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Destination Switzerland

Every person's residence is of central importance, not only in a personal sense, but also from a legal perspective. It has a significant influence on every person's legal situation be it in inheritance, matrimonial property or tax matters. This article discusses the effects of establishing residency in Switzerland, and the dispositions that should be made in advance of such a move.

RESIDENCE UNDER CIVIL LAW

Establishing a civil-law residence in Switzerland requires not only a physical presence in the place of residence, but also the intent to remain permanently as well as the surrender of the former residence. The new residence cannot be selected arbitrarily, but must be lived in. A desire and emotional preference for a location are irrelevant in establishing a civil-law residence. Thus, the decisive factor is not what a person designates as his residence, but rather where he resides with the intent of remaining permanently. The Swiss legal system allows a person to have only one residence; once a residence is established, it remains so until a new residence is acquired.

Objective element

The objective element, namely presence in the place of residence, is rarely disputed, and even a brief presence in the place of abode is sufficient. In other words, contrary to the situation in other countries, no minimum duration of physical presence is required to establish a Swiss residence. Nevertheless, the stay cannot be arbitrarily short, since foreigners generally must remain in Switzerland for the majority of the year in order to prevent the cancellation of their

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Swiss residency permit. Exceptions to this requirement can be made on a case-by-case basis for artists, athletes, international business people, technicians, etc., so long as they maintain their center of vital interests (Lebensmittelpunkt) in Switzerland.

No minimum duration of physical presence is required to establish a Swiss residence.

Subjective element

The subjective element involves determining a person's center of vital interests. Here also, the decisive factor is not what a person subjectively deems to be his residence, but rather whether the center of vital interests was actually established with the intent of residing there permanently; a planned stay of one year is sufficient for meeting the criteria of permanency in this case. In legal practice, a person's center of vital interest is normally associated with the location in which his primary familial, social, and private relationships are centered, rather than his place of employment.

If multiple dwelling places are under debate, including dwellings in different countries, then a Swiss court will determine a person's center of vital interests by applying Swiss law, based upon indications and taking into proportional account all of the person's professional, familial, and life circumstances. This includes a comparison of the residences under discussion, wherein actual registration in a place of residence is merely an indication for that residence.

Spouses

In the case of married persons, residence is determined individually for each person, although this is normally the location of the marital dwelling. A configuration involving two separate residences is also possible if the spouses are still living together as a couple, for example if they alternately meet at the other spouse's residence. If one spouse leaves the shared marital dwelling with the intent of definitively ending marital cohabitation, then he may establish a new residence directly, without needing to wait for a court ruling on separation or divorce.

Globetrotters

In practice, situations may arise in which a person has no official residence because in each country where he stays, he claims having a residence in another country, although without actually having registered



If family members or assets are in different locations throughout the world, then reliable advice makes sense in order to avoid unpleasant surprises in the inheritance process.

Gian Andri Töndury, lic. iur, LL.M.
Partner

there; or because his connections to each of the countries where he stays are very loose due to his travel activities (globetrotter). In such cases, the Swiss abode may – under certain circumstances – be considered as the residence in Switzerland. Because such situations lead to enormous legal challenges, particularly in cases of inheritance, they should be avoided by all means.

EFFECTS OF SWISS RESIDENCY

If a person moves his residence to Switzerland, the following aspects will require careful planning in order to prevent any unpleasant surprises.

Matrimonial property rights

If a married couple move their residence to Switzerland, they are advised to examine the effects of the new residence on matrimonial property rights. Contracts involving such rights that were formed in the prior domicile are largely accepted in Switzerland. If the spouses have not made any written agreement, however, Swiss law will apply retroactively to the date of the marriage unless the spouses preclude this retroactive effect by means of a written agreement.

Inheritance

In principle, the Swiss courts in the deceased's last residence have jurisdiction for matters involving his worldwide estate. In general, an estate is subject to Swiss law unless the foreign national specifies in a last will or contract of inheritance that his estate should be subject to the law of his country of origin ("professio iuris"). Nationals from Anglo-Saxon countries may be particularly disturbed to learn that Switzerland applies forced heirship portions (Pflichtteile) which significantly restrict a testator's power of disposition. The selection of the foreign governing law is no longer possible once a person obtains Swiss citizenship.

Foreign contracts involving matrimonial property rights are largely accepted in Switzerland.

RESIDENCE FOR TAX PURPOSES

As under civil law, a person's residence for tax purposes is the location where he resides with the intent of remaining permanently; in other words, where his personal and economic interests are centered. The center of personal interests is primarily at the abode of the family, defined ex ante as spouse and children. The center of economic interests is the place of employment. If these are in two different locations, then the residence for tax



When cross-boarder issues are involved, it is particularly important to carefully analyse tax and social security aspects.

Severine Vogel, MLaw, certified Tax Expert
Associate

purposes is generally where the person's private life is centered. As a rule, therefore, the location in which the taxpayer maintains his personal, familial, social, economic, or affective relationships is determinative.

If a person works in Switzerland but regularly returns on weekends and holidays to the family location abroad, then he is considered a weekly resident in Switzerland. He generally remains subject to tax in the family location. However, the Swiss employment income will be taxed in the work location (source tax). A resulting double taxation will be avoided based on the corresponding double taxation treaty.

As a rule, the location in which the taxpayer maintains his personal, familial, social, economic, or affective relationships is determinative.

Joint taxation of spouses

In Switzerland, married persons are subject to joint taxation, i.e. the income and assets of spouses living in a legally and factually intact marriage are combined without consideration of the matrimonial property scheme. Taxes are therefore assessed on the total income and assets of both spouses ("factor addition").

Income and assets are independently taxed for each party only in the case of legal or factual separation. For this to occur, however, there may no longer be any marital cohabitation, and subsistence may no longer be maintained from joint funds.

If one spouse has a foreign residence, then despite a legal and factually intact marriage, only the spouse residing in Switzerland is subject to unlimited domestic taxation, and only his income and assets are taxed. The income and net wealth of the spouse residing abroad will, however, be taken into account when determining the tax rate and must be declared in the tax return.

Globetrotters

According to consistent decisions by the Federal Supreme Court, merely dissolving the connections to one's former residence is not sufficient for moving a residence abroad. On the contrary, the decisive factor is the establishment of a new residence based upon the entirety of circumstances. Once a residence has been established in Switzerland, it remains so in principle until a new residence is acquired. The question of when a taxpayer has de-registered or left the former domicile is therefore not the decisive factor. If the person moves abroad, then he remains generally subject to tax in Switzerland until he can provide documentation that he has established a new residence abroad.

The taxpayer must substantiate his claim that a change of residence has occurred. This includes not only the final dissolution of connections to the former residence, but also a description of the circumstances that led to the establishment of the new residence. If a person retains his health insurance in Switzerland or continues to use services such as credit cards, banks, and telephone in Switzerland, it will be very difficult for him to prove a change of residence.

MOVING TO SWITZERLAND

If a foreign national is considering moving to Switzerland, a number of issues must be resolved before the new residence is established. For entry into Switzerland, foreign nationals require a valid passport or identification card that is recognized by Switzerland, as well as a visa in certain cases. The permit required in order to reside and/or work in Switzerland must be determined. In addition, the person must be able to furnish documentation of sufficient means for subsistence during his stay in Switzerland. If the person is considering the purchase of a home, it must be noted that the purchase of residential property by foreign nationals is restricted in Switzerland. In the event of a move, this means that the purchase of the property and the establishment of residency must be carefully coordinated.

Private asset structures should be analyzed before the move to ensure that they will continue to serve their purpose even after the change of residence. It is particularly important to obtain a preliminary tax ruling prior to moving when international arrangements are involved.

Persons contemplating a move should also decide in advance, based upon a review of customs regulations, whether they can import certain goods of their household such as works of art, antique cars, weapons collections, or horses and other pets, and what rules may apply. Foreign driver's licenses should be changed over within 12 months of arrival, and motor vehicle registrations should be changed to Switzerland. Finally, it is important to formally de-register in the country of origin and then quickly register in the new place of residence in Switzerland. §

Gian Andri Töndury, Severine Vogel



Who has jurisdiction? This simple question can make the slight difference that we at Staiger, Schwald & Partner look out for.

Cyrill Süess, lic. iur. HSG
Associate

Territorial jurisdictions in international relations involving residence/domicile in Switzerland

If a natural or legal person has his residence/domicile or branch office in Switzerland and maintains cross-border (business) relationships, this raises the question of whether the courts and authorities in Switzerland or those in other countries are authorized to decide any legal issues.

PRINCIPLES

In Switzerland, two regulatory frameworks primarily determine which courts or authorities have jurisdiction in cross-border disputes. The first is Switzerland's Federal Private International Law Act (PILA), and the other is the Lugano Convention (the "Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters," which was signed in Lugano). Whereas the PILA is a Swiss federal law, the Lugano Convention is an international agreement to which the European Union, Iceland, Norway, and Switzerland are signatories.

The Lugano Convention standardizes the delineation of jurisdictions among the courts of the various signatory States, and thus ensures greater legal security. This makes it one of the most important regulatory frameworks relating to court jurisdiction within Europe. As an international agreement, it takes precedence over domestic law, and thus the jurisdiction for a matter falling within the scope of application of the Lugano Convention is determined exclusively in accordance with its provisions. The scope of the Lugano Convention, however, specifically excludes questions of tax law, property law, and inheritance law.

In such cases, the PILA (or other international agreements) determine jurisdiction. The lack of coordination between Swiss standards of jurisdiction and those of other countries can lead to conflicts of jurisdiction, however.

Quite frequently, the matter in dispute is whether the prerequisites for the jurisdiction of the court seized of the matter have been fulfilled. In these cases, the court itself decides whether it has jurisdiction.

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GENERAL VENUE

As the general venue, the courts in the residence or domicile of a person have jurisdiction in principle for a suit brought against this person.

The general venue must be distinguished from special venues. The latter may apply as a result of law or the parties' intention. Special venues can also be either absolutely compulsory or partially compulsory.

Divergence from the latter type of venue is possible only if it benefits the economically weaker party. Some of these special venues are presented below.

SPECIAL VENUES IN INTERNATIONAL RELATIONS

Labor law disputes

In labor law disputes, the employee is considered the weaker party, and thus the party requiring protection. For this reason, both the PILA and the Lugano Convention provide for jurisdictions beneficial to the employee, divergence from which is possible only if this benefits the employee or only after the dispute has arisen.

If an employer has a residence/domicile in a Lugano Convention signatory State, then in addition to the general venue, suit may be brought against it before the courts of the location in which the employee customarily performs or has performed his work.

If the employer's residence/domicile is not in a Lugano Convention signatory State, then the employer can nevertheless be called to account by the employee in the location of the branch office, agency, or other office of the employer in a Lugano Convention signatory State for claims arising from its operation. For the employer, this means that when it establishes a branch office or agency in a Lugano Convention signatory State, it is simultaneously establishing a new venue outside of its country of residence or domicile, and can be sued in that venue by its employees.

In labor law disputes, both the PILA and the Lugano Convention provide for jurisdictions beneficial to the employee

Outside of the scope of application of the Lugano Convention, the PILA specifies that for suits arising from an employment contract, the Swiss courts in the residence/domicile of the defendant, or those in the location where the employee customarily performs his work, have jurisdiction.

In addition, the employee can file suit against the employer in the employee's place of residence or in the location of his customary abode in Switzerland.

For suits filed by the employer, on the other hand, only the courts in the employee's place of residence/domicile have jurisdiction. Comparable regulations on jurisdiction also exist for consumer and insurance contracts.

Jurisdiction for cases of inheritance

The question of international jurisdiction does not require a legal dispute, however. Even for a life event that is not the subject of legal dispute such as death, it is also necessary to determine for example which authorities and courts have jurisdiction for settling the estate.

International jurisdiction in inheritance matters is based upon the PILA, and regardless of the deceased's nationality, the Swiss courts and authorities in his last place of residence again generally have jurisdiction.

For a Swiss citizen with a residence abroad, however, it is possible to subject all of an estate or only a portion (e.g. the assets located in Switzerland) to Swiss jurisdiction by means of a testamentary disposition. This is subject to compulsory jurisdictions of the country of residence.

Another special jurisdiction exists for assets located in Switzerland and belonging to a foreign national whose last residence was abroad. Insofar as the foreign authorities do not concern themselves with these assets, the Swiss courts and authorities have jurisdiction.

SUMMARY

The question of jurisdiction is of central importance in all areas of law. It not only decides whether travel and translation expenses are incurred, but also determines the available options for procedural defense or legal remedies. There are also large differences between the various courts and authorities with regard to the duration of proceedings and application of law.

Given these far-reaching consequences, it is well worth clarifying jurisdictions in international relations at an early stage, and optimizing them when necessary within the scope of the statutory possibilities.

Particularly when preparing contracts or drafting testamentary dispositions, consultation with an attorney can help prevent unpleasant surprises in the event of litigation. §

Cyrill Süess



When relocating companies into Switzerland from abroad, it is advisable to obtain legal support as soon as possible in order to handle any situations that may arise.

Thiemo Sturny, Dr. iur., LL.M.
Partner

Relocating a foreign company to Switzerland – Corporate law aspects

Relocating a foreign company in Switzerland is a recognized and relatively easy way to subject a foreign company to Swiss law without the need for liquidation and re-establishment. Early and prudent planning of the extensive documentation requirements will help in avoiding unpleasant surprises and delays in carrying out a relocation.

Legal Basis and Prerequisites

In Switzerland, the prerequisites for international relocation of companies have been governed since 1989 by Article 161 et seqq. of Switzerland's Federal Private International Law Act (PILA). Prior to the enactment of the PILA, there was a dispute as to whether and under what conditions a foreign company could be relocated without liquidation and re-establishment in Switzerland.

According to Article 161 PILA, three material prerequisites must be fulfilled for the relocation of a foreign company into Switzerland:

- a. the applicable foreign law must permit the relocation;
- b. the prerequisites of the foreign law for the relocation must be fulfilled;
- c. the foreign company must be adaptable to a Swiss legal form.

The Commercial Register Ordinance fleshes out these three central prerequisites by specifying a list of documents that must be submitted when applying for registration of the company in the Swiss Commercial Register. For example, companies must submit proof of the legal existence of the company abroad or proof that adaptation to a Swiss legal form is possible. While the first proof can be procured in practice by obtaining an excerpt from the Commercial Register (if such a register exists in the country concerned), a Certificate of Incorporation with the Articles of Association and By-laws, or similar documents, the second proof requires obtaining an expert opinion from the Swiss Institute of Comparative Law in Lausanne. The Institute of Comparative Law reviews whether a relocation to Switzerland is possible on a case-by-case basis given the company's specific structure in its country of origin. Thus there is no list of foreign

corporate forms that can be "automatically" transferred to Switzerland.

Another proof that must be submitted is certification by a licensed audit expert to the effect that the company's capital is covered under Swiss law. In practice, the authorities of the Commercial Register will accept the issuance of this certification based upon a balance sheet with a reporting date no more than six months since the relocation. An audited balance sheet is not required, although the Swiss audit expert will generally insist on conducting certain auditing activities before issuing the certification.

There is no list of foreign corporate forms that can be "automatically" transferred to Switzerland.

Finally, the managing bodies of the company must submit a certification to the effect that the company has relocated the focus of its business activity to Switzerland.

In addition to this documentation for the Commercial Register specifically required for an international relocation, companies must submit the documents required for the establishment and new entry of the corresponding company, particularly a notarized instrument confirming the relocation and the adaptation of the Articles of Association and By-laws to comply with Swiss law.

Practical aspects

Although procuring the documentation may not appear problematic at first glance, obtaining the proofs and certifications abroad frequently proves to be a time-consuming process. This can delay or, in a worst case scenario, even prevent an international relocation.

Many of the documents to be procured abroad must be certified and legalized or affixed with an Apostille, and must also be translated if they are not already available in the official language of the responsible Swiss Commercial Register. A timeframe of at least 4-8 weeks for procurement of all the necessary documents has therefore generally proven to be a realistic estimate.

Relocation, whether of the private residence or of the place of business, entails a variety of changes. Our long-standing and diversified experience enables Staiger, Schwald & Partner to provide comprehensive and foresighted assistance in relation to both.

Many of the documents to be procured abroad must be certified and legalized or affixed with an Apostille.

A timeframe of 3 to 8 weeks must be expected for obtaining an expert opinion from the Swiss Institute of Comparative Law, since the Institute reviews on a case-by-case basis whether the foreign company can be adapted to a Swiss legal form. The duration of the review depends upon the complexity of the actual situation. If the foreign legal form allows an adaptation in principle, but a relocation to Switzerland is impossible due to the company's specific structure, then the necessary restructuring efforts under corporate law must be undertaken abroad prior to the relocation, and this will necessarily involve a certain amount of time.

If the company is unable to produce an audited balance sheet, and comes from a legal system that recognizes capital requirements different from those of Switzerland (e.g. no minimum capital), then sufficient time must be factored in to enable the audit expert to issue his certification regarding compliance with Swiss capital requirements. In practice, this aspect regularly proves to be problematic for operating companies from offshore jurisdictions when the audit expert insists on conducting auditing activities and the

management team is unfamiliar or insufficiently familiar with queries from auditors. In these situations, the company must also ensure that it has sufficient freely available equity capital to fulfill the Swiss capital resource requirements.

Regardless of the fact that a number of formalities must be observed and fulfilled in order to relocate a foreign company in Switzerland, experience has regularly shown that with early and prudent planning, the many stumbling blocks on the path to relocation can be eliminated with relative ease. The alternative to relocation, namely the liquidation of the company abroad and a subsequent re-establishment in Switzerland, will always prove to be more time-consuming and complex. §

Dr. Thimo Sturny