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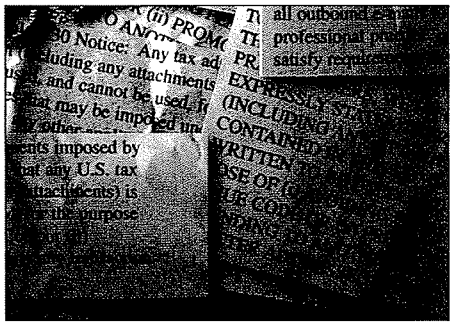

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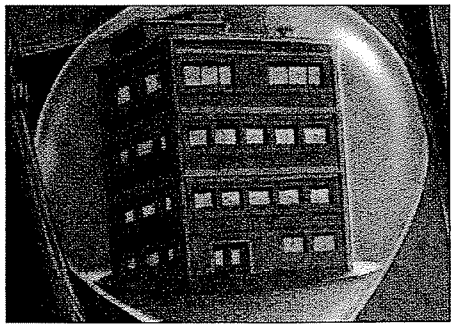

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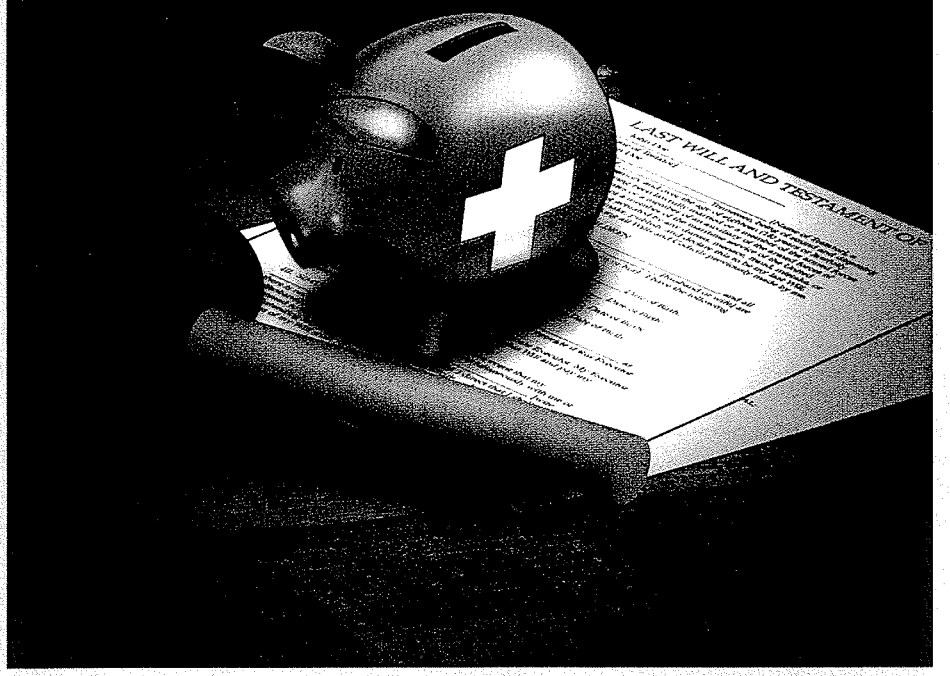
Features

Estate Planning and Swiss Assets

By Jacob C. Jørgensen



For decades, Switzerland, with its highly developed private banking industry, strong statutory protection of bank secrecy, moderate tax rates, and stable currency and political climate, has been a preferred safe haven of investors from all over the world, not least from the United States. In spite of growing international competition in cross-border asset management and increasing political pressure on Switzerland to abandon its bank secrecy laws, Swiss banks are still home to more than one-third of the world's privately owned wealth. Against this background, it is not surprising that international estate planning practitioners are regularly called on to give advice on how assets located in Switzerland, such as Swiss bank accounts, should be treated to avoid disclosure and tax exposure in relation to probate proceedings.

This article outlines and analyzes the rules under Swiss law concerning when non-Swiss residents may subject Swiss assets to Swiss probate jurisdiction through a will and thereby avoid probate proceedings in the courts of the clients' domicile country. In addition, some comments are made regarding the recognition of common law trusts under Swiss law.

The provisions regulating when a non-Swiss resident may make a Swiss will are found in the Swiss Code on Private International Law (hereinafter "CPIL"), *Loi fédérale du 18/12–1987 sur le droit international privé*, which entered into force on January 1, 1989, and in a number of international treaties that Switzerland has entered into. The relevant provisions of the CPIL and these treaties will be outlined in the following with particular emphasis on the rules concerning U.S. citizens. Before examining the rules, however, it may be useful to make some brief comments on the definition of a non-Swiss resident, the rules concerning testamentary capacity, and the formal requirements for a will under Swiss law.

Non-Swiss Residents, Testamentary Capacity, and Formal Requirements

Under Art. 20 of the CPIL, a person's *domicile* is in the state in which he or she resides with the intention of remaining permanently, whereas a person's place of *residence* is the state in which he or she lives for an extended period of time, even if the period is limited from the outset. Art. 20 also provides that no person can have more than one domicile at a time, and, if a person has no domicile, the place of residence shall therefore be determinative.

Swiss law thus distinguishes between domicile and residence and does not exclude a person from having a Swiss domicile while residing in another country. Nor is there necessarily a correlation between being a Swiss citizen and having a Swiss domicile or residence.

To have any legal effect, a will must evidently be valid both in regard to both form and testamentary capacity. For the formal requirements under Swiss law, Art. 93 of the CPIL provides that the form shall be governed by the Hague Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions (hereinafter the "Hague Convention"). Art. 1 of the Hague Convention requires that the will must comply with either (1) the law of the testator's country of domicile, residence, or citizenship or (2) the law of the country where the will was signed. For real property, the Hague Convention provides that the law of the country in which the property is located (the *lex rei sitae*) applies.

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For testamentary capacity, Art. 94 of the CPIL provides that the testator must have had testamentary capacity under (1) the law of his or her country of domicile, (2) the law of his or her habitual residence, or (3) the law of the testator's country of citizenship when the will was signed.

Swiss Probate Jurisdiction and Choice of Law

Testators Whose Last Domicile (But Not Residence) Was in Switzerland

For this group of testators, which may include both Swiss and non-Swiss citizens having their last domicile in Switzerland but residing abroad at the time of death (for purposes of work or study, for example), Art. 86 of the CPIL gives Swiss courts probate jurisdiction and jurisdiction to hear any inheritance disputes that may arise. Accordingly, Swiss courts will take jurisdiction over an estate defined in a testament made by a testator whose last *domicile* was in Switzerland, regardless of whether the testator was *residing* abroad at the time of death. Art. 86 thus reflects the general principle of international inheritance law according to which the courts of the country of the decedent's last domicile have probate jurisdiction. Art. 86(2) of the CPIL, however, limits the jurisdiction of the Swiss courts by providing for exclusive jurisdiction of the courts of the country where the decedent's real property is located.

Swiss jurisdiction embraces both Swiss and non-Swiss assets mentioned in a will except for real property over which courts in the country where the property is located ("the situs courts") claim exclusive jurisdiction. Swiss courts at their own initiative will determine whether they must decline probate jurisdiction in favor of the foreign situs courts, although they will always take the *value* of such real property into account when calculating the total value of the estate. This ensures that applicable forced heirship rules are respected in Swiss probate proceedings that might run in parallel to probate proceedings abroad.

For choice of law, Art. 90 of the CPIL provides that *Swiss law* governs the estate, although under Art. 90(2) a non-Swiss citizen may use a choice of law clause to submit his or her estate to the law of the state of citizenship. Such a choice of law will be void if the testator was no longer a citizen of the state at the time of death or if the testator had acquired Swiss citizenship. Thus, a U.S. citizen domiciled in Switzerland may submit his or her estate to the laws of the state of New York with a choice of law clause in the Swiss will.

Testators Who Were Swiss Citizens and Domiciled Abroad at the Time of Death

Art. 87(2) of the CPIL provides that the courts of the testator's canton of origin shall have jurisdiction if a Swiss citizen domiciled abroad has submitted his or her estate, or the assets of the estate that are located in Switzerland, to Swiss jurisdiction *or to Swiss law.* The will must include the entire estate or only assets in Switzerland, but not only non-Swiss assets.

Swiss law thus distinguishes between domicile and residence and does not exclude a person from having a Swiss domicile while residing in another country.

Accordingly, a Swiss citizen domiciled in the United States may use a will containing a Swiss choice of law clause and/or a Swiss forum selection clause to obtain Swiss probate jurisdiction over both Swiss and non-Swiss assets (except for real property abroad over which situs courts have exclusive jurisdiction). For assets that are listed in public registers in foreign countries (such as airplanes, patents, trademarks, and shares of listed companies), it is essential to check whether the foreign registering authorities will recognize a Swiss probate court's order for the transfer of title to the assets before subjecting them to Swiss probate jurisdiction through a will.

For the applicable law, Art. 91(2) of the CPIL provides that if Swiss courts have jurisdiction under Art. 87, the estate of a Swiss testator who had his last domicile in a foreign country will be governed by Swiss law *unless* the testator *expressly* provided by will for the application of the law of his last domicile. Art. 91(2) recognizes that it is possible to make use of a *partial* choice of law so that Swiss law, for example, applies to Swiss assets and the law of the testator's domicile country applies to assets located there.

Testators Who Were Not Swiss Citizens and Not Domiciled and Not Residing in Switzerland at the Time of Death

For this group of testators seeking Swiss probate jurisdiction, the options are limited. Art. 88 of the CPIL provides that if a non-Swiss citizen domiciled and residing abroad at the time of death leaves property located in Switzerland, the Swiss judicial or administrative authorities at the place where the property is located shall have jurisdiction to regulate that part of the estate in Switzerland, *but only to the extent not dealt with by the foreign authorities.* Accordingly, for this group of testators, Swiss courts will not grant probate over Swiss assets on the basis of a will alone but may only take jurisdiction if foreign probate authorities (typically the ones in the testator's country of domicile or residence) fail to deal with the Swiss assets.

The purpose of Art. 88 is to ensure that assets located in Switzerland do not remain undistributed because of a lack of competence of the probate authorities abroad to grant probate. Thus, Swiss courts will take action only if the probate authorities in the testator's country of domicile do not have jurisdiction to distribute assets located in Switzerland. In addition, Swiss courts may grant probate under Art. 88 if the foreign authorities are competent but remain inactive about Swiss assets, although the heirs have taken all necessary measures to include such assets in

the foreign probate proceedings.

Art. 88 is particularly relevant for Swiss real property for which foreign courts decline jurisdiction. Swiss bank accounts are treated no differently than real or movable property under Art. 88. Accordingly, for the above group of testators, Swiss courts will usually *not* grant probate over a Swiss bank account based on a Swiss will unless the conditions for applying Art. 88 are met. For the applicable law in Art. 88 cases, Art. 91 of the CPIL provides that the conflict of law rules of the testator's last domicile determine the law applicable to the estate.

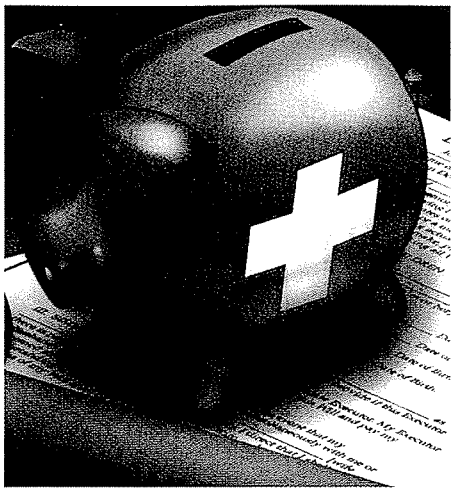
For the above category of clients, who own Swiss bank accounts with substantial assets, the settling of a trust will often be the right estate planning solution. See below for further details.

Persons Domiciled in the United States

As mentioned above, Switzerland has entered into a number of bilateral treaties with countries such as Italy, Greece, Portugal, Iran, and the United States, which regulate the issues of jurisdiction, applicable law, and mutual recognition of court decisions in inheritance matters. These bilateral treaties supplement the above outlined provisions of the CPIL. In this context some comments should be made about Articles V and VI of the Treaty of 25 November 1850 between the United States and Switzerland commonly known as the Treaty on Friendship, Commerce and Extradition (hereinafter the "Treaty"), which are of particular interest to attorneys advising U.S. clients on estate planning for Swiss assets.

If the estate of a U.S. domiciled person involves real property located in Switzerland, the Swiss probate authorities are *prima facie* competent to deal with the property according to Art. VI of the Treaty. In practice, however, Swiss courts will, in accordance with the rule of comity, give up its jurisdiction if the U.S. court includes the Swiss property in its probate proceedings so that all assets are treated together in the probate proceedings in the domicile courts in accordance with the principle of the "unity of the estate." See *In re Rougeron's Estate*, 217 N.E.2d 639 (N.Y. 1966), cert. denied, 385 U.S. 899 (1966). Several Swiss decisions have upheld this principle. See, e.g., the Geneva Cantonal Court's decision of November 4, 1958, *In re Rougeron v. Dame Rougeron*, SJ 81 (1959) 589, and, for more details, see Bernard Dutoit et al., III *Répertoire de droit international privé Suisse* 54ff. (1986).

For movable property located in Switzerland, such as a Swiss bank account, U.S. courts will take jurisdiction, unless the account is subject to a Swiss will under the rules of the CPIL. Most Swiss banks are experienced in dealing with foreign probate proceedings, and, on the basis of a certified copy of the letter testamentary or the letter of administration, the bank will normally release account information to the executor or administrator of the estate of a deceased account holder without any objections.



For estate taxes, it should be noted that Switzerland and the United States have entered into a Convention for the Avoidance of Double Taxation with respect to Taxes on Estates and Inheritances, July 9, 1951, 3 U.S.T. 3972, 165 U.N.T.S. 51, which covers U.S. federal taxes on estates and Swiss taxes on estates levied by Swiss cantons and their political subdivisions. The convention provides for equal treatment of tax exemptions and imposes a duty on the two states to grant a tax credit for any tax imposed in the other state on certain property that has been included for tax in both states. Any claim for such a tax credit or tax refund must be made within five years of the date of death of the decedent.

The Scope of the Applicable Law, Forced Heirship Rules, and Public Policy

According to Art. 92 of the CPIL, the law applicable to the estate, whether Swiss or foreign, shall determine (1) what belongs to the estate, (2) who is entitled thereto, (3) who shall meet the debts of the estate, and (4) what legal remedies and measures may be invoked. Art. 92(2) provides that the procedures for execution shall be governed by the *lex fori*. In particular, *lex fori* shall govern protective measures and the devolution of the estate, *including the execution of the will.*

Attorneys advising U.S. clients should be aware particularly of the major differences existing between the procedural probate rules under Swiss and U.S. law, particularly of the powers of the executor, transfer of ownership of the estate to the heirs, and liability for debts.

Under Swiss law, the heirs constitute a "community," which is formed by law at the time of death of the decedent. Each heir becomes a joint owner of the assets of the estate and also becomes jointly and severally liable for all debts of the decedent. The heirs have certain rights, for example, to challenge the will if the testator has violated forced heirship rules, to disclaim the inheritance, and to ask for a public inventory. The heirs are free to distribute the estate among themselves out of court, if they all agree and it is not precluded by the will itself.

It is not possible for a testator to subject his or her estate to a specific inheritance *tax* law by a choice of law in the will. As a rule, estates are taxed in the jurisdiction of domicile of the decedent, although real property is often taxed in the jurisdiction where it is located. Therefore, a Swiss will is not a suitable instrument for efficient inheritance tax planning/avoidance.

As already indicated, Swiss law, like most other legal systems based on a civil code, has forced heirship rules, which will be applied by Swiss courts

if Swiss law governs the estate identified in the testament. Forced heirs are the surviving spouse, the descendants, and, in the absence of descendants, the parents of the deceased. Forced heirship may be avoided by those testators who, under Art. 90(2) or 91(2) of the CPIL, have the right to subject their estates by choice of law in the testament to a national law with no forced heirship rules. The Swiss Federal Court held, in *In re Hirsch v. Cohen*, ATF 102 II 139, that a circumvention of forced heirship rules by a choice of English law does not violate Swiss public policy. A U.S. citizen domiciled in Switzerland may thus by means of a choice of law clause in his or her Swiss will avoid the forced heirship rules that would otherwise automatically apply in the Swiss probate proceedings.

Trusts

The common law concept of a trust does not exist under Swiss law; however, Swiss courts have in several decisions recognized trusts existing under the laws of *foreign* jurisdictions, and it is also established case law that an inter vivos express trust is to be upheld under Swiss law as a "company-like organized asset unit" within the meaning of Art. 150(1) of the CPIL. See Andreas C. Limburg & Pietro Supino, *Disputes Involving Trusts*, Trusts & Trustees 195ff. (1999), for further details.

Although trusts organized under the laws of foreign jurisdictions are generally recognized under Swiss law, there is considerable uncertainty about taxation of trust assets and the legal rights and duties of trustees, beneficiaries, and settlers, because Swiss law does not offer any statutory regulations on these issues. The upcoming ratification of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (the "Hague Trust Convention") in Switzerland should erase some of these uncertainties.

Despite the lack of legislation regulating trusts under Swiss law, most Swiss banks provide a wide range of offshore trust products through affiliated offshore trust companies that are typically administered in Switzerland. But, even so, trust companies do not offer tax or legal advice to their clients, and many of the standard structures offered (such as the "directed trust") are noncompliant in most onshore jurisdictions and may therefore not be upheld if challenged by disgruntled heirs or tax authorities in the settlor's domicile country. Moreover, the large trust companies usually charge very significant fees for settling and administering a trust, and they often only accept investments held in a bank account with an affiliated bank as trust assets. Accordingly, to avoid unnecessary expenses and the many pitfalls of offshore estate planning, U.S. clients holding Swiss bank accounts are well-advised to consult with a U.S. or a Swiss attorney before buying a standard offshore trust for estate planning purposes.

Conclusion

Parallel probate proceedings in different jurisdictions often can cause complications—in particular, if several courts grant probate over the same assets. Therefore, if Swiss assets can be subjected to probate proceedings in one jurisdiction only, in the courts of the decedent's country of domicile, for example, this will often promote procedural efficiency and certainty. To this end, Art. 96 of the CPIL lends wide recognition to decisions rendered by foreign probate authorities, including U.S. courts, on Swiss assets.

In some cases, however, it may be advisable for U.S. clients to make a Swiss will subjecting their Swiss assets to Swiss probate jurisdiction, although this option is generally only open to U.S. clients who are Swiss citizens or domiciled in Switzerland. A Swiss will cannot legally protect the client's heirs from inheritance tax exposure but might nonetheless prevent administrative trouble if the account is subjected to Swiss jurisdiction where transfer of the assets can be made directly from the bank to the heirs without the intervention of the probate court or the estate executor. Furthermore, by making a will with a U.S. choice of law clause the client can avoid the application of the Swiss forced heirship rules.

When the client holds significant assets in a Swiss bank account, a trust will often be the right estate and tax planning solution. Some standard offshore trust products offered by major trust companies are noncompliant, however, and very expensive. Clients therefore should always seek advice from a U.S. and/or a Swiss attorney before placing their Swiss assets in a trust. ■