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January  
2022

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**Private Wealth**



# Swiss Trust: Preliminary Draft

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## Introduction

The Federal Council initiated a public consultation on a draft bill introducing the trust into Swiss law. The proposed provisions, which are to be included in a new chapter of the Code of Obligations, offer a high degree of flexibility. The trust can be used both to structure private assets and in the context of commercial transactions. The settlor may provide for arbitration.

Schellenberg Wittmer is pleased to provide you below with the English translation of the proposed Swiss trust.

### Translator's notes:

1. This unofficial English translation is based on the German and French original versions of the draft bill (status January 2022). Where the two versions differ, the more precise version of the two was followed.
2. References to the masculine gender include the feminine gender.

## Swiss Code of Obligations

*Preliminary draft*

(Introduction of the Trust)

### Amendment of ...

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*The Federal Assembly of the Swiss Confederation,  
having considered the Dispatch of the Federal Council dated ...,  
decrees:*

I

The Swiss Code of Obligations is amended as follows:

## Title Twenty-Two<sup>bis</sup>: Trusts

### Art. 529a

A. General provisions  
I. Definition and form

1. A trust is the settlement of assets by one or more settlors into a separate fund held and administered by one or more trustees in the interest of one or more beneficiaries.
2. A trust may be established by written declaration or by a disposition of property upon death.

### Art. 529b

II. Constitution and legal effects

1. The trust instrument expresses the settlor's intention to appropriate assets to a trust, appoints the trustee and the beneficiaries and sets out the rules for the trust's administration.
2. If the trust is settled by a disposition of property upon death, the settlor is not required to appoint the trustee in the trust instrument. In this case, any interested person may apply to the court to appoint the trustee.
3. Where the settlor himself is the trustee, the trust instrument shall specify the assets allocated by the settlor to the trust.
4. The trust instrument also includes a designation identifying the trust. Otherwise, the trustee chooses its designation.
5. The trust becomes effective when the trustee has consented in writing to his appointment and has acquired the assets to be allocated to the trust.
6. The statutory provisions protecting the rights of the settlor's creditors, spouse or registered partner and heirs are reserved.

**Art. 529c**

III. Designation of beneficiaries

1. The trust instrument may designate the beneficiary or beneficiaries by name or by a particular relationship with the settlor or with another person, or by other criteria capable of establishing the status of beneficiary at the time of a distribution.
2. The trustee cannot be the sole beneficiary.

**Art. 529d**

IV. Benefits

1. The trust instrument confers on the beneficiaries' entitlements to benefits or mere expectancies at the trustee's discretion.
2. A beneficiary's entitlement to benefits may be subject to conditions and time limits. Unless otherwise provided in the trust instrument, the entitlement may be assigned; it may not, however, be transmitted by inheritance.
3. A beneficiary's expectancy may neither be assigned nor inherited.
4. A beneficiary may at any time renounce his entitlements or expectancies under the trust by a written statement to the trustee.

**Art. 529e**

V. Settlor's powers

1. The trust instrument may grant powers to the settlor, including the power to:
  1. revoke or terminate the trust;
  2. grant or withhold his consent to certain acts of the trustee;
  3. ask for an account of the trust and order an audit;
  4. replace the trustee or appoint his successor;
  5. appoint one or more protectors, replace them, or appoint their successors.
2. The settlor shall personally exercise the powers granted to him by the trust instrument or by law. All representation is excluded.

**Art. 529f**

VI. Protector's powers

1. The trust instrument may grant one or more protectors all or some of the powers referred to in Article 529e. A trustee cannot be a protector. A protector may only revoke the trust during the settlor's lifetime.
2. The protector shall personally exercise the powers granted to him. All representation is excluded.
3. Unless otherwise provided in the trust instrument, the protector exercises the powers granted to him in the beneficiaries' interests. Where the protector is also a beneficiary, he shall give due consideration to the interests of all the beneficiaries.
4. Where there is more than one protector, decisions are taken by absolute majority unless otherwise provided in the trust instrument.

**Art. 529g**

B. Trustee's powers and duties  
I. In general

1. The trustee shall administer, manage, and dispose of trust assets in accordance with the trust instrument and the law.
2. The trustee may, in his own name and in his capacity as trustee, bring and defend lawsuits and debt enforcement proceedings in relation to any matter concerning the trust.
3. The trustee is liable with his entire assets for all the duties incurred by him in the exercise of his function as trustee. This personal liability may be excluded by agreement with the creditor.
4. Unless otherwise stipulated in the trust instrument, the trustee exercises his office in person, except where compelled by circumstance to delegate it to a third party.
5. Where there is more than one trustee, the following shall apply to the relationship between them:
  1. the trustees are joint holders of the trust assets;
  2. unless otherwise provided in the trust instrument, all decisions are taken unanimously;
  3. they are jointly and severally liable for any duties arising from the trust instrument and the law.

**Art. 529h**

II. Duty of care and loyalty

1. The trustee shall act with due care and loyalty in the exclusive interest of the beneficiary or beneficiaries.
2. In particular, he shall:
  1. perform the duties arising from the trust instrument and the law with such diligence as may reasonably be expected from a person with his abilities and profession;
  2. when the trust is settled, draw up an inventory of the assets and liabilities forming the trust fund;
  3. keep accounts on income and expenditure and on the asset position in accordance with Article 957 § 2.
3. Unless otherwise provided in the trust instrument, the trustee shall also:
  1. act independently from the settlor;
  2. avoid any conflict of interest in the exercise of his function; in particular, he shall not accept any unauthorised advantage or exploit any information obtained in connection with his office for himself or for any third party;
  3. where the trust has more than one beneficiary, he shall act impartially and take due account of their different interests;
  4. keep the trust assets separate from his personal assets;
  5. invest the available trust assets with due care and prudence in the interests of the beneficiaries.

**Art. 529i**

III. Accountability of the trustee and beneficiaries' right to information

1. At the request of the settlor who has reserved this right in the trust instrument, or of another trustee, protector or beneficiary, the trustee must at any time give an account of his management of the trust.
2. Any beneficiary may request information from the trustee about his rights and expectancies under the trust instrument.
3. The trustee can refuse to provide information to a beneficiary:
  1. for good cause as provided for by the trust instrument;
  2. if such information would jeopardise the legitimate interests of other beneficiaries.

**Art. 529j**

IV. Identification and documentation requirements

1. The trustee shall identify, with the appropriate diligence under the circumstances, the settlor, the other trustees, protectors, beneficiaries or classes of beneficiaries and any other natural person who exercises actual control over the trust, and ascertain their identity.
2. The trustee shall collect basic information about any financial institutions, insurance companies and any accountants, tax advisors, investment advisors, portfolio managers or other service providers who have business relationships with the trust.
3. The information includes the first name and surname or company name, address, the nature of their function or relationship with the trust and, for the persons referred to in paragraph 1:
  - a. in the case of natural persons, their date of birth and nationality;
  - b. in the case of legal entities or partnerships, the first name, surname, address, date of birth and nationality of each natural person who controls it.
4. If the trust instrument designates classes of beneficiaries, the trustees shall ascertain the qualifying criteria for the status of beneficiary.
5. The trustee shall keep and retain records of this information. The trustee shall regularly check that these records are up-to-date and update them if necessary.
6. The records shall be kept to be accessible at any time in the country of the trustee's residence or registered office. The trustee shall retain them for five years after leaving office.

**Art. 529k**

V. Liability

1. The trustee is liable in accordance with Articles 97 to 101 for any damage to the trust fund or beneficiaries arising from his failure to discharge his duties. The trustee cannot be exonerated in advance from his liability for willful breach or gross negligence of an associate.
2. The settlor who has reserved this right under the trust instrument, another trustee, a protector, and any beneficiary may sue for damages to the trust fund.

- Art. 529l**
- C. Trust assets  
I. General
1. The trustee is the owner of the trust assets. Trust assets comprise the property, claims and other assets allocated to the trust when it was settled or thereafter, as well as any income and increase in value therefrom and any replacement acquisitions.
  2. If the settlor himself is the trustee, any subsequent allocation of own assets requires a written declaration with a precise designation of such assets.

- Art. 529m**
- II. Entry in a public register
- Where trust assets are recorded in a public register, the trustee shall ensure that the entry contains a note disclosing the connection with the trust. Absence such disclosure, the connection with the trust if not effective against third parties acting in good faith.

- Art. 529n**
- III. Rights of third parties over the trust fund
1. The trust assets and liabilities constitute a separate fund from the trustee's own estate. The trust fund is not part of the trustee's matrimonial property nor of his estate upon his death.
  2. Trust assets are liable only for the obligations set forth in the trust instrument and for those incurred by the trustee in the due exercise of his office. Trust property is precluded from debt enforcement proceedings for any other obligations.

- Art. 529o**
- IV. Trustee's rights over the trust fund
1. Unless otherwise provided in the trust instrument, the trustee has the following claims against the trust fund:
    1. reimbursement of his outlays and expenses, with interest;
    2. release from any duties incurred in the due exercise of his office;
    3. appropriate remuneration;
    4. compensation for damage sustained through no fault of his own in the due exercise of his office.
  2. The trustee may assert a statutory lien or right of set off against trust assets for any claim due under paragraph 1.

- Art. 529p**
- V. Trustee's reimbursement duty
1. Unless otherwise provided in the trust instrument, the trustee shall restore to the trust fund any assets or benefits acquired or received by him for any reason whatsoever in the exercise of his function.
  2. If, in breach of the trust instrument, the trust fund has contributed to the acquisition, enhancement or maintenance of an asset which is part of another separate fund of the trustee, the trust fund shall have a claim against the separate fund for reimbursement of the contribution and for a share of the capital appreciation, if any.

- Art. 529q**
- VI. Asset recovery
1. If the trustee wrongfully disposes of trust assets, the acquirer shall be obliged to make restitution to the trust fund pursuant to the rules on unjust enrichment. Further claims under this law are reserved.
  2. Restitution may be claimed by the settlor who has reserved this right in the trust instrument, or by another trustee, a protector, or each beneficiary.
  3. Restitution cannot be claimed from a person who acquired for value and in good faith.

- Art. 529r**
- VII. Impending insolvency and over-indebtedness
- The provisions of the law on companies limited by shares governing impending insolvency and over-indebtedness, as well as the revaluation of real estate and participations, apply by analogy.

- Art. 529s**
- D. Replacement of the trustee or protector
1. Unless otherwise provided in the trust instrument, the office of the trustee or protector ends when he:
    1. resigns;
    2. becomes insolvent, and notably when he is declared bankrupt, applies for a debt restructuring moratorium, enters into a composition agreement with his creditors or when a certificate of loss is issued against him;
    3. loses the legal capacity to act or is unable to perform his duties for any other reason;
    4. deceases.

2. Where a trustee or protector is in serious breach of his duties, a beneficiary, trustee, or protector may apply to the court for his removal.
3. A new trustee or protector shall be appointed in accordance with the trust instrument or absent such provision, by the court.
4. The transfer of the trust fund requires a written transfer agreement between the former trustee and his successor. This may take the form of an assignment of assets within the meaning of Article 181; the Mergers Act of 3 October 2003 does not apply. Where the trustee is a natural person and there are no other trustees, the trust fund is automatically transferred to the new trustee upon the former trustee's death.

**Art. 529t**

E. Power of amendment and termination  
I. Amendment

1. The trust instrument may grant the settlor, the trustee, or a protector the power to amend the provisions of the trust instrument, including those relating to the beneficiaries, applicable law and jurisdiction of the court or an arbitral tribunal.
2. Amendments to the provisions of the trust instrument must be made in writing.

**Art. 529u**

II. Termination

1. The trust shall terminate at the expiration date, upon the occurrence of an event stipulated in the trust instrument or when there are no longer any beneficiaries, but at the latest 100 years after its settlement.
2. Once all the beneficiaries have been determined, they may prematurely terminate the trust by written agreement. The settlor's consent to the termination may be reserved under the trust instrument.
3. When the trust is terminated, the liabilities shall be settled, and the remaining assets promptly distributed as provided in the trust instrument.

**Art. 529v**

F. Procedure  
I. Court order

1. Where there is a legitimate doubt as to the scope of the rights and duties of the settlor, trustee, or protector, each of them may apply to the court for a ruling on the conformity of a proposed act with the trust instrument and the law.
2. At the request of the settlor who has reserved this right under the trust instrument, or of a trustee, protector or beneficiary, the court may amend the provisions of the trust instrument or order its termination provided there are factual and objective grounds, and the amendment or termination does not infringe the rights of beneficiaries or third parties.
3. In the cases referred to in § 1 and 2 and in Article 529b §2, and Article 529u §2 and 3, the settlor, the trustee, the protector, and the beneficiaries shall first be given the opportunity to state their position. If all the beneficiaries have not yet been identified, if their identification is extremely difficult or if it is not possible for any other reason to allow them to state their position within a reasonable time frame, the court may appoint a joint representative to safeguard their interests. The court's decisions are binding upon the settlor, trustee, protector, and beneficiaries.

**Art. 529w**

II. Arbitration

1. An arbitration clause in the trust instrument is binding upon the settlor, trustees, beneficiaries, and protectors.
2. The trust instrument may provide that the arbitration court is also competent to rule in the cases referred to in Article 529b § 2, Article 529s § 2 and 3, and Article 529v.
3. The arbitration court shall apply Article 529v § 3.

**II**

The amendments to other (Swiss) Acts are set out in the Annex.

**III**

1. This Act is subject to an optional referendum.
2. The Federal Council determines the date of entry into force.



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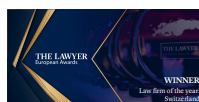
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