



A NEW ATTEMPT FOR A SWISS SUBSTANTIVE TRUST LAW

In the past, attempts made to codify the Trust under Swiss law have not been crowned with success. The Federal Council has rejected several parliamentary attempts since 2001. The clear assumption of "Postulate Merlini" by the National Council in February of this year and the parliamentary initiative "Regazzi" may now change the circumstances here.

The world of trusts has changed since the Anglo-Saxon trust became embedded in the Swiss legal system in 2007 following ratification of The Hague Convention. Most of the arguments and reservations raised until that point no longer apply today.

The Financial Institutions Law (FINLAW)

Soon, in addition to the Anti-Money Laundering Act (AMLA), the Financial Institutions Law will subject Swiss trustees to meticulous monitoring and the duty to obtain a license. The purpose of these steps is to ensure that trusts can no longer be misused for undesirable purposes Switzerland. Trusts are a reality in Switzerland, and the FINLAW now takes this into account. Thus, a law governing Swiss trusts can only be the logical conclusion to this.

Automatic Exchange of Information (AEOI)

According to OECD guidelines, the automatic exchange of information results in transparency across borders. This makes using trusts in "secret" impossible. To-date, asset structures like trusts and their use have often been presented from a one-sided point of view in the media. Thus far, this has led to the impression that trusts as a legal form are primarily used for improper purposes. However, the present and especially the future look different owing to the AEOI and the up-and-coming regulation of Swiss trustees taking effect.

The reputation of Switzerland as a financial centre

The ongoing implication of Switzerland as a financial centre manifested in the form of leaks and other scandals happening abroad strengthens the desire for control and to irrevocably put an end to old practices. However, this will only succeed if legal structures like trusts are made available from within Switzerland. In the absence of such solutions, it is necessary to establish structures abroad. Dealing with foreign legal forms is, of course, much more difficult, and it is almost impossible to enforce effective oversight outside of Swiss territory. Yet, nearly a quarter of the assets that are deposited with Swiss banks are held in the name of trusts and other legal structures. This should be reason enough to pay additional attention to trusts and other structures.



Financial Centre Strategy

Switzerland as a financial centre is under pressure and needs to develop strategies to compete with opposing financial centres. In contrast to Switzerland, other financial centres, as our largest "rivals", almost invariably pursue a harmonised strategy involving banks, asset management, insurance and structuring services (trusts, foundations, companies, funds, securitisation, etc.). When it comes to funds, Switzerland has already removed itself from the race years ago. Alternative suitable structuring options based on Swiss law are almost completely lacking. The use of Swiss foundations is heavily restricted due to the prohibition of entailed estates (ZGB 335), corporations are often not an option due to the withholding tax, and limited partnerships are non-existent along with framework laws for securitisation transactions. This represents a clear competitive disadvantage. Switzerland is in fact more a banking centre than a financial centre. As a part of this, transparency and globalisation amplify substantially the competitive situation and mean that the right tools are required to be able to assert against the competition, since assets are increasingly being held at the location where the legal structure has also been established.

The establishment of a trust mostly takes place for purely civil law reasons. Transnational assets, and above all questions of succession, represent two of many challenges to which trusts can give the right answers. Trusts can overcome the limits of classical civil law instruments such as endowments, wills, inheritance and marriage contracts, guarantees and other surety agreements. In the private and especially business environments, trusts have been used for several hundred years and there is no reason to believe that this will change in the future. The only question is whether Switzerland will play a role or abandon the playing field to its competition.

Several civil law systems have already successfully codified trusts and integrated them into their legal system. For this reason, nothing stands in the way of transferring the trust from the Anglo-Saxon legal system to the Swiss one. From a tax perspective, one can also learn from foreign countries and bring valid tax models into the equation. One approach, for instance, is that a trust can choose between transparent taxation (dependent on the facts at hand, the founder and/or beneficiaries are taxed at their place of residence, which is guaranteed by the AEOI), or taxation as a separate taxable entity (e.g. with access to double taxation agreements). This would have the positive side effect that, in many cases, Switzerland could generate tax revenues on assets via the trust that are allocated to foreign beneficial owners. This represents an interesting option at a time when we are struggling with declining tax revenues.

Owing to its political and economic stability in combination with its expertise and quality of service, Switzerland rightly enjoys an excellent reputation. These cards need to be played.

How Mandaris can help you with trusts and other asset structures

Mandaris specialises in the field of consulting and management for transnational structures. Dealing with the challenges relating to these structures is the order of



the day for our experienced specialists at Mandaris. In doing so, we ensure that domestic and foreign legal systems are fully respected.

Please do not hesitate to contact the author if you have any questions or queries.

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