

Title

The Doctrine of *Renvoi* may still have some relevance in the trust context

Text

Trustees have been held absolutely liable for misdelivering income and/or principal. In a multijurisdictional setting, an incorrect assessment by a trustee as to which body of law governs in a given situation could result in such a misdelivery. Think conflicting doctrine governing the validity of a trust of land. If there is no valid express trust then we have a resulting trust and the subject property belongs outright and free of trust, say, to the settlor's heirs at law. If there is a valid express trust then the equitable interest in the subject property accrues to the beneficiaries designated in the trust's terms. Let's say the law of the forum would bring about one result while the law of the situs (of the land) would bring about the other. Getting it wrong risks misdelivery.

Assume that a dispute over rights and duties is in adjudication; assume that the law prevailing in the jurisdiction of the forum court calls for a general deference to the law of some foreign jurisdiction, to include the conflict-of-laws rules of that foreign jurisdiction; finally, assume that the conflict-of-law rules of the foreign jurisdiction call for application of the substantive law of the forum. Such a rebound application of the substantive law of the forum is an example of *renvoi*, which is French for to send back or return unopened. "If, in applying the doctrine of *renvoi*, the foreign jurisdiction's conflict-of-laws rules would apply the forum's law, this reference back to the forum to its own law is called 'remission,' and if the laws of the foreign jurisdiction refer the forum court to the law of a third jurisdiction, this is called 'transmission.'" See 15A C.J.S. Conflict of Laws §37. The German term for the juridical process of "remission" is *Rückverweisung*; the German term for the juridical process of "transmission" is *Weiterverweisung*. "The word 'renvoi' itself does not appear in either English or American judicial opinion prior to 1903." See Schreiber, *The Doctrine of the Renvoi in Anglo-American Law*, 31 Harv. L. Rev. 523 (1918).

Here is an example of how the doctrine of *renvoi* might be encountered in the context of contemporary trust jurisprudence (U.S.). Assume the validity of an inter vivos trust of land is being litigated in a jurisdiction other than the jurisdiction in which the land is situated. There is then the law of the forum and the law of the situs (of the land). Which law is applicable?

The Restatement (Second) of Conflict of laws, specifically §278, provides that "the validity of a trust of an interest in land is determined by the law that would be applied by the courts of the situs [of the land]." If the deference to the law that would be applied by the courts of the situs is expansive enough to capture the conflict-of-laws rules that would be applied by the courts of the situs, then it is possible that those rules would call for application of the substantive law of the forum such that there is a *renvoi*.

The relevant language of the Restatement (First), specifically §241, however, is/was not so expansive: "The validity of a trust of an interest in land is determined by the law of the state where the land is." Arguably the words "where the land is" effectively constitute/ed a ruling out of any application of the doctrine of *renvoi* in this particular context.

Article 17 of *The Hague Convention on the Law Applicable to Trusts and on Their Recognition* expressly excludes application of the doctrine of *renvoi* for its purposes. Here is the language: “In the Convention the word ‘law’ means the rules of law in force in a State other than its rules of conflict of laws.” This Hague Convention, which the U.S. has yet to ratify, is discussed generally in §8.12.2 of *Loring and Rounds: A Trustee’s Handbook* (2022). The *Handbook* itself is obtainable via <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>. The *Handbook*’s §8.12.2 is reproduced in its entirety in the appendix below. Conflict of laws is taken up generally §8.5 of the *Handbook*.

Appendix

§8.12.2 *The Hague Convention on the Law Applicable to Trusts and on Their Recognition* [from *Loring and Rounds: A Trustee’s Handbook* (2022), obtainable via <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

*As a comparison to Italy, Dr. Christian Von Oertzen presented the reception of trusts in Germany, another civil law country. If the trust in Italy could be characterized as largely unknown but being considered, in Germany, the reception is more hostile. The German Federal Supreme Court even ruled in 1985 that a legal trust relationship is incompatible with German public policy for structural reasons. Germany has not signed the Hague Convention on Trusts and probably won’t in the near future.*¹²⁰

*[A] major challenge in achieving a single financial market in Europe is a lack of a domestic law of trusts in the civil jurisdictions making up all of Europe other than England and Ireland.*¹²¹

The Hague Convention on the Law Applicable to Trusts and on Their Recognition (the “Hague Convention”) (concluded July 1, 1985), available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=59>, states that its purpose is to deal with the most important issues concerning the recognition in civil law jurisdictions of trusts established in common law jurisdictions. The Hague Convention has entered into force in the following civil law jurisdictions: Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Panama, San Marino, and Switzerland. It has been ratified in the following common law jurisdictions: Australia, Canada (with the exception of Quebec), and the United Kingdom, and in the hybrid jurisdictions of Gibraltar and the Isle of Man, as well. China has ratified the

¹²⁰Howard S. Simmons reporting on STEP Conference held at the Villa D’Este, Milan, on 27–29 October 2002. See STEP J. (Dec. 2002) at 21.

¹²¹Excerpt from an email (Oct. 9, 2002) from Dr. Joanna Benjamin, member of Bank of England’s Financial Markets Law Committee to Steven L. Schwarcz. The excerpt is reprinted in footnote 17 of Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparatists*, Duke Law School Public Law and Legal Theory Research Paper Series, Research Paper No. 39 (Apr. 2003).

Convention for the Hong Kong Special Administrative Region only.

The United States, however, has yet to ratify the Convention. Some in the United States, most notably Professor Jeffrey A. Schoenblum of Vanderbilt Law School, while applauding the goal of gaining wider acceptance for the trust in noncommon law jurisdictions, have suggested that ratification by the U.S. Congress of the Hague Convention in its current form would have adverse “inbound effects” in that it would cause foreign law to apply to transfers of U.S. real property, unsettle U.S. choice of law rules regarding trusts, and interfere with the jurisdiction of U.S. courts over U.S. trusts.¹²³ In Louisiana, concern has been expressed that ratification “would lead to problems in its domestic property law caused by interference of foreign trust law with domestic rights of inheritance and forced heirship.”¹²⁴

Others in and outside the United States, most notably Professor Luc Thévenoz of the University of Geneva Faculty of Law, see no adverse “inbound effects.”¹²⁵ In his opinion, “the Convention deals with the law applicable to trusts, not with the law applicable to transfers of property to or from the trustee.”¹²⁶

¹²³See generally Jeffrey A. Schoenblum, *Multistate and Multinational Estate Planning* §15.04 (CCH 2008).

¹²⁴Henry Christensen, III, *Foreign Trusts and Alternative Vehicles*, SH032 ALI-ABA 81, 92 (2002).

¹²⁵Letter from Luc Thévenoz, Professor, University of Geneva Faculty of Law, to Charles E. Rounds, Jr., Professor, Suffolk University Law School (May 23, 2000) (on file with the author).

¹²⁶Letter from Luc Thévenoz, Professor, University of Geneva Faculty of Law, to Charles E. Rounds, Jr., Professor, Suffolk University Law School (May 23, 2000) at 1 (on file with the author).