By **Melvin A. Warshaw** & **Trang Fernandez-Leenknecht**

U.S. Estate Planners and Foreign Property: Part I

Non-tax and estate/inheritance tax considerations

The world is changing much faster than at the beginning of our professional careers. It's vital that every U.S. estate planner understand what's happening elsewhere in the world. Increasingly, our U.S. citizen clients are making investments in or have business ties to foreign countries, or they're purchasing property located in another country.

Over the past decade, the approach of the rest of the world toward disclosure of ultimate beneficial ownership (UBO) and privacy has deviated from that of the United States. The era of full disclosure of UBO of property is prevalent elsewhere (and especially in Western Europe). Clients in Europe don't like making disclosures on these registries; however, their governments claim they need the information in fighting criminal behavior of a few nefarious actors who try to hide their wealth abroad. The government authorities of member countries in the European Union (EU) are not only concerned with who owns property but also who has significant control over properties and companies. While these European registries are often referred to in Europe as "company registries," practitioners know they encompass trusts as well.

Until recently, the focus of many U.S. private clients has been on a handful of small states that have enacted trust-friendly legislation to attract their business and on federal tax legislation and how long the very favorable but temporary relief from estate tax will last with Democrats in control in Washington, D.C. However, U.S. estate-planning clients and their advisors are now also on the threshold of enhanced mandatory UBO disclosure to the U.S. government.

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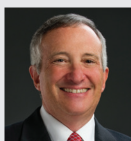


Foreign governments now enforce not only other countries' criminal laws but also the other countries' tax laws. The United States faces renewed pressure from the other industrialized nations to adopt the Common Reporting Standards (CRS), which would force our government to automatically share information about foreign taxpayers with their home governments. Eventually, the United States will have CRS reporting.

The CTA

The U.S. Corporate Transparency Act (CTA), enacted into law on Jan. 1, 2021, will add a new layer of UBO disclosure in the United States, peeling away at an individual's right to privacy. The purpose of the CTA is to prevent illicit use of so-called "shell companies" to conceal illegal activity or to facilitate money laundering and tax evasion. The CTA requires certain reporting companies to annually disclose information to the Financial Crimes Enforcement Network (FinCEN) regarding their beneficial owners, as well as information regarding the applicants who form these companies. FinCEN is a bureau of the U.S. Treasury Department that collects and analyzes information about financial transactions to combat illicit activity, such as money laundering.[1]

The CTA amended the U.S. Bank Secrecy Act to require corporations, limited liability companies (LLCs) and similar entities to report certain information about their beneficial owners (the natural person who ultimately owns or controls the

companies). The CTA requires FinCEN to "maintain the reported beneficial ownership information in a confidential, secure and non-public database."[2]

Like many laws aimed at traditional business entities, it's currently unclear how traditional estate-planning trusts will fit into the new CTA. The definition of a "reporting company" under the CTA doesn't specifically describe trusts. A common law trust established for estate-planning purposes likely isn't a reporting company because a common law trust is an entity that isn't created by the filing of a document with a state government as is a statutory or business trust.

A common planning technique occurs when an irrevocable discretionary trust owns one or more U.S. LLCs to facilitate the settlor's efficient transfer of assets to family members. If the underlying companies are reporting companies, and they're wholly owned by a trust, is it sufficient to disclose the identity of the trustee, or must the identity of the underlying current beneficiaries of the trust also be disclosed to Treasury? While the Treasury is required to issue final regulations by the end of this year, it's possible that we still won't have definitive resolution of all trust disclosure questions and issues heading into next year.[3]

Tax Minimization

While income taxes are driven by their ability to raise revenue for the government, transfer taxes are designed for policy reasons to prevent concentration of wealth among a few individuals and their families.[4]

Years ago, a basic trust was designed to prevent real property from being subject to transfer taxes each time the older generation died. The trust paid income taxes, and the rule against perpetuities prevented long-term trusts.[5] Today, trusts established in a handful of states that have adopted modern trust statutes are regularly designed to exist in perpetuity and avoid transfer taxes and state income taxes. In some of these states, they can even be designed as secret (confidential) trusts.[6]

Many of these same states have also enacted debtor-friendly asset protection laws to protect trust assets from creditors of the settlor.

A settlor residing halfway around the world or in a high tax U.S. state, who has a nominal connection with a modern trust state, can nonetheless invoke that state's trust laws by paying an annual fee to a local trust company in that state. In return, the settlor can adopt a directed trust, in which all important trust decisions are made by individuals appointed by and either related to or friendly with the settlor. The local in-state institutional trustee has no discretion under a typical directed trust adopted in a modern trust state.

U.S. estate planners must recognize that when introducing business structures into the planning, they're introducing business, legal and especially tax principles.

The United States accepts taxing trusts based on residency, but the rest of the world imposes taxes based on domicile, which significantly impacts taxation. This is one reason much of the world dislikes and discourages trusts and instead favors the use of commercial entities for estate-planning purposes. However, using these commercial entities requires different planning because these entities are rooted in business law, not succession law. U.S. estate planners must recognize that when introducing business structures into the planning, they're introducing business, legal and especially tax principles such as business purpose, form over substance, sham transaction and step-transaction doctrine into the law of trusts and estates.

Questions to Ask

The U.S. estate planner is often overwhelmed by the number of questions they must ask clients who own foreign property:

- Is the client a U.S. person for estate tax purposes? (This is a fairly subjective determination for

non-citizens that addresses intent to remain indefinitely in the United States.) For U.S. estate tax purposes, a U.S. person includes a U.S. citizen or U.S. domiciliary (that is, a Green Card holder physically present in the United States is presumed to be a U.S. domiciliary).

- Does the client have a nationality outside the United States?
- What's the client's current residency status?
- Is the client a U.S. income tax resident? (This is a fairly objective determination).
- Does the client intend to change their residency in the future?
- If the client is married, where did the couple marry?
- Did the laws of the jurisdiction where the couple was married or where they resided at the time of their marriage have any presumptions concerning assets acquired during the marriage?

Often, the best holding structure depends on the nature of the specific asset to be held abroad.

- Will the marital assets be considered community property owned equally by each spouse regardless of which spouse earned or acquired the asset?
- Does the client own portfolio assets, real estate, a business, collectibles or other tangible property abroad?
- How's title to the property held?
- What are the client's planning objectives?
- Who's the client's family?

Investment Abroad

U.S. persons (that is, U.S. citizens, Green Card holders and substantial presence taxpayers, all of whom are U.S. income tax residents) invest abroad for a variety of reasons, with diversification of risk and exposure to additional markets a prime consideration. Some U.S. investors believe there are outsize opportunities in certain emerging markets. Wealthy investors may wish to diversify their currency risk while also mitigating geopolitical risks. Sometimes a U.S. person simply wants a vacation home abroad, while others may be involved in an active foreign business.

Often, the best holding structure depends on the nature of the specific asset to be held abroad. Financial or portfolio assets, real estate, tangible property (art or gold) or an active business interest may be acquired by the U.S. person, and each asset may suggest a different ownership structure. Sometimes, the best ownership structure is none at all, and the individual should take title to the foreign property in their name. While there are numerous non-tax considerations when owning property outside the United States, the U.S. advisor must also be mindful of the potential local inheritance tax. The United States has only 14 bilateral estate and inheritance tax treaties with other countries (as of Jan. 1, 2021). Seeking the advice of local counsel in the foreign jurisdiction is a necessity.

It's often difficult for a U.S. person to avoid or defer current U.S. income tax through the use of non-U.S. investment structures due to the various anti-deferral tax regimes implemented by the United States. The United States has approximately 58 bilateral income tax treaties, and it's imperative to consult the applicable one because it should provide relief from double taxation of the same income and may also reduce or eliminate withholding tax in the foreign country. Under many modern tax treaties negotiated by the United States, it's common that gain from only the sale of real estate and business assets physically present in the foreign country are taxed by the source country, while most other gain is taxed by the country of residence of the seller.

Non-Tax Considerations

Lack of recognition of a trust in foreign country. Trusts are the workhorse of most U.S. estate planning. They offer the advantages of flexibility, local privacy and possible incontestability because unlike wills, trusts aren't required to be probated.

The construction and recognition of foreign trusts rely uniquely on case law because civil law jurisdictions generally don't have specific conflict-of-laws statutes applicable to trusts. Consequently, it may be unknown whether a court in a civil law country will give effect to a declaration of trust and

whether it will enforce or implement the trust, for example, as a matter of contract or otherwise.[7]

Except in certain select civil law jurisdictions that have specifically adopted domestic trust legislation acknowledging a trust as a form of ownership, there's no local law of trusts.[8]

In all the other civil law jurisdictions, the purported declaration of a settlor domiciled there that from now on they'll hold assets in trust is generally a nullity where those assets are in a civil law country such as Brazil, France, Germany or Spain. In certain specific circumstances, courts of those jurisdictions have given some effects to the declaration of trust by construing it as a civil law institution, most often as a contract.[9]

The bottom line is that most civil law countries don't recognize trusts. A couple, Japan and South Africa, have codified trust laws. If a civil law country doesn't have codified trust laws, it's critical to determine whether the country at least is a signatory to the Hague Convention on the Law Applicable to Trusts and Their Recognition (the Hague Convention). If the country is a signatory (for example, Italy), the Hague Convention requires the country to recognize a foreign trust provided it's valid under the domestic law of the jurisdiction where the trust was established. Importantly, the Hague Convention isn't restricted to trusts created or administered in the contracting states that have ratified the Hague Convention, but rather applies as a default rule to all trusts, including trust equivalents created in a civil law country. Although the United States has signed the Hague Convention, it's never ratified it.

If a country has ratified the Hague Convention, then generally a U.S. trust will be valid in such civil law country. Nevertheless, this means that beyond recognizing the existence of trust arrangements, a civil law country embraces the trust concept in its own domestic laws. Some civil law countries, such as Switzerland, embrace the trust concept.[10]

However, at a bare minimum, the U.S. person must obtain foreign counsel's validation on the extent of a trust's use in that jurisdiction.

A U.S. person with a comprehensive U.S. estate plan could find it wholly ineffective as it relates to property located in a foreign jurisdiction. Sometimes, transferring property in a foreign jurisdiction to and from trusts creates insurmountable titling problems in the foreign jurisdiction, or the costs to do so are much more costly than in the United States. For the unsophisticated U.S. advisor, there may be unintended local income and inheritance tax consequences to gifting assets to a trust, including a revocable trust, even in common law countries.

For example, lifetime gifts made to a discretionary trust with a U.K. resident trustee in excess of the nil rate band (about $442,000) are subject to 20% tax when the trust is created, 38.1% tax on dividend income, 28% capital gains tax on residential property and 20% tax on all other gains, a 6% charge on the value of the trust every 10 years and an exit charge of up to 5.85% levied when assets are no longer held in a relevant trust or leave the trust. An unwary U.S. advisor could inadvertently create a U.K. resident trust subject to punitive U.K. taxes if a U.K. resident becomes trustee of a typical revocable trust commonly used in the United States to avoid probate.[11]

Even if a foreign country recognizes the validity of a foreign trust, there may be insurmountable foreign country legal problems.

Even if a foreign country recognizes the validity of a foreign trust, there may be insurmountable foreign country legal problems such as draconian inheritance taxes if property passes to a trust, suggesting some other form of ownership to minimize inheritance taxes. For example, Germany imposes punitive inheritance tax on transfers to trusts.[12]

Community property. The laws in China, most civil law countries in continental Europe and virtually all countries in Latin America allow spouses to own property "in community" unless they've expressly adopted another property regime, such as separation of property (perhaps through a

pre- or post-marital agreement or transmutation agreement). This means that a married U.S. citizen client may not have as much property to dispose of as the client had thought.

Moreover, a married U.S. citizen who's lived in, say, New York (a separate property state) who purchases a residence or business in California (a community property state) might effectively be making a gift of one-half of the property value to the non-purchasing spouse at the time of purchase. In general, this isn't a problem if both spouses are U.S. citizens. However, this could create significant U.S. gift and estate tax issues if the non-purchasing spouse isn't a U.S. citizen. Gifts to a non-U.S. citizen spouse are subject to a modest annual exclusion (currently $159,000 in 2021) after which such gifts are charged against the purchasing spouse's lifetime gift and estate tax exemption amount (assuming they're a U.S. citizen or domiciliary).

Forced heirship rules determining automatic inheritance by children and the general lack of recognition of trust laws in civil law jurisdictions can wreak havoc on a finely crafted U.S. estate plan.

Virtually every country in Latin America, continental Europe, the Middle East (except Israel), Japan, South Korea and Taiwan *require* that spouses, descendants and at times parents inherit (or have at least a claim to inherit) a portion of or interest in the decedent's property, *regardless of what the decedent's will provides.*[13]

Forced heirship rules determining automatic inheritance by children and the general lack of recognition of trust laws in civil law jurisdictions are significant departures from common law principles and can wreak havoc on a finely crafted U.S. estate plan. For example, traditional U.S. estate planning calls for U.S. citizen married couples to maximize their unused federal gift and estate tax exemption amounts at each spouse's death with any excess value passing to a marital trust, thereby deferring tax until the death of the surviving spouse. If a U.S. citizen or domiciliary spouse owns property in a civil law country enforcing local forced heirship rights of a surviving spouse and children, optimal U.S. tax planning may be thwarted unless proactive action is taken with advice of local counsel in the foreign country. Significant property located in that foreign jurisdiction could easily pass outright to a non-U.S. citizen spouse or children (regardless of citizenship) on the death of the first spouse to die, unless the attentive U.S. estate planner coordinates with local counsel.

Unlimited liability of inheritors (heirs). In many of these same jurisdictions (continental Europe, Japan, Latin America, South Korea and Taiwan), the heirs are deemed to inherit property directly from a decedent on death, without a common law estate administration. There is, therefore, a major distinction between common law probate and civil law succession. A critical, sometimes overlooked implication is that in these civil law countries, the heirs automatically assume unlimited personal liability to creditors of the decedent even if those liabilities exceed the fair market value of the inherited property.[14] Often, an election can be made to limit this liability to the value of the property inherited, which results in a process comparable to a common law estate administration. However, the time limit for making this election is only one month in Switzerland and three months in Japan, South Korea and Taiwan.[15]

Choice of laws. Under U.S. law, whether one dies with or without a valid will, the general default choice-of-laws (that is, conflict-of-laws) rule concerning real property is that the law of the jurisdiction (that is, the U.S. state) where the real property is located will govern the succession to land and improvements. The general default choice-of-laws rule concerning personal property is that the law of the jurisdiction (that is, the U.S. state) of the decedent's domicile will govern the succession to movable property (that is, personal property).

Except in the EU, in most civil law jurisdictions, such as Latin America, the law of a individual's

country of nationality (citizenship) will govern succession law matters.

Renvoi. The doctrine of renvoi[16] provides that a forum should apply not only the substantive law of the jurisdiction but also its choice-of-law (conflicts) rules. If renvoi is applied, the forum jurisdiction essentially sits as a foreign court to reach a result consistent with the "whole" law (choice of law and substantive local law) in that jurisdiction. There's very little authority in the United States concerning renvoi.[17]

For example, France will generally not accept renvoi from say, the United States, but Germany will. If a U.S. citizen owns real property in Germany, German law initially refers to the U.S. law on succession based on the U.S. citizenship of the owner. A U.S. court would refer to German law under its choice-of-law rules. A German court should accept this reference and apply its own law (that is, German law) with respect to real property located in Germany. Unless the U.S. citizen makes an election under Brussels IV (see below) to have U.S. law apply to property owned in an EU country, a transfer of German real estate at death would be subject to German forced heirship rules.[18]

There have been notable exceptions to the traditional rejection of renvoi in the United States, however, and the *Restatement (Second) of Conflict of Laws* advocates the use of renvoi in connection with the succession of personal property.[19]

There's also an important exception to the general rule of no renvoi in U.S. courts that involves succession to foreign real estate owned by U.S. citizens. Under the U.S. approach, when a succession law matter concerning foreign real property owned by a U.S. citizen decedent arises, the U.S. state court will attempt to decide the case in the same manner as a court in the foreign country, applying both the actual or substantive foreign law and the choice-of-law rules of that foreign country; however, this outcome is dependent on the foreign court accepting renvoi from the United States.[20]

Choice of law in the EU (Brussels IV) and election available to U.S. citizens owning property there. Article 22 of the Brussels IV regulations[21] now allows an individual to opt out of the default choice-of-law rules under Brussels IV and elect the application of the state of the decedent's nationality to govern their succession, which can be the law of the relevant state where the decedent was a national either at the time of their death or at the time they made the election.

This election under Brussels IV opens up a significant degree of certainty for U.S. citizens owning property in an EU country (and for U.S. citizens habitually residing in an EU country that's adopted Brussels IV). The U.S. citizen can elect to have U.S. law apply to that U.S. citizen's entire succession to property in an EU state (both real and personal property). In a country like the United States, which doesn't have a national law of inheritance, Article 36 of Brussels IV requires resorting to that country's conflict-of-laws rules. Accordingly, in the case of the United States, which also doesn't appear to have national conflict-of-laws rules governing a decedent's succession, Article 36 of Brussels IV requires resorting to the law of the territorial unit of the decedent's "habitual residence" at the time of death under Article 21. However, if the decedent had a "closer connection" to another state at the time of death such other state would govern the succession under Article 21.[22]

Brussels IV provides that renvoi doesn't apply at all in cases in which a choice of the law of nationality has been made.

Thus, Brussels IV gives a U.S. citizen who isn't resident in the EU but who owns property in an EU member state the ability to make an election to have U.S. law apply to the disposition of that property. This will ensure that the EU property will pass according to the law of the U.S. jurisdiction with which that U.S. citizen has the closest connection.

Most significantly, Brussels IV provides that renvoi doesn't apply at all in cases in which a choice of the law of nationality has been made.[23]

This is especially important for a U.S. citizen who may wish to make an election of U.S. law under

Brussels IV because it gives that citizen the assurance that the choice of U.S. law won't be reversed and referred back to the very EU law that the U.S. citizen was trying to avoid.

The following language might be inserted into one universal will disposing of a testator's U.S. and EU property for admission into original probate in the proper court in the United States:

> I am a citizen of the United States of America. Pursuant to Article 22, 24(2) and 36(2)(2)(b) of Regulation (EU) No. 650/2012 of the European Parliament and of the Council dated July 4, 2012, I elect that the law of my United States nationality shall govern my succession as a whole, including without limitation, the admissibility and substantive validity of this my will, which law I expect to be the law of the state of ____________, the state of the United States with which I have the closest connection.[24]

In general, many civil law countries would look to the law of the individual's nationality.

A U.S. lawyer working with clients who own property abroad must be aware of the potential conflicts-of-law rules and consider potentially different choice-of-law rules. For example, if a U.S. citizen owns real estate in a civil law jurisdiction outside the EU (such as Latin America, Japan, South Korea or Taiwan) that follows the succession laws based on the individual's nationality (citizenship), what rules apply to govern the disposition of real estate located in that foreign country? In general, many civil law countries would look to the law of the individual's nationality (for example, the United States in the case of a U.S. citizen residing in the United States). In this example, the United States would apply the law of the civil law country (the situs of where the real property is located), and the civil law would apply the laws of the individual's nationality (the United States).

Foreign Inheritance

Inheritance taxes in foreign countries. U.S. citizens are subject to U.S. gift, estate and generation-skipping transfer (GST) tax on worldwide assets.

Many European countries, including France, Germany, Japan, South Korea, Taiwan and the United Kingdom impose inheritance taxes, which can be substantial. (In Canada, they may impose a "deemed disposition" tax at death on Canadian situs property owned by U.S. citizens.) In most situations, these inheritance taxes would be applied on a worldwide basis if a U.S. citizen died a domiciliary or resident of the foreign jurisdiction. There's a U.S. estate tax credit for foreign death taxes under Internal Revenue Code Section 2014 that covers foreign inheritance taxes imposed on foreign property. Reliance on this credit isn't always satisfactory, because it credits only taxes paid to the United States on the property taxed abroad, while the country abroad may tax property eligible for the U.S. marital or charitable deductions. There's some relief provided by so-called "modern" U.S. estate tax treaties and the income tax protocol with Canada. There's no treaty protection for U.S. citizens who own property in foreign countries with significant inheritance taxes, such as in Belgium, the Philippines, South Korea and Turkey.

Converting non-U.S. property into U.S. property (possible use of a U.S. LLC as a holding company to unify estate plan but with a big caveat). Some U.S. commentators recommend trying to convert a client's non-U.S. property into U.S. property by using a single member disregarded U.S. LLC to hold all non-U.S. situs property of a U.S. citizen or domiciliary, as well as non-U.S. property owned by a U.S. citizen who's domiciled abroad.[25]

The use of U.S. LLCs as holding vehicles has become increasingly popular among U.S. taxpayers by providing flexibility and tax transparency/flow-through tax treatment while shielding owners from unlimited liability.

The objective is to unify a U.S. citizen's estate plan so that U.S. estate-planning documents will govern the disposition of non-U.S. property and minimize disparate foreign succession and tax law rules that could undermine the U.S. estate plan. The approach is to first consider a U.S. LLC that would serve as an on-shore U.S. holding company and then fill in with

other strategies to the extent the U.S. LLC strategy is insufficient.[26]

However, when it comes to cross-border structuring, transparent U.S. LLCs should be used with great caution. Much of the authority in this evolving area comes from foreign legal decisions in which a non-U.S. taxpayer adopts a transparent U.S. LLC through which to invest or operate in the United States:

> The crux of the issue is the potential mismatch in how an LLC is classified under U.S. tax law and the laws of a foreign jurisdiction. In many instances the transparent treatment accorded under [U.S.] federal law is not relevant in determining how the LLC is classified for the tax purposes of another country. If the LLC is regarded as a non-transparent [opaque] entity by the jurisdiction of its foreign owner, a mismatch will arise as to the *identity* and *residency* of the taxpayer who recognizes revenues and expenses, as well as the *timing* of income recognition.[27]

A 2015 U.K. Supreme Court decision, *Anson v. Commissioners for Her Majesty's Revenue and Customs*, helps to illustrate the potential consequences.[28]

Anson was a U.K. resident who ran his investment management business in the United States through a U.S. LLC. In the United States, he was taxed on his share of the LLC's profits regardless of actual distributions, and he was personally liable for U.S. federal and state income taxes. When the profits were then distributed to the LLC members, Anson was taxed in the United Kingdom on the distributions. Anson attempted to claim a foreign tax credit in the United Kingdom for the U.S. taxes paid, contending that the profits subject to tax were the same in both countries and that under the U.S.–U.K. tax treaty, couldn't be taxed twice, once by the United States when earned and again by the United Kingdom on distribution.

The U.K. tax officials denied Anson's claim, finding the U.S. LLC was indeed a separate corporate entity for U.K. tax purposes and distinguishing the profits earned from the actual distributions. However, the U.K. Supreme Court disagreed with the U.K. tax officials and allowed foreign tax credit relief, finding that due to the terms in the LLC agreement and Delaware law, the members were effectively viewed as recognizing their share of the profits as they were earned by the LLC and not on actual distribution. The court's opinion conflicts with the U.K. tax authorities' historical view that LLCs should be regarded as non-transparent entities.

> Due to the complexity and uncertainty surrounding the use of hybrid entities in cross-border structuring, advisors should handle transparent U.S. LLCs with great care.

When a single member U.S. LLC is taxed as a separate corporation in the foreign jurisdiction (sometimes referred to as a "hybrid entity"), the United States will disregard the foreign characterization of the U.S. LLC as a separate entity for U.S. tax purposes and under the U.S. tax classification rules will treat the entity as disregarded. This will generally result in the foreign taxes paid to the foreign jurisdiction by the U.S. LLC being treated for U.S. tax purposes as being paid by a U.S. citizen owner of the LLC and should be fully creditable against such U.S. citizen's U.S. taxes on the same income. However, if a foreign country taxes a U.S. LLC at a higher rate of tax than that to which a U.S. citizen owner of the LLC is subject, there could be additional costs. Although corporate tax rates in much of the world don't exceed 35%, when a high corporate tax rate is coupled with withholding tax on dividends paid to the U.S. owner of the U.S. LLC, the effective foreign tax rate can be higher than the U.S. tax rate. Further complicating the situation is that the treaty approach to hybrid entities varies depending on the treaty country.[29]

Another potential problem for a U.S. citizen investing abroad through a U.S. LLC is that foreign jurisdictions don't necessarily have an equivalent to IRC Section 351, which makes contributions of appreciated property to a domestic U.S. corporation a non-recognition event as long as the control of the corporation remains the same before and after the contribution. A contribution of appreciated real property located in a foreign country to a U.S. LLC could trigger a capital gains tax in the foreign country even though there would be no U.S. tax by applying Section 351. Moreover, if a U.S. LLC is engaged in overseas business (or there's significant post-contribution appreciation in asset values held by the U.S. LLC), a termination and liquidation of the business (or investments) could be treated as a corporate liquidation in the foreign jurisdiction, triggering possible capital gains or other taxes in that country, while there might be little or no U.S. tax due on such liquidation.

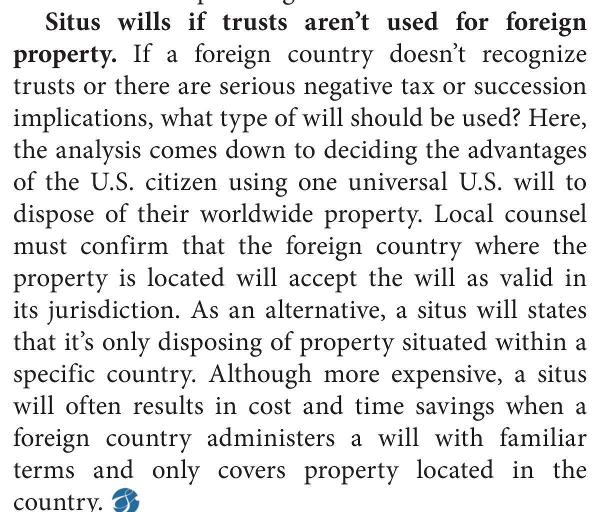
A few countries don't allow a foreigner to hold title directly in the foreigner's individual name.

Due to complexity and uncertainty surrounding the use of hybrid entities in cross-border structuring, advisors should handle transparent U.S. LLCs with great care. If flow-through treatment is desirable in both countries, more traditional entities, such as limited partnerships, are less likely to result in mismatches of income and taxes. Whenever a U.S. LLC is being considered, counsel in both jurisdictions must carefully review the interaction of U.S., foreign and treaty provisions to prevent unintended tax consequences in either country.

While the use of a U.S. LLC as a holding company doesn't afford ironclad protection across multiple jurisdictions from non-U.S. property and tax rules, proponents suggest that a U.S. LLC together with other techniques could, in the right circumstances, produce a satisfactory outcome that indirectly applies U.S. law for a U.S. decedent who owns overseas property.[30]

According to these proponents, the techniques that might be deployed depending on the circumstances are: assuring favorable non-U.S. choice-of-law provisions are selected, using pre-death and post-death renunciations (that is, akin to our disclaimers) in the non-U.S. jurisdictions, having all heirs sign an inheritance or succession agreement enforceable in the United States and drafting of synchronized U.S. estate plan documents disposing of foreign property in a way that encourages full cooperation by U.S. heirs (possibly through the use of in terrorem clauses).[31]

Taking title to foreign property. A few countries don't allow a foreigner (for example, a U.S. citizen residing in the United States) to hold title directly in the foreigner's individual name. Often, a suitable vehicle is established in these foreign countries allowing the foreigner to take title to real property. For example, Americans buying real property in Mexico along the seashore typically take title through a fideicomiso, likely designating the client's revocable living trust as the beneficiary to incorporate optimal U.S. transfer tax planning.



Situs wills if trusts aren't used for foreign property. If a foreign country doesn't recognize trusts or there are serious negative tax or succession implications, what type of will should be used? Here, the analysis comes down to deciding the advantages of the U.S. citizen using one universal U.S. will to dispose of their worldwide property. Local counsel must confirm that the foreign country where the property is located will accept the will as valid in its jurisdiction. As an alternative, a situs will states that it's only disposing of property situated within a specific country. Although more expensive, a situs will often results in cost and time savings when a foreign country administers a will with familiar terms and only covers property located in the country.

Endnotes

1. Clients and their advisors are likely familiar with Financial Crimes Enforcement Network (FinCEN) Form 114, better known as the FBAR (Report of Foreign Bank and Financial Accounts), which requires a U.S. individual to report annually certain foreign bank and other foreign financial accounts having an aggregate value in excess of $10,000. In 2016, FinCEN issued its first real estate Geographic Targeting Order (GTO) to help address money

laundering risks in real estate and for other reasons and has renewed and expanded the GTO multiple times since then. According to FinCEN analyses, all cash real estate purchases by a legal entity poses a money laundering risk, particularly in certain U.S. cities.

2. FinCEN Advance Notice of Proposed Rulemaking, issued by the FinCEN Office of Strategic Communications (April 1, 2021).
3. For a very good early overview of the impact of the U.S. Corporate Transparency Act (CTA) on U.S. private clients, *see* Paul D'Alessandro, Jr. and Jennifer Wioncek, "The Corporate Transparency Act: Initial Observations for Domestic and International Private Clients," *Bilzin Sunberg newsletter* (Feb. 10, 2021).
4. Joshua S. Rubenstein, "It's a Small World After All: Representing Global Families During Times of Unprecedented Change," University of Miami School of Law 54th Annual Heckerling Institute on Estate Planning (Jan. 14, 2020).
5. *Ibid.*
6. For example, Alaska, Delaware, New Hampshire, Nevada, South Dakota and Wyoming.
7. Henry Christensen III, *International Estate Planning, Second Edition* (now edited by McDermott Will & Emery), *see* Chapter 9.02, "Difficulties with Civil Law Countries."
8. For example, Argentina, Belgium, Colombia, Guernsey, Jersey, Liechtenstein, Louisiana, Malta, Panama, Puerto Rico, Quebec province and South Africa are some of the major civil law jurisdictions with exceptions. In these jurisdictions, the settlor may generally create both inter vivos or testamentary trusts and revocable or irrevocable trusts. *Ibid.*
9. *Ibid.*
10. *See* Christiansen, *supra* note 7, Chapter 17.10[5], "Switzerland, Foundations and Trusts, Recognition of Trusts by Swiss law." Validly set-up foreign trusts are fully recognized in Switzerland. A Swiss resident, even if not a Swiss citizen, can validly set up a trust subject to a foreign law or be a beneficiary of such trust. In general, revocable trusts in Switzerland are transparent, and trust assets and income thereof remain entirely taxable in the hands of the settlor. The tax consequences of irrevocable discretionary trusts in Switzerland are more complicated. For example, if the settlor is a lump sum taxpayer (under a forfeit with one of the cantons), the assets settled in trust must continue to be submitted to the lump sum agreement in the particular canton, and distributions to the beneficiaries are taxed as gifts; however, gifts to spouses and descendants are exempt in most cantons.
11. *See, e.g.,* Christensen, *supra* note 7, Chapter 16, "England," Section 16.08, "Inheritance Tax" and Section 16.12, "Taxation of Trusts."
12. *See, e.g., ibid.,* Chapter 18.09, "Germany, Trusts under German Estate Tax and Foreign Civil Law." Under German law, transfers to trusts under German wills violate public policy, while transfers to non-German trusts under non-German instruments incur gift and inheritance tax at the highest marginal tax rates. Except in Liechtenstein, the trust isn't an entity that's fully integrated in the internal laws of any country in continental Europe.
13. Michael Galligan, "International Estate Planning for U.S. Citizens: An Integrated Approach," *Estate Planning Journal* (October 2009).
14. *Ibid.*
15. *Ibid.*
16. Conflicts between jurisdictions as to which laws apply and the substance of their respective substantive laws can trigger a referral mechanism known as "renvoi" (from the French meaning, "send back"). In the United States, renvoi arises when the choice-of-law rules of a U.S. state directs that a U.S. court shall consider a matter by reference to the "law" of another jurisdiction. While the complex mechanics of renvoi are beyond the scope of this article, its purpose is to prevent forum shopping (that is, to prevent laws being selected by reference based on the most desirable outcome).
17. In the one notable U.S. case involving renvoi of succession matters, a New York Surrogate's Court considered whether Swiss or New York succession law should apply to sale proceeds from the sale of a decedent's Swiss real estate. The court determined that it should apply Swiss law. Switzerland followed the nationality principle in succession law matter but wouldn't accept renvoi from New York. Accordingly, the court applied New York law to determine the parties rights to the proceeds. *See Accounting of Schneider,* 96 N.Y.S.2d 652 (Surr. 1950).
18. R. Scott Jones, "U.S. Expatriates and the World of Estate Planning*"* (May 2009), *www.tax-lawyer.info/files/u_s__expatriates_and_the_world_of_estate_planning.pdf.*
19. *See* Christensen, *supra* note 7, Chapter 7.01(2), "Conflict of Laws Issues in the Succession of International Estates, *Renvoi"* (2020 version).
20. *Ibid.*
21. Regulation No. 650/2012 of the European Parliament and of the Council (July 4, 2012).
22. Michael W. Galligan, "US expatriate persons and property owners, the European Union Succession Regulation and the choice of New York law," *Trusts & Trustees* (April 2017), at p. 328.
23. *See* Brussels IV, Article 34(2).
24. Galligan, *supra* note 22, at p. 340.
25. *Supra* note 13.
26. *Ibid.*
27. Pietro M. Sturdi, "The Problematic Use of Transparent U.S. LLCs by Foreign Taxpayers," *The Tax Adviser* (Oct. 1, 2015) (emphasis in original).
28. *Anson v. Commissioners for Her Majesty's Revenue and Customs,* 2015 UKSC 44.
29. Many treaties and protocols signed in the last 25 years include provisions similar to the U.S.–U.K. treaty. Other U.S. treaties adopt an ad hoc transparent entity concept, such as with Canada. Older treaties might not address hybrid entity situations.
30. *Supra* note 13.
31. *Ibid.*