

Trusts Owning Swiss Residential and Commercial Property

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Trust owning real estate

- Transfer of ownership to the trustee
- Hence: trustee = owner (legal owner)
 - Issues with Swiss civil law (validity of transfer)
 - Issues with Lex Koller (prohibiting ownership of Swiss real estate by foreigner)
 - Registration in the Land Registry

Trust owning real estate

- Plan of this presentation:
 - Short introduction to the basics of:
 - Civil law / transfer of ownership into a trust
 - Lex Koller related to trusts
 - Land Registry regulations
 - And then application to a case study based on a real case

Trusts & Civil law

- Ownership of real estate must pass on to the trustee (not to the trust); the trustee is legal owner
- Swiss law requires registration in the Land Registry
- Trustee must be registered as owner in the Land Registry
- Shares of a company holding real estate: ownership of shares must pass properly to the trustee

Trusts & Civil law

- Deed of transfer must be notarized
- Transferor: settlor
- Transferee: trustee
- Causa: transfer into a trust (not a donation, not a sale, sui generis)

Trusts & Civil law

- Other cases:
 - distribution of real estate to beneficiaries
 - sale of real estate by the trustee
 - change of trustee
- Subject to notarization

Lex Koller

- Acquisition of real estate by a foreigner is subject to Lex Koller
- Broad definition of “acquisition”
- Some foreigners are exempted: EU/EFTA nationals with residency in Switzerland (B and C permit), non EU/EFTA nationals with C permit

Lex Koller

- Commercial real estate (so called “établissement stable”) are exempted
- Residential property is subject to Lex Koller
- In principle : residential property cannot be bought by foreigners (in the Lex Koller definition), EXCEPT
 - as main residence (for non EU/EFTA nationals with B permit, *NB: EU/EFTA with B or C Permit as well as non EU/EFTA with C Permit are not “foreigners”*)
 - As a holiday home, in some cantons, subject to a permit to acquire

Lex Koller

- Other exceptions include:
 - Legal heirs
 - Acquisition by a parent in direct line up or down or spouse
 - Existing co-propriété or common property

Lex Koller

- Companies are considered as foreigners :
 - Where the company's seat is in a foreign country
 - Where the company's seat is in Switzerland but where the company is « dominated » by foreign persons (c.f. trustees, see later)

Trusts and Lex Koller

- Lex Koller general principles apply today:
 - No trust specific provisions in Lex Koller today
- Position of the guidelines and case law: exemption of the necessity to obtain an authorization if neither the trustees nor the beneficiaries are “foreigners” (Lex Koller definition) *and if a later extension to other beneficiaries is excluded by the trust deed* (Guidelines Lex Koller of Federal Office of Justice)

Trusts and Lex Koller

- Look at both trustee AND beneficiaries, who must both meet the requirements for the exemption
- Current situation favours Swiss corporate trustees where they are controlled by Swiss persons or Swiss resident and Swiss nationals acting as trustee
- Specific issue with holiday real estate (authorization to acquire only to a physical person holding it in its own name)

Trusts and Lex Koller

- Better approach: Evaluation of all relevant facts case-by-case:
 - Focus on the beneficiaries, not on the trustee
 - Protector is not relevant
 - Allow trustees to own a holiday home for a foreign family (problem of prohibition of fiduciary holding in such case art. 8 of the Lex Koller Ordinance)

Trusts & Land Registry

Legal grounds:

- art. 149 d Private International Law Act
- ORF (Ordinance on the Land Registry): art. 58, art. 67, art. 128 and art. 147

Trusts & Land Registry

Art. 149d para. 3 PILA:

“The relation with a trust which has not been mentioned or registered cannot be opposed to bona fide third parties”

In the official French text of art. 149d LDIP:

1 Lorsque les biens d'un trust sont inscrits au nom d'un trustee dans le registre foncier, le registre des bateaux ou le registre des aéronefs, le lien avec un trust peut faire l'objet d'une mention. (...)

³ Le lien avec un trust qui n'a pas fait l'objet d'une mention ou qui n'a pas été inscrit n'est pas opposable aux tiers de bonne foi.

Trusts & Land Registry

The Ordinance on Land Registry contains precise rules on :

- How to obtain the mention on the Registry of the trust relation (art. 58 ORF)
- How does such mention has to look like (art. 128 ORF)
- How to cancel such mention (art. 137 ORF)
- How the transfer of ownership in relation to a trust must be concluded (art. 67 ORF)

Trusts & Land Registry

- Role and effect of the “mention”
 - For the settlor/beneficiaries
 - For the trustee
 - For the Land Registry
 - For the notary
- A notarized deed is required in most cases (cf. art. 67 ORF and art. 64-65 ORF applicable via art. 67 para. 2 ORF)

Case Study - Facts

- Lily is a widow, lives in Switzerland and has one son living in Australia who has three children living in the UK.
- Lily owns several real estate properties located in Switzerland and managed by a local real estate company.
- Lily is 82 years old and would like to plan her succession and make sure that the properties remain the family's assets.

Case Study - Facts

- Lily will irrevocably transfer movable assets (one bank account with cash), as well as her Swiss real estate properties.
- Lily will be the settlor and the first beneficiary. After the death of the settlor, the beneficiaries will be her son and, after his death, her grand-children.

Case study: Lex Koller issues

- Lily is a UK citizen, lives in Switzerland (B-permit) and has one son living in Australia (UK citizen) who has three children living in the UK (between 24 and 28 years old). Quid Lex Koller?
- Commercial real estate
- What if it was residential real estate?

Case study: Lex Koller issues

- Commercial real estate is exempted from Lex Koller → no matter who is trustee and who are the beneficiaries
- Residential real estate would be more problematic:
 - Swiss trust company AND dominated by non-foreign shareholders
 - Look at the beneficiaries: foreigners but legal heirs of the settlor. Quid Lex Koller?

Case study: civil law and Land Registry

- Deed of transfer between Lily and the trustee must be notarized by a local notary (art. 67.1.a.1 ORF)
- Mention in the land registry of art. 149d PILA to publicize the trust relation (cf. Lily's wish)

Final word

- Lex Koller remains an obstacle for residential real estate. This should be challenged before Swiss Courts!
- Precise rules exist in the Land Registry Ordinance but...
- Mention of art. 149d PILA

Thank you for your attention.