



Foundations and Trusts

Block 3 – Part I

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I. Tradition and customs in common law vs civil law countries

- Common Law:
 - Legal reserve (forced heirship) typically unknown
 - Providing for a family stronger than for individual heir
 - Hardly any Code provisions – very flexible for tailor-made solutions
 - Information rights limited to information relevant

- Civil Law:
 - Legal reserve (varies from jurisdiction to jurisdiction)
 - Providing for individual heir more important than for family
 - Various Code provisions to be obeyed – less flexible for tailor-made solutions
 - Right to information important



I. Tradition and customs in common law vs civil law countries

➤ Example

- Mr Smith, resident in the US, may transfer his entire estate to a trust
Mr Müller, resident in CH, is subject to strict forced heirship rules
- Mr Smith may exclude certain 'legal heirs' in his trust, a can include strict distribution provisions
Mr Müller must respect provisions of the marital regime, inheritance rules and other provisions on the transfer to assets into a structure



II. Information Rights – Heirs vs. Beneficiaries

➤ Principles

- Heirs have information rights on documents and transactions of the deceased, they have also rights on beneficial ownerships of the deceased
- Heirs of settlor enjoy the same information rights from trustee as the settlor during his lifetime
- Beneficiaries' information rights depend on the applicable law and the trust documents – typically limited to information evident and/or relevant
- Swiss foundation law does not provide for information rights



III. Pass-Through

- While a look-through or pass-through approach is often taken for tax purposes based on an economical view (Substance-over-Form), Courts are more hesitant to a pass-through for civil law purposes
 - Rybolovlev vs. Rybolovleva
 - High Court Schaffhausen, 10/2003/11 dated 30 July 2004
 - High Cour Nidwalden, AbR 2006/07 Nr. 2, dated 5 July 2007
 - Federal Supreme Court, 5A_498/2007/bnm, dated 28 February 2008



III. Pass-Through

- High Court Schaffhausen, 10/2003/11, 30 July 2004
 - The children of W have legal claim (donation) against their father W. He tries avoiding payment. The children caused seizure of funds held by a Lichtenstein foundation founded by W. The foundation appealed the seizure in the following debt collection proceeding.
 - The Court held the following:
 - A foreign foundation is a company within the meaning of IPL
 - Typically recognition of a foundation (principle of incorporation)
 - In case of abuse – foundation is disregarded as an exception. The power to change the statutes and by-laws is however not sufficient alone for a pass-through



III. Pass-Through

- High Court Schaffhausen, 10/2003/11, 30 July 2004
 - The Court held the following:
 - question of a pass-through liability of a foundation organised and administered under the law of Liechtenstein is subject to Liechtenstein law
 - void sham structure may be justified if the founder intended to continue to use the foundation assets for his own benefit and not in the sense of the stated foundation purpose.
 - founder established the foundation primarily to deprive his children of the assets
 - the intent of W contradicted the stated charitable foundation purpose
 - thus, a pass-through was permissible under Liechtenstein law



IV. Anti-Forced Heirship Provisions

- Article 471 CC
 - Legal portion of spouse $\frac{1}{2}$ of the estate – legal reserve $\frac{1}{4}$
 - Legal portion of descendants $\frac{1}{2}$ of the estate – legal reserve $\frac{3}{8}$; if no surviving spouse $\frac{1}{1}$ - legal reserve $\frac{3}{4}$ (under revision)



IV. Anti-Forced Heirship Provisions

- Article 527 Swiss CC:
 - disposal of assets within 5 years of death
 - disposal of assets at any time which minimizes, or disregards legal reserve is taken into consideration when legal reserve is determined; recipient can be forced to pay / transfer back any assets received



IV. Anti-Forced Heirship Provisions

- non-exhaustive list of such jurisdiction:
 - Bahamas
 - Barbados
 - Bermuda
 - BVI
 - Cayman Islands
 - Cyprus
 - Dubai
 - Guernsey / Jersey / Isle of Man
 - Mauritius
 - Singapore



IV. Anti-Forced Heirship Provisions

- attacking a trust or executing a foreign decision in its “home” jurisdiction is mostly an uphill-battle
- If funds are held in a Swiss bank heirs/beneficiaries may be able to seize the assets – pass-through approach



V. Transfer of Swiss Property (Lex Koller)

- Legal Basis
 - Art. 4 HTC – transfer of real property is not governed by HTC
 - Art. 11 para. 3 lit. d HTC – right to receive property if trustee mixed it with his own assets are sold it (Art. 149d Abs. 3 IPRG)
 - Art. 12 HTC – right of trustee to publicly record trusteeship (Art. 149d IPRG)
 - Art. 15 para. 1 lit. d HTC - application of conflict of law rules lex fori
 - Art. 99 Abs. 1 IPL - lex rei sitae for Swiss properties



V. Transfer of Swiss Property (Lex Koller)

- Legal Basis
 - Art. 149d par. 1 IPL – registration of trustee in land register
 - Art. 149d par. 3 IPL – bona fide third party is protected if trusteeship is not mentioned
 - Art. 58, Art. 67, Art. 128 and Art. 137 - Ordinance to land register (GBV)
 - Guidance of Federal Land Registry and Real Estate Law Office
 - Lex Koller
 - Bundesgesetz über das bäuerliche Bodenrecht (BGBB)



V. Transfer of Swiss Property (Lex Koller)

- Transfer follows Swiss law (Art. 4, 15 HTC, Art. 99 par. 1 IPL)
 - Commitment and registration in land register
 - Principle of compulsory registration
 - Obligation: dedication as unilateral act sui generis (trust statute 9)
 - Registration of obligation by settlor with consent of trustee



V. Transfer of Swiss Property (Lex Koller)

- Notarial Deed
 - Trust has been settled validly according to applicable (foreign) law
 - Person being registered is the trustee (trust itself has no legal entity)
 - Property to be transferred has been dedicated to the trust assets
 - Trust Deed needs to be presented in case dedication is part of it



V. Transfer of Swiss Property (Lex Koller)

- Transfer from Trustee to Trustee (Art. 67 par. 1 lit. d GBV)
 - Change of ownership in case of change of trustee
 - Notarial Deed signed by leaving trustee and/or new trustee



V. Transfer of Swiss Property (Lex Koller)

- Lex Koller
 - Property covered includes family homes, condominiums and apartment buildings
 - Commercial property is in principle not covered
 - Holiday homes may be purchased in various Cantons – subject to official approval



V. Transfer of Swiss Property (Lex Koller)

- Lex Koller – no approval is needed
 - Legal heirs (non-Swiss citizens)
 - Acquisition by parents in direct line or spouses



V. Transfer of Swiss Property (Lex Koller)

- Lex Koller – purchase is not possible for real estate companies
 - With statutory seat abroad
 - With statutory seat in CH, but controlling majority of shareholders are foreigners resident outside CH



V. Transfer of Swiss Property (Lex Koller)

- Transfer of property to a Trust
- No legal basis
- Introduction of Art. 58, 67, 128 and 137 GBV as a result of the ratification of HTC
- Guidance of Federal Land Registry and Real Estate Law Office



V. Transfer of Swiss Property (Lex Koller)

➤ Transfer of property to a Trust possible if

All beneficiaries are Swiss citizens (even if resident abroad)

- All trustees are Swiss citizens (even if resident abroad)
- Corporate trustee as long as statutory seat in CH and controlling persons are Swiss citizens
- Trust Deed excludes non-Swiss beneficiaries and trustees.



VI. Insolvency Issues

- Insolvency of Trustee

- Art. 248b SchKG («Bankruptcy Code»):

- Segregation of Trust assets from personal assets of Trustee in case of an insolvency procedure over the trustee



VI. Insolvency Issues

- Insolvency of Settlor
 - Principle: Assets in Trust are separate from Settlor's assets provided the assets had been validly contributed to the trust
 - Swiss fraudulent conveyance claim (*Paulianische Anfechtungsklage*) if Settlor is a Swiss citizen
 - Look through «sham trusts» (Werner K. Rey case)



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- I. Asset Protection
- II. Keeping Assets for the Family
- III. Avoiding Probate in common law jurisdictions
- IV. Tax Optimization Tool



I. Asset Protection

- Trusts and Foundations may effectively shield a person's assets from future unexpected third-party litigation, punitive damages, unjustified claims or other threats to a person or family's wealth.
- These structures effectively disconnect assets from the current owner, thereby making it impossible for third parties to reach those assets.
- The settlor has ultimately no control to use or distribute the assets.
- All Asset Protection Trusts are irrevocable!
- Some US states provide for Asset Protection Trust. Offshore Trusts can be used as well



II. Keeping Assets for the Family

- Parents want to make sure that their children do not inherit a lot of money while they are still young
- Parents want to make sure that their disabled child is provided for in case they pass away
- Family assets can be protected over several generations (prohibited in CH)
- Family Governance can be implemented in a structure
- Family Businesses are protected from unfriendly take-overs or partial sale by family members



III. Avoiding Probate in common law jurisdictions

- Probate is the entire process of administering a dead person's estate. This involves organising the money, assets and possessions and distributing them as inheritance – after paying any taxes and debts.
- If the deceased has left a Will, typically an executor has been appointed to administer the estate.
- The executor must apply for a Grant of Probate, a legal document that gives him the authority to deal with the deceased's property.



III. Avoiding Probate in common law jurisdictions

- Probate ends once all taxes and debts have been paid and all inheritance passed on.
- Probate takes about a year for most estates. In complex or sizable estates, it can even take longer.
- International probate can be more complicated and usually takes between six months and two years.



III. Avoiding Probate in common law jurisdictions

- In the US a Living Trust is settled during lifetime
- The trust is revocable and the trust deed contains rules as to what shall happen with the trust funds after the settlor passed away
- Benefits of a living trust
 - The trustee can immediately take care of the funds after the settlor passed, e.g. paying for funeral costs and distributing property to heirs, without having to wait on the probate judge.
 - A living trust is less likely to be challenged in court than a simple will
 - A will is a public document, anyone can get a copy of it. A living trust is totally private – not copies of the trust deed can be received



IV. Tax Optimization

- USA
 - the tax exempt threshold for estate taxes is currently USD 11.58 mln
 - By transferring USD 11.58 to a trust, this exemption can be used as this threshold can be reduced in the future

- Germany
 - The German inheritance tax between parents and children is up to 30% and up to 50% for non-related heirs. The tax exempt amount for children is Euro 400'000 „only“
 - By transferring funds into a foundation, a one-time tax applies



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I. Regulatory Development in Switzerland

- Trusts and typically Liechtenstein Foundations had been used for decades, unfortunately often for tax evasion
- Bad reputation to be fought against
- Beneficial owner identification rules
 - Bank forms A, T, and S introduced
 - Terme beneficial owner has been broadened over the years, today includes discretionary beneficiaries
 - Sometimes mistaken with controlling person



I. Regulatory Development in Switzerland

- Regulations shall prevent money laundering and terrorist financing
- Application of international standards of Financial Action Task Force (FATF)
- Revised Federal Act on Money Laundering entered into force on 1.1.2020
 - Extending due diligence obligations to advisors, including trustees
 - Periodic checking and updating of client data
 - Duty to report to Money Laundering Reporting Office Switzerland (MROS)
- FINIA / FINSA entered into force on 1.1.2020



II. Anti-Money Laundering Provisions

- Definition of Money Laundering (Art. 305 bis para. 1 PC)
Anybody committing an act capable of preventing the investigation into the origin of, the discovery of or the seizure of assets that – as he, she, or it knows or has to assume – originate from a crime, may be punished by imprisonment or by a fine.



II. Anti-Money Laundering Provisions

- Predicate offences
 - anything defined as a 'crime' under Swiss law
 - drug trafficking, fraud, theft, embezzlement, human trafficking, bribery, product piracy, counterfeiting of goods, insider trading or share manipulation.



II. Anti-Money Laundering Provisions

- Predicate offences
 - Since 1.1.2016 severe violation of tax
 - tax evasion qualifies as tax fraud under Swiss tax law - forging or (substantially) falsified documents that have a qualified evidentiary value (e.g., salary certificates, balance sheets or business records) with fraudulent intent
 - tax fraud must exceed the sum of CHF 300'000 per tax period.



II. Anti-Money Laundering Provisions

- Predicate offences
 - Since 1.1.2016 severe violation of tax
 - Tax offense committed abroad also qualify if the requirements of double incrimination is fulfilled
 - tax offense committed abroad must be punishable under the foreign laws
 - the foreign tax offense must fulfill the requirements for a qualified tax offense from a Swiss law perspective
- The non-declaration of a bank does not constitute a predicate offence



II. Anti-Money Laundering Provisions

- Federal Anti-Money Laundering Act
 - based on art. 305bis Swiss Penal Code (PC)
 - applies to financial intermediaries and governs the combating of money laundering and terrorist financing
 - ensures the exercise of due diligence in the conduct of financial transactions



II. Anti-Money Laundering Provisions

- Anti-Money Laundering Ordinance
 - sets out the requirements for the professional practice of financial intermediation and the due diligence obligations and reporting duties
- Ordinance of financial intermediation
- FINMA Circular Financial Intermediation under AMLA



II. Anti-Money Laundering Provisions

- The AMLA applies to any entity or natural person qualifying as a Financial Intermediary (FI)
- Art. 2 AMLA contains a (non-exhaustive) list of persons qualifying as FIs
 - banks, certain categories of fund managers, investment companies with variable capital, limited partnerships for collective capital investments, investment companies with fixed capital, asset managers within the meaning of the Collective Investment Schemes Act, certain categories of insurance providers, securities dealers, and casinos.



II. Anti-Money Laundering Provisions

- Art. 2 AMLA contains a (non-exhaustive) list of persons qualifying as FIs
 - Non-banking sector:
natural persons 'who, on a professional basis, accept or hold or deposit assets belonging to third parties or who assist in the investment or transfer of such assets'
 - E.g. asset managers and credit institutions, inter alia those offering financial leasing, commodities traders, traders in banknotes, precious metals, as well as lawyers and notaries engaging in financial intermediation



II. Anti-Money Laundering Provisions

- FI handling third party assets commercially if
 - gross profit equal to or in excess of CHF 50'000 per annum;
 - contractual arrangements with more than 20 parties per annum;
 - unlimited authority to dispose of third-party assets in excess of CHF 5; and
 - the conduct of transactions in excess of CHF 2 mln per annum



II. Anti-Money Laundering Provisions

- Due Diligence Duties in connection with FI handling of third-party assets
 - verification of the identity of the contracting party
 - determination of the BO
 - establishment, monitoring and regular amendment of written 'client history'
 - clarification of the economic background and purpose of a transaction or business relationship
 - appropriate record keeping of customer, BO and transaction data
 - implementation and maintenance of adequate internal organisational measures



II. Anti-Money Laundering Provisions

- Suspicious activity report (SAR) to MROS
 - Duty to report if reasonable grounds for suspicion (art. 9 AMLA), or
 - Right to report in cases where there is merely a suspicion (art. 305ter par. 2 PC) - “any observations that indicate that assets originate from a felony.”
- bank must freeze the associated assets as soon as the reporting office informs that it is for-warding a report to a law enforcement authority
- account will remain frozen by the bank until the notification from the prosecuting authority arrives, but for a maximum of 5 working days



II. Anti-Money Laundering Provisions

- Beneficial Owner
 - obligation to duly identify contractual party and to duly determine the beneficial owner (BO)
 - Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB 20) – a de facto minimal standard



II. Anti-Money Laundering Provisions

- Beneficial Owner
 - A natural person or persons "who ultimately own or control a legal entity or arrangement, such as a company, a trust, or a foundation"
 - Beneficial Owner of an account is identified on bank form A
 - Beneficiaries of Foundations and Trust are reported on
 - Form S for foundations (Stiftungen)
 - Form T for Trusts
 - Domiciliary Company (Sitzgesellschaft) – beneficial owner must be identified individually



III. FINIA / FINSA

- 1 January 2020 - the Swiss Financial Institutions Act (FINIA) and the Swiss Financial Services Act (FINSA) entered into force
- trustees operating in Switzerland are obliged to obtain an authorisation to carry out their activities
- Certain exemptions
- Objection
 - to create a uniform competitive landscape for financial intermediaries
 - to improve client protection



III. FINIA / FINSA

- **FINIA:**
basic obligations for acting as a financial institution in or from Switzerland

- **FINSA:**
basic requirements for providing financial services and governs the offering of financial instruments.



III. FINIA / FINSA

- Trustee under FINIA
 - Trustees are not subject to FINIA provided they manage the trust funds only



III. FINIA / FINSA

- Trustee under FINSA
 - person who on a commercial basis manages or holds a separate fund for the benefit of the beneficiaries
 - Commercial Basis
 - Gross earnings > CHF 50'000 per calendar year
 - Business relationship with > 20 contractual partners per calendar year



III. FINIA / FINSA

- Trustee under FINSA
 - Exemptions
 - Trustees exclusively managing or holding assets of persons with whom they have “family ties”
 - Private Trust Company
 - Single Family Office



III. FINIA / FINSA

- New Regulatory Obligations under FINSA
 - Structure
 - Sole Proprietorship
 - Commercial Enterprise
 - Cooperation



III. FINIA / FINSA

- New Regulatory Obligations under FINSA
 - Organization
 - Two qualified directors
 - appropriate corporate and management organization, risk management and adequate internal control systems
 - Effective place of management in Switzerland
 - > 10 full-time employees or annual revenues > CHF 5 mln
 - board of directors mainly independent from management



III. FINIA / FINSA

- Trustee under FINSA
- Swiss vs. foreign Trustee
 - place of effective management (whether the geographical location where the entity carries out its management activities is exclusively or predominantly in Switzerland or from Switzerland)
 - foreseeable significant practical consequences, as trustee structures commonly operate with a foreign and sometimes predominant component



III. FINIA / FINSA

- New Regulatory Obligations under FINSA
 - Business Conduct
 - Fit & proper requirement (“Gewährserfordernis”)
 - Good reputation and qualification
 - Necessary professional qualifications



III. FINIA / FINSA

- New Regulatory Obligations under FINSA
 - Professional qualification
 - At least 5 years experience in Trust industry
 - Training courses of at least 40 hours relating to Trust



III. FINIA / FINSA

- Trustee under FINSA
 - Internal audit and risk management
 - More than 5 full-time employees
 - annual gross revenue exceeds CHF2 mln
 - External audit – trustees are subject to an annual audit by the designated supervisory organisation