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Switzerland

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I. Settlements and Swiss Internal Law

The notion of a "trust" is unknown in Swiss law. The reported decisions, in this respect, demonstrate that common law settlements do not fit well within the framework of the law of Switzerland or of most continental European countries.[1] This situation is due to several interacting factors.

Some basic characteristics that distinguish the succession law of the Swiss system derive from the eo ipso principle (*le mort saisit le vif:* the dead grants seisin to the living). Because heirs are supposed to be a continuation of the personality of the decedent, all assets and liabilities of the decedent pass to the heirs ipso facto, through the fact of the decedent's death. As a result of this principle, it is not necessary to appoint an administrator, since technically, there is no "estate" as a separate entity to administer, although practical necessities may require a separate administration where heirs are hard to find or in dispute.

Family foundations, in those European countries where they still exist, are fettered by such restrictions that they are practically useless and are becoming obsolete.[2] *Fidéicommisse* (perpetuities) have been abolished in most countries except Liechtenstein;[3] that country also has a law of trusts, including a corporate form of trust, and its foundations are in wide use because of the liberal attitude toward settlements.

Another problem with trusts in continental Europe is that most of the countries concerned have forced-heir laws under which some of the closest relatives among the legal heirs are entitled to a given portion or share of the estate. Gifts, benefits, or legacies impinging upon this reserved portion (*réserve*) may be reduced.

Since there are no trusts under Swiss law, there are no trustees under Swiss wills. It is possible, however, for foreigners (except where bilateral agreements prohibit[4]) to make a choice of law decision (*professio juris*) in favor of the law of their citizenship, and thus indirectly apply the law of their own country, including possibly the appointment of trustees.

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1. Settlements are frowned upon, especially since the 18th Century Age of Enlightenment and the French Revolution, as obstacles to the transfer and circulation of assets and as a means of favoring the concentration of assets in the hands of certain classes through perpetuities and accumulations.

2. For example, under CODE CIVIL SUISSE [SWISS CIV. CODE] [CC] art. 335, the use of family foundations is strictly limited to providing for the cost of education or for special aid to the members of a family. They are not to be used for general maintenance.

3. The settlement of property in perpetual trust (*fidéicommis*) for the benefit of a family is prohibited. CC art. 335, lit. 2.

4. This is the case for Italians and Frenchmen dying domiciled in Switzerland (and vice versa) under the 1868 and 1869 Treaties respectively.

II. Ordre Public

Ordre public may be defined as a principle under which the application of foreign law as commanded by a choice-of-law (conflicts) rule, is superseded by a mandatory rule of local law that the courts feel should have precedence for reasons based on the public policy of the forum.

Forced-heir rules are considered a matter of public policy and may result in heirs, who make claims, being given immediate possession of their reserved portion. It is significant that in almost all the cases decided by civil law courts, where the foreign trust was upheld, no consideration of forced-heirship roles arose.[5] Even without any forced-heirship considerations, the prohibition of perpetuities and accumulations is frequently construed as a matter of public policy and may result in a claim that the settlement is void and that its assets should be handed over outright to a person entitled thereto under some other title, such as heir of the settlor.

In a famous precedent, the *Harrison* case,[6] the Swiss Federal Court gave effect to a common-law trust that had been created by a settlor domiciled in the United States, even though the assets were located in Switzerland and the trustee was a Swiss bank. The settlement contained no choice of law and the Court therefore did not give effect to the trust directly in accordance with U.S. law. Nevertheless, the Court, by applying an elaborate mosaic of different institutions of Swiss law, upheld the various aspects of the trust.[7]

Even though no issue of forced-heirship arose in *Harrison,* the beneficiaries themselves argued that the settlement was void and that they should receive their benefits absolutely rather than merely their interests under the trusts of the settlement. In general, however, the danger exists that a Swiss trustee may be sued by persons claiming as reserved heirs in preference to the beneficiaries under the settlement. Where it was difficult, as it was in the *Harrison* case, to construe jurisdiction against the settled assets themselves through a successful attachment in Switzerland, it was sometimes necessary to sue the Swiss trustee in liability.

5. In the French case of Soc. Lombard et autres v. Cornier-Thierry-Delanove, Trib. gr. inst. de la Seine, 22 Mar. 1967, a court of first instance declared itself competent to hear an action concerning a trust created in Liechtenstein comprising assets in a Swiss bank. The court held that the trust had been created by a French resident as a testamentary arrangement that and French courts had jurisdiction to set aside the trust upon the application of a reserved heir.

6. *See* Arrêts du Tribunal fédéral Suisse 96 (1970) II 79 (Switz.).

7. The Swiss Federal Court considered that although the division of ownership between legal ownership and equitable ownership did not exist in Swiss domestic law, this did not render the Harrison trust void. Examining to what extent parallel legal institutions could be found in Swiss law to give effect to the intentions of the settlor, the Court found that the trust combined features of four institutions of Swiss law: the mandate, the donation, the fiduciary transfer of property, and the contract for the benefit of a third party.

III. Issues Related to the New Swiss Conflicts Law Act

Since January 1, 1989, Switzerland has had a new conflicts law act, the Swiss Federal Act on Private International Law (SPIL).[8] This law has affected or raised some issues related to trusts.

Switzerland now has an express provision that the public policy of foreign laws primarily applicable to a set of facts is part of the public policy of Switzerland and shall be given effect. Therefore, dispositions contrary to the public policy of foreign laws, primarily applicable under Swiss conflicts rules, would also be considered of no effect in Switzerland as being *in fraudem legis.*[9]

SPIL article 150 provides that "all organized associations of persons and all organized economic entities shall be considered to be companies within the meaning of the Act," more particularly its chapter 10. This provision introduces a rather strange notion of "organized block of assets" (*patrimoine organisé*), which is treated as a corporation and which raises the following issue, among others: Is a common law trust to be considered a "company" within the meaning of SPIL article 150?

So far, no court has handed down a decision relating to the situation of foreign trusts under the new conflicts law act, and the question is still being debated. Bearing in mind the wording of SPIL article 150, the characteristic requirement seems to be that all combinations of individuals or assets with a minimum of organization may qualify as "companies." The characterization as a company for the purposes of SPIL article 150 is then independent from its legal nature, be it corporate or purely contractual, as long as it has some aspect of an organization. In its report to the Federal Parliament the Swiss Federal Council expressly mentioned that SPIL chapter 10 may apply to "certain forms of the trust."[10] Nevertheless, some legal commentators exclude its application in respect of family trusts.

If trusts, or at least certain forms of trusts, are to be treated as corporations for the purpose of SPIL article 150, then under SPIL article 152, lit. b Swiss courts have jurisdiction if the trusts are managed from Switzerland. In addition, under SPIL article 159 Swiss law is applicable to the liability of persons acting for such corporation (or trust) from Switzerland: "[W]here the activities of a company created under foreign law are managed in or from Switzerland, the liability of the persons acting in its name shall be subject to Swiss law."[11]

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8. For a discussion of the development of private international legislation in Switzerland, see 21 INT'L LAW. 580 (1987).

9. *See id.* at 582–83.

10. *See Message,* 1983 Feuille Fédérale [FF] 425, no. 292.

11. SPIL art. 154, § 1 provides that "companies shall be subject to the law of the State under which they are organized, provided they fulfill the publicity or registration provisions of such law or, in the absence of such provisions, provided they are organized in accordance with the law of that State." Article 154, § 2 adds that "where a company does not fulfill these prerequisites, it shall be subject to the law of the State in which it is in fact managed."