Foundations and the Cayman Islands Foundation Company

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Foundations and the Cayman Islands Foundation Companies

Paolo Panico

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(a) How did it all start?

(b) Private foundation jurisdictions world-wide

(c) Three models of private foundations

(d) 5 new laws in 2017: a «new generation»?

(e) Some examples
How did it all start?

- Moses, Archbishop of Ravenna, 12th Century:
  - Who owns the property of a monastery that has been abandoned by all the monks?

- Sinibaldo de’ Fieschi (later Pope Innocent IV)
  - «Collegium fingatur una persona»

- Friedrich Carl von Savigny, System des heutigen Römischen Rechts (1840)
  - Two classes of legal persons: Korporationen and Stiftungen

- Aloys von Brinz, Lehrbuch der Pandekten (1868)
  - Zweckvermögen = a fund of assets appropriated to a specified purpose

Theories applicable to charitable foundations
- family foundations (16th century Netherlands, 19th century Germany)
Private foundation jurisdictions (civil law)

- **Germany**, BGB (1 January 1900), § 80 ff.

- **Switzerland**, Civil Code (1907), Art 80 ff

- **Liechtenstein**: Personen- und Gesellschaftsrecht (PGR), 26 January 1926, reformed 1st April 2009: Stiftung

- **Netherlands**, Dutch Civil Code (1976), Book 2, Part 6: stichting

- **Austria**: Privatstiftungsgesetz (PSG), Sept 1993 (partial reform 30 December 2010)
Private foundation jurisdictions (civil law, cont.d)

- **Panama**: *Ley de 12 de Junio de 1995 por la cual se regulan las Fundaciones de interés privado* (LFIP)

- **Estonia**, Foundations Act 1996

- **Netherlands Antilles**, National Ordinance regarding Foundations (1998), since 2004 Book 2 of Netherlands Antilles Civil Code: *stichting particulier fonds* (SPF) in force in Curaçao and St Maarten since the dissolution of the Netherlands Antilles as of 10 October 2010 (reformed as of 1st January 2012)

- **Malta**, Second Schedule to Civil Code, Title III (2007)

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Private foundation jurisdictions (civil law, cont.d)

- **Belgium**: *Loi du 27 juillet 1921 sur les associations sans but lucratif etc.*, reformed as of 1st July 2003 under the *Loi 2002-05-02/51 sur les associations sans but lucratif et les fondations*

- **Czech Republic**, Civil Code (in force as of 1st January 2014): foundation (*nadace*), foundation fund, (*nadačný fond*), fiduciary fond (*svěřenský fond*)

- **Hungary**: Civil Code (in force as of 15 March 2014), foundation (*alapítvány*), fiduciary property management contract” (*bizalmi vagyonkezelés*)

- **Luxembourg**, Projet de Loi N 6595 submitted to Parliament on 22 July 2013 *Fondation Patrimoniale (??)*
Private foundation jurisdictions (common law)

- Liberia, Associations Law, Part VI, Chapter 60 (as amended, 2002)
- St Kitts, Foundations Act 2003
- Bahamas, Foundations Act 2004
- Antigua and Barbuda, International Foundations Act 2007
- Anguilla Foundation Act 2008
- Foundations (Jersey) Law 2009
- Seychelles Foundations Act 2009
Private foundation jurisdictions (common law, cont.d)

- **Vanuatu**, Foundations Act 2009
- **Belize**, International Foundations Act 2010
- **Labuan**, Foundations Act 2010
- **Isle of Man**, Foundations Act 2011
- **Mauritius**, Foundations Act 2012
- **Cook Islands**, Foundations Act 2012
- Foundations (**Guernsey**) Law 2012

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Private foundation jurisdictions (common law, cont.d)

- Samoa, Foundations Law 2016

- 5 more in 2017: see later!
Three «foundation models»

- «Germanic» (or «classic»)
- Dutch
- Common Law
Three «foundation models» (1)

- «Germanic» -> Liechtenstein, Austria, Panama («classic model») – *Familienstiftung*
  - Founder’s powers or «rights» (*Gestaltungsrechte*)
  - «Beneficiaries» have rights only if they are granted enforceable claims (*klagbarer Anspruch*)
  - *Comparable to a trust with a «stronger settlor» and «weaker beneficiaries»*
Three «foundation models» (2)

• Dutch: «orphan» corporate entity
  – NO founder’s rights, NO beneficiaries
  – Possibility of *stichting administratiekantoor (STAK)*
  – «Orphan» entity used in corporate arrangements (securitization, syndicated loans, etc)
Three «foundation models» (3)

- Common Law (St Kitts) –
  - Combination of TRUST and COMPANY features
  - Some control mechanisms deriving from trust law
  - Diversification within the «model» (cf offshore trusts)
Non recognition of certain private foundations
Oberlandesgericht (OGH) Stuttgart, 29.06.2009, 5 U 40/09

- Facts:
  - The assets held in the name of a Liechtenstein foundation were treated as part of the deceased founder’s estate

- Questions of law:
  - An agency agreement (Mandatsvertrag) was in place, which allowed the founder to give directions in respect of the administration and appointment of the foundation assets
  - An alternative construction might have been to characterize the foundation as a contract in favour of a third party (recognized under German law) but it was denied in the face of the circumstances

A «Mandatsvertrag» kills a foundation

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Founder’s «Rights» (Rechte) taken in execution

Oberster Gerichtshof (OGH)
OGH, 26.04.2006, 3Ob 217/05 s, 3 Ob 16/06 h

- **Facts:**
  - Founder’s creditors allowed to exercise the founder’s right to revoke the foundation by way of subrogation

- **Questions of law:**
  - If a foundation is revocable, in the absence of other stipulations, the founder is deemed to be the «ultimate beneficiary» (PSG§ 36(4)), ie the foundation assets revert to the founder in case of revocation -> founder’s creditors allowed to revoke the foundation and apply the assets towards satisfaction of their claims
  - Founder’s rights are höchstpersönlich and not assignable under Austrian law (PSG § 3(3)): in this case it is not an assignment but a subrogation

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Five new laws in 2017!

Gibraltar, Private Foundations Act 2017 (11 April 2017)

Five new laws in 2017!

New Hampshire, Foundations Act (1st October 2017)

Cayman Islands, Foundation Companies Law 2017 (18 October 2017)

Dubai International Financial Centre, Foundations Law (Law N. 8 of 2017)
DIFC, Foundations Law, Art 10

Nature of a Foundation:

(1) A Foundation is a body corporate with a legal personality separate from that of its Founder(s) and any other person.

(2) The property of a Foundation is not held by it upon trust for any other person.

(3) A Founder has such rights (if any) in respect of a Foundation as provided for in its By-laws.

(4) A person specified in the By-laws (other than a Founder, a member of the Council, the Registered Agent and any Guardian) has such rights (if any) in respect of a Foundation as provided for in its By-laws.
DIFC, Foundations Law, Art 26

(2) A Founder may reserve the following powers:

(a) a power to amend, revoke or vary the terms of the Charter or By-laws, or both of them, in whole or in part;

(b) subject to Article 12(2), a power to amend, revoke or vary the objects of the Foundation, in whole or in part; and

(c) a power to terminate the Foundation,
provided that the power to amend, revoke, vary or terminate, as the case may be, is detailed in full in the Charter, and provided that these powers are only reserved:

(i) for a period not exceeding the duration of a Founder’s life, if he is a natural person; or

(ii) for a period not exceeding fifty (50) years from the date of establishment of the Foundation, if the Founder is a legal person, and thereafter any such powers so reserved shall lapse, notwithstanding the terms of the Charter.
DIFC, Foundations Law, Art 29(1)

A Foundation’s By-laws may provide for the distribution of property of the Foundation to Qualified Recipients.
DIFC, Foundations Law, Art 30

(1) A Foundation may issue securities, including depository receipts, representing specific rights to payment quantified by reference to specific parts of the property owned by the Foundation or relating to other rights or interests, whether present or future, to which the Foundation is or might be entitled.

(2) Any such securities issued by a Foundation may be subscribed for or issued in favour of any individual or legal entity.

(3) The Foundation retains full ownership of the properties and full entitlement to the rights or interest in any property in respect of which it issued securities under Article 30(1).

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New Hampshire, Foundations Act, § 564-E:7-702 (b)

Unless the governing documents provide otherwise, the founder retains the following powers, rights, and interests:

(1) The power to amend or restate the foundation’s certificate of formation

(2) The power to amend, restate, or revoke the foundation’s bylaws
New Hampshire, Foundations Act, § 564-E:7-702 (b)

(3) The power to direct the directors concerning distributions of the foundation’s property

(4) The right to receive distributions from the foundation; or

(5) The power to dissolve the foundation
New Hampshire, Foundations Act, § 564-E:8-802

Trust powers

(a) A foundation shall have trust powers to the extent that it:
   (1) Does not transact business with the general public
   (2) Is a family trust company as defined in RSA 383-A:2-201(a)(26)
   (3) Is a foreign family trust company that is authorized to engage in trust business in this state under RSA 383-d:13-1301

(b) Trust powers include the power to act as a trustee or other fiduciary, a trust advisor as defined in RSA 564-B:1-103(27), or a trust protector as defined in RSA 564-B:1-103(28)
Further readings

**International Trust Laws, 2d edition**
Paolo Panico
ISBN13: 9780198754220
Published: March 2017

**Private Foundations: Law and Practice** Paolo Panico
ISBN 9780199646197
published March 2014
Oxford University Press

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Thank you!

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