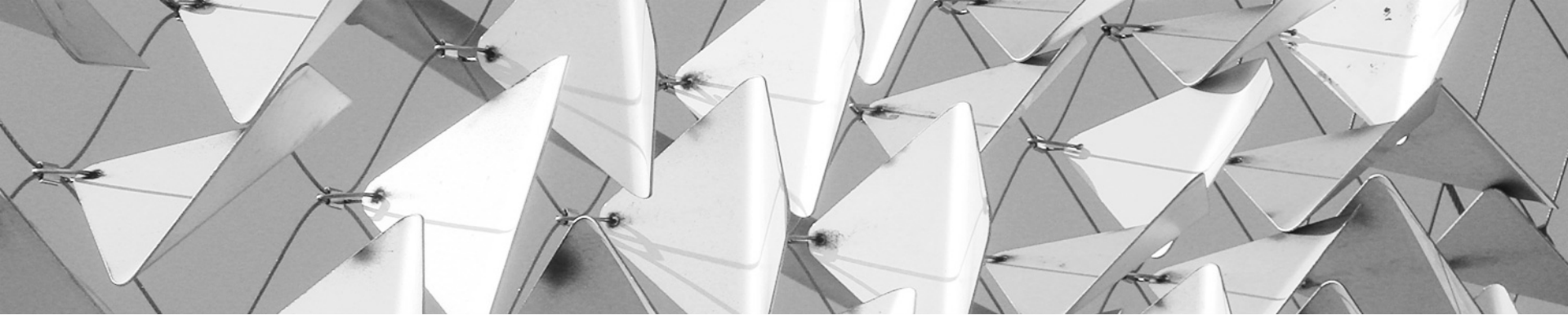


TRANSFORMA CONSULTING ZURICH

Family Office Event, September 3 & September 5, 2019



USE OF FOUNDATIONS, TRUSTS FOR INTERNATIONAL FAMILIES

What solution is best in which context?

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Both, foundations and trusts, are frequently used as estate planning vehicles, namely for :

The preservation and valorization of the founder's/settlor's assets during his/her lifetime and after his/her death in favor of

- a defined circle of beneficiaries: founder/settlor and/or members of his/her family
- a specific purpose (for example charity, philanthropy)

The final choice in favor of a specific structure such as a foundation or a trust in a specific case will result from your ascertainment as advisor that the chosen structure will be recognized and executed by any competent administrative and/or judicial authority with regard to the applicable conflict of law rules, the law applicable to capacity of the founder/settlor; the law applicable to matrimonial property issues; the law applicable to succession issues; the law applicable to property and the law applicable to the structure itself, taking into consideration the various connecting factors of the specific case, such as: nationality / residence of the founder / settlor, and/or the beneficiaries and the location of the assets. In addition, the chosen structure should not hurt mandatory provisions (lois d'applicable immédiate) or provisions which are part of public policy. Last but not least, the chosen structure should be tax efficient. Once these preliminary issues have been cleared, make "your choice", keeping in mind the client's and client's family priority and governance.

1. GENEROUS SWISS LAW FOR INTERNATIONAL FAMILIES

- **Choice of law for matrimonial property issues :**
 - Art. 52 parag. 1 PILA (Private International law Act of December 18, 1987) : spouses can choose the law of the State of common residence or the national law of one of the spouse by written convention or matrimonial contract, the choice of law can be modified or revoked

 - **Choice of law for succession issues :**
 - Art. 90 parag. 2 PILA : a foreigner (non Swiss), resident in Switzerland, can choose, via last will or successorial pact, to have his/her national law to apply to his/her succession. ATF/BGE 102 II 136: provisions of the Swiss Civil Code (CC) on compulsory portions are neither mandatory, nor are they part of Swiss public order
 - Art. 91 parag. 2 PILA : a Swiss citizen, resident abroad, can make a choice in favor of the law (including conflict of law rules) of the State of his last residence abroad
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1. GENEROUS SWISS LAW FOR INTERNATIONAL FAMILIES

- Art. 91 parag. 2 PILA : the succession of a non Swiss citizen (foreigner), resident abroad, is ruled by the law designated by the conflict of law rules of the State of last residence
 - **Principle of “favor testamenti”**
 - In accordance with art. 1 of the Hague Convention of October 5, 1961 on the conflicts of law relating to the form of testamentary dispositions, entered into force for Switzerland on March 11, 1973
 - **Recognition of foreign decisions**
 - Art. 96 PILA : **foreign decisions, measures and documents**, in connection with a succession abroad, are recognized in Switzerland if rendered / drawn up in accordance with the law of last domicile of decedent or pursuant law chosen by decedent or recognized by one of those States, or the State of situs of a property as far as real property is concerned
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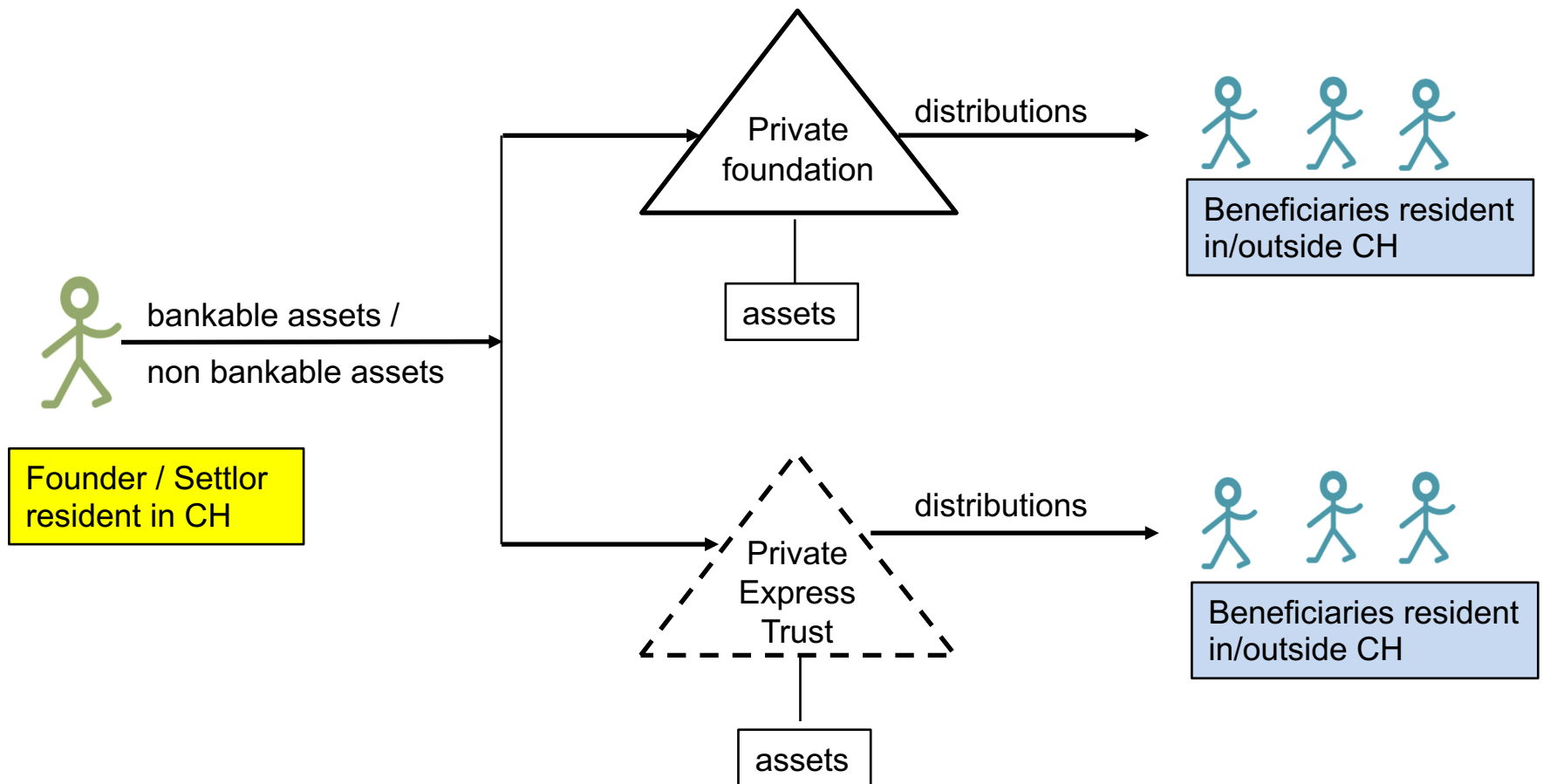
1. GENEROUS SWISS LAW FOR INTERNATIONAL FAMILIES

- **Old but not outdated : Bilateral Treaties on establishment** (with possible effects in succession matters) concluded by the Swiss Confederation with Greece (1927); Iran (1934); Italy (1868); United States of America (1850)
 - **Switzerland has not adhered to the EU REGULATION n° 650/2012 of July 4, 2012** on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession
 - **Principle of incorporation**
 - Art. 154 PILA : legal entities such as foundations, validly constituted in accordance with the **law of incorporation**, will be **recognized under Swiss law**, the principle of incorporation leads to the **recognition, in Switzerland, of a foreign “Unterhaltsstiftung” / “fondation d’entretien”, prohibited under Swiss Civil law, art. 335 parag. 2 CC**
 - Art. 335 CC : **is not a mandatory provision** and is **not part of the Swiss public order** (ATF/BGE 135 III 164)
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1. GENEROUS SWISS LAW FOR INTERNATIONAL FAMILIES

- **Principle of incorporation applies to foreign trusts**, validly constituted under the proper law applicable to the trust : **art. 149a – 149e PILA** and **Hague Convention of July 1, 1985 on law applicable to trusts and their recognition, in force for Switzerland since July 1, 2007**
 - **Tax law follows “principle of incorporation”**, subject to **tax evasion**
 - ↪ A foreign foundation is treated the same as a Swiss entity to which it compares in legal form (structure) or effective structure (function) (art.43 parag. 3 Federal Tax Act and art.20 parag. 2 Federal Law on Tax Harmonization)
 - ↪ Circular n° 30 of the Swiss Tax Conference, dated August 22, 2007, and Circular n° 20 of the Federal Tax Administration, dated March 27, 2008, on the tax treatment of trusts
 - **Limitation regarding acquisition by foreigners** (non Swiss foundation, trust) **of real property in Switzerland : Lex Koller**
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2. FOUNDATION OR TRUST ? A CHOICE GUIDED BY STRUCTURE AND GOVERNANCE



2. FOUNDATION OR TRUST ? A CHOICE GUIDED BY STRUCTURE AND GOVERNANCE

- **Civil law concept**
 - **Separate legal entity** based on notarial deed / last will : intention (will) to create a foundation / specific purpose / assets contribution
 - IRREVOCABLE
 - **Purpose** : specific, possible, not unlawful or contrary to public policy ▲ art. 335 CC for Swiss family foundations
 - **Registration → Publicity**
 - **No State supervision** for family / private foundations
 - **Common law concept**
 - **Settlement** based on 3 certainties: intention / subjects / objects; assets transferred to trustee/s
 - IRREVOCABLE / REVOCABLE
 - Purpose (objects): specific, possible, not unlawful or contrary to public policy
 - **No registration → Confidentiality**
 - **No State supervision** (≠ charitable trusts)
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2. FOUNDATION OR TRUST ? A CHOICE GUIDED BY STRUCTURE AND GOVERNANCE

- **Title to foundation assets with foundation**, foundation owner of its own right
 - **Administration & control** through **council with discretionary powers**, limited reservation of powers in favor of founder (▲ tax); however, functions may be apportioned to founder and/or beneficiaries; creation of a “supervisory board”
 - **No fiduciary duties**
 - **Limited rights of information** in favor of **beneficiaries**
 - **Title to assets with trustee** (legal ownership), **separate trust fund**, not part of trustee’s own assets
 - **Administration & Control** through **trustee/s** : distinction between **fixed interest trust / discretionary trust** ; reservation of powers in favor of settlor possible (▲ tax and validity / reality of legal structure)
 - **Fiduciary duties** towards **beneficiaries (equitable owners)**
 - **Extensive rights of information** in favor of **beneficiaries**
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2. FOUNDATION OR TRUST ? A CHOICE GUIDED BY STRUCTURE AND GOVERNANCE

💣 **Separate tax subject**, person, resident and beneficiary under DTT : **access to DTT, subject to anti abuse provisions** (see 4 : FL Foundation)

- Common Reporting Standards (CRS)

💣 **Settlor and/or beneficiaries as potential tax subjects** → **complex access to DTT**

- Common Reporting Standards (CRS)

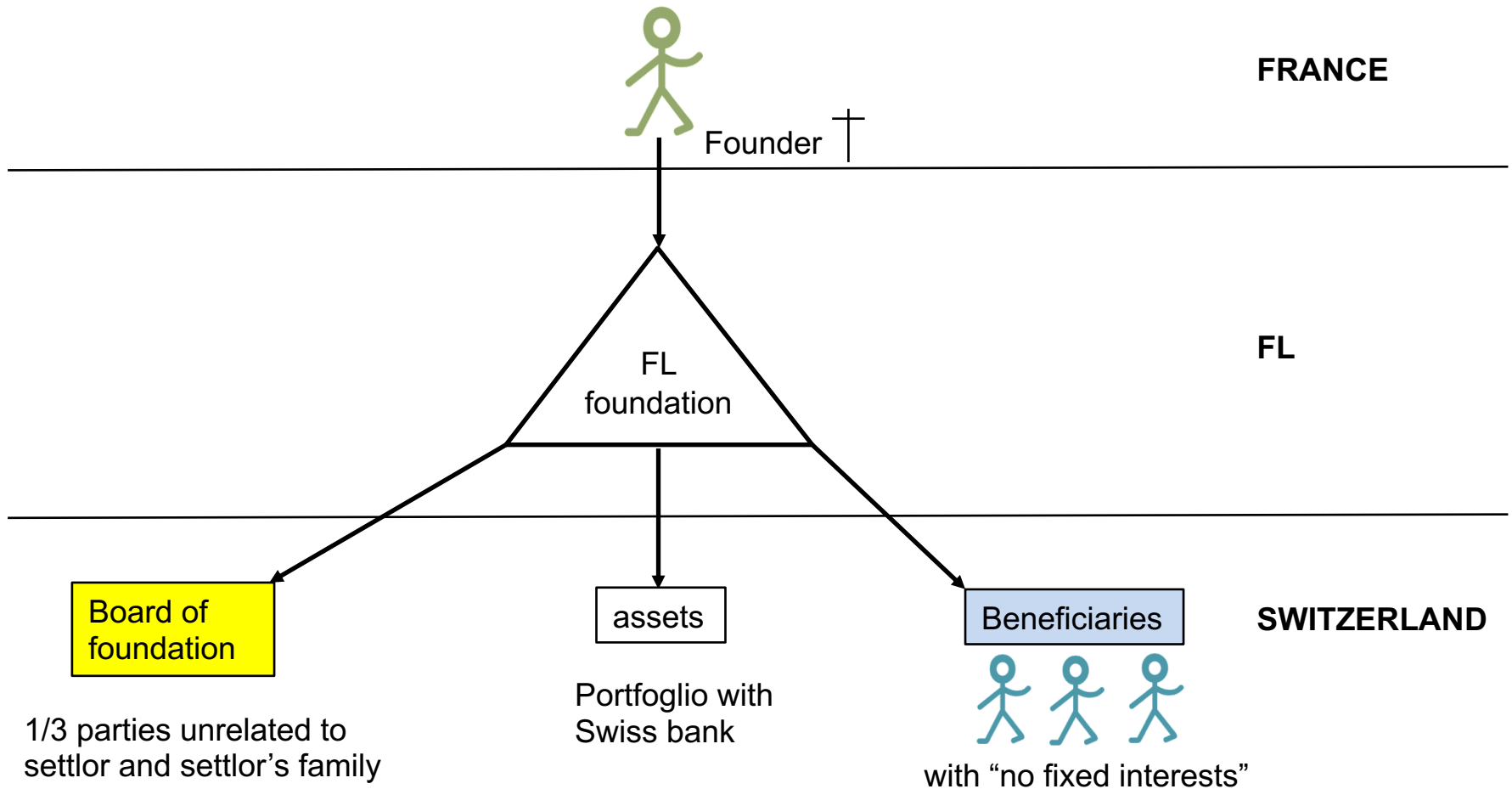
3. “SWISS TRUST LAW”, FOR WHOM ?

- What about Swiss citizens, resident in Switzerland ?? Limits of art. 335 CC and no, or limited, access to foreign trust structure → **Discrimination**
 - **Governmental Report** launched on the basis of political initiatives, **not yet published**
 - **Scholars proposals** around :
 - law on fiducie (“Treuhand”) [Thévenoz]
 - review of Swiss family foundation, towards a reinterpretation or abolition of art. 335 CC [Peter]
 - Swiss private fund [Sprecher]
 - **Our view** :
 - **Give favor to a vehicle or instrument compatible with Swiss legal principles** : principle of unity of property, no split of legal / beneficial ownership
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3. “SWISS TRUST LAW”, FOR WHOM ?

- **Build on existing but “modernized” instruments such as the family foundation (see above : abolition of art. 335 CC)**

4. FL FOUNDATION, PROTOCOL AD ART. 4 OF CH-FL DTT, DATED JULY 10, 2017



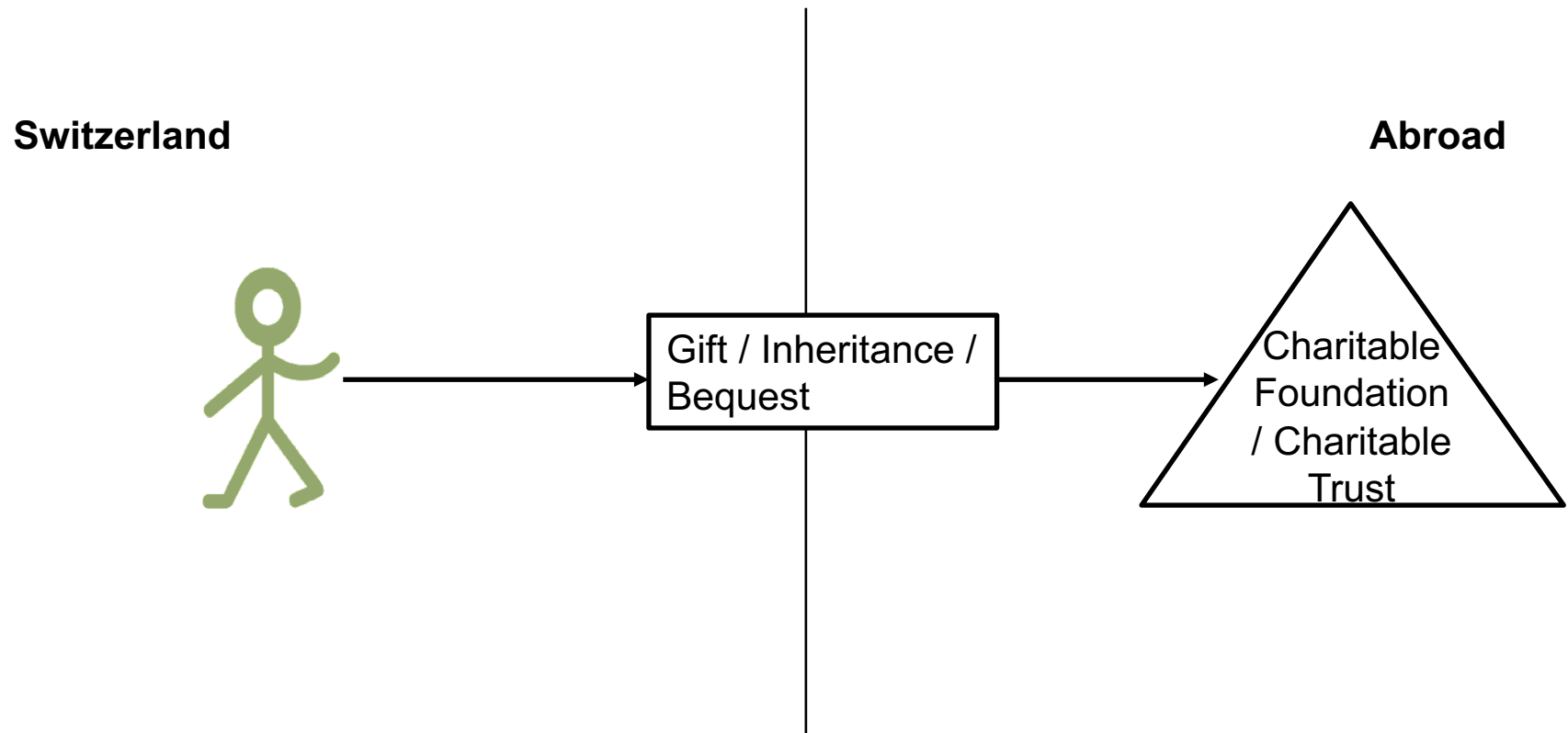
4. FL FOUNDATION, PROTOCOL AD ART. 4 OF CH-FL DTT, DATED JULY 10, 2017

- Validly constituted under the foreign law of incorporation → FL foundation is recognized as a legal entity in Switzerland (art. 154-155 PILA)
 - In particular, so called “fondations d’entretien” “Unterhaltsstiftungen”, with the sole purpose to maintain, invest and manage a capital in favor of the founder itself, his/her family, are recognized in Switzerland (ATF/BGE 135 III 164)
 - The limitations set by art. 335 Swiss Civil Code are not part of Swiss public order, nor do they represent mandatory provisions “loi d’application immédiate” / “zwingend anwendbares Recht” which overrule the foreign law of incorporation (ATF/BGE 135 III 614)
 - From a Swiss tax perspective: the principle of incorporation leads to recognition of the foreign entity, subject to tax evasion; ▲ place of effective management in CH leads to latent risk of double taxation (FL + CH)
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4. FL FOUNDATION, PROTOCOL AD ART. 4 OF CH-FL DTT, DATED JULY 10, 2017

- FL foundation paying minimal tax in Liechtenstein qualifies as private patrimonial structure “**Privatevermögensstruktur**” / “**structure patrimoniale privée**” and **does not qualify as a resident under DTT CH-FL of July 10, 2017, Protocole ad art. 4 DTT FL-CH → NO ACCESS TO DTT BENEFITS**
 - **Options ?**
 - Liquidation of FL foundation ?
 - **Modify investment policy in portfolio ?**
 - Transfer of seat of FL foundation to Switzerland in the canton of effective place of management ?
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5. CROSS BORDER TRANSFERS IN FAVOR OF CHARITABLE FOUNDATION OR CHARITABLE TRUST RESIDENT ABROAD



5. CROSS BORDER TRANSFERS IN FAVOR OF CHARITABLE FOUNDATION OR CHARITABLE TRUST RESIDENT ABROAD

- **Transfer to Swiss resident charitable institutions**
 - **Gifts, bequests, inheritances** in favor of a Swiss resident and tax exempt charitable entity are **not subject to gift/inheritance taxes**
 - **At donor's (individual or corporate) level** : “**charitable transfers**” are **tax deductible** from taxable income / profit at federal level and cantonal level
 - **Gifts, bequests, inheritances in favor of Swiss based tax exempt legal entities** are deductible regardless of whether activities are exercised in Switzerland or abroad

 - **Transfers to charitable institutions established abroad**
 - **Fully taxable for gift / inheritance tax purposes**
 - **NOT deductible**
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5. CROSS BORDER TRANSFERS IN FAVOR OF CHARITABLE FOUNDATION OR CHARITABLE TRUST RESIDENT ABROAD

- **No provisions in DTTs** concluded by the Swiss Confederation is the area of inheritance/ estate taxes
 - ↪ **Discrimination provisions** contained in DTTs concluded by the Swiss Confederation in the field of income / wealth tax **not applicable**
 - **Reciprocity Treaties concluded by a few cantons with foreign States**, where contracting parties acknowledge their respective tax exempt institutions
 - ↪ Such **Reciprocity Treaties** have been concluded with Germany, State of California and United States of America; France; Israel; Liechtenstein
 - ↪ **▲ Reciprocity Treaties do not extend to include trusts, charitable trusts !**
 - **Unilateral exemption provisions in cantonal tax** legislation for example, canton of Zoug § 175 al. 2 inheritance tax law (proof of exclusive dedication of gift / bequest to public interest purposes)
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5. CROSS BORDER TRANSFERS IN FAVOR OF CHARITABLE FOUNDATION OR CHARITABLE TRUST RESIDENT ABROAD

➤ Developments at EU Level

↪ Extensive **Case law of European Court of Justice** based on free movement of capital/freedom of establishment :

➡ direct impact for cross border gifts/bequests from EU towards Switzerland

EU —————→ CH Charity

➡ not applicable for cross border gifts/bequests from CH towards EU

CH —————~~→~~ EU Charity

➤ Transnational Giving Europe (TGE)

↪ **Private Initiative** : “Transnational Giving Europe” is a **partnership of European foundations and associations** in order to facilitate tax efficient cross border giving within Europe

SELECTED BIBLIOGRAPHY

ARTER Olivier : Ausländische Familienunterhaltsstiftungen, SUCCESSIO 2/11, 125

ARTER Olivier : Wer soll den Stiftungsrat meiner philanthropischen Stiftung wählen ? Empfehlungen zur Stiftungserrichtung und – führung, EXPERT FOCUS 2018/ 6-7, 464

ARTER Olivier : Unternehmensnachfolge mittels Unternehmensstiftung, Grundlagen (1. Teil), EXPERT FOCUS 2018/8, 602

ARTER Olivier : Unternehmensnachfolge mittels Unternehmensstiftung, Einbezug der Familie (2. Teil) EXPERT FOCUS 2018/9, 723

ARTER Olivier : Das neue Finanzinstitutgesetz, Auswirkungen auf die Tätigkeit als Trustee, EXPERT FOCUS 9/2018, 709

CRETI Sibilla: Trust, fondation et patrimoine artistique, aspects de droit fiscal, l'Expert-comptable suisse, 2003/10, 228

CRETI Sibilla: Vers une imposition des successions harmonisée au niveau européen ? La Suisse, un modèle pour l'Europe?, l'Expert-comptable suisse, 2013/4, 222

HAMM Michael / PETERS Stefanie : Die schweizerische Familienstiftung - ein Auslaufmodell? SUCCESSIO 3/08, 248

HUBER Giedre Lideikyte : Philanthropy and taxation, Swiss legal framework and reform perspectives, EXPERT FOCUS 3/2018, 209

KOELE Ineke A. : The Dutch private foundations in comparison with trusts; for the same purpose but rather different, Trust & Trustees 1/2016, 140

SELECTED BIBLIOGRAPHY

KRATZ-ULMER Aline: Ein philanthropischer bzw. gemeinnütziger Trust für die Schweiz ? Gegenüberstellung zweier Rechtsinstitute verschiedener Rechtsordnungen, EXPERT FOCUS 3/2018, 199

OPEL Andrea : Steuerliche Behandlung von Familienstiftungen, Stiftern und Begünstigten – in nationalen und internationalen Verhältnissen unter Einbezug des liechtensteinischen Stiftungsrecht, Diss. Univ. Basel, 2008

PALTZER Edgar H. / SCHMITZ Patrick, Switzerland : Are charitable trusts an alternative to charitable foundations? Trust & Trustees Vol. 14, n° 5, June 2008, 357

PETER Natalie : Introduction of a trust law in Switzerland, Trust & Trustees 6/2019, 578

REICH M. / SIMONEK M. : Die Begünstigung an einer Familienunterhaltsstiftung im Vermögenssteuerrecht, AJP/PJA 8/2004, 995

SPRECHER Thomas : Der Stifter im Erbrecht – der Erblasser im Stiftungsrecht, Schweizerische Juristen Zeitung (SJZ) 114 (2018) Nr. 23, 541

SPRECHER Thomas : Braucht die Schweiz ein neues Vehikel zur privatnützigen Vermögensperpetuierung ? Schriften zum Stiftungsrecht, 1/2010, 181

THEVENOZ Luc : Propositions pour un trust suisse, SZW / RSDA 2/2018, 99

ZEITER Alexandra : Neues zur Unterhaltsstiftung, (SJZ) 97 (2001), 451

ZEITER Alexandra : Errichtung einer Unternehmensstiftung, Attraktive Option in der Nachlassplanung, Der Schweizer Treuhänder 2010/04, 841

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