

SWISS INVESTMENT REPORT* 12

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* The Swiss Investment Report is provided by Wenfei Attorneys-at-Law Ltd. (“Wenfei”), a Swiss law firm with its seat in Zurich, which has gained extensive experience in providing services in Greater China.

The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

The Swiss Investment Report provides background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor’s perspective.

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Swiss Law of Succession

I. Introduction

The law of succession is part of the Swiss national civil law and thus unified in Switzerland. Swiss succession law is promulgated by articles 457 to 640 of the Swiss Civil Code (CC). It applies to Swiss domestic cases as well as to international cases governed by the substantive laws of Switzerland.

II. Statutory Order of Succession

The legal order of succession according to Swiss law as stated in article 457 et seq. CC provides for the following distribution order of the estate:

1. The nearest heirs of the deceased person are his or her descendants, whereby children inherit in equal parts and predeceased children are replaced by their own descendants.
2. Where the deceased is not survived by any descendants, the estate passes to the parental line, whereby the father and the mother each inherit one half of the estate and a predeceased parent is replaced by his or her descendants. Where there are no legal heirs on one side (maternal or paternal), the entire estate passes to the heirs on the other side.
3. Where the deceased is survived by neither descendants nor heirs in the parental line, the estate passes to the line of the grandparents.
4. Surviving spouses and registered partners (of same-sex couples) receive one half of the estate, if they have to share with the descendants; three-quarters of the estate, if they have to share with heirs in the parental line; and the entire estate, if no heirs exist in the parental line either.

With the death of the deceased, the estate passes in its entirety to the heirs by operation of law. Subject to statutory exceptions, the deceased's claims, rights of ownership, limited rights in rem and rights of possession automatically pass to the heirs and the debts of the deceased become the

personal debts of the heirs. Beneficiaries who are entitled to a share in an estate have the right to disclaim the inheritance. The time limit for a disclaimer is three (3) months. For statutory beneficiaries, the period begins on the date that they became aware of the deceased's death unless they can prove that they became aware of the inheritance at a later date. For nominated beneficiaries, the period begins on the date that they were officially informed of the disposition in their favour.

III. Testamentary Dispositions

As showed above, Swiss inheritance law imposes a statutory order of inheritance. However, this is only applicable in so far as the deceased did not make any testamentary dispositions.

A. Forms

Swiss law basically provides for two forms to dispose of assets upon death, will ("*Testament/letztwillige Verfügung*") and the contract of succession ("*Erbvertrag*"). In case the statutory order of succession does not correspond with the testator's requirements, the testator has the right to make his or her own arrangements in regard with the distribution of the estate.

1. Will

A will may be established by (i) public deed, or (ii) in holographic, or (iii) oral form (only in case of emergency).

A will by public deed must be prepared and notarized by a notary public. The document must be signed by the testator and two witnesses. The document must also confirm in the form of public deed that the testator is capable of making rational decisions. This can be an advantage compared to the holographic will, in particular if there is a risk that someone will challenge the validity of the will after the testator's death or if such document shall be recognized by foreign authorities.

The formal requirements for a holographic will are comparably low. The entire document must be handwritten and signed by the testator. It shall

include the date and place of execution, but no witnesses or notarization is necessary.

Due to the fact that a will in the form of a public deed is notarized and explicitly confirms the testator's capacity to make rational decisions at the time of execution, such document enjoys higher legal certainty. On the other hand, a holographic will grants the testator the opportunity to keep his last will confidential during his or her lifetime. Furthermore, it does not entail any costs and involvements of authorities.

2. Contract of Succession

A contract of succession is a contract between two or more persons in which at least one person commits him-/herself in his/her lifetime either by (i) renunciation of inheritance or (ii) provision of inter vivos benefits. In order to be valid, a contract of succession must meet the same formal requirements like a will executed as public deed. The contracting parties must simultaneously declare their intentions to the notary public and sign the deed before the notary and two witnesses.

B. Freedom of Testation

The Swiss law of succession only considers direct descendants, the spouse and, in cases where there are no children, the parents and grandparents under the conventions of the legal succession. If a person wishes to dispose of his or her estate in favour of other persons, such as an unmarried partner or stepchildren, he or she must do so by will or contract of succession. **However, such testamentary dispositions are subject to the compulsory portions ("Pflichtteil") of certain close relatives as stipulated in Art. 471 CC.**

The compulsory portion of a child is three-quarters of its statutory succession rights. If the child, for example, has to share with the surviving parent and one sibling, the compulsory portion is three-quarters (3/4) of one-quarter (1/4), i.e. three-sixteenth (3/16). The compulsory portion of a parent or surviving spouse is one-half of its statutory succession right. Grandparents do not have any mandatory entitlements.

A person who is not survived by any heirs with compulsory portion rights may freely dispose of his or her entire estate by testamentary disposition.

Within a will or a contract of succession, the testator may name one or more heirs to the entire estate or to a fraction thereof. The testator may also bequeath a legacy to a beneficiary without naming that person as an heir. Furthermore, the testator may attach obligations or conditions to the disposition, the fulfilment of which may be requested by any interested party once the disposition becomes effective.

Where the testator has exceeded his or her testamentary freedom, those heirs who do not receive the full value of their compulsory portion may sue to have the disposition abated to the permitted amount according to Art. 522 et seq. CC.

IV. Conflict of Laws

A. Jurisdiction

As a general rule from a Swiss law perspective, the Swiss judicial or administrative authorities at the last domicile of the deceased have jurisdiction in probate proceedings and inheritance disputes. An exclusive jurisdiction claimed by a state with respect to real property located therein shall, however, prevail.

If a foreigner, who had his last domicile abroad, leaves property located in Switzerland, the Swiss judicial or administrative authorities at the place where the property is located shall have jurisdiction to regulate that part of the estate to the extent not dealt with by the foreign authorities.

B. Applicable Law

The estate of a person last domiciled in Switzerland shall be governed by Swiss law. A foreigner may, however submit his estate by will or by contract of succession to the law of the state of which he or she is a citizen. Such choice shall, however, be void if the deceased was no longer a citizen of the chosen state at his death or if he or she had acquired Swiss citizenship.

The scope of the law applicable to the estate includes the determination of what belongs to the estate, who is entitled thereto and to what extent, who shall meet the debts of the estate, the legal remedies and measures that may be invoked and under what conditions. The procedures for execution itself shall however be governed by the law of the state of the authority having jurisdiction. In particular that law shall govern protective measures and the devolution of the estate, including the execution of the will.

The form of a will or any testamentary disposition is governed by the Hague Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions of October 5, 1961.

In regard with the establishment and recognition of trusts, a foreign testator should be aware that under Swiss substantive law, a testator cannot establish a trust, but may create a foundation by last will or contract of succession. So called family foundations are, however, only permitted to a very limited extent, i.e. for educational purposes or the financial support of individual family members in need, but not to maintain a whole family over generations. Where a foreigner with last domicile in Switzerland has subjected his/her estate to the law of his/her citizenship, a trust may be set up by will according to the applicable provisions of the governing foreign law.

C. Recognition and Enforcement of Foreign Decisions

Foreign decisions, measures, and instruments concerning an estate, as well as rights which are derived from an estate probated abroad, are recognized in Switzerland, if they were rendered in the state of the last domicile of the deceased or pursuant to the law chosen by the deceased, or if they are recognized in one of those states. In case of decisions concerning real property, such decisions are recognized in Switzerland if they were rendered in the state in which the property is located or if they are recognized in that state. Protective measures issued in the state in which property of the deceased is located shall also be recognised in Switzerland.

V. Practical Cases

A. Chinese Citizen with Last Domicile in Switzerland

A case of succession involving a Chinese citizen last domiciled in Switzerland will generally be handled by the competent authorities at the deceased's last domicile in Switzerland. However, PRC law provides for an exclusive jurisdiction of the people's courts for inheritance disputes at the place where the major part of an estate is located (Art. 33 (3) PRC Civil Procedure Law). This exclusive jurisdiction is recognized by Swiss international private law with respect to real property located in China, and shall therefore prevail (Art. 86 II Swiss International Private Law). But, even if the major part of the estate located in China is not real property, the parties are generally advised to submit the dispute to the competent people's court. Otherwise, they risk that a decision rendered by a Swiss court will not be recognized and enforced by Chinese authorities, and particularly in cases where the major part of the estate is located in China, such recognition and enforcement in China is usually inevitable.

The estate of a Chinese citizen last domiciled in Switzerland is generally governed by Swiss law, unless the deceased has submitted his estate to PRC law. Such submission has to be disposed by will or contract of succession. The major advantage of submitting the estate to PRC law is that the testator can avoid the relatively extensive restrictions of his freedom of testation caused by the protection of statutory heirs under Swiss forced heirship, which does not exist to the same extent under PRC law.

From a Swiss law perspective, a will or contract of succession of a Chinese citizen is valid according to the very liberal provisions of the Hague Convention on the Conflicts of Law Relating to the Form of Testamentary Disposition, even though China is not a signatory state of this convention. Thus, a testamentary disposition is valid if its form complies with the internal law (i) of the place where the testator made it, or (ii) of a nationality possessed by the testator at the time when he made the disposition or at the time of his death, or (iii) of a place in which the testator had his domicile

either at the time when he made the disposition, or at the time of his death, or (iv) of the place in which the testator had his habitual residence at the time when he made the disposition or at the time of his death.

B. Chinese Deceased with Assets in Switzerland

The PRC Civil Procedure Law provides for an exclusive jurisdiction of the people's court at the place where the deceased had his last domicile. Thus, the jurisdiction with respect to inheritance disputes will generally be in China if a Chinese citizen was last domiciled in China, even if the estate or major part thereof is located outside of China, e.g. in Switzerland.

The Swiss law respects this exclusive jurisdiction, but provides for an alternative jurisdiction in Switzerland under certain circumstances: If a Chinese citizen domiciled outside of Switzerland at death leaves property located in Switzerland, the Swiss judicial or administrative authorities at the place where the property is located shall have jurisdiction to regulate that part of the estate in Switzerland to the extent not dealt with by the foreign, i.e. Chinese authorities (Art. 88 I Swiss International Private Law). In any event, if the deceased had his last domicile abroad and left property located in Switzerland, the Swiss authorities can order provisional measures necessary to protect the property (Art. 89 Swiss International Private Law).

According to the PRC conflict of laws rules, the estate of a person last domiciled in China shall generally be governed by PRC law. As an exception, for real property located outside of China, the Chinese Law of Succession states that the law of the place where the property is located shall apply. Therefore, even though the PRC law does not explicitly state to what extent the foreign law shall apply, a Chinese citizen owning real property in Switzerland should submit his or her estate to PRC law by will or contract of succession, if he or she does not want his freedom of testation be restricted by the provisions regarding forced heirship of the Swiss inheritance law.

VI. Taxes

When a deceased had his or her last domicile in Switzerland, inheritance taxes will be levied according to the applicable cantonal tax laws. Inheritance

taxes in Switzerland are in the full discretion of each canton, whereas the federal government does not levy any inheritance taxes. Except the canton of Schwyz, all Swiss cantons levy inheritance taxes, with tax rates generally varying from 0% up to 50% (status as of January 1, 2014). Heirs and legatees are usually taxed on their share of inheritance and the applicable tax rate depends on the relationship between the beneficiaries and the deceased and the value of the assets transferred. In most cantons spouses and children are exempt from inheritance taxes. In case of real property, the canton in which the property is located is entitled to levy respective taxes. Where more than one canton is involved, the tax amount is split between the entitled cantons, in order to avoid double taxation.

The initiative regarding the “Erbchaftssteuerreform” (revision of the inheritance tax law) aims to introduce a uniform federal inheritance and gift tax. The tax rate shall be 20%, whereby a one-off exemption of two million Swiss francs on the amount of the estate and all taxable gifts is granted. Only donations between spouses and registered partners as well as gifts of CHF 20’000 per year and recipient shall be exempt from taxation. Further exceptions shall be granted to small and medium sized enterprises and agricultural businesses. It remains to be seen whether this initiative will pass the referendum, which is expected to take place in 2014 or 2015.

VII. Conclusion

Generally, the administrative authorities and courts at the last domicile of a deceased person have jurisdiction regarding inheritance matters, applying the substantive inheritance law at the place of the last domicile. Under Swiss law, a testator may dispose of his estate in the form of a will or contract of succession, subject to compulsory shares granted by law to close relatives.

As a Chinese citizen domiciled in Switzerland or owing real property in Switzerland may be affected by the forced heirship as stated in Art. 471 of the Swiss Civil Code, he or she should consider to submit his or her estate to PRC law.

If a deceased person had his or her last domicile in Switzerland, the estate will be subject to the applicable cantonal inheritance taxes. The federal government does, so far, not levy any inheritance taxes.

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