
INTERNATIONAL TRUST DISPUTES

SECOND EDITION

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D. External Trust Disputes

Jurisdiction

Trustees are often the target of aggrieved beneficiaries or ex-spouses and can become involved in Swiss trust-related disputes, in particular in divorce and inheritance proceedings.²² Jurisdiction of external trust disputes, that is where third parties try to attack or vary the trust, is determined in accordance with the jurisdictional rules depending on the subject matter of the dispute. 30.17

Both inheritance and matrimonial property disputes are excluded from the scope of the LC.²³ The Swiss courts of the domicile²⁴ of the defendant spouse or of the domicile of the plaintiff spouse, provided the latter has been residing in Switzerland for at least a year or is a Swiss national, are competent to adjudicate a divorce and related financial aspects, for example matrimonial property claims.²⁵ According to Art 86 PILA, the Swiss courts of the last domicile of the deceased have jurisdiction in inheritance matters with regard to the worldwide estate apart from foreign real estate in relation to which the foreign state claims exclusive jurisdiction.²⁶ A (foreign) trustee may thus be subject to a claw-back claim (based on Swiss forced heirship law) before the Swiss courts, in cases where the settlor died with last domicile in Switzerland, regardless of the domicile of the contesting parties or the location of the assets. Furthermore, Art 87 and Art 88 PILA provide for a subsidiary jurisdiction of the Swiss courts, in cases where the foreign authorities do not deal with Swiss estate assets of a foreign national domiciled abroad or with the entire estate of a Swiss national domiciled abroad. 30.18

Applicable Law

Swiss law may be applicable if and in so far as the HTC excludes certain aspects from its scope of application. According to Art 4 HTC, the validity of acts by virtue of which assets are transferred to a trustee, are not within the scope of the HTC (see section C above). 30.19

Furthermore, the HTC does not prevent the application of certain provisions of the law designated by the conflict rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, in particular as regards matrimonial property as well as succession and forced heirship rights (Art 15(b) and (c) HTC). From a Swiss conflict of law perspective, the spouses may choose the law of the state in which they are both domiciled (or will be domiciled after entering into their marriage) or the law of the state of which one of the spouses is a citizen to govern their matrimonial property rights.²⁷ In the absence of a choice of law, the following laws apply (in this order): (i) the law of their common state of domicile, (ii) the law of their last common state of domicile, (iii) the law of their common state of 30.20

²² Cf Wüstemann T, Garbarski A and Conrad Hari A, 34–37.

²³ Art 1(2)(a) LC.

²⁴ Domicile as defined in Art 20 PILA is closer to the term 'residence' than 'domicile' as understood in common law jurisdictions.

²⁵ Art 59 PILA; see also Art 60 PILA.

²⁶ Art 86 PILA. Switzerland is not a member state of the EU Succession Regulation (EU 650/2012), known as Brussels IV.

²⁷ Art 52 PILA.

citizenship, or (iv) the Swiss regime of separate property.²⁸ As regards succession, the worldwide estate of a testator last domiciled in Switzerland is generally governed by Swiss law.²⁹ A foreign national—who does not have Swiss citizenship at the same time—may, however, choose her national law to govern the devolution of her estate.³⁰

- 30.21** Finally, depending on the matter in question, Art 16 HTC (so-called *lois d'application immédiate*) and Art 18 HTC (public policy) may also result in the application of Swiss substantive law instead of the foreign trust law.

Matrimonial Property Disputes

- 30.22** Disputes concerning matrimonial property rights and trusts typically relate to the division of assets upon divorce, involving the settlor as one of the spouses. As regards the transfer of assets to a trustee, the set of rules discussed below in Swiss matrimonial property law are of particular importance in this context.

Restrictions Regarding Transfers of Assets

- 30.23** Swiss matrimonial property law provides for specific limitations applying to the transfer of assets by a spouse to third parties, such as a trustee. Most notably, such limitations concern the right to dispose of the family home,³¹ the transfer of co-owned property (in the default matrimonial property regime of participation in acquisitions),³² and the transfer of community property (where the spouses opted for the matrimonial property regime of community of property).³³ Such dispositions require the spouses to act jointly, meaning a spouse may not execute a transfer without the other spouse's consent. Absent such consent, the disadvantaged spouse may pursue an *in rem* claim regarding the assets invalidly transferred to the trustee, as would be the case in any other kind of invalid transfer (see section C above).

Division of Acquisition Property and Claw-Back Mechanism

- 30.24** Assuming assets have been validly transferred by a spouse to a trustee, they are no longer considered the spouse's property and are thus in principle not taken into account in Swiss divorce proceedings. However, such trust assets may to a certain extent nevertheless be vulnerable to division in case of divorce, if the spouses are subject to the Swiss default matrimonial property regime of participation in acquisitions. Transfers of assets made to a trustee by a spouse during marriage are taken into account when calculating the claiming spouse's (monetary) matrimonial property claims if the following conditions are met: (i) the transferred assets constitute acquisition property³⁴ and (ii) the transfer was either (a) made within

²⁸ Art 54 PILA.

²⁹ Art 90 (1) PILA; see Art 91 PILA as regards the applicable law in case the deceased died domiciled abroad. The PILA only applies to the extent that there are no multi- or bilateral agreements in place, it being noted again that Switzerland is not a member state of the European Succession Regulation.

³⁰ Art 90 (2) PILA.

³¹ Art 169 CC.

³² Art 201 (2) CC; According to Art 200(2) CC marital property in the default regime of participation in acquisitions is presumed to be co-owned, unless a spouse proves sole ownership.

³³ Arts 222(3) and 228(1) CC.

³⁴ The *acquisition property* mainly consists of income from work and revenue from *own property*, both acquired during marriage. On the other hand, pre-marital assets as well as inherited or gifted assets are part of a spouse's *own property* (see Arts 197 and 198 CC).

five years prior to the dissolution of the marital property regime, without consideration and without the other spouse's consent or (b) made with the intent of reducing the other spouse's share in the marital property.³⁵ In consequence, the assets are notionally added to the transferring spouse's remaining acquisitions, thereby increasing the other spouse's monetary claim in case of divorce. In addition, to the extent the remaining assets of the transferring spouse are insufficient to satisfy the other spouse's monetary claim, the latter spouse has a direct claim against the third-party recipient, such as a trustee, up to the amount of the shortfall. This claw-back mechanism is provided for in Art 220 CC, which is a mandatory provision in the sense of Art 15(1)(b) HTC.³⁶ Whether a spouse would succeed with a claim based on Art 220 CC depends on the domicile of the trustee³⁷ and the location of the trust assets. The conflict of law rules, particularly in offshore jurisdictions, might prevent the application of Swiss matrimonial property law or the enforcement of a judgment rendered on that basis.³⁸

The most prominent Swiss case relating to marital property in the context of trusts, *Rybolovlev v Rybolovleva*,³⁹ concerned assets acquired by the husband during the marriage and later transferred by him to two irrevocable Cyprus trusts without consideration. Such assets comprised art collections, real estate, a yacht, and shares in various companies, at the time of transfer valuing approximately USD 1bn. In the divorce proceedings, the Geneva Court of Appeal ruled that the entire trust assets must be taken into account to calculate the wife's share in the matrimonial property. The court came to such a conclusion because the assets had been transferred to the trusts within the five-year period prior to the dissolution of the marital property regime and the wife had not given her consent to such transfers.⁴⁰ Given that the Court of Appeal, unlike the Court of First Instance (which disregarded the trusts in light of the extensive powers of the husband as settlor), had held the Cyprus trusts valid,⁴¹ the trust assets were, however, taken into account only at their value at the time of the transfer to the trustee, which was significantly lower than the value at the time of the (final) divorce decree.⁴² However, since the case was eventually settled, there is still no precedent of the Swiss Federal Court regarding the treatment of trust assets in the context of ordinary divorce proceedings.⁴³ 30.25

³⁵ Cf Art 208 CC.

³⁶ Wüstemann and Gabriel, 'Switzerland' in Matthews, Goodman, Harper et al (eds), *International Trust and Divorce Litigation*, 2nd edn (2013) Jordan Family Law, 270; see also Thévenoz, *Trusts en Suisse* (2001) Schulthess, 61.

³⁷ In domestic situations the court dealing with the divorce does according to the prevailing view not have jurisdiction for the claw-back claim, but rather the court at the domicile of the third party defendant (Steck and Fankhauser, *FamKomm Scheidung*, 3rd edn (2017) Stämpfli, Art 220 N 6; In an international context, this question has gained little attention (see however Berger and De Saugy 'Switzerland' in Matthews, Goodman, Harper et al (eds), *International Trust and Divorce Litigation*, 2nd edn (2013) Jordan Family Law, 263, who are vaguely mentioning potential Swiss jurisdictions based on the PILA or the LC).

³⁸ Wüstemann and Gabriel, 'Switzerland', 271.

³⁹ *Rybolovlev v Rybolovleva*, The Court of Appeal of Geneva, Decision of 5 June 2015, ACJC/663/2015 (SJ 2016 I 273).

⁴⁰ *Rybolovlev v Rybolovleva*, supra recit 10.1 and 10.2.

⁴¹ See the discussion in paragraph 30.37 below with regard to the sham argument in the *Rybolovlev* case.

⁴² *Rybolovlev v Rybolovleva*, supra recit 10.2 and 10.3; see also Art 214 (2) CC.

⁴³ See however section F below with regard to the Swiss Federal Court's decision on provisional measures in the *Rybolovlev* case.

Succession and Forced Heirship Disputes

30.26 In Switzerland, disputes concerning matters of succession and in particular the treatment of trusts in the context of the Swiss forced heirship regime, have gained considerable attention, but the case law is still scarce. As the forced heirship provisions will according to the HTC prevail over the foreign trust law,⁴⁴ from a Swiss perspective, firewall provisions in the applicable trust law may not prevent the application of Swiss forced heirship rules. Among the persons protected by forced heirship rights are spouses, descendants and—in the absence of descendants—parents.⁴⁵

Claim for Reduction

30.27 For the purpose of calculating forced heirship entitlements, not only the value of the estate the testator has left upon death is relevant, but to an extent *inter vivos* transfers are taken into account too.⁴⁶ This can give rise to what is known as a claim for reduction. Most Swiss scholars and practitioners, including the authors, agree that transfers of assets by a settlor to a trustee without consideration are to be treated in the same way as revocable or irrevocable gifts (depending on the nature of the trust) when determining if and to what extent trust assets should be taken into account to calculate forced heirship rights.⁴⁷ Generally speaking, such transfers must for calculation purposes be added to the net estate if the transfer was: (i) made to a trustee of a revocable trust; or (ii) occurred within five years prior to the settlor's death; or (iii) was made with the settlor's intent to circumvent forced heirship rights.⁴⁸

30.28 If the value of the estate left upon death is not sufficient to satisfy the forced heirship share of the settlor's heirs, the heirs may file a claim for reduction against recipients of the above mentioned *inter vivos* transfers, including a trustee of a trust set up or funded by the deceased.

30.29 While a reduction claim against a trustee (and/or a beneficiary having received distributions from the trust) may prove to be successful, such proceedings are regularly very complex and must be evaluated on a case-by-case basis. The same is true for the enforcement of a Swiss judgment concerning forced heirship rights abroad.

Recovery of Inheritance Claim

30.30 Besides a claim for reduction, Swiss inheritance law provides for an *in rem* recovery of an inheritance claim against any person who holds assets allegedly belonging to the estate.⁴⁹ Such claim could be directed towards a trustee or a beneficiary if it is argued that the transfer of assets to the trustee is invalid as such (see section C above). Furthermore, recovery of inheritance may be sought to restore assets held in a sham trust or if it is alleged that the settlor has kept control over the trust assets and has thus not divested himself of such assets (see section F below).

⁴⁴ See paragraphs 30.19–30.21 above; see also Harris, *The Hague Trust Convention* (2002) Hart, 366–367, as regards the discussion, whether forced heirship rules fall under Art 4 or Art 15 HTC.

⁴⁵ Art 471 CC and Arts 457–458 CC.

⁴⁶ Art 475 CC and Art 527 CC.

⁴⁷ Cf Eitel and Brauchli, 'Trusts im Anwendungsbereich des schweizerischen Erbrechts' (2012) *successio* 139–141; Herzog, *Trusts und schweizerisches Erbrecht* (2016) Schulthess, 231–232; Weingart, *Anerkennung von Trusts und trustrechtlichen Entscheidungen im internationalen Verhältnis—unter besonderer Berücksichtigung schweizerischen Erb- und Familienrechts* (2010) Schulthess, 159–162; see also Jakob and Picht, 'Der Trust in der Schweizer Nachlassplanung und Vermögensgestaltung' (2010) 6 AJP 14.

⁴⁸ Art 527(3) and (4) CC; cf for instance Eitel and Brauchli *ibid* 139–141; Jakob and Picht *ibid* 14–15.

⁴⁹ Art 598 *et seq* CC.