

International Financial Law Review

October 2006 -

Trusts

In Swiss private banking, trust services and trusts have been offered and administered for decades, but the concept of trusts is almost unknown in Swiss law. As Switzerland is a civil law jurisdiction, for historical reasons, Swiss legislation does not provide for statutory provisions governing trusts. This always left uncertainty in Swiss legal practice, as well as in the Swiss trust industry, on issues such as the recognition of trusts and the law they are governed by, the enforcement of foreign judgments and the separation of assets in the event of a trustee's bankruptcy.

To promote legal certainty on these issues and to strengthen the competitiveness of the local banking industry, the Swiss government took the initiative to ratify the Hague Convention on the Law Applicable to Trusts and on their Recognition, dated July 1 1985, and simultaneously to amend the Swiss Federal Private International Law and the Bankruptcy Law on trust-related issues. This legislative initiative is being discussed by the Swiss parliament. The Bill has already passed the Swiss Council of States and is likely to be approved by the Swiss National Council too, so if this pace can be upheld, the new legislation could be enacted in mid-2007. Upon enactment of the Hague Convention, trusts will be fully recognized in Switzerland if they were set up in accordance with the law chosen by the settlor or, in the case of lack of choice of law, in accordance with the law with which the trust is most closely connected. By reference to the Hague Convention, the new legislation confirms the principle that the trust assets constitute a separate fund and are not part of the trustee's own estate. In line with this, the new provisions of Swiss Bankruptcy Law state that, upon the trustee's bankruptcy, trust funds must be released from the trustee's bankruptcy estate.

The taxation of trusts, settlors, beneficiaries or trustees by Swiss Federal and by Cantonal Tax Authorities is hardly predictable, which to some extent burdens the use of trusts for tax-planning purposes. In light of divergent views of tax authorities, advisers who set up trusts for their clients are urged to ask the tax authorities for tax rulings. But this is going to change, even before enactment of the Hague Convention. Swiss tax authorities are drafting a Directive that is intended to ensure a predictable and harmonized tax treatment of trusts throughout Switzerland. This new Directive is expected to enter into force in late-2006. Pursuant to the draft Directive, under Swiss tax laws neither trusts nor trustees will be subject to taxation concerning the trust assets and their distribution. Depending on the type of trust arrangement, the settlor and/or the beneficiaries will be taxed. The scope and the time of taxation particularly depend on whether a trust is revocable or irrevocable in nature. As to irrevocable trusts, the draft Directive provides for a different taxation regime for irrevocable fixed-interest trusts on the one hand and for irrevocable discretionary trusts on the other.

Daniel Stoll and Patrick von Arx

All material subject to strictly enforced copyright laws. © 2008 Euromoney Institutional Investor PLC.