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Introduction to Swiss Private Law

- I. Origins and characteristics of the SCC**
- II. Structure**
- III. Introductory provisions**
- IV. Law of persons**
- V. Property**
- VI. Inheritance and family law**

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I. Origins and characteristics of the SCC

- Fragmentation of law between and within the cantons in the pre-Napoleonic era
- Early 19th century:
 - Adaptation of French law in the west and south
 - Adaptation of Austrian law in the Berne region
 - German and autochthonous law in Zurich and Central Switzerland
- Failed attempts to achieve unification throughout the 19th century
- Eugen Huber's blueprint succeeds in 1907

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Section 201a

Legal consequences of the withdrawal of a service relating to financial services

- (1) The performance required is to be determined as follows:
 1. Where all parties to the contract are natural persons, the performance required is the provision of the service as agreed.
 2. Where all parties to the contract are legal persons, the performance required is the provision of the service as agreed, unless the contract provides for the provision of a different service.
 3. Where the contract provides for the provision of a different service, the performance required is the provision of that service.
- (2) Where the contract provides for the provision of a different service, the performance required is the provision of that service, unless the contract provides for the provision of a different service.
- (3) Where the contract provides for the provision of a different service, the performance required is the provision of that service, unless the contract provides for the provision of a different service.

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III. Introductory provisions

- Principles of good faith and abuse of rights

Art. 2

¹ Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.

² The manifest abuse of a right is not protected by law.

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III. Introductory provisions – good faith

BGE 128 III 201 – facts:

- German company S sells to Serbian company B four machines at a price of CHF 1 Mio, to be paid by 10 installments.
- Swiss bank G guarantees payment, agreement governed by German law.
- First, but no further installment paid. S submits and G acknowledges overdue notices at the times when installments due.
- S sues G for payment based on the guarantee, G raises defense of limitation.

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III. Introductory provisions – good faith

BGE 128 III 201 – findings:

- In principle, German law applies to the contract.
- Conduct of G does, however, violate principle of good faith according to Art. 2 SCC.
- Art. 2 SCC part of Swiss "positive" ordre public as *loi d'application immédiate* (Art. 18 SPIL) and, hence, to be enforced even against foreign applicable law.
- Principles of good faith and abuse of rights applies throughout all areas of the law and all instances.
- No detailed assessment of German substantive law needed since defense of limitation cannot be accepted anyway.
- S succeeds.

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IV. Law of persons
Foundations – Art. 80-89a, 335 SCC

- A characteristic institution of Continental Law
- A driving force for Switzerland's economy and society

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IV. Law of persons – Foundations

1. Nature and legal framework

- Endowment of assets for a particular purpose → independent legal entity, Art. 80 ZGB
- Creation inter vivos or testamentary, Art. 81 ZGB
- Prima facie contradictions when using foundations as will substitutes
 - Separation founder/foundation ⇔ retaining influence on foundation
 - Foundation as "eternal" entity ⇔ distribution of assets to beneficiaries

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IV. Law of persons – Foundations

- Separation founder/foundation ⇔ retaining influence on foundation
 - Drafting foundation documents according to founder's wishes
 - Competence to modify foundation purpose (Art. 86a ZGB)
 - Founder member of foundation council
- Foundation as "eternal" entity ⇔ distribution of assets to beneficiaries
 - Time limited-foundation
 - Spend down foundation

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IV. Law of persons – Foundations

2. Types of foundations and their issues

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graph TD; A[Classical foundations] --> B[Charitable]; A --> C[Company]; D[Family foundations] --> E[Mixed];
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Art. 335 ZGB

Autotelic foundations illicit

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IV. Law of persons – Foundations

3. Family foundations

- Family members of founder as beneficiaries, Art. 87, 335 ZGB
- Prima facie the prototypical „inheritance foundation“
- In principle some attractive characteristics:
 - No ongoing supervision, Art. 87 ZGB
 - No mandatory registration in the commercial register

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IV. Law of persons – Foundations

- Art. 335 ZGB as a major impediment

Art. 335

¹ A body of assets may be tied to a family by means of a family foundation created under the law of persons or inheritance law in order to meet the costs of raising, endowing or supporting family members or for similar purposes.

² It is no longer permitted to establish a fee tail.

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IV. Law of persons – Foundations

BGE 93 II 439 – facts:

- Couple F establishes the "Familienstiftung Burg Reichenstein" (family foundation Reichenstein castle) and transfers to the foundation some cash as well as Reichenstein castle, previously bought and renovated by them.



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IV. Law of persons – Foundations

BGE 93 II 439 – facts:

- Foundation purpose: Maintain the castle which is to serve as country home for the founders and their family and where the founders are to be buried.
- Beneficiaries: Founders, then their children, then the children's issue, if no family left the University of Basel.
- Founder declares in a letter: Does not expect that beneficiaries will receive much from foundation because of limited capital. Main intention is to preserve castle and add to family reputation.
- Return on foundation assets never really sufficient to maintain castle property. In particular so since foundation granted a loan to the founder's son. Castle habitable only in summer. Finally rented out to a local businessman.
- Founder's son files a lawsuit against foundation to have it declared void and its assets transferred to him.

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IV. Law of persons – Foundations

BGE 93 II 439 – findings:

- Naming as "family foundation" not decisive, founders' subjective intentions regarding purpose and function of foundation to be determined (Willensprinzip – principle of intention ↔ Vertrauensprinzip – principle of trust).
- Letter can be taken into account, even though not part of statutes (Andeutungstheorie – principle of indication).
- Founders intended a family foundation.
- Art. 335 (1) SCC requires that the assets of a family foundation be used to cover specific needs of the beneficiaries. The type of occasions on which the beneficiaries may be supported must either be those listed in Art. 335 (1) SCC or very similar to them. General maintenance not permitted.

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IV. Law of persons – Foundations

BGE 93 II 439 – findings:

- Foundation at issue does not comply with Art. 335 (1) SCC: No support for specific needs. Reputation, preservation of castle, burial not covered by the provision.
- Also conflicting with Art. 335 (2) SCC: Fee-tail like succession of beneficiaries.

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IV. Law of persons – Foundations

BGE 93 II 439 – findings:

- However, foundation not to be voided but to be converted into classical foundation:
 - Possible because founders would have established classical foundation had they known their family foundation to be illicit (unwritten principle of Swiss law, expressed in § 140 German Civil Code)
 - Purpose: Preservation of Castle
 - Beneficial position of family eliminated
 - Foundation to be registered in commercial register

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IV. Law of persons – Foundations

BGE 135 III 614 (modified):


- What if the founders had established the foundation under Liechtenstein law which permits maintenance foundations (no provision like Art. 335 SCC)?
- Court: Art. 335 SCC no loi d'application immédiate because not sufficiently essential part of Swiss law (any more).

Les considérations sur la base desquelles a été introduit l'art. 335 al. 2 CC, qui sont d'une part morales, voire puritaines (il s'agissait de combattre l'oisiveté) et, d'autre part économiques (il s'agissait d'empêcher la prolifération de biens de mainmorte), sont aujourd'hui dépassées. En effet, à l'époque actuelle, c'est bien plutôt la lutte contre le chômage que celle contre le désœuvrement qui représente une tâche étatique prioritaire en Suisse; autrement dit, le combat contre l'oisiveté n'a plus rien à voir avec la sauvegarde d'intérêts supérieurs. Quant aux biens de mainmorte, ils se rapportent à l'ancien régime et sont totalement étrangers au système économique de la Suisse moderne.

- Hence, Liechtenstein family foundation to be given legal effect in Switzerland.

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IV. Law of persons – Foundations

- In sum: Art. 335 ZGB major impediment to Swiss foundation landscape (and business)
 - Traditionally narrow reading by courts
 - → no regular, presuppositionless payments permitted, no "family maintenance foundation"
 - Changing view on family foundations in Switzerland?
 - Majority of scholars critical
 - Swiss Federal Court: No "loi d'application immédiate"

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IV. Law of persons – Foundations

4. Company foundations

- Company/shares constitute essential foundation asset
- Permitted in principle (BGE 127 III 337)
- Attractive to entrepreneurs as a means to preserve their life's work
- Legal and economic concerns remain
 - Self-serving foundations illicit
 - Underdiversification of foundation assets
 - Relatively inflexible
 - State Supervision

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IV. Law of persons
Trusts

- No „Swiss law-trust“
- Recognition of foreign law-trusts after adoption of Hague Trust Convention
 - Treated „as trusts“, Art. 11 HTC → no transformation into Swiss law-entities
 - In principle application of law according to which trust was created, Art. 11, 6 seq. HTC

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IV. Law of persons – Trusts

- Application of Swiss law to important aspects of a trust-related case, e.g.
 - Transfer of property in trust, Art. 4 HTC
 - Mandatory provisions of other pertinent jurisdictions, Art. 15 HTC
 - Lois d'application immédiate, Art. 16 HTC; Ordre public, Art. 18 HTC
- (As yet) some legal uncertainty regarding overlap of Swiss law/respective trust law (cf. Rybolovlev case below)

→ Trusts in Switzerland promising but legal counsel indispensable

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IV. Law of persons – Trusts

BGer 5A_259/2010 – Piercing the trust-veil in the Rybolovlev case:

- Prior to divorce, Dimitri Rybolovlev transfers billion dollar-fortune in Cyprus trusts
- When Elena Rybolovlev claims part of this money in divorce proceedings, Swiss courts pierce the veil of the trusts and freeze the assets according to Art. 178 ZGB (interim measure) without paying much heed to HTC
- Prima facie discouraging for use of trusts in Switzerland, BUT
 - „Bad case → bad law“: Blatant attempt to evade marital property rules
 - Very strong remaining influence of settlor on trust (assets)
 - Veil piercing as yet limited to interim measures, main proceedings-decision still unpublished

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V. Property

Bona fide purchase – a compromise between the protection of market participants and of the property owner

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V. Property – bona fide purchase

Action for restitution based on right to possession, Art. 934 SCC

I. Previous possession of E and actual possession of B (+)

II. Chattel losts or stolen (+)

III. Limitation period not lapsed (+)

IV. Defenses

1. Acquisition of property by way of transaction (-)

- Art. 714 (2), 934 (1) SCC; 5-year term not over yet

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V. Property – bona fide purchase

2. Acquisition of property by operation of law due to adverse possession, Art. 728 SCC (-)

- 5-year term not yet lapsed

3. Acquisition of property by operation of law due to processing, Art. 726 SCC (-)

- Assembled bike not a «new object»
- Value of work < value of material (components)

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V. Property – bona fide purchase

4. Right to reimbursement, Art. 934 (2) SCC

- Transaction type listed in Art. 934 (2) SCC
- Bona fide of B
- Right to reimbursement-defense raised
- Consequence: Reimbursement of price paid

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V. Property – bona fide purchase

5. indemnification for necessary or useful expenditure, Art. 939 SCC

- Bona fide of B
- Necessary/useful expenditure (+): Repair and maintenance
- Potential set-off of fruits, Art. 939 (3) SCC

V. Summary

- E can claim restitution based on Art. 934 (1) SCC
- Right to reimbursement, Art. 934 (2) ZGB
- Indemnification Art. 939 SCC, potentially set off against fruits collected
- Disputed: Fruits collected to be set off also against right to reimbursement under Art. 934 (2) SCC?

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VI. Family and inheritance law

A tree with Germanic and Roman roots – freedom to bequeath, mandatory family participation at death and participation of spouses in the surplus

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VI. Family and inheritance law

Inheritance law:

- Freedom to make a will, Art. 470 SCC
- Rather extensive forced shares for family members, Art. 471 SCC:
 - Issue: 1/4 of statutory share → typically (1 spouse, two kids) 3/16
 - Parents: 1/4 of statutory share
 - Spouse: 1/4 of statutory share → typically (1 spouse, two kids) 4/16
- Protection against evasion by way of inter vivos transactions, Art. 527 SCC

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VI. Family and inheritance law

Marital property law:

- Statutory (default) marital property regime: participation in acquired property, Art. 196 seqq. SCC
- Transactional independence during marriage Art. 201, 202 SCC
- Participation in the surplus at dissolution of property regime, Art. 215 SCC

Art. 215

¹ Each spouse or his or her heirs is or are entitled to one-half of the surplus of the other spouse..

² The claims are set off.

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VI. Family and inheritance law

BGE 128 III 314 – facts:

- Spouses M and F have the child S. M also has a daughter, D, from a previous marriage.
- In a marital agreement M waives his right to the surplus in case he outlives F.
- F dies first, bequeathing her fortune to S.
- At his death, M appoints S (5/8) and D (3/8) as his heirs.
- D files for abatement of the surplus waiver.

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VI. Family and inheritance law

BGE 128 III 314 – findings:

- In principle, it is permitted to waive right to the surplus.
- Waiver of right to surplus is alienation of assets in the sense of Art. 527 No. 4 SCC while F's will does not qualify since D has no forced share-relationship to her.
- Alienation qualifies – from M's perspective which is the relevant one – as *inter vivos* because it takes effect at the death of F and the transfer of her property to S.
- For "intention" it is sufficient that the transferor is, at the time of the transfer, aware that he might violate forced share entitlements but embraces that possibility (*dolus eventualis*).
- → D succeeds.

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VI. Family and inheritance law

BGE 128 III 314 – findings:

- Cf. also Art. 216 (2) SCC
 - Disputed whether independent right to abatement or to be applied together with Art. 527 SCC
 - In any case: S could not have claimed abatement, Art. 216 (2) SCC *e contrario*

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