Out now: Zeitschrift für Vergleichende Rechtswissenschaft featuring various contributions on the comparative law of trusts and foundations

The most recent issue of the *Zeitschrift für Vergleichende Rechtswissenschaft* (German Journal of Comparative Law; Vol. 117 [2018], No. 3) features the following contributions:

Die Leistungskraft der österreichischen Privatstiftung für Familienunternehmen

Susanne Kalss*

ZVglRWiss 117 (2018) 221–245

The family can be an essential factor for entrepreneurs. However, family can also cause conflicts, as different roles and interests collide. There is no ideal legal form for a family business. Rather, a legal solution based on the specific needs has to be found for each individual entrepreneur. It should be kept in mind that temporary arrangements tailored to specific situations often fail and might not be able to respond to changing market circumstances. Private foundations are suitable to ensure that the assets will not be split up in case of succession and can therefore provide a legal basis to assign the foundation benefits to the family. By establishing a private foundation, a family-owned company can substantially reduce the influence of family members on management decisions in favor of an independent foundation board. This in turn reduces significantly the attractiveness of this chosen structure.

Liechtenstein Trust Enterprises as Instruments for Corporate Structuring

Hanno Merkt*

ZVglRWiss 117 (2018) 246–259

Although trusts are usually associated with intra-family wealth transfers, the importance of trusts in capital markets is rising steadily. Due to their flexibility and the high degree of privacy they provide, the Liechtenstein trust enterprise (trust reg.) can be a suitable instrument for corporate structuring and planning. Nevertheless, there remain some open questions with regard to the liability of the beneficiaries and settlors, especially if they issue continuous instructions to the trustee, or if one of them makes use of their power of dismissal against the trust management for the sole purpose of exercising influence on the trust enterprise management. In order to enhance the attractiveness of trust law for corporate structuring, an amendment of the law, that addresses the mentioned unsettled questions might be desirable.

A German View on Trusts: Selected Aspects of Trusts and their Possible Impact on the Recognition of Trusts by German Courts under Civil Law

Jonas Hermann*

ZVglRWiss 117 (2018) 260–282

When it comes to the recognition of trusts by German courts under civil law, there are several uncertainties and obstacles to overcome. The more the features of a trust are aligned with features that can also be found in German entities and other legal structures, the less risks in regard to aspects of public policy will occur. Unusual clauses (from a German point of view), like spendthrift clauses or anti-duress clauses will increase the likelyhood that a trust and its legal consequences will not be recognised.

New Trust Legislation in Civil Law Jurisdictions

Paolo Panico*

ZVglRWiss 117 (2018) 283–302

Outside the common law world, there are different approaches to replicate the functions of the English Trust or to grant them recognition in the respective jurisdiction. In this context, the ratification of the Hague Trust Convention is of particular interest. Other jurisdictions – such as Liechtenstein – have introduced trusts and trust-like arrangements into their legal system by way of special legislation. One of the main difficulties with trusts in civil law and mixed

jurisdictions lies in the peculiar nature of beneficial interests, which cannot easily be categorized in either *rights in rem* or *in personam*. Scotland, for example, addresses this problem with the *dual patrimony theory*.

Compelling Trustees to Exercise Their Discretion: A Principle of Non-Intervention?

Tang Hang Wu*

ZVglRWiss 117 (2018) 303–317

Due to their inherent flexibility, discretionary trusts are a very popular way for wealth structuring. The present paper deals with the judicial control of a trustee's discretion and addresses the limits of the so-called principle of non-interference. It can be concluded that the courts should intervene whenever a trustee is using his discretion in an abusive way, including situations where the trustee is misinformed, acts in *mala fide* or with improper motives, as well as when he fails to exercise his discretion at all.

Reforms in Hong Kong Trust Law and their Impact

Lusina Ho*

ZVglRWiss 117 (2018) 318–326

Although Hong Kong has never been an typical offshore jurisdiction, i. e. a financial centre with only a relatively small domestic economy, it has established itself as a centre for succession and asset planning by means of trusts and other legal structures. Recent developments and modernizations of Hong Kong trust law intend to attract offshore trust business to Hong Kong and to bring the Trustee Ordinance in line with modern trust statutes in onshore common law jurisdictions.

Trustee Liability for Breach of Trust in the Common Law World

Oonagh B. Breen*

ZVglRWiss 117 (2018) 327–348

When is a trustee liable? This article reviews trustee liability for breach of trust in the common law system. In Part I the author gives an introduction into the

traditional trustee liability, continuing with general measures in Part II, before exploring the 2013 UK Supreme Court judgment in Futter v HMRC and its implications for trustees. Furthermore the paper considers the issue of limited or excluded liability.

Trustee Liability in Selected Civil Law Jurisdictions

Stephan Ochsner*

ZVglRWiss 117 (2018) 349–359

Since entry into force of the Hague Trust Convention on 1 July 2007, the trust has been officially recognised in Switzerland. But there is no Swiss legislation or case law dealing with the the liability of trustees, even when the trustee is based in Switzerland. A trustee runs the risk of aiding and abetting tax evasion if he or she knows or should know that the assets endowed have not been taxed. Beyond the domain of taxation, the liability risk for trustees is continuously increasing. The general increase in litigiousness in the financial services sector can probably be seen as a reason. Trustees are therefore advised to know their risks and to take measures to mitigate these risks.

Liechtenstein Trusts in International Corporate Structuring

Johanna Niegel*

ZVglRWiss 117 (2018) 360–383

Under Liechtenstein law, there are two types of trust, which can be used for corporate structuring: (a) the trust settlement as known in Anglo-Saxon law and (b) the trust enterprise (trust reg.). While a trust settlement does not enjoy legal personality, the trust enterprise can be set up with or without legal personality and fulfil various purposes. Both these types of Liechtenstein trust fall into the general category of fiduciary relationships, as they both contain an element of trust. Trust enterprises can be structured like a corporation or similar to a foundation. On the other hand, a classic example of a trust settlement would be the family trust whose objects and purposes can be compared to those of a family foundation.

The Use of Trusts for Corporate Structuring in Common Law Jurisdictions

Marcus Staff*

ZVglRWiss 117 (2018) 384–393

In this paper a typical instance is identified in which a trust is used to hold shares in an “orphan” company for the benefit of the company’s bondholders; a use to which it has been put precisely because the persons with the right to execute or enforce the trust have no valuable interest in exercising their rights. That instance is then used as an introduction to discuss the differences between execution and enforcement of a trust, including (i) trusts for persons and (ii) trusts for abstract and impersonal objects for public purposes, namely charitable trusts. There is then a description of deliberately designed trust-like arrangements for private purposes (provided for by statute in various jurisdictions) which employ representative enforcers, and problems are mentioned that may arise with the enforcement and execution of such arrangements.

Modernes Stiftungsrecht im Lichte grenzüberschreitender Stiftungstätigkeit

Alexandra Butterstein*

ZVglRWiss 117 (2018) 394–404

Globalisation is allowing „worlds to merge“ and at the same time is harmonizing the legal systems of the European states. Due to these adjustment processes, cross-border structuring options and associated issues of conflicts of law have become increasingly important in the field of asset and estate structuring. The cross-border dimension of a foundation (Stiftung) becomes particularly evident when considering the possible geographical distribution of its assets, its opportunities to participate in companies operating globally and its associated income opportunities. Founders can strategically integrate these strengths into “their“ foundation purpose. A foundation’s potential for cross-border structuring is, however, contingent up on the foundation’s recognition as a legal entity, including its identity preserving characteristics, beyond the jurisdiction in which the foundation was established.

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