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IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

1. Inheritance Law and Foundation Law

- Most estate planning cases include an international element
- Which law is applicable is a question of private international law
 - In PIL (private international law), the applicable law to a set of questions is called a «statute» (e.g., the inheritance statute is the applicable law relating to inheritance questions)
- Inheritance statute vs. foundation statute
 - PIL analysis: Decomposition of the facts into sub-complexes, which are then assigned to different «statutes» by means of «qualification» by way of a «connection» or «link»
 - Also significant for procedural law, because depending on the qualification, it can be determined which rules of jurisdiction are applicable; competent court then applies the *lex fori*, i.e. its own conflict-of-law rules



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

1. Inheritance Law and Foundation Law

- Inheritance statute vs. foundation statute
 - From a Swiss perspective, interplay of inheritance statute, opening statute, statute of personal capacity, inheritance contract statute, form statute, matrimonial property statute and also foundation or trust statute
 - Also relevant: Applicable tax law
 - Competent counselling must have all these aspects in mind



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

1. Inheritance Law and Foundation Law

– Inheritance statute

- In Germany formerly linked to the concept of «nationality», today the EU inheritance regulation (EU ErbR-VO) refers to the «last habitual residence»
- In Switzerland concept of «last domicile»; adaption to the EU regulation currently under discussion
- In the Principality of Liechtenstein linked to «nationality»



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

1. Inheritance Law and Foundation Law

– Foundation statute

- Controversial in Germany whether to apply «incorporation theory» or «real seat theory»; see now BGH from 8 September 2016, ZIP 2016, 2060 *et seq.*
- In Switzerland «incorporation theory» (art. 154 CH-CPIL)
- In the principality of Liechtenstein cascade: Choice of law, incorporation, seat (art. 232 FL-PGR)
- If the place of incorporation and the place of seat coincide, generally no difference: The foundation law of the place of incorporation is applicable (for questions of recognition see below)



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

2. Foundations in Estate Planning

a. Possible uses of the foundation

– Basic effect is always:

- Separation of the assets from the previous owner of the assets (foundation assets are no longer part of the founder's assets or estate); change of the owner and, in principle, also of the tax subject
- Dedication of assets to a specific purpose that is in principle permanently perpetuated, which must actually be pursued and be directed outwards (not a «self-purpose» foundation only for the administration of its own assets)



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

2. Foundations in Estate Planning

a. Possible uses of the foundation

- Pursuit of non-profit objectives; often secondary tax effect due to tax exemption of the transfer of assets
- Benefit for individuals, mostly family members
- Permanent safeguarding and perpetuation of an object, such as a business, especially in the absence of descendants (who are suitable for continuation)
- Channelling estate planning, especially in the conflict area between unity of assets and centrifugal force of inheritance law

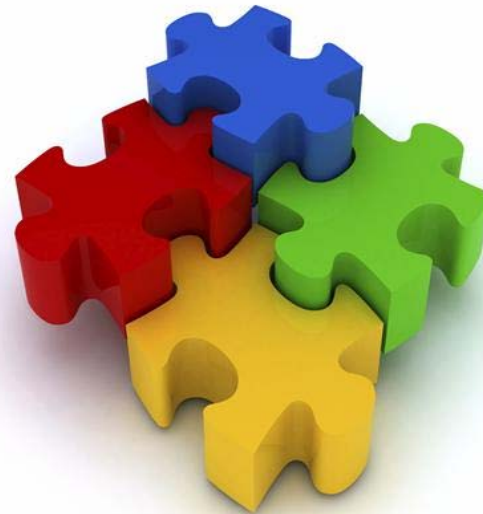


IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

2. Foundations in Estate Planning

a. Possible uses of the foundation

- Protection of assets («asset protection») from creditors, spouses, children, heirs, uncertain regimes (e.g., risk of expropriation)
- All together





IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

2. Foundations in Estate Planning

b. Further planning objectives/prioritisations

- Final separation of assets or possibility of recovery?
- Priority of influence, protection against forced shares or tax effect?
- Should the next generation be determined «from the grave» or rather «empowered» at an early stage? Structure «eternal» or limited in time, fixed or flexible?
- Solution against or with family? Part of «family governance»?
- Early structure or legacy on death?
- National or international solution?



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

2. Foundations in Estate Planning

c. Example

X, the 80-year-old sole proprietor of a business, comes to you for advice on the structuring of his estate: He is a German citizen, but has recently been living with his wife (F) (separation of property) in the municipality of Schwyz (Canton Schwyz). The two children, Anna (A) and Berthold (B), both lived in Germany, and there were no other descendants. He does not see a successor in his family for the continuation of his business, but does not want his life's work to be shattered and would like it to be perpetuated after his death. He had therefore thought of a foundation solution. F and A are generally cooperative, but B wants to «fight to the last drop».

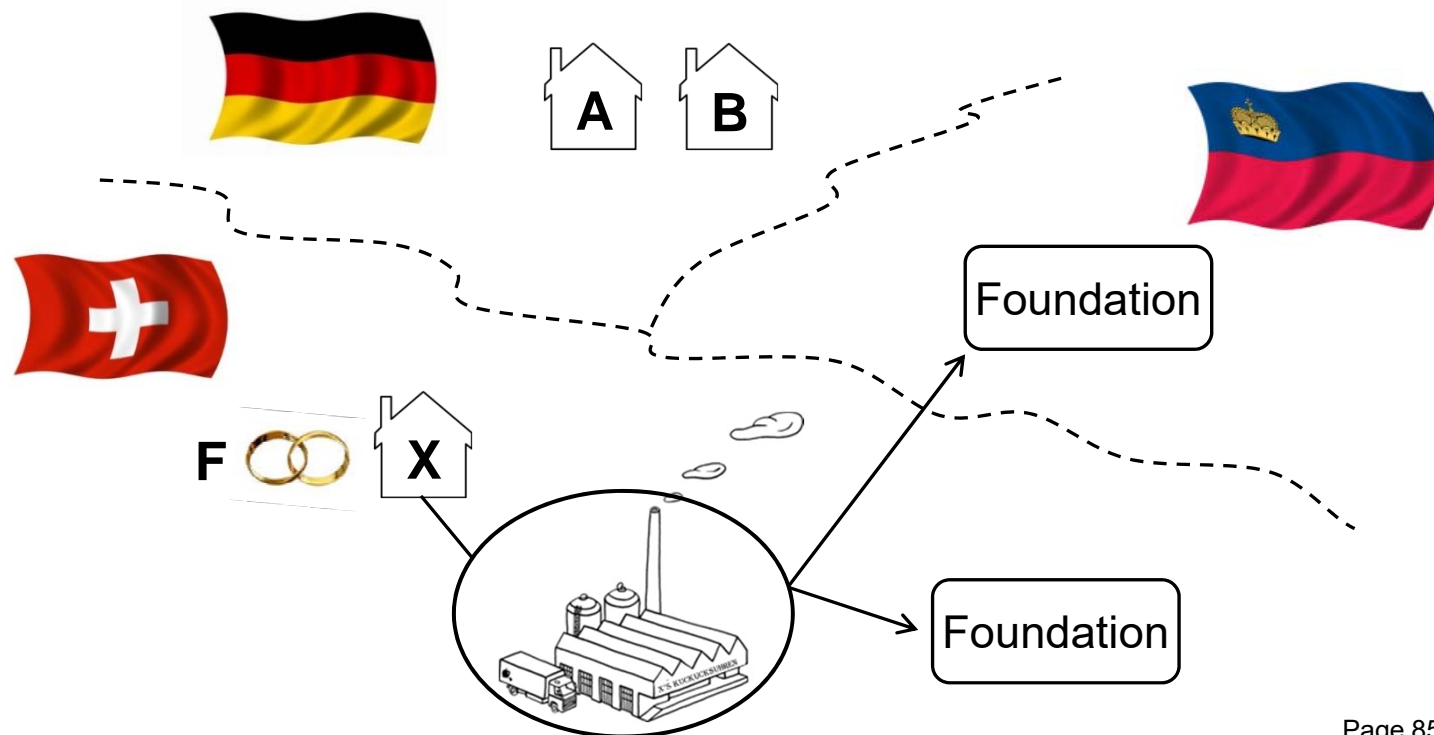
It is also of interest to X whether he can retain influence over the assets and whether maintenance payments by the foundation to the family members are possible.



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

2. Foundations in Estate Planning

c. Example





IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

3. The Swiss Foundation

a. Forms of foundations

- Classic charitable foundation
 - Pure charitable purpose can lead to a tax free transfer, if criteria for tax exemption are met
- Many reasons can motivate charitable giving (no descendants, desire for «memorial», «giving back» to the community, *cf.* «giving pledge» in the US)



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

3. The Swiss Foundation

a. Forms of foundations

– Enterprise or business foundation

- In estate planning special use for holding foundations (in pure or mixed forms)
- Motives for establishing a foundation
 - Permanent safeguarding of the company on an independent legal entity
 - Long-term securing of business and philosophy
 - Wealth and succession planning
- Problems and risks



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

3. The Swiss Foundation

a. Forms of foundations

– Family foundations

- Swiss family foundation faces problems in estate planning (art. 335 CC)
- Prohibition of unconditional (maintenance) payments (at least according to the established case law of the Swiss Federal Supreme Court, which has been strongly criticised by scholars and practitioners for years)
- Reform of the Swiss family foundation might lead to renaissance as an estate planning tool



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

3. The Swiss Foundation

a. Forms of foundations

- Mixed foundations
 - *E.g.*, dedication of assets/transfer of a business with the purpose
 - to maintain the company on a permanent basis, and form the income,
 - to support certain charitable projects and
 - the family in situations of need
 - Traditional structure in Switzerland
 - Can cause problems over the generations
- The structures should ideally be embedded in a suitable family governance (see *Jakob, Trusts & Trustees 2020, 4 ff.*)



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

3. The Swiss Foundation

b. Embedding the structure in estate planning

– Aspects of matrimonial property law

- In the event of a donation within 5 years prior to dissolution of the matrimonial property regime without the consent of the spouse, addition to the acquired property (art. 208 para. 1 no. 1 CC)
- In the case of «intent to diminish» the spouse's share, addition without time limit (art. 208 para. 1 no. 2 CC)
- If the spouse's assets do not cover the claim for participation, claim against the foundation (art. 220 CC)



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

3. The Swiss Foundation

b. Embedding the structure in estate planning

– Aspects of inheritance law

- Conflict between the foundation and the right to a compulsory portion
 - Swiss compulsory share quotas very high ([still] $\frac{3}{4}$ for one child, reduction to $\frac{1}{2}$ within the forthcoming inheritance law revision)
 - Establishment of a foundation *mortis causa*: In the event of violation of the compulsory portion, reduction claim pursuant to art. 522 CC



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

3. The Swiss Foundation

b. Embedding the structure in estate planning

– Aspects of inheritance law

- Conflict between the foundation and the right to a compulsory portion
 - Establishment of foundation *inter vivos*: In case of violation of compulsory portion, «claw back»-claim according to art. 82 in connection with art. 527 no. 3 CC in case of donations within 5 years prior to inheritance (unlimited in time in case of abusive intent, art. 527 no. 4 CC)
- Option: Choice of a different inheritance law, in the present case: German law?



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

3. The Swiss Foundation

b. Embedding the structure in estate planning

– Example: Foundation solution under Swiss law

- Foundation within the meaning of art. 80 *et seqq.* CC can act as owner of the company shares in the sense of a business holding foundation and enable perpetuation
- Transfer to independent legal entity draws enterprise out of estate so that it is no longer subject to distribution rules under inheritance law
- At the same time, the basis for calculating the compulsory portion is reduced, so that compulsory portions decrease in size



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

3. The Swiss Foundation

b. Embedding the structure in estate planning

– Example: Foundation solution under Swiss law

- However, if the testator does not survive for 5 years, lawsuits against the foundation can be expected; if the foundation cannot generate assets (e.g., by selling parts of the business), there is a risk of collapse
- Here it becomes clear that the successful transfer of the asset does not immunise against access to its value
- Possibility of an «inheritance waiver» by the entitled persons: The decisive factor is often whether there is a sufficient «package» (e.g.: financial compensation; beneficiary position; participation rights in foundation)
- Again: Importance of family governance



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

4. The Liechtenstein Foundation

a. Forms of foundations

- Basic division into non-profit foundations (obligation to register and supervision) and private-benefiti foundations (obligation to deposit only, legal protection by court), depending on the predominance of the foundation's puposes
- Within this spectrum, both corporate holding foundations and (pure or mixed) family foundations are possible
- Family foundations are not subject to any restriction of content (no art. 335 CC), maintenace elements are therefore possible in a legally secure manner, both for the benefit of family members and of the founder himself («foundation for the founder»)



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

4. The Liechtenstein Foundation

a. Forms of foundations

– Other «special features»

- Fiduciary establishment for increased confidentiality
- Founder can reserve founder's rights to freely change the purpose and/or even to revoke the foundation
- Structure options with regard to internal and external governance
- Possibly: Reduction of «claw-back»-period to 2 years for actions before Liechtenstein court (art. 29 FL-CPIL)

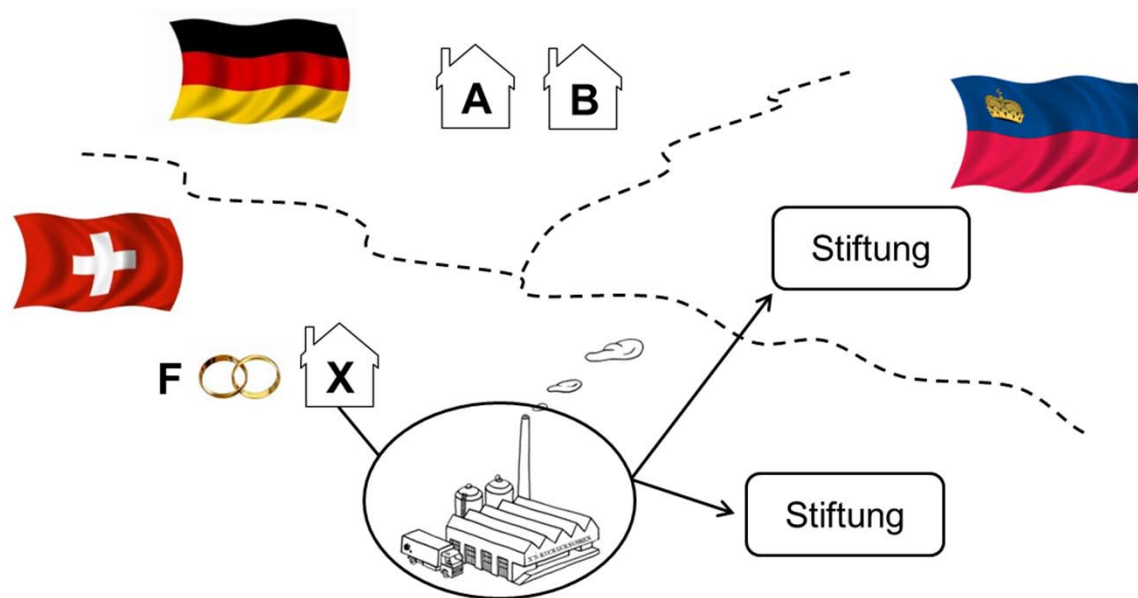


IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

4. The Liechtenstein Foundation

a. Forms of foundations

- Example: X could perpetuate maintenance purposes in addition to company holding purposes and reserve special founder's rights for himself





IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

5. Recognition of Foreign Foundations

a. General

- The best structure under foreign law is of no use if it is not recognised in terms of civil law and tax law, in *all* the legal systems concerned
- Often difficult «statute puzzle»; especially important are foundation statute and inheritance statute; consider choice of law options (regarding applicable inheritance law, execution of wills, waiver agreements, *etc.*)





IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

5. Recognition of Foreign Foundations

a. General

- In addition, pay attention to
 - *Ordre public* (art. 17 CH-CPIL); result of the application of the applicable foreign legal rules is incompatible with fundamental principles of the Swiss legal order → result correction
 - *Loi(s) d'applications immédiate* (art. 18 CH-CPIL): Swiss norms that are internationally mandatory (↔ internally mandatory) are applied even if foreign law is applicable → application of the mandatory norm in addition to application of foreign law
- Here only room for principles



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

5. Recognition of Foreign Foundations

b. Recognition in Switzerland

- Foreign foundations generally recognised in Switzerland (art. 154 CH-CPIL)
- In the context of inheritance law, however, note that inheritance law is assessed according to the inheritance statute and that this statute applies in addition to the foundation statute; therefore, e.g., rights to a compulsory portion according to art. 522 *et seqq.* CC enforceable; benefits from foundation or charitable purposes usually irrelevant
- Foreign maintenance foundations do not fall under art. 335 CC, which is no «*loi d'application immédiate*» (BGE 135 III 614)
- According to BGE 102 II 136, foreign regulations that deviate from the Swiss law on compulsory portions do not violate public policy (art. 17 CH-CPIL)



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

5. Recognition of Foreign Foundations

b. Recognition in Switzerland

– Note: Particularities may occur in connection with Liechtenstein

→ art. 29 para. 5 FL-CPIL

- «Whether the reduced mandatory heir may claim rights against third parties who have received assets from the deceased during his or her lifetime is to be assessed in accordance with the law of the country to which the succession is subject. **Moreover, the assertion of such rights is only permissible if it is also permitted under the law applicable to the acquisition transaction.**»
- Cumulative link in order to reduce «claw-back»-period to the two years applicable under Liechtenstein law (enhanced asset protection)
- Question of enforcement: Provision only applicable by Liechtenstein courts



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

5. Recognition of Foreign Foundations

c. Recognition in other affected legal systems

- Attention: Recognition must also be guaranteed in all other relevant jurisdictions (Residence of the children? Real estate abroad?)
- In the example case, the recognition in Germany must be considered:
 - German law generally recognises foreign foundations if the seat remains abroad (disputed application of incorporation or real seat theory to foundations)
 - But: Under today's harsh tax policy, case law may refuse to recognise Liechtenstein foundations if they are in the context of untaxed asset or too far-reaching founder's rights



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

5. Recognition of Foreign Foundations

c. Recognition in other affected legal systems

– Germany as an example:

- Since the decision of the BVerfG of 19 April 2005, BVerfG 112, 332 (compulsory share of descendants guaranteed by art. 14 GG), literature tends to classify legal results that deny children and spouses a compulsory share as contrary to ordre public irrespective of their need
- Also consider deviating tax law consequences (*cf.*, *e.g.*, § 15 D-AStG)



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

5. Recognition of Foreign Foundations

d. Further caveats

- Under Liechtenstein law, possibilities to reserve strong influence (e.g., founder's rights to change purpose and to revoke foundation)
 - If the establishment of the foundation is only simulated, the foundation will be considered to be a «sham» foundation and thus «void»
 - In the case of arrangements that appear to be an abuse of law, risk of «piercing the corporate (the foundation's) veil»
 - Mechanism of Swiss PIL (*ordre public* or *loi d'application immédiate*)



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

5. Recognition of Foreign Foundations

d. Further caveats

- In Liechtenstein law, possibilities to reserve strong influence (*e.g.*, founder's rights to change purpose and to revoke foundation)
 - If the influence is otherwise too high (especially reservation of a right of revocation), the reduction periods may not start to run due to the lack of a definitive «sacrifice of assets»; also, founder's rights may be subject to seizure
 - Tax «transparency» if assets continue to be economically attributable to the founder; the latter could be intentional in order to avoid inheritance taxes
- The above could also happen to a Common Law foundation or a trust



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

6. Regulatory Environment – Compliance

- General transparency mania
- Money laundering regulations (FATF, AMLA)
- Data exchange in tax matters (FATCA, AEOI/CRS)
- Ready for «offshore leaks»?





IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

7. Conclusion and Outlook

- Foundations are versatile instruments for (international) estate planning, also for business succession
- A sensitive and far-sighted planning is always necessary; in case of doubt, seek professional advice
- Planning process
 - What are the objectives of the testator/founder?
 - Which legal system offers tools that can be used to realise these goals as optimally as possible?
 - Check whether the domestic legal system, but also all other potentially affected legal systems (e.g., children's domicile, assets abroad?) recognise the structure; if necessary, the objectives must be reconsidered or reprioritised



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

7. Conclusion and Outlook

– Further:

- Provide for private governance mechanisms and «checks and balances»
- In dynastic structures (especially concerning family businesses): Put emphasis on family governance (build up common values, empower the next generation, leave flexibility and exit strategies, etc.)
- Always give more weight to a reasonable civil law-structure than to tax law-effects



IV. Introduction to Estate Planning via Foundations from a Swiss Perspective

7. Conclusion and Outlook

- Especially for foundations with a long-term character, the environment is also crucial (political, economic, financial conditions; reputation)
 - Switzerland is established as a reliable foundation location for founders from Switzerland and abroad
 - Liechtenstein regains reputation, especially *vis-à-vis* «exotic» foundation models





Thank you for your attention

Prof. Dr. Dominique Jakob, M.I.L.

Chair for Private Law, Center for Foundation Law

University of Zurich

www.rwi.uzh.ch/jakob

www.zentrum-stiftungsrecht.uzh.ch