International Trust and Divorce Litigation

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(ii) if it is satisfied that any disposition of property is intended to be made with any such object, to grant an injunction preventing that disposition.

SWITZERLAND

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Introduction

7.171 Swiss law does not know the concept of trust and a trust can thus not be governed by Swiss law. However, as a result of the ratification of the Convention on the Law Applicable to Trusts and on their Recognition ('Hague Trust Convention' or 'HTC')[283], Switzerland fully recognises foreign trusts.

Switzerland is seen by many foreigners as an attractive place to live and trusts are therefore often 'imported' by settlors relocating to Switzerland. Switzerland's popularity as a hub for trust administration has increased since the ratification of the Hague Trust Convention and so has the number of trust litigation before Swiss courts[284].

With a divorce rate of over 40 per cent, more than half of nearly 17'000 divorces each year in Switzerland involve international couples[285]. Judges in Swiss divorce proceedings are thus often confronted with conflict of law issues. Swiss courts do, however, not yet have much experience in dealing with trusts in a divorce context, mostly because the few cases have been settled before reaching judgment. As a result, there is little guidance from case law and general principles of Swiss law must be applied[286].

Treatment of trusts in Switzerland

Swiss substantive law

7.172 When it comes to structures, which are established to amass and protect a family's wealth, Swiss law traditionally follows a restrictive approach. Even though Swiss substantive law provides for the instrument of a so-called family foundation to tie a fortune to a family, Art 335(1) of the Swiss Civil Code

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[283] SR 0.221.371.

[284] Cf. Tina Wüstemann/Andrew Garbarski/Aurélie Conrad Hari, 'Mountain to Climb. Trust Litigation in Switzerland' (December 2016/January 2017) STEP Journal 34.

[285] Swiss Federal Statistics Office: https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/heiraten-eingetragene-partnerschaften-scheidungen/scheidungshaeufigkeit.html (accessed 11 July 2019).

[286] For Swiss case law in matters of trust law see www.trusts.ch (accessed 11 July 2019); see also Alexander Wintsch, 'Recent Swiss Case Law on Trust-related Issues' (2018) 24 Trusts & Trustees 168.

(CC)[287] restricts its admissibility to foundations whose purpose is to defray the costs of education or to support family members in relation to specific needs. Family foundations with other purposes are not admissible[288]. In particular, it is not permitted to set up a family foundation with the purpose to provide a higher or more comfortable standard of living for the beneficiaries without a particular link to any requirements of special life circumstances. Swiss law explicitly prohibits family entailments[289], thereby further limiting the possibilities to set up family wealth structures.

In light of the above, it is not surprising that the number of Swiss family foundations is very limited[290]. However, over the last years, several political initiatives requiring the introduction of trusts in Swiss law were brought forward. A motion on the introduction of a Swiss substantive trust law (originally introduced as parliamentary initiative in 2016) was approved by Swiss parliament in March 2019 and the Swiss Federal Council is now mandated to present a Swiss trust law within 2 years[291]. Whether the Swiss legislator will in this process adopt a more liberal approach when it comes to family wealth structures remains to be seen.

Hague Trust Convention

7.173 Prior to the ratification of the Hague Trust Convention, the Swiss Federal Supreme Court held that a trust comprises elements of a fiduciary agreement, a donation, a deposit agreement and a mandate agreement, thereby trying to explain the concept of trust by means of different types of contracts known under Swiss law[292].

Based on the Hague Trust Convention, Swiss courts and authorities now consider foreign trusts as distinct legal institutions under the relevant trust legislation[293]. To recognise the trust does not mean integration of trust law concepts into Swiss law but implantation of the Anglo-Saxon trust in the respective civil law jurisdiction by means of clear and practicable rules in a flexible conflict of law system and thereby recognition of the foreign legal

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[287] SR 210.

[288] For example, the Swiss Federal Tribunal has considered the purpose of maintaining a family residence and other family assets as an invalid purpose for a Swiss family foundation (BGE 108 II 339); see also Oliver Arter, 'The Swiss Family Foundation' (2012) 26(3) Trust Law International 152.

[289] Article 335 (2) CC.

[290] By contrast, Swiss charitable foundations are often used due to the very liberal provisions governing Swiss charitable foundations and the attractive, stable Swiss environment.

[291] For more detailed information see https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20160488 (accessed 11 July 2019).

[292] 'Harrison Case' BGE 96 II 79.

[293] It has been discussed by the Swiss doctrine if trusts violate the ban of family entailments (article 335 (2) CC) and the multiple appointments of reversionary heirs (article 488 (2) CC). The predominant Swiss doctrine is of the opinion that the trust needs to be recognised since Switzerland has joined the Hague Trust Convention, which is also in line with the recent decisions of the Swiss Federal Supreme Court.

institution. The Hague Trust Convention covers all types of internal trust disputes, eg applications for directive and constructive summonses and requests for the replacement of a trustee[294].

Hence, foreign trusts are recognised in Switzerland and, where applicable, Swiss courts and authorities will apply foreign trust law when dealing with trust-related matters or adjudicating internal trust disputes. At the same time, Swiss law may be applicable if and insofar as the Hague Trust Convention excludes certain aspects from its scope of application. For example, according to Art 4 HTC, the Hague Trust Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to a trustee. Accordingly, while a Swiss court will assess the validity of a foreign trust based on the relevant trust law, it will examine the validity of the transfer of assets by a spouse to a trustee based on the law applicable to the respective transaction. As a consequence, the recognition of a foreign trust under the relevant trust legislation does not exclude the challenge of a transfer of assets by a spouse to a trustee under the law applicable to such transfer[295].

Further restrictions of the scope of application of the Hague Trust Convention are contained in Art 15 Hague Trust Convention (mandatory provisions of the law designated by the conflict of law rules of the forum)[296], Art 16 Hague Trust Convention (so-called *lois d'application immédiate*)[297] and Art 18 Hague Trust Convention (public policy)[298]. These restrictions may also result in the application of Swiss substantive law instead of the foreign trust law depending on the matter in question.

International divorce proceedings in Switzerland

Jurisdiction

7.174 Disputes regarding the status of a person and matrimonial property disputes are both excluded from the scope of the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of

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[294] Article 8 HTC.

[295] Delphine Pannatier Kessler, *Le droit de reconnaissance et de suite selon la Convention de la Haye sur les trusts*, Zurich 2011, 79.

[296] Article 15 HTC: the convention '... may not prevent the application of provisions of law designated by the conflict rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters [...] the personal and proprietary effects of marriage.'.

[297] Article 16 HTC: 'The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws. If another State has a sufficiently close connection with a case then, in exceptional circumstances, effect may also be given to rules of that State which have the same character as mentioned in the preceding paragraph. Any Contracting State may, by way of reservation, declare that it will not apply the second paragraph of this Article.'.

[298] Article 18 HTC: 'The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (ordre public)'.

30 October 2007 ('Lugano Convention' or 'LC')[299]. According to Swiss conflict of law rules, the Swiss courts at the domicile 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[300] and related financial aspects eg matrimonial property claims[301]. Moreover Swiss courts can be competent for divorce proceedings even in cases where none of the spouses is domiciled in Switzerland, if one is a Swiss citizen and the action for divorce cannot be brought at the domicile of one of the spouses or if it is unreasonable to so require[302].

Applicable law

7.175 From a Swiss conflict of law perspective, Swiss courts in principle apply Swiss substantive law when deciding about the dissolution of a marriage and related financial aspects[303]. However, special rules apply with regard to certain specific matters such as matrimonial property rights. From a Swiss conflict of law perspective, the spouses may choose by means of a marital agreement the law of the state in which they are both domiciled (or will be domiciled after their marriage) or the law of the state of which one of the spouses is a citizen to govern their matrimonial property rights[304]. In the absence of a choice of law, the following laws apply (in this order): (i) the law of the state of their common domicile, (ii) the law of the state of their last common domicile, (iii) the law of their common state of citizenship, or (iv) the Swiss regime of separation of property[305].

The Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes applies for most legal proceedings as well as authentic instruments formally drawn up on or after 29 January 2019. Although Switzerland is not a member state of the EU, the legislation of the EU may have an impact on Switzerland. For example, in case an EU national residing in Switzerland (i) got married in an EU member state, (ii) owns real property in an EU member state,

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299 SR 0.275.12; Art 1(2)(a) LC.

300 Article 59 of the Swiss Private International Law Act (PILA); SR 291.

301 Article 63(1) PILA, Art 5(2)(b) LC.

302 Article 60 PILA.

303 Articles 61 and 63 PILA. Considering that pursuant to Swiss law, in case of a contested divorce, a minimum separation period of 2 years is required before divorce proceedings can be initiated, Switzerland might appear as a rather unattractive option for forum shopping. However, the Swiss Federal Court has decided that the filing of a divorce petition in a foreign jurisdiction by the defendant spouse can be interpreted as a consent to the divorce. Therefore, it could be worth considering to initiate divorce proceedings in Switzerland even though the requirement of the minimum separation period of 2 years is not yet fulfilled, since a later action for divorce in another jurisdiction would be qualified as a deemed consent to divorce regardless whether the 2 year separation period has been observed. In such case, the Swiss court will treat the pending divorce proceedings as a divorce by joint request, which is not subject to the 2 year separation period (decision of Swiss Federal Court, 5A_203/2011).

304 Article 52 PILA.

305 Article 54 PILA.

(iii) intends to move to an EU member state or moved to Switzerland from an EU member state or (iv) if such EU national chooses the law of a member state to govern his matrimonial property regime. However, the Regulation 2016/1103 only applies if the marriage was entered into or the choice of the law of an EU member state with regard to the matrimonial property regime was made on or after 29 January 2019.

Swiss law may be applicable in Swiss divorce proceedings involving trusts, if and in so far the HTC excludes certain aspects from its scope of application. According to Art 4 HTC, the question whether a spouse has validly transferred assets to a trust does not fall within the scope of the HTC. Furthermore, the HTC does not prevent the application of certain claw back claims against third parties such as trustees (Art 220 CC; see 7.185 below), since such claw back claims are mandatory provisions in the sense of Art 15(1)(b) HTC.

Trusts in a marital context

Swiss matrimonial property regimes

7.176 Swiss law knows three main types of matrimonial property regimes: the participation in acquisitions, the community of property regime and the separation of property regime. The choice of a matrimonial property regime has an effect not only on the division of assets in case of divorce or death of one of the spouses, but also on the spouses' power to dispose or to administer their marital assets. In addition, their liability for debts may vary[306].

Spouses may not only deviate from the default regime of participation in acquisitions and choose the community or separation of property regimes as provided for in statutory law, but they may instead tailor the marital agreement to their specific needs within certain statutory limits. They may do so prior to or after the marriage and they may modify their selection of matrimonial property regime and switch to another matrimonial property regime by entering into a new marital agreement, even with retroactive effect.

Participation in acquisitions (Art 196 et seq CC)

7.177 The participation in acquisitions is the default matrimonial property regime, which applies where the spouses have not made a specific choice for an alternative matrimonial property regime by way of a marital agreement in a public deed[307]. Under this regime, a spouse's property consists of (i) the acquisitions, which mainly comprises a spouse's proceeds from his or her employment during the marital property regime as well as revenues and income derived from his or her so-called individual property[308], and (ii) the individual property, which mainly contains assets belonging to a spouse at the beginning

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[306] See Tina Wüstemann/Delphine Pannatier Kessler, 'Trusts in the context of Swiss divorce proceedings' (2011) 17(9) Trust and Trustees 883, 884.

[307] Article 181 CC.

[308] Article 197(2) CC.

of the marital property regime (ie marriage) or acquired later without consideration, eg by gift or inheritance[309]. Upon dissolution of the marital property regime, which namely occurs upon divorce or death of one spouse, each spouse has a claim equivalent to half of the value of the other spouse's acquisitions, less half of the value of her/his own acquisitions; the spouses' mutual claims are set off[310]. Thereby, the participation in the acquisitions of the other spouse is reflected in a mere monetary claim.

Community of property (Art 221 et seq CC)

7.178 The community of property regime must be agreed in a marital agreement (ie post- or prenuptial agreement) by public deed. Under this regime, most of the spouses' assets and income are considered common property, which belongs to both spouses jointly[311]. Apart from the common property, each spouse has its individual property, which by law consists of items for the exclusive personal use of a spouse and certain claims for compensation[312]. However, Swiss law allows to a certain extent for a different definition of common and individual property, provided such modifications are reflected in the marital agreement. If the community of property regime is dissolved by death of a spouse, each party or his or her heirs is entitled to his or her individual property and one-half of the common property[313]. In the event of a divorce, the division is different and similar to the one under the marital property regime of participation in acquisitions[314].

Separation of property (Art 247 et seq CC)

7.179 As the community of property regime, the regime of separation of property must be agreed in a marital agreement by public deed. Under the regime of separation of property, each spouse administers and enjoys the benefits of his or her own property and has unrestricted power of disposal over it[315]. The marriage has no effect on the spouses' assets and as a consequence, there are no monetary compensation claims between the spouses in case of death or divorce.

Transfer restrictions under Swiss matrimonial property law

7.180 Where the Swiss default matrimonial property regime of participation in acquisitions applies, each of the spouses is in principle entitled to freely dispose of its own assets (acquisitions and individual property) under Art 201(1) CC. Consequently, a spouse can freely transfer his assets to a trustee, to the extent

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309 Article 198 CC.

310 Article 215 CC; according to Art 216(1), a different participation in the acquisitions may be agreed by marital agreement.

311 Article 222(1) and (2) CC.

312 Article 225(2) CC.

313 Article 241(1) CC; according to Art 241(2) CC, a different participation in the common property may be agreed by marital agreement.

314 Article 242(1) and (2) CC.

315 Article 247 CC; special regulations apply with regard to the so-called family home (see 7.181 below).

she/he is the sole owner of such assets[316]. However, if an asset is in the co-ownership of both spouses, neither spouse may dispose of his or her share in it without the other's consent[317]. Thereby, co-ownership is not uncommon, since Swiss law knows a presumption, according to which an object or asset is presumed to be held in co-ownership of both spouses, absent any proof for the sole ownership of one spouse[318].

Under the community of property regime, the common property belongs to both spouses jointly (see 7.178 above). Apart from everyday management, the spouses may incur liabilities with regard to the common property and dispose thereof only jointly (or individually with the other's consent)[319]. No restrictions apply with regard to the administration and disposal over individual property. As a consequence, a spouse's possibility to transfer certain assets to a trust are very limited under the community of property regime.

7.181 As set out above, there are no specific transfer limitations applicable in the separation of property regime, since the marriage has no effect on the spouses' assets. Hence, each spouse is basically free to transfer her/his assets to a trustee or any other third person. However, special regulations apply with regard to the so-called family home, which – independent from the applicable matrimonial property regime – enjoys special protection under Swiss (matrimonial) law. Therefore, a spouse may only dispose of the family home with the express consent of the other spouse, even though the transferring spouse is the sole owner thereof[320].

The question of consent of a spouse as regards dispositions of marital property is thus mainly relevant in the context of the marital property regime of community of property. As far as ordinary affairs of the spouses are concerned, each spouse may administer and dispose of common assets on their own (thereby binding both spouses). In extraordinary matters (eg, larger investments or the transfer of community property to a trust), the spouses can only jointly or with the consent of the other spouse dispose of common assets.

Should a transfer of assets by one spouse without the other spouse's consent violate the above mentioned restrictions under Swiss matrimonial property law, such transfer will be considered invalid under Swiss law. In this case, a trustee may be ordered to transfer trust assets to the deprived spouse based on a vindication claim *in rem* (see 7.184 below). Assuming assets have been *validly* transferred by a spouse to a trust (ie trustee), they are no longer considered that spouse's property and are thus in principle not taken into account in Swiss divorce proceedings. Switzerland recognises in application of Art 11 HTC the fact that the trust assets are held by the trustee as a separate entity. However,

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[316] However, the transferred assets may nevertheless be taken into account when calculating the spouses' matrimonial property claims (see 7.185 below).

[317] Article 201(2) CC.

[318] Article 200(2) CC.

[319] Article 228(1) CC.

[320] Article 169(1) CC; see also Art 226m of the Swiss Code of Obligations (SR 220).

where the matrimonial property regime of participation in acquisitions applies, it may nevertheless be possible that such assets are taken into account when calculating the spouses' matrimonial property claims (see 7.185 below).

Trusts in the context of Swiss divorce proceedings

Information rights of the deprived spouse

7.182 Under Swiss family law, each spouse has the right to demand information from the other concerning his or her income, assets and debts (Art 170(1) CC). At the request of one spouse, the court may order the other spouse or even a third party to furnish such information and to produce the necessary documents (Art 170(2) CC)[321]. In accordance with these provisions, not only the other spouse but also a trustee or a bank[322] could be ordered by the Swiss court to give information as to assets transferred to a trust.

Attacking trust assets based on Swiss matrimonial property law

7.183 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. The most prominent Swiss case relating to marital property in the context of trusts, *Rybolovlev v Rybolovleva*, 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 (see in detail 7.187 et seq below).

Restrictions regarding transfers of assets

7.184 As noted above, 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, the transfer of co-owned property (in the default matrimonial property regime of participation in acquisitions) and the transfer of community property (where the spouses opted for the matrimonial property regime of community of property). 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* based on Art 641(2) CC regarding the assets invalidly transferred to the trustee, as would be the case in any other kind of invalid transfer (unless the trustee could make a defence based on his *bona fide* acquisition, which should practically hardly be admitted)[323].

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[321] This does not apply to any information held by lawyers, doctors, clerks and their auxiliary staff which is subject to professional privilege (Art 170(3) CC).

[322] Decision of the Swiss Federal Court 5P.423/2006 (12.02.2007), recit.5.3.2.

[323] Tina Wüstemann/Delphine Pannatier Kessler (n 25) 889.

Division of acquisition property and claw back mechanism

7.185 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.

Under the Swiss default matrimonial property system of participation in acquisitions (see 7.177 above), transfers made to a trust by a spouse during marriage are taken into account when calculating the spouses' matrimonial property claims if the following conditions are met[324]: (i) the transferred assets constitute acquisition and, (ii) the transfer was either (a) made within 5 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 diminishing the other spouse's share in the marital property. If these requirements are met, the assets are notionally added to the transferring spouse's remaining acquisitions and, in principle, increase 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 divorce judgment in the other spouse's favour, the deprived spouse has a direct claim against the trustee or an already considered beneficiary 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[325].

According to the prevailing Swiss doctrine, the third party recipient, ie the trustee, has thereby the right to choose whether to satisfy the claim of the deprived spouse by transferring back assets in kind up to the amount of the shortfall. In case the value of the transferred assets (eg shares etc.) decreased since they have been vested to the trustee, some Swiss authors hold that the deprived spouse has a monetary claim in the amount of the shortfall[326]. Moreover, according to Swiss practice, a trustee, which acted in good faith when accepting the assets, must only restitute to the extent still enriched[327].

In a domestic situation, such direct claim against a trustee would, according to the prevailing view, in principle have to be brought at the trustee's seat since the

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[324] Article 208 CC: 'The following are added to the property acquired during marriage: 1. the value of dispositions made without consideration by one spouse without the other's consent during the 5 years preceding the dissolution of the marital property regime, save for the usual occasional gifts; 2. the value of assets disposed of by one spouse during the marital property regime with the intention of diminishing the other's share.'.

[325] Luc Thévenoz, *Trusts en Suisse*, (Schulthess 2001), 61; see also Angelo Schwizer, 'Trusts in Ehescheidungen: Güterrechtliche Fragen' (2012) AJP 1119, 1125.

[326] BSK-Commentary, Hausherr/Aebi-Müller, N 33 ad Art 220 CC, Basle 2018; BK-Commentary, Hausheer/Reusser/Geiser, N 58 ad Art 220 CC, Bern 1992/2017.

[327] BSK-Commentary, Hausherr/Aebi-Müller, N 24 ad Art 220 CC, Basle 2018.

court dealing with the divorce does not have jurisdiction for the claw back claim[328]. However, in an international context, this question has so far gained only little attention.

Enforcement difficulties in offshore jurisdictions

7.186 Whether or not the aforementioned actions are successful, depends on the seat of the trustee (jurisdiction, see 7.185 above) and the location of the trust assets (enforcement). If the trustee and/or the trust assets are located in an offshore jurisdiction, the offshore conflict of law rules are likely to prevent the application of the Swiss matrimonial law or the enforcement of a judgment rendered based on Swiss matrimonial law. The claimant spouse's situation would be more favourable if the trust assets and/or the trustee were to be located in Switzerland[329].

Provisional measures in the context of Swiss divorce proceedings

7.187 Provisional measures are important to protect the interest of a deprived spouse, whereby Swiss matrimonial law provides with Art 178(1) CC for measures restricting a spouse's power to dispose of certain assets. According to this provision, the court may, at the request of one spouse, to the extent such measure is required to safeguard the family's financial situation or to ensure the fulfilment of a financial obligation arising from the marriage, restrict the other spouse's power to dispose of certain assets, thereby making any disposal conditional on the other spouse's consent. Since court decisions within the framework of provisional measures are rendered on the basis of the likelihood of facts, a spouse does not have to fully prove that the financial security of the family is seriously endangered by the other spouse's behaviour. The court order thereby specifies the assets affected by the restriction and the duration of such measure[330]. The court may notify third parties such as banks or debtors of the spouse, which is subject to the order, to ensure compliance with the ordered measures. Whenever the court prohibits a spouse from disposing of real estate, the competent land register must be notified[331]. In addition, the court may subject the measure to criminal consequences in case of non-compliance[332].

In case assets have already been transferred to a third party, such as a trustee, the question arises whether a Swiss court can order the seizure of assets held by a trustee. In this connection, on 26 April 2012, 5 years after the Hague Trust Convention became effective in Switzerland, the Swiss Federal Supreme Court rendered its judgment in the matter *Rybolovlev v Rybolovleva*[333], dealing for the first time with trusts in the context of divorce proceedings.

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328 FamKomm-Commentary, Steck/Fankhauser, N 6 ad Art 220 CC, Bern 2017.
329 Tina Wüstemann/Delphine Pannatier Kessler, (n 25) 890.
330 FamKomm-Commentary, Vetterli, N 3 et seq ad Art 178, Bern 2017.
331 Article 178(3) CC.
332 BSK-Commentary, Isenring/Kessler, N 23 ad Art 178, Basle 2018.
333 Decision of the Swiss Federal Supreme Court 5A_259/2010 of 26 April 2012.

In this case, the spouses, both Russian citizens, got married in Russia in 1987 without entering into a pre-nuptial agreement at that time. They moved to Geneva, Switzerland in 1995. In April 2005, the husband, a Russian billionaire, submitted a Swiss post nuptial agreement to his wife, based on the default Swiss matrimonial regime of participations in acquisitions containing a number of exceptions, which the wife refused to sign. A couple of months later, the husband set up two irrevocable discretionary trusts governed by Cyprus law, to which he transferred a large part of his assets, including art collections, real estate, a yacht and shares he held in various companies, without consideration. The principal beneficiaries of the trusts were the husband together with his two daughters. The husband was also appointed as protector of the two Cyprus trusts with the powers to hire and fire the trustees and to add or exclude beneficiaries.

7.188 In 2008, the wife filed for divorce with the courts in Geneva, claiming under the Swiss matrimonial property regime of participation in acquisitions half of the husband's wealth accrued during marriage. In parallel, she also sought an order for the provisional attachment of various assets held by her husband or third parties such as the trustees of the Cyprus trusts until the rendering of a final and enforceable judgment concerning the liquidation of their matrimonial property. While the Geneva court of first instance rejected in 2009 the wife's application for provisional attachment, the Geneva Court of Appeal ordered in 2010 the provisional attachment over (i) the husband's personal worldwide assets (by prohibiting him to dispose of them) as well as over (ii) the foreign trust assets, pending the liquidation of the couple's matrimonial property regime.

Such decision was subsequently confirmed in April 2012 by the Swiss Federal Supreme Court, which followed the approach of the lower Geneva Court of Appeal in applying the doctrine of *piercing the veil* under Swiss law (abuse of law according to Art 2(2) CC) concerning the assets of the two Cyprus trusts. As a consequence, the court treated the respective assets as still belonging to the settlor and hence the husband. The Swiss Federal Court argued that due to the provisional and expedited nature of provisional measures, a court can apply Swiss law instead of a foreign law which would apply on the merits[334].

It is important to note that the respective decisions were rendered in the framework of provisional measures on the basis of the likelihood of facts and that there were no decisions on the merits. Moreover, the Supreme Court only had to examine whether the lower court acted arbitrarily (violation of law). While the case on the merits was never brought before the Swiss Federal Court, the Geneva Court of Appeal has ruled that the two Cyprus trusts were valid under Cyprus trust law and the doctrine of piercing the veil was not applied (see **7.189** below).

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[334] Decision of the Swiss Federal Supreme Court 5A_259/2010 of 26 April 2012 of the Swiss Federal Court, recit. 7.3.3.2.

Recent Swiss case law on trust and divorce litigation

7.189 Cases dealing with trusts in a Swiss divorce context are still rare and it is not surprising that the most prominent case in that regard is still the matter *Rybolovlev v Rybolovleva,* which occupied the courts for many years.

As mentioned above, Mrs Rybolovleva was claiming under the Swiss matrimonial property regime of participation in acquisitions half of the husband's wealth accrued during marriage. In May 2014, Geneva's Court of First Instance, which disregarded the trusts in light of the extensive powers of the husband as settlor, granted her the largest divorce award in Switzerland's history with over CHF 4bn. However, the Geneva Court of Appeal later[335], in application of Art 149c PILA and Art 6 HTC held the Cyprus trusts valid[336]. But, since the spouses were living under the marital property regime of participation in acquisitions, and the asset transfers by Mr Rybolovlev to the trustees occurred within the 5-year-period prior to the dissolution of the marital property regime without the consent of his wife, the assets were notionally added to Mr Rybolovlev's remaining acquisitions increasing his wife's monetary claim[337]. It was further controversial whether the assets should be taken into account at the value at the time of the transfer to the trustee (Art 214(2) CC)[338] or the significantly higher value at the date of the of the (final) divorce decree (Art 214(1) CC)[339]. The Geneva Court of Appeal thereby applied Art 214(2) CC which resulted in a significantly lower monetary claim of Mrs *Rybolovleva* in the amount of CHF 564m[340]. The court argued, *inter alia*, that under the regime of participation in acquisitions each spouse is basically entitled to freely dispose of its own assets and thus, even when notionally added to the acquisitions by means of Art 208 CC, the respective disposition of assets, eg gifts or transfers to trustees, remains valid[341].

However, since the parties ultimately reached a settlement in October 2015, there are still no decisions from the Swiss Federal Supreme Court regarding the treatment of trust assets in the context of ordinary divorce proceedings.

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[335] *Rybolovlev v Rybolovleva*, The Court of Appeal of Geneva, Decision of 5 June 2015, ACJC/663/2015 (SJ 2016 I 273). For a detailed analysis of the court decision see Jean-Christophe a Marca, 'Le trust dans le cadre de la liquidation du régime matrimonial de la participation aux acquêts', in Entretien de l'enfant et prévoyance professionnelle 9e symposium en droit de la famille 2017 (2018), 159, 168 et seq.

[336] *Rybolovlev v Rybolovleva* (n 54) recit. 4.4.

[337] *Rybolovlev v Rybolovleva* (n 54) recit. 10.1 and 10.2.

[338] Art 214(2) CC: 'For assets added to the acquired property, the defining juncture is the date on which they were alienated.'.

[339] Art 214(1) CC: 'For the purpose of valuing the acquired property at hand at the time of the dissolution of the marital property regime, the defining juncture is the time of the division.'.

[340] The court decision generated strong media attention, see for example https://www.bilan.ch/finance/divorce_elena_rybolovlev_obtient_564_millions_au_lieu_de_4_milliards (accessed 11 July 2019).

[341] *Rybolovlev v Rybolovleva* (n 54) recit. 10.2.

'Firewall provisions' and enforcement of foreign divorce court orders in Switzerland

7.190 As Swiss law does not know the concept of trust, there are no provisions under Swiss law providing for the protection of trusts from foreign divorce court orders.

In general, the recognition and enforcement of foreign divorce and separation decrees is governed by Art 65 PILA[342]. According to this provision, foreign divorce and separation decrees are recognised and enforced in Switzerland if they are granted in the countries of domicile, usual place of residence or citizenship of one of the spouses or if they are recognised in one of these countries. If a decree is granted in a country of which none of the spouses or only the plaintiff spouse is a citizen, such decree is recognised in Switzerland only if (i) at least one of the spouses had his/her domicile or usual place of residence in this country when the action was filed and the defendant spouse was not domiciled in Switzerland; (ii) the defendant spouse submitted to the jurisdiction of the foreign court without reservation; or (iii) the defendant spouse consents to the recognition of the decree in Switzerland.

In matrimonial property law matters the recognition and enforcement of foreign court orders is governed by Art 58 PILA. This provision states that foreign decisions on matrimonial property regimes are recognised in Switzerland if (i) they were rendered or are recognised in the country of domicile of the defendant spouse; (ii) they were rendered or are recognised in the country of domicile of the plaintiff spouse, provided that the defendant spouse was not domiciled in Switzerland; (iii) they were rendered or are recognised in the country whose law applies under the PILA provision; or (iv) they concern real estate and were rendered or are recognised where the real estate is located. However, if a decision with regard to a matrimonial property regime is rendered in connection with divorce or separation proceedings the rules governing the recognition and enforcement of foreign divorce and separation decrees apply (see above).

[342] The Lugano Convention is not applicable in divorce and matrimonial matters, except for maintenance issues.