



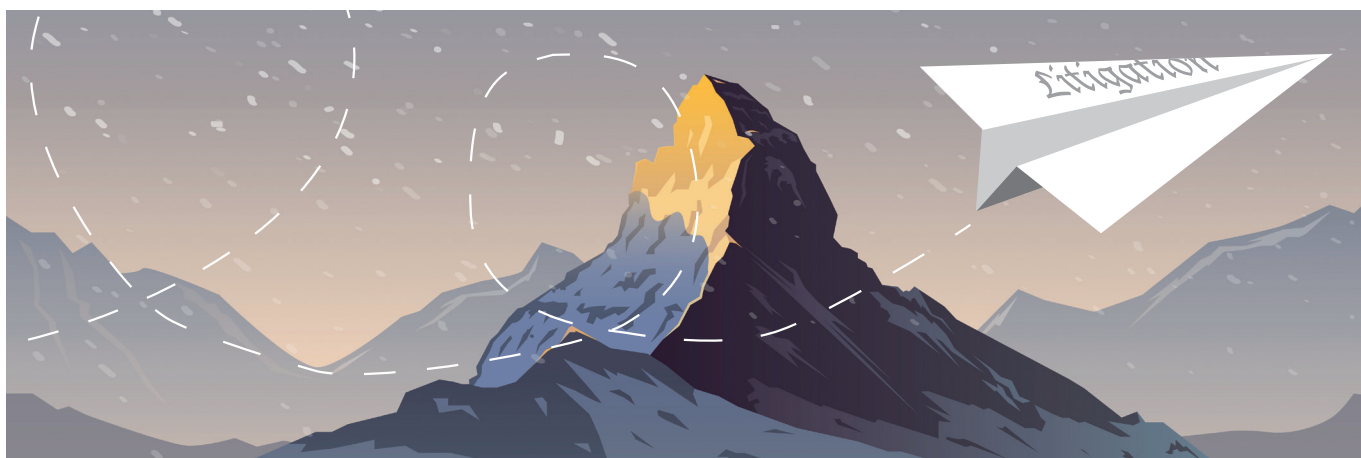
FOCUS ON
EUROPE
TRUST LITIGATION IN SWITZERLAND

MOUNTAIN TO CLIMB



Litigation

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SUMMARISE WHAT FOREIGN TRUSTEES NEED TO KNOW IN RELATION
TO TRUSTS WITH A LINK TO SWITZERLAND ➡



→ KEY POINTS

WHAT IS THE ISSUE?

Trustees have become increasingly involved in Swiss civil and criminal proceedings. They are frequently dragged into complex cross-border disputes and often serve as the target of aggrieved beneficiaries, excluded family members or ex-spouses.

WHAT DOES IT MEAN FOR ME?

Foreign trustees must be aware that a beneficiary may sue them before the Swiss courts when the trust is administered in Switzerland or the settlor is a Swiss resident.

WHAT CAN I TAKE AWAY?

An awareness of the potential impact Swiss procedural and/or substantive law may have on a trust's administration and, more importantly, its assets. This should help avoid any unexpected surprises.

CIVIL LITIGATION

REQUESTS FOR INFORMATION

Provided that the trust deed does not explicitly designate a foreign court, Swiss courts accept jurisdiction if (i) the trustee is based in Switzerland, (ii) Switzerland is designated in the trust deed as the place of administration, or, (iii) absent such designation, the trust is effectively managed from Switzerland. To avoid uncertainties with regard to the jurisdiction of Swiss courts, the trust instrument should contain a forum selection clause and specify the trust's place of administration.

TRUSTS IN SWISS INHERITANCE PROCEEDINGS

Swiss inheritance law provides for forced-heirship rights, according to which, spouses and descendants (or parents in the absence of descendants) are entitled to a certain share of the estate. Whether forced-heirship rights have been honoured in a particular case

depends on the value of what the testator has left to their heirs upon their death, and in some cases *inter vivos*.

There is no case law yet in Switzerland regarding the treatment of trusts under Swiss inheritance law. Most authors agree that transfers of assets by a settlor to a trust are deemed 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 when calculating forced-heirship rights. Whenever the settlor is a Swiss resident, firewall provisions in the applicable trust law may not prevent the application of Swiss forced-heirship law upon the settlor's death.

Generally, under Swiss inheritance law, assets transferred to a trust are likely to be taken into consideration, and hence may be subject to a clawback claim (usually a monetary claim), if the transfer (i) was made to a revocable trust, (ii) occurred in the five years prior to the settlor's death, or (iii) was made with the settlor's intent to circumvent forced-heirship rights.

TRUSTS IN SWISS DIVORCE PROCEEDINGS

Under the default Swiss matrimonial property regime of participation in acquisitions, each spouse owns and is entitled to use their own property freely during the marriage without the consent of the other.

When the matrimonial regime is dissolved in case of death or divorce, each spouse is entitled to half of the property acquired by the other during marriage (consisting mainly of income/savings from work or earnings from own property).¹ Swiss law provides that any transfer of acquisition property made by a spouse without consideration and without the other spouse's consent in the five years prior to the initiation of divorce proceedings must be taken into consideration when calculating the other spouse's marital property share. →

SWITZERLAND'S POPULARITY as a hub for trust administration and related services has increased continuously in the past few years, and so has the number of litigation matters involving trust structures. The civil courts are no longer the only ones to witness these battles: claimants have become less hesitant in bringing their cases to the attention of the criminal prosecution authorities.

Switzerland ratified the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* in 2007, and thus recognises foreign trusts. However, the concept, found in common-law jurisdictions, of separating legal ownership (trustee) from equitable ownership (beneficiary) is not applicable in Switzerland, a typical civil-law jurisdiction.

This raises a number of practical issues for Swiss judges and prosecutors, as they have to juggle both the rules governing the trust, and their own potentially conflicting legal and procedural concepts.

'To avoid uncertainties with regard to the jurisdiction of Swiss courts, the trust instrument should contain a forum selection clause'

In addition, any transfer made with the intent to deprive the other spouse of part of its share must be fully taken into consideration, regardless of when such transfer was made.

Hence, depending on when or why a spouse transfers assets to a trust, the relevant trust assets may be taken into consideration under the Swiss matrimonial property regime of participation in acquisitions (unless the spouses have opted for the regime of separation of property).

In the well-known *Rybolovlev* saga, the Geneva Court of Appeal considered the trust set up by the husband to be valid (as opposed to the Court of First Instance, which disregarded the trust in light of the extensive powers of the husband settlor). Nevertheless, the Court ruled that the entire trust assets must be taken into account to calculate the wife's matrimonial property claim, given that the transfer of assets to the trust occurred in the five years prior to the divorce proceedings. The Court further decided that the relevant value of the trust assets was the value at the time of the transfer to the trust (as opposed to the value at the time when the matrimonial regime was split, i.e. the final divorce decree). The parties eventually settled the case before it was brought to the Swiss Federal Supreme Court.²

CRIMINAL LITIGATION

ENTITLEMENT TO FILE A CRIMINAL COMPLAINT WHEN TRUST ASSETS ARE THE SUBJECT OF AN OFFENCE
There is no clear-cut answer to this issue, and court decisions dealing with this topic are scarce and not always consistent. Ultimately, the answer will depend on the particular circumstances of each case. Although isolated decisions suggest (surprisingly) that a trust can be admitted to act as a plaintiff in criminal proceedings, such capacity should solely rest with the trustee, since they are deemed the legal owner of the trust assets as a matter of Swiss law.

However, we are also aware of recent matters in which the beneficiaries of a trust were admitted to act as plaintiffs. In addition, no specific rules have been enacted so far to address the particular situation of trusts in the context of Swiss criminal proceedings.

ENTITLEMENT TO CHALLENGE COMPULSORY MEASURES INVOLVING TRUST ASSETS

Typical compulsory measures ordered by the prosecution authorities include the search of premises, or the seizure of assets or other means of evidence, such



'Companies, including foreign-law structures, can be subject to criminal liability under Swiss law'

as banking documentation or corporate books and records.

Whenever a compulsory measure is ordered in respect of trust assets (e.g. the freezing of a bank account), only the trustee may challenge such a measure according to case law, again as a result of the trustee being deemed the legal owner of the relevant assets. The question of whether the capacity to appeal should be extended to beneficiaries in cases where the trust structure was dissolved is, so far, left unanswered.

CRIMINAL LIABILITY OF A TRUST

Since 2003, companies, including foreign-law structures, can be subject to criminal liability under Swiss law. In a nutshell, the criminal liability arising out of an offence committed within the company may be extended to the latter, subject to certain requirements. Among other things, such an offence has to be committed in the frame of 'commercial activities' that are consistent with the purpose of the concerned company. While we are not aware of any court

precedent dealing with this issue, which thus remains untested, certain scholars argue that a trust could potentially incur criminal liability if and to the extent that it enjoys a certain degree of organisation and exercises commercial activities that are analogous to those of an actual company.

RECENT CHANGES IN SWISS CRIMINAL LAW IMPACTING TRUSTS

Switzerland has recently implemented the revised recommendations that were adopted in early 2012 by the Financial Action Task Force. As a result, since 1 January 2016, tax offences may also serve as a predicate to money laundering. Not all tax offences are concerned, only the so-called 'qualified tax offence', which requires, *inter alia*, the perpetration of tax fraud that leads, whether in Switzerland or abroad, to an aggregate tax saving of at least CHF300,000 during a relevant tax period.

The extension of money laundering to the qualified tax offence is likely to increase the attention criminal prosecution authorities pay to trust structures, in particular where there are indications that a trust was set up essentially for tax-avoidance purposes. Indeed, to the extent that the transfer of assets into a trust may be deemed an obstructive act for the purposes of the money-laundering provision, the settlor and service providers of a trust structure face a greater exposure since 1 January 2016.

CONCLUSION

The establishment of a foreign trust may not serve as a firewall to protect a trustee from being dragged into civil or criminal litigation in Switzerland when there is a connection to Switzerland (e.g. location of trust assets, location of administration of a trust, or a Swiss-resident trustee, settlor or protector). Switzerland may be a completely different legal environment for the foreign trustee, with different rules than their respective home trust jurisdiction, and a foreign trustee must be aware of such consequences if the trust has any connection to Switzerland.

¹ Own property can comprise, for example, pre-marital assets or assets received during marriage by gratuitous transfer

² For more information, see David Wallace Wilson, 'Trust in Suisse', *Trust Quarterly Review*, Vol14 Iss3 (September 2016), bit.ly/2eGbFEw



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