(INTERNATIONAL) PRENUPS TO PRESERVE FAMILY WEALTH - THE SWISS PERSPECTIVE

In an increasingly mobile world, many newlyweds have ties to multiple jurisdictions. This is no different in Switzerland, which keeps attracting the international wealthy. Today, roughly 25% of the Swiss population are foreigners and every third marriage is bi-national.

A couple's ties to multiple jurisdictions or a move to another country can have a huge impact in case the marriage breaks down. The difference between getting a divorce in Zurich, London, San Francisco or Dubai can be staggering. Existing connecting factors – such as place of marriage, residence, domicile or nationality – or a relocation to a certain jurisdiction thus need to be carefully considered and reflected in matrimonial property planning to preserve family wealth in the long term.

When advising international couples in relation to a pre- or postnuptial agreement under Swiss law, the following considerations need to be kept in mind.

Swiss divorce law: The three-pillar system and respective planning options

If a divorce takes place in Switzerland, there are three financial aspects to be resolved between the spouses: (1) the division of the spouses' property; (2) post-divorce alimony payments and (3) the sharing of savings accrued in the spouses' pension funds during the marriage. While common law jurisdictions typically consider the financial impact of a divorce altogether and aim towards a global "fair and

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equitable" solution between the spouses, Swiss divorce law addresses these three questions separately. All three aspects can generally be agreed upon between the spouses under Swiss law. However, the measures available to the spouses to plan for each of these financial aspects differ in terms of requirements, flexibility and binding nature.

Regarding the **division of matrimonial property,** Swiss law provides for the option to choose from three different matrimonial property regimes whereby the chosen regime can be modified within the limits of the law. Such marriage contracts can be entered into before (prenuptial agreement) or after (postnuptial agreement) the civil wedding and must be made in the form of a notarized deed. They are fully binding provided that both parties consent freely and with full understanding of the agreement and its implications. It is the notary's task to inform the spouses about the legal consequences of the chosen marital property regime and to ensure that the spouses have understood them.

As far as post-divorce **alimony payments** are concerned, Swiss law does state the circumstances under which such support will be due in case of divorce, but there are no statutory provisions on how and to what extent spouses may waive or agree in advance on such payments. While it is generally admitted in Swiss practice that such agreements are admissible, the binding effect thereof is not guaranteed: In case of divorce, the competent Swiss court will still have to approve the agreement on spousal support and may deny the approval in case the agreement between the spouses proves manifestly inappropriate in light of the overall circumstances at the time of divorce. In practice, while there are no formal requirements for such agreements, they are typically made part of a marriage contract in the form of a notarized deed.

Regarding the sharing of pension benefits accrued during marriage, the spouses' planning options are limited and any deviation from the statutory half-half split is possible only if both spouses agree and otherwise have sufficient superannuation and invalidity coverage. Such agreements will again be subject to judicial approval at the time of divorce.

Swiss matrimonial property regimes

Swiss matrimonial property law offers **three distinct regimes** to govern the financial relations between spouses: The default regime of participation in accrued gains, the community of property regime and the separation of property regime. These regimes allow couples to structure their financial relationship in a way that aligns with their personal and financial circumstances. Although the flexibility is not limitless, the options available under Swiss law grant a certain room for maneuver which is often desirable and can be critical when families involve patchwork situations or where planning should preserve the family wealth.

The **participation in accrued gains regime** is the default regime that applies automatically if a couple does not enter into a marriage contract. In case of a relocation to Switzerland, absent an agreement between the spouses or an explicit, written choice of a foreign law, the spouses' matrimonial property relations will – unlike under the European Matrimonial Property Regulation – be subject to this regime with retroactive effect from the date of marriage under the relevant Swiss conflict of law rules.

Under the participation in accrued gains regime, each spouse retains ownership and the right to dispose of their assets during the marriage. Upon dissolution of the marriage, whether through divorce or death, both spouses (or in case of death of a spouse, his or her estate) keep the individual property, i.e. pre-marital wealth as well as assets received by way of inheritance or gift during the marriage. However, what has been accrued during the

marriage (such as income and savings from gainful activities or derived from investments) is shared between the spouses. According to the default statutory provisions under Swiss law, the split between the spouses is half-half, but the spouses do have the option to deviate from this rule by agreement by means of a marriage contract. Furthermore, Swiss law allows the spouses to exclude income derived from individual property from the accrued gains with the result that it is not subject to division. This option allows to fully protect e.g. premarital assets while safeguarding both spouses' interests in the wealth created through joint efforts during the marriage.

Overall, while the default regime of participation in accrued gains is suitable for many couples, it is not suitable e.g. for a wealthy entrepreneur, who built up his or her entire business and wealth during the marriage. In case of a divorce, the financially weaker spouse gets 50% of the value of the entrepreneur's (business) assets at the time of the final divorce decree, which might put the entire business at risk due to a lack of sufficient liquidity.

Under the **community of property regime,** certain defined assets are considered common property of the spouses. This can include income and property accrued during the marriage or it can extend way beyond and include even assets brought into marriage or acquired by way of gift or inheritance. Also, it is possible to exclude certain specific assets from the community. Upon divorce or death, the common property is divided equally between the spouses or as agreed in the marriage contract. During the marriage, transfers of community property (e.g. to a trustee), require the consent of both spouses.

In practice, the community of property regime is often used in patchwork situations to optimize the position of a new spouse for estate planning purposes whereby forced heirship rights of all descendants must be observed.

The **separation of property regime,** which also requires the conclusion of a marriage contract, enables each spouse to maintain full ownership of their assets, both past and future, whatever their nature or origin. There is no sharing of property whatsoever upon dissolution of the marriage.

Obviously, this regime is favored where both spouses are financially independent and is the obvious choice for entrepreneurial families where the main goal is to keep the family wealth in the bloodline and protect the business from divorce claims of sons- or daughters-in-law.

Trust assets in the context of a Swiss divorce

Foreign trusts are fully recognized in Switzerland under the Hague Convention on the Law Applicable to Trusts and on their Recognition. In case of a Swiss divorce, according to article 15b) of the Hague Convention, Swiss marital property law - and not foreign trust law - will be decisive as to how trust assets are treated.

While trust assets are fully protected from a Swiss perspective if the spouses have chosen the separation of property regime, the situation varies under the regime of participation in accrued gains, depending on whether the trust was funded with individual property assets or with accrued gains. If a trust is funded during the marriage with accrued gains, the assets can be taken into account when calculating the spouse's participation claims. This will be the case, if the assets were transferred to the trustee i) within the five years prior to the dissolution of the matrimonial property regime, or ii) with the intent to curtail the entitlement of the other spouse. Furthermore, trusts are vulnerable to attacks if assets have been transferred invalidly (e.g. out of the common property fund but without the consent of the spouse under the common property regime)

and are therefore still part of the matrimonial assets.

In the well-known Rybolovlev saga, the Geneva Court of Appeal considered the trust set up by the husband to be valid (as opposed to the Court of First Instance, which disregarded the trust in light of the extensive powers of the husband settlor). Nevertheless, the Court ruled that the entire trust assets must be taken into account to calculate the wife's matrimonial property claim, given that the transfer of assets to the trust occurred in the five years prior to the divorce proceedings. The Court further decided that the relevant value of the trust assets was the value at the time of the transfer to the trust (as opposed to the value at the time of the final divorce decree). The parties eventually settled the case before it was brought to the Swiss Federal Supreme Court.

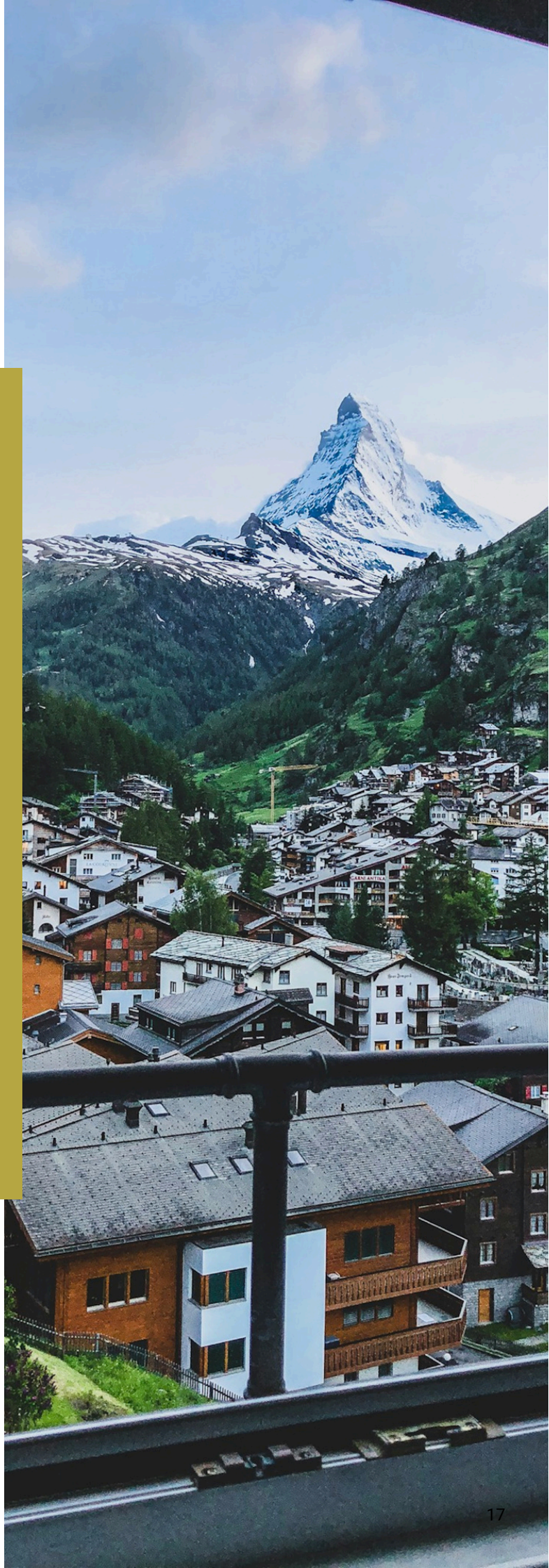
Managing Cross-Border Complexities

In cross-border matrimonial property planning, the relevant Swiss conflict of law rules allow couples to navigate the complexities of differing legal systems and to plan effectively for implications in the jurisdictions they have ties to. From a Swiss perspective, spouses can opt for the law at the place of their joint or first marital residence, the citizenship of one of the spouses or even the place where the civil wedding is celebrated to govern their matrimonial property relations. In the absence of an explicit choice of law, the law of the country where both spouses are or were last resident applies.

The flexibility provided by the choice of law options under the Swiss conflict of law rules enables international couples to select a legal framework that best suits their circumstances. At the same time, it necessitates **careful coordination with legal advisors in all relevant jurisdictions** where a divorce could be a potential scenario to avoid conflicts. It is recommended to state in the pre- or postnuptial agreement that a future relocation to another jurisdiction shall not impair the choice of law nor the agreement between the spouses.

Whether a Swiss marriage contract will then be recognized in case of a divorce taking place abroad, is a question of the local law at the relevant time. It needs to be kept in mind that foreign courts may only uphold the Swiss marriage contract, if certain **requirements under the local statutory provisions or case law** are met. For example, many jurisdictions have specific requirements regarding disclosure and independent legal representation or call for a "cooling-off" period between the signing of the agreement and the civil wedding – which is unknown under Swiss law. There are jurisdictions where prenuptial agreements are generally not considered as binding and a Swiss marriage contract may be invalidated. To ensure that a Swiss marriage contract is upheld abroad, it is thus crucial to consider all relevant jurisdictions where divorce may become an issue.

Particular care must be also taken with so-called **"mirror" agreements** whereby pre- or postnuptial agreements are drafted in accordance with the laws of more than one jurisdiction, each "mirroring" the other, to ensure that if one is unenforceable a "back-up" agreement may be upheld, nonetheless. From a Swiss perspective, in case of several parallel "mirror agreements", there is the risk that there will be lengthy court proceedings about the question which agreement shall prevail. Likewise, a **"catch-all" agreement** which tries to contemplate and cover any possible jurisdiction where divorce may become an issue, risks not being upheld by a Swiss court if it is not clear on the face of the agreement what marital property law or particular regime shall govern the division of the spouse's marital property in case of divorce.



Conclusion

Swiss matrimonial property law offers a range of options tailored to the financial and personal situation of the spouses and/or their families. Whether couples opt for the community of property, separation of property, or the participation in accrued gains regimes, it is crucial to consider the legal and financial implications and personal circumstances carefully. Cross-border planning further necessitates coordination with legal advisors in all pertinent jurisdictions where divorce may become an issue. A thorough understanding of the relevant legal framework and conflict of law provisions is key to ensure that marriage contracts are upheld and enforceable and that the family wealth is protected across jurisdictions. Certainly, from a Swiss perspective, prevention by means of a prenuptial agreement e.g. providing for separation of property is better than cure, i.e. transferring assets to a trust during the marriage.