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# **Private Foundations and Trusts: Just the Same but Different**

**The International Academy of Estate and Trust Law  
Florence, 20. May 2015**

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## Agenda

- I. Introduction: the 'Germanic' view on foundations
- II. What is a foundation and how does it function?
- III. How to use a foundation in (international) estate planning?
  1. Types of foundations under Swiss law
  2. Types of foundations under Liechtenstein law
- IV. When will a foreign law-foundation be recognized?
  1. A (Liechtenstein) private foundation: an internally viable instrument?
  2. Will trend from trusts to private foundations influence the international environment?
- V. Conclusion: An ideal structure?



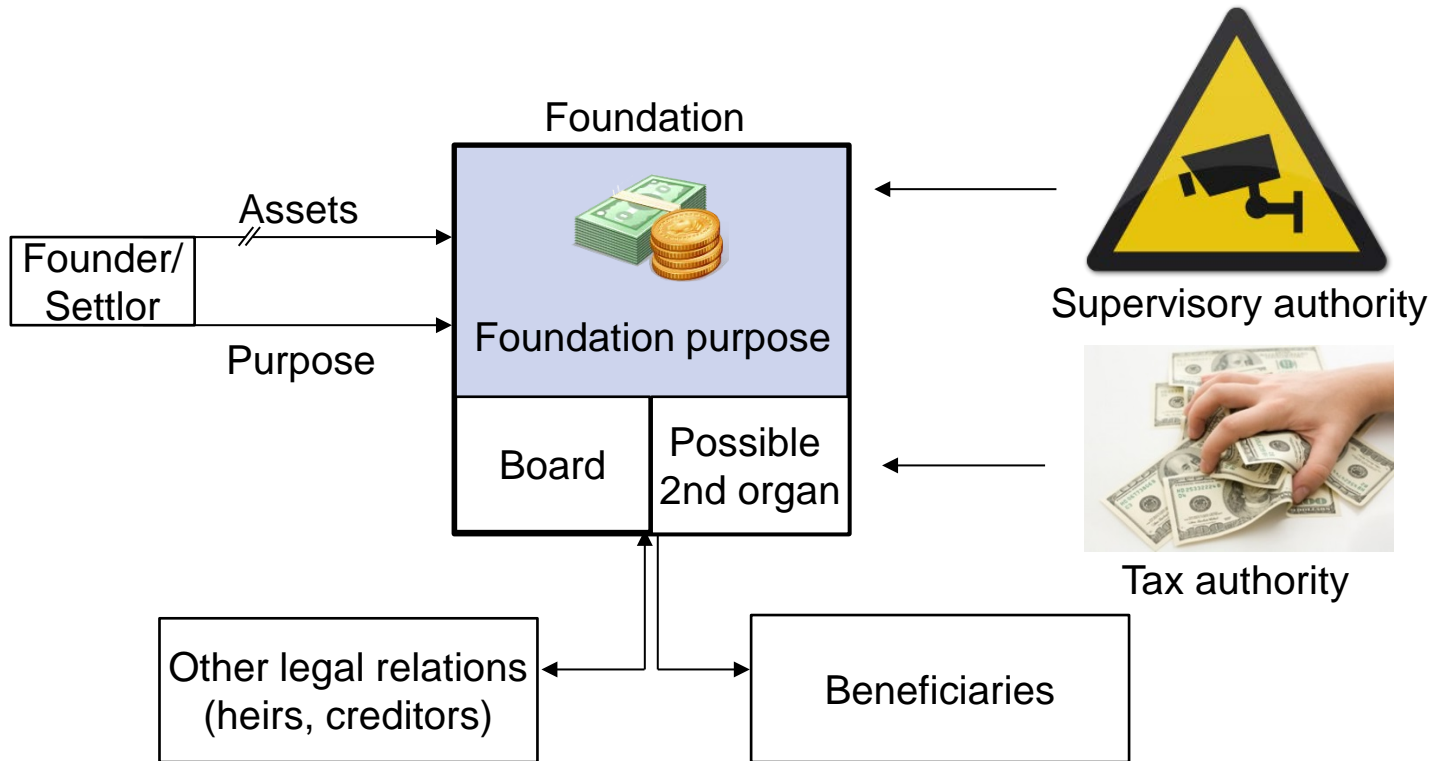
## **Private Foundations and Trusts: Just the same but different**

### **I. Introduction: the ‘Germanic’ view on foundations**

- The ‘German legal family’
  - Germany, Switzerland
  - Liechtenstein, Austria
- The rise (and fall) of foundations
- The ‘classical’ foundation concept vs. ‘private foundations’

# Private Foundations and Trusts: Just the same but different

## II. What is a foundation and how does it function?





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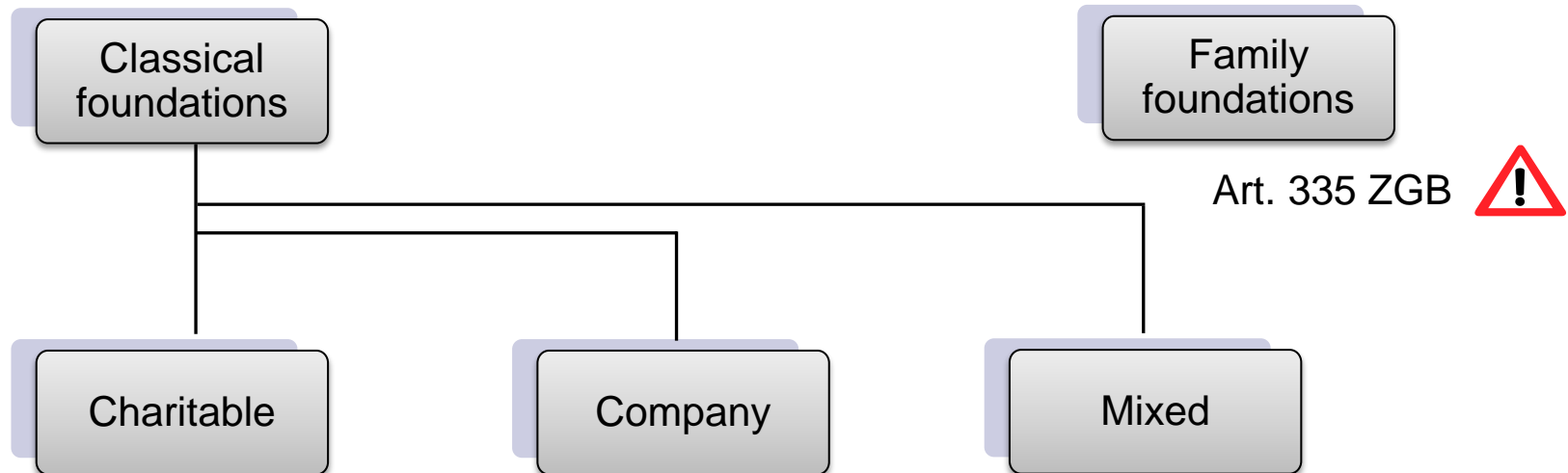
### II. What is a foundation and how does it function?

- The ‘classical foundation’ concept vs. ‘private foundations’
  - Classic model: Complete separation of assets and rigid perpetuation of original will of the founder
  - Private foundation: Autonomy of the founder prevails over dogmatic limitations thus providing a more flexible tool for asset and estate planning
  - Private purpose foundation ≠ private foundation
  - Some compromise in Swiss law which contains a few ‘functional’ elements since 2006 (e.g. a [limited] right of the founder to change purpose)

## Private Foundations and Trusts: Just the same but different

### III. How to use a foundation in (international) estate planning?

#### 1. Types of foundations under Swiss law: Overview





## Private Foundations and Trusts: Just the same but different

### III. How to use a foundation in (international) estate planning?

#### 1. Types of foundations under Swiss law: 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
- Combination of company foundation-purposes with family and charitable purposes
  - Permitted, even traditional Swiss foundation model
  - Concern: Drifting apart of interests in second or third generation



## Private Foundations and Trusts: Just the same but different

### III. How to use a foundation in (international) estate planning?

#### 1. Types of foundations under Swiss law: Family foundations

- Family members of founder as beneficiaries, Art. 87, 335 ZGB
- Prima facie the ‘prototypical estate planning foundation’
- In principle some attractive characteristics: no ongoing supervision, Art. 87 ZGB; no mandatory registration in the commercial register (subject to change)
- But: 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?

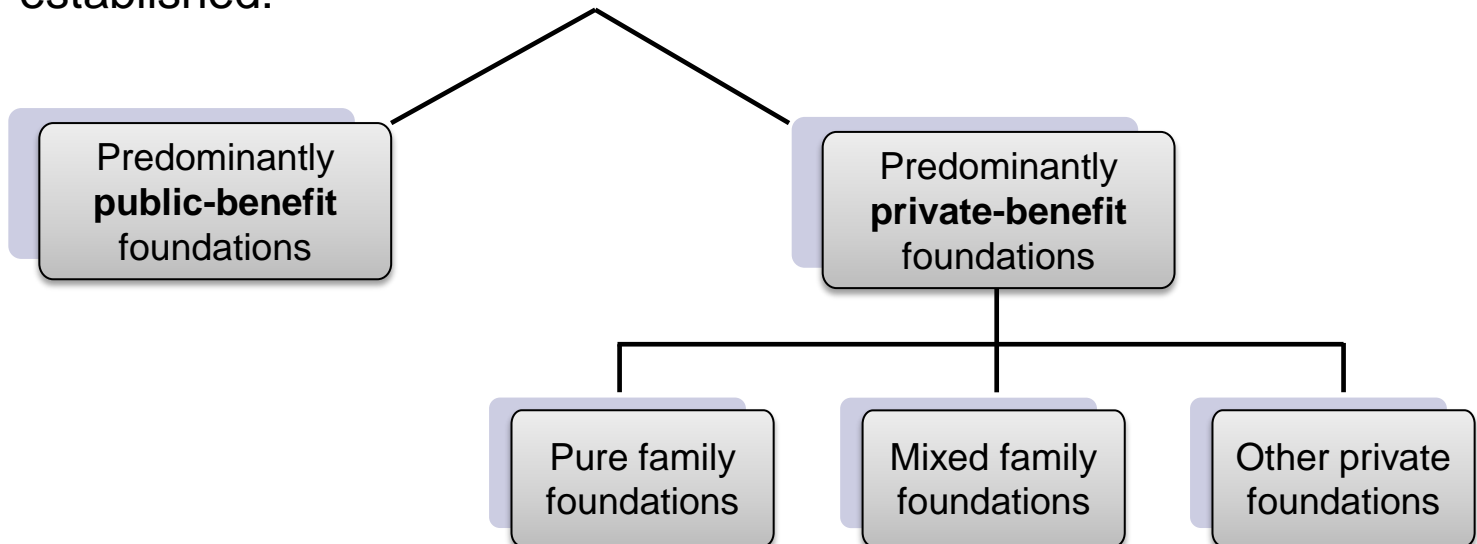


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### III. How to use a foundation in (international) estate planning?

#### 2. Types of foundations under Liechtenstein law

- Since ‘total revision’ of Foundation Law (2009) new distinction established:





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### III. How to use a foundation in (international) estate planning?

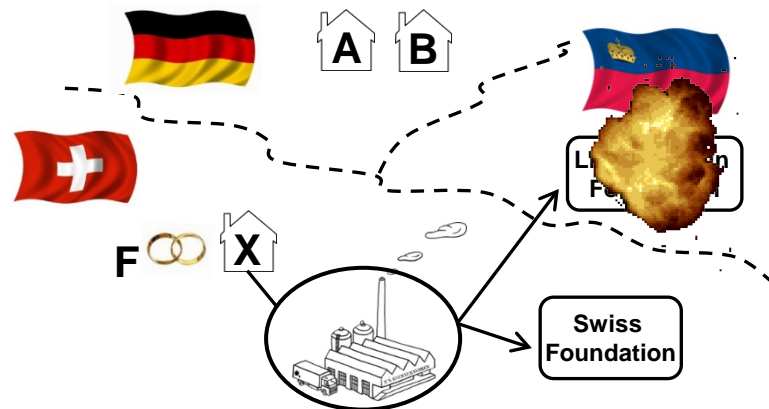
#### 2. Types of foundations under Liechtenstein law: Private foundations

- 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; reservation of right to change purpose of or to revoke foundation
  - Foundation can be established by fiduciary → Privacy
- 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, Art. 29 (5) FL-IPRG

## Private Foundations and Trusts: Just the same but different

### IV. When will a foreign law-foundation be recognized?

1. A (Liechtenstein) private foundation: an internationally viable instrument?
  - Liechtenstein (and other) private foundations highly flexible and attractive
  - Danger: Other relevant jurisdictions may consider them as violation of mandatory law and refuse to (fully) acknowledge them ('piercing the veil')





## Private Foundations and Trusts: Just the same but different

### IV. When will a foreign law-foundation be recognized?

1. A (Liechtenstein) private 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 a founder retains, the weaker the asset protection effect may be
    - E.g. suspension of abatement period; tax treatment as a transparent structure



## Private Foundations and Trusts: Just the same but different

### IV. When will a foreign law-foundation be recognized?

#### 2. Will trend from trusts to private foundations influence the international environment?

- Will a Jersey or Guernsey foundation be recognized in Switzerland and/or Germany?
  - As a trust or a foundation?
- Switzerland:
  - Recognized as a normal foundation (see above)
  - However, the more exotic and bold a structure is, the more likely Swiss courts will ‘pierce the veil’
  - Could a ‘Rybolovlev-Case’ happen also with a Jersey Foundation? Probably yes!



## Private Foundations and Trusts: Just the same but different

### IV. When will a foreign law-foundation be recognized?

#### 2. Will trend from trusts to private foundations influence the international environment?

– Germany:

- Since trust not recognized (as ‘trust’), the new ‘common law foundations’ constitute chance for estate planning, since legal personality and recognizable as a ‘foundation’
- However, same (or more?) suspicion as towards Liechtenstein foundations (sham, piercing the veil, ordre public)
- No test of the pudding, no awareness or indepth analysis of the different new foundation models
- Forecast: Domestic trend towards modernization could influence approach towards foreign foundations with strong founder-control; no mercy in case of tax evasion (violation of ordre public)



## Private Foundations and Trusts: Just the same but different

### V. Conclusion: An ideal structure?

- Foundations and trusts: common chances and common challenges
  - Plan prudently and conservatively
  - Prioritize: Reservation of control *or* asset protection
  - In dynastic structuring of family businesses:
    - Build up common values before perpetuation
    - Leave flexibility and exit strategies for the next generation
  - Provide for private governance mechanisms and ‘checks and balances’
  - Plan for the recognition of the structure in *all* potentially affected countries
  - Always give greater weight to *civil law*-structure than to *tax law*-effects



# Thank you for your attention

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