

Proposed Solution

**Question 1**

*Note: The following considerations are possible. No more than 15 points can be awarded in total.*

Own foundation or alternative structure:

- It is to be discussed whether the establishment of an independent foundation actually makes sense.
- An alternative would be to endow an already existing foundation, if such a foundation already exists in the desired area with a comparable purpose (which is possible in a university context and should be investigated).
- Another possibility would be to set up a dependent foundation in the sense of a donor advised fund at a theme-related umbrella foundation (such as an already existing “university foundation”).
- The larger the assets that the founder intends to dedicate, the more reasonable it is to set up an independent foundation of its own.

Jurisdiction:

- You should inform the client about the differences of the various foundation models; being based in Zurich, Liechtenstein law could be a good alternative (whereas the establishment of a foreign law trust seems possible, but not advantageous).
- The private foundation model of Liechtenstein law would offer more confidentiality, more founder’s rights, more freedom regarding private purposes, and some asset protection effects; however, since a genuine charitable foundation should be established, the founder is based in Zurich, and the purpose is Zurich related, a Liechtenstein foundation would most probably not offer significant advantages.

Purpose of the foundation:

- The purpose is the core of the foundation which permanently determines the foundation’s activities; the formulation of the purpose is therefore of utmost importance.
- A balance has to be found between the fixation of the founder’s ideas and the openness of the purpose to allow for future developments.
- It should be decided, for example, whether the foundation would like to support other persons/institutions or to operationally carry out own projects or to establish/maintain an own institute.

Foundation assets:

- The future assets are also an elementary component of the structure.
- Here, it would have to be discussed whether a one-off sum should be dedicated in its entirety or whether the assets should be allocated successively, whether the foundation should be maintained on a permanent basis and operate only from its income or whether it would be appropriate to set up a spending down-foundation.

<ul style="list-style-type: none"> <li>• The decisive factors are the amount of the assets, but also the philosophy of the founder.</li> </ul> <p><u>Organisation/Governance:</u></p> <ul style="list-style-type: none"> <li>• With regard to the organisation, the question arises as to the right foundation governance.</li> <li>• Here, it must be decided whether the founder wishes to have influence on the foundation throughout his life, or whether independent experts or the university management should have a decisive influence; a certain independence from the university is advisable in any case.</li> <li>• If the foundation should be sustainable and free of conflicts of interests, a mixture of checks and balances is advisable, the details of which should not be underestimated.</li> </ul> <p><u>Tax exemption:</u></p> <ul style="list-style-type: none"> <li>• A key decision is whether the foundation should enjoy tax exemption; this goes hand in hand with the tax exemption of the transfer of assets and the deductibility of donations to the foundation.</li> <li>• If the founder desires tax exemption, the criteria of non-profit status must be observed: An activity in the general interest (with an open circle of beneficiaries) as well as altruism.</li> <li>• Non-profit status presupposes the avoidance of profit-making purposes, which can result in restrictions with regard to holding companies, founding spin-offs and the exploitation of patents.</li> <li>• In addition, problems with regard to the remuneration of the foundation Board must be considered.</li> </ul> <p><u>Estate planning:</u></p> <ul style="list-style-type: none"> <li>• Depending on the founder's personal circumstances, it is imperative that the foundation be comprehensively embedded in the founder's estate planning and that appropriate provisions be made, in particular with regard to the fulfilment of claims under matrimonial property law or compulsory inheritance portions.</li> <li>• If necessary, it may be advisable to draw up an accompanying inheritance contract (potential waiver) with family members.</li> <li>• In view of the founder's age, it should be discussed whether a foundation inter vivos or a foundation mortis causa is preferable; the foundation inter vivos is probably preferable if the founder is still able and willing to set up the foundation with his own hands and play a role in the first years of the foundation's life.</li> </ul>	
<p><b>Maximum achievable number of points of question 1: 15 points</b></p>	
<p><b><u>Question 2</u></b></p> <p><i>Note: The following considerations are possible. No more than 15 points can be awarded in total.</i></p> <p><u>Comparison of legal systems and availability of trusts in Switzerland:</u></p> <ul style="list-style-type: none"> <li>• Switzerland's legal system differs from those of the USA and South Africa, with Switzerland being a civil law jurisdiction and most Federal States of the USA as well as South Africa following the legal traditions of the common law.</li> </ul>	

- Trusts are a product of the common law. Switzerland does not have its own substantive trust law (although efforts are being made to change that).
- Switzerland is a signatory state of the Hague Trusts Convention (HTC). As such, Switzerland *recognizes* trusts that were validly created under the laws of a jurisdiction that provides for a substantive trust law (even if the jurisdiction in question is not itself a member state to the HTC due to HTC's *erga omnes* effect). Trusts are recognized "as is", i.e., with the legal effects afforded by the law under which the trust was created.
- Switzerland is an important banking and financial centre and known to be "trust-friendly".
- It is possible to set up a trust pursuant to a foreign law (e.g. in the US, where Mr. Goah spends most of his time) and have all of the trust assets managed within Switzerland.

Setting up a trust *in concreto*:

- Setting up a trust requires 1) a unilateral declaration of trust and 2) a transfer of property. The declaration is usually made in writing and signed by the settlor (some jurisdictions have stricter formal requirements).
- The trust declaration must fulfil the three certainties: certainty of intention (to create a trust), certainty of subject matter (i.e. the assets subject to the trust), certainty of objects (i.e. the beneficiaries or purpose of the trust).

"Pros" of a trust structure:

- The (private express) trust is a flexible instrument; trusts may be created revocable or irrevocable, discretionary or fixed interest and may serve to achieve a variety of goals (e.g. asset protection, estate planning).
- There is increased legal certainty when it comes to the trust's worldwide recognition due to the existence of the HTC (a big advantage when one moves around or has connections to several jurisdictions, as Mr. Goah does).
- The trustee usually acts in a professional capacity and is bound by fiduciary duties towards the beneficiaries of the trust ("beneficiary principle"); conversely, beneficiaries hold a beneficial interest in the trust assets.
- A wide variety of trust jurisdictions are available for settlors to choose from.
- In many jurisdictions, a trust can be established without registration or other strict formal requirements.

"Cons" of a trust structure:

- The more flexible and more "transparent" the structure and the more influence a settlor retains, the more likely the trust is to be considered a "sham" (either by the trust jurisdiction or a jurisdiction in which the trust should be recognized).
- South Africa is not a member state to the HTC and recognition of a foreign-law trust in South Africa is therefore not a given (however, a South African trust would be recognized in Switzerland and the US due to the *erga omnes* application of the HTC).

Other concerns and considerations:

- A trust is typically not able to accommodate a combination of private and public (charitable) purposes.

<ul style="list-style-type: none"> <li>• Mr. Goah could consider setting up a separate structure (public trust or charitable foundation) for the purpose of charitable giving.</li> <li>• Certain foundation laws allow combinations of public and private purposes. However, the international recognition of foundations is less legally certain than that of trusts because the HTC is typically not applicable to foundations.</li> <li>• Mr. Goah should also consider making the trust revocable or reserving other settlor rights, as changing life circumstances (e.g. marriage or children) may affect his planning needs (and applicable inheritance and marital laws may limit the trust's recognition in the future, art. 15 b) and c) HTC).</li> </ul>	
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**Maximum achievable number of points of question 2: 15 points**

**Question 3**

*Note: The following considerations are possible. No more than 15 points can be awarded in total.*

**Question 1:**

- Both could in principle fulfil that purpose. However, he would violate the forced heirship portions of his family. The son could go to Court and claw-back his portion.
- Adam should choose US law to be applicable to his estate to avoid such violation.
- If Swiss law were applicable, he should choose a trust jurisdiction that has anti-forced heirship provisions.

**Question 2:**

- Except for his son, the family is resident in Switzerland. The foundation is a civil law vehicle, while the trust is used in common law jurisdictions.
- The trust is a very flexible instrument. From a Swiss tax point of view, a trust can be settled without disadvantageous tax consequences.
- The foundation has the advantage that it is a legal entity and Switzerland knows better how to deal with it than with a trust. By contrast, the assets of the trust legally belong to the trustee.
- As his children are both US citizens, a trust may be beneficial for the future.

**Question 3:**

- A Swiss foundation would be too limited in its purpose (CC 335).
- The transfer of assets would trigger Swiss gift taxes in the highest rate.
- He could choose to set up a Liechtenstein foundation.

**Question 4:**

- No power of revocation is available for a Swiss foundation.
- For tax law purposes, the power of revocation makes the trust transparent, i.e. all the assets and income are directly allocated to Adam and taxed in his hands.

<ul style="list-style-type: none"> <li>• For civil law purposes, the trust remains valid (the Hague Convention). The power of revocation terminates upon his death; therefore the trust assets are not part of his estate. However, the assets might be subject to claw-back claims under inheritance and/or matrimonial property law.</li> </ul> <p><u>Question 5:</u></p> <ul style="list-style-type: none"> <li>• Based on his power to amend the foundation and because he is a beneficiary, the foundation would be treated transparent for tax purposes.</li> <li>• No gift tax would be due on the transfer.</li> <li>• Trust assets and income therefrom are taxed in Adam's declaration.</li> <li>• Distributions to his children would be viewed as tax free gifts.</li> <li>• Upon his death, the trust will become discretionary – an inheritance tax could be due unless the trust assets can be allocated to a beneficiary.</li> </ul> <p><u>Question 6:</u></p> <ul style="list-style-type: none"> <li>• Lex Koller allows a transfer to a trust if all trustees and all beneficiaries are Swiss citizens. Adam is a US person, but resident in Switzerland.</li> <li>• He would need to make sure that all non-Swiss citizens are excluded persons.</li> <li>• He would not transfer the home to a Liechtenstein foundation as the foundation itself has legal entity abroad.</li> </ul>	
<b>Maximum achievable number of points of question 3: 15 points</b>	
<b>Total</b>	<b>45</b>