LONG-TERM ESTATE PLANNING BY MEANS OF A TRUST OR FOUNDATION UNDER LIECHTENSTEIN LAW

I. STRUCTURAL POSSIBILITIES UNDER SWISS INHERITANCE LAW

The means available for estate planning under Swiss inheritance law are explicitly and exhaustively listed in the law. However, they only permit estate planning for a “short period” over one generation, or at most two generations (via the appointment of predecessors and successors). The institute of a Swiss foundation is also only suitable to a very limited extent for one’s own estate planning, since distributions can only be made if certain conditions are met (meeting the costs of education, furnishing or supporting family members; Art. 335 ZGB). According to the case law of the Federal Supreme Court, however, distributions are only permissible in the case of special needs and requirements or for the purpose of securing the existence of the family (BGE 75 II 90 f.). Thus, in particular, fixed annual maintenance allowances for family members are not permitted. The family foundation provided for in Swiss foundation law is therefore not attractive for long-term estate planning, in particular for wealthy families, due to its highly limited scope of use.

If, on the other hand, the family’s assets are to be available to the family over several generations in the long term, a trust or a foundation under Liechtenstein law is suitable for estate planning. In the following analysis, no specific distinction is made between trust and foundation, as they are similar in many respects. There are individual differences, but for the sake of simplicity, these are not addressed here.

II. BENEFITS OF A FOUNDATION OR TRUST UNDER LIECHTENSTEIN LAW

1. Long-term Safeguarding of Family Assets
Depending on the family constellation, there may be a legitimate interest in safeguarding the family’s assets over several generations. This is particularly the case if individual descendants cannot manage money, have high debts or suffer from a gambling addiction. A pending divorce can also play a role. The motives are basically based on one idea: The testator wants to ensure that his or her assets remain with the family for as long as possible.

Another aspect is the fact that when estates are divided, it is often the case that existing assets have to be divided up in order to satisfy the claims of the individual heirs. The division or sale of certain assets can lead to the asset itself losing value as a result of the division (e.g. real estate, shareholdings, art collections). By transferring these assets to a Liechtenstein foundation / trust, one protects these assets from the division.

2. Structural Versatility
Estate planning by means of a trust or a foundation under Liechtenstein law allows for a great deal of freedom in terms of structuring the estate. The testator can already determine the statutes and possible regulations during his or her lifetime. In this way, he or she can determine whether, when and, if so, under what conditions distributions are to be made to beneficiaries. Furthermore, he or she can determine which persons are to be beneficiaries in the future (e.g. only direct descendants, or also persons by marriage, or even friends of the family) and which substrate may be distributed (use of the family assets or distribution of income only).

In the case of a formation during one’s lifetime, a freely revocable trust or foundation is also conceivable. This allows the founder to dissolve the structure at any time and take back ownership of the assets. However, this arrangement is not very attractive from a tax point of view. Instead, the founder can appoint him or herself as the beneficiary and, for example, also reserve the right to amend the articles of association. This provides the founder with a far-reaching influence. Finally, he or she can also participate in the Board of Trustees or as a trustee in the trust.

For tax reasons, however, it is recommended for the Board of Trustees not to be composed of family members. On the one hand, for tax reasons, and on the other hand, so that disputes within the family are not transferred to the foundation or the trust. It is recommended that the Board of Trustees be staffed with neutral experts. A so-called protector can be created as a controlling body. Such a body can, for example, re-elect the Board of Trustees or must approve certain resolutions. The majority of the members of such a Board should also be experts.

3. Anonymity
The design and operation of the trust allows for a high degree of privacy. Inspection by third parties of the foundation’s or trust’s documents is very limited. In particular, the identity of the beneficiaries is not public information. In the case of the foundation, neither the founder has to be disclosed nor do the foundation documents have to be presented. In the case of a

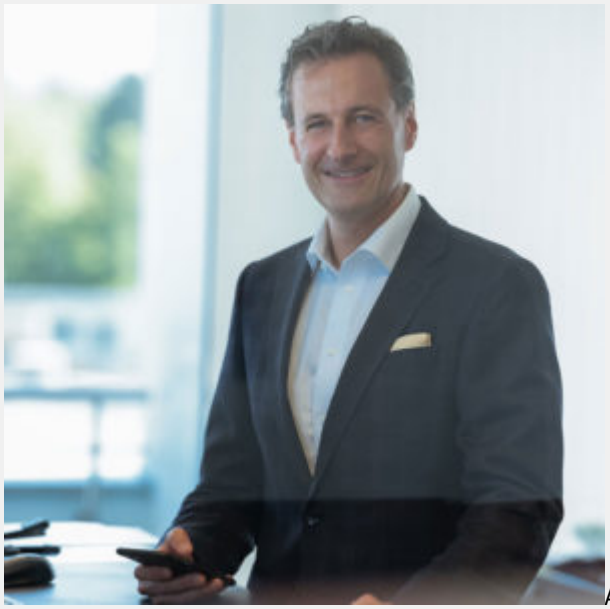
trust, instead of an entry in the commercial register, a deposit can be made. Such deposited documents are only accessible to a very limited group of people.

4. Tax Advantages
The structuring of the estate planning through a foundation or a trust under Liechtenstein law can, depending on the arrangement, also bring tax advantages. Since the assets are separated from the family, the family members pay neither wealth tax nor any income tax on income. Only in the case of distributions do tax consequences arise.

Every arrangement and structuring is individual. For the tax treatment of the dedicated assets, the structuring is decisive. It is therefore recommended to involve appropriate tax advisors.

-MLaw Armin Gilg, Attorney at Law and Notary, Partner at Studhalter & Meier Rechtsanwälte AG

WE CONGRATULATE DR. PHILIPP STUDHALTER ON HIS SUCCESSFUL ELECTION AS PRESIDENT OF THE COMMITTEE OF THE SWISS FOOTBALL LEAGUE



At the General Assembly of the Swiss Football League on Friday, 19th November 2021, our Partner, Dr. Philipp Studhalter was successfully elected as President of the Committee of the Swiss Football League. Dr. Studhalter has been a member of the Swiss Football League Committee since 2017. He was head of the structural reform working group, whose recommendations came into force with the General Meeting on 18th November 2021. From 2015 to spring 2021, he was president and CEO of FC Lucerne. In his function as a lawyer, he holds various other Board of Director mandates.

www.sfl.ch/news/news/artikel/philipp-studhalter-neuer-praesident-des-sfl-komitees/

Article published on 19th November 2021 on the website www.sfl.ch

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THE CURRENT CASE LAW ON THE FREEDOM OF LEGAL ENTITIES FROM SELF-INCRIMINATION

I. ISSUE

One of the most fundamental principles of criminal proceedings is the right not to incriminate oneself (nemo tenetur). Accused persons have the right to refuse to testify. Statements made in ignorance of the right not to incriminate oneself cannot be used to the disadvantage of the accused. Accused persons are neither obliged to hand over documents nor to participate, in any way, in the investigation of the facts. However, the extent to which freedom from self-incrimination includes legal entities has not been conclusively resolved. Legal areas in which administrative provisions take on the character of sanctions are also of increasing importance. In contrast to criminal proceedings, there is usually a duty to cooperate in administrative proceedings.

II. CASE LAW

The Federal Supreme Court assumes that the principle of nemo-tenetur also applies to legal entities, but that this principle can be restricted. Specifically, the Federal Supreme Court is of the opinion that documents that were created on the basis of legal documentation obligations are not subject to the exemption from self-incrimination (BGE 142 IV 207; BGE 140 II 384). Accordingly, the accused legal entity is obliged to submit documents that it was obliged to produce by law. This is justified by the fact that the nemo tenetur principle is derived from human dignity. This component is missing in the case of legal entities (BGE 140 II 384, E. 3.3.4).

Another example of the aforementioned problem is antitrust law. Art. 49a para. 1 KG provides that companies can be charged with a sanction in case of unlawful restrictions of competition. The Competition Commission has the power to hear third parties as witnesses and to oblige those concerned to provide evidence. In these cases, the legitimate question arises as to the extent to which principles of criminal procedure, in particular the nemo tenetur principle, apply.

The issue was once again brought into the limelight by a recent Federal Supreme Court decision (BGer 2C_383/2020 of 08.03.2021): The Federal Supreme Court had to judge whether former executive bodies could be comprehensively obliged to testify against the company as witnesses. The Federal Supreme Court came to the conclusion that the distinction between “those directly affected by the investigation” and “third parties” (Art. 42 (1) CartA) was of crucial importance for assessing this question. In principle, it was stated that for “persons directly affected by the investigation” Art. 6 para. 1 ECHR applied. They can refuse to testify, while third parties as witnesses are subject to the duty of truthfulness (BGer 2C_383/2020 of 08.03.2021, E. 4.3).

The Federal Supreme Court concluded that only the parties to the proceedings would fall under the term “parties affected by the investigation”. Since legal entities act through their current formal and de facto bodies, they are to be treated as parties. Other employees or former bodies, on the other hand, lack party status, which is why they are to be questioned as witnesses (BGer 2C_383/2020 of 08.03.2021, E. 4.6 f.).

In its reasoning, the Federal Supreme Court stated that in antitrust proceedings a different thrust is pursued than in criminal proceedings against natural persons. The purpose of refusing to testify in antitrust proceedings is not to protect the executive bodies, but to protect the rights of defense concerning the incriminated companies. The executive bodies of legal entities may refuse to testify if they still perform their current function and have not left the company (BGer 2C_383/2020 of 08.03.2021, E. 5.2.2).

III. CONCLUSION

The courts do not grant comprehensive application to the nemo tenetur principle. The restrictive handling leads to the fact that companies can be held criminally responsible, but they do not have the same procedural rights as natural persons. The way in which case law deals with the formulation of the aforementioned principle seems unsatisfactory. It appears that an attempt is being made to water down an elementary procedural principle for practical reasons.

Nevertheless, the scope of application is not completely limited, but a few concessions are made. The flexible design of these rights, however, brings legal uncertainty with it. The principle of freedom from self-incrimination and Art. 6 ECHR should not be applied to varying degrees. From the point of view of the investigating authority, it seems understandable that the determination of the facts is made considerably more difficult without an obligation to cooperate. However, the notoriously limited resources of the prosecution authorities should not undermine the validity of a right with constitutional status.

-MLaw Laura Muheim, Attorney at Law at Studhalter & Meier Rechtsanwälte AG
-MLaw Felicitas Ronneberger, Legal Intern at Studhalter & Meier Rechtsanwälte AG

GOVERNMENT COUNCIL INTRODUCES COMPULSORY FORMS IN THE CANTON OF LUCERNE AS OF 1ST NOVEMBER 2021

From 1st November 2021, landlords in the Canton of Lucerne are required to disclose the previous rent to the tenant when concluding a rental agreement and to justify any increases.

Due to the current low vacancy rate, the cantonal government is issuing a form requirement. This will apply from 1st November 2021 throughout the canton of Lucerne and also includes the analysis region of Unteres Wiggertal (Altishofen, Dagmersellen, Egolzwil, Nebikon, Reiden, Wau-wil and Wikon), where the vacancy rate is over 1.5 percent.

The form requirement is intended to create transparency with regard to rents and rent increases and to prevent rent index excesses when tenants change.

According to § 94 para. 1 EGZGB Lucerne, the government council can declare the use of the form obligatory for the conclusion of new tenancy agreements in the entire cantonal territory or in parts thereof.

The obligation to use the form comes into force on 1st November 2021 and applies until further notice to tenancy agreements concluded on or after 1st November 2021. The relevant form can be downloaded from the following link as of 1st October 2021: https://gerichte.lu.ch/organisation/schlichtungsbehoerden/miete_pacht/formulare.

-MLaw Ralf Voger, Attorney at Law and Partner at Studhalter & Meier Rechtsanwälte AG
-MLaw Mara Wilhelm, Legal Intern at Studhalter & Meier Rechtsanwälte AG

REMARKS ON THE REQUIREMENT FOR VACCINATION CERTIFICATES FOR ACADEMIC COURSES

With the start of the academic year at universities and institutions of higher education in Switzerland, there is a great deal of debate regarding the requirement for vaccination certificates in order to attend courses. Our Attorney at Law Laura Muheim comments on the controversial requirement for vaccination certificates.

www.tele1.ch/nachrichten/gefaehrdet-die-zertifikatspflicht-das-recht-auf-bildung-143762943

New broadcast from 15th September 2021 on Tele1

STUDHALTER & MEIER RECHTSANWÄLTE AG WELCOMES ITS NEW PARTNERS!

We are pleased to announce that Armin Gilg, Artan Sadiku and Ralf Voger, all of whom have been with Studhalter & Meier Rechtsanwälte AG for many years, are now partners in the firm. Studhalter & Meier Rechtsanwälte AG relies on continuity, experience and expertise and is looking forward to further cooperation with our new partners.

USEFUL INFORMATION CONCERNING "HOLIDAYS"

I. INTRODUCTION

Holiday is defined as the exemption from the obligation to work while, at the same time, receiving one's salary. As important as holidays are for employees' relaxation, it is equally important to know the legal situation in connection with these holidays, especially since conflicts under labour law can arise quickly. The most basic points are briefly explained below without claiming to be exhaustive.

II. LEGAL BASIS

Holidays are governed by Art. 329a et seq. of the Swiss Code of Obligations (CO). It is necessary to distinguish the terminology of "holiday" from "leave". While these terms are used synonymously in common parlance, the legislature does not understand the term "leave" to mean normal holidays; rather, it's understood to mean leave for extracurricular youth work (Art. 329e CO), maternity leave (Art. 329f CO), paternity leave (Art. 329g CO), leave to care for dependents (Art. 329h CO) as well as leave to care for a child whose health is seriously impaired due to illness or accident (Art. 329i CO).

III. DURATION OF HOLIDAY

The employer must grant the employee at least four weeks of holiday each year of service and at least five weeks of holiday for employees up to the age of 20 (Art. 329a CO). This is the minimum duration of holiday though the employment contract can of course provide for longer holidays. The minimum duration must be granted so that holidays cannot be compensated financially. The situation is different when the employment relationship is terminated. If the employee still has a holiday entitlement at the end of the employment relationship, this must be paid out to him or her.

During holidays, the employee must be granted the opportunity to relax. If the recreational purpose is thwarted, it cannot be considered a holiday. Thus, it is not permitted to declare culpable absences from work as holidays after the fact, even if both parties agree to it.

The recreational purpose of the holiday may also be thwarted by accident or illness. If an employee falls ill or has an accident during the holiday, so that the purpose of the holiday is not guaranteed, the employee is entitled to the

corresponding number of additional days. There does not necessarily have to be an actual incapacity to work; rather, if the recreational purpose of the holiday is not guaranteed for health reasons, this is sufficient for a claim to additional allowance.

IV. REDUCTION OF HOLIDAY

If the employee is prevented from working for a total of more than one month during a year of service through his or her own fault, the employer may reduce the holidays by one-twelfth for each full month of absence (Art. 329b CO). The absence must be due to the employee being unable to work. Unpaid holiday, legal disputes, operational disruptions, etc. are therefore not covered by Art. 329b CO. Only absences that are self-imposed by the employee or if no work can be performed due to gross negligence are entitled to a reduction of vacation.

If the absence is not the fault of the employee, such as in the case of illness, accident or military service, the holiday entitlement may only be reduced by one-twelfth from the second full month of absence (Art. 329b Para. 2).

V. TIMING OF HOLIDAY

The timing of holiday also regularly offers potential for conflict between employers and employees. According to Art. 329c of the Swiss Code of Obligations, holidays must generally be granted during the course of a year of service, whereby at least two weeks of holiday must be taken at the same time. Contrary to popular belief, the timing of the holidays is not determined by the employee, but by the employer, whotakes the wishes of the employee into account as far as possible.

If holiday is not taken during the year, it must be carried over to the next year. It should be noted that the holiday entitlement expires after five years in accordance with Art. 128 No. 3 of the Swiss Code of Obligations.

Although the timing of the holiday is determined by the employer, he or she must take into account the wishes and family circumstances of the employee to the extent that this is compatible with the interests of the company or household. In particular, holidays may not be arranged exclusively outside of the school holidays if the employee has school-age children. The employer must determine the holidays early so that the employee can organize his or her holidays accordingly. In the case of longer holidays, the courts assume a lead-time of about three months.

IV. CONCLUSION

In order to prevent conflicts in connection with holidays, it is advisable to have an open dialogue in this regard and to coordinate these matters with the employees at an early stage. This is all the more important as the relaxation and satisfaction of the employees is also in the interest of the employers.

-Dr. iur. Philipp Studhalter, Attorney at Law and Partner at Studhalter & Meier Rechtsanwälte AG

WE CONGRATULATE ARTAN SADIKU ON THE SUCCESSFUL COMPLETION OF THE CAS CRIMINAL PROCEDURE LAW PROGRAMME

Studhalter & Meier Rechtsanwälte AG congratulates Attorney at Law Artan Sadiku on the successful completion of the CAS “Criminal Procedure Law” programme. We look forward to continuing to assist our clients in their criminal proceedings with our expertise, passion and commitment.

LEGALISED CANNABIS CULTIVATION AND SALE UNDER THE LABEL OF SCIENCE

I. INTRODUCTION

In Switzerland, it is fundamentally forbidden to cultivate, import, produce or sell non-medical cannabis. With the Ordinance on Pilot Trials for the Controlled Dispensing of Non-Medical Cannabis (BetmPV), a legal basis has now been created for the implementation of scientific pilot trials for dispensing cannabis products of all kinds to adult study participants. Specifically, since 15th May 2021, applications for the testing of pilot trials with non-medical cannabis can be submitted to the Federal Office of Public Health (FOPH).

II. LEGAL BASIS

Based on the newly created Art. 8a of the Narcotics Act (BetmG) and the BetmPV, the Federal Office of Public Health may, after consulting with the cantons and municipalities concerned, authorize pilot trials with narcotics of the cannabis type under the following conditions, which must be met cumulatively:

- The trials must be limited in terms of location, time and subject matter. The area of the pilot trial must be limited to a few municipalities. In addition, up to 5’000 adults who have already used cannabis and reside in the participating canton may participate in the project. The time limit for a project is 5 years per trial, although it can be extended by two additional years upon request.
- The trials must make it possible to gain knowledge about how new regulations affect the use of cannabis for non-medical purposes and how the health of the participants develops. It is mandatory for a recognized research institute to be involved in the project. The research question defined by the respective research project is also subject to the approval of the responsible ethics committee.
- Experiments must be conducted in such a way as to ensure the protection of health, the protection of minors, the protection of public order and public safety.
- Cannabis products that are of Swiss origin and comply with the rules of the Swiss organic landscape must be used in the experiments.

III. IMPLEMENTATION OF PILOT TRIALS

The pilot trials are not only open to those who conduct the trials, cultivate cannabis, produce and sell cannabis products, but also to adult cannabis users as study participants. Study participants will be counseled and decriminalized as part of the trial.

The framework conditions for the pilot trials are strict and therefore require a considerable amount of organisational and administrative effort. This even extends beyond the duration of the trial, especially since the study participants must be cared for even after the experiment has been completed. In the run-up to the experiment, close cooperation with the municipal and cantonal authorities is required to clarify issues relating to the protection of public safety and order and to obtain the necessary permits.

As mentioned above, the cannabis offered must meet high quality standards and be organically grown. Supply chains are monitored and strictly controlled from seed to product distribution to prevent products from entering the black market. In addition, the cannabis must not exceed a total tetrahydrocannabinol (THC) content of 20%. Even the packaging is subject to strict rules and there is an absolute ban on advertising.

Sales are only permitted at locations approved by the authorities. This is to ensure that the sales staff is adequately trained and qualified. Furthermore, the point of sale must have an appropriate infrastructure. This includes, in particular, theft-proof storage of the products. After the trial has ended, the remaining cannabis products must be handed over to the authorities.

The sale price of the cannabis products must be based on the black market price. The higher the THC concentration, the more the product can be sold for. However, as mentioned above, the THC content must not exceed 20%. The amount that can be distributed per person is limited to 10 grams of total THC per month.

IV. LEGAL ALTERNATIVES TO PARTICIPATION IN A PILOT TRIAL

Those who shy away from the aforementioned administrative hurdles to participate in a pilot trial and still want to cultivate cannabis have the opportunity to grow so-called CBD. The abbreviation CBD stands for cannabidiol and, in contrast to the active ingredient THC, it has a calming, analgesic, anti-inflammatory and anti-spasmodic effect.

Since CBD is not subject to the Narcotics Act, there is no legally defined limit in Switzerland. In contrast, the THC content is always decisive. Cannabis with a THC content of less than 1% has been legal in Switzerland since 2011. The distributors of such products must, however, comply with the relevant Swiss legislation under which his or her product falls (e.g. Foodstuffs Act, Tobacco Regulation, Chemicals Act, etc.). In addition, he or she is obliged to report the products to the FOPH before placing them on the market.

IV. CONCLUSION

Based on the information provided above, the cultivation and sale of cannabis products is legal in Switzerland under certain conditions. However, before implementing a project, it is always advisable to obtain detailed information about its legality and to ensure that the necessary conditions are met and that the required permits are obtained.

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THE PROPERTY PURCHASE CONTRACT, PART II – LEGAL RISKS FOR THE BUYER

I. OVERVIEW OF RISKS

A property purchase contract always involves large sums of money, which is why it is important for the parties to take as few risks as possible and to protect themselves from the existing risks in the best way possible.

The following risks for the buyer are detailed below:

- Building contractor’s lien
- Real estate lien on property gains tax
- Real estate lien on condominium contribution costs
- Warranties on the building

II. THE SELLER’S RISKS

1. Building Contractor’s Lien
The seller often has minor renovation work carried out before the sale so that the property can be sold at the highest possible price (painting, plumbing, etc.). Building contractors can establish a lien on the property within four months of completing such work if the client (seller) does not pay the invoice. This can lead to a situation where the buyer purchases a plot of land and only after the purchase has been made does the building contractor secure the plot of land – now owned by the buyer – with a lien. As a result, the buyer ends up paying the building contractor’s costs which weren’t paid by the seller if he or she wants to prevent the property from being auctioned off.

2. Real Estate Lien on Property Gains Tax
The most common security measure in real estate purchase agreements is the security of the real estate gains tax. The real estate gains tax is owed by the seller and represents a tax on the realized sales profit. If the seller does not pay the real estate gains tax, the tax authorities may establish a lien on the real estate, which at that time no longer belongs to the seller (!). As a result, the buyer has to pay the real estate gains tax if he or she wants to prevent his real estate from being auctioned off by the tax authorities for the payment of the real estate gains tax.

3. Real Estate Lien on Condominium Contribution Costs
In the case of a purchase of a condominium unit, the buyer must clarify before the purchase whether the seller has paid all contribution costs to the condominium owners’ association. This is because the condominium owners’ association has a legal lien on the property for outstanding claims. This means that a lien can be placed on the apartment for unpaid contributions. If the buyer wants to prevent a corresponding auction, he must pay the outstanding amounts. After paying these premium costs, the buyer can take recourse against the seller, although he or she naturally bears the risk that the seller will not pay him or her anything.

4. Warranties on the Building
Buying an existing (and often older) house is comparable to buying a second-hand car. Accordingly, the warranty for the building is often excluded as far as legally possible. The building is purchased as viewed. Is it therefore important for the buyer to examine the object of purchase carefully and, if necessary, to take a specialist with him or her to the inspection.

The risk of the buyer then lies, in particular, in defects which were not visible at the beginning (e.g. if mold infestation of walls was painted over before the sale). If the buyer claims defects which the seller fraudulently concealed, he or she must be able to prove this in the event of a dispute (for example, an expert opinion on the property by a building surveyor). In addition, the notice periods must also be observed in the event of such defects. In other words: Immediately after discovering a defect, notify the seller in writing and assert the corresponding right (e.g. assumption of the costs for repairing the damage by the seller).

III. CONCLUSION

The purchaser must ensure that the aforementioned risks are covered in the best possible way in the property purchase contract. This will prevent a rude awakening after the purchase and save on expensive legal proceedings.

-MLaw Armin Gilg, Attorney at Law and Notary at Studhalter & Meier Rechtsanwälte AG