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Will-Substitutes in Switzerland and Liechtenstein

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'Will-substitutes' is a term developed under common law, whose meaning is therefore necessarily subject to adaptation when applied in a 'continental' legal environment. With regard to Swiss and—where of particular interest—Liechtenstein law, this chapter intends to present where the legal framework for using will-substitutes diverges from common law (section I) and which legal tools have emerged from this specific environment. While foundations (sections III and IV), trusts (section V) and life insurance (section VI) will be canvassed in greater detail, some less prominent 'substitutes' will only be briefly mentioned (section II). Variation in form between common and continental law, however, does not imply disparity in purpose. On the contrary, the following analysis will show that appropriate estate planning can also achieve typical will-substitute goals under Swiss and Liechtenstein law.

I. *Eo Ipso* Succession and the Need for Will-Substitutes

Neither Switzerland nor Liechtenstein know a full-blown, common law style probate process.[1] The Swiss legal tradition follows the German model, where the estate vests in the heirs, ie, the legal successors to the *de cujus*, by operation of law and without the intervention of the court or an administrator (arts 537, 560 of the

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[1] For a general overview on the probate process, see P Wendel, *Wills, Trusts, and Estates* (New York, Aspen Publishers, 2010) 6 ff, for the juxtaposition of the European approach of universal succession see ibid, 10.

Swiss Civil Code, the *Schweizerisches Zivilgesetzbuch* (ZGB)).[2,3] Administration of the estate may occur, but only in specific cases such as where the testator has named an executor (so-called *Willensvollstrecker*, see arts 517 ff ZGB).[4] In Liechtenstein, which adopted the Austrian General Civil Code, the *Allgemeines Bürgerliches Gesetzbuch* (ABGB)[5] in the early-nineteenth century, the estate does not automatically vest in the heirs, but instead is at rest (so-called '*hereditas iacens*') until the heir(s) formally accept it, pursuant to §§ 799 ff ABGB, and the court devolves it according to § 819 ABGB. Thus, the system in Liechtenstein resembles more closely a common law probate process rather than the Swiss system of *eo ipso* succession, as it requires positive action by various parties in order for the estate to pass from the *de cujus* to the heirs.

Against this background, under both Liechtenstein and particularly Swiss law, there is less reason to use will-substitutes in order to avoid a probate process. Accordingly, wills are of comparably higher importance. Nevertheless, both Switzerland and Liechtenstein know several constellations where the idea of a wealth transferral *outside* the classical inheritance system can be appealing. First, without the need to rely on the inheritance system, the wealth distribution becomes more predictable and controllable, as a monitored step by step transfer of the assets is possible. Second, dissipation of the assets can be avoided. If, for instance, a testator has one Picasso and six daughters, it will be an almost insurmountable task to retain the painting in the family, should it fall under the regular inheritance process. Third, perhaps the central reason for employing a will-substitute in practice is the aim of avoiding or at least mitigating the cogent rules on forced succession. In Switzerland, these rules are extremely strict with, for example, the children's statutory share amounting to three-quarters of the estate.[6] Finally, but no less significant, tax planning is an important driver for the use of will-substitutes.

II. Principal Will-Substitutes in Switzerland and Liechtenstein

The principal types of will-substitute used in Switzerland and Liechtenstein are foundations, trusts and life insurance. In addition, Swiss law offers several other instruments that could be employed to transfer wealth upon death outside inheritance law.

[2] Swiss Civil Code of 10 December 1907 (SR 210).

[3] U Bürgi in A Büchler and D Jakob (eds), *Kurzkommentar ZGB, Schweizerisches Zivilgesetzbuch* (Basel, Helbing Lichtenhahn, 2012) art 560 para 5 f. German law is explained in ch 8 above.

[4] H Grüninger in A Büchler and D Jakob (eds), *Kurzkommentar ZGB, Schweizerisches Zivilgesetzbuch* (Basel, Helbing Lichtenhahn, 2012) arts 517/518 paras 1 ff.

[5] General Civil Code of 1 June 1811, LGBl 1967 no 34; it was enacted in Liechtenstein on 18 February 1812.

[6] See art 417 para 1 ZGB.

Marital property law[7] transfers wealth from the decedent to the surviving spouse before,[8] and, in general, without the intervention of succession law.[9] However, since the division of marital property and the inheritance procedure are closely intertwined, thorough estate planning has to take their reciprocal effects into consideration.[10]

One, albeit controversial[11] option of the bequeather, is to establish a joint account (a so-called *compte joint*),[12] which incorporates a clause (so-called *Erbenausschlussklausel*) that entitles the surviving tenant to dispose of all the assets and to exclude the heirs from becoming a party to the joint account contract (between the bank and the joint creditors). However, where the transaction is qualified as a *donatio mortis causa* pursuant to article 245 paragraph 2 of the Swiss Code of Obligations, the *Obligationenrecht* (OR),[13] inheritance rules apply and the remaining creditors have to respect the forced share of the heirs.[14]

Another possibility for the *de cujus* to influence his estate after death is to grant a power of appointment which takes or maintains effect *post mortem*. As the authorised representative has to safeguard the interests of the heirs,[15] however, the scope of action remains very limited.

Finally, wealth can be passed upon death by way of succession in shares to partnerships through a continuation clause (so-called *Fortsetzungsklausel*) that

[7] For a general overview on the Swiss matrimonial law, see H Hausheer, T Geiser and R Aebi-Müller, *Das Familienrecht des Schweizerischen Zivilgesetzbuches*, 4th edn (Bern, Stämpfli, 2010) paras 12.02 ff.

[8] The expression 'before' is here not one of time, but rather refers to the order in which the rules of matrimonial property law and succession law are to be applied.

[9] Pursuant to art 204 para 1 ZGB, the marital property regime is dissolved on the death of a spouse (or on the implementation of a different regime).

[10] Rules on statutory shares, for instance, can also be enforceable against prenuptial contracts, see art 216 paras 1 and 2 ZGB; for a good overview of this intensely discussed topic, see P Bornhauser, *Der Ehe- und Erbvertrag, Dogmatische Grundlage für die Praxis* (Zurich, Schulthess, 2012) paras 84 ff.

[11] See E Huggenberger, 'Vertragsbeziehungen und AGB' in P Abegg, A Geissbühler, K Haefeli and E Huggenberger (eds), *Schweizerisches Bankenrecht, Handbuch für Finanzfachleute*, 3rd edn (Zurich, Schulthess, 2012) 68; the discussion regarding the legality of 'survivorship clauses' has been raging for decades, see, eg the dispute between E Wolf, 'Die Berechtigungen am Compte joint nach dem Tode eines Kontoinhabers' (1971) 67 *Schweizerische Juristen-Zeitung* 349 ff and P Früh, 'Erbenausschlussklausel beim "Compte joint"' (1972) 68 *Schweizerische Juristen-Zeitung* 137 ff; the Swiss Federal Court has admitted survivorship clauses *in dicta* in BGE 94 II 167, in recent decisions it was silent on the matter, see BGer 5P.17/2002 of 12 February 2002.

[12] NP Vogt and S Liniger, 'The Survivor Takes All: Joint Tenancy-ähnliche Rechtsfiguren im schweizerischen Recht' in HC von der Crone, P Forstmoser, RH Weber and R Zäch (eds), *FS für Dieter Zobl zum 60. Geburtstag* (Zurich, Schulthess, 2004) 323; Huggenberger, above n 11, 57; D Rochat and P Fischer, 'Compte joint et clause d'exclusion des héritiers: de la difficulté de servir plusierurs maîtres' (2012) *successio 2012* 240/241 f.

[13] Law of Obligations of 30 March 1911 (SR 220).

[14] See C Huguenin, *Obligationenrecht, Allgemeiner und Besonderer Teil*, 2nd edn (Zurich, Schulthess, 2014) para 2862 f.

[15] R Watter in H Honsell, NP Vogt and W Wiegand, *Basler Kommentar, Obligationenrecht I, Art 1-529 OR*, 5th edn (Basel, Helbing Lichtenhahn, 2011) art 35 paras 7 ff; Huguenin, above n 14, para 1085.

takes effect on the withdrawal or death of one of the partners.[16] However, the devil once again lies in the detail and in certain constellations such a clause might be qualified as a disposition *mortis causa* that in turn would have to fulfil the relevant formal requirements and respect the rules on statutory portions.[17]

III. Foundations: Switzerland

A. Nature and Legal Framework

Switzerland follows a classical foundation model whereby a foundation is an independent legal entity created through the destination of assets to a particular purpose (art 80 ZGB).[18] This can happen either *inter vivos* or by way of a will (art 81 ZGB).[19] A Swiss foundation will result in a definitive separation of assets, as the foundation is *irrevocable* and the founder loses control over the assets that have to serve the purpose of the foundation in accordance with the original intention of the founder. At least in theory, the founder retains no more influence on the foundation and its assets than any other third party.[20] The fact that the founder cannot distribute the assets to the beneficiaries or his heirs may at first sight counter-indicate the use of a foundation as a will-substitute. However, prudent drafting and planning can preserve a degree of influence to the founder, and after his death to the heirs. As an example, the founder can retain the competence to modify the foundation purpose (art 86a ZGB). Furthermore, he can secure himself or a family member a position on the foundation board or another organ and thus reserve some influence for the family. Hence, even the classical Swiss foundation can be modelled so as to serve as a will-substitute. Moreover, even though with

[16] A Meier-Hayoz and P Forstmoser, *Schweizerisches Gesellschaftsrecht mit Einbezug des künftigen Rechnungslegungsrechts und der Aktienrechtsrevision*, 11th edn (Bern, Stämpfli, 2012) § 12 paras 94 ff; D Staehelin in H Honsell, NP Vogt and R Watter, *Basler Kommentar, Obligationenrecht II, Arts 530–964 OR, Arts 1–6 SchlT AG, Arts 1–11 ÜBest GmbH*, 4th edn (Basel, Helbing Lichtenhahn, 2012) art 545/546 para 12.

[17] Staehelin in Honsell, Vogt and Watter, above n 16, art 545/546 paras 9, 12. See chs 6 and 8 above III.C and VII.B.

[18] D Jakob in A Büchler and D Jakob (eds), *Kurzkommentar ZGB, Schweizerisches Zivilgesetzbuch* (Basel, Helbing Lichtenhahn, 2012) art 80 para 2 f; for the different possible purposes, see H Grüninger in H Honsell, NP Vogt and T Geiser (eds), *Basler Kommentar, Zivilgesetzbuch I, Art 1-456 ZGB*, 5th edn (Basel, Helbing Lichtenhahn, 2014) art 80 paras 12 ff; for a categorisation of the different types of foundation see D Jakob, *Schutz der Stiftung, Die Stiftung und ihre Rechtsverhältnisse im Widerstreit der Interessen* (Tübingen, Mohr Siebeck, 2006) 72 ff.

[19] For further details, see Grüninger in Honsell, Vogt and Geiser (eds), above n 18, art 81 paras 1 ff; Jakob in Büchler and Jakob (eds), above n 18, art 81 paras 1 ff.

[20] For a deepened analysis of the relationship between the founder and the foundation see Jakob, *Schutz der Stiftung*, above n 18, 103 ff; for the situation in Switzerland see Grüninger in Honsell, Vogt and Geiser (eds), above n 18, art 80 para 6; D Jakob, 'Ein Stiftungsbegriff für die Schweiz' (2013) 132 *Zeitschrift für Schweizerisches Recht* 185, 253 f.

a foundation an infinite perpetuation can be achieved, this is not a prerequisite for the establishment of a foundation. The trend rather goes in the direction of schemes that permit possible distribution of all foundation assets to the beneficiaries. Time-limited foundations (so-called *Stiftungen auf Zeit*) and spend-down foundations (so-called *Verbrauchsstiftungen*) are nowadays firmly established under Swiss law.[21]

B. Types of Will-Substituting Foundations and their Issues

If one looks at the various types of Swiss foundation,[22] one can distinguish between ordinary or 'classic' foundations and family foundations. The most important classic foundation is the charitable foundation, which is not a typical will-substitute, but can also serve estate planning purposes. As Switzerland is home to over 13,000 classic foundations with combined assets of some 100 billion Swiss Francs, this type of foundation is not only the most important one in the foundation sector, but also of significant relevance to the Swiss economy.[23]

Compared with charitable foundations, private purpose foundations come closer to the will-substitute concept. One example is the so-called company or corporate foundation that may receive and hold the shares of a corporation and thus aims at preserving a business that would otherwise be jeopardised by the succession process.[24] Since the Swiss Federal Court clarified that a Swiss foundation may serve as a holding foundation pursuing economic goals,[25] Switzerland is able to provide an attractive model for entrepreneurs seeking to preserve their life's work and to channel the assets via estate planning. However, this model entails certain legal and economic concerns, as a foundation created solely to perpetuate its own assets might be illicit (so-called *Selbstzweckstiftung*).[26] Furthermore, if the shares are the only assets of the foundation, insufficient diversification inconsistent with the modern portfolio theory might present a conceivable risk.[27] Another drawback is that such holding-structures are relatively inflexible and might encounter difficulties when it comes to adapting to economic needs

[21] See Jakob in Büchler and Jakob (eds), above n 18, art 80 para 5.

[22] Jakob in Büchler and Jakob (eds), above n 18, pre-arts 80–89a paras 7 ff.

[23] For further reference, see Grüninger in Honsell, Vogt and Geiser (eds), above n 18, pre-arts 80–89a para 1; B Eckhardt, D Jakob and G von Schnurbein, *Der Schweizer Stiftungsreport 2014* (Basel and Zürich, 2014) 4.

[24] For further detail, see Grüninger in Honsell, Vogt and Geiser (eds), above n 18, pre-arts 80–89a paras 15 ff; Jakob in Büchler and Jakob (eds), above n 18, pre-arts 80–89a paras 9 ff.

[25] See BGE 127 III 337 E 2.c f.

[26] Jakob in Büchler and Jakob (eds), above n 18, art 80 para 3.

[27] The diversification principle is one of the key principles when it comes to the investment of foundation assets, as confirmed in BGE 124 III 97 E 2.a by the Swiss Federal Court; see L Krauss, 'Vermögensanlagen und Anlagevorschriften für klassische Stiftungen' in YA Moor, D Dubach, L Krauss, M Brandenberger and D Roos (eds), *Vermögensanlagen von Pensionskassen und klassischen Stiftungen* (Bern, Stämpfli, 2010) 41, 64 ff.

and possible changes in the relevant market.[28] Lastly, being a classic foundation, the company foundation is subject to public supervision by a state authority (art 84 para 1 ZGB), a fact that may deter prospective founders.

Company foundation purposes can be mixed with family, charitable or other purposes. Such a mixed foundation is not only permitted, but is even a traditional foundation model in Switzerland. Several important Swiss companies are held by foundations with a mixed purpose structure. Here, too, specific concerns arise. Due to the combination and parallel perpetuation of multiple, potentially highly diverse interests, problems might occur after the death of the patriarch, since in the second or third generation these interests may increasingly drift apart. Accordingly, in a second phase—unless planned accurately—these structures may lead to problems and at times a collapse may only be prevented through the exit of one of the stakeholders.[29]

C. Family Foundations in Switzerland

A special regime applies to family foundations, ie, foundations with family members of the founder as beneficiaries.[30] This type may, prima facie, even be seen as the prototypical inheritance foundation, since the assets are intended to be passed on to the heirs or beneficiaries. Indeed, family foundations enjoy some attractive privileges, as there is no ongoing public supervision (art 87 ZGB) and no mandatory registration in the commercial register.[31] However, family foundations suffer from one major impediment. According to the 'notorious' article 335 paragraph 1 ZGB, family foundations in Switzerland are only permitted 'in order to meet the costs of raising, endowing, or supporting family members or for similar purposes'.[32] This provision has been interpreted in such a way that payments on a regular basis without further preconditions are not permitted, and hence no family maintenance or enjoyment foundations are admissible under Swiss law.[33] Even though for decades the majority of scholars and practitioners have been consistently critical of this interpretation, it has so far been upheld

[28] Meier-Hayoz and Forstmoser, above n 16, § 23 paras 12 ff take a very critical position.

[29] For a legal perspective on the intertwining of family matters with charitable foundations, see T Wüstemann, 'Familienpartizipation und gemeinnützige Stiftungen—rechtliche Herausforderungen und Chancen im nationalen und internationalen Kontext' in D Jakob (ed), *Stiftung und Familie* (Basel, Helbing Lichtenhahn, 2015) 25, 29 ff.

[30] See Jakob in Büchler and Jakob (eds), above n 18, art 87 para 4; art 335 paras 1 ff.

[31] The latter privilege has now been abolished: From 1 January 2016 all types of foundation have to be registered; see the new art 52 ZGB and art 6b para 2bis SchlT ZGB. This important amendment results from the effort of the Swiss Parliament to comply with the recommendations of the FATF, see the 'Bundesgesetz zur Umsetzung der 2012 revidierten Empfehlungen der Groupe d'action financière' of 12 December 2014, BBl 2014, 9689.

[32] For further reference on family foundations, see Grüninger in Honsell, Vogt and Geiser (eds), above n 18, art 335 paras 6 ff; Jakob in Büchler and Jakob (eds), above n 18, art 87 para 4; art 335 paras 1 ff.

[33] See again Grüninger in Honsell, Vogt and Geiser (eds), above n 18, art 335 paras 6 ff; Jakob in Büchler and Jakob (eds), above n 18, art 87 para 4; art 335 paras 1 ff.

by Swiss courts.[34] Thus, the family foundation would have the potential to serve as a valuable instrument of 'private succession law',[35] but the overly narrow interpretation of Swiss courts is a considerable impediment.

D. Foundation and Inheritance Law: Core Overlaps

However, all the above-mentioned matters face one specific obstacle, namely the way the rules on forced heirship react to the establishment of a foundation.[36] If assets are transferred to a third party such as a foundation *inter vivos*, the value of these assets will be included in the calculation of the share of the forced heirs. In cases where the testator has exceeded his testamentary freedom, an abatement claim, ie, a claim aimed at granting the compulsory portion to those entitled to it, may be brought against the foundation when the assets were transferred either (i) within five years prior to the death of the founder[37] *or* (ii) with an abusive intention.[38] In these cases, those heirs who do not receive the full value of their forced heirship entitlement may sue the foundation to have the disposition abated to the permitted amount. Accordingly, even though foundations can function well as will-substitutes, forced heirship rules might lead to an abatement claim against the foundation, at least in cases where the founder happens to die within five years of its establishment.

Hence, from the viewpoint of the founder, it is advisable to persuade the forced heirs to waive their legal shares. This, of course, is another challenging task, which might more easily be achieved if the waiving heirs receive an inducement, such as a substantial payment, membership of the foundation council, or the position of foundation beneficiaries.[39]

[34] In detail, *cf* Jakob, 'Ein Stiftungsbegriff für die Schweiz', above n 20, 323; D Jakob, 'Freiheit durch Governance—Die Zukunft des Schweizer Stiftungsrechts mit besonderem Blick auf die Familienstiftung' in D Jakob (ed), *Stiftung und Familie* (Basel, Helbing Lichtenhahn, 2015) 61, 71 ff; see also G Studen, 'Die Familienstiftung und der gesellschaftliche Wertekanon im Wandel der Zeiten' in D Jakob (ed), *Stiftung und Familie* (Basel, Helbing Lichtenhahn, 2015) 89 ff.

[35] Expression coined by A Dutta, *Warum Erbrecht?—Das Vermögensrecht des Generationenwechsels in funktionaler Betrachtung* (Tübingen, Mohr Siebeck, 2014) 78, 79 ff; further ch 8 above V.B.

[36] This flows from the fact that under certain circumstances, *inter vivos* gifts could be added to the estate; see Grüninger in Büchler and Jakob (eds), above n 4, art 475 paras 2 ff; art 527 paras 4 ff; D Staehelin in H Honsell, NP Vogt and T Geiser (eds), *Basler Kommentar, Zivilgesetzbuch II, Art 457-977 ZGB, Art 1-61 SchlT ZGB*, 4th edn (Basel, Helbing Lichtenhahn, 2011) art 475 paras 1 ff; R Forni and G Piatti in H Honsell, NP Vogt and T Geiser (eds), *Basler Kommentar, Zivilgesetzbuch II, Art 457-977 ZGB, Art 1-61 SchlT ZGB*, 4th edn (Basel, Helbing Lichtenhahn, 2011) art 527 paras 7 ff.

[37] Grüninger in Büchler and Jakob (eds), above n 4, art 527 para 5; Forni and Piatti, above n 36, art 527 paras 7 ff.

[38] Grüninger in Büchler and Jakob (eds), above n 4, art 527 para 6; Forni and Piatti, above n 36, art 527 paras 10 ff.

[39] This entails risks for both parties, as usually the waiving party does not exactly know how large their legal share will be, see H Lange and K Kuchinke, *Erbrecht*, 5th edn (Munich, Beck, 2001) 169; Jakob, *Schutz der Stiftung*, above n 18, 287; D Jakob, 'Die Haftung der Stiftung als Erbin oder als "Beschenkte"' in R Hüttemann, P Rawert, K Schmidt and B Weitemeyer (eds), *Non Profit Law Yearbook 2007* (Cologne, Carl Heymann, 2008) 113, 122.

IV. Foundations: Liechtenstein

A. Types of Family Foundation in Liechtenstein

As we have seen, Swiss family foundations face severe constraints. As a reaction, many Swiss (and other international) clients opt for the establishment of a foundation in other jurisdictions, such as the Principality of Liechtenstein.[40] One of the main categories of private foundation under the laws of Liechtenstein is the family foundation.[41] There are two forms of family foundation under the Liechtenstein Persons and Companies Act, the *Personen- und Gesellschaftsrecht* (PGR):[42] First, the so-called 'pure' family foundation under article 552 § 2 paragraph 4 no 1 PGR, and second, the so-called 'mixed' family foundation pursuant to article 552 § 2 paragraph 4 no 2 PGR. The former is limited to similar purposes to those allowed under article 335 of the ZGB. Hence, in Liechtenstein, as in Switzerland, 'pure' family foundations may not unconditionally distribute assets to the beneficiaries, but rather such distributions must be linked to the specific purposes of a 'pure' family foundation.[43] As opposed to Switzerland, in Liechtenstein, however, such an unconditional distribution of assets to beneficiaries becomes possible when a 'mixed' family foundation is employed.[44] According to article 552 § 2 paragraph 4 no 2 PGR, a 'mixed' family foundation must predominantly pursue the purposes of 'pure' family foundations, but it can also pursue charitable purposes or other private (such as unconditional maintenance or enjoyment) purposes. If unconditional payments predominate, the foundation is still admissible as an ordinary private foundation (but without specific family foundation privileges).[45] As shown above, the private foundation under the PGR—in contrast to the Swiss family foundation—allows the unconditional distribution of assets to its beneficiaries. Thus, it is an interesting device that may be employed in order to transfer wealth to the next generation outside the inheritance law context.

[40] The foundation law of Liechtenstein was completely revised on 28 June 2008 and entered into force on 1 April 2009, *Gesetz vom 26 Juni 2008 über die Abänderung des Personen- und Gesellschaftsrechts*, LGBl 2008 no 220, which amended the Law on Persons and Companies of 20 January 1926, LGBl 1926 no 4.

[41] D Jakob, *Die Liechtensteinische Stiftung, Eine strukturelle Darstellung des Stiftungsrechts nach der Totalrevision vom 26 Juni 2008* (Vaduz, Liechtenstein, 2009) paras 114 ff.

[42] Law on Persons and Companies of 20 January 1926, LGBl 1926 no 4.

[43] Such as the 'defrayal of costs of upbringing or education, provision for or support of members of one or more families or similar family interests'. For the conditions of the latter see R Quaderer, *Die Rechtstellung der Anwartschaftsberechtigten bei der liechtensteinischen Familienstiftung* (Schaan, GMG Juris, 1999) 64. Furthermore, see Jakob, *Die Liechtensteinische Stiftung*, above n 41, para 116 f.

[44] Jakob, *Die Liechtensteinische Stiftung*, above n 41, para 116 f.

[45] Quaderer, above n 43, 66; H Bösch, *Liechtensteinisches Stiftungsrecht* (Bern, Stämpfli, 2005) 275; Jakob, *Die Liechtensteinische Stiftung*, above n 41, paras 116 ff. This nuance remains relevant under the reformed foundation law of Liechtenstein: A 'normal' private foundation loses certain special advantages—such as bankruptcy privileges for beneficiaries—exclusively granted to 'pure' family foundations.

B. Family Foundations: Key Differences from Swiss Law

In a nutshell, the attractiveness of the Liechtenstein foundation is due to a variety of reasons. First and foremost, foundations that partially or exclusively serve the maintenance of their beneficiaries are permitted under Liechtenstein law.[46] In addition, the Liechtenstein foundation has some quite special features. In particular, the founder himself can be one, or even the sole beneficiary of the foundation. Furthermore, he can reserve tight control and extensive rights in the statutes,[47] such as the right to change the purpose of the foundation or to revoke it.[48] The possibility of having the foundation established by a fiduciary is another advantage, since it enhances privacy.

Moreover, under Liechtenstein law, there is a stronger protection against interference by succession rules, as the ABGB provides for a two-year abatement period (§ 785 para 3 ABGB), compared with a five-year period in Switzerland and a 10-year period in Germany.[49] Under § 29 paragraph 5 of the Liechtenstein Private International Law, the *Gesetz über das internationale Privatrecht* (FL-IPRG),[50] the two-year period will even prevail over the normally applicable inheritance law if a case is ruled by a Liechtenstein court. Liechtenstein's private international law is thus designed to foster 'asset protection' for foundations.

All these features suggest that the Liechtenstein family foundation is a suitable will-substitute. However, estate planners always have to take account of the international environment, an environment which has recently become increasingly hostile towards Liechtenstein (or other private) foundations. Therefore, quite a number of settlors have seen their foundation structures collapse under the attention of foreign judges.

C. Liechtenstein (Family) Foundation: An Internationally Viable Instrument?

This increasingly hostile international legal environment is due to the very success of Liechtenstein foundations on the one hand, and a number of individual cases of misuse on the other. Because Liechtenstein foundations are highly flexible and attractive instruments, other jurisdictions may be reluctant to (fully) acknowledge them, regarding them as potentially violating the respective mandatory law.

[46] This stands in sharp contrast to the somewhat deadlocked legal situation in Switzerland, see Jakob, *Die Liechtensteinische Stiftung*, above n 41, paras 44 f, 114 ff.

[47] ibid, paras 247 ff.

[48] ibid.

[49] For Switzerland, see above section III.D; for Germany, see § 2325 para 3 *Bürgerliches Gesetzbuch* and ch 8 above V.B.

[50] Code on Private International Law of 19 September 1996, LGBl 1996 no 194, in its version after the revision of the foundation law in 2009.

In Switzerland, Liechtenstein foundations can be relatively sure of recognition. In a pivotal decision of 2009, the Swiss Federal Court ruled that article 335 ZGB[51] is no *loi d'application immédiate*, ie, no overriding mandatory provision under Swiss international private law, and accordingly will not prevail over applicable Liechtenstein law.[52] Thus, any family foundation duly established under the laws of Liechtenstein will be recognised by Swiss courts pursuant to article 154 of the Swiss Federal Code on Private International Law, the *Bundesgesetz über das Internationale Privatrecht* (IPRG),[53] even though it contains maintenance or enjoyment foundation features. In Germany, however, Liechtenstein foundations encounter increasingly adverse conditions, at least when instances of tax evasion are involved or in cases where the founder retains a controlling position. In those cases, there is a tendency for German courts to 'pierce the veil' of the foundation, ie, to refuse recognition on the grounds either of some form of sham doctrine or of the domestic *ordre public*.[54]

The German cases, in particular, teach a very important lesson, namely that estate planning has to be constantly aware of relevant connections to other jurisdictions (domicile of heirs, property) which might treat a will-substitute less favourably than its jurisdiction of establishment. A second lesson can be added: that a founder has to accept that the more flexibility and control he retains, the weaker will be the protection of his assets. Limitation periods for abatement actions, for instance, might not run where, from an economic point of view, the founder has not truly separated himself from the earmarked assets. Hence, the potential claims of forced heirs remain valid.[55] From a tax perspective, assets that are still effectively

[51] *cf* above section III.C.

[52] BGE 135 III 614, 618 f E 4.3; in BGE 102 II 136, the Swiss Federal Court held that foreign rules on the compulsory portion that differ from those applicable in Switzerland do not conflict with the Swiss *ordre public*.

[53] Federal Code on Private International Law of 18 December 1987 (SR 291).

[54] Thus, German courts have refused to recognise foundations in the context of presumed tax avoidance, even though German law recognises foreign foundations in principle; see OLG Stuttgart 5 U 40/09 of 29 June 2009, OLG Düsseldorf 22 U 126/06 of 30 April 2010 and the criticism in D Jakob and M Uhl, 'Die liechtensteinische Familienstiftung im (Durch-)Blick ausländischer Rechtsprechung' (2012) 5 *Praxis des Internationalen Privat- und Verfahrensrechts* 451 ff, with a critical view also on the decision of the Austrian Supreme Court OGH 30b 1/10h of 26 May 2010; D Jakob and G Studen, 'Die liechtensteinische Stiftung in der aktuellen deutschen Zivilrechtsprechung' (2011) *Zeitschrift für das Recht der Non Profit Organisationen* 4 ff; both articles demonstrate that after Liechtenstein's foundation law reform a *general* suspicion towards Liechtenstein foundations seems no longer appropriate.

[55] According to the so-called *Vermögensopfertheorie*, a complete separation of the assets of the foundation from those of the founder is required for the abatement period to commence (since Liechtenstein adopted the Austrian *Allgemeines Bürgerliches Gesetzbuch*, a referral to the Austrian literature and even to its jurisprudence may prove useful in those cases); see Bösch, above n 45, 712 ff; N Arnold, *Privatstiftungsgesetz Kommentar*, 3rd edn (Vienna, LexisNexis Publishers, 2013) Introduction para 23b with further references; Jakob, *Die Liechtensteinische Stiftung*, above n 41, para 243, para 686 f with further references; as a general reference see Jakob, 'Die Haftung der Stiftung als Erbin oder als "Beschenkte"', above n 39, 113, 120 ff; for the jurisprudence, see Liechtenstein Supreme Court, FL-OGH 03 CG.2011.93 of 7 December 2012, E 9.2.18 ff, (2013) *Zeitschrift für Stiftungswesen* 54 ff, which followed the jurisprudence of the Austrian Supreme Court, see OGH of 5 June 2007, 10 Ob 45/07, (2007) *Zeitschrift für Stiftungswesen* 86.

controlled by the founder will also not be treated as economically separate from his fortune. As a result, the foundation will be treated as 'transparent' and taxed accordingly. A prospective founder's choice between 'asset protection' and 'control' can be quite difficult. If he fails to sufficiently release control, the foundation assets may be abated or otherwise afflicted. If, on the other hand, the founder devolves too much control, his foundation may cease to be an effective will-substitute in that he may be unable to direct its asset distribution policy in a reliable manner. One way out of this predicament could be for the founder to retain a right to revoke the foundation, but with another person as ultimate beneficiary.[56] This way the founder could retain a certain influence while the separation of assets would nevertheless be effected.[57]

In sum, if structured correctly, a Liechtenstein foundation can be used as an effective will-substitute. Yet, it is vital for the founder or his estate planner to examine recognition of the structure in all potentially affected jurisdictions.

V. Trusts in Switzerland and Liechtenstein

A. Switzerland

Trusts are not uncommon in the Swiss legal landscape and Switzerland has a prospering trust industry. This may strike some as surprising given that Switzerland has no trust law of its own and there is no such thing as a 'Swiss law of trusts'. However, the prosperity of the Swiss trust sector can be explained by the fact that Switzerland is not only an important international financial centre, but has also ratified the Hague Trusts Convention (HTC),[58] which obliges Switzerland to recognise foreign trusts and to apply to them the law under which they were created.[59] This means that in Switzerland *foreign law* trusts can potentially be used as *Swiss* will-substitutes. Such use generates an overlap with Swiss domestic

[56] For the legal situation in Austria, see Arnold, above n 55, Introduction para 23b.

[57] Jakob, *Die Liechtensteinische Stiftung*, above n 41, para 687.

[58] Convention on the Law Applicable to Trusts and on their Recognition concluded 1 July 1985. In Switzerland, it entered into force on 1 July 2007 (SR 0.221.371).

[59] See the Dispatch on the Convention on the Law Applicable to Trusts: 'HTÜ, Botschaft zur Genehmigung und Umsetzung des Haager Übereinkommens über das auf Trusts anzuwendende Recht und über ihre Anerkennung vom 2.12.2005' BBl 2006 551, 562 ff. Previously, Swiss scholars, courts and practitioners tried to fit the trust into known Swiss legal institutions, see R Gassmann in M Amstutz, P Breitschmid, A Furrer, D Girsberger, C Huguenin, M Müller-Chen, V Roberto, A Rumo-Jungo, A Schnyder and HR Trüeb (eds), *Handkommentar zum Schweizer Privatrecht* (Zürich, Schulthess, 2007) Art 149a paras 1 ff; M Seiler, *Trust und Treuhand im Schweizerischen Recht unter besonderer Berücksichtigung der Rechtsstellung des Trustees* (Zürich, Schulthess, 2005); D Jakob and P Picht, 'Der trust in der Schweizer Nachlassplanung und Vermögensgestaltung—Materiellrechtliche und internationalprivatrechtliche Aspekte der Ratifikation des HTÜ' (2010) *Aktuelle Juristische Praxis* 855, 856; BGE 96 II 79; BGer 4C 94/2005 of 14 September 2005.

inheritance law, as the system of the HTC strives to comply with domestic law (*cf* art 15 HTC). At the risk of oversimplification, it might be stated that the rules of forced heirship, abatement and inheritance in general apply to a foreign trust in much the same way as they would to a Swiss or foreign foundation.[60] One important difference remains, however. Lacking a respective legal tradition, Swiss courts seem to feel far less confident when dealing with cases involving trusts than they do when tackling foundation cases. A prominent example of this effect is the case of *Rybolovlev v Rybolovleva*.[61]

Shortly before his divorce, the Russian billionaire Dimitri Rybolovlev transferred a billion-dollar fortune into two irrevocable discretionary Cyprus trusts.[62] Subsequently, his wife Elena claimed part of that fortune in the course of divorce proceedings in a Geneva court, which actually pierced the veil of the trusts and froze the assets in an interim measure, pursuant to article 178 ZGB.[63] In doing so, the Geneva court completely ignored the HTC and the applicable Cyprus trust law, solving the case by applying exclusively Swiss domestic law. Notwithstanding sharp criticism from both national and international scholars, the Swiss Federal Supreme Court upheld the decision as 'non-arbitrary' and therefore compliant with Swiss federal law.[64] Prima facie, these judgments may draw a fairly discouraging picture for trusts in Switzerland. However, in *Rybolovlev* a bad case truly produced bad law, since the establishment of the two Cyprus trusts was a blatant attempt to evade marital property rules, and Dimitri Rybolovlev retained an overly strong influence on the trusts.[65] Furthermore, the court's piercing of the veil—at least at the level of the Swiss Federal Supreme Court—was limited to interim measures, where specific private international law principles come into play.[66] In 2014, however, the lower court rendered its main decision,[67] in which Elena was adjudicated the highest divorce claim ever awarded in Switzerland (over four billion dollars). Since the decision as yet remains unpublished and the higher court has recently overruled that decision,[68] there is scope for speculation and

[60] That is the reason why heirs should be involved whenever planning a trust in Switzerland, see Jakob and Picht, above n 59, 870.

[61] The decisions in the main proceedings were not published. The decisions in the interim procedures can be found as follows: Cour de Justice du Canton de Genève of 4 March 2010, C/29642/2008; Swiss Federal Supreme Court of 26 April 2012, BGer 5A 259/2010. For an overview of the fairly complex Rybolovlev case, see D Jakob, D Dardel and M Uhl, *Verein—Stiftung—Trust, Entwicklungen 2012* (Bern, Stämpfli, 2013) 175 ff.

[62] ibid, 175 f.

[63] Cour de Justice du Canton de Genève of 4 March 2010, arrêt C/29642/2008.

[64] Swiss Federal Court of 26 April 2012, BGer 5A 259/2010, E 9.

[65] ibid, E 7.

[66] Jakob, Dardel and Uhl, above n 61, 177.

[67] Unpublished.

[68] See the decision of the Cour de Justice du Canton de Genève of 5 June 2015 (unpublished) in which the Court acknowledges the establishment of the trusts and reduces the amount for the divorce claim drastically (an estimated CHF 564 million) reasoned by the fact that it did not take into account the increase in value after the disputed assets were transferred to the trust. It has been announced, however, that an appeal has been filed to the Swiss Federal Supreme Court.

hope that the Swiss courts will develop a more systematic approach to trust cases in the future.

B. Liechtenstein

Liechtenstein is one of the very few civil law countries[69] that actually has its own national trust law,[70] albeit with a somewhat contractual trait.[71] Liechtenstein trusts are notably successful in the national context. However, the international acceptance of the Liechtenstein trust is at least as problematic as that of the Liechtenstein foundation, and might be even more uncertain in countries such as Germany which generally do not recognise trusts.

VI. Pension Plans and Life Insurance in Switzerland

A. Will-Substitutes and the Swiss Social Security System

Pursuant to articles 111 ff of the Swiss Federal Constitution, the *Bundesverfassung* (BV),[72] the Swiss social security system is based on three pillars.[73]

The first pillar is constituted by the old-age, survivors' and disability insurance scheme. It is a general, compulsory insurance, and according to article 112

[69] As another example, San Marino introduced a trust law in 2010 (Trust Law of 1 March 2010 no 42, last modified through decree no 98 of 25 July 2013); for further reference, see A Vicari, 'Country Reports: San Marino' (2012) 18 *The Columbia Journal of European Law Online* 81 ff (available at www.cjel.net/wp-content/uploads/2012/03/countryreport_sanmarino81-92.pdf). Furthermore, Hungary introduced a trust law in its 2014 reform of the Civil Code (Act V of 2013 of 15 March 2014 regarding the regulation of the Hungarian trust). For further reference, see Dentons Budapest Newsletter, 'Die Stiftung im neuen Bürgerlichen Gesetzbuch' of 2 January 2014; Dentons Budapest Newsletter, 'Die Treuhandschaft im neuen Bürgerlichen Gesetzbuch' of 13 February 2013, both available at www.dentons.com.

[70] F Schurr, 'Liechtensteinische Vermögensstrukturen für Familienvermögen im heutigen Umfeld' in D Jakob (ed), *Stiftung und Familie* (Basel, Helbing Lichtenhahn, 2015) 111 ff; G Meier and O Schmidt, 'Liechtenstein' in A Kaplan, *Trusts in Prime Jurisdictions*, 3rd edn (London, Globe Law and Business, 2010) 275 ff; Jakob, *Die Liechtensteinische Stiftung*, above n 41, paras 72 ff, also for a brief overview on the main features of the Liechtenstein trust. Next to the trust, Liechtenstein also knows so-called trust enterprises, which were introduced to the PGR in 1928 (art 932a § 1-170 PGR).

[71] Meier and Schmidt, above n 70, 279.

[72] Federal Constitution of the Swiss Confederation of 18 April 1999, as of 9 February 2014 (SR 101).

[73] For a general overview, see T Locher, *Grundriss des Sozialversicherungsrechts*, 3rd edn (Bern, Stämpfli, 2003) § 1 paras 33 ff; P Bornhauser, 'Zusammenspiel erbrechtlicher und sonstiger durch den Tod ausgelöster Ansprüche' (2005) *Jusletter* of 10 January 2005, paras 5 ff; R Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB' (2009) *successio* 7 ff.

paragraph 2(b) of the Federal Constitution, it aims to cover basic living expenses.[74] Survivor benefits under the first pillar undoubtedly fall outside the inheritance law system, neither forming part of the estate nor qualifying as potential abatement actions since they are not part of the statutory share calculations.[75] However, the first pillar is characterised by a pay-as-you-go system—ie, a system where the collected pension contributions are used immediately to cover the running costs of pensions—and consequently there is no room for a private transferral of wealth or even estate planning under this pillar.[76]

The occupational pension scheme pursuant to article 113 of the Federal Law on Occupational Retirement, Survivors' and Disability Pension Plans, the *Berufliches Vorsorge Gesetz* (BVG)[77] forms the second pillar, which aims at enabling the policyholder to maintain his standard of living after retirement (art 113 para 2 lit a BV). This scheme is divided into a compulsory (pillar 2a) and a non-compulsory (pillar 2b) part. Under the former, every employee with an annual salary exceeding a certain sum[78] has to be insured under an occupational pension scheme with a minimal amount, whereas the latter comprises policies that exceed this legal minimum.[79] The benefits flowing from the compulsory occupational pension scheme under pillar 2a remain entirely outside the scope of inheritance law,[80] since pillar 2a is a compulsory public law institution whose protective purpose may not be impaired by inheritance law interference.[81] Opinions differ concerning the non-compulsory occupational pension scheme under pillar 2b. The prevailing legal scholarship, however, and (at least in principle) the Swiss Federal Court

[74] For further detail, see Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB', above n 73, 7 f; Bornhauser, 'Zusammenspiel erbrechtlicher und sonstiger durch den Tod ausgelöster Ansprüche', above n 73, para 5 f.

[75] Staehelin in Honsell, Vogt and Geiser (eds), above n 36, art 476, paras 16, 18; T Koller, 'Familien- und Erbrecht und Vorsorge' (1997) *recht*, Studienheft no 4, 22 f; JN Druey, *Grundriss des Erbrechts* (Bern, Stämpfli, 2002) § 13 para 27.

[76] For the pay-as-you-go system see Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB', above n 73, 7.

[77] Federal Law on Occupational Retirement, Survivors' and Disability Pension Plans of 25 June 1982, as of 1 January 2014 (SR 831.40).

[78] This threshold is regularly adjusted in line with inflation; in 2015, it amounted to CHF 21.150, *cf* www.bsv.admin.ch/kmu/ratgeber/00848/00851/index.html?lang=de.

[79] Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB', above n 73, 8; Bornhauser, 'Zusammenspiel erbrechtlicher und sonstiger durch den Tod ausgelöster Ansprüche', above n 73, paras 7 ff.

[80] BGE 129 III 305 E 2; Druey, above n 75, § 13 para 27; Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB', above n 73, 20; Staehelin in Honsell, Vogt and Geiser (eds), above n 36, art 476 para 17; P Tuor, B Schnyder, J Schmid and A Rumo-Jungo, *Das Schweizerische Zivilgesetzbuch*, 13th edn (Zurich, Schulthess Juristische Medien, 2009) § 68 para 29; P Izzo, *Lebensversicherungsansprüche und –anwartschaften bei der güter- und erbrechtlichen Auseinandersetzung (unter Berücksichtigung der beruflichen Vorsorge)* (Freiburg, Universitätsverlag, 1999) 313 ff; R Aebi-Müller, *Die optimale Begünstigung des überlebenden Ehegatten—Güter-, erb-, obligationen- und versicherungsrechtliche Vorkehren unter Berücksichtigung des Steuerrechts*, 2nd edn (Bern, Stämpfli, 2007) para 03.46.

[81] For further detail, *cf* Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB', above n 73, 20.

are inclined to qualify the entire second pillar as a unique legal institute under public law and to exclude it from the rules of inheritance law. For estate planning purposes, however, it has to be clarified that in the vast majority of cases, the employees are bound to a pension institution by signing an employment contract. They can rarely influence the arrangement of the occupational pension scheme regarding either the compulsory or the non-compulsory component.[82]

The third pillar consists of additional individual provisions which are entirely optional. It is composed of two distinct parts: on the one hand, the tied voluntary pension (pillar 3a) and on the other, the flexible voluntary pension (pillar 3b). Together, pillars 3a and 3b aim to reduce possible financial gaps left by the other two pillars in order to ensure maintenance of the previous living standard after retirement.[83] Pillar 3a originates in article 82 paragraph 1 BVG and the Ordinance on the Tax Deductibility of Contributions to Recognized Forms of Benefit, the *Verordnung über die steuerliche Abzugsberechtigung für Beiträge an anerkannte Vorsorgeformen* (BVV 3)[84] that allow a tax deduction for certain bound voluntary insurance, including certain types of life insurance. Its major advantage over pillar 2b, ie, the non-compulsory occupational pension scheme, is the absence of factual constraints on taking out insurance in a prescribed way and on determining the beneficiaries of the insurance.[85] Pillar 3b consists of all the investments that fail to fulfil the requirements of BVV 3. Certain life insurance might also fall within this category. In the third pillar marital property law and inheritance law can come to full application.[86]

B. Life Insurance[87]

Private insurance in the third pillar that are paid to a third party upon the demise of the decedent and policyholder have to be taken into consideration

[82] ibid, 20; Izzo, *Lebensversicherungsansprüche und –anwartschaften bei der güter- und erbrechtlichen Auseinandersetzung*, above n 80, 313 f; M Trigo Trindade, 'Prévoyance professionelle, divorce et succession' (2000) *Semaine Judiciaire* 505; Aebi-Müller, *Die optimale Begünstigung des überlebenden Ehegatten*, above n 80, para 03.49; for the jurisprudence of the Swiss Federal Court, see BGE 129 III 305 E 2.3, 2.7; BGE 130 I 205 E 8.

[83] Bornhauser, 'Zusammenspiel erbrechtlicher und sonstiger durch den Tod ausgelöster Ansprüche', above n 73, paras 30 ff.

[84] Ordinance on the Tax Deductibility of Contributions to Recognized Forms of Benefit (BVV 3) of 13 November 1985, as of 1 January 2009 (SR 831.461.3).

[85] Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB', above n 73, 22 f.

[86] Aebi-Müller, *Die optimale Begünstigung des überlebenden Ehegatten*, above n 80, paras 09.63 ff; Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB', above n 73, 13.

[87] Life insurance has a central role in Switzerland, with just under CHF 30 billion life insurance payout in 2013, see www.bfs.admin.ch/bfs/portal/de/index/themen/12/05/blank/kennzahlen/ges_praemienein.html.

in the settlement of the estate.[88] This is mainly due to the fact that in the tied voluntary insurance there is no link to an employment contract, hence the policy taker is free to choose whether he or she wishes to take out insurance.[89] However, the beneficiary of such a contract under pillar 3a receives the insurance payment directly pursuant to article 78 of the Federal Law on Insurance Contracts, the *Versicherungsvertragsgesetz* (VVG),[90] which is why the payment does not fall within the estate[91] and can function as a will-substitute. As this creates opportunities to circumvent the rules of succession law, articles 476 and 529 ZGB specifically protect statutory heirs and the compulsory portion to which they are entitled. Pursuant to these provisions, the surrender value of the life insurance has to be included in the calculation of the statutory share. Importantly, only insurance with a surrender value fall under article 476 ZGB, such as whole life insurance and mixed insurance, but not endowment insurance.[92] Insurance under pillar 3b may be included in the estate if the insurance is received on the basis of a disposition of property upon death. They do not fall within the estate if a third person receives the insurance as a beneficiary under an insurance contract. In principle, however, and similarly to pillar 3a, only the surrender value of the insurance falls into the computation basis for the compulsory share pursuant to articles 476 and 529 ZGB.[93]

In sum, while with regard to pension funds the room for manoeuvre is highly restricted and estate planning proves exceedingly difficult, life insurance can indeed be employed as will-substitutes. Care has to be taken, however, in order to avoid them falling within the estate and thus under the inheritance process.

VII. Concluding Remarks

The absence of a full-blown probate process creates a specific environment for will-substitutes in Switzerland and Liechtenstein. Will-substitutes do not really serve as 'substitutes', but rather as additional instruments to pass on wealth upon death. As has been seen, such instruments can nonetheless present attractive estate planning options provided clear limitations, such as forced share provisions, and legal risks are taken into account. On an international level in particular, certain Swiss and Liechtenstein will-substitutes are increasingly subject to criticism. Structures which were state-of-the-art 10 years ago may cause problems today. More than ever, estate planners have to be aware of the broader picture, including national as well as international limitations, in order to avoid civil and tax liability. For this reason a cross-border dialogue between scholars and practitioners from a range of jurisdictions such as that at the 'Oxford Conference on Will-Substitutes' of March 2015, on which this publication is based, is most valuable.

In view of the fruitful and at times controversial discussion at the conference, the author would like to close with an additional remark. Core questions remain regarding what a will-substitute actually is and how international inheritance law reacts to this type of legal instrument. In the author's view, a will-substitute, without particular relevance to the term itself, is an instrument for passing on assets *outside* inheritance law. Inheritance law and other provisions such as insolvency law may accept, restrict or otherwise impact such transfer, depending on the decisions legislature takes in the involved jurisdictions. From this perspective, however, employing will-substitutes should not be regarded as an 'evasion' of cogent inheritance rules, but rather as the legitimate use of instruments granted by law in an overall estate planning context. This insight strongly advocates the switch from a 'negative' avoidance-based approach to a 'constructive' one. In a constructive perspective, will-substitutes have the potential of passing *more than just property* from one generation to another. Foundations in particular are apt to acquire a separate and genuine function: they can, for instance, transmit the specific traditions or the identity of a family (eg, in the form of a *family foundation*) or serve as a tool for sharing family values and strengthening family governance (eg, in terms of a *charitable foundation* set up by a family as an intergenerational joint family project). Accordingly, it would seem worthwhile, in future research and discussion, to accentuate this underdeveloped perspective.[94]

[88] W Zumbrunn, 'Private Lebensversicherungen in der Erbteilungspraxis' (2006) *Aktuelle Juristische Praxis* 1207.

[89] Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB', above n 73, 22 f.

[90] Federal Law on Insurance Contracts of 2 April 1908 as of 1 January 2011 (SR 221.229.1)

[91] Zumbrunn, above n 88, 1207; Aebi-Müller, 'Die drei Säulen der Vorsorge und ihr Verhältnis zum Güter- und Erbrecht des ZGB', above n 73, 23; Druey, above n 75, § 13 para 30; P Izzo, 'Assurances- Vie et LPP: Droit des successions et régimes matrimoniaux' (2002) *La Semaine Judiciaire* 107.

[92] Thus the consequences under succession law vary according to the insurance policy, for more detail see S Plattner, 'Erbrecht und Versicherungen, Die Lebensversicherungen der Säule 3a und 3b als Instrument der Nachlassplanung und Nachlassteilung' in J Schmid (ed), *Nachlassplanung und Nachlassteilung* (Zürich, Schulthess, 2014) 220 ff; see also Staehelin in Honsell, Vogt and Geiser (eds), above n 36, art 476 paras 23 ff.

[93] Details are still controversial, for further reference see Plattner, above n 92, 220 ff; Staehelin in Honsell, Vogt and Geiser (eds), above n 36, art 476 para 10.

[94] See D Jakob (ed), *Stiftung und Familie* (Basel, Helbing Lichtenhahn, 2015), a volume based on a conference dealing primarily with these important issues.