



**Universität
Zürich** ^{UZH}

Rechtswissenschaftliches Institut

Will-substitutes in Switzerland and Liechtenstein

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Will-substitutes in Switzerland and Liechtenstein

- I. Eo ipso succession and the need for will-substitutes
- II. Main reasons for using will-substitutes under Swiss/Liechtenstein law
- III. Foundations: Switzerland
 1. Nature and legal framework
 2. Types of will-substituting foundations
 3. „Company“ foundations
 4. Foundation and inheritance law: core overlaps
 5. Family foundations
- IV. Foundations: Liechtenstein
 1. Types of family foundations, Art. 552 § 2 PGR
 2. Family foundations: important differences with Swiss law
 3. Liechtenstein (family) foundation: an internationally viable instrument?
- V. Trust
 1. Switzerland
 2. Liechtenstein
- VI. Pension plans and life insurances in Switzerland
- VII. Concluding remarks



Will-substitutes in Switzerland and Liechtenstein

I. Eo ipso succession and the need for will-substitutes

- No (full-blown) Common Law-style probate process under Swiss and Liechtenstein law
- Switzerland
 - Estate vests in the heirs by operation of law without intervention of court/administrator/executor, Art. 537, 560 ZGB
 - Administration of the estate may occur, i.a. if testator names executor
- Liechtenstein
 - Estate vests only after heirs accept and court devolves, Art. 799, 819 ABGB
 - → Closer to Common Law-probate



Will-substitutes in Switzerland and Liechtenstein

I. **Eo ipso succession and the need for will-substitutes**

- Less reason to use will-substitutes in order to avoid probate process; higher relative importance of wills
- Important motives for using will-substitutes remain
 - Predictability and controllability of wealth distribution; step-by-step transfer possible
 - Avoiding dissipation of assets
 - Forced share-avoidance
 - Tax planning



Will-substitutes in Switzerland and Liechtenstein

II. Main will-substitutes in Switzerland and Liechtenstein

- Foundations
- Trusts
- Third party-beneficiary contracts (life insurances; pension fund schemes, savings agreements etc.)
- Matrimonial property law-instruments
- Specific bank accounts
- Authorizations taking/maintaining effect post mortem
- Succession in shares to partnerships



Will-substitutes in Switzerland and Liechtenstein

III. Foundations: Switzerland

1. Nature and legal framework

- Endowment of assets for a particular purpose → independent legal entity, Art. 80 ZGB
- Creation inter vivos or testamentary, Art. 81 ZGB
- Prima facie contradictions when using foundations as will-substitutes
 - Separation founder/foundation ⇔ retaining influence on foundation
 - Foundation as “eternal” entity ⇔ distribution of assets to beneficiaries



Will-substitutes in Switzerland and Liechtenstein

III. Foundations: Switzerland

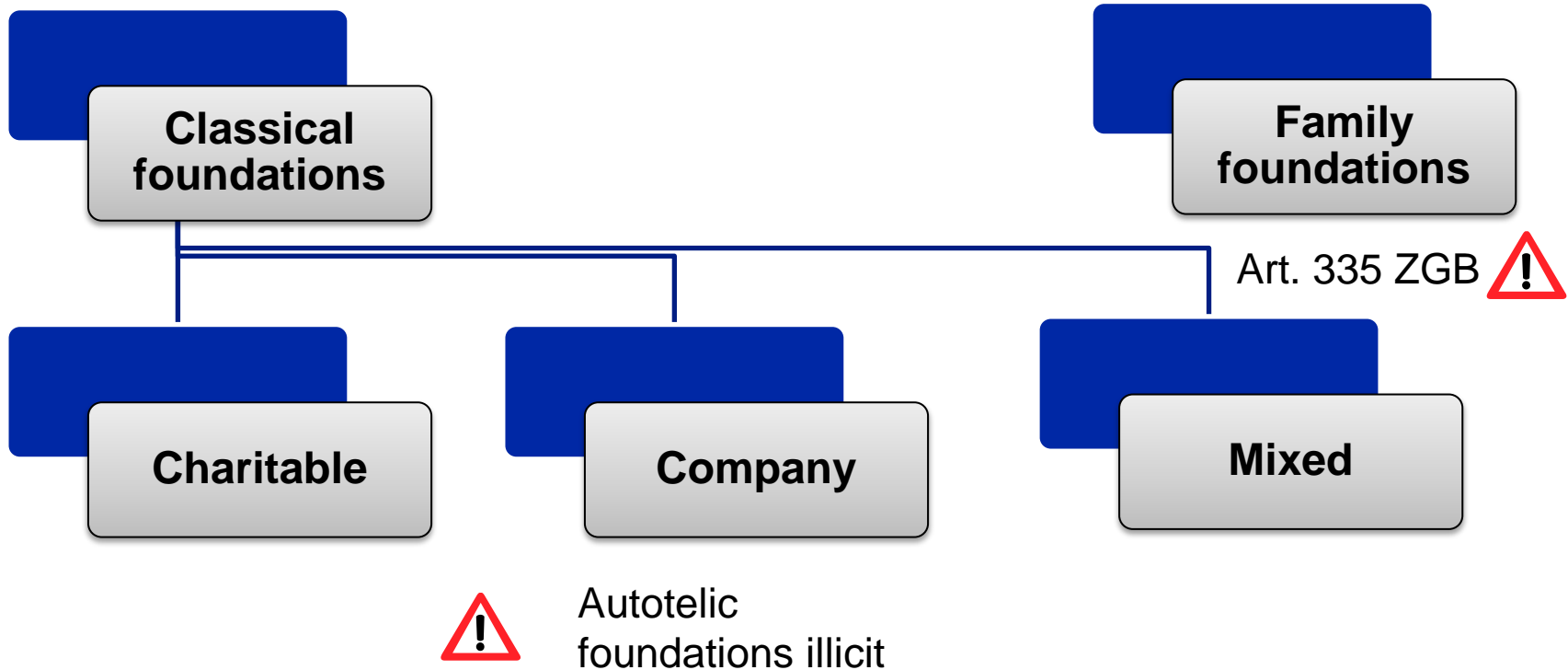
1. Nature and legal framework

- Separation founder/foundation ↔ retaining influence on foundation
 - Drafting foundation documents according to founder's wishes
 - Competence to modify foundation purpose (Art. 86a ZGB)
 - Founder member of foundation council and reservation of (family) influence
- Foundation as „eternal” entity ↔ distribution of assets to beneficiaries
 - Time limited-foundation
 - Spend down-foundation

Will-substitutes in Switzerland and Liechtenstein

III. Foundations: Switzerland

2. Types of will-substituting foundations and their issues





Will-substitutes in Switzerland and Liechtenstein

III. Foundations: Switzerland

3. „Company“ foundations

- Company/shares constitute essential foundation asset (holding foundation)
- Permitted in principle (BGE 127 III 337)
- Attractive to entrepreneurs as a means to preserve their life's work and to channel estate planning
- Legal and economic concerns remain
 - Self-serving foundations illicit
 - Underdiversification of foundation assets
 - Relatively inflexible
 - State supervision



Will-substitutes in Switzerland and Liechtenstein

III. Foundations: Switzerland

4. Mixed foundations

- Combination of company foundation-purposes with family and charitable purposes
- Permitted, even „classical“ Swiss foundation model
- Concern: Drifting apart of interests in second or third generation



Will-substitutes in Switzerland and Liechtenstein

III. Foundations: Switzerland

5. Family foundations

- Family members of founder as beneficiaries, Art. 87, 335 ZGB
- Prima facie the prototypical „inheritance foundation“
- In principle some attractive characteristics:
 - No ongoing supervision, Art. 87 ZGB
 - No mandatory registration in the commercial register (subject to change)



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III. Foundations: Switzerland

5. Family foundations

- Art. 335 (1) ZGB as major impediment
 - Family foundations only permitted: „in order to meet the costs of raising, endowing or supporting family members or for similar purposes”
 - Traditionally narrow reading by courts
 - → No regular, presuppositionless payments permitted, no „family maintenance foundation”
 - Changing view on family foundations in Switzerland?
 - Majority of scholars critical
 - Swiss Federal Court: No „loi d’application immédiate” (BGE 135 III 614)



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III. Foundations: Switzerland

6. Foundation and inheritance law: core overlaps

- Potential abatement of assets transferred to a foundation
 - Art. 527 No. 3 ZGB: gifts freely revocable or made within five years prior to death
 - Art. 527 No. 4 ZGB: transfers with the obvious intention of circumventing the limitations on testamentary freedom
 - Right of heirs to restitution, Art. 528 ZGB
 - Forced heirship rules as a main challenge to foundations as will-substitutes

Will-substitutes in Switzerland and Liechtenstein

IV. Foundations: Liechtenstein

1. Types of family foundations, Art. 552 § 2 PGR

Pure family foundations

- Similar in purpose to Swiss family foundations
- No unconditional maintenance payments; Privileges, e.g. in bankruptcy

Mixed family foundations

- Predominantly pure family foundation-purposes but additional charitable or private purposes possible
- Unconditional maintenance payments (as other private purposes) possible
- Limited family foundation-privileges

Other private foundations

- Similar to mixed family foundations
- But no pred. pure family foundation-component
- No family foundation-privileges



Will-substitutes in Switzerland and Liechtenstein

IV. Foundations: Liechtenstein

2. Family foundations: important differences with Swiss law

- (Pure) maintenance/enjoyment foundations permissible
- Further „special features“
 - Founder as beneficiary
 - Considerable latitude for the founder to retain control over the foundation, e.g. right to change beneficiary at will
 - Reservation of right to change purpose of or to revoke foundation
 - Foundation can be established by fiduciary → Privacy



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IV. Foundations: Liechtenstein

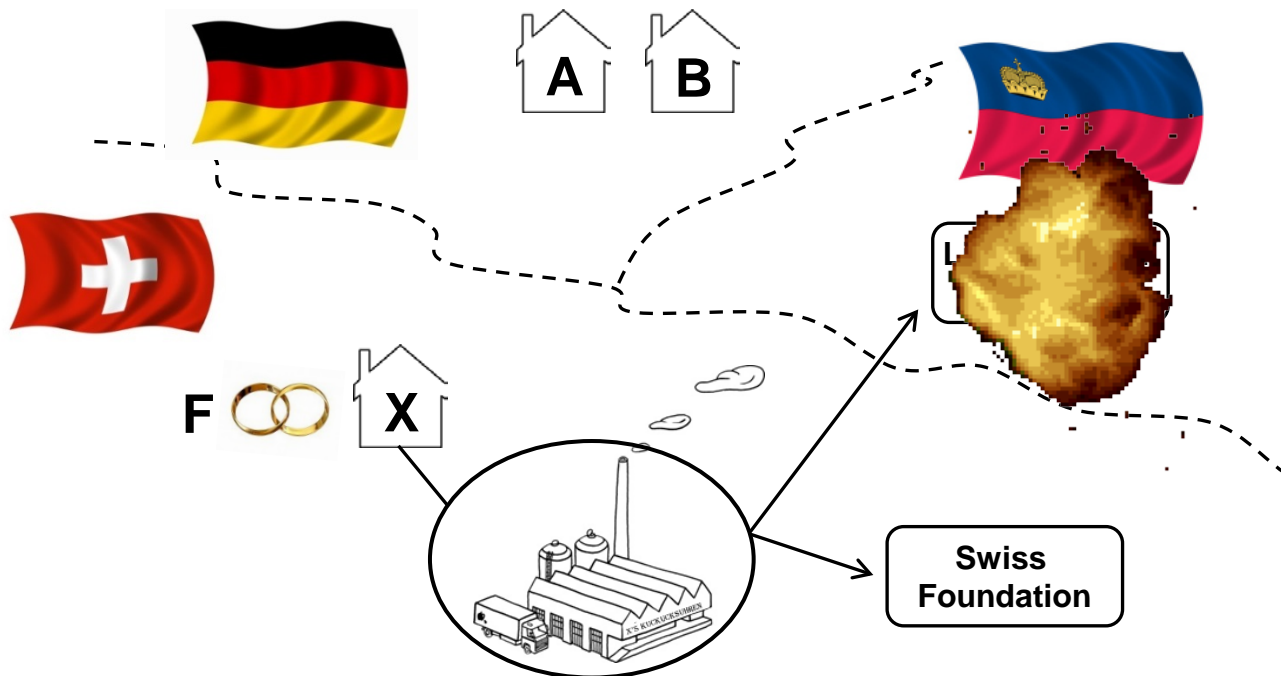
2. Family foundations: important differences with Swiss law

- Stronger protection against interference by succession rules
 - 2-year abatement period, § 785 (3) ABGB
 - No enforcement of foreign forced shares that differ from Liechtenstein regime (abatement period etc.), Art. 29 (5) FL-IPRG

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IV. Foundations: Liechtenstein

3. Liechtenstein (family) foundation: an internationally viable instrument?





Will-substitutes in Switzerland and Liechtenstein

IV. Foundations: Liechtenstein

3. Liechtenstein (family) foundation: an internationally viable instrument?

- Liechtenstein foundations in themselves highly flexible and attractive
- Danger: Other relevant jurisdictions may consider them violation of mandatory law and refuse to (fully) acknowledge them („piercing the veil“)



Will-substitutes in Switzerland and Liechtenstein

IV. Foundations: Liechtenstein

3. Liechtenstein (family) foundation: an internationally viable instrument?

- Switzerland
 - No violation of Art. 335 ZGB
 - Curtailing forced shares no ordre public-violation
- Germany
 - Veil piercing based on ordre public-violation/sham doctrine in case of tax evasion or controlling position of founder
- In general: The more flexibility and control founder retains, the weaker the asset protection effect may be
 - E.g. suspension of abatement period; tax treatment as a transparent structure



Will-substitutes in Switzerland and Liechtenstein

V. Trusts

1. Switzerland

- No Swiss trust law, no „Swiss law-trust“
- Recognition of foreign law-trusts after adoption of Hague Trust Convention
 - Treated „as trusts“, Art. 11 HTC → No transformation into Swiss law-entities
 - In principle application of law according to which trust was created, Art. 11, 6 seq. HTC



Will-substitutes in Switzerland and Liechtenstein

V. Trusts

1. Switzerland

- Application of Swiss law to important aspects of a trust-related case, e.g.
 - Transfer of property in trust, Art. 4 HTC
 - Mandatory provisions of other pertinent jurisdictions, Art. 15 HTC
 - Lois d'application immédiate, Art. 16 HTC; Ordre public, Art. 18 HTC
- (As yet) some legal uncertainty regarding overlap of Swiss law/respective trust law (cf. Rybolovlev case below)
- ➔ Trusts in Switzerland promising but legal counsel indispensable



Will-substitutes in Switzerland and Liechtenstein

V. Trusts

1. **Switzerland – piercing the trust-veil in the *Rybolovlev* case**
 - Prior to divorce, Dimitri Rybolovlev transfers billion dollar-fortune in Cyprus trusts
 - When Elena Rybolovlev claims part of this money in divorce proceedings, Swiss courts pierce the veil of the trusts and freeze the assets according to Art. 178 ZGB (interim measure) without paying much heed to HTC
 - Prima facie discouraging for use of trusts in Switzerland, BUT
 - „Bad case → Bad law“: Obvious attempt to evade marital property rules
 - Very strong remaining influence of settlor on trust (assets)
 - Veil piercing as yet limited to interim measures, main proceedings-decision unpublished



Will-substitutes in Switzerland and Liechtenstein

V. Trusts

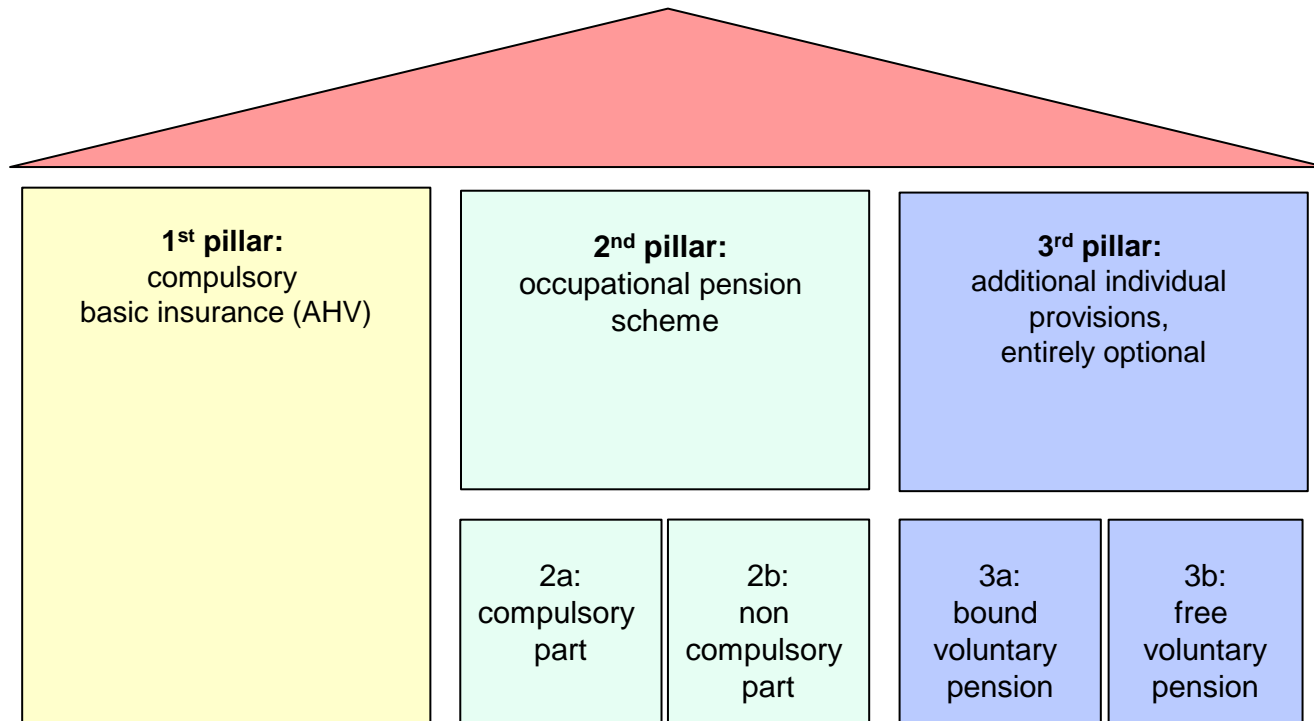
2. Liechtenstein

- Liechtenstein law-trust exists, Art. 897-932 PGR
- „Contractual nature”: consent of trustee always required, no trust by unilateral act
- Relatively weak position of beneficiaries, e.g. no *Saunders v Vautier*-rule
- Just as for Liechtenstein foundations, international acceptance might be a concern

Will-substitutes in Switzerland and Liechtenstein

VI. Pension plans and life insurances in Switzerland

- „Three pillars“ of old age-social security in Switzerland, Art. 111 ff. BV





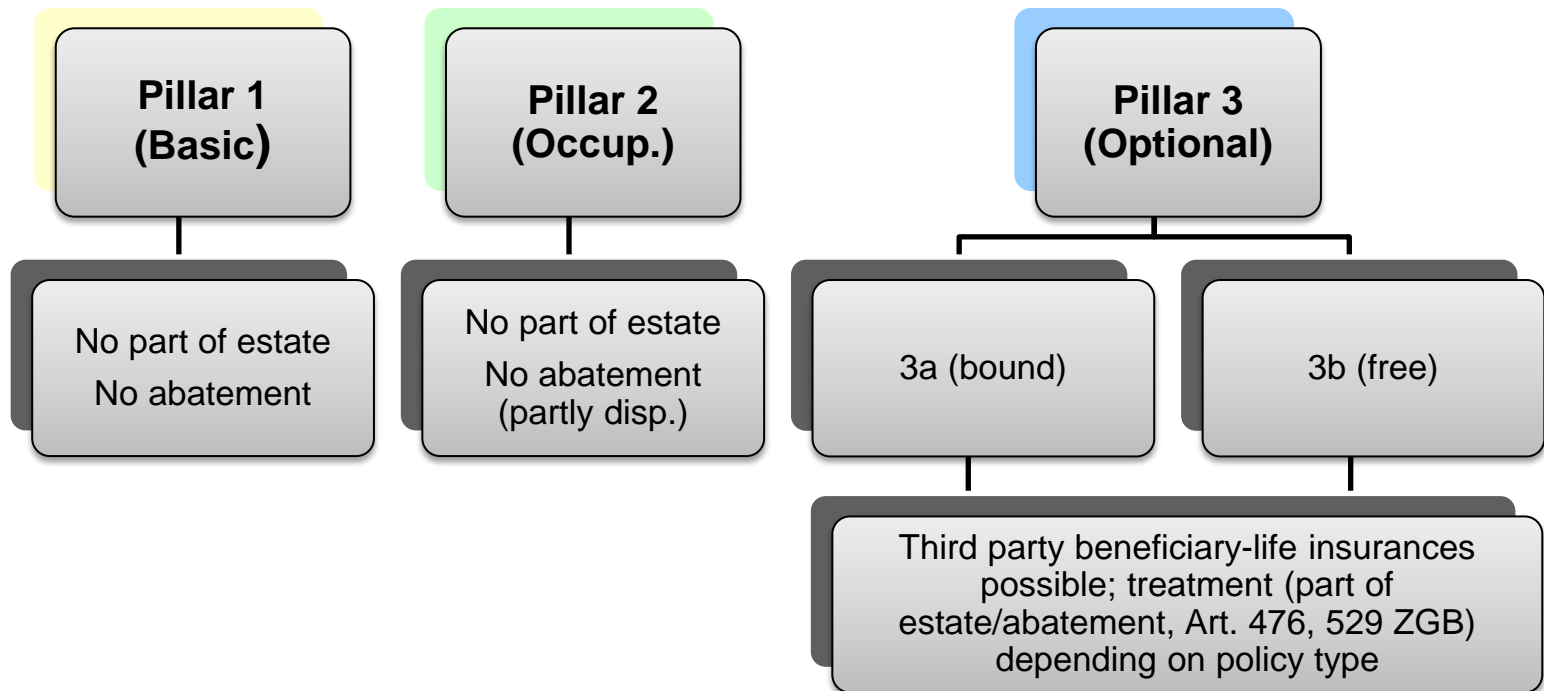
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VI. Pension plans and life insurances in Switzerland

- Two core resulting questions for using pension law-tools as will-substitutes:
 - Insurance part of the estate?
 - Property transferred by way of life insurances factored in when calculating forced shares, Art. 476, 529 ZGB?

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VI. Pension plans and life insurances in Switzerland





Will-substitutes in Switzerland and Liechtenstein

VII. Concluding remarks

- Absent a full-blown probate process, will-substitutes merely *additional* instruments to pass on wealth at death
 - Several interesting options for estate-planning
 - Use of will-substitutes has to face limitations (e.g. forced shares) and risks; (national and international) environment getting more and more precarious
- Know your limits – or ask**



Thank you for your attention

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Legal advice

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