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Towards a “Swiss Trust” : Pondering Models

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Swiss trust: who for? what for?

Promoting a “Swiss trust” requires clear choices:

- family planning or commercial transactions?
- domestic or international?

With a clear choice in mind, keep other options open as far as possible



Features

- **Split** benefits from legal and managerial control of assets
- Allow a wide range of **governance** arrangements
- Flexibility in designing **benefits**, including discretionary benefits
- **Persistence** over medium and long run
- **Adaptability** to change of circumstances, including supervision of courts (or other?)
- **Insolvency**-proof (“ring fencing”)
- Need to co-ordinate with legal regimes protecting spouses, heirs
- Need to co-ordinate with tax law



Features

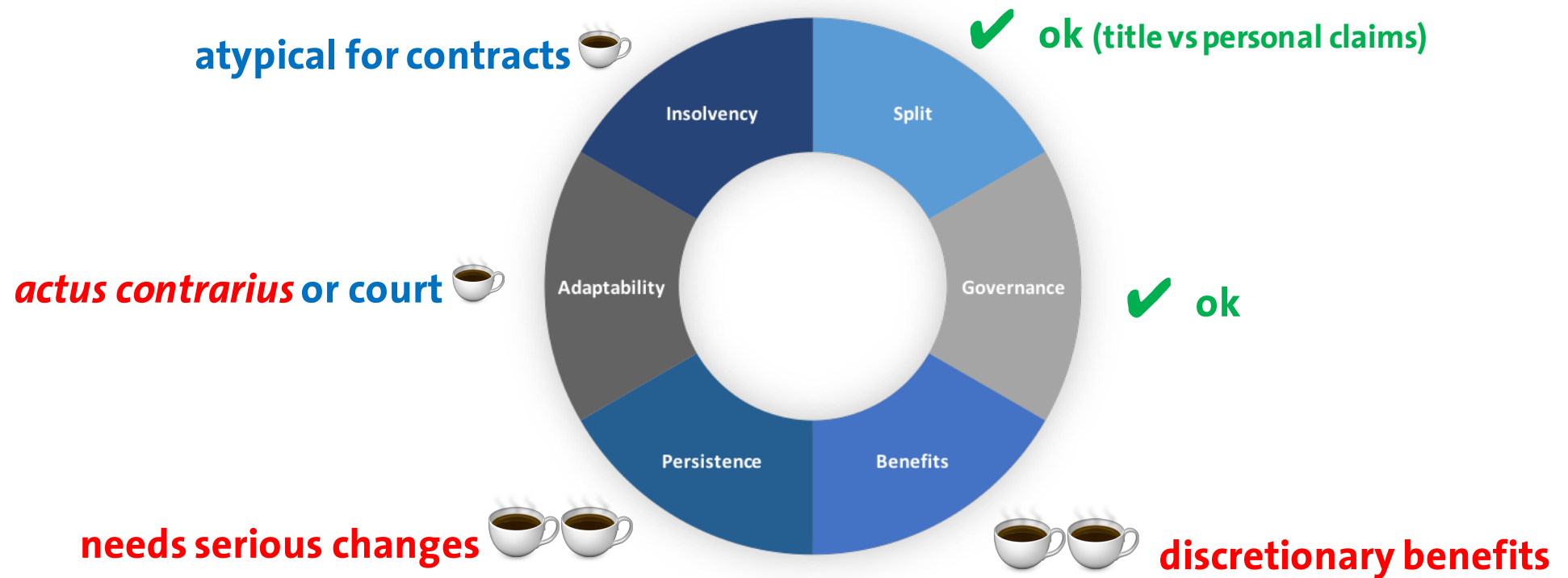




Model 1 : Fiduciary contract supercharged

- Swiss courts, practitioners and policymakers familiar with *fiducie*
- Contractual foundation easily (mis-)understood
- Contracts for the benefit of third parties are recognised

Model 1 : Fiduciary contract supercharged





Model 1: The San Marino twist

Law of 1 March 2010 on *affidamento fiduciario* (fiduciary entrustment)

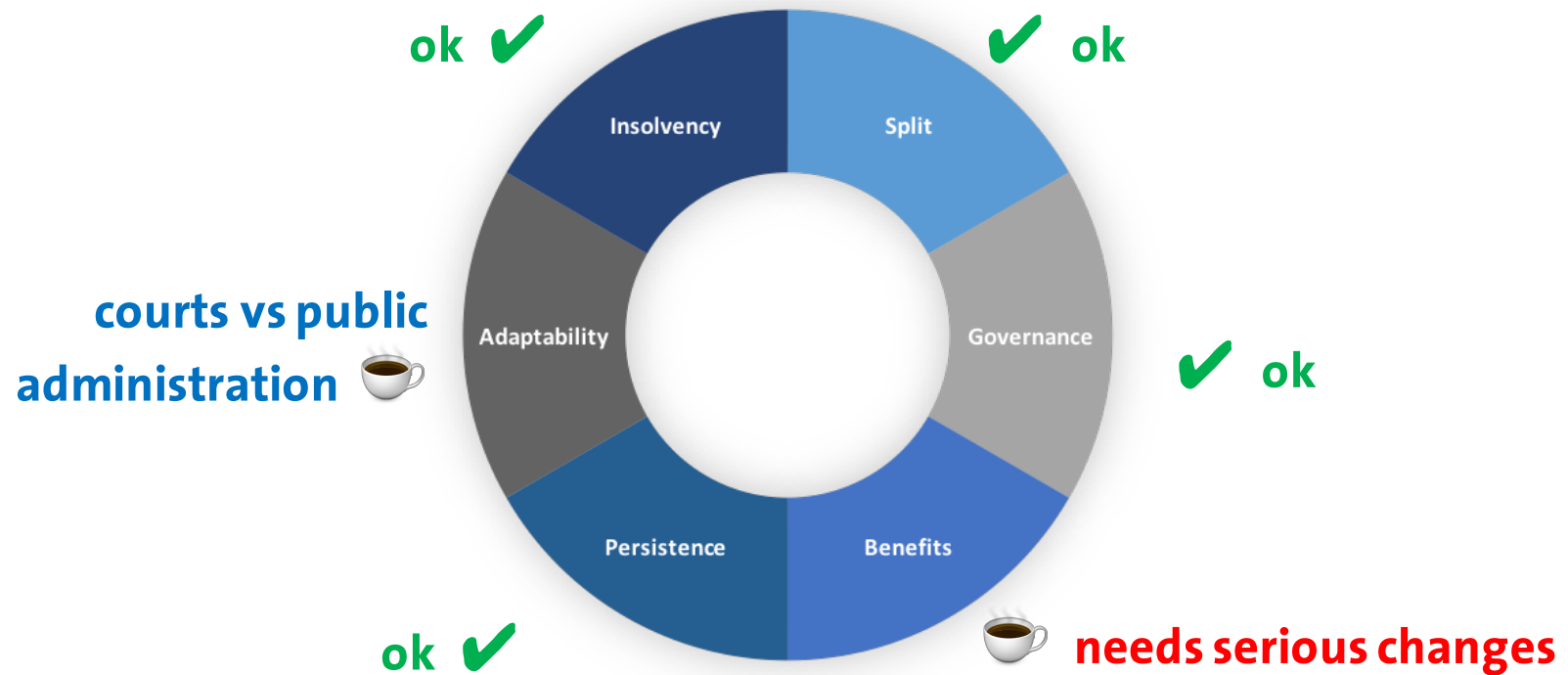
- Contract between affidante and affidatario
- over a programme that dedicates assets and benefits deriving from them to one or more beneficiaries
- ... who need not be identified at the time of the contract
- affidante's heirs don't inherit affidante's rights and powers, unless otherwise provided



Model 2: Private foundation

- Congruence of patrimony and legal personality
 - attractive to European legal minds
 - triggers a special tax regime
- Requires clear distinction between private and charitable foundations (*fondation patrimoniale, fondation d'utilité publique*)
- Requires a re-thinking of family foundations in Civil Code
 - types of benefits
 - limit in time?
 - supervision

Model 2 : Private foundation



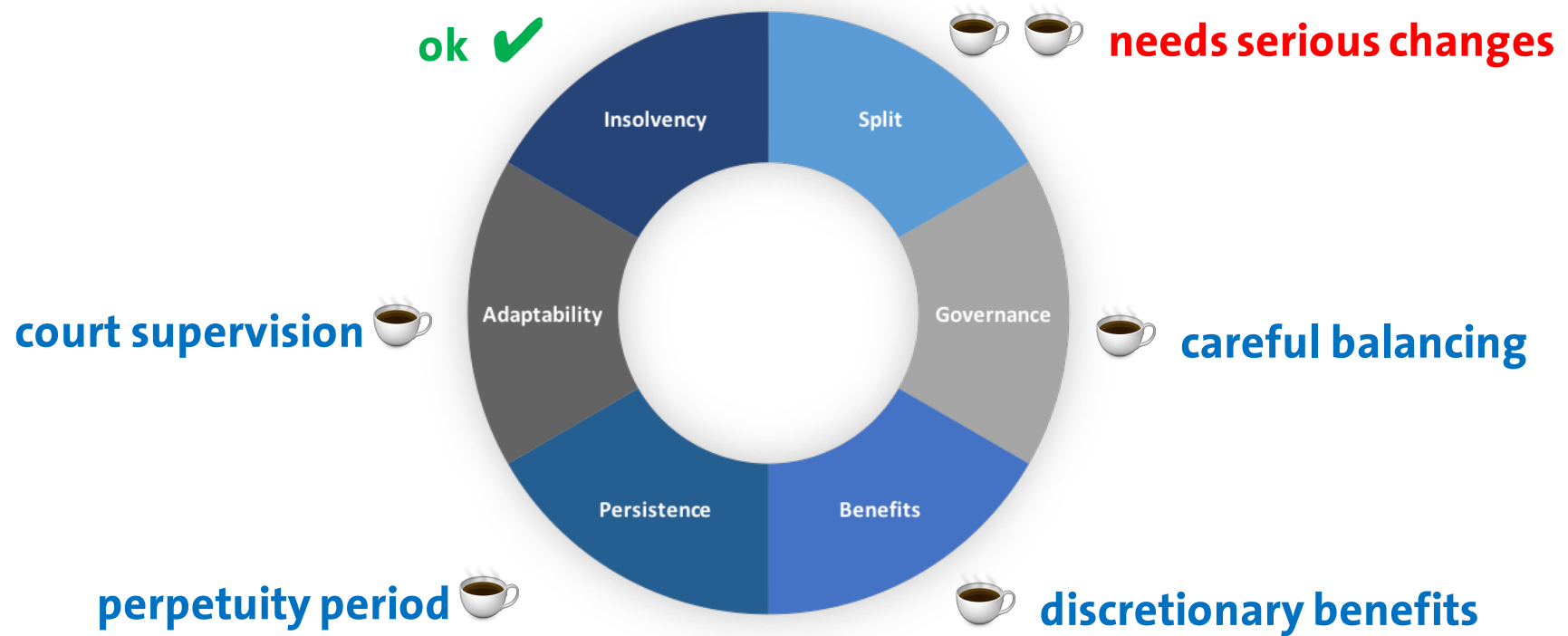


Model 3: Transplanting trust into Swiss law

- Reputable, fashionable, has withstood the test of time
- Scotland and other civil law jurisdictions are proof that trust does not need equity in the English sense
- Property or obligations?
 - Property and obligations
 - *Numerus clausus* doctrine



Model 3 : Transplanting the trust





Scorecard

Contract

Mentally comfortable...
as “false friends” often
are

Strong risk of over-
stretching

Does not challenge
current tax treatment

Might be politically more
palatable

Foundation

Familiar

International standard

Requires reconsidering
some traditional ideas

More specialised than
the other two

Already enjoys its own
tax regime

Trust

The international standard

Allows broader uses than
foundation

Challenges deep dogmas
of civil law

Would also require
overhaul of existing tax
treatment





Outlook

- No real “low hanging fruits”
- We need to be honest on what we want to achieve and open on choosing the basic design
- Tax fairness is key selling point
- Acknowledge need to maintain protection of creditors, spouses and heirs
- Use traditional recipes
 - e.g., major disposition inter vivos with long term effects may be well served by notarisation
- Consider arbitration as alternatives to courts





Further references

available on www.cdbf.ch/steplausanne/

- Luxembourg
 - Projet de loi relative à la fondation patrimoniale (2013)
- San Marino:
 - Legge del 1° Marzo 2010 – L’istituto del’affidamento fiduciario
 - English translation by M. Monte and P. Mathews
- Switzerland
 - Projet de codification de la fiducie (Thévenoz, 2001)

