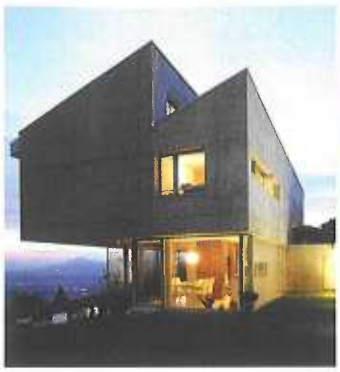
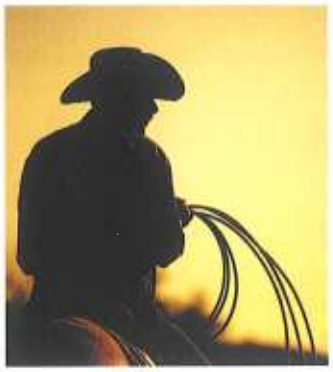
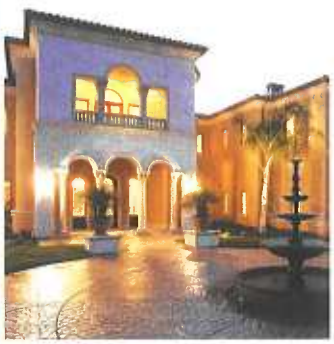
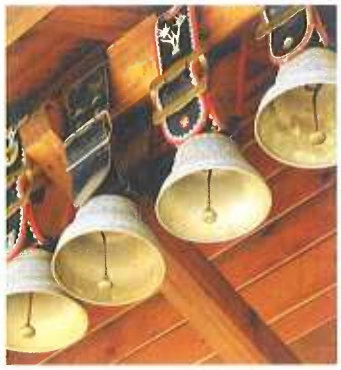
"Swiss forced heirship rules, which require compulsory shares of the estate for close relatives, may cause conflicts in Swiss-US estates"

ATLANTIC DIVIDE

Tina Wüstemann and **Basil Zirinis** provide an overview of issues that arise in the context of Swiss-US estates

PLANNING FOR A Swiss-US estate is particularly complex because of the differences between the inheritance and tax laws of Switzerland and those of the US. While the formal administration of the estate is similar in all US states, there are fundamental differences between Swiss and US laws regarding estate administration, which can lead to conflicts. To complicate matters further, differences exist among the US states in terms of conflict of law rules and substantive matrimonial property and succession laws. Unlike 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. In Switzerland, the general conflict of law rules found in the *Federal Statute on Private International Law* (PIL) of 18 December 1987 apply in international estate matters, subject to any applicable treaty between Switzerland and the relevant state.

Generally, the Swiss authorities at the last domicile of the decedent have jurisdiction over probate matters and inheritance disputes with regard to the decedent's worldwide estate, with the exception of real property over which a foreign state claims exclusive jurisdiction.[1] Swiss forced heirship rules, which require compulsory shares of the estate for the decedent's close relatives (surviving spouse, descendants or, if there are no descendants, parents of the decedent, but not siblings), may cause conflicts in Swiss-US estates where the heirs under Swiss law seek to have such rules apply in contravention of the decedent's testamentary wishes.

The Swiss-American Treaty

When dealing with estates that have a connection with Switzerland and the US, articles V and VI of the *Swiss-American Treaty of Friendship, Commerce and Extradition of 25 November 1850* (the treaty) must also be considered. The treaty, however, is applied differently in Switzerland and the US and has at times been ignored altogether by US courts. Furthermore, recent decisions addressing this issue are sparse in both countries and the related literature is outdated.

The treaty regulates jurisdiction as well as applicable law for Swiss-US estates. Estate administration, including probate, is not covered by the treaty. 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 a US citizen with last domicile in Switzerland dies. The same is true for dual citizens. According to the Swiss interpretation of the treaty, succession of personal property is subject to the law and jurisdiction of the last domicile of the decedent and succession of real property is subject to the law and jurisdiction of the state where the property is located. US courts have taken a mixed stance regarding application of the treaty to substantive succession law. In the New York decision *In re Schneider's Estate*,[2] the Court considered the succession law applicable to the Swiss real property of a US-citizen decedent

with last domicile in New York.[3] In finding that the treaty merely incorporates the relevant conflict of law rules of each state, the court misapplied Swiss conflict of law rules to hold that New York law (the law of the decedent's last domicile) would apply to the decedent's Swiss real property. As a result, the decedent's surviving spouse and children could not claim their compulsory shares under Swiss forced heirship rules. The treaty has been ignored by US courts in many other cases; the courts instead applied otherwise applicable conflict of law rules. Most US states apply the law of the *situs* to real property and the law of the decedent's last domicile to personal property, which generally corresponds with the Swiss interpretation of article VI. Therefore, the question arises whether the treaty can be ignored altogether.

The treaty does not address the question of whether a decedent may specify the law applicable to their estate in a will (*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 their entire estate.[4] The Swiss Federal Court has not yet ruled on this issue; however, the Federal Department of Justice,[5] as well as the predominant Swiss doctrine, are in favour of *professio iuris*, which could allow a US decedent with last domicile in Switzerland to avoid Swiss forced heirship rights by electing the law of a particular US state, preferably the state in which the decedent was last domiciled before moving to Switzerland.

The following examples illustrate Swiss-US estates in practice.

US citizen with last domicile in Switzerland

If the decedent's will specified New York law as the governing law, a Swiss court will probate the will or issue a certificate of executorship and inheritance, and apply New York succession law and Swiss procedural law to the entire estate.[6] Depending on the US state, assets located in the US (e.g. US bank accounts) may require ancillary probate proceedings. New York courts generally admit foreign wills to ancillary probate if in written form, and probate proceedings have been successfully initiated in the state of domicile.[7] In US ancillary probate proceedings, the validity of bequests of real property is generally assessed under the law of the *situs*, while the validity of bequests of personal property is commonly assessed under the law of the testator's domicile.[8] However, some states provide for deference to the law of the domiciliary jurisdiction for bequests of real property.[9] In other words, in some states, the ancillary court might apply Swiss law to US real estate.

Swiss citizen with last domicile in New York

A New York court will have jurisdiction over the domiciliary probate proceedings. In practice, Swiss banks often accept legalised and apostilled letters testamentary or letters of administration, if they have been issued by the US probate court without any territorial limitation. If such letters have been issued with territorial limitation, ancillary probate proceedings would be needed in Switzerland at the decedent's place of origin. With regard to the substantive succession law, the Swiss court will apply New York law (the law of the state of domicile) to personal property located in Switzerland and Swiss law (the law of the *situs*) to Swiss real property. However, an individual may avoid Swiss law applying to Swiss real estate by specifying a choice of law in favour of New York in their will, thereby subjecting all property in New York and Switzerland to New York law.[10]

Another important aspect of Swiss-US estate matters is inheritance and estate taxation. In Switzerland, to date, inheritance/estate tax is levied on a cantonal level only, with the introduction of a Swiss federal inheritance tax currently under discussion. Under Swiss cantonal law, the decedent's last domicile or the *situs* of real estate is generally the triggering factor for inheritance tax liability; however, in most Swiss cantons, direct descendants are exempt from inheritance taxes. The US imposes a federal estate tax based on either the domicile or citizenship of the decedent. If the decedent was a US citizen, (as a general rule) a Green Card holder or a US domiciliary for estate tax purposes, their worldwide assets above an exemption amount of USD5.25 million in 2013 (indexed for inflation) will be subject to US estate tax of up to 40 per cent, plus, in some states, a state estate tax.

For US-estate tax-planning purposes, trusts are, therefore, common estate-planning tools to preserve assets over generations and avoid immediate taxation upon the death of a US citizen. However, careful planning is necessary. For example, when planning for US citizens with last domicile in Switzerland, a dispute exists in Swiss doctrine over whether the establishment of a testamentary trust is admissible under Swiss inheritance law. In practice, *inter vivos* trusts are thus used more frequently.

Further, if trusts are used in cross-border Swiss-US estate planning, Swiss and US gift, estate, income and wealth taxes have to be considered. In most cases, a written application to the competent Swiss cantonal tax authorities for tax clearance is recommended. For estate taxes, there is a double-taxation treaty on inheritance and estate tax matters in force between Switzerland and the US. Relief under the treaty generally consists of a tax credit under certain circumstances where both Switzerland and the US seek to tax estate assets. In addition, the treaty contains rules to allocate taxation rights regarding certain types of assets between Switzerland and the US. However, it dates from 1951, and the treaty's effects are limited, in particular, due to its lack of a tie-breaker provision to determine which state may claim the decedent as a resident or domiciliary for estate or inheritance tax purposes.

Each Swiss-US estate must be assessed individually, and the proper estate-planning tools should be chosen based on the needs of the client. It is always advisable to include a local US and Swiss lawyer in the process. Cross-border practitioners hope Swiss courts will provide further guidance on the use of typical planning tools, especially trusts, in Swiss-US estates. Five years have passed since Switzerland's ratification of the *Hague Trust Convention*, and the trust has become an acknowledged planning tool in Switzerland. Therefore, formal guidance on these matters would be welcomed. ■

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1. Article 86, paragraphs 1 and 2 PIL
2. 198 Misc 1017 (NY Sur Ct 1950)
3. *In re Utassis' Will*, 15 NY 2d 436 (1966); *In re Hug's Estate*, 201 Misc 709 (1949)
4. *In re Estate of Prince*, 49 Misc 2d 219 (1964); *In re Estate Vischer*, 53 Misc 2d 912 (1967)
5. VPB 47 (1983) Nr 9 E 5c, 8a
6. Article 90 Abs 2 IPRG, NY EPTL 3-5.1(h)
7. NY SCPA s1602
8. *Restatement (Second) of Conflict of Laws*, ss239, 263; NY EPTL 3-5.1(b)
9. OCGA s53-5-34
10. Refer to footnote 5: there is not yet any Swiss case law in this regard