

Private Client
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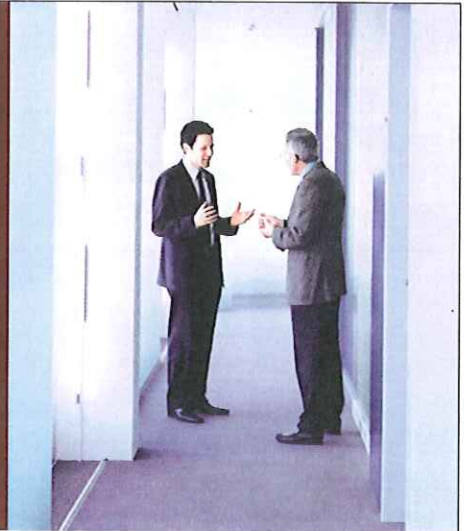
Clocking in

Switzerland seeks to build trust administration centre



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LENZ & STAEHELIN

From Hague to eternity

Richard Pease and Mark Barmes of Lenz & Staehelin review the impact of ratification of the Hague Trusts Convention on Switzerland and whether it will become a major jurisdiction for the administration of trusts

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“We hope to discourage existing clients from transferring their business to new emerging trust centres (such as Singapore) and to attract a new clientele by offering a credible alternative to those tax havens that are increasingly coming under international scrutiny . . .” (Foreword from the Federal Council to the Swiss Parliament supporting ratification of the Hague Trusts Convention).

How realistic is the expectation of the Swiss government and the financial services industry that following ratification of the Hague Trusts Convention on 1 July 2007 Switzerland will become a major jurisdiction for the administration of trusts? There is no doubt that the country has a number of significant advantages to offer. It is already a major player in the custody and management of private wealth, it has a highly developed financial services industry and it is well equipped to offer ancillary services in the fields of law, accounting and insurance.

The Swiss courts are well accustomed to hearing complex disputes governed by a foreign law. Against this background, it is



timely to consider how the formal recognition of trusts may influence the development of trust business in this country.

Trustee services prior to ratification

Prior to ratification of the Convention there were a number of uncertainties when establishing trusts with a Swiss connection. Although they were mostly highly technical legal issues that delighted lawyers, they were best summarised by the question: will the Swiss courts or a Swiss lawyer see a trust or something else?

As is usually the position where there is a good business case for an industry to develop, these uncertainties did not stop the trust from developing in Switzerland but it did curb its potential.

The trust is an essential part of the wealth manager's toolbox. To be fully effective, it must have certain features; first and foremost, that the trust fund is secure and safe from claims made by the trustees' own creditors or creditors of other trusts managed by the same trustee.

The practical response was the development of a number of business

models that minimised or eliminated any doubts. The prudent course was to select a trustee in a jurisdiction of the proper law and to restrict any contact with Switzerland to the assets deposited in a Swiss bank, often through an underlying company belonging to the trust.

Other possibilities included appointing co-trustees, one in the jurisdiction of the proper law and one in Switzerland or appointing an agent in Switzerland to administer the trust fund. The full potential as a centre for the administration of trusts was unnaturally restricted.

Post-ratification

Following ratification, the situation has changed dramatically. The answer to the key question is that a trust is a trust provided it fits within the relevant definition under Article 2 of the Convention.

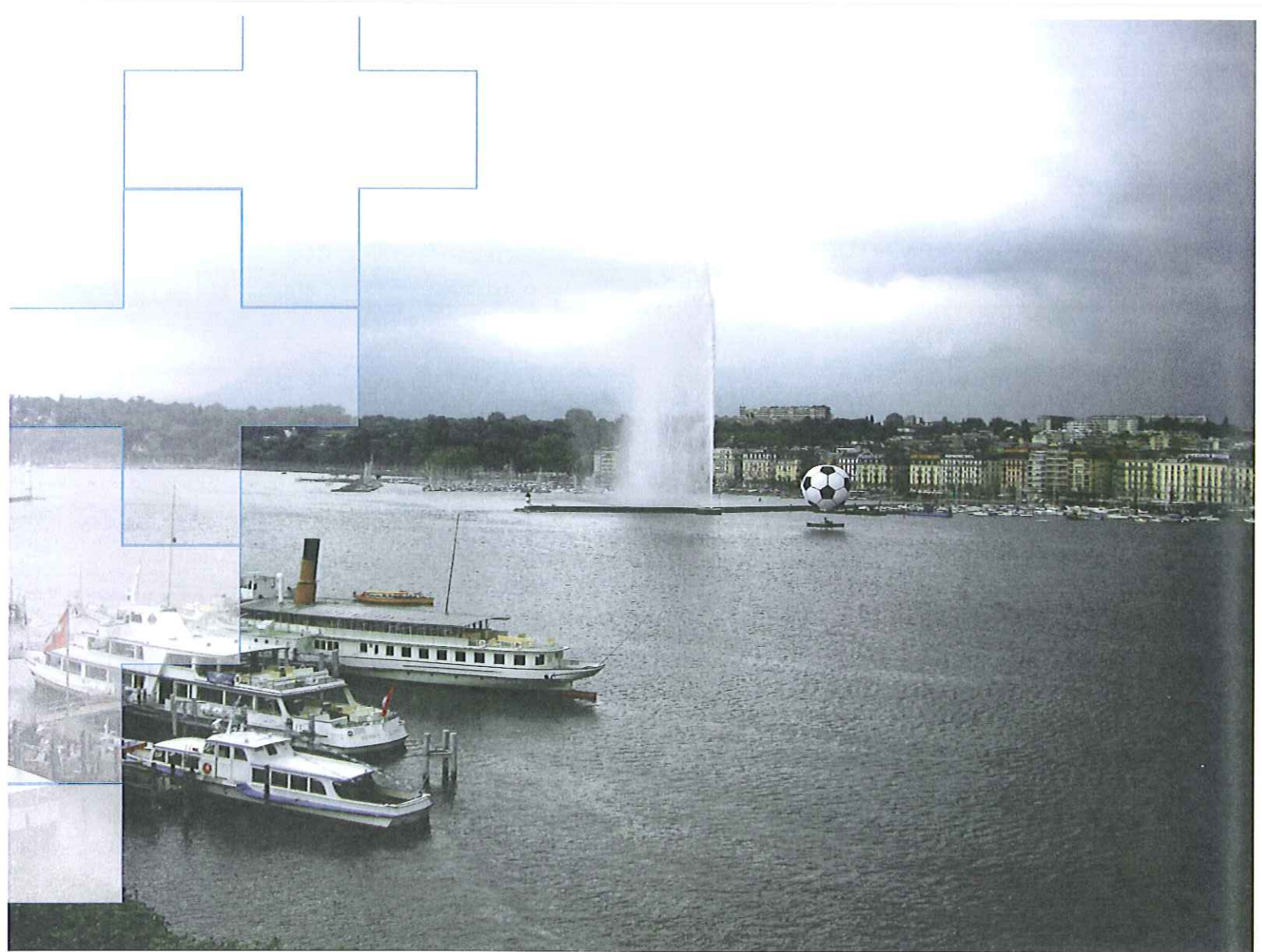
As a result, any settlor, even one connected with Switzerland in some way, may establish a trust and freely choose the law to govern the validity, interpretation, effects and administration of the trust. A Swiss court will also normally accept that choice and uphold the trust insofar as

required under the terms of the Hague Trusts Convention as incorporated in Swiss law.

Furthermore, such trusts now benefit from the provisions of chapter III of the Convention, most notably "the trust property constitutes a separate fund". This central feature of trusts has been reinforced by amendment of the Swiss Debt Collection Act (a statute introduced in 1889 and only once before the object of substantive changes, in 1994).

There have been developments in taxation matters as well. The Swiss Tax Conference is an organisation that brings together the heads of the cantonal tax authorities with the aim of facilitating and promoting the discussion of tax issues concerning the various cantons. The Conference publishes guidelines (known as circulars) from time to time on certain issues to assist the cantonal tax administrations. The guidelines published by the Conference, however, are not binding on either the cantonal tax administrations or at the federal level.

On 22 August 2007, the Conference published a circular on taxation in trust matters in Switzerland. ▶▶



On 27 March 2008, the Federal Tax Administration issued a notice that effectively adopts the Circular for the purposes of federal income tax and Swiss withholding tax.

In terms of administering a trust from Switzerland, the wonderful news in the Circular is that the trust itself will never be subject to tax due to a lack of legal personality. Furthermore, trust assets and income cannot be attributed to the trustee or the protector. Therefore, the trust assets can be managed by a Swiss resident trustee without triggering a tax liability on the trust assets and income.

The other issue of interest to trustees is the future of potential regulation. The Federal Council now seems broadly to recognise the trustee as a financial intermediary and has confirmed, for the time being, that no specific laws on the supervision of trusts or trustees are to be introduced. The Federal Council, however, said this could be done in the future. In particular, it said:

“It would not be wise to completely separate the issue of supervision of trustees from that of other independent financial intermediaries, in particular asset managers acting on a fiduciary basis who, from a supervisory perspective, fulfil the same role as a trustee.”

The Swiss Association of Trustee Companies (see the article in this special report by Xavier Isaac) is developing its Code for Swiss based trustees. In addition, all trustees are subject to Swiss Anti-Money Laundering laws and regulations involving compulsory affiliation with a regulatory organisation that imposes rules and conducts an annual audit.

The opportunities

The use of trusts for estate and tax planning purposes has long been customary in common law jurisdictions and trust structures have been offered by US and UK international banking groups to a broad range of clients from both

common law and civil law backgrounds.

The Swiss banks and fiduciary services providers have only relatively recently provided trust products, often through wholly owned trust company subsidiaries in the Channel Islands and the Caribbean.

It will be interesting to see if the major banks in Switzerland and family offices will now offer trust services from an exclusively Swiss platform. There is no doubt there will be an increasing demand for more sophisticated wealth management and estate planning vehicles among the clients from emerging markets such as Eastern Europe, India and China. Trustees are now well placed to secure a substantial part of this business in Switzerland.


The challenges

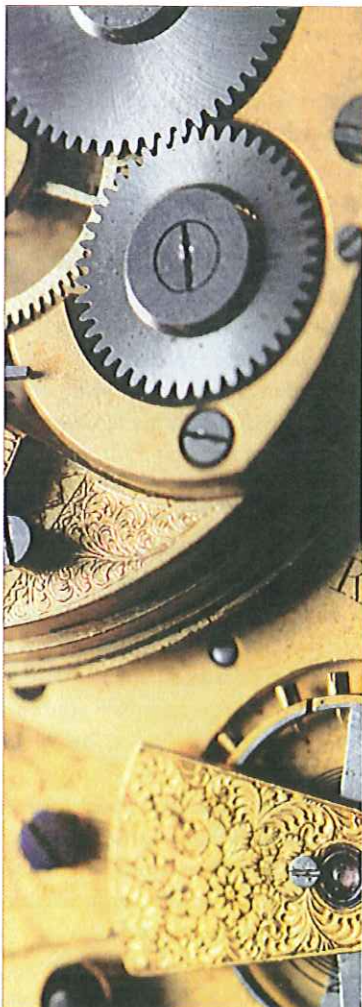
Ratification of the Convention is a major step in the right direction. In itself, ratification will not resolve all the lingering problems, however. The trust is alien to the Swiss and continental legal culture and, while the Swiss courts have for over a century been skilled in dealing with disputes governed by a foreign law, there will undoubtedly be a need for the Swiss judiciary to become more familiar with the trust concept.

As trust business develops, there will be an increasing demand, already in evidence, for qualified staff to provide local trust administration. The STEP/CLT courses on international trust and company management have

been successful in Switzerland and the students coming through those courses will help to meet the demands of the developing trust industry.

Conclusion

It is too soon to predict that Switzerland will emerge as a trust jurisdiction to rival Jersey or the Cayman Islands. But the early signs indicate the major international banks and trust companies already present in Switzerland and a number of trust companies currently based abroad are gearing up to offer skilled trust administration services from a Swiss platform. There is every reason to think that the hopes of the Federal Council will become reality. 



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