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Law and Practice

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Bär & Karrer AG 's private client team advises clients and their families on all matters relating to matrimonial property and succession law, including domestic and international estate planning, estate administration and executorships. Lawyers also assist our clients with regard to taking up residence and domicile in Switzerland. The team represents clients in all types of litigation involving trusts, gifts, wills, estates and matrimonial property before Swiss courts and, together with correspondent law firms, before foreign courts and in multi-jurisdictional disputes.

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1. Tax

1.1 Tax Regimes

General Principles

The Swiss tax system includes three taxation levels, namely federal, cantonal and communal. The federal tax system is generally common to all taxpayers and besides income tax includes value added tax (VAT) and withholding tax, eg on dividend payments. There is no wealth tax at federal level.

Due to the federal system in Switzerland, each of the 26 cantons has its own tax system. Most of the tax laws in the cantons were harmonised in 1995. However, the cantons still have a large degree of independence, particularly regarding tax rates and the interpretation of the tax laws. This results in significant taxation differences and tax competition between the cantons (see the section below on tax rates and special tax regimes).

Cantonal and communal tax systems include income and wealth taxes as well as inheritance and gift taxes. Moreover, capital gains on the sale of real estate, including participation in real estate through other classes of assets (eg shares in a real estate company), are subject to real estate capital gains tax at the cantonal level.

Capital gains on the sale of movable assets held in an individual's private wealth are generally tax-exempt. Exemptions apply for real estate gains as well as professional securities dealing and commercial assets.

Limited and unlimited taxation in Switzerland

Individuals are residents for tax purposes when they have their tax domicile or tax residence in Switzerland. An individual has a tax domicile in Switzerland if they reside in Switzerland with the intention of remaining permanently. A tax residence in Switzerland is regarded as existing when an individual – regardless of temporary interruption – stays in Switzerland for a period of at least 30 days while being employed or, without employment, for at least 90 days. An individual with tax residence in Switzerland is subject to unlimited taxation on their worldwide income and wealth.

A limited tax liability in Switzerland may arise due to economic relations. Under domestic law, this tax liability can particularly derive, inter alia,due to ownership in or brokerage of real estate in Switzerland or the permanent establishment of a foreign business in Switzerland. Thereby, generally only income and wealth attributable to Swiss sources are taxable in Switzerland.

Tax rates and special tax regimes
Tax rates for income and wealth tax are progressive. Due to different cantonal tax systems and tax competition between cantons, marginal income tax rates vary between about 22% (eg Canton of Zug) and 46% (eg Canton of Geneva, as of 2016). Besides the taxable amount and tax residence within Switzerland (Canton and Municipality), family status and possible church affiliation have an impact on an individual's tax rate.

Swiss-source investment income (eg dividends, interest on Swiss bonds and bank deposits with Swiss banks) is subject to a 35% withholding tax. This is fully recoverable by Swiss residents (whether Swiss or foreign), and is partially recoverable by individuals resident abroad (if a double taxation treaty provides for it).

Foreign nationals who do not engage in gainful employment in Switzerland can opt to pay an expenses-based tax (lump-sum taxation) instead of ordinary income tax and net wealth tax if they have (i) become resident in Switzerland for the first time or (ii) returned to Switzerland after having spent at least ten years abroad. The tax basis is generally calculated based on the annual living expenditure of the taxpayer and their family.

A qualifying taxpayer can choose each year between lump-sum taxation and ordinary taxation. Taxpayers may choose ordinary taxation to benefit from applicable double taxation treaties, as not all treaties apply to lump-sum taxpayers. In some cantons (Zurich, Basel-City, Basel-Landschaft, Appenzell-Ausserrhoden and Schaffhausen), the lump-sum taxation regime has been abolished at the cantonal level, but it remains available at the federal level and in all other cantons.

Gift and inheritance tax
There are no gift or inheritance taxes imposed at the federal level. However, most cantons and some municipalities impose inheritance and gift taxes according to cantonal and (where applicable) communal laws if either the deceased person or donor had their last residence in that canton or the transferred real estate is located there.

Transfers to a spouse, descendants and recognised charities are tax-exempt in most cantons.

Trusts and foundations
There is no Swiss tax law dealing explicitly with the taxation of trusts. However, the Swiss Tax Conference and Federal Tax Administration issued a Circular Letter dealing with the taxation of trusts in Switzerland. In practice, the qualification and thus the taxation of a trust is agreed upon with the competent Swiss tax authorities based on tax rulings. The taxation of a trust depends on the qualification of the trust (revocable, irrevocable fixed interest or irrevocable discretionary trust; **see section 2 et seq** below for more detailed information).

Swiss tax law generally provides for regular taxation of foundations as legal entities, that is, corporate income taxes (CIT) at federal, cantonal and communal level and capital taxes in most cantons and municipalities. Whereas the statutory CIT at federal level is a flat-rate tax amounting to 4.25% of net profit (as of 2017), the CIT and wealth taxes at cantonal and communal level depend on the respective canton and municipality.

Under certain conditions, foundations (and all other legal entities) may benefit from tax privileges and exemptions if they qualify as pursuing public welfare, non-profit or religious purposes on a nationwide basis. Accordingly, family foundations established under Swiss law are generally not tax exempt (**see section 2 Succession** for further information regarding Swiss family foundations).

If a Swiss foundation (or another legal entity) qualifies as solely a public welfare or non-profit tax-exempt entity, contributions made by an individual to the entity are deductible from income tax at federal level up to 20% of the individual's net income. Most cantonal tax laws provide for similar deductions or exemptions.

1.2 Stability of the Estate and Transfer Tax Laws
Switzerland has a stable and secure legal framework based on the rule of law and democratic principles. Legislation can only be amended in predefined and strictly regulated democratic processes. With respect to inheritance and gift taxes, which lie to a great extent within the competence of the cantons (there is no gift or inheritance tax at federal level), no significant cantonal legislative changes are expected in the near future. Regarding the federal level, a federal popular initiative calling for the introduction of a federal gift and inheritance tax was rejected by a clear majority (71%) of the Swiss people on 14 June 2015.

Switzerland does not have a general transfer tax law for the transfer of private assets. In general, transfers of assets without consideration, namely as gifts or inheritance, are not regarded as realisation of profits in Switzerland. Accordingly, no capital gains tax is levied upon a transfer of a private movable asset as a gift or inheritance. However, most cantons levy a gift or inheritance tax on the fair market value of the respective asset (there is no difference between an inter vivos gift and property that passes causa mortisfrom a transfer tax perspective). Thereby, transfers to the spouse, descendants and recognised charities are generally tax-exempt.

Certain transfer taxes may apply in case of the transfer of real estate.

1.3 Recent Developments or Forthcoming Regulatory Changes

Switzerland is an OECD member and a founding member of the Financial Action Task Force (FATF) and promotes transparency in tax matters and the fight against money laundering and terrorist financing. The revised Financial Action Task Force recommendations of 2012 have been implemented in the necessary national legislations, which entered into force either on 1 July 2015 or 1 January 2016 (with transitional periods).

Corporate Law: Increased transparency within companies

Changes in the Swiss Corporate Law in particular will lead to new regulatory challenges. As of 1 July 2015, the identity of the ultimate beneficial owners of a corporation or LLC have to be reported to the respective company. All shareholders owning at least 25% of the registered shares of the company are subject to the reporting duty, and sanctions are imposed in case of non-disclosure of the ultimate beneficial owner (within the statutory time limits).

In the case of bearer shares, acquirers have to report their identity to the company, which de factoleads to an abolition of bearer shares.

Anti-money laundering legislation

New due diligence obligations and reporting duties for traders have been implemented in Swiss anti-money laundering legislation which took effect on 1 January 2016. The new obligations and duties will generally be applied when traders accept cash payments of more than CHF100,000 in the course of trading activities. Thus, they are not applicable if payments are made via a finance intermediary (eg a bank).

The obligations include, inter alia,the keeping of a register of the respective clients and notifying the Money Laundering Reporting Office Switzerland (MROS) in certain circumstances. Accordingly, anonymous cash payments (exceeding CHF100,000) are no longer possible.

The new duties certainly lead to more transparency in the concerned sectors, eg in the art and watch markets, which are of great importance in Switzerland. However, the new regulations imply immense compliance and regulatory efforts and costs for the traders concerned, especially in the first years after the implementation of the new rules (eg for new IT systems and staff training).

Furthermore, there is a possibility that some clients might be deterred from buying/investing in art or other investments as they deem absolute confidentiality and anonymity to be indispensable – without having any intention of contravening regulations. In this respect, however, it is important to note that the new due diligence and reporting duties are, of course, governed by strict regulations, particularly the Swiss data protection legislation.

Family and ecclesiastical foundations: Obligation of entry in commercial register

Until 1 January 2016 an entry in the commercial register of family and ecclesiastical foundations was voluntary and had solely declaratory effect. In order to enhance transparency an obligation for family and ecclesiastical foundations to make an entry in the commercial register was introduced in Swiss law with effect from 1 January 2016 (with transitional periods). Thus, family and ecclesiastical foundations only acquire legal personality upon their entry in the commercial register.

Already-existing family and ecclesiastical foundations keep their legal personality but have an obligation to make an entry in the commercial register within five years.

Regarding estate planning, this amendment may not be of great importance in practice as the use of a Swiss foundation for the maintenance of a family is very limited under Swiss law (see section 2.1 The role of notable Cultural Factors in Succession Planning below).

1.4 Income Tax Planning

Due to the relatively broad autonomy of cantons and municipalities in the field of taxation and the resulting tax competition, tax residence within Switzerland is generally the most crucial factor with regard to income and wealth tax planning (see section **1.3 Recent Developments or Forthcoming Regulatory Changes** above). Marginal income tax rates may vary between 22.5% (eg Canton of Zug) and 46% (eg Canton of Geneva).

Furthermore, depending on each case and the structure of investments, individuals can benefit from the tax exemption of gains derived from the sale of movable assets held in the individuals' private wealth. Accordingly, case by case it might be beneficial from a taxation point of view to have investments with retained profits (and to sell the investment with a tax-exempt profit) rather than investments where profits are distributed (which would be subject to income tax).

However, it must be noted that disposal of shares in a real estate company can give rise to property gains tax. Moreover, when selling real estate, securities, works of art and other investment options, a private capital gain will, according to legislation and practice, only be tax-exempt as long as the investment is not considered commercial and does not qualify as a self-employment activity. The mere management of private assets is not considered to be a self-employment activity. In order to assess whether an activity is considered commercial, the tax authorities and courts usually take into account, inter alia, the following criteria: nexus to taxpayer's professional activity; borrowing of capital; frequency of transactions; systematic approach to investing; and reinvestment of gains.

Finally, the income tax burden may be lowered due to special deductions. For instance, contributions to Swiss pension funds (private retirement schemes) are tax-deductible.

1.5 Efforts to Address Perceived Abuses/Loopholes

Switzerland has a long judicial practice in the field of tax abuse and fraud cases both in national and international cases. The several principles derived from case law supplement the principles laid down in Swiss statutory law.

In recent years, especially, a tendency towards a stricter judicial practice regarding the criterion of beneficial ownership can be observed. The criterion of beneficial ownership is crucial both in national and international tax law, particularly in cases dealing with the refund of withholding taxes (eg on dividend payments).

2. Succession

2.1 The Role of Notable Cultural Factors in Succession Planning

As of the end of 2016, Switzerland had 8.4 million residents, of whom 25% were foreigners. Typically, Swiss families are rather small, with an average birth rate of 1.5 children per family. Compared with other countries in Europe, Swiss people can, on average, expect to inherit more wealth but at a relatively old age, which is not surprising given that Switzerland is a country with high prosperity and the average life expectancy is 81 years for men and 85 years for women. Consequently, more than half of all heirs are over 55 years old. By 2020 this is expected to increase to two thirds. As a result, in Switzerland inheritances are generally no longer used to set up a business or to finance family life as people often do not receive an inheritance until they are already a pensioner.

Succession in Switzerland is a family matter: 75% of all estates pass to children and surviving spouses and only a fraction goes to non-relatives or charities. Sons are not favoured over daughters, except in the passing on of family businesses, where there is still a tendency to favour male successors. While only a quarter of the Swiss population makes a will, statistics show that the older and wealthier a testator is the more willing they are to make a will.

2.2 International Planning

One fourth of the Swiss population are foreigners, mainly from the EU, and half of all marriages are binational. Switzerland still attracts many wealthy foreigners and often a testator relocates with their family to Switzerland from a common law jurisdiction.

Switzerland is not a member state of the EU succession regulation but follows its own conflict of law rules. This may lead to conflicts whenever a Swiss estate has ties to the EU. Moreover, Swiss estates with links to the US or UK are often fraught with complexities as a result of structural differences between inheritance, tax and matrimonial property laws. Case law is scarce to alleviate these legal differences. While Swiss conflict of law rules follow the principle of unity of succession, in the US and UK there are different rules for moveable and immoveable property (so-called scission of succession). Moreover, the Swiss principle of universality of succession, where the heirs are the legal owner of the estate (so-called community of heirs), differs substantially from English or US law where the deceased's personal representative becomes the legal owner of the estate. As a consequence, unlike under Swiss law, the heirs of a US or UK estate are not personally liable for any estate liabilities as the personal representative is tasked with settling any such debts before distributing the net estate to the beneficiaries.

In practice, conflicts may be minimised to a certain extent by including a choice of law in the testator's will. While Swiss conflict of law rules do not allow such planning for Swiss dual citizens, the EU succession regulation is more flexible in this regard. A choice of foreign law may also avoid the application of Swiss forced heirship rights. Alternatively, the forced heirship heirs can waive their rights by entering into an inheritance waiver agreement with the testator (see section **2.3 Forced Heirship Laws** below).

In any case, it is advisable to engage in careful lifetime planning so as to pre-empt and actively manage any conflicts and achieve a harmonious result whenever possible.

There are no gift or inheritance taxes at a federal level (see **section 1.1 Tax Regimes**). However, most cantons levy gift and inheritance taxes if either the deceased person or donor had their last residence in that canton or the transferred real estate is located in that canton. In international cases, depending on the tax law and principles of the involved states, inheritance and/or gift taxes on the same assets/transfers could be imposed twice or even more times (as each state applies its national tax law).

In order to prevent double taxation on inheritance, Switzerland has entered into ten double tax treaties in relation to inheritance taxes (DTAs generally only deal with taxation on income and wealth). The inheritance double tax treaty with France expired on 31 December 2014 and had not been replaced by any other agreement as of October 2016.

However, as many states follow similar principles (eg taxation at the place of immovable property), double taxation may often already be avoided based on national law.

2.3 Forced Heirship Laws

There is a forced heirship regime in Switzerland. While a testator is in principle free to depart from Swiss intestacy rules, there are statutory limits protecting certain categories of heirs, namely close relatives. These heirs have a right to a compulsory portion of the estate, a so-called forced heirship right. The testator can thus only dispose of the freely disposable portion of the estate (which is the entire estate less the compulsory portion) by their will.

Under Swiss inheritance law the spouse, registered partner and descendants (or parents, if there are no descendants) are protected by forced heirship rights. Their compulsory portions amount to a specified fraction of the statutory share, ie of the share they would be entitled to if the deceased died intestate.

The statutory shares under the intestacy rules vary depending on which relatives survive the deceased.

The surviving spouse inherits the following proportions of the estate:

- 50% if there are surviving descendants;
- 75% if there are no surviving descendants but surviving parents (or their descendants);
- 100% if there are no surviving descendants or surviving parents (or their descendants).

Surviving descendants inherit in equal shares:

- 100% if there is no surviving spouse;
- 50% if there is a surviving spouse.

Surviving parents inherit in equal shares:

- 25% if there is a surviving spouse but no surviving descendants;
- 100% if there are no descendants and no surviving spouse.

The compulsory portions are:

- For the spouse or registered partner: 50% of the statutory share.
- For the descendants: 75% of the statutory share.
- For parents: 50% of the statutory share.

When calculating the value of the estate, not only the net value of the estate at the time of death is taken into account, but also certain lifetime dispositions of the testator, most notably if revocable or if made within five years before the deceased's death or for the purpose of evading forced heirship rules. Assets transferred into a trust by the testator may therefore also be affected by the forced heirship regime.

If a testator fails to provide the heirs with their compulsory portions, the disposition is not automatically invalid but may be contested in court by the heirs.

Heirs can waive their forced heirship rights or, more extensively, renounce their status as an heir entirely, by signing an inheritance waiver agreement. The formal requirements under Swiss law require that such a contract is signed as a public deed drawn up by a public official or notary.

2.4 Prenuptial and Postnuptial Agreements

Swiss law recognises both prenuptial and postnuptial agreements, and such agreements are increasingly common in Switzerland.

Typically, Swiss pre- and postnuptial agreements deal with issues such as matrimonial property rights (eg separation of property or community of property), post-divorce maintenance payments, inheritance arrangements (combined inheritance and pre-/postnuptial agreement) and jurisdictional issues in case of divorce.

It needs to be noted that certain aspects cannot be determined in advance by a pre- or postnuptial agreement (eg preconditions for a divorce, nullification of marriage or separation) and others do not have a binding effect without court approval (eg arrangements for children, post-divorce maintenance payments, pension claims etc.).

In order for a pre- or postnuptial agreement to be valid, Swiss law does not require full disclosure to be given by both spouses with regard to their financial affairs, that both spouses are independently represented or that they enter into the prenuptial agreement a certain time prior to the date of marriage. Nevertheless, when advising international and mobile couples, such safeguards should be complied with to ensure the enforceability of the Swiss pre- or postnuptial agreement abroad to the greatest extent possible.

A pre- or postnuptial agreement under Swiss law has to be in the form of a public deed drawn up by a public official or notary. Spouses may enter into a Swiss pre- or postnuptial agreement prior to taking up residence in Switzerland.

2.5 Marital Property

Swiss law provides for three different matrimonial property regimes:

The default regime is participation in acquisitions. Under this regime, a distinction is made between individual property (pre-marital assets and assets received by way of gifts or inheritance during the marriage) and so-called acquired property of a spouse (income from work and earnings derived from individual property during marriage). In the event of dissolution of the marital property regime as a result of the death of a spouse or divorce, each spouse has a monetary claim in the amount of half of the acquired property of the other spouse. The spouses' individual property is not subject to division.

The spouses may opt out of the Swiss default regime of participation in acquisitions by choosing the community of property or separation of property regime by means of a pre- or postnuptial agreement.

Under the regime of community of property, in principle, everything apart from a spouse's personal belongings or gifts received by a spouse from third parties constitutes the common property of both spouses. Upon division, each spouse obtains half of the common property.

If the regime of separation of property is chosen, each spouse retains his or her own property and there is no property that must be divided between the spouses upon divorce or death of one spouse.

Spouses may, however, not only deviate from the default regime of participation in acquisitions and choose the community or separation of property regimes as provided for in statutory law, but they may instead tailor the contract to their specific needs within certain statutory limits. They may do so prior to or after the marriage and they may modify their selection of matrimonial property regime and switch to another matrimonial property regime by entering into a new contract, even with retroactive effect.

The question of consent of a spouse as regards dispositions of marital property is mainly relevant in the context of the marital property regime of community of property. As far as ordinary affairs of the spouses are concerned, each spouse may administer and dispose of common assets on their own (thereby binding both spouses). In extraordinary matters (eg larger investments or the transfer of community property to a trust), the spouses can only commonly or with the consent of the other spouse dispose of common assets.

2.6 Effect of Transfer of Property on the Cost Basis of Property Being Transferred

The transfer of a movable asset as gift or inheritance (ie without consideration) is not regarded as a realisation of profit in Switzerland (see section **1.2 Stability of the Estate and Transfer Tax Laws** above). Thus, no transfer tax as such is imposed.

The cantonal inheritance and gift taxes are levied on the fair market value of the respective asset (and not on the value added/accrued). Accordingly, no step-up or adjustment on a cost basis is available upon a transfer for income tax purposes. The non-availability of such adjustments generally does not cause any problems, since capital gains derived from the sale of private assets are normally tax-exempt in Switzerland. Furthermore, it has to be kept in mind that transfers to the spouse, descendants and recognised charities are usually tax-exempt.

Transfers of immovable property without consideration may trigger a real estate transfer tax.

2.7 Vehicles or Planning Mechanisms to Transfer Assets to Younger Generation Tax-Free

As transfers to descendants are generally exempt from gift and inheritance tax in most cantons (**see section 1.1 Tax Regimes**), there is no need in practice for any vehicles or planning mechanisms to transfer assets to younger generations in Switzerland.

In practice, immovable property is often transferred to younger generations as a gift with a usufruct (for a specific period or for life). In such cases, the usufructuary remains liable to wealth taxation for the transferred property. The descendants only become liable to wealth taxation when the usufruct ceases. The taxation of the income derived from the transferred asset and the imputed rental value depends on the actual structure of the usufruct and has to be determined on a case-by-case basis.

3. Trusts, Foundations and Similar Entities

3.1 Types of Trusts, Foundations, or Similar Entities

Swiss substantive law does not mention trusts (see below). The nearest equivalent to a trust in Switzerland is a foundation. Under Swiss law, a foundation is a legal entity to which assets are contributed for a specified purpose. The use of family foundations is very limited under Swiss law: the assets may be tied to a family by means of a Swiss family foundation for raising, endowing or supporting family members or for similar purposes. Accordingly, a Swiss family foundation may not pay any amounts to the donor or their family members.

As regards tax planning in Switzerland, trusts or foundations are not a commonly used tool to effectively mitigate Swiss taxes such as inheritance tax. However, transfers on death or gratuitous transfers during one's lifetime to descendants or to a spouse are generally tax-exempt in most cantons (see above).

In the context of estate planning, foreign trusts increasingly play a role, in particular in cases with an international background, given that many testators are relocating to Switzerland with trust structures. Swiss law does not mention the concept of trusts and they cannot be created under Swiss law. However, foreign trusts are fully recognised (**see section 3.2 Recognition of Trusts**). The possibility of using Swiss foundations for the maintenance of a family is to some extent limited in Swiss law. In practice, Swiss foundations are thus rarely used for estate planning purposes.

3.2 Recognition of Trusts

Switzerland has ratified the HCCH Convention on the Law Applicable to Trusts and on their Recognition (Hague Trust Convention). As a consequence, foreign trusts as defined in Article 2 of the Hague Trust Convention are fully recognised in Switzerland, regardless of the residence of the settlor. With the ratification of the Hague Trust Convention in 2007, Switzerland at the same time enacted jurisdictional provisions. Hence, where applicable, Swiss courts will apply foreign trust law when adjudicating (internal) trust disputes (it being noted that Swiss courts will decline jurisdiction if the trust deed explicitly designates a foreign court).

However, the concept used in common law trust jurisdictions of separating legal ownership (trustee) from equitable ownership (beneficiary) is unknown in Switzerland, a typical civil law jurisdiction. This may raise practical issues for the Swiss courts since they have to juggle with the rules governing the trust and their own, potentially conflicting, legal and procedural concepts.

3.3 Changes That Have Decreased or Eliminated the Benefits of Planning

In recent years Swiss law has not undergone significant changes that have decreased or eliminated the benefits of planning with trusts, foundations or similar entities. On the contrary, planning in Switzerland with foreign entities such as trusts has become easier and there is more planning certainty, in particular since the ratification of the Hague Trust Convention and the introduction of tax guidelines for the taxation of trusts. Furthermore, a revision of the Swiss inheritance law is currently being debated. In this context, it seems likely that the restrictions on freely disposing of one's assets (Swiss forced heirship law) will be reduced, which would further facilitate flexible estate planning in Switzerland.

3.4 Possible Tax Consequences of Serving as a Fiduciary or as a Beneficiary of a Foreign Trust, Foundation or Similar Entity.

In general, the assets of a foreign trust are not attributed to fiduciaries or trustees for tax purposes in Switzerland. Accordingly, fiduciaries or trustees resident in Switzerland are generally neither taxed on the assets of a foreign trust nor on the income derived therefrom.

The tax treatment of a foreign trust itself and a beneficiary thereof resident in Switzerland depends on the qualification of the trust and has to be determined on a case-by-case basis (see section **1.1 Tax Regimes** above):

- If a foreign trust is qualified as revocable, it is typically treated as transparent for Swiss tax purposes and a distribution to a resident beneficiary is qualified as a gift from the settlor to the beneficiary and is thus subject to gift tax (according to cantonal tax law).
- If the foreign trust is qualified as an irrevocable fixed-interest trust, the establishment (respectively the trust capital) of the trust is treated as a gift from the settlor to the beneficiary and the beneficiary of the trust is treated as an usufructuary (ie as holder of a life interest/usufruct). Hence, the trust assets are allocated to the beneficiary for cantonal wealth tax purposes. The beneficiary will generally be subject to income tax on the trust's income irrespective of whether the trust's income is distributed to the beneficiary or accumulated by the trust. Accordingly, if the beneficiary holds the property as 'private' asset, the distribution of the property will be tax-free (provided that the property concerned is a movable property).
- Finally, if a foreign trust is qualified as an irrevocable discretionary trust, the beneficiary is not liable to taxation for the trust capital in Switzerland. Distributions to the beneficiary qualify as taxable income at the level of the beneficiary, while distributions of trust capital are generally tax-free.

3.5 Structure of Irrevocable Trusts, Foundations or Similar Entities

There are no such changes in Swiss legislation as trusts, foundations or similar entities are not typical tools used in Swiss estate or tax planning. However, trust structures are increasingly used when planning for international families with Swiss ties, and certain case law has been developed by Swiss courts dealing with extensive control rights of settlors, for example in the context of Swiss succession or divorce cases.

For example, where the settlor of an irrevocable trust has retained extensive control rights, this could in the worst case lead to the trust being disregarded entirely and the trust assets imputed upon the settlor, eg in the context of Swiss forced heirship, matrimonial property or creditor rights.

3.6 Possible Tax Consequences of a Beneficiary or the Donor of a Trust, Foundation or Similar Entity also Serving as a Fiduciary

In theory, if the donor of a trust also serves as a fiduciary, the trust may be qualified as a revocable trust and the trust capital will, accordingly, be allocated to the donor for Swiss tax purposes. If a beneficiary of a trust also serves as a fiduciary, the trust capital would be allocated to the beneficiary/fiduciary. In other words, the trust structure as such would be disregarded in Switzerland for tax purposes.

Depending on the other countries involved and their trust and taxation laws, such structures may be used for tax planning reasons, as the other involved countries, as the case may be, qualify their respective trust structures differently from Switzerland.

However, such structures have been subject to criticism from a tax evasion and tax fraud point of view for many years, and are being addressed by current developments such as the OECD Base Erosion and Profit Shifting (BEPS) project.

4. Family Business Planning

4.1 Popular Family Business Succession Planning Strategies

A very popular planning strategy is to enter into a matrimonial contract and choose the matrimonial property regime of separation of property. If the couple have chosen the property regime of separation of property there will be no division of marital assets in case of a divorce. Even if the couple do not enter into a matrimonial contract and the default matrimonial property regime of participation in acquisitions applies, assets which a spouse owned before the marriage or acquired during the marriage without consideration (eg inherited assets or assets received as a gift) will not be divided. However, because income generated by individual property of a spouse qualifies as acquisition during marriage, most families owning a family business prefer the matrimonial property regime of separation of property or a modified version of the regime of participation in acquisitions (see also section **2.5 Marital Property** above).

Further, the testator and spouses (or other intestate heirs) may enter into an inheritance waiver agreement wherein the spouse either fully waives their right to become an heir or their forced heirship right (see section **2.3 Forced Heirship** above). Inheritance waiver agreements ensure that a spouse cannot claim any rights with regard to shares in the family business following the death of the shareholder. Moreover, it often makes sense to enter into a shareholders' agreement in order to make sure that the shares stay within the family and that minority family shareholders are adequately protected. In certain situations, transferring shares in a family business to a (foreign) foundation or settling them in a trust can also be a suitable option.

4.2 Transfer of Partial Interest in an Entity

In order to take account of a lack of marketability and control, a standard reduction of 30% may be granted in the case of a minority shareholding of non-listed securities for Swiss wealth tax purposes, provided that certain conditions are met.

In case a tax is levied on a transfer without consideration (eg an inheritance tax or a property transfer tax on the transfer of an interest in a real estate company), the valuation of the interest for the purposes of the respective tax and, as the case may be, a discount for a lack of marketability and control, has to be determined on a case-by-case basis.

4.3 Most Popular Method for Asset Protection

There are several instruments that can be used for asset protection, such as marriage contracts, lifetime gifts to the spouse or children, the use of legal entities, eg a corporation, transferring assets to a (foreign) foundation or a trust. Whether an instrument is suitable depends on the specific circumstances and on the kind of risk against which protection is sought. Unless the consent of the potential creditor can be obtained, the implementation of such asset protection instruments must normally take place at least a certain period of time before the claim of the creditor arises in order to be effective.

5. Wealth Disputes

5.1 Trends Driving Wealth Disputes

Given the mobility of individuals in a shrinking world, international trust and estate litigation has also increased substantially in Switzerland. Trusts often have links to Switzerland, either because they are imported into Switzerland in connection with a relocation of the settlor or because trust assets or the trustee are based in Switzerland. It is thus not surprising that Swiss-based trustees find themselves involved in complex cross-border disputes, often serving as the target of aggrieved beneficiaries, excluded family members, ex-spouses or heirs of the settlor.

One of the main driving forces for the increase in trust and estate disputes is the fact that settlors are leaving substantial fortunes in complex structures covered by different jurisdictions. Settlors from civil law jurisdictions are often unfamiliar with common law trusts and become frustrated by the rules the trustees must follow. Sometimes they seek to set aside their own trust as they do not understand that the advantages of irrevocable trusts stem from their irrevocable nature and the fact that the settlor cannot take back their money whenever it suits them. The boom in trust litigation is also a result of the 'second-generation problem' where first-generation settlors pass away and hand the baton over to the next-generation in circumstances where familial pressures have been left unresolved. The increasing incidence of multiple marriages and the tensions that arise in patchwork families also give rise to litigation.

Poor drafting of wills and estate planning are further reasons for the increase in wealth disputes. It gets even more complicated if a deceased dies intestate, leaving behind an unorganised estate and often irritated heirs. As mentioned, in Switzerland the vast majority of the population dies intestate.

Swiss courts are increasingly confronted with information claims brought by beneficiaries against Swiss-based trustees or against foreign trustees, which are effectively managed out of Switzerland. Foreign trustees may be sued before Swiss courts in relation to claims brought by the heirs of the settlor in connection with a Swiss estate, in the context of Swiss divorce proceedings, or in undue preference claims brought by the administrator of a Swiss bankrupt estate.

Whenever the settlor of a trust is a Swiss resident, firewall provisions of the applicable trust law may not prevent the application of Swiss forced heirship and/or matrimonial property law in a case involving the death or divorce of the settlor in Switzerland.

5.2 Mechanism for Compensating Aggrieved Parties

There is no case law yet in Switzerland as regards the treatment of trusts under Swiss inheritance law. Most authors, however, agree that transfers of assets by a settlor/testator to a trust are comparable to revocable or irrevocable gifts (depending on the nature of the trust) when determining if and to what extent trust assets should be taken into account when calculating forced heirship rights. Thus, Swiss forced heirship law will from a Swiss perspective prevail over firewall provisions under foreign trust law in case the settlor/transferor dies with their last domicile in Switzerland.

Generally, under Swiss inheritance law, assets transferred to a trust are likely to be taken into consideration when calculating forced heirship rights – and hence may be subject to a clawback claim (usually a monetary claim) – if either the transfer (i) was made to a revocable trust, (ii) occurred within five years prior to the settlor's death or (iii) was made with the settlor's intent to circumvent forced heirship rights.

When the Swiss default matrimonial regime of participation in acquisitions is dissolved on the death of a spouse or by a divorce, each spouse is entitled to half of the property acquired by the other spouse during marriage (consisting mainly of income/savings from work or earnings from individual property, whereby individual property can comprise for example pre-marital assets or assets received during marriage by gratuitous transfer).

Swiss law provides that any transfer of acquisition property made by a spouse without consideration and without the other spouse's consent within five years prior to the initiation of divorce proceedings must be taken into consideration when calculating the other spouse's marital property share. In addition, any transfer made with the intent to deprive the other spouse of part of their share must be fully taken into consideration, regardless of when such transfer was made.

Hence, depending on when a spouse transfers assets to a trust or the circumstances in which such a transfer occurs, the relevant trust assets may be taken into consideration under the Swiss matrimonial property regime of participation in acquisitions (unlike in the case where the spouses have opted for the regime of separation of property).

In a divorce case involving Russian billionaire Dmitry Rybolovlev, the Geneva court of appeals considered a trust set up by the husband as valid (as opposed to the court of first instance, which disregarded the trust in light of the extensive powers of the husband as settlor). Nevertheless, the court ruled that the entire trust assets must be taken into account to calculate the matrimonial property claim of his wife Elena, given that the transfer of assets to the trust occurred within five years prior to the divorce proceedings. Notably, the court further decided that the relevant value of the trust assets to be taken into account for calculating the wife's matrimonial property claim was the value at the time of the transfer to the trust (as opposed to to the value at the time when the matrimonial regime was split, ie the final divorce decree). The parties eventually settled the case before it was appealed to the Swiss Federal Supreme Court.

6. Roles and Responsibilities of Fiduciaries

6.1 Prevalence of Corporate Fiduciaries

Professional fiduciary services are usually offered by corporate fiduciaries. To the extent such services are based on a contractual basis, Swiss agency law applies and the fiduciary is fully liable even for slight negligence unless the parties agreed on a limitation of the liability. In accordance with the practice of the Swiss courts, agents offering their services as specialists are subject to a higher standard of duty of care. The applicable standard depends on the specific services provided. As only natural persons can be appointed as board members in Switzerland, corporate fiduciaries cannot act as corporate directors but their employees often offer to serve as directors if requested.

6.2 Piercing the Veil of a Trust

The concept of piercing the veil of a company or structure is known in Switzerland and is based on the general principle that the abuse of a right is not protected by law. While the concept of piercing the veil has traditionally been used to hold shareholders who abused the limited liability of a legal entity personally liable (eg if they failed to distinguish between personal and company assets), the same concept can also be applied with regard to trusts or foundations. However, in such cases the Swiss courts should first analyse whether the trust or the foundation does validly exist in accordance with the applicable trust or foundation law. Only if this is the case and requesting the recognition of the trust or foundation can, based on the specific circumstances, be qualified as an abuse of law, should a Swiss court pierce the veil. So far, there is only very limited case law with regard to piercing the veil of foundations and trusts.

6.3 Regulation of a Fiduciary's Investment of Assets

The powers of a fiduciary to invest assets depend on the contractual agreement between the fiduciary and the principal respectively on the articles of foundation or the trust deed, in the case of a foundation or a trust. In the absence of specific agreements or provisions concerning the investment of assets, the investment strategy and the asset allocation must be adequate and reflect the actual circumstances as well as the principal's readiness and capacity to assume risks.

6.4 Authorisation to Hold Active Businesses

In principle, trusts and foundations can hold active businesses. There are no specific rules governing such activities. However, restrictions can apply from a tax point of view if the trust or the foundation qualifies as a tax-exempt charity in Switzerland.

6.5 Mechanisms to Protect Fiduciaries from Liability

The liability of a fiduciary depends on the contractual agreement with the principal. In accordance with Swiss statutory law, a fiduciary is liable for slight negligence. The liability can, however, be limited to wilful intent and gross negligence. To the extent a fiduciary is allowed to delegate certain tasks and the delegation is in the interests of the principal, the liability of the fiduciary is limited to the duties of carefully selecting, instructing and supervising the respective person.

7. Citizenship

7.1 Requirements for Domicile/Residency/ Citizenship

Subject to exceptional cases, residence permits are normally linked to work permits in Switzerland. Anyone who works while staying in Switzerland or who remains in the country for more than three months needs a residence permit. A distinction is made between short-term residence permits (less than a year), annual residence permits (limited) and permanent residence permits (unlimited). A further distinction is made between EU/EFTA and non-EU/EFTA citizens: while EU/EFTA citizens have a legal right to a permit, work and residence permits for non-EU/EFTA citizens are subject to a nationwide annual quota. Applicants from those countries are generally only admitted if no appropriate candidate in Switzerland and EU/EFTA countries can be found. Mere residence permits without employment can be issued on an exceptional basis in case of important public interest (fiscal, political or cultural interest). Special provisions apply for students, for candidates who travel to Switzerland for medical treatment, and pensioners (ie applicants aged 55 or older).

Unlike other jurisdictions, under Swiss law nobody can simultaneously have more than one domicile. Swiss law defines a 'domicile' as the place where a person resides with the intention of permanently settling. The place where a person is registered is therefore not the sole determining factor. The notion of domicile is important under Swiss law because it is the link to various legal consequences (taxation, social security, succession, jurisdiction etc).

In order to obtain Swiss citizenship, a naturalisation licence is needed, for which one has to pass a test. Foreign nationals may apply for the licence if they have lived in Switzerland for a total of 12 years, including three of the five years prior to the application being made. The naturalisation procedure is subject to cantonal and communal legislation, which means that more specific requirements are regulated at cantonal (and sometimes even communal) level. In addition, as of 1 January 2018, a revised Federal Act on the Acquisition and Loss of Swiss Citizenship comes into effect. Although the required duration of stay has been reduced from 12 to ten years, other formal and material conditions of ordinary naturalisation have been somewhat tightened: The applicant now has to hold a permanent residence permit, needs to be successfully integrated into Swiss society and must fulfil the integration conditions (eg has to respect the fundamental principles of the Swiss Constitution, and has the ability to communicate in one of the national languages, etc).

7.2 Expeditious Means for an Individual to Obtain Citizenship

A foreign national may apply for simplified naturalisation. They are required to be already married to a Swiss citizen and either to have lived for a total of five years in Switzerland or to have lived in Switzerland for one year but to have been married to a Swiss citizen for three years.

8. Planning for Minors/Adults with Disabilities

8.1 Special Planning Mechanisms for Minors or for Adults with Disabilities

Swiss adult protection law has been revised significantly since 2013. One important aspect of the new law is the planning methods dealing with a person's potential loss of capacity. In particular, a person may put in place an advanced care directive and/or a living will, thereby providing guidance as to how they wish to be treated in the event of loss of capacity and how representation by their designated representative should be carried out. Furthermore, together with the new adult protection law, a new provision was inserted into Swiss inheritance law allowing a testator to appoint a successor heir who inherits the residue of the part of the estate that was left to a forced heirship heir of a testator who lacks capacity judgment and is not survived by issue or a spouse. Apart from these mechanisms there are no special planning tools specifically reserved for minors or adults with disabilities. However, Swiss law offers a variety of options to deal with such circumstances, eg conditions in testamentary dispositions or the concept of usufruct. Alternatively, insurance products can be an adequate way to deal with such circumstances.

8.2 Appointing a Guardian

The law defines under what circumstances the competent authority (the child and adult protection authority, or KESB) must appoint a guardian for a minor or an adult with disabilities and how the guardianship should be carried out. Usually, this does not require court approval. However, if an interested party is of the opinion that the authority wrongly fails to intervene, they may address the competent court in order to have a guardian appointed.

The child and adult protection authority is also responsible for the supervision of any guardianship. Furthermore, with regard to some significant actions or decisions, the guardian cannot act on their own but needs the authority's consent.

Finally, guardians are required to report periodically to the child and adult protection authority and need to notify it immediately of relevant changes of circumstances and update it on the question of whether a guardianship is still required.

9. Planning for Non-Traditional Families

9.1 Children Born Out of Wedlock and Adopted Children

While a person is automatically presumed to be the father of a child if married to the mother, the father of a child born out of wedlock is required to acknowledge the fatherhood officially with the competent civil registry. In the event that there is a disagreement between mother, father, child or other interested parties with regard to the identity of the father, the fatherhood may be contested in court.

In principle, children born out of wedlock have the same inheritance rights as children born in a marriage, provided their fatherhood has been acknowledged or declared by court decision. However, their statutory share with regard to the estate of a parent (including the compulsory portion protected by the Swiss forced heirship regime), is naturally smaller if they have to share the estate with a surviving spouse of the testator, as compared with the situation of unmarried parents who have no mutual statutory inheritance rights.

As of 1973, adopted children have had the same inheritance rights as biological children, provided the adoption was carried out in accordance with Swiss law or is recognised in Switzerland.

9.2 Recognition of Same-Sex Marriage

Since 2007, same-sex couples have been allowed to register their partnership at a Civil Registry Office under the Partnership Act. In order to register, at least one of the partners must be a Swiss national or domiciled in Switzerland. A marriage between persons of the same sex validly concluded abroad is recognised in Switzerland as a registered partnership according to the Partnership Act.

The Swiss marital property regime of separation of property applies to registered partnerships in the absence of an agreement providing otherwise. This is in contrast with the default marital property regime of married couples, which is participation in acquisitions.

Regarding inheritance law and social security, civil partners have the same rights as married couples and are taxed in the same way as spouses for income, wealth and inheritance/gift tax purposes.

Decisions or measures taken abroad with regard to a registered partnership will normally be recognised in Switzerland. Finally, registered partners are currently not allowed to adopt children, but the Swiss parliament is discussing a revision of the adoption law in order to allow adoption by registered partners as well.

9.3 Recognition of Domestic Partners

While same sex couples can register their partnership (see **9.2 Recognition of Same-Sex Marriage** above), there is no such possibility for heterosexual couples who are not married (typical for patchwork families). To the extent that the parties do not enter into a cohabitation agreement, certain aspects of such relationships can be subject to the rules of a (simple) partnership or qualify as a contractual relationship (eg employment agreement) depending on the specific circumstances.

Couples who are not married or in a registered partnership have no statutory inheritance rights, are taxed separately and inheritance/gift tax is levied at the rate for non-relatives. It is thus essential for such couples to plan their estates carefully by means of wills, inheritance pacts and similar instruments.

10. Charitable Planning

10.1 Laws on Charitable Giving

Switzerland, with its political stability and secure legal framework, hosts many charitable organisations. The Swiss foundation sector has undergone substantial growth in recent last years. The reputation of Switzerland as a location for foundations is based on a clear, liberal and ethical framework. Switzerland's attractiveness as a place for charities is demonstrated by the fact that there are about 13,000 charitable foundations active in Switzerland with either Swiss or international management and with assets of approximately CHF70 billion as well as annual payouts totalling around CHF1.5 billion.

Swiss foundation law is flexible and, with the considerable freedom of organisation that it provides, ensures that a founder's wishes with respect to the structuring of a foundation may be realised in the best way. As a general rule, the founder is free to choose the purpose and a Swiss foundation may have multiple purposes which need not be associated with each other.

Most cantonal laws provide for an exemption of gifts/donations to certain charities from inheritance and gift tax. Therefore, if the donation is granted by a donor to an institution of public or charitable interest in Switzerland, the donation may be eligible for (i) a gift tax exemption (in relation to the estate/inheritance tax) and (ii) an income tax deduction (with certain restrictions), generally up to a certain cap, of the taxable income.

If the donation is made by a Swiss-resident donor to a charitable organisation located in another canton, the tax treatment is governed by inter-cantonal reciprocal agreements. Gifts and donations made to foreign charities are generally not deductible for income tax purposes and are only tax-exempt for gift tax purposes on an exceptional basis if specific bilateral or multilateral agreements apply.

10.2 Structures Most Commonly Used for Charitable Planning

Almost all types of Swiss legal entities (eg foundations, associations, limited liability companies, cooperatives etc) can be used as charities but the majority of charities in Switzerland are established in the form of foundations, which ensures a high degree of sustainability. Moreover, the founder can exercise a certain control as to how the assets are to be used and administered by defining the purpose of the foundation and providing for investment rules in the foundation charter and regulations. The regulatory and legal framework remains the same, regardless in which canton of Switzerland the foundation is finally set up.

The founder can set up a charitable foundation either by public deed during his/her lifetime or by testamentary dispositions in their will (or in an inheritance contract). Swiss foundations are subject to the supervision of the community (federal, cantonal, communal) to which they are designated. Foundations with an international scope are usually supervised by the Swiss Federal Department of the Interior.

11. Elder Law

The fact that people are living longer is a highly debated topic in Swiss politics. Frequently, concerns are raised that the social security system will face considerable challenges in the future, and reforms are being discussed. Efforts to raise the pension age, in particular for women, have been made and to some extent have already been successful. The Swiss social security system is very sophisticated and to a large extent allows individuals to manage their personal retirement fund flexibly. Such planning is carried out by many Swiss residents, not least because it is encouraged through tax advantages.

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