The Swiss-American Succession

Tina Wüstemann
Daniel Bader

English translation of article published in successio 2/2013, page 161, updated version of 2 February 2018

This article is based on the speech of Tina Wüstemann regarding the Swiss-American Succession of 30 August 2012 at the 7. Schweizerischen Erbrechtstag in Lucerne. The authors thank Mr. Basil Zirinis, Partner, Sullivan Cromwell LLP, New York, Ms. Elizabeth Viole and Samuel Roth, Associates, Sullivan Cromwell LLP, New York, for the review of the manuscript concerning US laws.

BÄR & KARRER

BÄR & KARRER AG
Brandschenkestrasse 90
8027 Zurich - Switzerland
T: +41 58 261 50 00
F: +41 58 261 50 01

www.baerkarrer.ch

Zurich, February 2018

The Swiss-American Succession

Tina Wüstemann
Daniel Bader

English translation of article published in successio 2/2013, page 161, updated version of 2 February 2018

This article is based on the speech of Tina Wüstemann regarding the Swiss-American Succession of 30 August 2012 at the 7. Schweizerischen Erbrechtstag in Lucerne. The authors thank Mr. **Basil Zirinis**, Partner, Sullivan Cromwell LLP, New York, Ms. Elizabeth Viole and Samuel Roth, Associates, Sullivan Cromwell LLP, New York, for the review of the manuscript concerning US laws.

Bär & Karrer

Contents

I Introduction

The US is currently the second most important trade partner of Switzerland and the most important investment location for Swiss companies. Moreover, offices of American companies located in Switzerland contribute considerably to Swiss prosperity[1]. This is one of the reasons why, according to the statistics on foreigners of the Federal Office of Migration, 17,648 US citizens (other than dual citizens) were permanent residents of Switzerland as of November 2015[2]. It is estimated that around 100,000 Swiss-American dual citizens live in Switzerland. At the same time, most Swiss citizens who live outside of Europe reside in the US. The number of Swiss citizens living in the US amounted to 78,696 as of the end of 2014[3].

In the context of Swiss-American succession, US tax and succession law must be considered in addition to Swiss law. This arises, for example, when counseling American citizens with residence in Switzerland or Swiss citizens who own US real estate or US securities. There is a considerable potential for conflict when it comes to succession planning because the Swiss and US succession and tax laws are organized differently and are not compatible in all aspects. In international succession matters between the US and Switzerland it is also important to consider the Swiss-American treaty of friendship, commerce and extradition of 25 November 1850 (subsequently "Treaty")[4]. Articles V and VI of the Treaty which address conflict of law issues are particularly significant.

Before dealing in detail with the handling of Swiss-American estates, the principles of US matrimonial property and succession law must be examined in order to understand the problems arising in connection with such estates. Specific references to US law refer to the state of New York.

II Principles of US Matrimonial Property and Succession Law

1 General

There is no uniform US matrimonial property and succession law. Each of the 50 federal states has its own conflict of law rules and substantive matrimonial property and succession law. Attempts to comprehensively harmonize the private law of the federal states by way of Model Laws such as the *Restatements*[5] and the *Uniform Probate Code*, which were recommended to the individual states for adoption and for the transformation of their legislation, have remained widely unsuccessful. The *Restatements* have influenced the succession laws

1 Economiesuisse, treaty with the US important for economy, press release of 26 April 2010.
2 Number of permanent foreign citizens, end of November 2015, Federal Office of Migration.
3 58,201 of which were dual citizens. 2014 statistic of Swiss living abroad, Federal Department of Foreign Affairs, Bern.
4 SR 0.142.113.361, entered into force on 8 November 1855 (The French and English text of the treaty is relevant).
5 The relevant *Restatements* are *the Restatement (Second) of Conflict of Laws* and *Restatement (Third) of Property: Wills and Other Donative Transfers.*

of certain states and some states have at least adopted parts of the *Uniform Probate Code*[6].

US succession law – which derives from British succession law (*common law*) – differs fundamentally from continental European law which is based on the Roman judicial system[7]. Each state distinguishes between *succession* (substantive succession law) and *administration* (formal handling of an estate). Thereby, the administrator collects the estate, pays the debt of the decedent and distributes the balance of the assets to the heirs. If a will exists, the probate court examines the formal validity of such will in a *probate* proceeding before it takes effect[8]. While *administration* is handled similarly in most states, substantive succession law is organized very differently across the states[9]. In New York, the substantive succession law is found in the *Estates, Powers and Trusts Law* (E.P.T.L.) and the provisions on the formal handling of the succession (*probate and administration*) are contained in the *Surrogate's Court Procedure Act* (SCPA). Conflict of law provisions can be found in both acts.

The continental European succession law follows the principle of universal succession, according to which the estate passes immediately to the heirs. US law, by contrast, follows the principle of special succession. The estate is divided into immovable property and movable property, the latter being transferred to an administrator, the *personal representative*, who is under judicial supervision and responsible for payment of the decedent's debt and distribution of the estate assets[10]. The immovable property of the decedent, however, descends directly to the heirs, but may be under the care of the administrator under certain circumstances[11].

In contrast to Switzerland, which follows the principle of unity of the estate, US law provides different legal frameworks for movable and immovable property. The succession rules are determined according to *lex rei sitae* for immovable property, while movable property is subject to the law of the last domicile of the decedent, which leads to a scission of the estate[12].

2 Marital Property Law in the US

In the US, there are two types of matrimonial property regimes: (i) common law and (ii) community property. Nine states[13] have adopted a community prop-

6 Uniform Law Commission: http://uniformlaws.org/LegislativeFactSheet.aspx?title=Probate Code, last visited 5 January 2016.
7 The judicial system of the state of Louisiana, however, is based on Napoleon's *code civil* due to the influence in colonial days.
8 MARKUS FREY, US-Amerikanische Grundstücke in einem schweizerischen Nachlass, Diss. Zurich 1986, 68f.
9 G.WARREN WHITAKER in: International Succession, 3rd edition, Oxford University Press, UK 2010, N 50.01.
10 HANS RAINER KÜNZLE, Der Willensvollstrecker im schweizerischen und US-amerikanischen Recht, Zurich 2000, 49.
11 MURAD FERID/KARL FIRSCHING, Internationales Erbrecht, Vol. 8, Schweiz, N 69; Frey, (Fn. 8),79.
12 FREY, (Fn. 8), 48, 51 et seq.; FERID/FIRSCHING, (Fn. 11), N 38, N 40.
13 The *community property*-states are: Arizona, California, New Mexico, Idaho, Louisiana, Nevada, Wisconsin, Texas and Washington.

erty regime which originates from the Spanish-French influence in the colonial period. There are many similarities across the nine states and their provisions resemble those of the Swiss community property regime[14].

The remaining states are common law states. As the surviving spouse would not otherwise have any automatic claim to the decedent's property in case of death, the older laws of the common law states provided certain rights to use immovable assets for the protection of the surviving spouse (e.g., dower and curtesy)[15]. Today most common law states, including New York, provide for a statutory forced share for the surviving spouse which is called the "elective share"[16] (see chapter II.3.2 below). In New York, the common law property regime is only applicable in the case of death and not in case of divorce[17]. Other states also make the distinction between death and divorce when it comes to the division of matrimonial property, therefore the local legislation should be considered.

If spouses change their residence from a common law state to a community property state or vice versa, the applicable law for real property remains the law of the location of the property (*lex rei sitae*)[18]. If the spouses own real property in a community property state, this property is subject to the community property regime even if the rest of the property is subject to the property regime of the new domicile[19].

Personal property acquired prior to the change of domicile remains subject to the property regime of the former domicile. If the spouses moved from a community property state to a common law state, each spouse is entitled to half of the assets that were part of the community property until the change of domicile. The assets acquired after the change of domicile are subject to the common law property regime. In the reverse case, each spouse is entitled to his/her own property which he/she owned prior to the change of residence and property acquired after the change of domicile will be community property[20]. These rules are also generally decisive for spouses who move to the US from a foreign state, for example Switzerland, and vice versa[21].

Generally, community property states as well as common law states allow spouses to determine the ownership of their separate and matrimonial property in a marriage contract entered into either before or after the marriage[22]. If and under what conditions foreign marriage contracts are recognized in the US is subject to the legislation of the respective US state. In the state of New York,

14 Cf. EUGENE SCLOES/PETER HAY, Conflict of Laws, 2nd edition, St. Paul Minn., 1992, § 14.3; FERID/FIRSCHING, (Fn. 11), N 90
15 SCOLES/HAY, (Fn. 14), § 14.2.
16 EPTL §5-1.1.
17 SCOLES/HAY, (Fn. 14), § 14.4.
18 SCOLES/HAY, (Fn. 14), §14.6.
19 SABINE PEGORARO-MEIER, Die Abwicklung des Nachlasses im Verhältnis Schweiz-USA, Diss. Basel, 1992, 6.
20 SCOLES/HAY, (Fn. 14), § 14.4 et seq., § 14.9.
21 PEGORARO-MEIER, (Fn. 19), 7.
22 SCOLES/HAY, (Fn. 14), § 14.15.

foreign marriage contracts are generally recognized[23], whereby the independent representation of spouses and the disclosure of the financial situations is not mandatory but recommended when the contract is concluded.

3 US American Succession Law

3.1 Conflicts of Law

As mentioned above, each of the 50 states applies its own conflict of law rules in relation to succession; however, most US states do not make a distinction between out-of-state and out-of-country cases. All states follow the principle of scission of the estate for intestate as well as testamentary succession. As a general rule, the *lex rei sitae* is applicable to immovable assets. For movables, the domicile of the decedent at the time of death is generally decisive (*lex domicilii*)[24].

States have varied formal requirements for a valid will. The ordinary form is the attested will or witnessed will, which requires a written form (e.g., typewriter) and the presence of two witnesses, no involvement of a notary being required[25]. Oral or handwritten wills without witness statements are admissible in exceptional cases only. Consistent with the Hague convention of 1961, the recognition of foreign wills follows the *favor validitatis* principle. Under the legislation of New York, a will executed in another state is recognized if it conforms with the formal requirements of New York, of the place where it was executed, or of the domicile of the decedent at the time of execution or the time of death. These rules apply both for worldwide assets of the decedent with last domicile in New York as well as for New York real estate of a decedent with last domicile outside of New York[26].

3.2 Succession

The intestate shares of the heirs differ among the states. In New York, the surviving spouse is entitled to USD 50,000 plus half of the remaining estate if the decedent has children[27]. If there is no surviving issue, the surviving spouse receives the entire estate. If there are descendants from different generations who survive the decedent, each surviving descendant as well as the children of a predeceased as a whole receive the same share from the remaining estate (distribution by representation). If a decedent has three children and one of them has predeceased leaving behind two children (grandchildren of the decedent), each child of the decedent receives one-third and the grandchildren one-sixth each[28].

23 Cf. JOHN TEITLER/NICHOLAS LOBENTHAL/PAUL GETZELS in: Family Law, Jurisdictional Comparisons, 1. edition, London 2011, 450.
24 FERID/FIRSCHING, (Fn. 11), N 38, N 40.
25 GREGOR JOOS, Testamentsformen in der Schweiz und in den USA, Diss. Zürich 2001, 145 f., 164.
26 EPTL § 3-5.1; WHITAKER, (Fn. 9), N 50.108.
27 EPTL § 4.1.1(a)(1).
28 See EPTL § 4-1.1. and EPTL § 1-2.16.

Contrary to Swiss law which foresees forced heirship rights for the surviving spouse, the children and the parents of the decedent, inheritance laws of practically all US states provide for extensive testamentary freedom of the decedent. Often the US courts do not recognize the forced heirship rights of the descendants arising under the laws of another jurisdiction because these rights would contradict the principle of testamentary freedom[29]. Only the surviving spouse is entitled to a statutory minimum amount from the estate. The descendants, however, are not entitled to a forced share (except in the state of Louisiana whose laws are heavily influenced by French law)[30]. So-called family allowances restrict the testamentary freedom of the decedent. The probate court may order a monthly cash amount as maintenance in favor of the surviving spouse and minor children and in addition allow the free use of certain estate assets, such as the family vehicle, furniture etc. (*exempt property*)[31]. The laws at the last domicile of the decedent determine the surviving spouse's minimum statutory share and maintenance for the minor children[32]. In New York, the surviving spouse is entitled to make a choice (*elective share*). The spouse may elect to receive what is provided for under the will or the greater of USD 50,000 and one-third of the estate[33]. The surviving spouse must make the election within six months after the issuance of the letters testamentary or letters of administration by the probate court. This right of election expires after two years following the death of the decedent at the latest[34]. The spouses may waive their right of election in writing[35].

In contrast to Swiss law, it is not general practice in the US to enter into inheritance contracts. Some states, however, allow that two parties contractually bind each other to make a will for the benefit of the other party or a third person (contract to make a will). These contracts are qualified as *inter vivos* acts[36]. In most states, neither formal testamentary requirements nor probate proceedings are required. If the decedent defaults on his contractual obligation by not making the will in accordance with the agreement, the other party may claim for damages against the estate. However, the laws of New York require that the claimant has given consideration during the decedent's lifetime in return for benefitting from the will[37]. Most states allow for mutual wills and joint wills, whereby, depending on the state, the unilateral revocation of mutual wills and joint wills may not be permitted. A New York court would probably verify if a Swiss inheritance agreement is in line with the formal requirements of a will and generally recognize such agreement subject to the possibility of unilateral revocation[38].

29 46 California Law. Rev. 232; in *re Estate of Renard* regarding French forced heirship rights of descendant, 108 Misc.2d 31, 437 N.Y.S.2d 860.
30 FREY, (Fn. 8), 64; WHITAKER (Fn. 9), § 50.02.
31 DENNIS HOWER, Wills, trusts, and estate administration, Delmar, NY, 2012, 137, 138.
32 SCOLES/HAY, (Fn. 14), 821, in *re Estate of Clark*, 21 N.Y.2d 478, 288 N.Y.S.2d 993, 236 N.E.2d 152 (1968).
33 EPTL § 5-1.1-A(a)(2).
34 WHITAKER, (Fn. 9), N 50.24 f.; EPTL § 5-1.1-A(d).
35 EPTL § 5-1.1-A(e)(2).
36 FERID/FIRSCHING, (Fn. 11), N 232; PEGORARO-MEIER (Fn. 19), 30.
37 For example, the decedent promises to his niece that he will give her real estate property under his will if she takes care of the testator until death and until his/her minor children reach adulthood. The niece fulfills her obligations. The testator dies without having made the promised statement in the will. The niece cannot make an inheritance claim before the probate court, but needs to enforce the promise based on her contractual entitlement; cf. EPTL § 13-2.1.
38 Cf. FERID/FIRSCHING, (Fn. 11), N 49b.

Generally, US state laws allow the decedent to make a choice of law in favor of that state[39]. New York allows persons domiciled outside of the state to elect for their estate assets located in New York to be governed by the laws of New York[40]. If the decedent intended to circumvent forced heirship rights, New York courts will uphold the testamentary dispositions if the relevant forced heirship rights are not recognized under New York law, e.g., forced heirship rights of descendants or parents of the decedent. However, the court may disregard the testamentary disposition if it circumvents rights of the surviving spouse which correspond to the New York elective share[41]. In any event, the *lex rei sitae* governs with regard to immovable estate assets. The local court where real property of the decedent is located may not respect forced heirship rights of foreign heirs if the respective state does not have equivalent rights under its laws.

A typical example is the decision of the New York Surrogate's Court of 1981, known as the matter of Renard[42]. The decedent was a French citizen who lived in New York for thirty years and obtained US citizenship. A few years prior to her death, the decedent moved to France where she died in 1979. Her only son who lived in California was the sole statutory heir. The decedent executed a will in France whereby she chose New York law to apply to her assets (USD 300,000 in a bank account) located in New York. She deprived her son of this bank account and disposed of it differently. The son contested the "New York will" by stating that it would violate French forced heirship rights. The New York Surrogate's Court and the Court of Appeals approved the will by stating that foreign forced heirship rights of foreign heirs need only be respected if there is an equivalent provision in New York inheritance law (e.g., regarding the surviving spouse). This was not the case because descendants do not have forced heirship rights under New York law.

4 Administration of the Estate in the US

While succession is regulated differently in each state, the formal administration of an estate is similar in all states. Each state is competent for the estate administration of assets located in its territory and follows its own procedural rules (*lex fori*).
There are fundamental differences between Swiss and US laws regarding estate administration[43]: US law generally provides only for direct transfer of the estate with regard to immovable assets. The movable assets are generally transferred to the personal representative by law. The personal representative collects estate assets under court supervision, settles the debts and distributes the remainder to the heirs or to the principal legal representative at the

39 Cf. also SCOLES/HAY, (Fn. 14), § 20.8, § 20.13 with more details.
40 EPTL § 3-5.1(h).
41 PEGORARO-MEIER, (Fn. 19), 122.
42 108 Misc. 2nd 31, 437 N.Y.S.2nd 860 [Surr. Ct. 1981].
43 This paper only states the basic principles of estate administration and does not deal with special proceedings such as small estate settlement or summary administration.

last domicile of the decedent (see chapter II.4.1 below)[44]. The personal representative is called executor if he was named in the will; in all other cases, the personal representative is called administrator. The probate court issues letters of administration (if issued to the administrator) or letters testamentary (if issued to the executor). These letters are used as proof of legal authority when dealing with third parties.

4.1 Administration

The probate court issues letters of administration to the administrator in case of intestacy. The administrator is responsible for the devolution of the estate[45]. The laws of each state determine the priority of certain individuals to be appointed as administrator[46]. The tasks of the executor and the administrator are identical to a large extent[47]. Briefly summarized, these tasks include the collection of estate assets, making an inventory, settlement of creditors' claims, payment of all state and federal taxes and distribution of the remainder of the estate to the heirs and other beneficiaries[48]. Administration is generally governed by US procedural laws and many issues are considered to be procedural while Swiss law considers them to be part of substantive succession, such as the rights and duties of the executor or claims of creditors. A US court in these cases will apply its internal procedural law (*lex fori*)[49].

The laws of all states make a distinction between domiciliary administration and ancillary administration. The domiciliary administration consists of the principal estate proceedings at the last domicile of the decedent. The rights of the personal representative appointed by the domiciliary court are limited to the movable assets and immovable located in the state of the last domicile. Separate administration proceedings are necessary if immovable estate assets are located outside of the domiciliary state (ancillary administration)[50]. Ancillary administration may also be needed in cases where the decedent was last domiciled outside of the US and left assets in the US (e.g., a US bank account)[51].

4.2 Probate Proceedings

Probate proceedings must be initiated if the decedent leaves a will. The competent probate court decides whether the submitted document is a will and if the formal requirements have been met[52]. The probate court further determines whether there is testamentary capacity and takes therefore not only procedural

44 FREY, (Fn. 8), 71; FERID/FIRSCHING, (Fn. 11), N 68, N 242; KÜNZLE (Fn. 10), 48.
45 FERID/FIRSCHING, (Fn. 11), N 238, N 256; WHITAKER, (Fn. 9), N 50.42.
46 SCPA 1001 is relevant as regards New York.
47 FERID/FIRSCHING, (Fn. 11), N 274.
48 HOWER, (Fn. 31), 408; Frey (Fn. 8), 71.
49 FERID/FIRSCHING, (Fn. 11), N 55b.
50 Local creditors shall get the possibility to make their claims in front of local courts under local laws; Hower, (Fn. 31), 85, 88.
51 FERID/FIRSCHING, (Fn.11), N 263.
52 HOWER, (Fn. 31), 6; SCOLES/HAY, (Fn. 14), § 22.1.

aspects into consideration but also substantive aspects[53]. The probate court usually approves the person named as executor in the will and appoints him as personal representative of the estate. At the end of the probate proceedings, the probate court issues the probate decree and also issues the letters testamentary to the executor. However, separate proceedings are necessary for construction of the will and questions regarding the substantive validity of the will (e.g., violation of the forced share of the surviving spouse) whereby the probate court may be competent depending on the state[54].

If a decedent with last domicile outside of the US leaves a will and estate assets in the US, such assets can only be claimed if there is a probate decree regarding the will. If this is the case, the court issues ancillary letters to the foreign executor in order to deal with third parties (e.g., banks, etc.). Generally, a foreign probate decree which has been issued by the competent court at the last domicile of the decedent can be used for all movable estate assets irrespective of their location. A foreign probate decree is only valid for immovable property if permitted by local law[55]. The laws of each state need to be examined to see what is required for recognition of the foreign probate by the respective state.

4.3 The Probate Court

The probate courts in the US become active upon request. In New York, the Surrogate's Court[56] is competent regarding practically all estate matters. These include issuance of the probate decree, authorization and supervision of the administration, claims regarding the formal and substantive validity of wills, construction of the wills and claims against actions of the administrator, etc. The probate court applies its own procedural law regarding formal proceedings (*lex fori*). As regards substantive aspects, the court applies the laws of the last domicile of the decedent for movable assets and the laws where the property is located for immovable assets (cf. chapter II.3.1 supra)[57].

III Swiss-American Treaty of 25 November 1850

1 General

In international estate matters concerning the US and Switzerland, the Swiss-American Treaty of Friendship, Commerce and Extradition of 25 November 1850[58] should be observed. It is the oldest treaty of Switzerland still in force[59].

53 FREY, (Fn. 8), 68.
54 FERID/FIRSCHING, (Fn. 11), N 38k, N 238 et seq. In New York, the Surrogate's Court is competent: SCPA § 1420.
55 WHITAKER, (Fn. 9), N 50.92 f.
56 SCPA 205, 206.
57 WHITAKER, (Fn. 9), N 50.42
58 SR 0.142.113.361.
59 FREY, (Fn. 8), 106.
60 SR 291.
58 SR 0.142.113.361.
59 FREY, (Fn. 8), 106.

For Swiss-American succession only articles V and VI are of importance. According to art. 1 para. 2 of the Swiss private international law[60] (subsequently referred to as "PIL"), international treaties clearly preempt the regulations of the PIL. The Swiss-American Treaty of 1850, particularly art. V and VI, contain conflict-of-law rules that preempt the regulations of the PIL[61]. Art. V and art. VI of the treaty regulate the jurisdiction as well as the applicable law for Swiss-American succession[62]. The treaty is applied differently in Switzerland and the US and has in some cases been completely ignored by US courts, which can lead to conflicts while handling estate matters[63]. There is a lack of recent decisions regarding the treaty in both jurisdictions.

The treaty generally applies when a Swiss citizen with last domicile in the US or an American citizen with last domicile in Switzerland dies. The same is true for dual citizens[64]. The decedent must at least have one of the two citizenships[65]. In addition, the treaty is only applicable in matters of conflicts between the heirs and is irrelevant to claims by third parties[66]. The Swiss federal court has ruled that the treaty not only applies to inheritance disputes between citizens of different countries, but also between citizens of the same country, as long as the dispute concerns estate matters in the other contracting state[67]. It is not entirely clear from the relevant doctrine and case law which claims fall under the treaty regulations. If the interpretation of treaties during the same period of time is used as an analogy, as for example the Swiss-Italian treaty of 1869, then abatement suits, invalidity claims, partition claims as well as inheritance claims and claims regarding bequests should fall under the regulations of this treaty[68]. *Succession* and *administration* must be distinguished when tying inheritance matters in the US as well as in Switzerland. The treaty, however, does not distinguish between succession and administration. Due to the lack of explicit rules in the treaty, the relevant court must determine if it is applicable for succession and administration (cf. chapter III.2 below)[69].

2 Interpretation of the Treaty

2.1 Swiss Interpretation

Art. VI of the treaty states as follows:
"Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the Judges of the country in which the property is situated."[70]

70 SR 0.142.113.361.
60 SR 291.
61 Cf. ANTON K. SCHNYDER/MANUEL LIATOWITSCH, Internationales Privat- und Zivilverfahrensrecht, 3rd edition, Zurich/Basel/Geneva, N 69.
62 BSK IPRG-SCHNYDER/LIATOWITSCH, Art. 86 N 25 with reference to BGE 96 II 79 E. 7.
63 FREY, (Fn. 8), 111 f.
64 VPB 47 (1982) Nr. 9 E. 3; BGE 24 I 312.
65 VPB 46 (1982) Nr. 48 E. 1.; Cf. M. NUSSBAUM, Amerikanisch-schweizerisches Privatrecht, in: Abhandlungen zum schweizerischen Recht, Issue 336, Bern 1959, 29.
66 BGE 8 770 E. 1.
67 BGE 9 507 E. 3.
68 Cf. TINA WÜSTEMANN/LARISSA MAROLDA MARTINEZ, Der schweizerisch-italienische Erbfall, successio 1/11, 64.
69 MARTIN SCHÖN, Die schweizerische internationale Zuständigkeit in Sachen der freiwilligen Gerichtsbarkeit, Diss. Freiburg, 1974, 79.

A literal interpretation of this clause would mean that the actual location of the individual estate assets would be taken into consideration for the place of jurisdiction and the applicable law, which would lead to a fragmentation of the estate. The Swiss federal court as well as the predominant doctrine rightly assume that art. VI should be interpreted such that the movable property as a whole after the principle of *mobilia ossibus inhaerent* should be subject to the law and the jurisdiction of the court at the last domicile of the decedent (*lex domicilii*). The immovable property should be subject to the law and jurisdiction of the court where the property is located (*lex rei sitae*)[71]. This provision of this treaty is inconsistent with the typical connecting rules of the Swiss PIL, which can lead to legal uncertainties in matters of immovable property, for example. It is not clear whether art. VI is also valid for immovable property in third countries as is the case with the Swiss-French treaty of 15 July 1869[72]. If a Swiss decedent with last domicile in the US leaves immovable property in a third country, the relevant American conflict of law rule would also lead to the application of the *lex rei sitae*. If a US decedent with last domicile in Switzerland leaves immovable property in third countries, it should be generally assumed that art. VI is applicable due to the historical development of the treaty[73]. However, certain doctrines state that the PIL conflict of law rules should apply in determining the applicable law and jurisdiction over immovable property located in third countries. Thus, a scission would only occur if the foreign conflict of law rule explicitly demands it. The uniform treatment of the estate including immovable property in third countries may be more advantageous, especially for heirs with a compulsory portion, than a scission according to art. VI of the treaty[74].

As already illustrated, there are fundamental differences between US and Swiss law with regard to estate administration. To bridge a gap between these already existing differences in 1850, the following was added to art. V of the Swiss-American treaty:

"In the absence of such heirs, or other successors, the same care shall be taken by the authorities, for the preservation of the property, that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same."[75]

Art. V is of particular importance, as it provides protective measures among other things. The provision corresponds largely with the purpose of art. 89 PIL, whereby the necessary measures for the protection and conservation of assets are to be taken at their location. Further, art. V was intended to maximize the freedom of disposition for the citizens of both states[76].

In an old decision, the Swiss Federal Court excluded administration from the scope of the treaty[77]. In a later decision, however, the Federal Department

71 BGE 96 II 90; BGE 43 I BGE 24 I 319 E. 7 mit Hinweisen, BGE 43 I 86/87, BGE 81 II 325; Frey, (Fn. 8), 109.
72 "Vertrag zwischen der Schweiz und Frankreich über den Gerichtsstand und die Vollziehung von Urteilen in Zivilsachen", BS 12, 347 et seq.
73 MURAD FERID/KARL FIRSCHING, Internationales Erbrecht, Vol. 7, Switzerland, N 40.
74 RICHARD GASSMANN, Der US-amerikanisch-schweizerische Erbfall, St. Galler Erbrechtstag 2012, Zurich, 20 November 2012.
75 SR 0.142.113.361.
76 FRANK VISCHER, Die erbrechtliche professio iuris und der schweizerisch-amerikanische Staatsvertrag von 1850, in: Schweizerisches Jahrbuch für internationales Recht, Band 22, 1965, 73.
77 BGE 8 770 E. 1 f.; MARTIN SCHÖN, (Fn. 69), 80.

of Justice stated, in the case of a Swiss citizen with last domicile in the US, that the Swiss interpretation of art. VI of the treaty shall also be applied to jurisdiction over administration[78]. In connection with the Swiss-Italian treaty of 22 July 1868[79], which is applicable in Swiss-Italian inheritance matters, the Federal Court stated that the treaty does not address the question of jurisdiction regarding administration of the estate. Thus, the regulations of the Swiss PIL (Art. 86 et seq. PIL) are applicable[80]. Since the treaty between the US and Switzerland does also not explicitly address administration, the same reasoning could apply to exclude administration from the treaty's scope (apart from the protective measures covered in art. V of the treaty). This would harmonize the two legal systems. Accordingly, the estate proceedings in Switzerland should only be opened if an American decedent had his last domicile in Switzerland or insofar as American authorities do not concern themselves with the estates of Swiss citizens living abroad (Art. 87 para. 1 and art. 88 PIL). The PIL defines "administration" to include the formal handling of the inheritance, particularly the opening of the inheritance, formal aspects pertaining to the issuing of inheritance certificates[81], waiver of the inheritance, public inventory, official liquidation, the administration of estates as well as formal aspects of executorship[82].

2.2 American Interpretation

Only a few American authors have written on the scope and interpretation of the treaty[83]. Only the American author Nussbaum has looked into the treaty intensively and interpreted it in accordance with the Swiss view[84]. However, there is a lack of more recent studies. Moreover, there have only been a few US court decisions which have dealt in detail with the treaty and its scope and there is a lack of more recent decisions here as well. A consistent case law in the US cannot be discerned.

Insofar as the administration proceedings are concerned, US courts tie the jurisdiction and the applicable law for administration to the actual location of the assets of the estate (movable and immovable). The applicable procedural law is generally based on *lex fori*[85]. This principle is followed in all of the 50 US States and has applied in the known Swiss-American estate matters, without any American probate court ever referring to the treaty of 1850 for justification. Thus, there is a homewards drift of the US courts to the procedural law of the forum, regardless of whether it concerns movable property or immovable property[86].

78 VPB 42 (1978) Nr. 13.
79 SR. 0.142.144.541.
80 BGE 120 II 293 E. 2.
81 The issuance of an inheritance certificate itself is seen as a formal act that falls under administration. The conditions for the issuance and the effects of the inheritance certificate however fall under succession.
82 BSK IPRG-SCHNYDER/LIATOWITSCH, Art. 92 N 8.
83 Cf. NIKLAUS SCHIESS, Die Auslegung von Art. VI des schweizerisch-amerikanischen Staatsvertrages von 1850, in: Schweizerisches Jahrbuch für internationales Recht, Vol. 32, 1976, 60.
84 ARTHUR NUSSBAUM, (Fn. 65), 29.
85 FERID/FIRSCHING, (Fn. 11), 36b.
86 PEGORARO-MEIER, (Fn. 19), 180, 188.

However, US courts have taken a mixed stance regarding the treaty's application to succession (substantive inheritance law). The treaty was completely ignored in many cases by US courts and they applied their own conflict of law rules instead. Examples of these decisions are *In re Barandon's Estate*[87], *In re Hug's Estate*[88], *In re Utassis' Will*[89] as well as *In re Batsholt's Estate*[90]. The conflict of law rules coincide largely in all of the US States (immovable property: *lex rei sitae*, movable property: The law applicable at last domicile of the decedent) and correspond to the Swiss interpretation of art. VI. In the well-known decision *In re Schneider's Estate*[91] the New York *Surrogate's Court* stated that the treaty only recites general conflict of law principles and that the conflict of law rules of the US state in question are still applicable[92].

By contrast, a few years later the same court in *In re Prince's Estate*[93], stated that treaties between the US and other countries preempt the respective state laws. In 1966, a decision was made in *In re Rougeron's Estate*[94], which corresponds to the Swiss interpretation of the treaty. The decedent with French and US citizenship and last domicile in Switzerland had, according to his will, left his entire estate to his wife. The movable assets of the decedent, which consisted of cash and corporate stocks located in Switzerland, were brought to New York after his death. The decedent's illegitimate son claimed his compulsory portion under Swiss law. The New York Court of Appeals decided in accordance with the Swiss interpretation of art. VI, that for the movable assets the law applicable at the last domicile is decisive and thus the Swiss compulsory portion must be granted[95]. This decision is from 1966 and no recent decision concerning the treaty can be found.

Insofar as US court decisions have interpreted the treaty, a tendency towards the Swiss position can be observed. Albeit US courts reach the same result when disregarding the treaty altogether, since, as mentioned before, their conflict of law rules concur with the Swiss interpretation of art. VI. The fact

87 41 Misc. 380, 84 N.Y.S. 937 (1903).
88 201 Misc. 709, 107 N.Y.S.2d 664 (1949).
89 15 N.Y.2d 436, 261 N.Y.S. 2d 4 (1966).
90 188 Misc. 867, 66 N.Y.S.2d 358 (1946).
91 198 Misc. 1017, 96 N.Y.S.2d 652 (1950).
92 This court decision was about a Swiss-American dual citizen with last domicile in New York. The decedent disposed of his Swiss real estate in his will and in doing so he violated Swiss forced heirship rights. The widow and executrix sold the property und transferred the sales profits to New York. While after the Swiss interpretation of art. VI the treaty precedes other conflict of law rules, the New York court only saw a primary reference to *lex situs* in art. VI. For that reason not only the internal laws of New York are applicable but also its conflict of law rules with regard to Switzerland. Furthermore, the New York court applied the Swiss conflict of law rules – due to Swiss real estate – wrongly, by mistakenly referring to a *renvoi* of Swiss law or rather a redirection to New York law. Since the New York Court was under the notion that the New York laws of domicile of the decedent were applicable and not the *lex rei sitae*, the decendants lost their Swiss forced heirship rights.
93 In re Estate of Prince 49 Misc. 2d 219, 267 N.Y.S. 2d 138 (1964) with further references; SCOLES/HAY, (Fn. 14), §3.57. This court decision was about a US citizen with last domicile in Switzerland, who left movable assets in New York. The court granted that the treaty precedes the conflict of law rules of the respective US states. In addition, the court declared that the treaty only applies to those citizens that are domiciled in the other contracting state and assets that are located in that state. Therefore, the New York court refused to apply the treaty to the estate located in New York of a US citizen with last domicile in Switzerland and only applied New York law.
94 *In re Rougeron's Estate*, 17 N.Y.S.2d 264, 217 N.E.2d 639 (1966); cf. SCOLES/HAY, (Fn. 14), §3.57.
95 However, the court dismissed the claim of the heir having forced heirship rights arguing that the heir took part in the previous probate proceedings and had not appealed the respective decision of the Surrogate's Court in which the court decided that New York law would be applicable.

that US courts have often completely ignored the treaty is thus not posing any real problems.

US decisions or doctrine regarding art. V could not be found. Indisputably, from the US point of view estate administration does not fall under art. V and thus administration is not covered by the treaty (other than providing for safety measures at the location of the estate assets). Without referring to the treaty, US probate courts have considered themselves to be responsible for the order and enforcement of administration of estate assets (movable and immovable property) located in their state territory. Thereby they apply their own procedural law (*lex fori*).

US law takes a broader view of the definition of "administration" than Swiss law does. It includes all aspects of estate administration (incl. executorship in testamentary succession) and the enforcement of creditors' claims. During probate proceedings, compliance with formal requirements, testamentary capacity of the decedent as well as possible absence of intent of the decedent are verified. In general, these are all questions which Swiss PIL subjects to succession. This can at times lead to conflicts in practice (cf. chapter IV).

2.3 Admissibility of Professio Iuris

2.3.1 US Citizen with Domicile in Switzerland

The treaty does not address the question of *professio iuris*. US courts have repeatedly allowed for *professio iuris* for US citizens with last domicile in Switzerland[96]. While some cantonal courts had decided against the admissibility of *professio iuris* before the PIL came into effect[97], art. VI should be construed according to the predominant doctrine[98] and on the basis of art. 90 para. 2 PIL (decreed at a later time), American citizens have the right to make a choice of law applicable to their estates. The Swiss Federal Court has not yet commented on this topic; however, the Federal Department of Justice explicitly upheld the admissibility of a *professio iuris* in its decision of 17 January 1983[99].

From a Swiss perspective, due to lack of regulation in the treaty, nothing limits the applicability of art. 90 para. 2 PIL to a US decedent's estate, including Swiss real estate. A choice of law as in art. 90 para. 2 PIL does not affect the procedural law applicable to administration, but impacts the law applicable to succession only. However, *professio iuris* is not available to a Swiss-American dual citizen in order to maintain legal equality with a Swiss citizen without dual

96 *In re Estate of Prince* 49 Misc. 2d 219, 267 N.Y.S. 2d 138 (1964); in *re Estate Vischer* 53 Misc.2d.912, 280 N.Y.S.2d 49 (1967).
97 Decision of Cour de Justice de Genève of 4.11.1958 in Sem.Jud 1959, 589; Decision of the Tribunal Cantonal Vaudois of 15.11.1960 in JdT 1961 III 72.
98 Cf. VISCHER VISCHER (Fn. 76) 49 et seq.
99 VPB 47 (1983) Nr. 9 E. 5c.

citizenship[100]. The *professio iuris* must be made in a will or in an inheritance contract. At the same time, it is of particular importance that a choice of law in favor of "American inheritance law" can be invalid (since it is not clear which US state's law is applicable) and thus the *law of a specific US state* must be chosen. According to some parts of the Swiss doctrine and an older decision of the Geneva Cantonal Court, a US citizen's law of origin is determined by his last domicile in the US before moving to Switzerland[101]. However, more recent decisions do not exist and it is also unclear which law should be chosen if a US citizen has never lived in the US. According to the view of the authors, the decedent should at least have the right to choose the law of his state of origin. The *Place of Birth*, which is documented in the passport, could thereby be compared to the Swiss place of origin. The free choice of law in favor of any US state could turn out to be problematic, since that could not only circumvent the Swiss forced heirship rights but also the elective share of the surviving spouse[102].

2.3.2 Swiss Citizen with Domicile in the US

Art. 87 para. 2 PIL generally enables Swiss citizens living in the US to subject their entire estate or the estate located in Switzerland to the law and jurisdiction of the Swiss authority at their place of origin. The *professio iuris* is only granted to Swiss citizens living abroad insofar as the American authorities at the domicile agree to or rather accept the choice of law[103]. Generally, a choice of law in matters of succession is permitted in the US (cf. chapter II.3.2 supra)[104]. The US courts, however, will not acknowledge a Swiss choice of law and jurisdiction concerning real estate located in the US. In addition, US courts generally see themselves as solely responsible to conduct an administration for the movable assets (e.g., a US bank account) located in their territory[105]. From a US perspective, a Swiss court is not competent regarding movable property of a Swiss citizen domiciled in a US state, even if he elected for the Swiss court at the place of origin to have jurisdiction.

The *Surrogate's Court* of New York stated in the two older decisions of *re Healy's Will*[106] and *Cowan* v. *McVey*[107] that a decedent domiciled in New York could subject his movable property to a foreign law under certain conditions; the immovable property located in New York, however, is strictly subject to New York law. In regard to the movable property, the application of foreign law was granted, whereas the reason for the possibility of a choice of law was not

100 Botschaft, Ziff. 263.3.; VPB 47 (1983) Nr. 9 E. 6.
101 ZK-IPRG, HEINI, Art. 90 N 8 with more references.
102 RICHARD GASSMANN, Der US-amerikanisch-schweizerische Erbfall, St. Galler Erbrechtstag 2012, Zurich, 20 November 2012.
103 PEGORARO-MEIER, (Fn. 19), 159.
104 Restatement (Second) of Conflict of Laws, § 240, §264; EPTL § 3-5.1(h); *In re Estate of Prince*, 49 Misc. 2d 219, 267 N.Y.S.2d 138 (1964); *In re Estate Vischer*, 53 Misc. 2d 912, 280 N.Y.S.2d 49 (1967).
105 FERID/FIRSCHING (Fn. 11), N 67; PEGORARO-MEIER, (Fn. 19), 136.
106 125 N.Y.S. 2d 486 (1953).
107 40 Misc. 2d 932, 244 N.Y.S. 2d 271 (1963).

based on the citizenship of the decedent but on the circumstance that a large part of the movable assets were located in another state and the decedent had his domicile there earlier[108].

The question of whether from a US perspective all movable estate assets could be subjected to the Swiss law at the place of origin has not yet been answered. However, it would probably be allowed in the State of New York in light of the cases mentioned above, if the main assets of the Swiss citizen living abroad were located in Switzerland and if he was domiciled in Switzerland before moving to the US. However, it should be noted that the US states allow the decedent to dispose more freely of the estate assets than under Swiss inheritance law (especially in light of forced heirship rights). Therefore, a Swiss citizen with last domicile in the US will rarely subject his estate to Swiss law[109]. The authors have knowledge of a case in which the Swiss authorities at the place of origin affirmed the Swiss jurisdiction and the application of Swiss law for the estate (immovable and movable property) located in Switzerland, because the decedent with last domicile in the US was domiciled in Switzerland at the time of execution of the will. In addition, the will was penned in the German language and a Swiss executor was appointed for the Swiss estate. After taking all of the circumstances into consideration, the Swiss authorities at the place of origin decided to apply Swiss law, which the decedent did not have to state explicitly in her will.

IV The Swiss-American Succession in Particular

1 Estate of a US Citizen with Last Domicile in Switzerland

1.1 Intestacy

When an American citizen with last domicile in Switzerland passes away and leaves Swiss real property as well as movable assets in the US, then Switzerland's jurisdiction for administration proceedings collides with the US state's assertion of jurisdiction over property located there. An ancillary administration generally must be requested from the probate court of the respective US state, so that the heirs may receive the estate at that location. At the same time, the existence of domiciliary probate proceedings is generally required[110]. The US court then appoints an ancillary administrator, who delivers the balance of the movable estate property to the Swiss authorities, or directly to the heirs, once the creditors have been satisfied and the ancillary administration has come to a conclusion. New York law, however, permits a transfer of the movable assets located in New York to the foreign representative of the estate (e.g., a foreign administrator) without ancillary proceedings under certain

108 PEGORARO-MEIER, (Fn. 19), 186.
109 PEGORARO-MEIER, (Fn. 19), 186, 206.
110 SCOLES/HAY, (Fn. 14), § 22.7.; HOWER, (Fn. 31), 88.

circumstances (cf. chapter IV.3.1 below). With regard to Swiss real estate, New York law acknowledges that the Swiss courts are competent to initiate probate proceedings. The treaty determines the applicable succession rules, and it is the opinion of both states that Swiss law is decisive[111].

1.2 Testamentary Succession (Will)

When an American citizen with last domicile in Switzerland dies, and has stated in a will that all of his estate (incl. his Swiss real estate property) is subject to the law of the state of New York, for example, then the Swiss courts are competent to initiate the probate proceedings and handle all of the estate[112]. The choice of law in favor of New York law thus only applies to succession and not administration. Hence, the Swiss authorities at the domicile are also competent to probate the will or issue a certificate of executorship or inheritance certificate (with remark to *professio iuris* in favor of New York law)[113]. The American administration authorities will, however, generally not acknowledge the competence of Swiss courts in regard to movable assets (e.g., US bank accounts) located in the US, but will request an ancillary administration in which the will must be submitted to the American probate court for an ancillary probate. According to New York law, however, movable assets may be transferred to the foreign executor without a court order under certain circumstances (cf. chapter IV.3.1). In the state of New York there is a liberal code of practice when acknowledging foreign wills. Generally, the will is acknowledged if it is in written form and probate proceedings have been successfully initiated in the state of domicile[114]. Other US states might have stricter requirements and it is thus not impossible that a will executed under Swiss law will not be valid in the US, due to the fact that, for example, the respective state may not acknowledge the form of the will. It is verified during the probate proceedings if the decedent had testamentary capacity and if there was testamentary intent[115]. These are all questions that are subject to succession rules according to Swiss inheritance law; however, the law applied in US probate courts often depends on whether a bequest is of immovable or movable property[116]. The validity of bequests of real property is generally assessed using the *lex fori*, whereas the validity of bequests of personal property is commonly assessed under the law of the testator's domicile[117]. And, in ancillary probate cases, some states provide for

111 FERID/FIRSCHING, (Fn. 11), N 263 f.; PEGORARO-MEIER, (Fn. 19), 193 et seq.
112 Art. 90 Abs. 2 IPRG, EPTL 3-5.1(h).
113 PEGORARO-MEIER, (Fn. 19), 197 et seq., 163: "It makes sense to consider the administration to be extensive and to apply it in case of a *professio iuris* not only with regard to the formal handling of the estate in accordance with the laws at the place of origin but also with regard to the probate of the estate, the issuance of the heir's certificate, the liability of the heirs towards the creditors of the decedent as well as the acquisition of the estate by the heirs and legatees. In case the Swiss authorities are competent to probate, the principle of universal succession applies even if succession sets forth a different form of acquisition of the estate."
114 SCPA 1602.
115 HOWER (Fn. 31), 408; FERID/FIRSCHING (Fn. 11), N 239.
116 See Restatement (Second) of Conflict of Laws, §§ 239, 263; EPTL 3-5.1(b).
117 See id.

additional deference to the law of the domiciliary jurisdiction, even with respect to bequests of real property[118]. In other words, the ancillary court might apply Swiss law to the US real estate.

2 Estate of a Swiss Citizen with Last Domicile in the US

2.1 Intestacy

Under art. VI of the treaty, the succession law at the last domicile in the US of the decedent is applicable for movable property, and the *lex rei sitae* is applicable for immovable property; thus the laws of the American domicile or location of the estate assets (in case of US real estate) are applicable for the whole estate. In regard to administration, which does not fall under the treaty, there is a conflict of competence concerning the movable property located in Switzerland, due to the fact that the American probate courts are only competent to conduct the administration for estate assets that are located in their territory. Therefore, the American authorities at the domicile do not concern themselves with estate assets (e.g., a Swiss bank account) located in Switzerland which leads to a so-called absence of competence. A solution is provided by art. 87 para. 1 PIL, which accepts the forum of subsidiary competence, and the referral of the relevant US state law. The Swiss authorities at the place of origin of the decedent are competent to initiate the probate proceedings for a Swiss citizen who died in the US. If one agrees that a Swiss court is competent to initiate the probate proceedings, then the principle of universal succession should be valid and heirs are to be seen as the owners of the estate assets located in Switzerland and the American administrator will take on the role of a Swiss executor pertaining to matters of administration of the estate assets located in Switzerland (cf. chapter IV.3 below)[119].

2.2 Testamentary Succession (Will)

The same principles that apply to intestacy are generally valid with regard to administration in case of testamentary succession. The probate court in the US state of last domicile of the decedent is competent for the opening of probate proceedings. Since the probate court in the US is not concerned with assets located outside of that state, ancillary administration proceedings generally must be initiated for those assets. According to art. 87 para. 1 PIL, a subsidiary competence at the place of origin of the decedent applies to all assets that were disregarded by the US probate court, in regard to the movable assets and real estate in Switzerland. Thereby uniform handling of all Swiss assets by the Swiss authorities is ensured. The *lex fori* is applicable for the procedural

118 See, e.g., OCGA 53-5-34.
119 BSK IPRG-SCHNYDER/LIATOWITSCH, Art. 96 N 4; PEGORARO-MEIER (Fn. 19), 201 et seq.; Cf. FRANK VISCHER/ANDREAS VON PLANTA, Internationales Privatrecht, 2. Aufl., Basel und Frankfurt a.M., S. 152; BGE 43 I 88.

law. As regards succession, the law of the state of domicile in the US is applicable for movable property and *lex rei sitae* is applicable for real estate, in accordance with art. VI of the treaty. Since US state law generally grants the decedent more freedom in making a will due to lack of forced heirship rights for descendants, a Swiss citizen living abroad generally will not choose the law at his place of origin. Hence, the law of the US domicile will be applicable for the movable assets in Switzerland and in the US. Furthermore, the Swiss citizen living abroad can exclude *lex rei sitae* for real estate located in Switzerland by choice of law in his will, in accordance with art. 91 para. 2 PIL. Thereby, the decedent avoids a scission of the estate concerning his Swiss real estate, and thus the law at his US domicile is applicable for the whole estate[120].

3 Executor

3.1 Swiss Executor in the US

The Hague Convention of 2 October 1973 concerning the international Administration of the Estates of Deceased Persons, which would at least allow for a uniform handling in regard to movable estate assets, has not been ratified by either Switzerland or the US. The authorities in Switzerland and the US each issue their own certificate of legitimation by request, which is then either accepted or adjusted if needed, when it comes to actions in the respective country[121]. Swiss succession rules apply to the executor of a decedent who died in Switzerland. From the perspective of the relevant US state law, the authorization of the executor is a part of administration, which is why administration proceedings are generally necessary for movable assets located in the US. New York law, however, permits the transfer of the movable assets to a foreign representative of the estate without a court order or administration proceedings. For example, a bank in New York may generally transfer the assets in a US bank account to the foreign executor. Such a transfer is only valid if the bank has not been notified of pending administration proceedings or of the existence of local estate creditors[122]. If the delivery of the movable assets is refused, the Swiss executor must request the issuance of ancillary letters of administration by the New York Surrogate's Court in order to operate in New York[123]. These letters give him extensive authorization; however, for the transfer of real property, further documents are needed such as an order for distribution by the court. The requirements regarding the authorization of foreign executors vary from state to state.

120 PEGORARO-MEIER (Fn. 19), 205 et seq, 157 et seq.
121 BK-KÜNZLE, Vorbemerkungen zu Art. 517-518 ZGB, N 101, N 146.
122 Furthermore, the bank can refuse to transfer the assets to the foreign executor if the bank believes that the beneficiaries will not receive the assets. This is the case, for example, if a foreign state wants to seize the assets; EPTL § 13-3.4; *In re Estate of Cardoso*, 19 Misc. 3d 695, 860 N.Y.S.2d 836 (Sur. 2008).
123 SCPA 1604.

3.2 US Executor/US Administrator in Switzerland

When an individual dies in the US with movable property in Switzerland, then from the US perspective, the authority of the executor is not subject to the applicable US succession rules, but is instead subject to Swiss law (because under US law the rights and obligations of the executor are generally construed in accordance with the applicable law regarding administration proceedings and thus by Swiss law). The legal position of the US executor is thereby adapted to the respective position of a Swiss executor[124].

The US letters testamentary are generally recognized in accordance with art. 96 PIL. Even though the executor has only limited authority depending on the US state, most US letters are issued for the worldwide assets (except foreign real property). If a US executor wants to become active in Switzerland, he/she can either apply for the issuance of a separate Swiss certificate of executorship or request recognition of his or her letters testamentary in Switzerland[125]. In practice, Swiss banks sometimes accept legalized and apostilled letters testamentary which have been issued by the US probate court without any territorial limitation.

Generally, Swiss probate proceedings must be initiated in order to issue a separate certificate of executorship to the US executor. According to art. 87 para. 1 PIL, the authorities at the place of origin are competent if the decedent was a Swiss citizen with last domicile abroad. However, if the decedent was a US citizen with last domicile in the US, the authorities where estate assets are located (e.g., location of the real property) are competent in accordance with art. 88 PIL[126]. If a US citizen with last domicile in the US owned a Swiss bank account, the probate proceedings must be initiated in the canton where the relevant bank is located[127].

According to art. 96 PIL, the US letters of administration are generally acknowledged in Switzerland (decedent with last domicile in the US without leaving a will), even though these are only valid in the respective US state according to the law of many US states. Thereby, the legal position of the US administrator is adapted to the respective position of a Swiss executor[128]. In practice, Swiss banks sometimes accept legalized and apostilled letters of administration, if they have been issued by the US probate court without any territorial limitation.

V US Estate Taxes

After having focused on potential conflicts regarding the administration of Swiss-American successions, we will next discuss how the US and the Swiss

124 BK-KÜNZLE (Fn. 121), N 146.
125 BK-KÜNZLE (Fn. 121), N 147.
126 Federal Department of Justice, Ausländische Erbfolgezeugnisse als Ausweis für Eintragungen im schweizerischen Grundbuch, Bern 2001, 12.
127 BK-KÜNZLE (Fn. 121), N 120
128 PraxKomm, GRAHAM-SIEGENTHALER, 2nd edition, N 4 ad Anhang IPRG, 2032; BSK IPRG-SCHNYDER/LIATOWITSCH, Art. 96, N 4; PEGORARO-MEIER (Fn. 19), 201 et seq.; Vgl. FRANK VISCHER/ANDREAS VON PLANTA, Internationales Privatrecht, 2nd edition, Basel und Frankfurt a.M., S. 152; BGE 43 I 88; cf. BK-KÜNZLE (Fn. 121), N 155

tax authorities may subject a quite considerable portion of an estate with connections to both countries to inheritance taxes. This results from the fact that estate and inheritance taxation are triggered by different connecting factors in the US and Switzerland. While in Switzerland the last domicile of the decedent is the connecting factor, the connecting factor in the US is the nationality or domicile of the decedent[129]. This must be considered when planning for such an estate.

If a decedent with last domicile in the canton of Zurich is a US citizen or US Green Card holder and passes his movable assets located outside of the US on to his children domiciled in Switzerland who are not US citizens or Green Card holders, the children are generally subject to estate taxes in the canton of Zurich (last domicile of the decedent). The children are, however, exempt from taxation because they are direct descendants of the decedent. The same applies to spouses (§ 11 Estate and Gift Tax Code of 28 September 1986 [ESchG])[130].

As the decedent is a US citizen, his worldwide assets are subject to US estate tax[131]. The gross estate over an exemption amount of approximately USD 11,2 million (adjusted for inflation) as of January 2018 is subject to US Federal estate tax at a maximum rate of 40% (not including state estate tax)[132]. If a decedent uses only part of his or her exemption, the remainder may be applied against the surviving spouse's subsequent estate tax liability; thus, the total exemption amount for a married couple is approximately USD 22,4 million[133]. While the gross estate of a US citizen or Green Card holder consists of all assets at the time of death, the gross estate of a nonresident alien is limited to the assets which can be attributed to the US at the time of death[134]. Transfers at death between US citizen spouses are fully deductible from US estate tax[135].

Uncertainties with regard to planning in Switzerland have been resolved in the meantime. An initiative to introduce estate taxes on a Federal level was subject to a popular vote on 14 June 2015. With the exception of transfers at death between spouses or to charitable institutions, all estates exceeding CHF 2 million would have been subject to 20% tax. However, roughly 71% of the Swiss voters opposed the initiative, while almost 29% supported the

129 MARC BAUEN, Das internationale Steuerrecht der USA, 2nd edition, Zurich/Basel/Geneva 2007, N 12.
130 The cantons of Schwyz and Obwalden do not know any inheritance taxes. The introduction of Federal estate taxes has been rejected by the Swiss voters on 14 June 2015.
131 The worldwide application of US estate taxes was not affected by the 2017 US tax reform, which, among other things, converted US corporate income taxation from a worldwide to a territorial system. It is important to note, however, in the context of cross-border estate and tax planning that significant changes have been made to the regime for the taxation of Controlled Foreign Corporations ("CFCs"). The subject is beyond the scope of this article, but as a result, more closely-held businesses will now be considered controlled foreign corporations under US law. Particular attention should be paid when an estate plan contemplates that interests in a foreign corporation will pass to one or more heirs who are US persons. P.L. 115-97, 131 Stat. 2054.
132 BAUEN (Fn. 129), N 688.
133 26 U.S.C. § 2010. The exemption amount is scheduled to decrease by 50 percent effective 1 January 2026.
134 BAUEN (Fn. 129), N 694 et seq.
135 Planning possibilities for inheritances of US and non-US spouses exist in connection with so-called Qualified Domestic Trust ("Qdot Trust"). In such case, a tax deferral is granted until the death of the non-US spouse at the latest.

proposal. Therefore, the current cantonal regimes remain applicable. Planning uncertainties regarding the US have, at least for the time being, been widely reduced due to the American Taxpayer Relief Act enacted on 2 January 2013 which made permanent the estate tax exemption amount. The main question now is how the tax exemption amount of approximately USD 11,2 million as of January 2018 should ideally be used. Gifts to children or alternatively the use of the tax exemption amount for the funding of a trust for the benefit of future generations are common planning methods. Funding a trust makes sense only if the beneficiaries will have some connection to the US.

Some estate tax planning considerations need to be taken into account when non-US children whose parents are domiciled in Switzerland (with no tax relations to the US) have become resident aliens in the US for a longer period of time and are deemed to be domiciled in the US for US estate tax purposes[136]. From a Swiss tax perspective, the descendants are exempt from estate taxes in most cantons even though the decedent was last domiciled in Switzerland. As long as no US situs assets are transferred upon death, no US estate tax will be owed. US situs assets are moveable and immovable property located in the US as well as US corporate stocks[137].

Even though there would be no US estate tax liability in the above example, it should be noted that if the decedent's children are US persons (US citizens, Green Card holders or resident aliens), US estate tax will be triggered upon their deaths. In light of the above, it is advisable to examine the possibility of establishing a trust where future generations may be subject to US estate tax.

It is in the client's discretion whether he wishes to pursue a long-term solution by using a trust for his estate planning in order to take possible estate tax consequences at the death of his/her children into account. It should be noted that future tax legislation is not foreseeable. In any case, it is advisable when using a trust for estate planning that has a connection to Switzerland to apply for estate tax exemption by writing to the Swiss tax authorities. This is even more important if the trust estate includes Swiss real estate, whereby additional Lex Koller aspects under the Swiss federal law of 16 December 1983 regarding the acquisition of real estate by persons living abroad (BewG)[138] need to be taken into account.

VI Estate Planning Options

1 General

Estate planning is widely used in the US. Mainly tax reasons make estate

136 BAUEN (Fn. 129), N 689.
137 BAUEN (Fn. 129), N 695 et seq.
138 Federal Code of 16 December 1983 regarding the acquisition of real estate by persons living abroad (SR 211.412.41).
139 HOWER, (Fn. 31), 2: "*Estate planning is the determination and utilization of a method to accumulate, manage and dispose of real and personal property by the owner of the property during life and after death and to minimize income, gift, inheritance, and estate taxes due.*"

planning advantageous during the individual's lifetime[139]. The US administration and probate proceedings are very time consuming and costly[140]. Therefore, estate planning is used in the US to exclude as many assets as possible from probate proceedings[141]. Probate proceedings are public and information about the financial situation of the decedent and his family is accessible to everyone, which is often not in the interest of the heirs. For these reasons, so-called will substitutes are used in US estates to keep estate assets outside of administration proceedings. Accordingly, there are numerous planning tools in the US. The main types of such will substitutes are life insurance policies, pension funds, joint bank accounts and, in particular, trusts[142].

2 Inter Vivos Trust vs. Testamentary Trust

Due to the substantial estate taxes in the US when transferring assets to descendants and the possibility to defer such taxes by using trusts, it is not surprising that the trust is an important part of estate planning in Swiss-American successions.

There are two main types of trusts: the so-called testamentary trust and the inter vivos trust. While the testamentary trust is established at death by the will of the decedent, the inter vivos trust is established during the decedent's lifetime and may be funded at the individual's death through testamentary disposition in the will. This planning tool is called a pour-over will in the US[143]. In practice, inter vivos trusts are used more frequently than testamentary trusts. When using these trusts in the framework of estate planning with Swiss connections, it is important to note that there is no trust under Swiss law[144]. However, Switzerland has recognized foreign trusts since the ratification of the Convention on the Law Applicable to Trusts and on their Recognition (hereinafter "HTÜ")[145] in the year 2007. A dispute exists in Swiss doctrine whether the establishment of a testamentary trust – for example in case the testator dies with last domicile in Switzerland – is admissible or not. The reason is that there is a mandatory *numerus clausus* regarding the types of testamentary dispositions under Swiss inheritance law and the establishment of a trust is not part of it[146]. In that regard, we concur with the opinion of EITEL/BRAUCHLI according to which testamentary trusts should be allowed under Swiss inheritance law in the same manner as the testamentary establishment of a foundation in accordance with art. 493 CC[147]. According to other opinions in Swiss doctrine, the establishment of a trust should not be subjected to succession rules, but subjected to the trust rules even if established by will[148]. Due to Switzerland's ratification of the HTÜ

140 JESSE DUKEMINIER, Wills, trusts and estates, 7th edition, Aspen Publishers, New York, 2009, 45 et seq.
141 FREY (Fn. 8), 73.
142 DUKEMINIER (Fn. 138), 393 et seq.
143 HOWER (Fn. 31), 308-309.
144 DOMINIQUE JAKOB/PETER PICHT, Der Trust in der Schweizer Nachlassplanung und Vermögensgestaltung, Materiell rechtliche und internationalprivatrechtliche Aspekte nach der Ratifikation des HTÜ, in: AJP/PJA 7/2010, 856.
145 SR 0.221.371.
146 PAUL EITEL/SILVIA BRAUCHLI, Trusts im Anwendungsbereich des schweizerischen Erbrechts, in: successio 2/12, 123.
147 EITEL/BRAUCHLI (Fn. 144), 127, 129.

without any reservations, the testamentary trust should generally be allowed, regardless of which doctrine one agrees with (establishment of a trust subject to succession rules or to trust rules)[149].

Due to the lack of Swiss Federal Court decisions in this area, it is advisable not to use a testamentary trust but instead to establish an inter vivos trust during the individual's lifetime. Alternatively, a US citizen with domicile in Switzerland may choose the laws of the state of his origin to govern his estate, provided that both the succession rules and trust rules of that state recognize testamentary trusts. There is no relevant Swiss case law and thus caution is advised. The predominant Swiss doctrine is of the opinion that the additional funding of an already existing inter vivos trust by making such disposition in the will is admissible the same way as if the decedent names an existing foundation as heir or legatee in his will[150]. Again, there is no case law of the Swiss Federal Court.

Furthermore, it is under discussion whether trusts violate the ban on so-called "Familienfideikommiss" (art. 335 para. 2 CC) and the multiple appointments of reversionary heirs (art. 488 para. 2 CC)[151]. The predominant Swiss doctrine is of the opinion that the trust needs to be recognized since Switzerland has joined the Hague Trust Convention[152]. In addition, the Swiss Federal Court protected the establishment of a Liechtenstein family maintenance foundation by a Swiss founder despite art. 335 para. 2 CC[153]. According to the authors, this decision should be applied by analogy with regard to trusts.

If the testator intends to transfer Swiss real property to an inter vivos trust through testamentary disposition, it is advisable to request a cantonal tax ruling on whether the transfer of Swiss real estate into a foreign trust is subject to the Federal law on the acquisition of real estate by persons abroad (BewG)[154]. This is the case if one of the trustees or beneficiaries is, for example, a US citizen without a Swiss residence permit. According to the bulletin of the Federal Department of Justice, there is no authorization required if the beneficiaries of the trust are direct descendants of the trust settlor/decedent[155]. However, there is no consistent practice and the requirements are different in each canton. Some cantons require a Swiss co-trustee to act together with the foreign trustee.

Each case must be assessed individually based on the needs of the client to determine which estate planning tools should be used in Swiss-American succession. Generally, it makes sense for a US citizen with last domicile in

148 JAKOB/PICHT (Fn. 142), 858, 859.
149 Cf. JAKOB/PICHT (Fn. 142), 860.
150 CLAUDIO WEINGART, Anerkennung von Trusts und trustrechtlichen Entscheidungen im internationalen Verhältnis – unter besonderer Berücksichtigung schweizerischen Erb- und Familienrechts, Diss. Zürich 2010, N 186; EITEL/BRAUCHLI (Fn. 144), 129.
151 STEPHAN WOLF/NADINE JORDI, Trust und schweizerisches Zivilrecht – insbesondere Ehegüter-, Erb- und Immobiliarsachenrecht, in: Der Trust – Einführung und Rechtslage in der Schweiz nach dem Inkrafttreten des Haager Trust-Übereinkommens, Bern 2008, 46.
152 EITEL/BRAUCHLI, (Fn. 144), 131.
153 BGE 135 III 614 E. 4.3.3.
154 Bundesgesetz vom 16 Dezember 1983 über den Erwerb von Grundstücken durch Personen im Ausland (SR 211.412.41).
155 Federal Department of Justice, Erwerb von Grundstücken durch Personen im Ausland, Merkblatt, Bern 1. Juli 2009, 5c.

Switzerland leaving behind US descendants to choose the US state laws of his place of origin to apply to his estate and to establish an inter vivos or possibly a testamentary trust. The use of trusts by Swiss citizens with last domicile in Switzerland is recommended if the decedent has US descendants and he intends to defer US estate taxes. The decedent may establish an inter vivos trust after having obtained a respective tax ruling and appoint the already existing trust as heir or legatee[156]. Transfers to the trust often lead to the violation of forced heirship rights of the surviving spouse or the descendants, which are part of Swiss succession rules. Such a violation of forced heirship rights may be avoided by entering into a Swiss inheritance agreement with a waiver of the compulsory portion. The advisability of this strategy should be examined with local US tax counsel. For the sake of completeness, we note that it is advantageous from a US tax perspective to have the decedent transfer his assets in full to an inter vivos trust. However, this is often not an option for practical reasons.

VII Impact of the EU Succession Regulation

As a final remark, reference is made to the EU Succession Regulation[157] (the "Regulation"), which is by operation of law directly applicable to all estates of individuals who pass away on or after 17 August 2015. It has direct binding legal force and will apply in all EU Member States other than in the United Kingdom, Denmark and Ireland ("Member State"), which have opted out. Even though the Regulation forms neither part of Swiss law nor part of US law, it may affect Swiss-American successions in some instances. This is due to its wide-ranging connecting factors. First of all, the Regulation is relevant in case the decedent is considered to have had his or her last habitual residence in a Member State. The term "last habitual residence" under the Regulation and the term "last domicile" in accordance with Swiss PIL are different which may result in a conflict of competences. Whereas the term "last habitual residence" focuses on the circumstances at the time of death and the years just before death, the term "last domicile" focuses on where a person resides at the time of death with the intention of staying there permanently, thus containing a future element. The Regulation will further apply if the deceased had his or her last habitual residence in Switzerland or the US, but left assets in a Member State and either possesses the nationality of that Member State or had his or her previous last habitual residence in that Member State less than 5 years before moving to Switzerland. In such circumstances the court of the respective Member State may assume jurisdiction for the worldwide estate (Art. 10 of the Regulation). If a decedent has assets in a Member state but no further

156 Cf. JAKOB/PICHT, (Fn. 142), 879; DOMINIQUE JAKOB, Der Trustee als Erbe, Seminar Europainstitut "The 9th Zurich Annual Conference on International Trust and Inheritance Law Practise", Zurich, 1 November 2012.

157 EU Regulation No 650/2012 of 4 July 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.

connection to such state, the Member State may nevertheless assume jurisdiction, but only for the assets located in that Member State. Consequently, in a Swiss-American succession the Regulation may result in a conflict of competence simply because the estate of a person residing in Switzerland or the US partially consists of assets located in a Member State, e.g., a bank account in France. These examples show why in planning situations attention should be paid to the EU Succession Regulation whenever a person has ties to an EU Member State.

VIII Summary

Planning for a Swiss-US estate is particularly complex because of the differences in the inheritance and tax laws of Switzerland and the US. To complicate matters further, differences exist among the US states in terms of conflict of law rules and substantive matrimonial property and succession laws.

US matrimonial property rights must be observed at the death of a spouse. With regard to conflict of law rules, the matrimonial property rights of the spouses are subject to the principle of division of movable and immovable property. Nine states have introduced the community property regime as their ordinary regime. In the other 41 states, the common law property regime is in force. Some of the common law states have introduced actual forced heirship rights for the surviving spouse. In New York, for example, the surviving spouse is entitled to elect the greater of USD 50,000 and one-third of the estate (the elective share). However, it must be considered that in some common law states, the principle of the common law property regime is only applicable in the case of death of a spouse and not in case of divorce.

Contrary to Switzerland, which generally applies the law of the last domicile to real and personal property (unity of the estate), US conflict of law rules provide different legal frameworks for each. The succession law of the situs applies to real property, whereas personal property is subject to the law of the last domicile of the decedent, which leads to a scission of the estate.

The US federal states have exclusive jurisdiction over matters of succession as well as in matters of formal administration of the estate. While succession is regulated differently in each state, the formal administration of the estate generally follows the same principles in all states. The laws of all states make a distinction between domiciliary administration and ancillary administration. The domiciliary administration is considered to be the principal estate proceeding at the last domicile of the decedent. The rights of the personal representative, an executor or an administrator, who is appointed by the domiciliary court, are limited to the estate assets located in the state of the last domicile (principle of territory). Separate administration proceedings are generally necessary if estate assets are located outside of the domiciliary state (ancillary administration), unless, for example, the state in question e.g. New York permits the immediate delivery of the movable assets to the representative of the estate without additional administration proceedings. If the decedent leaves a will, probate proceedings must be initiated, wherein the competent probate court

decides whether the submitted document is a valid will. The law applied in US probate courts often depends on whether a bequest is of immovable or movable property. The validity of bequests of real property is generally assessed using the *lex fori*, but the validity of bequests of personal property is commonly assessed under the law of the testator's domicile. And, in ancillary probate cases, some states provide for additional deference to the law of the domiciliary jurisdiction, even with respect to bequests of real property.

In international succession matters between the US and Switzerland it is also important to consider art. V and VI of the Swiss-American treaty of friendship, commerce and extradition of 25 November 1850. The treaty, however, is applied differently in Switzerland and the US and has at times been completely ignored by US courts, which can lead to conflicts in the devolution of the estate. Furthermore, there is a lack of recent decisions in Switzerland as well as in the US and the relevant literature is scarce and outdated.

The treaty regulates jurisdiction as well as applicable law for Swiss-American succession. From a Swiss perspective, articles V and VI of the treaty, which govern succession, are always applicable when a Swiss citizen with last domicile in the US or an American citizen with last domicile in Switzerland dies. The same is true for dual citizens. According to the Swiss interpretation of the treaty with regard to material succession, the movable property as a whole is subject to the law and the jurisdiction of the court at the last domicile of the decedent (*lex domicilii*) and the immovable property is subject to the law and jurisdiction of the court where the property is located (*lex rei sitae*). The Swiss Federal Court has excluded the administration of the estate from the scope of the treaty. In addition, the treaty is only applicable in matters of conflicts between the heirs and is irrelevant when third parties are concerned. If the interpretation of treaties that were concluded during the same time period are used as an analogy, as for example the Swiss-Italian treaty of 1869, abatement suits, invalidity claims, partition claims as well as inheritance claims and claims regarding bequests should fall under the provisions of this treaty. The treaty does not address the question of *professio iuris*. New York courts have followed the decedent's choice of law in Swiss-US estate matters and allowed the decedent to choose New York law to apply to his entire estate. The Swiss Federal Court has not yet ruled on this issue; however, the Federal Department of Justice as well as the predominant doctrine are in favor of a *professio iuris*, which would allow a US decedent with last domicile in Switzerland to elect the law of a particular US state, preferably the state in which the decedent was last domiciled before moving to Switzerland. The free choice of law in favor of any US state could turn out to be problematic, since that could not only circumvent the Swiss forced heirship rights but also the elective share of the surviving spouse. The question of whether a US court would allow a Swiss citizen domiciled in the US to subject his Swiss or even worldwide estate assets (including his movable assets in the US) to the Swiss law at his place of origin, has not been answered yet. However, it could be affirmed in light of the case law in some of the US states, if the main assets of the Swiss citizen living in the US are located in Switzerland and if he was domiciled in Switzerland before moving to the US. US real estate, however, is strictly subject to the law of the respective US state.

Often, US courts have not applied the treaty at all or interpreted it in such a way, that they could apply their own law without having to deal with Swiss law. Insofar as the administration and probate proceedings are concerned, US courts tie the jurisdiction and the applicable law for the administration to the actual location of the assets of the estate (movable and immovable). The applicable procedural law is always based on *lex fori*. This principle is generally valid in all of the 50 US Federal States and has been followed in Swiss-American estate matters, without any American probate court ever referring to the treaty of 1850 for justification.

US courts have taken a mixed stance regarding the treaty's application to succession (substantive inheritance law). The treaty was completely ignored in many cases by the American courts and they applied their own conflict of law rules instead. The conflict of law rules are generally the same in all of the US Federal States (immovable property: *lex rei sitae*, movable property: law applicable at the last domicile of the decedent) and correspond to the Swiss interpretation of art. VI. In view of the fact that US courts have more or less ignored the treaty completely and that from a Swiss perspective legal uncertainties may arise due to the different connecting factors in the Swiss PIL, the legitimate question arises, whether the application of the treaty can be relinquished altogether.

From both a Swiss doctrine and US perspective, administration does not fall under the application of the treaty. Accordingly, the estate proceedings in Switzerland should only be initiated if the American decedent had his last domicile in Switzerland or insofar as the American authorities do not concern themselves with the estates of Swiss citizens living abroad (art. 87 para. 1 and art. 88 PIL). In doing so, conflicts arise in both states regarding matters of administration: When there is a decedent with last domicile in Switzerland, the Swiss authorities at the domicile will claim jurisdiction over the administration proceedings for all of the movable assets which conflicts with the relevant US state's claim to jurisdiction over assets on its territory. Furthermore, the two legal systems collide with regard to the law applicable for the administration of the estate. In the US, the procedural qualification of the administration is interpreted very extensively. Various facts are considered to be part of the administration while Swiss law considers them to be part of succession, such as the rights and duties of the executor. If a Swiss executor wants to become active in the US, he has to (depending on the state) request the issuance of ancillary letters of administration from the competent court. The requirements regarding the authorization of foreign executors in the US vary from state to state.

When a US Person dies owning property in Switzerland, the extent of the executor's authority (testamentary succession) or, respectively, the administrator (intestacy), with respect to that property is subject to the Swiss law of administration. The legal position of the US executor or, respectively, the administrator, is thereby adapted to the respective position of a Swiss executor, and the letters testamentary (testamentary succession) or, respectively, letters of administration (intestacy) issued by US courts, are generally recognized in Switzerland in accordance with art. 96 PIL. In practice, Swiss banks often accept a legalized and apostilled letters testamentary or letters of administra-

tion, if they have been issued by the US probate court without any territorial limitation, i.e., a separate *exequatur* procedure is not needed.

A vital aspect in Swiss-American estate matters is inheritance and estate taxation. While in Switzerland the last domicile of the decedent is the connecting factor for the liability to pay inheritance tax, the US imposes estate tax based on both domicile or nationality of the decedent. If the decedent is a US citizen, Green Card holder (as a general rule) or resident for transfer tax purposes, his worldwide assets over a USD 11,2 million exemption (adjusted for inflation) are subject to US estate taxes. The US Federal estate tax currently is assessed at a maximum rate of 40%. If a Swiss citizen nonresident alien dies in the US, only the assets attributed to the US (situs rules) are subject to US estate tax. Even in the absence of any connecting factors to the US, it should be noted that any children who are deemed to be US persons will pay US estate tax at their death when they subsequently pass on the received assets to the next generation. Thus, lifetime trusts are a common estate planning tool to move assets out of an individual's taxable estate. If there is a connection to Switzerland, application to the Swiss tax authorities for tax exemption when establishing trusts is recommended. In most Swiss cantons, the direct descendants are exempt from inheritance taxes.

Depending on the needs of the decedent and his descendants it is advisable to set up an inter vivos (established during the decedent's lifetime) or a testamentary trust (established at death by the will). It should be noted that there is a dispute in Swiss doctrine whether the establishment of a testamentary trust is admissible under Swiss inheritance law. In practice, inter vivos trusts are used more frequently than testamentary trusts, due to the fact that their legal permissibility is clearly undisputed. Foreign trustees often hold the trust assets of trusts with a connection to Switzerland. Therefore, Swiss real estate included in the trust assets is subject to the Federal law on the acquisition of real estate by persons living abroad (BewG; Lex Koller), unless an exemption applies.

In case the person involved in a Swiss-American succession has ties to an EU Member State, particularly assets located in an EU Member state, attention has to be paid to the EU Succession Regulation. This Regulation is rather wide-ranging in its scope, so that conflicts of competence can occur in the handling of an estate.

Each case needs to be assessed individually and based on the needs of the client, the proper estate planning tools should be chosen in Swiss-American succession. It is always advisable to include a local US lawyer in the process. In conclusion, one should hope that the Swiss courts are going to address the typical planning tools and the use of trusts in Swiss-American succession, especially because nine years have passed since the ratification of the Hague Trust Convention and the trust has become an acknowledged planning tool from a Swiss perspective.

Authors

Tina Wüstemann

Tina Wüstemann heads the private client team. She advises Swiss and foreign private clients, executives as well as entrepreneurs regarding complex estate and succession planning matters including trusts, prenuptial agreements, wills and relocations to Switzerland. Tina Wüstemann also advises charitable foundations and represents clients in contentious trust and estate matters as well as the administration of large international estates.

She publishes regularly and frequently lectures on trust and estate matters as well as arbitration in Switzerland and abroad.

Tina Wüstemann is a member of the editorial board of the Journal Trust & Trustees and chair of the Zurich Annual Conference on International Trust and Inheritance Law Practice. Furthermore, she serves as board member in several international charitable organizations.

Who's Who Legal lists Tina Wüstemann as thought leader private client 2018. Furthermore, Citywealth recognised her among the Top 200 IFC Power Women 2018. In 2017 she won the title "Best in trust & estates" at the Europe Woman in Business Law Award. Chambers and Partners HNW 2017 rank Tina Wüstemann in tier 1 of Switzerland's leading lawyers for private clients. Best Lawyers awarded her as "Lawyer of the Year 2016" in the category Wealth Management Zurich. Euromoney references her among the "Best of the Best 2016 – Top 30 Trust practitioners in the World".

Daniel Bader

Daniel Bader provides national and international tax and legal advice to individuals and corporate clients.

He comprehensively advises private clients, executives and entrepreneurs in tax-related questions including successions planning, compensation plans and private wealth structures.

Daniel Bader develops tax-related solutions, particularly related to cross-border structuring and to corporate and private relocations from and to Switzerland. He assists clients in questions regarding income and wealth tax, estate and gift taxes, real estate tax and social security.

Daniel Bader teaches at the Swiss Tax Expert Academy, is a frequent speaker at national and international tax and private clients conferences and acts as board member of Family Offices. He is listed as a leading lawyer by Citywealth 2015 and as an expert in the practice areas "Private Client" and "Corporate Tax" by Who's Who Legal 2015, Legal 500 2015 and Chambers Global 2015.

Bär & Karrer is a renowned Swiss law firm with more than 150 lawyers in Zurich, Geneva, Lugano and Zug.

Our core business is advising our clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. Our clients range from multinational corporations to private individuals in Switzerland and around the world.

Most of our work has an international component. We have broad experience handling cross-border proceedings and transactions. Our extensive network consists of correspondent law firms which are all market leaders in their jurisdictions.

Bär & Karrer was repeatedly awarded **Switzerland Law Firm of the Year** by the most important international legal ranking agencies in recent years.

Offices of Bär & Karrer:

Zurich
Brandschenkestrasse 90, CH-8027 Zurich
Phone +41 58 261 50 00, Fax +41 58 261 50 01
zurich@baerkarrer.ch

Lugano
Via Vegezzi 6, CH-6901 Lugano
Phone +41 58 261 58 00, Fax +41 58 261 58 01
lugano@baerkarrer.ch

Zug
Baarerstrasse 8, CH-6301 Zug
Phone +41 58 261 59 00, Fax +41 58 261 59 01
zug@baerkarrer.ch

Geneva
12, quai de la Poste, CH-1211 Geneva 11
Phone +41 58 261 57 00, Fax +41 58 261 57 01
geneva@baerkarrer.ch

www.baerkarrer.ch