 15 HTC, the imperative rules of the law designated by the conflict rules of the forum can always apply, irrespective of the trust law. This provision makes it possible to make the extremely important distinction between the law applicable to the trust and the law applicable to other questions arising in relation to the trust. For example, with regard to successions, the question of whether a person has the right to organize his succession by means of a trust is not necessarily governed by the same law as the trust law. This question must be regulated under the law applicable to the succession of the settlor. It is this law which specifically determines if the trust is one of the authorised methods of disposition of the estate on death and to what extent each person has the power to dispose of his assets on death[30]. Since the Convention does not apply to questions relating to the distribution of the estate (Article 15(1)(c) HTC), the conflict rules of the forum are applicable to determine the law applicable to the succession of the settlor.

Pursuant to Article 16 HTC the mandatory rules of the law of the forum – and, in exceptional circumstances, of the law of another State[31] – which are applicable regardless of the law designated by the conflict of laws rules can always apply. This provision refers to the *lois d'application immédiate.* These are rules provided for the protection of private interests considered to be public policy matters which are intended to apply to all the situations that they cover. A good example would be a law restricting to nationals the acquisition of land. For example, real estate located in Switzerland can be transferred to the trust fund only if this transfer of property meets the conditions fixed by the Swiss Federal law on the acquisition of real estate by

[30] See GUILLAUME (*supra*, note 19), pp. 38 *et seq.*

[31] The contracting States can limit the scope of application of Article 16 HTC to the mandatory provisions of the law of the forum by making a reservation. Such is the case in Canada, Hong Kong, Luxembourg, Monaco and the United Kingdom of Great Britain and Northern Ireland.

persons resident abroad (Lex Koller)[32]. One also encounters *lois d'application immédiate* in the field of money laundering. In Switzerland, for example, trustees must respect the provisions of the Swiss Federal law on combatting money laundering in the financial sector irrespective of the trust law[33].

According to Article 18 HTC, the application of the law determined under the Convention may be refused if the effects of its application would be manifestly incompatible with the public policy of the forum. This provision makes it possible to set aside the law indicated by the Convention and to apply the law of the forum in its place. The function of this public policy clause is to ensure the observance of the essential principles of the legal order of a State. It could especially be cited when the creation of a trust according to a certain law constitutes an abuse of law. This situation however would in principle already fall within the scope of Article 13 HTC[34]. Article 18 HTC could also be cited for example when the settlor has created a trust according to a foreign law in order to evade the rule against perpetuities imposed by the law of the forum.

II. Selected Questions in Swiss Private International Law

The Hague Trusts Convention entered into force on July 1st, 2007 in Switzerland. The ratification of this Convention made it possible to clarify the treatment of trusts in Switzerland and to strengthen legal certainty in this field[35]. Before the ratification, it was necessary to characterize trusts to determine their legal regime in Switzerland. Primarily two characterizations could be considered: characterization as a "company"[36] and characterization as a "contract"[37]. This duality of characterization generated major legal uncertainty, exacerbated by the creativity and the lack of predictability of Swiss case law.

As the scope of application of the Convention is limited to the recognition of trusts and the determination of the trust law, the Swiss legislator has supplemented the Swiss PILA with provisions of international civil procedure making it possible (1) to determine the competence of the Swiss courts to handle cases concerned with trust law (Article 149b Swiss PILA), and (2) to recognize decisions issued by a foreign authority on the matter (Article 149e Swiss PILA). These provisions have been integrated into a special chapter of the Swiss PILA devoted to trusts, accompanied by two provisions specifying that the Convention is the benchmark for determining the law applicable to the trust (Article 149c Swiss PILA), and that the term "trust" in Swiss private international law only covers legal institutions within the scope of application of the Convention (Article 149a Swiss PILA). This chapter also contains a provision of material law which makes it possible to settle some questions in relation to the entry of the trust assets in a register (Article 149d Swiss PILA)[38].

A. Notion of Trust under Swiss Private International Law

1. Reference to the Convention

The Swiss legislator did not attempt to formulate his own definition of the notion of trust and referred to the definition of Article 2 HTC (Article 149a Swiss PILA)[39].

In our opinion, the notion of trust in Swiss private international law covers in principle only express trusts. The Swiss legislator correctly excluded constructive trusts from the scope of application of the Convention[40]. On the other hand, we cannot concur with his opinion that the other types of trusts constituted on the basis of the law by judicial decision (re-

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32 See Guillaume (note 19), p. 42.

33 See *Circulaire de l'Autorité de contrôle LBA, du 4 juin 2004, "Assujettissement du trustee et du protector à la loi sur le blanchiment d'argent".*

34 See *supra*, section I.C.3.

35 Concerning the advantages of the Convention over the previous regime, see *Message du Conseil fédéral, du 2 décembre 2005, concernant l'approbation et l'exécution de la Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance*, FF 2006 561 *et seq.*, No 1.7.1.

36 The Swiss courts characterized as a "company" a trust constituted according to the law of Jersey (Decision of the Swiss Supreme Court of 3 September 1999, SJ 2000 I 269), a *Treuhänderschaft* constituted according to the law of Liechtenstein (Decision of the Swiss Supreme Court of 14 September 2005, No 4C.94/2005) and a trust constituted according to the law of Guernsey (Decision of the Bezirksgericht Zürich of 1 February 1994, *OD-Bank (en liquidation) v. Konkursmasse des Werner K. Rey Trust,* Blätter für Zürcherische Rechtsprechung 98 (1999) No 52 pp. 225 *et seq.).*

37 The Swiss Supreme Court characterized as a "contract" a trust constituted according to English law (Decision of the Swiss Supreme Court of 29 January 1970, ATF/BGE 96 II 79), before the entry into force of the Swiss PILA.

38 This provision does not belong in the Swiss PILA. It should be included in this law only until such time as the Swiss CC is amended to take account of trusts.

39 See *supra*, section I.B.

40 *Message du Conseil fédéral, du 2 décembre 2005, concernant l'approbation et l'exécution de la Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance*, FF 2006 561 *et seq.*, No 1.6.1.2.

sulting trusts) fall within the scope of application of the Convention[41]. We are of the opinion that these types of trusts cannot in principle be characterized as trusts created voluntarily within the meaning of Article 3 HTC, precisely because the settlor clearly did not express his will to create a trust or did not really want to create a trust[42].

When an entity does not have the three characteristics essential to qualify as a trust under Article 2 HTC, it will be necessary to characterize it in such a way as to determine the category of Swiss private international law with which it has the most points of convergence[43]. The characterization must be made on a case by case basis according to the characteristics of the entity in question. If it meets the requirement of an organisation under the terms of Article 150(1) Swiss PILA, it will be characterized as a company. It will, in this case, be recognised *ipso jure* in Switzerland[44] and will be governed in principle by the law of the State under which it is organised (Article 154(1) Swiss PILA), and on a subsidiary basis by the law of the State in which it is actually managed (Article 154(2) Swiss PILA). In the absence of sufficient organisation, it will be characterized in principle as a contract (Article 150(2) Swiss PILA). Sometimes the characterizations of unjust enrichment, torts and inheritance can also be considered.

2. Unwritten Trusts

The Swiss legislator extended the scope of application of the Convention by specifying that it also applies to trusts evidence of which cannot be provided in writing (Article 149a *in fine* Swiss PILA; Article 3 HTC). It is difficult to imagine what types of trusts will be affected by this extension of the notion of trust in practice.

41 *Ibid.*, No 1.8.3.

42 See *supra*, section I.B.

43 See FLORENCE GUILLAUME, *Incompatibilité du trust avec le droit suisse? Un mythe s'effrite*, Revue suisse de droit international et de droit européen 2000 pp. 1-36, at pp. 23-30.

44 The principle of the recognition *ipso jure* of companies applies in Swiss private international law. See GUILLAUME (*supra*, note 13), pp. 68-70.

B. Recognition of Trusts

1. Implici Reference to the Convention

The Swiss PILA does not contain a specific provision relating to the recognition of foreign trusts in Switzerland. The principle of the recognition *ipso jure* established by the Convention thus applies (Article 11(1) HTC)[45].

Any trust within the meaning of Article 2 HTC, of which evidence can or cannot be provided in writing[46], constituted according to the law chosen by the settlor, or, on a subsidiary basis, according to the law with which it has the closest links, will be recognised *ipso jure* as a trust in Switzerland.

2. Validity of a Domestic Trust

It follows from Article 149c(2) *in fine* Swiss PILA that a trust whose significant elements are in a closer connection with the law of a State which does not have the institution of the trust than with that which is applicable under the terms of the system of connections established by the Convention will also be recognised *ipso jure* in Switzerland. This provision indeed expressly sets aside the application of Article 13 HTC[47].

A trust created by a person domiciled in Switzerland, who has appointed a trustee also located in Switzerland, who manages the trust assets located in Switzerland in favour of beneficiaries also domiciled in Switzerland, will be recognised in Switzerland if it has been constituted in accordance with the foreign law which governs it. Even in this extreme case, the fact that the only element of extraneity of the trust is the choice of a foreign law to constitute it is not an obstacle to its recognition in Switzerland. In private law, there is no legal provision which makes it possible to dispute the legal existence in Switzerland of such a domestic trust[48]. The Swiss legislator clearly waived the application of Article 13 HTC in such a situation[49].

45 See *supra*, section I.C.1.

46 Article 149a *in fine* Swiss PILA.

47 See *supra*, section I.C.3.

48 See STEPHAN WOLF/NADINE JORDI, "Trust und schweizerisches Zivilrecht – insbesondere Ehegüter-, Erb- und Immobiliarsachenrecht", in Stephan Wolf (ed.), *Der Trust – Einführung und Rechtslage in der Schweiz nach dem Inkrafttreten des Haager Trust-Übereinkommens*, Bern 2008, pp. 29-77, at pp. 49-51.

49 *Message du Conseil fédéral, du 2 décembre 2005, concernant l'approbation et l'exécution de la Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance*, FF 2006 561 *et seq.*, No 2.2 ad Article 149c Swiss PILA.

It is therefore not possible to cite an abuse of law when the settlor constitutes a trust according to a foreign law with which it is only tenuously related.

3. Validity of a Trust Comparable to a Maintenance Foundation

In its current state, Swiss law prohibits foundations known as maintenance foundations (Article 335(2) Swiss CC). According to the case law of the Swiss Supreme Court, these are foundations which grant to a person or family members the enjoyment of the assets of the foundation or of its revenues with the obligation to transfer the estate of the foundation upon his or their death to a predesignated heir of the family, and so on from one generation to another[50]. This raises the question whether Article 335(2) Swiss CC is a *loi d'application immédiate* within the meaning of Article 16(1) HTC[51]. If such is the case, the recognition of a trust which fulfills the same functions as a maintenance foundation could be refused.

The Swiss legislator has stipulated that provisions of Swiss law can be regarded as *lois d'application immédiate* only if they have a fundamental significance and if their application is essential for the maintenance of public policy because of their particular goal. He has expressly stated that the question whether this condition is met in the case of the prohibition of maintenance foundations appears debatable[52]. Swiss legal scholars are divided on the question[53]. We are of the opinion that Article 335(2) Swiss CC is not a *loi d'application immédiate.* It is not necessary to apply this provision in all international situations.

It is not appropriate to introduce exceptions to the principle of the recognition *ipso jure* of trusts established by the Convention. This principle is essential even if a trust could have been constituted to circumvent the prohibition of maintenance foundations in Swiss law[54]. The principle of the recognition *ipso jure* of a legal institution created abroad corresponds to a modern conception of private international law. It is the counterpart of the principle of the freedom of choice existing in the field of applicable law. This principle is one of the foundations of Swiss private international law and must be allowed with regard to trusts, just as with regard to companies (Article 154 Swiss PILA), contracts (Article 116 Swiss PILA) and inheritance (Article 90 Swiss PILA). The Swiss legislator has confirmed his attachment to this principle by expressly rejecting the application of Article 13 HTC (Article 149c(2) Swiss PILA).

The Swiss Supreme Court recently stated that Article 335 (2) Swiss CC is indeed not a *loi d'application immédiate.*[55]

C. Law Applicable to Trusts

1. Reference to the Convention

In Swiss private international law, the rules of the Convention are applicable to determine the trust law (Article 149c(1) Swiss PILA).

The system of connections established by the Convention (Articles 6 and 7 HTC)[56] applies, even if it indicates the law of a State which does not provide for trusts or the category of trusts involved (Article 149c(2) Swiss PILA). The application of Article 5 HTC is expressly excluded. This means that, if the Convention designates the law of a State which does not provide for trusts (which should be a very exceptional situation in practice), it will be necessary to go through a process of characterization of the trust to determine which rules of the law of this State can govern it as well as possible.

There is no limit to the freedom of choice: the settlor can freely choose the law under the terms of which he constitutes his trust. But the selected law must of course allow the creation of a trust of the desired type.

2. Validity of a Trust within the Context of a Succession

In the field of inheritance law, the trust law cohabits with the law applicable to succession. The trust law is determined by the Convention, whereas the

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50 Decision of the Swiss Supreme Court of 7 October 1982, ATF/BGE 108 II 398, at p. 403; decision of the Swiss Supreme Court of 30 November 2006, 5C.68/2006, No 5.1.

51 See *supra*, section I.D.3.

52 *Message du Conseil fédéral, du 2 décembre 2005, concernant l'approbation et l'exécution de la Convention de La Haye relative à la loi applicable au trust et à sa reconnaissance*, FF 2006 561 *et seq.*, No 1.4.1.7.

53 For a discussion of the positions of legal scholars on this issue, see WOLF/JORDI (*supra*, note 48), pp. 46-49.

54 Accord: LUC THÉVENOZ, "Créer et gérer des trusts en Suisse après l'adoption de la Convention de La Haye", in Luc Thévenoz/Christian Bovet (eds), *Journée 2006 de droit bancaire et financier*, Zurich 2007, pp. 51–105, at pp. 68-69; NEDIM PETER VOGT, in Heinrich Honsell et al. (eds), *Basler Kommentar – Internationales Privatrecht*, 2nd ed., Basel 2007, Vor Art. 149a-e, No 96, pp. 1156. Compare: ANTON K. SCHNYDER, "Trust, Pflichtteilsrecht, Familienfideikommis", in Peter Breitschmid et al. (eds), *Grundfragen der juristischen Person – Festschrift für Hans Michael Riemer zum 65. Geburtstag*, Bern 2007, pp. 331-350, at p. 349.

55 Decision of the Supreme Court of 17 November 2009, ATF/BGE 135 III 614.

56 See *supra*, section I.D.1.

law applicable to the succession of the settlor is determined by the conflict of laws rules of the forum. Article 15(1)(c) HTC expressly stipulates that the Convention does not apply to questions about succession rights, and in particular about the reserved portion of the estate (forced heirship rights)[57].

Swiss private international law stipulates that the succession of a person who had his last domicile in Switzerland is governed in principle by Swiss law (Article 90(1) Swiss PILA). The domicile, and not the nationality, of the deceased is the connecting factor. If a person was domiciled in Switzerland at his death, Swiss law determines if he has the right to organize his succession by means of a trust. As Swiss law stipulates that it is possible to organize the succession only by means of a will[58] or of an agreement as to future succession (inheritance agreement)[59], it is not possible to do so by means of a trust. Moreover, as the trust does not form part of the methods of disposition of the estate on death accepted in Swiss law[60], a person cannot plan the constitution of a trust at his death to distribute the estate (testamentary trust; trust by will). Consequently, if a person has organized his succession, governed by Swiss law, by means of a trust, this will have no legal effect. The clause of the will relating to the trust will be regarded as non-existent in Swiss law. If the will in its entirety constitutes a trust deed, it will probably be regarded as entirely invalid in Swiss law. The estate will consequently be distributed among the heirs according to the intestate succession rules provided by Swiss law in the absence of a valid will[61].

The law applicable to the succession also determines what are the restrictions on the power of disposition on death, and in particular if part of the estate must be reserved for a particular category of heirs. If Swiss law is applicable to the succession of a person, the spouse, the descendants and the parents in the absence of descendants are forced heirs[62]. When a person has impaired the inheritance right of his forced heirs by distributing elements of his estate – in particular by transferring them to a trust – the forced heirs will have the right to recover some of these assets after the decedent's death. If the trust was established during the lifetime of the settlor *(inter vivos* trust), the assets transferred to the trust will be subject to the rules relating

57 See *supra,* section I.D.3.

58 Articles 498 to 511 Swiss CC.

59 Articles 494 to 497 and Articles 512 to 515 Swiss CC.

60 The Swiss CC enumerates a *numerus clausus* of methods of disposition of the estate on death. These are the designation of heirs, the legacies, the charges, the conditions, the substitutions and the foundation (Articles 482 to 493 Swiss CC).

61 Article 481(2) Swiss CC and Articles 457 to 466 Swiss CC.

62 Articles 471 and 458 Swiss CC.

to gifts between the living. They will thus be potentially subject to hotchpot[63] or to abatement[64]. This covers in particular the assets which the settlor has transferred to the trust fund within five years prior to his death, as well as the assets that he has transfered with the evident intention of evading the rules relating to forced heirship rights (Article 527 (3) and (4) Swiss CC). The heirs injured in their forced heirship rights will be able to assert their rights by means of an action in abatement[65]. There is thus a risk that the assets transferred to the trust fund can be "recovered" by the forced heirs of the settlor at his death. The assets in trust will only be protected from the forced heirs of the settlor if they are located in a foreign State in which any procedure to assert the rights of the forced heirs is excluded and whose private international law does not allow the recognition and the enforcement of a foreign decision issued in this matter[66]. The same applies to the beneficiaries of the trust: they will only be safe from proceedings brought by the forced heirs of the settlor if they are domiciled and have their assets in one or more States in which the forced heirs cannot assert their inheritance rights or achieve the recognition and the enforcement of a foreign decision in this matter[67].

Swiss private international law admits, on certain conditions, the possibility of choosing the law applicable to the succession (Article 90(2) Swiss PILA). The possibility of making a *professio juris* is open only to persons of foreign nationality domiciled in Switzerland. They can subject their estate only to their national law. Two conditions must be met for such a *professio juris* to be valid: (1) the person must still have the nationality chosen at the time of his death, and (2) he must not have Swiss nationality at the time of his death. By making a *professsio juris* in favour of a foreign national law

63 Articles 626 to 632 CC Swiss CC.

64 Article 527 Swiss CC reads: "The following are subject to abatement in the same manner as *dispositions mortis causa:* 1. Advances against a person's share of an inheritance made in the form of wedding gifts, settlements or assignments of assets, to the extent these are not subject to hotchpot; 2. Compensation payments in settlement of future rights of inheritance; 3. Gifts that were freely revocable by the deceased or made in the five years prior to his death, with the exception of customary occasional gifts; 4. Assets alienated by the deceased with the obvious intention of circumventing the limitations on his right of disposal."

65 Article 522(1) Swiss CC reads: "Where the testator has exceeded his right of disposal, those heirs who do not receive the amount of their reserved portion of the estate can sue to have the disposition reduced to the permitted amount."

66 Several trust-States have provided for such rules in their private international law (see *e.g.* Article 9 of the Trusts Jersey Law 1984).

67 With respect to the recognition and the enforcement of a foreign decision on this issue in England, see: DAVID HAYTON, *Trusts and Forced Heirship Problems,* Journal of International Trust and Corporate Planning 1993 pp. 3-11, at pp. 9-10.

in accordance with Article 90(2) Swiss PILA, a person domiciled in Switzerland can thus circumvent the regulations relating to the forced heirship rights in Swiss law. Such person will, in this case, be required to respect only those restrictions of his power of disposition on death stipulated in his national law. If this law contains no limits on the power of disposition on death, he will be entirely free to distribute his assets. Moreover, he will also be able to constitute a trust if the foreign law that he has chosen to govern his succession allows it. Only the law applicable to the succession is entitled to determine if the trust is one of the authorised methods of disposition of the estate on death and to what extent each person has the power to dispose of his assets on death.

The regulations on the forced heirship rights in Swiss law cannot be cited when the succession is governed by a foreign law. It has long been established that the forced heirship rights of Swiss law do not form part of the Swiss international public policy[68]. Consequently, it is not possible to require the application of the provisions on forced heirship rights stipulated by Swiss law by citing the public policy clauses (Articles 17 and 18 Swiss PILA). The Swiss legislator has stipulated that since it is possible to choose the law applicable to the succession under the Swiss PILA, it cannot be excluded that the testator chooses, not always the law which is closest to him, but indeed that which will most favour his intentions[69]. It is also not possible to require the application of Swiss law to the place of the chosen law by claiming that the case has only a remote connection to the latter law (Article 15(1) Swiss PILA), because this argument cannot be cited in the event of choice of law (Article 15(2) Swiss PILA). We also think that it is not possible to cite the prohibition of the abuse of law, as a *loi d'application immédiate* (Article 2 Swiss CC; Article 18 Swiss PILA), when a person subjects his succession to his national law, even if he no longer has any connection with this law. The choice of a foreign law to govern a succession cannot in any case constitute an abuse of law if it meets the conditions stipulated in Article 90(2) Swiss PILA[70].

68 Decision of the Swiss Supreme Court of 17 August 1976, *Hirsch v. Cohen*, ATF/BGE 102 II 136.

69 *Message du Conseil fédéral, du 10 novembre 1982, concernant une loi fédérale sur le droit international privé (loi de DIP)*, FF 1983 I 255 *et seq.*, No 263.3.

70 Accord: ANDREA BONOMI/JULIE BERTHOLET, "La *professio juris* en droit international privé suisse et comparé", in *Mélanges publiés par l'Association des Notaires Vaudois*, Geneva/Zurich/Basel 2005, pp. 355-380, at pp. 369-370. Compare: SCHNYDER (note 54), pp. 343-347.

3. Validity of a Trust with Regard to Creditors

When the settlor transfers the assets to the trust fund, he loses any property rights over these assets. This applies both to irrevocable trusts and to revocable trusts. The fact that the settlor reserves the right to recover all or part of the assets transferred to the trust does not prevent these assets from being removed from his estate for as long as he does not exercise this "right to repossess". As soon as the trust is constituted according to the law which governs it, the settlor is no longer the owner of the assets which he has transferred to the trust fund. As a result, the creditors of the settlor cannot in principle claim any right to the assets transferred to the trust fund.

The fact that the settlor can shelter his assets from his creditors by transferring them to a trust is shocking in some situations. Such is the case in particular when the trust is revocable, because that makes it possible for the settlor to recover the assets once the storm has passed. The same applies when the settlor keeps power over the trust assets by giving instructions to the trustee on the manner of managing the assets and proceeding to distributions. It can happen that he exerts his power either directly or indirectly through a third person. For example, when the protector of the trust has the power to approve all the decisions of the trustee in relation to the management of the assets and the distributions to beneficiaries and he does indeed exercise this prerogative systematically, it cannot be excluded that the settlor remains in control of the trust assets via the protector. When the trustee does not act independently, he runs the risk of being held in breach of trust and could be held personnaly liable. If it appears that the settlor did not actually have the intention to give up ownership rights over the assets – and thus to create a trust, the trust will be regarded as a sham trust and could be cancelled by a judge[71]. The conditions for an action in liability against the trustee for breach of trust or of an action in dissolution of a sham trust are defined by the trust law (Article 8 HTC).

In our opinion, the creditors of the settlor could also, in certain situations, cite the prohibition of the abuse of law envisaged in Swiss law. Article 2 Swiss CC is a *loi d'application immédiate* and can thus be cited irrespec-

71 See MOFFAT (*supra*, note 11), pp. 14-15; PEARCE/STEVENS (*supra*, note 11), pp. 163; see *e.g.* two decisions of the Jersey Royal Court of 11 June 1991, *Rahman v. Chase Bank (C.I.) Trust Company Limited*, [1991] JLR 103, and of 13 June 2003, *Grupo Torras SA and another v. Sheikh Fahad al Sabah and others*, [2003] JLR 188; and decision of the Chancery Division of 10 June 1994, *Midland Bank plc v. Wyatt*, [1995] 1 FLR 696. In Switzerland, see the decision of the Bezirksgericht Zürich of 1 February 1994, *OD-Bank (en liquidation) v. Konkursmasse des Werner K. Rey Trust*, Blätter für Zürcherische Rechtsprechung 98 (1999) No 52 pp. 225 *et seq.*

tive of the trust law (Article 16(1) HTC)[72]. The use of this provision to protect the interests of the creditors of the settlor would however presuppose that political, economic or social interests of the State, and not only private interests, are concerned[73]. Article 2 Swiss CC could be cited as a *loi d'application immédiate* if it appears that the principal objective of the constitution of a trust was precisely to evade a mandatory provision of Swiss law aimed at protecting the creditors[74].

Other provisions of Swiss law will be relevant when Swiss law is applicable to a legal situation cohabiting with a trust. For example, within the context of a procedure of enforcement directed against the settlor in Switzerland, the creditors will be able to exercise their rights by means of an avoidance action (Articles 285 *et seq.* Swiss DEBA; Article 15(1)(e) HTC). They will be able in particular to recover assets which have been transferred to the trust fund within five years prior to the opening of debt enforcement proceedings in the evident intention of inflicting a loss[75]. Within the context of a divorce of a married couple to which the matrimonial property regime of the participation in accrued gains applies, the spouse of the settlor will be able to demand the addition to the gains accrued during marriage of the value of the assets transferred to the trust fund within the five years prior to the dissolution of the marriage, or even beyond that when the transfer took place in the evident intention of undermining the interest of the spouse (Article 208(1) Swiss CC[76]; Article 15(1)(b) HTC).

The personal creditors of the trustee cannot make any claim to the trust assets, since they do not form part of his personal estate (Articles 2(2)(a), 11 (2), 11(3)(a) and (b) HTC; Article 284b Swiss DEBA). The same applies to his spouse and his heirs (Article 11(3)(c) HTC).

Nor can the personal creditors of a beneficiary of the trust make a claim to the trust assets, because they do not form part of his personal estate. They can only be paid off with the assets or the revenues of the trust which have already been distributed to the beneficiary. It is, however, possible that the claim of the beneficiary with regard to the trust can be seized for the benefit of his creditors[77]. But this possibility should be reserved for the case in which the beneficiary has a fixed interest. When a beneficiary has only a discretionary interest, it should be admitted that his creditors cannot force the trustee to make distributions in his favour. In our opinion, the prohibition of the abuse of law stipulated in Swiss law cannot be cited as a *loi d'application immédiate* in such a case (Article 2 Swiss CC; Article 16 (1) HTC).

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72 Decision of the Swiss Supreme Court of 21 January 2002, ATF/BGE 128 III 201.

73 See FRANK VISCHER, *General Course on Private International Law,* Recueil des Cours de l'Académie de Droit International 1992 I pp. 9-256, at pp. 153 *et seq.;* decision of the Swiss Supreme Court of 21 January 2002, ATF/BGE 128 III 201; decision of the European Court of Justice of 15 March 2001, *André Mazzoleni and Inter Surveillance Assistance Sarl,* C-165/98, Rec. 2001 I pp. 2189 *et seq.*

74 See decision of the Swiss Supreme Court of 7 May 2002, ATF/BGE 128 III 346; in this decision, the Swiss Supreme Court held that the *fraus legis* principle may be invoked as a corrective to the incorporation theory – which is applicable for determining the *lex societatis* – as a manifestation of public policy in Switzerland.

75 Article 288 of the Swiss DEBA reads: "Are voidable all transactions which the debtor carried out during the five years prior to the seizure of assets or the opening of bankruptcy proceedings with the intention, apparent to the other party, of disadvantaging his creditors or of favourising certain of his creditors to the disadvantage of others."

76 Article 208(1) of the Swiss CC reads: "The following are added to the gains accrued during marriage: 1. The value of dispositions made by one spouse without the other's consent during the five years preceding the dissolution of the matrimonial property regime, save for the usual occasional gifts; 2. The value of the assets disposed of by one spouse during the matrimonial property regime with the intention of diminishing the other's share."

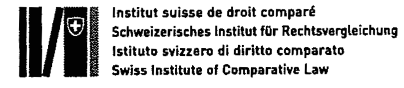
77 Decision of the Swiss Supreme Court of 5 April 1963, ATF/BGE 89 III 12.

CENTRE DE DROIT COMMERCIAL, FISCAL ET DE L'INNOVATION

Robert Danon | Jean-Luc Chenaux | Nathalie Tissot (eds)

Taxation of Trusts in Civil Law Jurisdictions

2nd Symposium of International Tax Law



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