# ASPECTS OF TRUST LITIGATION IN SWITZERLAND

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## INTRODUCTION

Foreign trusts have been broadly recognised in Switzerland already before the enactment of the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985 (the Hague Convention) on 1 July 2007. As a large volume of assets belonging to foreign trusts or managed in the name of trusts had been held in Switzerland, there was significant economic interest in greater legal certainty. A sound legal basis was desirable to improve conditions for the establishment and management of trusts, enhancing the appeal of Switzerland as a business location.

For these reasons, Switzerland signed and ratified the Hague Convention. Together with its enactment, a Bill introduced amendments to Swiss federal legislation on private international law, which did not contain any special provision on trusts so far. The Bill proposed an incorporation of regulations on the jurisdiction, the applicable law and the recognition of foreign decisions into the Swiss private international law. At the same time the Swiss debt enforcement and bankruptcy law was amended to take account of the segregation of trust and trustee assets provided under trust law.

Even though this new legislation has already been applied by courts, there is still as yet scarce case-law. The following article will focus on the debt collection regime against trusts and trustees and questions concerning the jurisdiction of Swiss courts in trust matters, especially in connection with jurisdiction clauses.

## THE RELEVANT SWISS SOURCES OF LAW REGARDING TRUST LITIGATION: THE HAGUE CONVENTION, ITS ACCOMPANYING LEGISLATION IN SWISS LAW AND THE LUGANO CONVENTION

The Hague Convention provides for rules on the determination of the applicable law in trust matters, ensuring the recognition of trusts in Switzerland, and setting

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minimum standards for the recognition of trusts. According to the Hague Convention, a trust has the following characteristics:

- the assets constitute a separate fund and are not a part of the trustee's own estate;
- title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- 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 recognition of a trust implies, 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. Insofar as the law applicable to the trust requires or provides, such recognition shall imply, in particular that:

- personal creditors of the trustee shall have no recourse against the trust assets;
- the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;
- 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;
- the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.

Due to its *erga omnes*-effect, not only trusts governed by laws of member states of the Hague Convention, but also trusts governed by laws of non-member states are recognised in Switzerland, and, consequently, subject to the abovementioned effects of the Hague Convention. However, the Hague Convention is only applicable to trusts created voluntarily and evidenced in writing.

It should, however, be noted that Switzerland did not introduce substantive trust law, ie Swiss law does not provide for a trust as a legal institution (as, for example, common-law countries or Liechtenstein and San Marino do). Nevertheless, Swiss courts and authorities are now equipped with a set of instruments on how to treat trusts in all sorts of legal affairs and to enable a trust to exert its effects in Switzerland. Under the new regime, it is no longer necessary to revert to alternative

but ultimately inconvenient rules on corporations, foundations, fiduciary relationships etc. The new rules also apply to domestic trusts, where the settlor, trustee and beneficiaries are domiciled in Switzerland.

Alongside the coming into effect of the Hague Convention, Switzerland introduced rules in its private international law (Chapter 9a of the Federal Code on Private International Law (CPIL)). Most of those rules deal with the jurisdiction, recognition, and enforcement of foreign decisions in trust matters. In contrast to the Hague Convention, the CPIL does not only recognise voluntarily created trusts evidenced in writing, but also voluntarily created trusts established orally.[1] In addition, Switzerland amended its insolvency law (Federal Code on Debt Enforcement and Bankruptcy Law (DEBL)) by assuring the separation of the personal assets of the trustee from the trust assets in the context of debt collection proceedings against the trust assets or against the trustee in person.[2] Since the Hague Convention is self-executing, these newly created rules apply in addition to those of the Hague Convention, and, in fact, mostly complement the latter. For instance, the CPIL widens the scope to cases not covered by the Hague Convention.[3]

With a view to trust litigation in particular, apart from the Hague Convention and the said Swiss legislation, the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention) plays an important role. The Lugano Convention provides for its own rules regarding jurisdiction, recognition, and enforcement of foreign decisions, including trust matters. To this extent, the Lugano Convention has priority over the respective rules of the CPIL and other rules of Swiss law. However, the Lugano Convention is only applicable in cases where at least one of the parties is domiciled in the EU, in Norway, Iceland or in Switzerland (usually the defendant).

## THE CAPACITY OF THE TRUSTEE TO SUE OR TO BE SUED IN SWITZERLAND IN MATTERS REGARDING THE TRUST

Unlike a foundation or a corporation, a trust has no legal personality, and is therefore not capable of exercising rights by itself. It is the trustee as the legal owner of the trust assets who acts on behalf of the trust. If thus a beneficiary possesses a claim against the trust assets, he has to direct his claim to the trustee in his capacity as trustee. The trustee may satisfy such claim, depending on his duties according to the trust deed and/or the law applicable to the trust.

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1 Article 21 paras 1, 3 and 4 and Art 149a–149c of the CPIL.

2 Article 284a and 284b of the DEBL.

3 Such as cases of Arts 5 and 13 of the Hague Convention.

If a trustee – due to the Hague Convention – sues or is sued in his capacity as a trustee in Switzerland,[4] he is a party in the proceedings and not only a representative or an organ of the trust. According to the Hague Convention the trustee may also appear or act in his capacity before a notary or any person acting in an official position. In contrast, the Hague Convention does not explicitly provide for the recognition of the capacity of the trustee to exercise any other legal act or transaction relating to trust matters. Therefore, Swiss courts or other authorities could theoretically not recognise such exercise of other rights. Yet the doctrine acknowledges that the Hague Convention must be interpreted extensively. Thus, the exercise of such other rights by the trustee ought to be recognised in Switzerland too.[5]

In contrast, the sole beneficiary who is also the settlor of the trust cannot exercise rights on behalf of the trust in Switzerland. In this respect the Federal Criminal Court ruled that (only) the trustee as the holder of a bank account belonging to the trust assets has legal standing to make a complaint against the transfer of documents regarding the bank accounts to another state in the course of legal aid proceedings.[6]

## DEBT COLLECTION PROCEDURE

### General remarks

The Hague Convention explicitly provides that the trust property must be separated from the personal funds of the trustee. Furthermore, it requires that personal creditors of the trustee shall have no recourse against the trust assets and that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy, provided the law applicable to the trust so requires.[7] Switzerland created special provisions, fulfilling these requirements, for the debt collection procedure and bankruptcy proceedings against trust funds and against the personal property of the trustee. They apply without regard to the applicable law, ie also in cases where the applicable law does not require such a degree of separation of assets. Needless to say, the application is restricted to trusts recognised in Switzerland (ie voluntarily created trusts, see above).

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4 Ibid, Art 11(2).

5 PM Gutzwiller, *Schweizerisches Internationales Trustrecht, Kommentar* (Helbing Lichtenhahn Verlag, 2007), at note 11–18.

6 RR.2011.272–275 of 15 May 2012.

7 Article 11(3)(a), (b) of the Hague Convention.

**Debt collection against the trustee**

The trust funds are not exposed to liability for personal debts of the trustee. Therefore, a debt collection proceeding for personal debts of the trustee cannot be directed against trust assets, but only against the personal assets of the trustee. In cases where both the personal and trust assets of the trustee are jointly liable for claims, two debt collection procedures each directed to the respective body of assets must be initiated separately.

In cases where bankruptcy proceedings are initiated over the trustee, Swiss bankruptcy law provides that the trust assets will be separated from the personal assets of the trustee *ex officio*, in order to protect them. In the course of the proceedings, the trustee's claims against the trust assets (for example, his remuneration) may be deducted from the trust assets. In this situation the particular circumstance may occur where the trustee himself must ensure that such claims will not (yet) be deducted from the trust assets, in order to prevent damage claims from the beneficiaries against him. In addition, if trust assets are erroneously involved in the debt collection proceeding against the trustee for his personal liabilities, the trustee himself must object to this in his capacity as a trustee.

However, exceptionally, the personal creditors of the trustee may be satisfied out of the trust funds in cases where the trustee is at the same time a beneficiary of the trust (for example, with the right to an interest in capital or to a life interest).[8]

**Debt collection against the trust assets**

As a consequence of the trustee being a party in legal proceedings against the trust, the debt collection procedure for claims against the trust funds has to be initiated against the trustee in person (for example, rights of beneficiaries or of other creditors). Enforcement can, however, only be sought against the trust assets as such: the personal assets of the trustee will not be affected by the debt collection procedure. For this purpose, the creditor has to declare on the debt collection request that the debt collection is directed to the trustee in his capacity as trustee and not to the trustee as a private person.

The debt collection procedure has to be initiated at the seat of the trust (in Switzerland), which is, according to Swiss law, the place of administration according to the trust deed, or otherwise evidenced in writing, no matter where the trustee is domiciled. Otherwise, the debt collection procedure shall take place in Switzerland where the trust is effectively administered. If the trustee is domiciled abroad while the seat of the trust is in Switzerland, the debt collection documents

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8 Gutzwiller op cit n 5, above, at note 11–24.

have to be transferred to the trustee by way of legal assistance while the debt collection proceedings as such take place in Switzerland.

The enforcement of claims against trust assets is effected by way of bankruptcy proceedings and not by seizure of specific trust assets (unlike in the common law world). This means that all trust funds and not only certain assets are to be liquidated in order to satisfy the claims of the creditors. Whether or not such bankruptcy proceedings also encompass trust assets located outside Switzerland is unclear and remains a matter of debate. Unlike in bankruptcy proceedings over a corporation, the trust is not dissolved after termination of the bankruptcy proceedings, unless the applicable law provides otherwise. Therefore, a debt collection procedure and bankruptcy proceedings against trust assets follow in principle the rules of bankruptcy but ultimately remain an attachment proceeding, encompassing all trust funds.[9]

Despite the initiation of bankruptcy proceedings against assets under trust, the trustee remains the legal owner of the trust assets as long as such assets are not distributed to creditors. The DEBL provides for special instruments for bankruptcy cases if the affiliation of an asset to the bankruptcy estate is unclear or contentious. These rules apply to trusts by analogy. If the bankruptcy administration or the creditors are of the opinion that a certain asset belongs to the trust, but this asset happens to be in the custody of the trustee or of a third party, they may claim this asset to be added to the bankruptcy estate. In the opposite situation, if the trustee or any other third party claim an asset to belong to his personal estate and not to the trust, he has a claim to single out this particular asset from the trust.

## THE JURISDICTION REGIME

### Swiss CPIL

The Swiss jurisdiction rules on 'trust matters' apply to international cases. A trust matter in the sense of Swiss private international law constitutes either a non-contentious trust issue, or a dispute between settlor, trustee, beneficiary or protector. In contrast, external legal relationships, such as an asset management agreement between the trustee and an asset manager, are not covered by the trust matter jurisdiction regime and have to be determined according to the rules applying to the particular legal relationship (for example, according to rules for contract law). Likewise, preliminary questions in connection to a trust but not originating from the internal trust relationship, such as issues regarding the legal

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[9] Schwander in: Kurzkommentar SchKG, Schuldbetreibungs- und Konkursgesetz (Helbing Lichtenhahn Verlag, 2014). Article 284a point 8ff.

capacity of the settlor, the validity of a will, or the transfer of property of a third party to the trustee are not subject to the trust matter jurisdiction regime either, but rather to the jurisdiction regime applying to these particular issues.

The starting point of the Swiss (international) jurisdiction regime on trust matters is based on the question whether or not there is a jurisdiction clause in the trust deed.[10] The Swiss Private International Law recognises written jurisdiction clauses conferring jurisdiction either to a Swiss or to a foreign court over trust matters. Furthermore, Swiss law recognises clauses conferring the power to determine jurisdiction to a designated person and the respective designation of jurisdiction by such person. It is important to note that for the validity of a jurisdiction clause it is not necessary that the trust as such has been validly established. It is sufficient that the jurisdiction clause is evidenced in writing. A Swiss court so determined has exclusive jurisdiction over the trust matters covered by the jurisdiction clause. A Swiss court is nonetheless not obliged to give effect to any such valid jurisdiction clauses, if, for instance, the dispute has no connection to Switzerland.[11] In any event, a Swiss court must assume jurisdiction in the case of a jurisdiction clause in favour of a court or courts in Switzerland, if one party of the proceedings is resident or has a branch in Switzerland, or the bulk of the trust fund is located in Switzerland.

If there is no (valid) jurisdiction clause or in the case of a non-exclusive jurisdiction clause in favour of a Swiss court, a Swiss court is competent if the defendant is domiciled or has his habitual residence in Switzerland or if the trust has its seat in Switzerland.

Finally, it should be noted that the CIPL recognises mutually agreed arbitration clauses, but not – explicitly – an arbitration clause in a trust deed, which is unilaterally enacted by the settlor. Even though a part of the doctrine is of the opinion that such an arbitration clause must be observed by a Swiss court too, uncertainty remains. An ordinary Swiss court might thus not observe an arbitration clause in a trust deed and assume jurisdiction in cases where it is competent according to the CPIL. Since a Swiss arbitration award may be challenged before the Swiss Federal Supreme Court on the ground that the arbitration court was not competent to hear the case, it remains likewise uncertain if a Swiss arbitration court would assume jurisdiction based on an arbitration clause in a trust deed.[12] An arbitration clause in a trust instrument might thus prove disappointing since it is unsure, if a Swiss court or an arbitration court with its seat in Switzerland would

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10 Article 149b of the CPIL.

11 R Huber, *Gerichtsstands- und Schiedsgerichtswahl in trustrechtlichen Angelegenheiten* (Schulthess Verlag, 2013), at point 228.

12 Articles 190(2)(b) and 191 of the CPIL.

observe it. It is of course always possible that the defendant agrees with arbitration proceedings either explicitly or by appearing before the arbitration court.

**Lugano Convention**

The Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters was concluded in Lugano on 30 October 2007. It is valid for Switzerland, the EU Member States, Norway and the Republic of Iceland. The present Lugano Convention is the successor to the Lugano Convention of 16 September 1988. The Lugano Convention serves as a parallel agreement to the EU Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).[13] It should be noted however that the traditional offshore centres, such as Guernsey, Jersey or the Isle of Man, are not submitted to the Lugano Convention.

As already mentioned the Lugano Convention takes priority over the CPIL and generally applies in civil and commercial matters if (at least) the defendant is domiciled in a Member State.

A person domiciled in a state bound by the Lugano Convention may be sued in the courts of the state (also bound by the Lugano Convention) in which the trust is domiciled, in his capacity as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing. Furthermore, the courts of a state bound by the Lugano Convention on which a trust deed has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, where relations between these persons or their rights or obligations under the trust are involved. It is, however, unclear if these rules may also be applied to sue a protector or an appointor, because these persons are not explicitly mentioned in the respective provisions of the Lugano Convention. Jurisdiction so determined stands also under the reservation of certain exclusive jurisdiction rules by virtue of the Lugano Convention itself (such as those for claims relating to land or the validity of a company).

The Lugano Convention does not accept clauses conferring the power to determine a court to certain persons. Furthermore, it does not apply to jurisdiction clauses conferring jurisdiction to a court of a non-member state. It does, however, respect such clauses, which means that a seized court of a member state must apply its own private international law to decide about its competence in such a case, and not the rules of the Lugano Convention (such as, for example, the competence of the court

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13 (2000) OJ L 12/1.

at the seat of the trust). As Swiss courts must observe exclusive jurisdiction clauses in favour of a foreign court, a Swiss court would deny its jurisdiction as long as it holds the jurisdiction clause valid (see above).[14]

**Practical case**

The beneficiary of a trust is domiciled in France and the trustee is resident in Switzerland. The trust assets are also located and managed in Switzerland. According to French tax law, a trustee – even if domiciled abroad – is obliged to report certain information about the trust and the value of its worldwide assets to the French tax authorities. If the trustee fails to report, an annual charge of 5% will be imposed, based on the value of the trust assets. If the penalty cannot be imposed on the trustees, the French tax authorities can collect the penalty from the beneficiary domiciled in France (joint liability). According to the jurisdiction clause in the trust deed, the rights of all parties and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed and regulated only according to the laws of the British Virgin Islands (BVI). Nevertheless, the beneficiary starts proceedings for compensation for the payment of the annual charges against the trustee in Switzerland. Will the Swiss court assume jurisdiction?

Since both parties are domiciled in member states bound by the Lugano Convention and the claim of the beneficiary against the trustee constitutes a damages claim, being a civil and commercial matter, in principle, the Lugano Convention has to be consulted in the first place in order to determine the place of jurisdiction. Since non-compliance by the trustee with mandatory French tax reporting provisions will most likely constitute a breach of his duties of care as a trustee, it can be assumed that such dispute falls under the jurisdiction clause referring to the BVI (which is not a member of the Lugano Convention). AS mentioned such a jurisdiction clause has priority over the forum at the seat of the trust (according to Art 5(6) of the Lugano Convention) or at the domicile of the defendant (according to Art 2(1) of the Lugano Convention) and the Swiss court must apply its own jurisdiction rules, ie the CPIL, to determin if it has jurisdiction. Accordingly, the explicit written jurisdiction clause in the trust deed has to be observed (Art 149b para 1 CIPL). Consequently, a Swiss court would deny its competence in this case, if it holds the jurisdiction clause valid and exclusive. If the jurisdiction clause is held invalid, Swiss courts would exercise jurisdiction – based on the CIPL – since the defendant (trustee) is domiciled in Switzerland (Art 149b para 3 CIPL).

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[14] Huber op cit n 11, above, at point 156; P O'Hagan, 'Trusts in Switzerland (a tale of two conventions)' (2012) 18(8) *Trusts & Trustees* 732, at p 738.

The beneficiary may sue the trustee in Switzerland. However, the risk that the Swiss court denies its jurisdiction remains substantial. It is still possible for the beneficiary to seek redress in Switzerland, if the trustee appears before the Swiss court, ie implicitly agreeing to a forum in Switzerland. In this unlikely case, the Swiss court would probably assume jurisdiction since it is not mandatory for the Swiss court to follow the jurisdiction clause.

## CONCLUSION

The amendments of the Swiss federal legislation on the international private law permit a degree of interplay between the Hague Convention and the CPIL. Specific provisions on court jurisdiction and the recognition of decisions made abroad have been added to the CPIL. Moreover, the DEBL was extended to enable Swiss debt enforcement proceedings to take account of the distinction between the personal assets of the trustee and the trust.

Swiss courts and authorities are now equipped with a set of instruments on how to treat trusts in all sorts of legal circumstances and to enable a trust to exert its effects in Switzerland. Under the new regime, it is no longer necessary to revert to alternative but ultimately inconvenient rules on corporations, foundations, fiduciary relationships etc.

If a trust has a connection to Switzerland because the trustee is resident in or because the trust assets are located and managed in Switzerland, the jurisdiction clause and/or the provisions of the applicable conventions should be analysed in order to determine whether or not a Swiss court is competent in a trust litigation matter.

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