RECOGNITION OF TRUSTS IN SWITZERLAND IN RELATION TO IMMOVABLE PROPERTY

RESEARCH ESSAY

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- EU Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
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- Federal Debt Enforcement and Bankruptcy Act (**DEBA**), RS 281.1
- Federal Act on Private International Law (**APIL**), RS 291
- Swiss Civil Code (**CC**), RS 210. See for an unofficial English translation provided by the Swiss government: http://www.admin.ch/ch/e/rs/2/210.en.pdf.

III. RECOGNITION OF TRUSTS IN SWITZERLAND IN RELATION TO IMMOVABLE PROPERTY

1. Introduction

Taking the risk to adopt a superficial and simple approach, one could sometimes compare law with today's tourism.

Many countries that seemed very remote and quite impossible to reach are today's most successful destinations of mass tourists struggling for a piece of beach in the Maldives or a proper view of the Rio de Janeiro bay…

Sometimes, it goes the same way with law. Also with trust law, actually. Civilian lawyers had, not so many years ago, a sceptical view on trusts, which was often depicted as something that may exist in the countries of common law but not in their own countries.

This has predominately changed. Trusts are today's important actors in the juridical world of continental countries. In the same way as some countries are forced to develop viable infrastructure for mass tourism in places where years earlier only few adventurous people could dare to venture, some civilian countries tried and are still trying to create a framework to have trusts recognised and effectively inserted into the juridical and business local context.

Switzerland was particularly touched by the phenomenon of the increase of the trust business. Indeed, various trustees companies are now settled in this country where it is not unusual to propose planning options related to trusts.

Accordingly, trusts have increased their importance in this country and their role in several frameworks.

Immovable assets located in Switzerland can now be held on trust. In this framework, interesting issues may arise. In the present essay, I will attempt to draft an overview of these topics.

2. Switzerland and the Hague Convention on Trusts

2.1. Situation before the ratification of the Hague Convention on Trusts

Prior to the ratification of the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (the "Hague Convention") already, Switzerland had already shown some openness towards trust by accepting it as a non-codified contract.

Indeed, the Swiss Supreme Court has recognised trusts since the case Harrison (1970)[1], where the judges, on the basis of Swiss law, admitted the existence of a trust as a contract *sui generis* with elements of the agency contract (S. 394 *et seq.* CO), of the non codified fiduciary agreement, of the donation (S. 239 *et seq.* CO) and of the contract in favour of a third party (S. 112 CO). In the later case Werner Rey[2], the Court of Appeal of the Canton of Zurich recognised a trust as characterising it as a mix contract (as decided in Harrison) and applied the chosen law, *ie* the law of Guernsey[3].

2.2. Situation after the ratification of the Hague Convention

On 1 July 2007 Switzerland ratified the Hague Convention. This was an important step for this country, more and more called to take a position on trusts whose importance had been increasing.

The effect of the ratification of the Hague Convention is that Swiss judges are now obliged to recognise trusts as such defined in the Convention, without having to build analogies to contracts or other figures of Swiss law[4]. This is surely an advantage both for the legal certainty as for the reliance on trusts within Swiss boundaries. This ratification brought to an increase of the importance of trusts in Switzerland. At the time of the ratification proposal (2005), the Swiss Federal Council recognised that important assets were held on trust in Switzerland and that, given the considerable mobility of capitals and persons, it was easy to suppose that the importance of trusts was suitable to increase. Moreover, the international pressure against some offshore centres was seen as a possibility to propose Switzerland as a reasonable alternative for trust activities[5]. The ratification was then approved by the Swiss parliament in 2005[6].

Subsequently to the ratification of the Hague Convention, a number of Swiss laws were modified in order to make the recognition of trusts efficient and reliable for Swiss lawyers and judges. Among the main changes, as we shall see in further details, the Federal Act on Private International Law ("APIL") as well as the Federal Debt Enforcement and Bankruptcy Act ("DEBA") were modified. *Inter alia*, these changes are related to immovable property situated in Switzerland and bankruptcy proceedings.

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[1] ATF 96 II 79

[2] ZR 98 (1999) nr. 52, p. 225.

[3] For further details concerning this decision and the evolution of the Swiss jurisprudence concerning the trust recognition, see NOSEDA

[4] S. 149a *et seq.* APIL

[5] Message, para. 1.2 et seq.

[6] For further details concerning the way to the ratification of the Hague Convention, see ARTER, p. 136

3. Land registration and trust recognition

3.1. Land Register

Land in Switzerland is duly recorded in the Land Register[7], which shows all existing property rights on a single land parcel[8]. On the basis of the inscriptions in the Land Register, any person is authorised to rely on them and is protected in any transaction relating to rights *in rem* made on this basis, unless it can be proved that this person is not *bona fide*[9].

Further, pursuant to S. 970 para. 4 CC, nobody is entitled to invoke the ignorance of one entry in the Land Register to take an advantage from it (principle of publicity). As a consequence, any persons holding the title of one right inscribed in the Land Register is protected and can oppose this right to anybody at any moment[10].

3.2. Transmission of property in case of creation of a trust *inter vivos*

When a settlor decides to create a trust, he may decide to transfer some immovable property that he holds into the trust. He will then transfer the immovable property to the trustee on the basis of the relevant trust deed. If the trustee and/or the beneficiaries are foreigners living abroad, an authorisation may be necessary on the basis of the *Lex Koller*[11]. Pursuant to S. 4 Hague Convention, Swiss law will determine the way by which the property will be transferred to the trustee. Swiss law will rule such transfer of immovable property located in Switzerland, although the parties can choose a foreign law[12]. However, the form of the notarised act (which is mandatory under Swiss law for real estate transactions[13]) is ruled, with no exceptions, by Swiss law[14].

According to the Guidelines of the Federal Justice and Police Department to the cantonal Land Register offices (which do not have any binding nature like a law), the settlor should file a notarised act (done by a Swiss notary or another authority empowered by law) recording that (i) the trust has been validly created with regard to the foreign applicable law; (ii) the transferee of the real property has been elected as trustee; and (iii) the immovable asset to be transferred to the trustee is part of the trust assets[15].

This view has been criticised by FOËX; according to this author, a Swiss notary will never dispose of the necessary juridical education and knowledge to assess autonomously

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[7] S. 656 CC
[8] S. 942 *et seq.* CC
[9] S. 973 CC
[10] PANNATIER KESSLER, p. 125 (with further details and references).
[11] For the relevant issues arising out of the so-called Lex Koller imposing to any foreigners living abroad an authorisation to acquire real estate in Switzerland, see decision of the Swiss Supreme Court dated 15.01.2010, 2C_409/2009 as well as the comments in the articles of ZEN-RUFFINEN and JEANRENAUD.
[12] S. 99 and 119 APIL
[13] S. 657 CC
[14] S. 119 para. 3 APIL; GUILLAUME, p. 40
[15] GUIDELINES, p. 3

whether a trust is valid or not. He will then have to revert to an expert in order to obtain a legal opinion confirming this fundamental issue. As a result, real property would be transferred on the basis of one legal opinion, which the notary has used in order to draft the necessary act. This seems to be hardly compatible with the Swiss *ratio legis* of having a notarised act for immovable property transfers, *ie* having all information duly checked by the notary[16]. Therefore, according to FOËX , in case of a land transfer to a trustee, a notarised act (acte authentique, Urkunde) relating the intention of the settlor to separate the land from his property in favour of the trustee and the acceptance of the latter appears to be necessary[17]. The notarised act would specify that the immovable asset is transferred to the trustee in the framework of the creation of one trust in observance of the relevant trust deed. Furthermore, some clauses regarding the beneficiaries could also be added to the notarised act, should this be considered as necessary[18].

In both possibilities, the cooperation of a Swiss notary (or of an equivalent public authority in some cantons) will be necessary in order to implement the transfer of an immovable asset to a trust. Some lawyers with an Anglo-Saxon juridical background might legitimately have quite a sceptical view on the approach of FOËX, requiring a notarised act done before the settlor and the trustee and relating of the intention of both parties to proceed with the land transfer. This is exactly what happens for a normal contact of sale of land. However, a trust is not a contract, and this could be therefore problematic.

Nonetheless, one should not forget that this is only about transfer of land located in Switzerland to a trustee. In this country, trusts are not part of local law and, despite a considerable increase of their economical importance, trusts remain *terra incognita* for many lawyers. At any rate, the concept may be familiar to many lawyers in Switzerland at a general level but their knowledge will be often limited in case of delicate problems, *eg* mistakes, shams, fraudulent transaction damaging the settlor's creditors pursuant to the applicable law, etc. Those are delicate matters that only a lawyer with proper education at common law can handle.

Swiss notaries will hardly have such knowledge. However, should a Swiss notary draft an act recording the valid creation of one trust and the consequent transfer from the settlor to the trustee, this act will be presumed as true and can only be contested with difficulty. As a consequence, in case of an act that wrongfully relates of the (apparently) valid creation of one trust, the trustee will be fully and validly entitled – according to Swiss law – to dispose of the immovable assets that he received. This can have serious consequences for the settlor.

On the other hand, should a notary require the presence of the settlor and of the trustee when drafting the act for the transfer of the immovable asset, the notary could ask directly the settlor and the trustee about the trust relationship and their respective

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[16] FOËX, Trust et registre foncier, p. 261. However, FOËX also mentions special cases in which the simple trust deed could suffice as necessary "acte" to transmit the property. This possibility should be given if (i) the trust deed (subject to foreign law) is a bilateral act, (ii) the form of the "acte" is compatible with Swiss requirements, including the official language of the Canton where the immovable asset is located, and (iii) the immovable asset in located in a Canton where the law does not require such "actes" to be passed before a public authority. This possibility appears quite remote and is of minor interest.

[17] Sharing this opinion: GUILLAUME, p. 40

[18] FOËX, *ibid*

willingness to create (or implement) such relationship. This should not discharge the notary from the burden to verify whether the trust has been validly created. However, he could fund his conviction more easily by asking the settlor and the trustee.

This would not mean that trusts are to be considered as contracts, which they are not. This would merely permit the notary with less comprehensive knowledge about trust law and operating in the Swiss legal system, which requires a notarised act for any land transfer, to ascertain more easily and with increased juridical security whether it is really the settlor's intention to create a trust and the trustee's to accept his task. Indeed, one should not forget that, although trusts are not contracts, a trustee is generally at liberty not to accept the task that the settlor wants to confer to him.

As a conclusion, a separate act (acte authentique / Urkunde) signed by the settlor and the trustee before a Swiss public notary should be preferred to other options.

3.3. Transmission of property in case of creation of a trust *mortis causa*

As a general principle, Swiss law rules the succession of a deceased person with last domicile in Switzerland[19]. If Swiss law rules the succession, one cannot provide the creation of a trust after his death, since trusts are not part of Swiss law[20]. However, a foreigner domiciled in Switzerland can opt for the appliance of his national law[21]. This can be of particular interest for a person with the nationality of a country with no forced heirship rules, deciding to set up a trust after his death.

Therefore, should somebody wish to plan his succession by transferring some of his immovable assets located in Switzerland into a trust created *mortis causa*, this will only be possible if (i) the deceased was not domiciled in Switzerland at his death and Swiss law was not applicable to the succession; or (ii) the deceased was domiciled in Switzerland at his death but was national of a country where the creation of a trust after one's death is contemplated.

As a consequence, should one not belong to these categories, he will rather choose to set up a trust during his lifetime and transfer into it the immovable assets he wishes. However, this entails the danger that, after this death, his/her heirs will challenge the creation of this trust since it is potentially in conflict with forced heirship rules. An immovable asset located in Switzerland will stay for the satisfaction of their claims, if they succeed. It goes differently with the creation of a trust during the lifetime of the deceased, in the framework of which liquid assets are transferred to a trust legislation not recognizing claims based on forced heirship rules[22] [23] or immovable assets located in a trust legislation with no (similar) forced heirship rules[24] are transferred into the trust[25].

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[19] S. 90 para. 1 APIL
[20] GUILLAUME, p. 38
[21] S. 90 para. 2 APIL
[22] GUILLAUME, *ibid*
[23] *Eg*, S. 9 TRUSTS (JERSEY) LAW 1984 (REVISED), specifying that any questions regarding the "validity or effect of any transfer or other disposition of property to a trust", "shall be determined without consideration of whether or not (a) any foreign law prohibits or does not recognise the concept of a trust; or (b) the trust or disposition avoids or defeats rights, claims, or interests conferred by any foreign law upon any person by reason of a personal relationship to

In case of the creation of such a trust *mortis causa*, the chosen trustee will be the only person entitled to claim the property of the immovable assets that are supposed to be part of the trust[26].

4. *Bona fide* parties in land transactions and mention of trust

According to Art. 12 of the Hague Convention, "Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed".

Together with the ratification of the Hague Convention, Switzerland modified its national law and, by so doing, created the possibility to allocate real estate property to a trust. S. 149d APIL says (freely translated):

> "[1] When the trust assets are entitled to a trustee in the Land Register, in the Ship Register or in the Aircraft Register, reference may be made to the trust relationship by means of an annotation.
> [2] (…)
> [3] A trust relationship that is not noted or entered shall be invalid against bona fide third parties."

According to a general principle in trust law, the trustee holds the trust assets in full proprietary right[27]. S. 149d APIL is drafted in respect of this principle. However, it permits to have the trust relationship noted on the folio of the Land Register concerning land held on trust by the trustee[28].

Entitled to require the inscription of the mention are (i) the trustee at any moment and (ii) the settlor at the moment of the creation of the trust[29]. The trust beneficiaries are not entitled to require the inscription of the mention since the law does not confer this capacity to anybody else but the land owner. Only in case that the applicable law to the trust or the trust deed itself foresees the duty of the trustee to make the trustee's position public in relationship with certain assets, *ie* by declaring that a certain asset is held on

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the settlor or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognize, protect, enforce or give effect to any such rights, claims or interests.

[24] *Eg*, England. Should the heirs challenge the transfer into a trust of one immovable asset located in England before a foreign court and obtain a judgement condemning the trustee to pay off the heirs on the basis of forced heirship rules, England would very likely not enforce the judgement, even if the judgement comes from a EU (Lugano)-Member State (S. 22 para. 1 Brussel Regulation 44/2001 – Lugano Convention).

[25] GUILLAUME, p. 39

[26] GUILLAUME, p. 41

[27] PENNER, p. 21

[28] The same can be said regarding entries in the Ships Register or in the Aircraft Register, as mentioned by S. 149d APIL. The following considerations also apply to these Registers, *mutatis mutandis*. However, particular issues going outside the framework of land registration and immovable assets have not been analysed.

[29] FOËX, La mention du trust au register foncier, p. 84; GUIDELINES, p. 3

trust, and supposing that the trustee does not comply with this duty, the beneficiaries should be entitled to invoke the Court's protection in order to obtain the inscription of the mention[30]. As a result, if the settlor does not express the wish in the trust deed to have the trust mentioned in the Land Register or if the trustee does not consider such a mention as opportune, the beneficiaries cannot obtain the mention, unless the applicable law foresees a duty to have such a mention registered. This is consistent with the formulation of Art. 12 of the Hague Convention; here the trustee is conferred with a discretion to have the mention registered (see beginning of Art. 12: "Where the trustee desires…")[31].

As a consequence, in respect of the principle that everybody is supposed to know about the content of the Land Register[32], any third party involved in a transaction concerning the immovable asset on trust is presumed to know about the trust relationship[33].

Therefore, in case of the mention of the trust, any third party involved will have to ensure that any transaction concerning the immovable asset is compatible with the terms of the trust. Should the transaction be performed in breach of trust, the new owner will be potentially exposed to a restitution claim of the beneficiaries, according to the applicable law to the trust (tracing)[34].

The advantages of such a mention are evident: its absence would protect the *bona fide* third party and prevent the beneficiaries from tracing the trust immovable asset, even if the transaction is performed in breach of trust according to the applicable law to the trust[35].

Moreover, the protection for *bona fide* third parties goes beyond the mere real estate transaction: it also concerns the trustee's creditors, who could require the immovable asset to be sold for the satisfaction of their claims (see below).

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30 FOËX, *ibid*; GUILLAUME, p. 43
31 HARRIS, p. 340
32 S. 970 para. 4 CC
33 FOËX, La mention du trust au register foncier, p. 85; GUILLAUME, p. 43-44; PANNATIER KESSLER, p. 139
34 PENNER, p. 382
35 Message of the Swiss Federal Council, p. 606; FOËX, La notion du trust au register foncier, p. 86;

5. Trustee's bankruptcy and mention of trust

5.1. Recognition of trusts under the Federal Debt Enforcement and Bankruptcy Act

The DEBA rules bankruptcy in Switzerland. S. 284a and S. 284b DEBA apply to bankruptcy proceedings in Switzerland in relation to trusts as defined in the Hague Convention (S. 149a APIL)[36].

5.1.1. Bankruptcy proceedings against the trust assets

Trusts have no juridical personality and cannot have rights nor can they own assets. It is on the contrary the trustee who owns on a fiduciary basis the assets on trust and who can create rights and liabilities in relation to these assets and according to the trust terms, so that to ensure the protection of the equitable interests of the beneficiaries[37].

Pursuant to this principle, S. 284a DEBA states that, when trust assets are liable, debt collecting or bankruptcy proceedings for trust liabilities have nevertheless to be initiated against the trustee and not against the trust. It is the applicable law to the trust[38], which determines when exactly a trustee can make the trust assets liable for his activity and, otherwise, under which conditions the trust assets are liable[39].

As a general principle, debts arising out of the trustee's fiduciary activity are either directed against the whole assets of the trustee, who then has a right of indemnity against the trust assets, or they are directed directly against the trust assets. The first option is the one of English law[40], whereas various US-States and offshore jurisdictions have opted for the second option[41].

According to para. 2 of S. 284a DEBA, bankruptcy proceedings are to be carried out at the place where the trust is situated. Is the administration place not in Switzerland, proceedings are possible against the trustee at the place where the trust is managed in facts.

It is further specified (para. 3) that the trust is treated like a company as for the applicable procedure and it is therefore subject to the regime of debt collection by bankruptcy pursuant to S. 159 DEBA *et seq.* (poursuite par voie de faillite / Betreibung auf Konkurs) and, therefore, not to the regime of debt collection by seizure of assets pursuant to S. 89 DEBA *et seq.* (poursuite par voie de saisie / Betreibung auf Pfändung). The only exception is where trust assets have been pledged or in case of appliance of S. 43 DEBA

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[36] STAEHELIN, p. 70 *et seq.*, regarding the bankruptcy courts' approach to trusts before the ratification of the Hague Convention.
[37] PENNER, p. 21
[38] S. 6 and 7 Hague Convention
[39] BOPP, BasK, ad S. 284a DEBA, para. 7; STAEHELIN, Trusts im schweizerischem Zwangsvollstreckungsrecht, p. 81; THÉVENOZ, Trusts in Switzerland, p. 237
[40] PENNER, p. 22
[41] PANNATIER KESSLER, p. 149

(special cases excluding the bankruptcy procedure)[42]. This means that, once bankruptcy has been validly declared by the Court[43], all creditors will be summoned to announce their claims and all assets on trust (at least the ones in Switzerland) will stay for the satisfaction of the creditors' claims[44].

Further, one should also consider the fact that trust assets can be subject to a claim of the settlor's creditors, in the event that the trust has been created with the aim of defrauding the latter or in order to unjustly favour only some of them[45]. Is the settlor subject to enforcement in Switzerland, so a revocatory claim (action révocatoire, Anfechtungsklage) is possible according to S. 285 DEBA *et seq.*[46]. Objects of such a revocatory claim can be transactions, *ie* the creation of the trust with the relative transfer of assets, which have been made either 1 year or 5 years (depending on the proved settlor's intention to defraud) before the bankruptcy declaration of the settlor[47].

Finally, the settlor's creditors are also likely to open proceedings outside Switzerland with the aim of having the trust set aside, should they consider that the latter has been created with the intention of defrauding creditors[48]. A judgement could then be enforced outside the framework of bankruptcy proceedings in Switzerland, triggering the liability of the trust assets[49].

5.1.2. Bankruptcy proceedings against the trustee personally

Creditors of the trustee can initiate debt collecting or bankruptcy proceedings against the trustee himself for debts arising outside the framework of his fiduciary activity, *eg* because the trustee does not pay his employees anymore or he has not paid the interests for a credit provided to him by a bank for the purchase of his premises.

Depending whether the trustee is a company or a natural person, either the regime of debt collection by bankruptcy[50] (for companies) or the regime of debt collection by seizure of assets[51] (for natural persons) apply.

The danger is of course that these proceedings, in theory, could trigger the liabilities of all trustee's assets, *ie* also the assets held on trust. However, a well-established principle

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42 Message of the Swiss Federal Council, p. 610
43 S. 171 DEBA
44 For further details, see BOPP, *ibid*, para. 17 *et seq.*
45 Concerning English law, see OAKLEY, p. 274
46 For the sake of completeness, note that, in the framework of such revocatory claims, the resulting judgement will not be able to be enforced in another Lugano-State since bankruptcy is excluded form the scope of the Convention (1 para. 2 lit. b CL). This was confirmed by the Swiss Supreme Court (ATF 131 III 227).
47 For further details, THÉVENOZ, Trusts in Switzerland, p. 253
48 THÉVENOZ, *ibid*, p. 252; STAEHELIN, *ibid*, p. 76
49 Within the applicability of the EU Regulation 44/2001 – Lugano Convention, the trust creation can be attacked at the trustee's domicile (S. 2) or, alternatively, at the place of domicile of the trust (S. 5). The revocatory claim will be directed against the trustee (S. 290 DEBA). A judgement given in this framework by a Court of a EU member state would then be subject to enforcement in Switzerland according to S. 38 *et seq.* Lugano Convention.
50 S. 159 DEBA *et seq.*
51 S. 89 DEBA *et seq.*

at common law foresees the segregation of the personal property of the trustee from the assets held on trust[52] since the trustee has no beneficial interest in the property he holds on trust[53]. As clearly explained by PENNER, "a beneficiary's equitable rights bind the trustee in bankruptcy"[54].

In respect of this fundamental principle, S. 284b DEBA ensures the ring-fencing of the trust assets in the event of the bankruptcy of the trustee. S. 284b DEBA integrates S. 11 para. 3 Hague Convention into the Swiss legislation, according to which, *inter alia*, "the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy".

As a consequence, bankruptcy authorities have to segregate on their own motion (distraction d'office / Aussonderung von Amtes wegen) the assets held on trust from the trustee's personal assets[55], after deduction of the trust's debts in favour of the trustee[56].

For the sake of clarity, it has to be noted that this is not the only case where segregation of assets is operated in the framework of Swiss bankruptcy proceedings: investors' funds are also ring-fenced in case of bankruptcy of the managing company of an investment scheme[57]; in case of bankruptcy of a bank, deposited assets belonging to clients and placed with the bank (current account and term deposit) up to CHF 100,000 are ring-fenced[58]; bearer bonds given for payment to the person who is then in bankruptcy are also ring-fenced[59]; in case of bankruptcy of one agent, the assets that the agent purchased in the framework of the mandate for his client, are ring-fenced[60] [61].

However, in this last case, according to S. 401 CO *e contrario*, assets that the trustee received from his client to be held fiduciary in the framework of the agency contract cannot be ring-fenced, so that they would be part of the bankrupt's estate in case of bankruptcy of the agent. Despite being often criticised by some authors[62], the Swiss Supreme Court has upheld this view so far[63]. As a consequence, trust beneficiaries are clearly privileged in case of bankrupt of the trustee compared to clients of an agent in case of bankrupt of the latter.

As mentioned above, this is not, however, the only case where such privilege is present in Swiss law.

The Swiss Supreme Court decided in a 2001 case[64], *ie* before the ratification of the Hague Convention by Switzerland, that this unequal treatment was compatible with Swiss public

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52 MOMBRAY/TUCKER, p. 767; EICHNER, p. 46, n. 115
53 PENNER, p. 45
54 PENNER, *ibid*
55 BOPP, BasK, ad S. 284b DEBA, para. 3; PEYROT, p. 66
56 S. 284b DEBA
57 S. 35 of the Federal Act of 23 June 2006 on collective investment schemes (Loi sur les placements collectifs, LPCC / Kollektivanlagengesetz, KAG)
58 S. 37a and 37b of the Federal Act on Banks (Loi sur les banques, LB / Bankengesetz, BankG)
59 S. 201 DEBA
60 S. 401 para. 2 and 3 CO.
61 For further details see PEYROT, p. 59
62 TERCIER/FAVRE, nr 5183 ; WERRO, *ad* Art. 401 N 9.
63 ATF 117 II 429
64 Decision of the Swiss Supreme Court 5C.169/2001 dated 19 November 2001.

policy. However, as PEYROT points out[65], this decision was about a constructive trust, *ie* a trust arising by operation of law[66], and not a voluntarily created express trust[67]. Pursuant to Art. 3, the Hague Convention only applies to express trusts and not to constructive ones. One may wonder whether today, after the ratification of the Hague Convention, the Swiss Supreme Court would have taken the same decision[68].

At any rate, we can now consider that the debate, whether the unequal treatment between clients of a bankrupt agent and trusts' beneficiaries is compatible with Swiss public policy, has been now practically closed by the ratification of the Hague Convention and the adoption of S. 284b DEBA. The latter law provision prevents indeed Swiss courts from considering such unequal treatment contrary to Swiss public policy as according to Art. 18 of the Hague Convention.

The law also provides further protection for the beneficiaries, should assets be considered to be part of the trustee's personal assets and, therefore, subject to bankruptcy proceedings.

Third parties with an interest can contest the trustee's own ownership by inferring that he holds certain assets on trust, and that, therefore, these assets are to be segregated from the trustee's own assets staying for the satisfaction of the creditors of the latter[69]. They will carry the burden of proof[70]. The law provides for a procedure leading to a decision of the bankruptcy authorities stating whether these assets are to be used for the satisfaction of the creditors' claims or not (revendication, Aussonderung)[71]. Who is entitled to claim an interest on these assets, must be determined in respect to the applicable law to the trust. The trust's beneficiaries should have this capacity in all cases[72]. The trustee should also be admitted to this claim, since he holds a legitimate interest that assets held on trust are not seized, since this would damage the legitimate interest of the trust beneficiaries to benefit from these assets. Should this happen, the trustee would be in breach of trust[73].

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65 PEYROT, p. 63

66 PENNER, p. 93 *et seq.*

67 For a definition of express trust, PENNER, p. 15: "An express trust is a trust that is intentionally set up. […] There are essentially two ways in which I can do this: I can simply declare that I now hold such and such property, say 1,000 shares of ABC plc, "on trust" for my daughters; or I can transfer the shares to someone else, my brother, say, to hold on trust for my daughters. In the former case, called "self-declaration" of trust, I become the *trustee*, the holder of the legal title of the shares who must deal with the property according to the terms of the trust; in the latter case, my brother does. In both cases, I am the settlor, and my daughters are the *cestui que trust*, or *beneficiaries*."

68 PEYROT, *ibid*

69 S. 242 DEBA in case of bankruptcy or S. 106-109 DEBA in case of asset seizure.

70 PEYROT, p. 75

71 BOPP, BasK, ad S. 284a DEBA, para. 24

72 PEYROT, p. 72-73

73 BOPP, BasK, ad S. 284b DEBA, para. 10; about the trustee's general duty to safeguard the trust assets, see THOMAS AND HUDSON, para 10.10 et seq.

5.2. The effect of publicity of the mention of trust in the Land Register in the framework of the bankruptcy of the trustee

5.2.1. Protection of *bona fide* creditors in bankruptcy

According to the Message of the Federal Council[74], the absence of the mention of trust "implies that the creditors can have the trustee's assets seized in order to satisfy their claims" in the framework of bankruptcy proceedings. In other words, the trust relationship cannot be opposed to *bona fide* creditors if the mention of trust has been omitted.

Various authors share this view[75]; however, this has been subject to some critics in the Swiss legal literature, so that a closer analysis of this issue seems to be necessary.

As we have seen above, one has to distinguish in bankruptcy proceedings against the trustee, whether the creditors' claims are based on a personal debt of the trustee - outside his activity as trustee - or whether they are based on the trustee's activity as trustee of a determined trust. Only in the latter case, trust assets stay for the satisfaction of the creditors' claims. Otherwise, trust assets are ring-fenced against the trustee's personal creditors[76].

It is indeed a determining factor to know whether, in case of the omission by the trustee (or other involved parties) to obtain the mention of trust concerning an immovable asset in the Land Register, this leads to a respective increase of the assets to be shared among the creditors for the satisfaction of their claims. Further, another problem is given by determining what is exactly meant with "*bona fide* third parties", as mentioned in S. 149d para. 3 APIL. If personal creditors of the trustee's in the framework of bankruptcy proceedings against the latter are also meant, how is it possible to assess whether they are truly of good faith and under which circumstances?

Pursuant to the Message of the Federal Council, protection should be granted to creditors who lent money to the trustee in good faith, *ie* creditors who did not know or should not have known about the trust and the immovable asset held on trust. As a result, if the trust relationship has not been mentioned in the Land Register, the bankruptcy administration (the equivalent to the English trustee in bankruptcy) will segregate the trust assets from the personal assets belonging to the trustee personally[77] only if the trust relationship is evident otherwise[78].

Should the bankruptcy administration consider that the trust relationship is not evident and that, therefore, creditors could not think of the existence of the trust, the immovable asset held on trust will be included into the bankrupt's estate. However, the beneficiaries (or other persons with an equitable right) will still have the possibility to claim back the assets by filing a restitution claim[79] with the bankruptcy court. However, they will have

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[74] Message, p. 606
[75] For more details: PEYROT, p. 90, footnote 37
[76] S. 2 lit. a Hague Convention; S. 284a and 284b DEBA
[77] S. 284b DEBA
[78] Message, p. 611
[79] S. 242 DEBA in case of bankruptcy or S. 106-109 DEBA in case of asset seizure.

to demonstrate that the creditors knew or should have known about the trust, *ie* that they were not *bona fide*[80]. They would lose their rights otherwise[81].

So far so good. But how is it possible to know exactly how creditors did not know about the trust relationship? And how is it possible to deal with bankruptcy proceedings where both creditors *bona fide* and *mala fide* coexist within the creditors wanting to obtain a share of the bankrupt's estate?

In absence of mention in the Land Register, a creditor will be presumed *mala fide* only if the trustee informed him personally about the trust relationship or if he knew about it in some other way. This could indeed lead to problems in proving it. In case of doubt, should the judge decide *in dubio pro creditore* or *debitore*? According to the view expressed in the Message of the Federal Council, the court's decision should be in this case in favour of the creditor. Moreover, in logic accordance to this view, the debtor or any other interested person should then carry the burden of proof.

Another potential problem is then given by the presence by both good faith creditors and other creditors who knew about the trust. Some authors propose the pragmatic solution to admit both kind of creditors as bankruptcy creditors but to let only the ones of good faith to benefit from the profit of the sale of the immovable asset, as long as their claims are not satisfied[82]. However, this solution has the evident problem that it puts the good faith of the creditors before the principle of equal treatment of the creditors in bankruptcy[83].

If some authors see the problem but choose to sacrifice the principle of the equal treatment of creditors in favour of the protection of the good faith in this particular circumstance[84], some others do not accept it and propose to offer this kind of privilege only to creditors in the framework of the regime of debt collection by seizure of assets[85] (for natural persons). For bankruptcy or debt restructuring agreements[86] (concordat / Nachlassvertrag) such difference among the creditors is considered far too complicated and unjustly contrary to the principle of equal treatment[87]. Therefore, it is proposed to refuse the creation of two bankrupt estates (for good and bad faith creditors) and to encompass the immovable asset as soon as only one creditor can invoke his good faith[88]. As a result, according to this view, the protection of creditors is then even stronger.

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80 PANNATIER KESSLER, p. 153
81 Message, *ibidem*
82 GUTZWILLER, ad S. 284, n. 16
83 S. 208 *et seq.* DEBA
84 GUTZWILLER, *ibid*; GUILLAUME, p. 43; FOËX, Trust et registre foncier, p. 265, whereas these two last authors do not explicitly speak of two separate bankrupt's estates, with different treatment of creditors *bona* or *mala fide*
85 S. 89 DEBA *et seq.*
86 S. 293 DEBA *et seq.*
87 GASSMANN, ad S. 149d APIL, n. 7
88 GASSMANN, *ibid*

5.2.2. Extent of the protection of *bona fide* creditors

In the recent Swiss legal literature, some authors have contested the view expressed in the message of the Federal Council, which seems to be largely shared in the legal literature.

According to these dissenting views[89], S. 149d para. 3 APIL does not apply to bankruptcy proceedings but only for the protection of *bona fide* purchasers in the framework of sale of land.

In his explanatory report dating before the Message of the Federal Council, THÉVENOZ says that the faculty for the trustee's personal creditors to claw trust assets in order to satisfy their claims depends on the foreign law applicable to the trust, which Switzerland has to recognise pursuant to the Hague Convention. According to the same author, has the trustee omitted to have the trust relationship mentioned in the Land Register, this does not justify to over-protect the trustee's personal creditors, since creditors, who truly seek protection for their claims, will ask for a mortgage right (droit de gage / Pfandrecht) on the land and will not merely rely on the fact that the trustee holds land[90].

Basing her views on the difference between claims and rights *in rem*, *ie* rights that are related to an immovable asset and that are visible in the Land Register, PEYROT rejects the view that the trust mention of S. 149d para. 3 APIL should protect the trustee's *bona fide* creditors even outside the framework of the acquisition of a right related to said immovable asset. In other words, *bona fide* creditors in the framework of debt collecting proceedings could not invoke S. 149d para. 3 APIL in order to have their claims protected, unless their claims are protected by a mortgage over the immovable asset. According to the same author, only a mortgage right should provide real protection; in this view, the simple good faith does not suffice[91]. Moreover, excluding *bona fide* creditors from the protection of S. 149d para. 3 APIL would comply with S. 973 para. 1 CC[92], protecting the *bona fide* purchaser of land, who relies on the contents of the Land Register. Only this interpretation can be considered as compatible with the system of the Land Register in Switzerland[93].

As we have already seen, one pillar of trust law is the protection of the trust assets and their consequent segregation in case of bankrupt of the trustee. This principle was so important that it was expressly mentioned in Art. 2 lit. a of the Hague Convention, according to which "the assets constitute a separate fund and are not a part of the trustee's own estate". The member states should not by-pass this asset separation by invoking Art. 15 of the Hague Convention, since the asset separation is a basic requirement of the Convention[94].

However, the Message of the Federal Council and various authors, as seen above, say that this separation is not effective if the trustee omits to have the trust relationship

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89 PEYROT, p. 56 *et seq*., especially p. 83 *et seq*.; PANNATIER-KESSLER, p. 156
90 THÉVENOZ, Trusts in Switzerland, p. 122
91 PEYROT, p. 98
92 « Any person who, relying in good faith on an entry in the land register, has acquired property or any other right in rem in reliance thereon, is protected in such acquisition. »
93 PEYROT, p. 105
94 HARRIS, p. 318

mentioned in the Land Register. In this case, the protection of the personal creditors of the trustee is considered more important.

With respect, this view should not be upheld. If Switzerland, like any other European continental country, really wants to ensure an effective and full recognition of trusts, it has to comply with the basic principles of trust law. One of those principles is the asset segregation in case of bankruptcy of the trustee, regardless if the asset is movable or immovable, registered or not registered. Moreover, the discriminating criterion based on the good faith of the creditors might be convincing at a theoretical stage, it appears less striking if we consider how complicated and difficult it is potentially to determine whether the good faith has to be admitted or not. This could lead to considerable practical problems that should not be underestimated[95]. Finally, as pointed out correctly by PEYROT, Swiss law provides protection for *bona fide* purchasers of land, not for creditors. This concept is not present in Swiss law and there should be no good reason to introduce it in the framework of the trust recognition. It is therefore submitted that the view expressed by PEYROT should be shared. In this respect, the opinion of the Swiss Supreme Court is awaited with highest curiosity.

With regard to the above considerations, it is at any rate to recommend having the trust mention duly inscribed into the Land Register. At the present time, this seems to be the best way to protect effectively the interests of trust beneficiaries.

6. Conclusion

Trusts have become quite important actors in the Swiss juridical landscape. They offer interesting planning options even in relation to immovable assets. Professionals in this business will have to take special care when advising their clients in relation to particular issues that present some uncertainties.

Extra care will be needed when drafting the necessary notarised act for the transfer of immovable assets to a trustee. Different issues arise depending on whether the trust is created *inter vivos* or following the decease of somebody.

For the sake of a better protection of the beneficiaries of one trust to which immovable assets have been transferred, the law provides the possibility to have the trust relationship mentioned in the Land Register. This offers several advantages and one should not decide too easily not to require such mention. On the contrary, this should be standard practice.

The same can be affirmed in respect with the unfortunate possibility of the bankruptcy of the trustee. The absence of such mention is still cause of a doctrinal debate offering interesting intellectual issues but no legal certainty. A serious practitioner should be aware of this and recommend the standard inscription of the trust mention to avoid unpleasant damages for the trust beneficiaries.

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[95] PEYROT, p. 108