



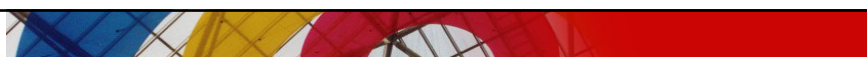
Can the Civil Law Do Better?

San Marino, 22–23 May 2015

Synchronic approach

Switzerland

Prof. Dr. Luc Thévenoz



Emerging debate on reform of inheritance law

- 2009: Supreme Court takes a clear stance against international scope of Civil Code's prohibition of fidéicommis de famille (Art. 335 CC)
 - SCR 135 III 614 (Liechtenstein foundation)
- 2010 et seq.: Parliamentary motions and legal scholarship start questioning the scope and extent of *réserve héréditaire* (indefeasible shares)
- 13 June 2015: citizens will vote on a universal 20% inheritance tax





Does Switzerland need a new patrimonial vehicle?

- 2006: Enough industry and political support to ratify the Hague Convention on Trusts, but no appetite for statutory codification of, or improvements to, fiducie
- Major international developments have clouded the debate
 - review of FATF Recommendations
 - forced move towards automatic exchange of information
 - whiffs of scandal (offshore leaks" ...)
 - ... all lead to demand for a level playing field
- However, no political interest for new patrimonial vehicle



3



Features

- A separate patrimony
- for a period of time
- dedicated to existing or future beneficiaries
- managed by a fiduciary
- under the supervision of a court



4



Choice of model

Assuming political will, choice among three models

- transplant the trust
- build upon fiduciary contracts
- remove restrictions to existing law of foundations



5



Transplant the trust

- reputable and fashionable
- has withstood the test of time
- if neither contract nor legal entity, must fit within the law of property:
a new allocation of property rights in assets
- calling it “fiducie” is unlikely to help much,
might attract critics for creating confusion with existing fiducie
- possible, very difficult



6



Statutorily enhance fiduciary contracts

- courts, practitioners and legislators are familiar with fiducie
- based on contracts
 - familiar to everyone
 - stretched to create long term, irrevocable relationships
- beneficiaries need not be party to the contract
- ring-fenced assets are uncharacteristic of contracts
- so are court powers to amend a long-term contract
- fiducie or fideicommiss? different words might be useful to distinguish existing fiducies from long term, wealth structuring fideicommiss



7



Liberalise foundations

- endowing a patrimony with legal personality has strong appeal for civil law systems
- would reconcile the law with the reality of some family foundations
- government has declined to reform the law
- need to differentiate private foundations (*fondation patrimoniale*) from charitable foundations (*fondation d'utilité publique*)



8



Summing up

- Even though legal reform is not on the political agenda, a discussion of its “what and how” is timely
- Caution with labels, need to focus on legal foundations (contract, legal entity, allocation of property rights)
- No reform of civil law will succeed without reconsidering the tax treatment of separate patrimonies and their beneficiaries

