

**Commentaries and Treatises on  
Liechtenstein and International Law  
Edited by Dr Markus H Wanger  
Vol. 18**

**Compendium**

**The new Liechtenstein  
Foundation Law**

**(After the complete revision of 26. June 2008)**

**A Compendium for  
Judges, Prosecutors, Officials and Practitioners**

**Markus H Wanger**



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International Law**

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**Vol. 18**

**Liechtenstein Foundation Law**

**Markus H Wanger**

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**The Foundation**

**Art. 552 § 1-41 PGR**

## **1. Introduction**

### **1.1 Meaning of Foundation in Liechtenstein**

The foundations have contributed substantially to the economic success of Liechtenstein.

Today there are approximately 40,000 foundations in Liechtenstein. About 1,500 of these are registered foundations, while 600 are run as Public- Purpose foundations.

The Liechtenstein judges, solicitors and trustees have a wide range of expertise in Foundation Law and offer an appropriate development of legal certainty. The Liechtenstein Foundation Law was received by Panama and Austria.

The liberal Foundation Law in Liechtenstein offers various types of foundations, including but not limited to the Public-Purpose Foundation, the Religious Foundation, the Pure Family Foundation, the Joint Foundation, the Corporate Foundation, and the Staff Welfare Foundation.

Around 100 billion Swiss francs, which are administered by the Liechtenstein banks, are assigned to pure or joint Family Foundations. Approximately one billion Swiss francs are held by Public-Purpose Foundations.

Not only foreign people but also individuals living in Liechtenstein form Liechtenstein foundations.

When establishing a foundation the founders' aim is to dedicate their assets for a private or public purpose. Alternatively the aim of the foundation can be explicitly stated; among other things the aim of the foundation could be holding of family property, or the support to socially disadvantaged or disabled people.

The new Liechtenstein legislation on money laundering and terrorism is also applicable to foundations. The rules are very strict and are continuously monitored by the authorities. The provision that customers and contracted parties are obliged to know each other (know your customer) ensures that no one can use a foundation for illegal purposes.

Foundations in Liechtenstein are not and never were an instrument to finance dubious groups or international crime. However there have been incidents of abuse in the past.

Above all, foundations are a way of protecting assets and managing taxes for professionals. The assets can be structured in a purposefully and predictable manner, avoiding the negative outside influences.

## **1.2 History**

The roots of the Foundation Laws go back to the Roman law and to the Byzantine civil and canon law respectively. In Europe, the heads of the families were able to hold the assets for the benefit of present or future family members, through a Fideikommiss. In England and Wales there was a similar legal concept, the so-called Trust.

The Fideikommiss was replaced by the legal concept of foundations in Germany in the 20s of the 20th century. In this approach, the property is not held by a natural person (Trustee), but by a legal person, the foundation, which is managed as a company.

Switzerland became leading within the field by introducing civil law and the institution of foundations. Liechtenstein followed the Swiss model when it in 1926 introduced the Person and Company Law.

## **1.3 Sources of law**

The Liechtenstein Foundations law is regulated by the second part, title 5, section 2, Article 552 § 1 - 41 PGR (Law on Persons and companies).

Articles 553 to 570 of PGR were repealed by the revision in 2008.

#### **1.4 The complete revision of 26 June 2008**

The complete revision of the Liechtenstein Foundation Law is mainly characterized by the fact that it forms a new piece of legislation, yet at the same time incorporates the legislation into the personal and public law. Not only the founder, but also the other involved parties will be given a clearer, stronger position by the new law. The founder has a bigger responsibility regarding the possible choices of access and information rights to beneficiaries.

The different types of foundations have been systematized and the foundation supervision has received a new structure. In addition, the Foundation Law has been updated with the latest case law.



More than any other political exponent, the Foundation Law has been granted a central role. It is occasionally referred to as the very core of the provision of services of trusteeship. The central role allows it to be used as a legal "Trojan horse"<sup>1</sup>.

Some people, mostly those who are not legal practitioners, claim that the new Foundation Law is only supported by the Yankees. For instance it is claimed that, the Public-Purpose foundation is not in its current form "state of the art."

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<sup>1</sup> WIKIPEDIA 01.02.2010, The Trojan Horse:

The **Trojan Horse** is a tale from the Trojan War, as told in Virgil's Latin epic poem The Aeneid and by Quintus of Smyrna. The events in this story from the Bronze Age took place after Homer's Iliad, and before his Odyssey. It was the stratagem that allowed the Greeks finally to enter the city of Troy and end the conflict. In the best-known version, after a fruitless 10-year siege, the Greeks constructed a huge wooden horse in an attempt to destroy Troy from the inside. According to Quintus, Odysseus came up with the idea of building a great wooden horse, in which 30 men could hide, to be wheeled into the city without the Trojans knowing. Under the leadership of Epeios, the Greeks built the wooden horse in three days. Odysseus' plan called for one man to remain outside of the horse; he would act as though the Greeks abandoned him, leaving the horse as a gift for the Trojans. A Greek soldier Sinon was the only volunteer for the role. Virgil describes the actual encounter between Sinon and the Trojans: Sinon successfully convinces the Trojans that he has been left behind and that the Greeks are gone; the horse is wheeled inside the city walls as a victory trophy. That night, the Greek soldiers hidden inside the horse emerged and opened the city gates for the rest of the Greek army. They raided and destroyed the city of Troy, ending the Trojan War.

Most attorneys who were involved with the Liechtenstein Foundation Law have included an understanding from the country of origin and thereby radically changing the liberal character of the earlier Liechtenstein Foundation Law. The original character of the Liechtenstein foundation is now lost. The new foundation is simply not compatible with the size of Liechtenstein and only leads into a legal dead end.

The tax administration will continue to decide whether or not a foundation is a Public-Purpose Foundation and whether the foundation is liable to pay taxes. How can this authority make this decision objectively when the outcome of the decision can be that no taxes are to be paid? A separate law should therefore govern the public-purpose foundation.

Most of the other changes are also disadvantageous to the Liechtenstein foundation system and, therefore ultimately, to Liechtenstein. Rigidity with respect to the changes regarding the will of the founder means that potential founders will look for other destinations that are as flexible as Liechtenstein used to be.

This way Liechtenstein and more importantly the tax authorities themselves acknowledge, not the total independence of the foundation assets from the

assets of the founder, but by adding the assets of the foundation to the assets of the taxpayers in calculating the tax progression, requires an asset tax from the foundation and requires tax of distributions given to the taxpayers of Liechtenstein, in case the dividend distributions, according to the tax administration, are higher than necessary for making a living and necessary for maintaining the lifestyle. Thus, Liechtenstein is moving more and more into international side-lines, as "ring fencing"<sup>2</sup> is no longer tolerated internationally. It is an entirely different question whether this brings Liechtenstein in consistency with the position stated in the declaration<sup>3</sup> of March 2009 from OECD.

The new Foundation Law carries great risks for founders and foundation organs and there are already large trust companies that refuse to dividend distributions under the guise of ostentatious liability. The founder finds himself in the foundation trap. But also the organs are caught in the legislation and risk damage claims, if the so called „Solvency Test“ has not been carried out, as explained below.

Other countries have recognized the problems. Therefore there are attempts in Austria to revise the

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<sup>2</sup> One understands this as different treatment of own tax payers in comparison with foreign tax payers. Such a practice is now internationally debarred and is described as `harmful tax practices`.

<sup>3</sup> See Annex, policy statement of March 2009

Foundation Law in accordance with the earlier Foundation Law in Liechtenstein.

It is almost certain that the formation of foundations in Liechtenstein will decrease massively. At the same time dissolutions will increase.

The following extracts from parliament meetings in September 2008 articulate this clearly. The tendency is increasing.

**No. of foundations  
Parliament sitting  
of 16./17./18./19./20.09.**

**Question:** Member of parliament  
Paul Vogt

**Answer:** Deputy prime minister Dr. Klaus Tschüscher

*Question:*

*What is the current number of foundations and how much has this declined during 2008.*

*Answer:*

*The following list shows the required information as of 12 September 2008:*

Exit	New Registrations	Per per	Closing
		01.01.08	12.09.08
Registered 1 Foundations	47 1565	1559	40
Unregistered foundations 14 (With only a notice)	46'768 1'872 45'839	2'787	

The number of registered foundations has been rather constant since the beginning of year. Specifically, 40 foundations have been closed, 1 has shifted office and 47 new foundations have been registered

A different picture emerges when we look at the unregistered (only with notice) foundations with land and public registry office. On 1 January 2008, there were 46,768 unregistered (only with notice) foundations. In the past nine months, 2787 unregistered (only with notice) foundations were closed and 1872 formed. There are 14 foundations with offices abroad as on 12 September 2008 and a total of 45,839 unregistered (with notice) foundations.

With respect to the numbers on 1 January 2008, the number of unregistered foundations has gone down by 929.

The following response to a question in the meeting of Parliament on April 2009 clearly shows the subordinate role played by public-purpose foundations until today. This will hardly change in future as long as a separate law is not made for the public-purpose foundations.

**"Small Questions" addressed to the Government**

**Foundations**

**Parliament  
sitting of  
22.04.2009**

**Question:** Member of parliament Dr. Pepo Frick

**Answer:** Government councilor Dr. Aurelia Frick

***Question:***

1. What is the actual number of foundations in Liechtenstein, divided into private purpose and public purpose foundations?
2. How many foundations were closed in the years 2007 and 2008 and how many new ones were registered, divided into public purpose

and private purpose foundations.

***Answer:***

The public register office does not differentiate between private purpose and public purpose foundations but between registered and non-registered foundations. Therefore the question is answered with division between registered and non-registered foundations.

To ensure completion of facts, it is to be noted that all public purpose foundations are obliged to register while only those private purpose foundations that have commercial activity are required to register. Private purpose foundations may be registered voluntarily. Normally private purpose foundations only give a notice to the public register office.

***To question 1:***

Currently there is data available for 1560 registered and 44,150 unregistered foundations.

***To question 2:***

In the year 2007, 52 registered and 2,454 unregistered (with notice) foundations were closed while 90 registered and 4,451 unregistered (with notice) foundations were established.

In the year 2008, 58 registered and 4,354 unregistered (with notice) foundations were closed while 75 registered and 2,431 unregistered (with notice) foundations were established.

## **2. General rules**

### **2.1 Legal personality**

Basically, the foundation has legal personality, and is a legal person<sup>4</sup>.

There is also the concept of "dependent foundations." A dependent foundation comes into existence when a founder transfers assets to another person with the mandate to manage the assets separately and according to the purpose defined by the founder. Such foundations can be established at any time, not under the new Foundation Law, but under the general rules of legal transactions and therefore to a large extent with private autonomy.

The question that commonly arises is: When does the foundation emerge as a legal person?

#### **2.1.1 Foundation statement**

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<sup>4</sup> Art 552 § 1 Para. 1 Sentence 1 PGR



The establishment of a Foundation is carried out by the foundation statement. This must be done in writing and the signature of the founder must be verified. Following this act the foundation acquires the rights of a personality and becomes a legal person. However this procedure only takes place if no registration in the Public Register is required by the Foundation.

### **2.1.2 Foundations requiring registration**

Public-Purpose and Private-Purpose Foundations, which on a statutory basis carries out commercial activities, are required to be registered<sup>5</sup> in the public register and achieve their legal personality this way. The registration is constitutive. Prior to registration, the foundation is treated as a so-called “pre foundation<sup>6</sup>.” Logically the Foundation Law will be applied, but general knowledge and precedents say that the pre foundation is a party without trading powers or party autonomy. Persons acting on behalf of such a pre foundation will be held liable jointly.

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<sup>5</sup> Art 552 § 14 Para 4 PGR

<sup>6</sup> Martin Schauer, Short commentary on Liechtenstein Foundation Law, Art 552 Par 14, RZ 19

However, if the foundation has an immoral or illegal purpose, the foundation cannot acquire the status of a legal personality under any case. (Art. 107 Para. 5 PGR<sup>7</sup>).

All other foundations (Religious, pure and mixed Family Foundations) acquire the right of legal person without registering in the public register. These other Private-Purpose Foundations may be registered in the public register. However there is no legal obligation to do so. (Art. 552 § 14 Para. 5).

Foundations formed due to death:

A foundation formed to fulfil a testamentary disposition or an agreement between heirs can be registered or recorded only after the death of the founder. In case of inheritance<sup>8</sup>, registration takes place after the death of one of the founders, as long as the inheritance agreement does not dictate otherwise or any other law does not oversee such a situation.

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<sup>7</sup> Associations of persons and establishments, including foundations whose objects are immoral or unlawful, may not, by virtue of the law, acquire the right of legal personality.

<sup>8</sup> § 602 ABGB

### **2.1.3 Foundations not duty bound to register**

If the foundation is not obligated to register, it will achieve a right to a legal personality without registration in the public register. A valid foundation statement along with the actual transfer of funds to the foundation is the only required precondition. The question of legal personality is not dependent on the submission of the deed of the foundation to the public registration office for a notice of formation.

An application of formation has to be prepared within 30 days by the board of the foundation. The representatives are also entitled to make an application of formation. This submission serves as a monitoring tool for registration obligations and for the prevention of formation of foundations with immoral or illegal purpose and to avoid circumvention of legal oversight.

There are substantial penalties for failure in complying with this provision (§ 66c SchIT PGR<sup>9</sup>).

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<sup>9</sup> § 66c SchIT (Final H heading)

5. Obligations of Foundations concerning Application to Register, Deposition and Declaration

1) On information from the foundation supervisory authority, the Court of Justice of Liechtenstein may in special non-contentious

Most of the foundations in Liechtenstein, approximately 40,000, have only deposited one

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civil proceedings impose a fine of up to 10,000 Swiss francs on any person

Who as a member of the foundation board:

1. Fails to apply for registration of a foundation in the Public Registry contrary to Art. 552, § 19, Para. 5; or

2. Fails to deposit at the Office of Land and Public Registration a notification of formation contrary to Art. 552, § 20, Para. 1 in conjunction with Para. 2 or a notification of amendment contrary to Art. 552, § 20, Para. 3.

2) The fine in accordance with para. 1 may be repeatedly imposed until a lawful status is produced.

3) Any person who intentionally makes a declaration incorrect in substance pursuant to Art. 552 § 20, para. 1 in conjunction with para. 2 or pursuant to Art. 552, § 20, para. 3, shall be sentenced by the Court of Justice of Liechtenstein to pay a fine of up to 50,000 Swiss francs on account of a misdemeanour, and in the event of non-collectability to a term of imprisonment of up to six months. If the perpetrator acts negligently, he shall be sentenced by the Court of Justice of Liechtenstein to pay a fine of up to 20,000 Swiss francs on account of a misdemeanour, and in the event of non-collectability to a term of imprisonment of up to three months.

4) Any person who as an attorney at law, trustee or holder of an entitlement in accordance with Art. 180a intentionally or negligently provides an incorrect confirmation of the information pursuant to Art. 552, § 20, para. 1 in conjunction with para. 2 or pursuant to Art. 552, § 20, para. 3 shall likewise be punished in accordance with para. 3.

5) The right to take disciplinary measures is reserved.

notice of formation. Old foundations, that may have deposited more than just the necessary information with the notification of formation with the public registration office, have meanwhile taken these documents back.

In case of such foundations both the inspection as well as the certification is restricted by third parties. The Government of the Principality of Liechtenstein issued instructions related to exchange of information regarding such notified (but unregistered) foundations on 21 October 1997 (this is also applicable to foundations which have deposited only one notice of formation.) The instructions have been given to the public registration office and apply universally to all disclosures. Specifically, the instructions are as follows:

a) Information to third parties about facts related to such notified (but unregistered) foundations can be given by the public registration office only on the basis of written justified requests, although the information can be provided orally or on telephone. Information about the existence or non-existence of such foundations is an exception.

b) Similarly a written and justified request is required by the third party for inspection and certification of such notified (but unregistered)

foundations in the register files of the public registration office.

c) The written request is to be conveyed to the Liechtenstein representative of the concerned notified (but unregistered) foundation for an opinion.

d) Decision is to be taken on the request after receiving the opinion of the Liechtenstein representative.

e) The inspection and certification as any other exchange of information may take place only after the date of this decision, apart from the exception given in point 1 above.

#### **2.1.4 Notice of formation**

As is described the application for formation serves the purpose of control. However lawyers, trustees or anyone else authorized under Art.180a PGR must certify in writing, the authenticity of the information in the application.

The law reads as follows:

##### *IV. Notification of Formation*

##### *§ 20*

*1. Deposition of Notification of Formation*

*1) If the foundation is not subject to an obligation to register for the purpose of monitoring the obligation to register and preventing foundations with an illegal or immoral purpose as well as preventing the circumvention of required supervision, each member of the foundation board shall be under an obligation to deposit, within 30 days following the formation, notification of the formation at the Office of Land and Public Registration. The representative also has authority to make the deposition. The accuracy of the information pursuant to Para. 2 shall be certified in writing by an attorney at law admitted in Liechtenstein, trustee or holder of an entitlement in accordance with Art. 180a PGR.*

*2) The notification of formation shall contain the following information:*

- 1. Name of the foundation;*
- 2. Domicile of the foundation;*
- 3. Purpose of the foundation;*
- 4. Date of formation of the foundation;*

*5. Duration of the foundation, if this is limited;*

*6. The last name, first name, date of birth, nationality and place of residence registered office of the legal attorney or the corporate name of the members of the foundation board as well as the form of the signatory's power;*

*7. The last name, first name, date of birth, nationality and place of residence or registered office of the legal attorney, or the corporate name and domicile of the legal representative;*

*8. Confirmation that the tangible beneficiaries, or beneficiaries identifiable on the basis of objective criteria, or of the category of beneficiaries, have been designated by the founder, unless this is evident from the notified purpose of the foundation;*

*9. Confirmation that the foundation is not entirely or predominantly intended to serve common-benefit purposes;*

*10. Indication of whether pursuant to a provision of the foundation deed the foundation is subject to supervision; as well as*



*11. Confirmation that the statutory minimum capital is at the free disposal of the foundation.*

*3) On each amendment of a circumstance contained in the notification of formation and on the existence of a reason for dissolution pursuant to § 39, Para. 1, the members of the foundation board shall be under an obligation, within 30 days, to deposit a notification of amendment at the Office of Land and Public Registration. The representative also has authority to make the deposition. The accuracy of the information in the notification of amendment shall be certified in writing by an attorney at law admitted in Liechtenstein, trustee or holder of an entitlement in accordance with Art. 180a.*

*4) On the application of the foundation the Office of Land and Public Registration shall, following each legally executed notification, issue an official confirmation of the deposition of the notification of formation. It shall not issue an official confirmation of deposition if:*

*1. the notified purpose is illegal or immoral; or*

*2. it is evident from the notification.*

*§ 21*

*2. Authority to Examine and take precautions*

*1) As foundation supervisory authority the Office of Land and Public Registration is entitled to verify the accuracy of the deposited notifications of formation and the amendments. For this purpose it may demand information from the foundation through the controlling body or, if no such body has been set up, through an authorised third party, inspect the foundation documents, insofar as this is necessary for verification purposes.*

*2) Duplicates and copies are only permitted to be drawn up if the verification indicates that the notification of formation or amendment is inaccurate.*

*3) If the verification shows that the foundation is pursuing an illegal or immoral purpose, it shall be dissolved, subject to application of the general rules concerning the legal entities. The provisions concerning the amendment of the purpose, which has subsequently*

*become impermissible, are reserved (§§ 31 and 33). If it becomes evident that the foundation is subject to an obligation to register, the entry shall be made by the Office of Land and Public Registration with the application of §19, Para. 4. If the verification shows that the foundation is subject to supervision pursuant to § 29, the foundation supervisory authority shall if necessary take the appropriate measures.*

*4) If the courts, the Office of the Public Prosecutor or an administrative authority become aware that the notification of formation or amendment has not been submitted or that the submitted notification of formation or amendment is inaccurate in content, a report shall be drawn up and forwarded to the foundation supervisory authority.*

*5) The Government may, by way of Executive Order, issue more detailed provisions concerning the exercise of the capacity to examine as well as the setting of fees by the foundation supervisory authority.*

## **2.2 Founder Liability**

Anyone, who handles the affairs of the foundation, before or without the foundation has obtained a legal personality, bears the liability for the actions of the foundation; particularly the founder or individuals appointed as an organ according to provisions of the company.

There exists a right of redress against the other participants (Art. 108 Sec. 1 PGR<sup>10</sup>). As mentioned

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<sup>10</sup> Art. 108 PGR

II. Absence of the same

1. In the event that action is undertaken on behalf of a legal entity without or prior to the said legal entity having acquired legal personality, liability shall rest with the persons that have so acted in particular founders or persons that have already been designated as bodies or the participants who pass resolutions at assemblies, pursuant to the provisions concerning the unregistered partnership and subject to the right of recourse against the persons otherwise participating.

2. A person who has not acted personally shall be liable only if according to the circumstances it must be assumed that that person granted an agent authority to act.

3. Those persons, who as a result of their acts, with or without the power of agency, have become unrestrictedly liable, may be released from this liability by the legal entity within three months of it acquiring legal personality, provided the obligation entered into by the person acting was expressly on behalf of the legal entity to be formed and the said legal entity appears competent to assume its undertaking pursuant to the law or the articles and to acquire this legal personality.

4. After assuming this legal personality, only the legal entity shall be liable to the creditors, subject, however, to the special

above, the participants are collectively liable according to the general rules of AGBG.

Participants who have played a role in the establishment of the foundation is accordingly liable with or without a power of attorney, they can transfer their liability to the foundation after a period of three months has passed after the foundation has acquired a legal personality. This, however, is applicable only if the commitment was made explicitly by the participants on behalf of the foundation to be established and this appears to be completely in accordance with the law or statutes of transfer of liability (Art. 108 Sec. 3 PGR).

It is therefore advisable to ensure that persons, who act for the establishment of a foundation, make it clear that they "act to establish the foundation XYZ"

The founders recognize the foundation only once it takes over the liability (Art. 108 Sec 4 PGR).

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provisions concerning contributions in kind and acquisitions in kind and concerning tortuous acts.

5. Where assets are transferred to a person for the purpose of forming a legal entity, the said person is in doubt subject to the provisions concerning the implied<sup>1)</sup> trust relationship.

### 2.3 Legal capacity

According to law the foundation has the same legal rights, as any natural individual unless natural characteristics or properties of people like gender, age, or personal relation is an essential precondition. (Art. 109<sup>11</sup>, § 7 Para. 2 TrUG).

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<sup>11</sup> III Legal capacity

1. The legal entities are by virtue of the law eligible for all rights in the same manner as natural persons, in particular, property rights, the right to the use of a name or the right of honour, the rights of membership, of participation in firms and all obligations insofar as these rights or obligations do not have the natural circumstances or characteristics of man, such as sex, age, relationship by blood, as a necessary precondition.

2. With this restriction, the provisions which apply to natural persons are therefore also applicable to legal entities.

3. Within this intendment, the legal entities may, through their governing bodies, be appointed to represent or their representatives, under their name or under their firm's name, appear before all court and administrative authorities and in all proceedings as party, intervener, the person summoned, participant or in a similar capacity for their rights and effect entries in public registers such as Land Register, Public Register, Patents Register and the like and demand the protection of the law.

4. By the virtue of the law, each member may, if necessary, at his own expense, appear as intervener, participant or as a summoned person for one of the parties at the legal entity's law cases. Where, however, the law acknowledges member minorities as parties, only members belonging to this minority may intervene in a dispute of the minority.

The foundation can be represented by the organs or representatives of the foundation in the name of the foundation, for preservation of its rights, before all judicial and administrative bodies and in all procedures as a party, intervener, summoned party, participant or in any other similar capacity and can obtain entries in (govt.) public registers like land register, public register, patent register and others and can also demand legal protection (Art. 109 Sec. 3 PGR).

## **2.4 Capacity to act**

The foundation has the power to act only if its essential organs have been authorized to do so by the law and statutes (Art. 110 PGR<sup>12</sup>).

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<sup>12</sup> IV. Capacity to act and for tortuous liability

### **Art. 110**

#### **1. Precondition**

1) The legal personalities are capable of acting as soon as the indispensable bodies required for this pursuant to the law and the articles have been appointed.

2) The internal regulations (by-articles), the memorandum of association, the formation deed (foundation deed) and the like shall, within this intendment, also be valid as articles, insofar as a deviation does not ensue from the individual provisions.

A member of an organ can be a natural person as well as a legal person (art. 111 PGR<sup>13</sup>). The organs of the foundation express the will of the foundation. If the decision-making organ consists of more than

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<sup>13</sup> Art. 111

In general

1) Natural persons, legal entities and firms may be appointed as members of a body.

2) The bodies are appointed to carry out the legal entity's wishes and intentions.

3) They commit the legal entity, without regard to their competence and subject to the right of recourse against the suspected party and to the special provisions concerning the liability of the principal by virtue of the law, not only by the conclusion of legal transactions but also by their conduct, insofar as this constitutes the undertaking of their representational activity or took place on the occasion of and when the opportunity was presented by the representational activity.

4) Within the limits of their legal capacity and their capacity to act, the legal entities are responsible, moreover, subject to a possible right of recourse against the suspected parties, for criminally tortious acts which a body or another representative appointed pursuant to the articles has committed in the exercise of their representational activity.

5) Where a legal entity or firm is a governing body or a representative of another legal entity, the represented legal entity or firm shall be directly entitled and committed as the result of the representational activities of their bodies and persons entitled to represent, subject to a possible right of recourse against the suspected parties.

6) The persons acting are, moreover, personally responsible for their inadmissible, culpable conduct and, if the preconditions of the foregoing paragraph are applicable, the legal entity or firm entitled to represent is also responsible.



one member, the decisions of the board are valid only through a simple majority of all countable votes, subject to statutory and other legal provisions. (Art. 112 Para 2 PGR<sup>14</sup>)

## **2.5 Domicile (seat)**

As long as the statutes do not state otherwise, the head office of the foundation is located at the place where the center of its administrative operations is (Art. 113 PGR<sup>15</sup>). It is to be noted that a foundation

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<sup>14</sup> Art. 112

b) Passing of Resolutions

1) Where the law or the articles do not determine to the contrary, the subject of the resolution shall be stated when a multiple-member body is convened.

2) In the absence of other provisions, the resolutions of a multiple-member body shall be validly passed by a simple majority of the countable votes.

3) Countable votes shall be deemed to be those which in individual cases are represented and have taken part in the voting and are not excluded from the right to vote.

4) Where the law or the articles do not determine to the contrary, resolutions of the bodies may also be passed by written assent to a motion put forward (resolution by circular letter) if a member of the body does not demand verbal deliberation.

<sup>15</sup> Art. 113

1) Where their articles do not determine to the contrary, the domicile of the legal entities shall be situated at that place where

administered in Liechtenstein cannot be shifted to another country and founded under a different tax regime if the place of management remains in Liechtenstein.

On the contrary foreign foundations are not allowed to manage their affairs in, from or over Liechtenstein as it will be directly against the just described management theory of the head office established in Liechtenstein (for Liechtenstein foundations). In all probability we will have a Liechtenstein foundation that will not be in accordance with Liechtenstein legislation (registration duty, obligation to submit the notice of articles, tax obligations etc.).

As a result, regulatory mistakes may have been made which might be punished accordingly. Today lawyers and trustees along with banks profit from the principle: Where there is no complainant, there is no judge. In the current precarious economic

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their administrative activities are centred, subject to the provisions concerning domicile in the international relationship.

2) By virtue of the law, the domicile of the legal entity is placed, under private law, in the same category as the residences of private individuals.

3) In addition to their domiciles, legal entities may have one or several branch establishments.

4)

situation, the complainant would not have to wait long to fill the state coffers.

The Liechtenstein tax authorities have already put the management theory to use and refer to it, when Liechtenstein foundations or private individuals are billing foreign companies (foundations) for services, they must pay a higher tax.

No higher tax liability rule applies if the Liechtenstein lawyer, trustee or bank is able to prove that the foreign company, foundation or trust has head office abroad. The proof must be provided by the domestic taxpayer. The domestic taxpayer has to prove that the foreign company has the necessary management and organization. This includes employees (foreign trustees are not included), office space, telephone, fax, company nameplate etc.

Based on this legal opinion, all foreign domiciled companies, which are managed from or over Liechtenstein, should only be billed with VAT.

A further legal consequence is tied to this: On the basis of the management theory, the foreign company should have its head office in

Liechtenstein, with all the corresponding legal consequences.

One of them is: These companies are also subject to double taxation agreements and tax information agreements<sup>16</sup>. It won't be long before these new rules are strictly applied. The government is under pressure to bring these into effect by FATF.

Pressure is already expected by the FATF<sup>17, 18</sup> and by the European Union.

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<sup>16</sup> Since (January 2010) in Force:

<sup>17</sup> The Financial Action Task Force (FATF) is an inter-governmental body whose purpose is the development and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing. The Task Force is therefore a "policy-making body" which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.

Since its creation the FATF has spearheaded the effort to adopt and implement measures designed to counter the use of the financial system by criminals. It established a series of Recommendations in 1990, revised in 1996 and in 2003 to ensure that they remain up to date and relevant to the evolving threat of money laundering, that set out the basic framework for anti-money laundering efforts and are intended to be of universal application.

The FATF monitors members' progress in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally. In performing these activities, the FATF collaborates with other international bodies involved in combating money laundering and the financing of terrorism. For more on Mutual Evaluations see monitoring implementation of the FATF Recommendations.

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The FATF does not have a tightly defined constitution or an unlimited life span. The Task Force periodically reviews its mission. The FATF has been in existence since 1989. The current mandate of the FATF (for 2004-2012) was subject to a mid-term review and was approved and revised at a Ministerial meeting in April 2008. For more information on the FATF's role, please see the FATF's standards

#### 18 Methods & Trends

The methods used for laundering money and the financing of terrorism are in constant evolution. As the international financial sector implements the FATF standards, criminals must find alternative channels to launder proceeds of criminal activities and finance illicit activities.

The FATF identifies new threats and researches money laundering and terrorist financing methods. FATF Typologies reports describe and explain the nature of these methods and threats, thus increasing global awareness and allowing for earlier detection.

Here is an updated list of Double Tax Treaties and Tax Information Exchange Agreements (TIEA) Liechtenstein has entered into so far. More will follow. It is the intention of the Liechtenstein government to expand this list.

(As per: 1.1.2011) (Source: Liechtenstein Inland Revenue)

#### Double Tax Treaties (DTT)

Country	Date	In force	since
Hong Kong	12.08.2010	*	*
Luxembourg	26.08.2009	17.12.2010	01.01.+
Austria	05.11.1969	07.12.1970	01.01.1969
San Marino	23.09.2009	*	01.01.+
Switzerland	22.06.1995	17.12.1996	01.01.1995

Uruguay	18.10.2010	*	*
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\* Internal Liechtenstein legislation procedure not yet passed.

+ = following year of commencement of the agreement/treaty

## Tax Information Exchange Agreements (TIEA)

Country	Date	In force	since
Andorra	18.09.2009	10.01.2011	01.01.2010
Antigua and Barbuda	25.11.2009	16.01.2011	01.01.2010
Belgium	10.11.2009	*	01.01.2010
Denmark	17.12.2010	*	
Germany	02.09.2009	28.10.2010	01.01.2010
Faroe-Islands	17.12.2010	*	
Finnland	17.12.2010	*	
France	22.09.2009	19.08.2010	01.01.2010
Greenland	17.12.2010	*	
Ireland	13.10.2009	30.06.2010	01.01.2010
Island	17.12.2010	*	



Monaco	21.09.2009	*	01.01.2010
Netherlands	10.11.2009	01.12.2010	01.01.2010
Norway	17.12.2010	*	
Sweden	17.12.2010	*	
St. Kitts and Nevis	14.12.2009	*	01.01.2010
St. Vincent and the Grenadines	02.10.2009	*	01.01.2010
UK	11.08.2009	02.12.2010	01.01.2010
USA	08.12.2008	04.12.2009	01.01.2009

\* Internal Liechtenstein legislation procedure not yet passed.

TIEA are internationally disputed. The grant information exchange without

minimizing the burden of a potential double taxation for the tax payer.

## 2.6 Necessary documents

Written documents (statutes) are necessary for the establishment of the foundation (Art. 116<sup>19</sup>). The foundation deed must be in writing and the signature of the founder is an absolute requirement (Art 552 § 14 Sec 1).

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<sup>19</sup> Art 116

In general

1 Insofar as the law does not determine to the contrary, written or otherwise produced articles shall be required for the formation of a legal entity.

2 Repealed 7

3 Where the law does not allow an exception, the legal entity must be designated in the articles as an association, a company limited by shares, a partnership limited by shares, a private company limited by shares, a registered co-operative society, a registered mutual insurance association or a registered relief fund, an establishment or a foundation.

4 Insofar as a corporate body institution is necessary or intended, this must be set forth in the articles in a manner that is in conformity with the law, and the intention of the participants to possess the legal personality must be made evident in a satisfactory manner.

5 Where, apart from the case of the assembly of the supreme body, a public notarised deed is prescribed for the articles, the founders or members may also give their assent by signature at various recordings and authentications which may take place at different times and places.

6 The articles and their amendments shall in all cases be signed by a founder or a member.

In case of a direct or an indirect representation, according to Art. 552 § 4 Para 3, the signature of the representative on the foundation deed is required.

As long as a public verification of the statutes is required by law, this applies only to the necessary legal content of the statutes. For all other provisions, for example additional foundation documents (by laws)<sup>20</sup> or regulations<sup>21</sup>, the only demand is that the provision has to be in writing<sup>22</sup>.

The foundation must be mentioned as a foundation in the statutes (Art. 116 Sec. 3 PGR); this applies mutatis mutandis to all legal entities.

## **2.7 Dissolution and Termination**

The dissolution of the foundation takes place in accordance with the law or the statutes.

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<sup>20</sup> Art. 552 § 17 PGR

<sup>21</sup> Art. 552 § 18 PGR

<sup>22</sup> Art. 116 Para 2 PGR

Moreover the foundation can be dissolved by an order of the court or by bankruptcy due to insolvency or indebtedness. In addition to these an illegality or a significant defect in the statutes could also be a cause for dissolution. (Art. 123 ff PGR). Details as under<sup>23</sup>.

The law in Article 552 § 39 PGR, states the reasons for dissolution to be as follows:

*§ 39*

*I. Grounds for dissolution:*

*1) The foundation shall be dissolved if:*

*1. bankruptcy proceedings have been initiated in respect of the*

*foundation assets;*

*2. the resolution, through which the initiation of bankruptcy proceedings has been rejected due to the probable insufficiency of assets to cover the costs of the bankruptcy proceedings, has achieved legal force;*

*3. the court has ordered dissolution;*

*4. the foundation board has adopted a legally valid resolution on dissolution.*

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<sup>23</sup> Chapter 18 ff

*2) The foundation board is obligated to adopt a resolution on dissolution as soon as:*

*1. it has received a legally admissible revocation by the founder;*

*2. the purpose of the foundation has been achieved or is no longer achievable;*

*3. the duration envisaged in the foundation deed has expired;*

*4. other grounds for dissolution stated in the foundation deed;*

*3) The resolution on dissolution shall in accordance with para. 2 be adopted unanimously unless otherwise provided in the foundation deed.*

*In the case that the foundation is subject to the supervision of the foundation supervisory authority, the foundation board shall notify the supervisory authority of the resolution on dissolution.*

*4) If no resolution in accordance with para. 2 is adopted despite the existence of a ground for dissolution the judge shall, in case the foundation is not subject to the supervision of the foundation supervisory authority, on the application of foundation participants, dissolve the foundation in special non-contentious civil proceedings; in the case of other foundations, application for*

*dissolution may also be made by the foundation supervisory authority.*

*5) If a resolution on dissolution is adopted in accordance with Para. 2 although there is no ground for dissolution the judge shall, in the case of foundations not subject to the supervision of the foundation supervisory authority, on the application of foundation participants, quash the foundation board's resolution on dissolution in special non-contentious civil proceedings; in the case of other foundations, the foundation supervisory authority is also entitled to apply.*

*6) If the foundation carries on business and commercial activities without complying with the prerequisites pursuant to § 1, Para. 2, the judge shall, on the application of a foundation participant or ex officio, adjudicate on the dissolution of the foundation if the foundation has not complied with a legally binding restraining order within a reasonable time limit.*

This article provides more legal certainty. When the old law was in force, foundations could be dissolved by a statement of the board (of trustees) stating that there were no assets or (missing) property. However these foundations were only "faking death". As long as the foundation has any assets anywhere, it stays alive.

This had serious consequences. Not the least the fact that, the taxes for these de facto existent foundations had to be paid for the period the foundations were in existence. Furthermore there were foundations that still existed, contrary to the information in the register. This situation resulted in serious legal uncertainty for both the registered as well as notified (but unregistered) foundations.

The new legislation created clarity. There has to be sufficient reason for a dissolution declaration by the board of trustees and also grounds on the basis of which a court can order dissolution of the foundation. The list in § 39 is exhaustive; there are no other grounds and the dissolution is mandatory in the above-mentioned situations.

#### **The grounds for dissolution in detail as follows:**

##### **2.7.1 Court Order**

Opening of bankruptcy proceedings

The opening of the bankruptcy proceedings for assets of the foundation leads to the dissolution. The



general provisions of bankruptcy law<sup>24</sup> apply. The board of trustees fails to meet the obligation for filing for bankruptcy if they do not follow the legal consequences of delaying the filing of bankruptcy<sup>25</sup> or cause damage to the creditors<sup>26</sup>. Faking

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<sup>24</sup> G vom 17. July 1973 on Bankruptcy proceedings (Bankruptcy ordinance) 1973 45/2

<sup>25</sup> Art. 6

Opening request of the debtor

1) At the request of the debtor bankruptcy is open if the assets to cover the costs of the bankruptcy process are expected to suffice. If a report of the payments is filed in the district court, it is considered as a request.

2) If the application to legal entities and Probate or does not come to the right representatives, the bankruptcy is to open only when the insolvency or indebtedness (Article 8 and 9) is made plausible.

<sup>26</sup> § 156

Intentional Fraudulent Bankruptcy

1) An individual who hides assets, sells or damage assets or acknowledge a not existing obligation or try to hide assets with the intend to defraud his creditors, or one of them is punished by imprisonment from six months to five years.

2) An individual who acts in a way that causes great damage is punished with imprisonment from one up to ten years.

#### § 157

Damage to other creditors

Similarly it will be punished if a part of the assets belonging to debtor is concealed, sold or damaged without the consent of debtor, or if a not existing claim is made against the debtor's

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property and frustrates or reduces the satisfaction of the creditors, or at least one of them.

§ 158

Favouring one creditor

An individual who after the commence of his inability to pay his creditors favours one creditor to the disadvantage of other creditors, or at least one of them, shall be punished with imprisonment up to two years.

§ 159 99

Grossly negligent damage to creditors' interests

1) In a situation where debtor acts grossly negligent by faking insolvency that leads to bankruptcy (Para 5), the debtor is to be punished with imprisonment up to one year.

2) Likewise it will be punished, if a debtor in knowledge of or in negligent ignorance of his insolvency satisfy at least one of his creditors and thereby damage the other creditors or if a debtor is faking bankruptcy pursuant to paragraph 5.

3) Similarly, someone shall be punished, who through gross negligence of an economic situation fakes bankruptcy action (paragraph 5) such that insolvency would have occurred if not one or more local without obligation directly or indirectly contributed, took similar precautions, donations or other similar measures had been initiated.

4) By imprisonment up to two years shall be punished, whoever

1. in the case of paragraph 1, whoever deceives his creditors or one of them for more than a 1.2 million Swiss francs.

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2. In the case of paragraph 2, a 1.2 whoever additionally deceives his creditors or one of them for more than 1.2 million Swiss francs.

3. Against anyone who have committed acts covered by paragraphs 1 or 2 that have been detrimental to the economic existence of many individuals or in the case of paragraph 3 have been detrimental.

5) acts "kridaträchtig", who acts contrary to ordinary principles of economic management

1. destroys, damages, renders useless, risks or gives away an important part of his assets

2. by an unusually risky business that is not part of his ordinary business operations, through gambling or betting spends excessively high amounts

3. excessive, with his financial relations or his economic abilities, and in contrast to this with strikingly high expenses.

4. Fails to keep business books or to keep records resulting in that it is considerably more difficult to obtain a comprehensive view of the actual assets, the financial position and profits or any other appropriate and necessary control measures, which create such a comprehensive view, or

5. Fails to provide the financial statements that he is obliged to create, or fails to provide the statements in such a way or within the time limit resulting in that it is considerably more difficult to obtain a comprehensive view of the actual assets, the financial position and the results.

#### § 160

Machinations in relation to inheritance agreements or bankruptcy procedures

1) The following will be punished with imprisonment up to one year:

bankruptcy offense applies only when many creditors (two or more) exist.

As long as the bankruptcy petition is filed by Liechtenstein tax authorities this is happening more

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1. where a non-existing or a lesser claim is made, with the intent to obtain a wrongful influence in the bankruptcy procedures or contract processes;

2. a creditor who, to the detriment of other creditors, accepts to exercise his voting rights in a certain way, or if he fails to exercise his right to vote and this gives or promises himself or a third party a financial benefit and also if a creditor is granted or promised a pecuniary advantage;

3. a creditor who to the advantage of himself or a third party and the detriment of the other creditors agrees to a reduction treaty in the composition agreement or to a discount contract in bankruptcy without the consent from the other creditors, and also where a creditor due to this behaviour is granted or promised a special advantage.

2) Similarly, the trustee in the estate contract process and the trustee in bankruptcy shall be punished if he, to the detriment of the other creditors, accepts an advantage or a promise of an advantage for himself or a third party that he is not entitled to.

#### § 161

Common provisions on the managing employees

1) According to §§ 156, 158, 159 and 162 there is equal right to punish a debtor and a creditor under § 160 who commits one of the acts referred to above as a managing employee (§ 309) a legal person or a company with no personality. Similarly, it is possible to punish those who under the said provisions act without consent from the debtor or creditor, but as his executive officer (§ 309).

2) Under § 160, paragraph 2, one who commits the acts mentioned as a managing employee, (§ 309) a legal person or a company with no personality, is also to be punished.

and more - it is advisable to clear the claims of trustees, lawyers or advisors before going "down," otherwise the penalty provisions has to take over because two or more creditors are present.

In such cases it is also necessary to ensure that the accounting requirements have been met adequately. The penal law also sets forth the provisions of fair accounting and the Foundation Law applies<sup>27, 28</sup> in

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<sup>27</sup> § 26

*b) Accounting*

Foundations that carry on business with commercial characteristics are subject to the general rules on accounting. Regarding all other foundations, the foundation board shall act in respect of the management and appropriation of the foundation assets, take into consideration the principles of orderly book-keeping, keep appropriate records of the financial circumstances of the foundation and keep documentary evidence presenting a comprehensible account of the course of business and movements of the foundation assets. In addition, the foundation board shall keep a schedule of assets showing the asset position and investments. Art. 1059 shall apply mutatis mutandis.

<sup>28</sup> Art. 1059 1117

III. Duty to keep and retain business records

1) Whoever is responsible for proper accounting must keep and store business books, records and business correspondence for ten years.

2) The financial statements and, if the provisions under this article state, the consolidated financial statement must be stored/kept in signed and in writing; other business books, records and business correspondence can be stored in writing, electronically, or in any other comparable manner and stored,

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insofar as this would ensure compliance with the underlying transactions and if they can be made readable at any time. The Government shall by regulations establish the detailed requirements.

3) Books, records and business correspondence kept electronically or in a comparable manner have the same evidential value as those that are readable without tools.

4) The retention period begins at the end of the fiscal year in which the last entries were made, the records emerge or the business correspondence is received or sent.

Art. 1060 1118

#### IV. Obligation to report

1) If disputes arise the individual responsible for proper accounting may be required to present business books, records and business correspondence upon request from the court or other official offices if a legitimate interest can be confirmed.

2) If the business books, accounting documents or business correspondence has been stored electronically or in a similar manner, the judge or authorities may require a submission that:

1. they are so presented that they can be read without assistance, or

2. The medium with which they can be made readable is available.

3) The account books cannot be kept in possession (of the previous possessor) when a business is going into bankruptcy. In such a case the company is taken as a whole and the books are indispensable for the continuation. A retention right cannot be claimed.

Art. 1061 1119

#### V. Inspection of the books

1) In situations where the accounting records come under official procedures, the authorities may, in concurrence with the parties, inspect and if needed, make a statement, if it is required by the procedures.

cases, where the foundation indulges in commercial activity. In all other cases, the board of trustees is the aim for the principles of fair accounting and accordingly the financial health of the foundation. A statement of assets is thus necessary in all cases. It is without exception recommended to follow the general rules of accounting.

This leads to the fact that management of a foundation in Liechtenstein is tied to high costs.

This is another reason to assume that Liechtenstein foundations will get the same status<sup>29</sup> as Austrian

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2) The remaining contents of the books are of use to the court only so far as it is necessary in the assessment of the accounting procedures.

3) For a dispute regarding the assets, especially in connection with inheritance, matrimonial property and the dividing of a company or where otherwise there is an obligation of accounting or request of information, the court may demand contents of the accountancy books in relation to non-contentious procedures or in other disputes.

<sup>29</sup> From [www.die-stiftung.de](http://www.die-stiftung.de/nachrichten/meldung/artikel/zahl-der-oesterreichischen-privatstiftungen-steigt-weiter-auf-rekordniveau.html) <http://www.die-stiftung.de/nachrichten/meldung/artikel/zahl-der-oesterreichischen-privatstiftungen-steigt-weiter-auf-rekordniveau.html> : 10.04.08

Number of Austrian foundations reaches record level  
The latest data from the Forum of Private Foundations shows that the number of private foundations in Austria reaches record level with 3.105 foundations in the beginning of 2008. Consequently the net assets were around 40 billion Euros. There

foundations and only a few thousands, if at all, will be left. In Austria there were a little more than 3100 foundations in the beginning of 2008. In Liechtenstein there were more than 40000 foundations. If one were to compare the size of Liechtenstein to that of Austria, perhaps only a handful will be left.

### **2.7.2 Dissolution decision by the board of trustees**

The essential preconditions are mentioned in Art. 552 § 39 Sec. A dissolution decision is to be taken in the presence of the board of trustees. The cause could be withdrawal by the founders, success or failure in achieving the foundation goal, expiry of the period and other causes taking into account the foundation deed.

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are around 200.000 people employed in companies controlled by private foundations. The Austrian Foundation Law passed in 1993. It runs parallel with the association- and country Foundation Law that applies to both public and private foundations. An important purpose with the law reform was to prevent the outflow of Austrian assets to foreign foundations (mainly to Schweiz and Liechtenstein) and at the same time make Austria an attractive place for foreign assets.

In the beginning the development was slow: In 1993 14 private foundation were established, in 1994 the number was 118. The number exploded to 2067 foundations between 1995 and 2000; in 2005 there were 2730.



### 2.7.3 Withdrawal by the founder

The board of trustees must make a decision as soon as they become aware of a valid withdrawal by the founder. The period, within which a decision must be taken, has not been legislated. It is natural to see a maximum period of four weeks as appropriate. After this period the parties involved (with the foundation) can submit applications for legal aid proceedings. The judge's decision will then take the place of the missing order of the Trustees. The foundation board will probably have to pay for the costs.

In order for the founder to be able to withdraw the foundation, this right must be contained in the foundation deed<sup>30</sup>.

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<sup>30</sup> § 30

I. Rights of the Founder to Revoke or Amend the Foundation Documents.

1) The founder may in the foundation deed reserve for himself the right to revoke the foundation or amend the declaration of establishment. These rights can neither be assigned nor are they inheritable. If one of these rights is to be exercised by a direct representative, it shall require a special power of attorney referring to this transaction.

2) If the founder is a legal entity, it cannot reserve for itself the rights in accordance with Para. 1.

These rights are neither transferable nor inheritable. If this right to withdraw is given to a direct representative, it requires a so-called special power of attorney that specifically deals with this legal issue.

If the foundation is established by a legal person such a person cannot reserve this right. After a “not uncontested<sup>31</sup>” legal opinion, this right cannot be reserved by a joint company with legal personality, although in technical sense it is not a legal person. These have been formulated with the intend to ensure that the rights of the founder are not allowed to be undermined.

Upon following the legal opinion, one finds that it is only possible to reserve the right to withdraw if the trust has been established with a maximum defined time period of 99 years and not an indefinite time period.

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3) If the rights in accordance with Para. 1 are exercised by an indirect representative (§ 4, Para. 3), the legal consequences shall revert directly to the founder.

<sup>31</sup> Representative: Martin Schauer, short commentary on Liechtenstein Foundation Law, § 30 RZ 7

The regulation is in the common law called "Rule against Perpetuities<sup>32</sup>"

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<sup>32</sup> WIKIPEDIA 29.01.2010: The rule against perpetuities at common law invalidates certain future interests (traditionally contingent remainders and executory interests) that may vest beyond the time of perpetuities; the rule "limit[s] the testator's power to earmark gifts for remote descendants".[1] In essence, the rule prevents a person from putting qualifications and criteria in his will that will continue to control or affect the distribution of assets long after he has died, a concept often referred to as control by the "dead hand" or "mortmain".

Although most discussions and analysis relating to rule revolve around wills and trusts, the rule applies to any future dispositions of property, including options. When a part of a grant or will violates the rule, only that portion of the grant or devise is removed. All other parts that do not violate the rule are still valid.

The perpetuities period under the common law rule is not a fixed term of years. By its terms, the rule limits the period to at the latest 21 years after the death of the last identifiable individual living at the time the interest was created. This "measuring" or "validating" life need not have been a purchaser or taker in the conveyance or devise. The measuring life could be the grantor, a life tenant, a tenant for a term of years, or in the case of a contingent remainder or executory devise to a class of unascertained individuals, the person capable of producing members of that class.

The rule against perpetuities at common law has been amended by statutes. In England, the Statute of Uses (1536) and the Statute of Wills (1541) and the consequent rise of flexible future interests made the rule a significant judicial tool in defeating the intent of landowners in grants and devises. Major alterations to the common law rule in the United Kingdom came into effect under the Perpetuities and Accumulations Act of 1964, including the application of traditional 21-year limitation on options.[2]

The rule is also stated in Australian law.[3]

In the United States it has been abolished by statute in Alaska, Idaho, New Jersey, and South Dakota.[4] Twenty-eight other U.S. states have adopted the Uniform Statutory Rule Against Perpetuities,[5] which validates non-vested interests that would

#### **2.7.4 Achievement or failure to achieve the purpose of the foundation**

If the purpose of the foundation has not been achieved or cannot be achieved a dissolution decision must be taken as part of “essentialia negotii”. One reason for such a situation is when sufficient funds are not available for achieving the purpose. There are different views on such a situation. One can say that sufficient funds are not present if no circumstances in the foreseeable future can be expected to bring funds to the foundation. Accordingly this reason for dissolution is not valid if in the foreseeable future a possibility might arise where the foundation will receive funds.

#### **2.7.5 Expiry of the period**

The time period of a foundation can be limited by the foundation deed. If this time period is over, the

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otherwise be void under the common law rule if that interest actually vests within 90 years of its creation.[6] Other jurisdictions apply the “wait and see” or “cy-près” doctrines that validate contingent remainders and executory interests void under the traditional rule in certain circumstances.[4] These doctrines have also been codified in the United Kingdom by the 1964 statute.[2]

board of trustees must declare a dissolution decision. The foundation does not automatically cease to exist when the time period expires, but exists until the dissolution decision is entered into the foundation register. The entry is constitutive and has legal effects.

#### **2.7.6 Other reasons according to the foundation deed**

Other reasons are accepted as basis for a dissolution decision according to Art. 552 § 39 Sec.2 point 4. These must have been defined in the foundation deed. The reasons have to be both legally and morally correct. Moreover they should not contradict the spirit of the Foundation Law or undermine the purpose of the legislation. It is expected that this provision will lead to legal disputes in the future, as other reasons have not been mentioned.

#### **2.7.7 Dissolution and Termination**

The dissolution and termination of a foundation is specifically governed by the legislation in Art. 552 §

40<sup>33</sup> PGR. This is to ensure clarity and legal certainty because of the fact that once a foundation is

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<sup>33</sup> 40

## *II. Dissolution and Termination*

1) The general provisions shall apply to the dissolution and termination of the foundation.

2) The provisions concerning the public notice to creditors shall not apply to foundations not entered in the Public Registry.

3) Upon termination of a foundation, the Office of Land and Public Registration shall issue a certificate of cancellation in the form of an extract from the Public Registry in case of a registered foundation, or in the form of an official confirmation in the case of an unregistered foundation.

4) If the foundation is subject to the supervision of the foundation supervisory authority, the foundation board shall notify the foundation supervisory authority of the termination of the foundation. If the foundation is entered into the Public Registry, an extract from the Public Registry shall also be submitted. The legal representative also has authority to make notification.

5) Subsequently emerging assets shall be distributed in accordance with the principles concerning subsequent dissolution (A rt. 139). In the case of a foundation subject to the supervision of the foundation supervisory authority, the foundation board shall inform the authority without delay about subsequently emerging assets. The legal representative also has authority to make notification.

liquidated, it no longer exists even if some assets may emerge at a later date. The foundation will be terminated by the legally binding act of a dissolution decision.

The general provisions of Art.130 ff<sup>34</sup> in PGR apply to the dissolution. Accordingly the dissolution

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<sup>34</sup> III. Liquidation  
Art. 130  
In general

1) Insofar as the law does not determine to the contrary, the liquidation of a legal entity for other reasons than bankruptcy shall result in the legal entity's liquidation.

1a) Where a domestic branch established by a foreign company with legal personality is closed down, liquidation shall be implemented in the same way as when a domestic company with legal personality is liquidated, unless the Public Register Office allows exceptions.

2) Insofar as assets are present after the conclusion of the bankruptcy of a legal entity, they shall also be liquidated, unless it is decided to continue the legal entity.

3) The procedure in the case of liquidation of the assets of the legal entity shall be pursuant to the following provisions, where special provisions have not been drawn up for individual legal entities or where their application is partly excluded as in the case of associations or foundations which are not entered into the Public Register or where there is no obligation to keep books or account.

4) Where during the liquidation proceedings it is established that the assets do not cover the liabilities towards third parties, the liquidators shall suspend their activity and give notice to the court for the purpose of initiating bankruptcy proceedings.

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5) In the event that the application does not come from all the liquidators, the court shall, before initiating bankruptcy proceedings, hear the members of the administration as well as the other liquidators and if they are not of the same opinion, bankruptcy proceedings are only to be initiated if the court is convinced of the indebtedness.

6) Insofar as the law or the articles do not determine to the contrary, a legal entity may, with the assent of all members, without being wound up, be converted into another legal entity or company with company name and in all cases the rights of third parties which existed up to the time of the conversion shall remain reserved.

#### Art 131

##### State of liquidation

1) If legal entities go into liquidation, they shall retain their legal personality and use their existing company name, with the unabbreviated addition "in liquidation" until the liquidation is implemented towards third parties and among members.<sup>102</sup>

2) Legal action may be taken against the existing company name and execution may be demanded against them as long as, in the case of a legal entity entered in the Public Register, the addition "in liquidation" is not entered in the Public Register, even if they have added the said addition to their signature on the filed documents.<sup>103</sup>

3) The bodies of the legal entity, with the exception of the administration whose powers as a body pass to the liquidation office, shall have the same powers during the liquidation as before, with the restriction effective by the virtue of law, that acts which by their nature are justified by the purpose of the liquidation.

4) An acquisition of membership shall no longer take place; The members shall nevertheless remain committed to their



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obligations during the liquidation, for example to the payment of membership shares which are not fully paid up, further contributions and the like which, by virtue of their purpose, appear to be enforceable for the duration and the state of liquidation and inasmuch as they serve to satisfy the creditors or for adjustment between the members.

### 3. Liquidators

#### Art 132

##### Due appointment and dismissal

1) Liquidators of the legal entity are the managers and members' representatives, insofar as the liquidation is not transferred to other persons in the articles or by resolution of the supreme body.

1a) At least one liquidator has to meet the requirements in art 180a or as a legal person have a permit as the law prescribes in art 31 abs 1. 104

2) The authority of such liquidators may be extended, restricted or withdrawn by the supreme body or, if important reasons exist, upon application by a member or other participant and, in the case of legal entities without members, by the Registrar in extrajudicial proceedings.<sup>105</sup>

3) Instead of this, the Registrar may initiate, upon application by the creditors who represent at least one-third of all uncovered credit balances, by representatives of professional organizations, members or the Chamber of Commerce or on behalf of the office if important reasons are present, especially in the case of inactivity or jeopardizing of national interests, an official liquidation under the supervision or control of the Registrar or under the supervision of an appointed committee of creditors

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and subject to the appropriate provisions concerning liquidation.  
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4) In the case of an official dissolution, the court may order the discontinuance of all enforcements pending against the legal entity.

5) The provisions concerning the liquidators shall be applicable analogously to the substitute liquidators.

#### Art. 133

##### b) Official appointment and status in bankruptcy

1) Where the liquidators are not described as such or where the legal entity is cancelled because of the pursuit of unlawful or immoral objects or where Art 971 dictates it, they shall be nominated by the Registrar in extrajudicial proceedings and in this case may be removed only by the judge.<sup>107</sup>

1a) The official chosen liquidator has to be a member of the administration in order to fulfil the requirements in Art 180a or if it is a legal person the law regarding trustees give a permission after Art 31 Abs 1. If important reasons appear the Registrar can, upon application, choose another appropriate person.

2) The registration of the official appointment or removal of liquidators shall take place ex officio.

3) In case of bankruptcy, the bankruptcy administration shall lead the liquidation pursuant to the bankruptcy law. However, the organ including possible liquidators of a legal entity, insofar as the disposition does not concern specific components of the total assets, shall have the same status as before the adjudication of bankruptcy.

4) In relation to the bankruptcy administration, the liquidators shall have the status of a natural person and ordinary debtor.

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5) The legal entity is to carry the expenses relating to the official chosen liquidators.

6) Given that the assets of the legal entity are not sufficient to cover the costs of the liquidators', the country is to carry these costs provided that the liquidators' are not former organs of the legal entity. In that the country makes payments relating to liability claims towards the organ. If assets appear after the liquidation the country has a priority claim for the costs regarding the liquidators.

#### Art. 134

##### c) Obligations and Responsibility

1) The provisions concerning the obligation to register, the notification and the rights and obligations of the liquidators, which are drawn up with respect to the general partnership, shall also be applicable to the legal entity, subject to the following provisions and in the opinion that the notifications for the purpose of registration in the Public Register shall happen through the administration.

2) Every change in the appointment of liquidators and the termination of their power of agency shall be notified through the administration.

3) Where the law does not determine the contrary, the provisions which apply to the administration shall also be applicable to the liquidators, except however, the competition clause.

4) Liquidators who violate or neglect the obligations that they pursuant to the law or the statutes are obliged to follow will, after dissolution of the legal entity, be responsible to the legal entity, the members and the creditors of the dissolved legal entity, for the damages and losses which have arisen, without restriction, jointly and severally, in the same way as the bodies of the legal entity.

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5) Unless otherwise determined, the liquidators shall act collectively and take decisions with simple majority votes.

#### 4 Liquidation activity

##### Art. 135

###### a) Drawing up of the balance sheet

1) Upon acquisition, the liquidators shall draw up a balance sheet, in the preparation of which the administration shall assist and make available all relevant records and business papers.

2) Creditors known from the business records or from other sources, whose abode can be ascertained, shall be requested by special notification in this connection to register their claims; notification to the unknown creditors for the purpose of registering claims shall be by public announcement in the journals provided pursuant to regulations for announcements to third parties and, in the absence of such a provision, in the journals intended for official announcements, insofar as the Registrar in extrajudicial proceedings does not permit any other kind of request or insofar as all creditors give their assent to such a request.<sup>111</sup>

3) Simultaneously, they may petition the court for the discontinuance of all enforcements.

4) At the request of the liquidators, the Registrar may, for important reasons, in extrajudicial proceedings, release the liquidators from their obligation to notify and request the creditors to register their claims, in which case the six-months' waiting period shall commence on the day the dissolution was announced by the Registrar.<sup>112</sup>

5) The request pursuant to the foregoing paragraphs shall also be made in the case of domiciliary undertakings.

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Art. 135a 113

b) Liquidation Balance

- 1) The liquidation balance consists, if there is no exceptions or other circumstances, of, on one side, the assets and liabilities to third parties, under which Foundations without a legal personality or a fiduciary objects clause falls, and on the other side, the debts.
- 2) For the assessment of the assets in the liquidation balance, the crucial value is without exception, the realizable value at the time of balance.
- 3) The crucial point in the distribution of organizational costs and exchange rate losses that arose from the issue of bonds is that appropriations and the like are not permitted.
- 4) Likewise, it is no longer allowed to maintain hidden reserves.

Art. 136

c) Procedure

- 1) The liquidators shall conclude current business, satisfy, as far as the assets allow, the legal entity's liabilities pursuant to the provisions concerning the ranking of claims in bankruptcy and realise the assets and, insofar as they are necessary in order to cover the liabilities, collect the members' performances which are still outstanding.
- 2) The realization of the assets, real estate or other rights can, with the assent of the supreme body or another body empowered pursuant to regulations, also be sold by private contract.
- 3) A balance sheet showing the net position on the assets and liabilities of the legal entity in liquidation shall be drawn up

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annually. During the liquidation, however, income may not be distributed and donations may not be made to the reserve fund.

4) Monies received, which are not necessary for the payment of creditors, may be deposited at the Landesbank (the state savings and loan bank) or, if important reasons are present, also in other ways or, with the consent of the court in extrajudicial proceedings, the monies may be applied for part payments.

#### Art. 137

##### d. Creditor Certainty

1) Where known creditors have omitted to register, the amount of their claim shall either be deposited judicially or paid out to them without notification.

2) Likewise, an appropriate amount shall be deposited for the legal entity's obligations which are suspended and not yet due, as well as for the disputable obligations, insofar as the distribution of the legal entity's assets is not postponed until the legal entity is disposed of or the creditors are provided with certainty which is of the same standard as judicial deposition.

3) Where important reasons exist, a committee of creditors may, upon the application of creditors, be appointed for the supervision of the liquidators and for the purpose of accelerating the liquidation. The said committee of creditors shall be appointed by a simple majority of the votes represented at a creditors' meeting convened under the chairmanship of the court and shall support and supervise the liquidators and shall exclusively validate responsibility towards the liquidators.

#### Art 138

##### e) Distribution of the Assets and Deregistration

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1) After the debts have been repaid, the assets of a dissolved legal entity shall, where the members are entitled to certain shares and insofar as they and not the legal entity itself are entitled to these and it has not been determined otherwise, be distributed among the members in proportion to the amounts paid in on these shares, but otherwise in case of doubt, per capita.

2) Distribution shall not be effected until a period of six months have expired, calculated from the day the liquidation was announced for the third time in the public journals intended for this purpose, with the request to register claims or, insofar as exceptions are not allowed, distribution shall ensue pursuant to the Registrar's order in extrajudicial proceedings. 117

3) A distribution before the expiration of these six months may be allowed by the Registrar in extrajudicial proceedings where, pursuant to the existing circumstances, danger to the creditors can be completely excluded. After the termination of their activity, the liquidators shall apply to the Public Register for deregistration.118

4) After the termination of the company, the liquidators are obligated to deregister the legal entity from the official register. A legal entity subject to a duty of publication is obligated to publish the deregistration.

5) Deregistration may ensue already before the expiration of the six-month ban.

6) Where the articles or the competent body do not determine to the contrary, the liquidators, after the completion of the dissolution, shall convene the supreme body, insofar as such a body exists, for the purpose of approving the final account and releasing the liquidators. Where the resolution to release is unreasonably refused, the liquidators may have the release determined by way of action taken against the legal entity.

legislations also apply to persons associated with the foundation.

An important provision of the law is the one concerning creditor proclamation. As discussed in the chapter regarding appeal, distributions can only be made to the beneficiaries if no creditor (beneficiaries, compulsory beneficiary, creditors, tax creditors, tax authorities) rights have been harmed.

Thereafter a so called "solvency test" is to be carried out in order to reveal whether the foundation is in a position to cover all claims after the distributions. Now it is near to impossible to find out, without detective investigations, whether such creditors exist. A good faith or simply wilful blindness<sup>35</sup> is no

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<sup>35</sup> WIKIPEDIA 30.01.2010:

Wilful blindness (sometimes called ignorance of law, wilful ignorance or contrived ignorance) is a term used in law to describe a situation in which an individual seeks to avoid civil or criminal liability for a wrongful act by intentionally putting himself in a position where he will be unaware of facts which would render him liable. For example, in a number of cases, persons transporting packages containing illegal drugs have asserted that they never asked what the contents of the packages were, and therefore lacked the requisite intent to break the law. Such defences have not succeeded, as courts have been quick to determine that the defendant should have known what was in the package, and exercised criminal recklessness by failing to find out before delivering it.

A famous example of such a defence being denied occurred in *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), in which the defendants argued that their file-swapping technology was designed in such a way that they had no way of monitoring the content of swapped files, and suggested that their inability to monitor the activities of users meant that they could not be



protection. An organ that is not acting reasonably can be accused of fraudulent breach of trust according to penalty law. The conditions for breach of trust are easily fulfilled in this case.

According to the creditor proclamation, every creditor has a right but also a duty to prove his claim, without which his right is forfeited and no liability claims will stand against the board of trustees or the liquidator.

This does not change the fact that the creditor proclamation will only be carried out in two Liechtenstein newspapers namely, "Liechtenstein Vaterland" and "Liechtensteiner Volksblatt" and through notices on the courtroom blackboard. If the local national newspaper only have local distribution, it is the duty of every creditor to get hold of the publication, whether or not he manages the German language or lives in the distribution area. The creditor proclamation provides legal certainty (to the creditors) but also provides protection of the organs.

The legislation states in Art. 552 § 40 Sec. 2 PGR that, the provision regarding the creditor

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contributing to copyright infringement by the users. The court held that this was wilful blindness on the defendant's part, and would not constitute a defence to a claim of contributory infringement.

proclamation is not applicable to unregistered foundations. Therefore this provision does not apply to the predominant part of foundations in Liechtenstein. Due to this, the legal certainty and protection intended with the provisions are missing for more than 80% of the foundations in Liechtenstein, if a creditor proclamation does not take place, even though it is legally permissible.

The statutory provision relating to the creditor proclamation does not mean that the proclamation may not be used for foundations that are not registered in the public register. The provision contains no prohibition, but has the intention to ease the liquidation and termination of such foundations and to avoid unnecessary costs.

It is therefore recommended to all organs, board of trustees and liquidators to make a voluntarily creditor proclamation that will have the same legal effect as the legally ordered creditor proclamation in the public register for registered foundations.

Public registration office and real estate registration office issue a certificate of liquidation over the pending deregistration. This takes place in the form of register extract in case of a registered foundation and in the form of an official certificate in the case of an unregistered foundation.

## 2.8 Subsequently Emerged Assets

Subsequently emerged assets are to be distributed according to the rules of the supplementary liquidation (Article 139 PGR<sup>36</sup>). The board of trustees must inform the appropriate authority overseeing the affairs of the foundation immediately about subsequently emerged assets. The authority to communicate is also with the legal representative. The law is not conclusive. A terminated foundation has neither a representative nor a board of trustees.

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<sup>38</sup> Art 139

### 5. Supplementary Liquidation

1) Where after the liquidation and its entry into the Public Register it becomes clear that there are further assets which are subject to distribution, the Court of Justice shall, upon the application of participants such as members, creditors or ex officio, in extrajudicial proceedings, undertake the distribution of the assets through officially appointed liquidators, in order of rank pursuant to bankruptcy law.<sup>120</sup>

2) This provision shall apply analogously where a legal entity has been dissolved as the result of bankruptcy and the supreme body omitted to appoint special liquidators or it is resolved that the legal entity shall continue.

3) Where undistributed assets of the legal entity still exist, a creditor, insofar as he seeks his satisfaction solely from these, cannot be opposed by the period of prescription (statute of limitations) which commenced after distribution.

In all cases any involved party, this could be a founder, representative of the founder, organs with representatives, beneficiaries, or creditors of any type can request a supplementary liquidation, if the preconditions, i.e. subsequently emerged assets, are present. The assets can be in the form of a claim, whether this is a contractual or a claim in tort.

It is also to be known that at first a successful claim has to be made through a curator, who will collect information before moving forward legally. The curator represents the foundation and all documents along with all legal notices, which the board in its capacity as board of trustees have collected and kept even during a change in the board, are to be made available to him. This naturally makes it easier for both the curator and the applicant to examine the circumstances.

In the event of supplementary liquidation, Article 552 § 39 Sec. 5 is not applicable. According to this article, the provision of a liquidation decision taken due to insufficient funds, which subsequently proves to be untrue, the judge can, upon application from the involved parties, annul the liquidation decision with the result that the foundation exists. This has to be „ex nunc“ for reasons of legal certainty. Otherwise other new claims might arise from the past regarding tax claims, claims by the board of trustees or that of other organs or representatives.

Furthermore, it will also be against the rules of proper accounting and auditing.

Following the above, the foundation can only be in the process of subsequent liquidation according to 139 PGR with the obligation to make a creditor proclamation and to distribute the assets in accordance with the bankruptcy hierarchy (classes). In this situation all, old creditors as well as new ones, together with the tax authorities have the opportunity to make their claims valid.

The legal material assumes a situation where the subsequent liquidation does not take place due to a faulty liquidation decision by the board of trustees on the basis of subsequently emerged assets, instead the court has to annul the liquidation decision of the board of trustees through legal proceedings, which means that the provision only brings more legal uncertainty with it.

The materials find nothing in the wordings of the law, which results in that the judge can solve the issue on the basis of case law for the purpose of legal certainty. Article 1 of PGR has anticipated

these problems and therefore grants the judge this option<sup>37</sup> explicitly in Para 3 leg cit.

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<sup>39</sup> Introduction Art. 1 PGR

### 3. The Concept of a Foundation

#### 3.1 Definition

The new Foundation Law (Art. 552 § 1<sup>38</sup>) now defines the foundation through a legal definition that did not exist earlier.

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<sup>38</sup>*I. Definition and Purpose*

##### § 1

###### *1. Description and Definition*

1) A foundation within the meaning of this Section is a legally and economically independent special-purpose fund which is formed as a legal entity (legal person) through the unilateral declaration of will of the founder. The founder allocates the specifically designated foundation assets, stipulates the purpose of the foundation, entirely non-self-serving and specifically designated, and also stipulates the beneficiaries.

2) A foundation is only permitted to carry on business of a commercial nature if it directly serves the achievement of its common benefit purpose or if this is permitted on a special statutory basis. Insofar as the orderly investment and management of the foundation assets require the setting-up of a commercial operation is permissible, even for private benefit foundations.

3) If there is no case of Para. 2, sentence 1, the foundation shall not be permitted to be the shareholder with unlimited liability of a collective under personal law, which carries on business of a commercial nature.

The foundation is defined as a legally and economically independent special purpose fund, which is established as a legal person through a unilateral declaration of intent by the founder. The founder dedicates the specifically assigned foundation assets and lays down the directly expressed specific purpose of the foundation and beneficiaries.

The assets assigned to the purpose (of the foundation) are separated from the personal property of the founder and become the property of the foundation. This goes so far, that the supervisory authority, representative of the public law or involved parties can insist that the asset secured in the foundation deed must be transferred to the foundation.

### **Foundation Assets**

It is not defined what is meant by foundation assets. Art. 552 § 13<sup>39</sup> stipulates that the foundation assets

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<sup>39</sup> § 13



must be a minimum of 30,000 francs, but can also be Euro or US dollar. In that case, the capital also has to be 30,000 francs.

The foundation assets must not only be dedicated but also actually provided during the establishment of the foundation. There is no requirement to maintain capital as in Germany or other countries, but the provision that dividend distributions can only be made when creditor rights' are not harmed ensures the same.

For practical reasons, it is advisable to define only the minimum capital in the foundation deed; other assets can be declared at the same time in

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1) The minimum capital of the foundation is 30,000 Swiss francs. It may also be contributed in Euros or US dollars and shall then amount to 30,000 Euros or 30,000 US dollars.

2) If there is an additional contribution of assets to the foundation by the founder after its' legally valid formation, this shall be treated as a subsequent endowment.

3) If there is a contribution of assets to the foundation by a third party, this shall be treated as a donation. The donor shall not thereby acquire the status of a founder.

4) If the foundation does not become effective until the death of the founder or after the termination of a legal entity, with regard to the contributions of the founder it shall be deemed to have come into being before his death or before the termination of the legal entity.

supplementary documents. The founder can also dedicate assets later; this has to be done after the establishment of the foundation in accordance with Art. 552 § 13 Para. 2.

Legally, this is a bilateral legal transaction concluded between the founder and the foundation. In case it is gratuitous, the provisions regarding donations are applicable. This also applies in relation to tax. The new tax law defines an in-bound tax (Widmungssteuer) replacing the former gift tax in Liechtenstein.

In the foundation declaration the assets are only dedicated to the foundation, which means that the foundation has an enforceable claim for this amount.

To successfully transfer the assets, a capital transaction is necessary. This can be done under property law but the transfer can also take place under § 1392 ff ABGB.

### **3.2 Dependent Foundations**

In addition to the independent foundations (dedication of assets with personality) the law recognizes the dependent foundations (dedication of assets without personality.) The dependent foundations (trustee or fiduciary) possess no legal personality, but assets are transferred to already existing legal entities or individuals or companies, with the condition that they have to manage the dedicated assets separately, give a special name and use the assets for a special purpose.

These independent trustee or fiduciary foundations are not governed by the Foundation Law but there are special provisions that apply, like the one concerning donations or inheritance, or the provisions for implicit or implied<sup>40</sup> trust relationship.

In contrast to other countries, the dependent foundation has gained very little importance in

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<sup>40</sup> Art. 898

*II. The Implied Trust Relationship*

1) Wherever by operation of law or disposition of an official authority or in any other way, a person, without being specifically appointed as trustee, receives property or rights of any kind in his own name, but for the benefit of the owner or a third party, the relationship existing between such person and the third party shall, in the absence of any other provision, be treated as an implied trust.

2) If the law does not contain special provisions for such legal relationships or nothing otherwise results from the special circumstances, the regulations relating to the trust relationship concerning, in particular, the status of the trust property in the case of execution and bankruptcy proceedings shall be applied analogously to the legal relationship between the holder of assets or rights and the third party.

Liechtenstein. Often a dependent foundation is chosen for small assets, when the effort of establishing an independent foundation is not advisable according to the law of the country.

One can do so without the approval procedure of the Foundation Law written abroad and the accompanying foundation supervision.

### **3.3 Nature of foundation**

#### **3.3.1 Introduction**

By way of introduction, let's have a short overview of the various types of foundations. In practice, pure forms are very rare. Most of them have mixed purposes e.g. Family Foundation with religious elements or a Public Purpose structure.

While different states recognize only foundations with public purpose character, Austria and Panama also recognize private-purpose foundations. Efforts are made in Europe to create a unified Foundation Law, according to which foundations must always

act towards a "public purpose" (open declared purpose).

Liechtenstein is still aloof from this idea but it will have no choice but to either create a new Foundation Law or to create a subsidiary law to the present Foundation Law to standardize Public Purpose foundations.

A further definition relating to the purpose is to be found in the provisions of a "trust company" with personality, to which the law previously explicitly referred to (Art. 552, Sec. 4 PGR old).

It is understood that the foundation can have any arbitrary, specific, reasonable and possible goal which is not illegal, immoral or dangerous to the state. This includes investment of assets, distribution of proceeds, centralization of the company through transfer of shares to trustees or for acquisitions, family care, public-purpose, non-profit, personal or impersonal goals or other similar goals(Art 552 Sec 4 PGR i.E. § 3 TrUG).

It should be mentioned that the earlier referral to Article 552 Sec.4, PGR could be waived almost

everywhere, but Art. 3 TrUG at the same time limits the different purpose options.

Provisions, which suggest that a foundation is not allowed to be illegal, immoral or dangerous to the state, can certainly not be excluded. Sanctions that arise from the provisions in Art. 944 ff PGR relating to public register, no additional entry is possible in such cases and registration authorities from the legal office will take a decision according to law during the audit procedures namely non registration of the foundation or non-acceptance. (a.A. here: "The corporate foundation in Liechtenstein", see 21, footnote 49, which assumes that there is absolutely no possibility of sanctions in the PGR).

Moreover the Liechtenstein law also recognizes the pure maintenance (livelihood) foundation. A maintenance foundation is a foundation whose sole purpose is to provide for the livelihood of a family or their descendants. The admissibility of this type of foundation in Liechtenstein arises from the fact that "Fideikomnisse" are allowed in Liechtenstein. The prohibition of family fideikommiss in different countries is based on the idea that an asset should not be bound over many generations.

### **3.3.2 Public Law Foundations**

The Liechtenstein Foundation Law regulates only the private-purpose foundation. In addition there are public purpose foundations, but they are not legally defined. Essentially the difference is that public law foundations have other public law characteristics, for example the inclusion into the governance of the state or the supervision during public activities and others.

Among others Liechtenstein recognizes these as public foundations – Liechtenstein National Library, Liechtenstein National Art Collection and Liechtenstein National Museum. The establishment and dissolution of these foundations is governed by the foundation laws. The foundation board is appointed either by the government itself or by advice from the elected state parliament.

There are special provisions in the Foundation Laws that governs changes in the foundation statute and the disposition of assets after the dissolution of the foundation. Even after the revision there are more types of foundations in Liechtenstein (and possible) than in other countries.

The public law foundations are not to be confused with public purpose foundations. These are foundations which serve the general public. Internationally recognized public purposes are: religion, charity, science, art, culture, education, social education, schooling, sports, heritage and homeland certainty<sup>41</sup>.

### **3.3.3 Religious Foundation**

The Liechtenstein law characterizes all foundations that have been established for religious purposes as Religious Foundations (Art. 553 Sec. 1 PGR old). It is not expressly stated in the legislation what a religious purpose is. The term does not have a narrow interpretation.

Religious purposes may include medical care, promotion of culture, education or other public-purpose purposes or religious purposes.

The constitution itself guarantees religious groups and foundations with religious, educational or other

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<sup>41</sup> More on that, Seifart / von Campenhausen, 2. Edition, § 1, RZ 10.



public purposes a right to own property and other asset. Art 38 (Constitution).

The new Foundation Law does not explicitly mentions religious foundations. In Liechtenstein there are hundreds of smaller and larger religious foundations. These are either donations of land, money from maintenance foundations or other similar gifts. Whether they can be subsumed under one of the foundation purposes, private or public, is questionable.

It is not desirable that these are defined as public because then they will be under direct supervision of the state which the church would neither welcome nor accept.

There is a gap that needs to be filled either by a court decision or by legislation. In the background there may be a smouldering dispute as to who owns the property on which the church is build and which has been transferred to the church community without the actual legal title. Here, clarity in separation between the church and the state is needed, a process that has been on going for years.

Some legal opinions state, based on the report and petition nr. Nr. 13/2008, 36,38,49<sup>42</sup>, that religious foundations are simple public foundations. This view is not tenable and must be resolved in the light of religious peace. A law, here unlawful, can certainly not be constructed on the basis of a motivated report as shown by the report and the petition of the government, and this was never the intention.

#### **3.3.4 Purpose of the Foundation**

The new law lays down the purpose of the foundation in Art. 552 § 2 PGR as follows.

##### *§ 2*

##### *2. Purpose of the foundation*

*1) Private or public purposes are considered as the purpose of the foundation.*

*2) Under Art. 107 Para.4a, a public foundation is one whose activities, according to its foundation deed, are intended to serve public purposes*

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<sup>42</sup> Schauer, Short commentary on Liechtenstein Foundation Law, Art 552 Par 2, RZ 6

*completely or mainly, if the foundation is not a family foundation.*

*3) In the sense of this section, a private foundation is a foundation whose activities, , according to its foundation deed, completely or mainly, are intended to serve private or individual purposes. The important point here is to differentiate private purposes from public purposes according to the activity. A foundation is regarded as a public foundation if one is not sure whether at a given point in time it is completely or mainly serving private purposes.*

*4) In particular, these are considered as private foundations:*

*1. Pure family foundations; these are foundations, whose assets (outside of disputes) are used to pay for education or upbringing, or support and help to the members of one or more families or are serving other similar family interests.*

*2. Mixed family foundations; these are foundations, which mainly serve the purpose of a pure family foundation but also additionally serve other private or public purposes.*

#### **3.3.4.1 Public and private foundations**

The Foundation Law basically distinguishes between private purpose and public purpose foundations. The definition of a public foundation is given in Art. 107 .Sec. 4a PGR<sup>43</sup>. For reasons of legal certainty, the foundation deed has to state whether it is a public or mainly public foundation. It is derived from the purpose of a public foundation that it must be registered in the public register and be under the supervision of foundation authorities.

Whether a public foundation will be recognized as a public foundation according to PGR and legal and government communication (Tax Administration of the Principality of Liechtenstein) is decided according to Art. 32 Sec. 1 of tax law, as it also handles the tax exemption issue. To this purpose, the tax authorities released a leaflet<sup>44</sup>.

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<sup>43</sup> Art 107 Abs 4a PGR) Where the Act refers to non-profit making (common-benefit) or public-purpose, this shall include such purposes where the fulfilment is to the benefit of the general public. In particular, there is deemed to be a benefit to the general public if the activity serves the common good in a public-purpose, religious, humanitarian, scientific, cultural, moral, sporting or ecological sense, even if only a specific category of persons benefit from the activity.

<sup>44</sup> LEAFLET of March 2009

Achieving the approval is not easy. The tax authorities once denied recognising a public foundation with reference to that it was a foundation for philanthropy and that it is was a sect based foundation and therefore could not get public foundation status. Reference to the definition of philanthropy in any standard lexicon is of no use either.

The concept of a public foundation originates from the tax law. The tax law designates every foundation as a public foundation whose activities includes care for the poor and sick and promotion of the religion, knowledge, teaching and other public-purpose acts (Art. 32 Sec. 1 lit. e tax law).

The public foundations should actually be governed by a different law with special provisions. With registration in the public register and with no pending evidence to the contrary, the public-purpose character is believed to be constitutive.

### **3.3.5 The Private Foundation**

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concerning the requirements for exemption of non-profit legal persons from the personal tax liability

The law defines private foundations as foundations that, according to the foundation deed, completely or mainly serve private or individual purposes. It is to be decided if the private purpose is the predominant one as that will show the relationship between private and public purposes. When in doubt, it is a statutory assumption that the foundation will be taken as a public foundation.

In practise, this legal standard leads to great difficulties because it is not possible mathematically to calculate the exact proportion between them.

It is not unusual that one or several years pass where no distribution of dividends from private foundations take place, but only very small distributions for public purposes. Is that to be considered as a public foundation? Well, hardly. It has to be stated how the dividend distributions regarding the total foundation assets will be made. Individual years may indicate differently but these are not decisive.

The change from private purpose to public purpose is allowed when, the last beneficiary is dead and is not to be expected ever and only the public purpose can be pursued. The private purposes have to be

completely exhausted or exist to a very limited extent and have to ascribe to the public character of the foundation. The founder has to be applied in this context. In fact the rules of private autonomy also state that this provision of law must be used restrictively.

### **3.3.6 The family foundation**

The law in Art. 552 § 2 Sec.4 specifically regulates the family foundations and differentiates between pure family foundations and mixed family foundations.

#### **3.3.6.1 Pure family foundation**

With pure family foundations one understands all foundations, whose assets are permanently used to pay for education or upbringing, or support and help to the members of one or more families or for serving other similar family interests.

#### **3.3.6.2 Mixed family foundations**

With mixed family foundation, one understands all foundations that mainly serve the purpose of a pure family foundation but also serve other private or public purposes. These purposes can also be religious or other purposes outside the concept of family.

Very often, these foundations will be given the task of helping people in need or to preserve valuable cultural assets.

### **3.3.7 Corporate foundation**

One of the options when establishing a private-purpose foundation is a corporate foundation.

Moreover the new Foundation Law does not give any definition of the corporate foundation<sup>45</sup>.

In order for a foundation to be a corporate foundation, it must be attached to a company. When we speak of a company, certain criteria has to be

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<sup>45</sup> More on that here: „the corporate foundation in Liechtenstein“, 9 ff



met, including use of personnel and funds and an economic purpose must be pursued- and all this in the form of an organization. The attachment of the foundation to the company can be in the following ways:

-The foundation itself is the bearer of the company and the company is run in the legal form of a foundation. **(Company bearing foundation – foundation in a narrow sense)**

-The foundation is a party to (running of) the company. The participation must be of a decisive nature; otherwise every foundation with shares in a company will be a corporate foundation, which they are obviously not. Here one is talking of a **holding foundation or foundation in broad sense.**

- The foundation is on the contractual level operating a company or is being operated. In this case the influence of the foundation on the company must, however, be<sup>46</sup> like that of a holding foundation.

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<sup>46</sup> More on that Grüniger: „The corporate foundation in the Switzerland “, 1984, S.11 ff

A corporate foundation is a foundation which is associated with an economic enterprise. It is important to be aware, that the foundation is only allowed to operate commercially if it serves the foundation in achieving its non-economic goals or it serves the type and extent of the participation in a commercial business.

#### **3.3.8 Asset management foundation**

All foundations are asset management foundations, whose purpose essentially is the management of assets and distribution of wealth and wealth proceeds.

#### **3.3.9 Staff Welfare Foundation**

When the employer makes contributions for the welfare of employee or the employees contribute to the fund and this fund serves the purpose of pension or health-, accident-, life-, disability or basic life insurance, we call it a Staff Welfare Foundation. The law governing and classifying Staff Welfare

Foundation is the Civil Code (§ 1173 a Art. 37 ff ABGB).

There are also other types of foundations which are legally recognized. The various types of foundations mentioned by law are only for demonstrative purposes and the list is not exhaustive.

### **3.3.10 Ownership of the Foundation**

Unlike the corporation, the foundation itself has no members or shareholders. Similarly the founder has no ownership rights to the independent assets.

The foundation works towards the fulfilment of the will of the founder. The assets of the foundation are available to fulfil this purpose. The foundation certainly has beneficiaries but they are not owners of the foundation. In fact whether or not they have a claim, they receive benefits from the foundation if the foundation deed grants them a present or past advantage.

### 3.4 Discretionary Foundation

The Discretionary Foundation is not a specific type of foundation like the private or public foundation (in the form as a family, religious or public-purpose foundation) but is defined by the nature of the foundation, as to whether the board of trustees is free or strictly bound in its decisions regarding distribution of dividends and the beneficiaries.

A foundation with a board free to decide whether or not to provide benefits to specific or identifiable beneficiaries is a discretionary foundation. The beneficiary himself has no right, not even to sue for the benefits. In addition it is explicitly regulated in Art. 552 § 36<sup>47</sup> PGR, that the foundation benefits of

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<sup>47</sup> § 36

#### *G. Provisions under the Law of Enforcement*

1) In the case of Family Foundations, the founder can decide that the creditors of the beneficiaries shall not be entitled to deprive the beneficiaries of their entitlement to a beneficial interest or prospective beneficial interest acquired without valuable consideration, or individual claims arising from such an interest, by way of safeguarding proceedings, compulsory enforcement or bankruptcy. In the case of Mixed Family Foundations, such a directive can only be issued insofar as the entitlement concerned serves the purposes of the family foundation.

2) If a creditor of the foundation can obtain no satisfaction from the foundation assets, and the founder has not yet fully provided

the beneficiaries cannot be withdrawn by the creditors on the basis of insurance procedures, foreclosure or bankruptcy.

Discretionary trusts are allowed by Liechtenstein legislation. It is sufficient that the beneficiaries can be identified. This can either be in the statutes or in the secondary statutes.

The provisions governing the "trust company" (Art. 932a § 105 PGR) go one step further. The provisions governing the trust company find special and corresponding usage particularly with respect to the various parties of the trust (Founder, board of trustees and foundation beneficiaries.).

These provisions are not subsidiary but apply additionally and are of the same value. Furthermore the provisions related to foundations (Art. 552 ff PGR) cannot be looked upon isolated. The general rules of the trust company` contain a legal presumption, that the fiduciary beneficiary should

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the allocated assets, the foundation board shall be under an obligation to provide the creditor with the information he requires to take legal action. In the event of bankruptcy of the foundation, this applies mutatis mutandis with regard to the administrator of the estate.

receive benefits in his lifetime even in absence of or because of inadequate provisions and that the legal heirs acquire the right to claim benefits through succession in case of the original beneficiary's unavailability or after his death. The beneficiaries are therefore to be determined in each case pursuant to the provisions of law.

The present discussion that a foundation cannot come into existence if the beneficiaries are not determined at the time of its establishment becomes redundant. It must be absolutely clear, who the founder is in order for the legal presumption to be valid or if they (beneficiaries) can be determined, the competent authority (mostly the founder or board of trustees) can bring the provisions into effect.

This results in significant benefits:

Banks also accept the discretionary foundations. When opening a bank account, the name of a beneficiary is not needed but that of a group of people. However, what they cannot do is to have no financial beneficiaries.

Nowadays banks demand the name of the founder, the potential beneficiaries and the previous owner of the property, especially if the assets have been

transferred as certainty - best known in the federal republic of Germany. This is "contra legem" but the rule of KYC, know your customers, is henceforth fulfilled. In practice, however, difficulties arise as the law now follows an ad absurdum `legal reality`. NN may well be the legal owner of the assets but according to the new `legal reality clause` he is a previous or later owner.

The regulation `obligation to take care` takes this into account. Art 21 states that the board of a foundation must make a declaration. This declaration must state that this is a discretionary foundation, who is the actual founder, who is authorized to issue instruction to the trustees, who belong to the group of beneficiaries, and which other persons have influence on the foundation e.g. protectors, curators or others.

- The assets are clearly separated from the assets of the founder. The calculation of any accrued gains during any possible division cannot be included.

- Creditors cannot access the foundation benefits of an expected beneficiary either through insurance procedures, or through foreclosure or bankruptcy.

- Distribution of estates over generations can be avoided.

- Art collections, archives, property ownership, etc., can be held together for decades.

- Depending on the country of origin of the founder and above all on the type of foundation, the foundation assets cannot be attributed to the assets of the founder or of prospective beneficiaries either through tax law or through civil rights law and the founder can have no influence either directly or indirectly on the activities of the foundation. But these tax options decrease when the authorities make a move and start calculating the assets of individual natural persons.

#### **3.4.1 Types of the discretion of the board:**



The rights that can be invested by the board of trustees to which the beneficiaries do not have any legal claim, is given in Art. 552 § 6 PGR<sup>48</sup>.

#### **3.4.1.1 Right to appoint beneficiaries**

The board of trustees can, within the frames of the statutes, the additional foundation deed and the regulations, freely choose the beneficiaries.

It is recommended that the beneficiaries are clearly defined, by name if possible, to meet the instructions regarding determination (of

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<sup>48</sup> § 7

#### **5. Discretionary Beneficiary (Beneficiary without Legal Claim)**

1) A discretionary beneficiary is a beneficiary who belongs to the category of beneficiaries specified by the founder and whose possible beneficial interest is placed within the discretion of the foundation board or another body appointed for this purpose. A person who only has an expectancy to such a future beneficial interest shall not be treated as a discretionary beneficiary.

2) A legal claim by the discretionary beneficiary to a specific benefit from the foundation assets or foundation income shall in any event not come into being until there is a valid resolution by the foundation board, or another executive body vested with this responsibility (§ 28), on an actual distribution to the relevant discretionary beneficiaries and such claim shall lapse on receipt of this distribution.

beneficiaries). This could be a phrase such as "descendants of NN" or "children A, B, C of the NN".

#### **3.4.1.2 Right to specify the benefits**

The board of trustees can according to its' discretion, distribute capital or only dividends or grant the benefits in any other way (Interest-free loans, payment of insurance premiums, free use of apartments.) The board also has the right to tie these benefits to conditions, time limits or other requirements.

#### **3.4.1.3 Right to amend these provisions**

Based on this provision, it is clear that the board has real discretion regarding the beneficiaries and benefits. The board alone decides, to whom, when, what and how the distributions will be made.

The following should clarify the difference between discretionary foundations and non-discretionary (controlled) foundations. They represent the extreme options when establishing a foundation.

Every type of foundation- family foundation, religious foundation, public-purpose foundation or mixed foundation- can be established as a discretionary or as a non-discretionary foundation. This is purely a question of organization and therefore the establishment of statutes and secondary statutes according to the will of the founder.

In fact the question regarding the foundation structure is important while answering the question whether the foundation is attributed to the assets of the founder and/or beneficiaries or if it is a separate legal entity.

This can have consequences according to both civil and tax legislation. Generally, it can be said that the more influence the beneficiaries and/or founders keep, the more likely is it that the foundation will be directly attributed to them.

#### **3.4.2 The discretionary foundation with respect to tax considerations**

(Germany serves as an example)

Most of the European tax laws recognize the principle of attribution taxation in one or another form. In many cases, attribution taxation can only be prevented if the foundation is established as a real discretionary foundation.

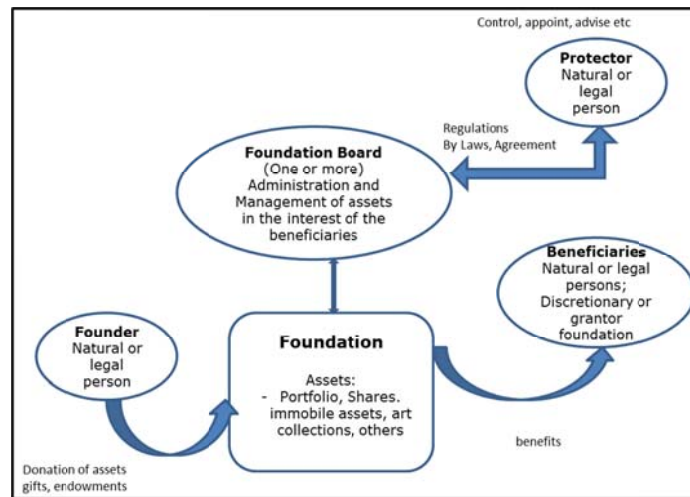
It generally applies that income from family foundations to tax liable founders is directly attributed to the beneficiaries or contingent beneficiaries. It is based on the principle of attribution taxation like in Germany. Therefore it is irrelevant to most European legal norms whether the beneficiaries or prospective or claimed beneficiaries have a valid claim or not and whether they get any dividends or not.

Therefore it is important to formulate the statutes and secondary statutes in such a way that a truly discretionary foundation is formed. This means that not only is no actionable right granted to the benefits but also that no secure legal position is given with respect to the services of the foundation. The statutes and secondary statutes must give the board of trustees sufficient discretionary space with regard to persons and to the amount of benefits. It is also at liberty to restrict this discretion to a definite or identifiable circle of persons.

According to tax law all persons that are beneficiaries and have a legal claim that in case of the dissolution of the foundation its assets or parts of it will be transferred to them; also all persons who are guaranteed by suitable measures (appointment of advisory board by family members) that they may get assets or parts of it. It is fair enough to say even according to different schools of thought that the foundation assets will be accrued to these persons in the typical course of events (See also BFH, Judgment of 25.4.2001 - II R 14/98NV).

In principle however, the entitlement to foundation benefits must be determinable and predictable, on account of which the attribution may take place. If the dividend distributions are to be made only in emergencies, then predictability is not possible and so the entitlement (to benefits) is also excluded. In case of such `chance beneficiaries`, a tax accountability is excluded.

### **3.5 Graphical representation**



#### 4. Foundation documents

The law distinguishes between foundation deed (statute), supplementary deed (by-laws) and regulations (Art. 552 § 16-18 PGR<sup>49</sup>).

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<sup>49</sup> II. Foundation Documents

##### § 16

##### 1. Foundation Deed (Articles)

1) The foundation deed shall in any event include:

1. the intention of the founder to form the foundation;
2. the name or corporate name and domicile of the foundation;
3. the dedication of specific assets, which must amount to at least the statutory minimum capital;
4. the purpose of the foundation, including the designation of tangible beneficiaries, or beneficiaries identifiable on the basis of objective criteria, or of the category of beneficiaries, unless the foundation is a public purpose foundation or the beneficiaries are evident from the purpose of the foundation, or unless there is express reference to a supplementary foundation deed regulating this;
5. the date of the formation of the foundation;
6. the duration of the foundation, if this is limited;
7. regulations on the appointment, dismissal, term of office and nature of the management (adoption of resolutions) and power of representation (authority to sign) of the foundation board;
8. a provision concerning the appropriation of the assets in the event of the dissolution of the foundation, with the application mutatis mutandis of item 4. above;

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9. the last name, first name and place of residence or corporate name and domicile of the founder or, in the case of indirect representation (§ 4, para. 3), the last name, first name and place of residence or corporate name and domicile of the representative. In this connection, there shall be express mention of the activity as indirect representative.

2) Insofar as the following contents are regulated, these shall likewise be recorded in the foundation deed:

1. the indication that a supplementary foundation deed has been drawn up or may be drawn up;

2. the indication that regulations have been issued or may be issued;

3. the indication that other executive bodies have been formed or may be formed; further particulars of the composition, appointment, dismissal, term of office as well as duties may be stated in the supplementary foundation deed or in regulations;

4. the reservation of the right of revocation of the foundation or amendment of the foundation documents by the founder;

5. the reservation of the right to amend the foundation deed or supplementary foundation deed by the foundation board or by another executive body pursuant to §§ 31 to 34;

6. the exclusion of enforcement pursuant to § 36, para. 1;

7. the reservation of the right of conversion (§ 41);

8. the provision that the foundation, although a private-benefit foundation, is subject to supervision (§ 29, Para. 1, sentence 2).

3) The provisions in accordance with para. 1, items 1, 3 and 4 are deemed to be material within the meaning of the voidability proceedings

#### § 17

#### 2. Supplementary Foundation Deed (Internal Regulations)

The founder may draw up a supplementary foundation deed if he has reserved for himself the right to do so (§ 16, para. 2, item 1). This may include those integral parts of the declaration of



#### **4.1. Foundation Deed (statute) According to Art 552 § 16 PGR**

The foundation deed (statute) must be in writing as well as legally attested by the signature of the founder.

The foundation deed is the constitution of the foundation and can only be designed in accordance with the law. Mandatory rules cannot be circumvented. The deed regulates the inner organization of the foundation as wished by the founder.

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establishment, which do not have to be recorded in the foundation deed.

§ 18

#### **3. Regulations**

For the further execution of the foundation deed or the supplementary foundation deed, the founder, the foundation board or another executive body of the foundation may issue internal directives in the form of regulations (§ 16, para. 2, item 2) if the right to do so has been reserved in the foundation deed. Regulations issued by the founder take precedence over those of the foundation board or another executive body of the foundation.

It does not regulate the relationship between the foundation and third parties. It is of significance to third parties if the powers of the foundation organs are circumvented, the preconditions for the validity of decisions by the board of the foundation are regulated or if rules that govern challenges or exchange of information are included.

A foundation can also be established following a testamentary disposition or by inheritance. Then the relevant provisions apply.

The law distinguishes between mandatory regulations and other regulations, which may optionally be included in the Deed.

#### **4.1.1 Legally necessary content**

The foundation charter or the articles shall contain the following mandatory regulations (Article 552 § 16 PGR):

- The will of the founder to establish the foundation;

- Name or company and seat of the Foundation;
- Dedication of a particular asset that must be at least the value of the legal minimum capital;
- Purpose of the Foundation, including the characterization of concrete or after objective standards individualized beneficiaries or a group of beneficiaries, if it is not a non-profit foundation or if the beneficiaries are a result of the foundation's purpose or unless it specifically refers to supplementary documents which regulates this;
- Date of the establishment of the foundation;
- Duration of the foundation, if limited;
- Regulation regarding the appointment, termination, duration and type of responsibilities (decision making) and power of representation (subscription rights) of the Board of Trustees;
- A provision on the use of the assets in the event of the dissolution of the foundation in `mutatis mutandis` application of Section 4;
- The name, first name, head office of the company and seat of the founder, or in case of indirect representation (§ 4, sec 3) the name, first name, head office of the company and seat of the representative. The responsibilities of

the indirect representative are to be specifically listed here.

The foundation deed must contain the following details, if these contents are to be regulated:

- the information that a supplementary foundation document exists or can be made;
- the information whether regulations have been enacted or could be enacted;
- the information, whether other organs have been established or may be established; other details relating to the composition, appointment, dismissal, function, duration and responsibilities can be described in the supplementary foundation document or in regulations.
- the issue of revocation of the foundation or the making of changes in the foundation documents by the founder.
- the subject of amendments to the foundation deed or the supplementary foundation documents by the board of trustees or other organs according to § 31 to 34;
- the exclusion of enforcement according to § 36 sec 1;
- the subject of conversion (of the foundation) (§ 41);

- the determination regarding supervision if it is a private-purpose foundation (§ 29 Sec. 1 sentence 2);

The provisions according to Sec. 1 point 1, 3 and 4 apply intrinsically in relation to the abolition procedures.

#### **4.4.1.1 Consequences of Insufficiency**

If the deed does not contain the necessary legal content, it is incomplete and imperfect. However this does not per se render it invalid. The founder is allowed to correct the document. Instead of correction, dissolution is also an option but only if the deficiency is concerning an essential part of the foundation.

These are the will of the founder to establish the foundation, the notation regarding foundation property, establishment of purpose and determination of the beneficiaries. In all these cases an action can be brought according to the general provisions<sup>50</sup> of PGR.

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<sup>50</sup> 3. On grounds of important defects in the articles (voidability)

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Art. 125

A) In general

1) Should the original or amended articles not contain the provisions designated by the law as essential or should these be contradicted by an instruction laid down in the regulations, voidability proceedings may be initiated insofar as the form, the defect in a provision concerning notification to the members or third parties, or the minimum number of members are not involved.

2) Every member and other in a legal entity entitled to vote, the administration or the audit authority can, through the Registrar, in extrajudicial proceedings, after the consultation of those authorized to represent the organs or if necessary a legal advisor specially appointed by the Registrar, set a reasonable period of time to be, amounting to no less than three and extendable if necessary, for the legal entity's competent body to remove the defect and if the defect is not removed within the set time limit, to effect dissolution by means of legal action.<sup>95</sup>

3) The legal entity may, through its competent bodies, at any time, even during voidability proceedings, up to the time of the final and conclusive decision, cure the defect by removal. If, however, this cure is not effected until after the expiration of the period of time mentioned in the previous paragraph, the legal entity shall pay all the costs accruing to the opposing parties, notwithstanding the legal entity's right of recourse to the offenders.

4) In all cases the legal entity shall retain the right of legal personality up to the termination of its dissolution, which shall ensue pursuant to the other provisions of this law, with reservation of bankruptcy.

5) This shall apply particularly with respect to the position of possible members and third parties.

6) Action can no longer be taken after the expiration of five years from the drawing up of a provision designated as essential.

Art. 126

b) Voidability

Until the point where the foundation is legally dissolved by the court order, it has legal personality.

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1) The action for voidability shall be taken against the legal entity, which is represented by the administration or by the possible audit authority if the administration brings an action. If, however, not only the members of the administration but also those of the audit authority bring an action or if an audit authority does not exist and another representative for the legal entity is not present, the court, pursuant to the provisions of the code of procedure, shall appoint a legal adviser for the proceedings.

2) Several actions shall be combined for simultaneous hearing and judgment. The initiation of the action as well as the time of the hearing itself may be published at the discretion of the court; publication may also ensue in the manner determined in the articles for notices and, if such a provision is lacking, in the journals intended for the publication of official notices and shall be annotated ex officio in the Public Register.

3) Upon application by the legal entity, the court may order, because of the disadvantage threatening the legal entity, that the plaintiff shall lodge a judicial bond, which shall be determined at the court's absolute discretion. Otherwise, the provisions of the Code of Civil Procedure concerning the judicial bond for the costs of an action shall be applied analogously to the performance and compensation of the said judicial bond.

4) Conversely, the court may postpone in proceedings by official order the execution of the contested provision if a threatening, irretrievable disadvantage to the legal entity can be established by preponderant evidence.

5) Any member of the legal entity or any other person in the legal entity entitled to vote may join the proceedings as an intervening party, on one side or the other, at the expense of the said intervening party.

Proceeds from such dissolution come to the benefit of the creditors first, however, beneficiaries cannot be accepted as creditors. If more assets are available, these go to the founder or as the case may be his legal heir(s). This takes place according to the law against unjust enrichment according to “*conditio causa data, non secuta*”<sup>51</sup>.

#### **4.2. Supplementary Foundation Deed (by-law) according to Art 552 Par 17 PGR**

By-laws can only be established if the founder has made a provision for it. The statutory authority allows all provisions to be regulated in a separate document, unless the provisions that has to be in the foundation deed.

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<sup>51</sup> WIKIPEDIA 31.01.2010:

The ***condictio causa data causa non secuta*** under Roman law was an action (“condictio”) for recovery of a transfer of property, where the purpose for the transfer had failed (*causa non secuta*). During the recognition of innominate contracts, and their enforcement via the *actio praescriptis verbis*, the *condictio causa data causa non secuta* still had relevance, however outside the field of valid contracts. This can be explained by reference to the purpose, which failed (the basis of the action): where *pacta sunt servanda*, the purpose is successful on discharge of the legal duties that flow from the contract, namely transfer of the object of the contract.



In contrast to the earlier law, this leads to a hierarchy. The by-laws are, according to the new law, subordinate to the foundation deed and cannot change or contradict the main deed.

Other Legal opinions<sup>52</sup> are of the view that the foundation deed and the by-laws are equally important, except in relation to Art. 552 § 16 Sec. 1 and 2 PGR and point out the government's report<sup>53</sup>.

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<sup>52</sup> Arnold, PSG Par 10 RZ 7 „Between foundation deed and supplementary foundation deed, there lies no over or under provision. “

<sup>53</sup> Because of certainty of the property is on a movable property from the seller, the guarantor and the borrower to the purchaser, the lender and secured party of the item transferred, without the good passes while in its actual possession.

Certainty is under § § 929 and 930 BGB the most important event of the transfer and ensures only the requirement that the acquirer to the seller, as long as it is. The transferor remains in possession of the thing, because the acts of certainty as a mortgage or a loan contract. The creditor is only a fiduciary owner, the only breach of the certainty agreement by non-repayment of a loan as Claim ownership may bring to the subject matter. A collateral assignment of all assets of an owner, however, is immoral and therefore inadmissible.

The arrangements of certainty are always included in a certainty agreement, to determine when a recovery of the goods is allowed and what is intended to secure the convent to demand thing.

The Commercial Code provides that the collateral matter is not accounted for at the bank, but directly with the borrower, even though he is not the real owner. The bank will report it only

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secured by the collateral requirement. In the case of bankruptcy, the guarantor of the separation law. Also in the tax law is not the owner of the collateral matter, but to the pledgor, users and owners allocated.

The meaning of the collateral assignment is that the pledgor the matter further uses for its operation in order to generate profit, which refinanced the loan. Who makes a collateral assignment, should inquire whether the property as certainty of property free reservations, since they are not repealed by acquisition in good faith. Moreover, a collateral in rented rooms is problematic because it is subject to the lien.

#### **Benefits of the certainty transfer:**

- Retention of the matter deleted by creditors
- debtor may use the collateral matter for profits.

#### **Disadvantages of the certainty transfer :**

- The moving thing can lose value - Wear impairment
- Rating errors are possible - estimated value is different from the actual value
- sale of the collateral to someone else.
- collateral as part of a property subject to retention of title.
- errors such as double transfer, shape defects.
- landlord lien stabs the certainty transfer.
- destruction of property due to mixing, processing, connecting.

This legal view leads to little legal certainty as the general will of the founder will be ascertained to interpret the law and decisions will be made accordingly to the law that prevails.

Legal certainty can be obtained only if there is a clear regulation of the hierarchy of documents.

Since the supplementary foundation deed cannot contain the essential components of a foundation deed according to Art. 553 § 16, the correct order is almost already established by law.

In practice, the supplementary foundation deed contains the precise information regarding the beneficiaries and their rights and when, where and how they will get these benefits and under which requirements, conditions or time limits.

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- damage, destruction or loss of the article.

The certainty transfer is a legal means to enable a credit practical use is common in Germany, also permitted in Austria. Switzerland banned it.

Other organs may also be created in the supplementary foundation sheet, e.g. the advisor, protector, appointer etc.

Other contents can be considered, e.g. asset management rules or dedication of additional assets.

#### **4.3. Regulations According to Art. 552 § 18 PGR**

For further implementation of the foundation deed or a supplementary foundation deed, the founder, board of trustees or any other organ may adopt other instructions in form of regulations as long as the provisions are made in the foundation deed.

Regulations adopted by the founder overrule those of the board or other organs.

It is therefore clear that the foundation deed and the supplementary deed are more important than regulations as these (regulations) are only related to implementation of instructions.

A hierarchy is also created within the regulations, i.e. the rules created by the founder has precedence over all other rules.

However, regulations can only be made if the foundation deed allows it.

A provision is invalid if it contradicts the foundation deed or supplementary foundation deed.

Regulations are generally amendable; an empowerment for changing the regulation is not necessary. It is advisable, though to include an amendment empowerment clause in the regulation in order to exclude future disputes regarding this issue. 81

Regulations are subject to the "clausula rebus sic stantibus"<sup>54</sup> and can be amended. This applies especially where non-changeability will prevent the fulfilment of the purpose of the foundation and will result in the dissolution of the foundation.

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<sup>54</sup> [www.wissen.de](http://www.wissen.de) 31.01.2010: Clausula rebus sic stantibus



## 5. Responsibility and Liability

### 5.1 General

Generally the organs of a foundation are collectively responsible for the damage that they may have caused intentionally or negligently (Art. 218, 220 PGR<sup>55</sup>).

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<sup>55</sup> H. Responsibility  
§ 16

#### *1. Foundation Deed (Articles)*

1) The foundation deed shall in any event include:

1. The intention of the founder to form the foundation;
2. The name or corporate name and domicile of the foundation;
3. The dedication of specific assets, which must amount to at least the statutory minimum capital;
4. The purpose of the foundation, including the designation of tangible beneficiaries, or beneficiaries identifiable on the basis of objective criteria, or of the category of beneficiaries, unless the foundation is a common-benefit foundation or the beneficiaries are evident from the purpose of the foundation, or unless there is express reference to a supplementary foundation deed regulating this;
5. The date of formation of the foundation;
6. The duration of the foundation, if this is limited;
7. Regulations on the appointment, dismissal, term of office and nature of the management (adoption of resolutions) and power of representation (authority to sign) of the foundation council;

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8. A provision concerning the appropriation of the assets in the event of the dissolution of the foundation, with the application *mutatis mutandis* of item 4. above;

9. The last name, first name and place of residence or corporate name and domicile of the founder or, in the case of indirect representation (§ 4, para. 3), the last name, first name and place of residence or corporate name and domicile of the representative. In this connection, there shall be express mention of the activity as indirect representative.

2) Insofar as the following contents are regulated, these shall likewise be recorded in the foundation deed:

1. The indication that a supplementary foundation deed has been drawn up or may be drawn up;

2. The indication that regulations have been issued or may be issued;

3. The indication that other executive bodies have been formed or may be formed; further particulars of the composition, appointment, dismissal, term of office as well as duties may be stated in the supplementary foundation deed or in regulations;

4. The reservation of the right of revocation of the foundation or amendment of the foundation documents by the founder;

5. The reservation of the right to amend the foundation deed or supplementary foundation deed by the foundation council or by another executive body pursuant to §§ 31 to 34;

6. The exclusion of enforcement pursuant to § 36, para. 1;

7. The reservation of the right of conversion (§ 41);

8. The provision that the foundation, although a private-benefit foundation, is subject to supervision (§ 29, para. 1, sentence 2).

3) The provisions in accordance with para. 1, items 1, 3 and 4 are deemed to be material within the meaning of the voidability proceedings

§ 17



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## *2. Supplementary Foundation Deed (Internal Regulations)*

The founder may draw up a supplementary foundation deed if he has reserved for himself the right to do so (§ 16, para. 2, item 1). This may include those integral parts of the declaration of establishment, which do not have to be recorded in the foundation deed.

## § 18

### *3. Regulations*

For the further execution of the foundation deed or the supplementary foundation deed, the founder, the foundation council or another executive body of the foundation may issue internal directives in the form of regulations (§ 16, para. 2, item 2) if the right to do so has been reserved in the foundation deed. Regulations issued by the founder take precedence over those of the foundation council or another executive body of the foundation.

<sup>55</sup> *3. due to insufficiency in the statutes (voidability)t)*

## Art. 125

### *a) In General*

1) Should the original or amended articles not contain the provisions designated by the law as essential or should these be contradicted by an instruction laid down in the regulations, voidability proceedings may be initiated insofar as the form, the defect in a provision concerning notification to the members or third parties, or the minimum number of members are not involved.

2) Every member of a legal entity and/or every other person in a legal entity entitled to vote, the administration or the audit authority can, through the Registrar, in extrajudicial proceedings, after the bodies authorized to represent or if necessary, a legal advisor specially appointed by the Registrar set a reasonable period of time, amounting to not less than

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three months' duration from the date of service, extendable if necessary, for the legal entity's competent body to remove the defect and if the said defect is not removed within the set period of time, to effect dissolution by means of legal action..95

3) The legal entity may, through its competent bodies, at any time, even during voidability proceedings, up to the time of final and conclusive decision, cure the defect by removal. If, however, this cure is not effected until after the expiration of the period of time mentioned in the previous paragraph, the legal entity shall pay all the costs accruing to the opposing parties, notwithstanding the legal entity's right of recourse to the offenders. 4) In all cases the legal entity shall retain the right of legal personality up to the termination of its dissolution, which shall ensue pursuant to the other provisions of this law, with reservation of bankruptcy.

5) This shall apply particularly with respect to the position of possible members and third parties.

6) Action can no longer be taken after the expiration of five years from the drawing up of a provision designated as essential.

#### Art. 126

##### b) Voidability action

1) The action for voidability shall be taken against the legal entity, which is represented by the administration or by the possible audit authority if the administration brings an action. If, however, not only the members of the administration but also those of the audit authority bring an action or if an audit authority does not exist and another representative for the legal entity is not present, the court, pursuant to the provisions of the code of procedure, shall appoint a legal adviser for the proceedings.

2) Several actions shall be combined for simultaneous hearing and judgment. The initiation of the action as well as the time of the hearing itself may be published at the discretion of the court; publication may also ensue in the manner determined in the articles for notices and, if such a provision is lacking, in the

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journals intended for the publication of official notices and shall be annotated ex officio in the Public Register.<sup>97</sup>

3) Upon application by the legal entity, the court may order, because of the disadvantage threatening the legal entity, that the plaintiff shall lodge a judicial bond, which shall be determined at the court's absolute discretion. Otherwise, the provisions of the Code of Civil Procedure concerning the judicial bond for the costs of an action shall be applied analogously to the performance and compensation of the said judicial bond.

4) Conversely, the court may postpone in proceedings by official order the execution of the contested provision if a threatening, irretrievable disadvantage to the legal entity can be established by preponderant evidence.

5) Any member of the legal entity or any other person in the legal entity entitled to vote may join the proceedings as an intervening party, on one side or the other, at the expense of the said intervening party.

<sup>55</sup>.WIKIPEDIA 31.01.2010:

The **Condictio causa data, causa non secuta** is the recovery due to non fulfillment of expected results. *Condictio causa data, causa non secuta* has been developed in teachings and legal discourse in analogy to 1435 ABGB . It depends on the person who has awarded the recipient in expectancy of some result that has not been achieved. The performance though is not subject to the contract

<sup>55</sup> Arnold, PSG Par 10 RZ 7 „No ordinance or provision is to lie between foundation deed and supplementary foundation deed.“

<sup>55</sup> BuA 13/2008,77ff, see annexure

<sup>55</sup> [www.wissen.de](http://www.wissen.de) 31.01.2010: **Clausula rebus sic stantibus**

is a tacit clause in contracts or treaties according to which a particular clause will apply only till such a time as a defined set of preconditions (business political) is fulfilled. Scope of this rule is controversial in international treaties.

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<sup>55</sup> *H. Responsibility*

*I. For companies with personality and their equivalent legal entities*

**Art. 218**

Nature of Liability

1) The bodies of a company with legal personality and the equivalent legal entities are liable towards the legal entity for the damage they cause if the said damage is caused intentionally or by neglect.

2) They shall be liable to the members for the intent and the negligence only insofar as the legal entity is not entitled to a claim for compensation.

3) Where, however, the legal entity has such a claim, the members shall have an independent claim only in the case of damage caused by intent.

4) Third persons who have cooperated in the issuance of shares, share certificates or bonds shall be liable to all parties only in the case of damage caused by intent.

Cases of Liability

**Art. 219**

a) General

1) Whoever is active in the formation of a company with legal personality or an equivalent legal entity is liable for compensation for damage:

1. If he makes or circulates untrue statements in prospectuses or circulars,

2. If with his cooperation a deposit or the takeover of parts of assets or a beneficial interest of individual members or other persons are stated incorrectly or incompletely or are withheld or concealed in the articles or a founder's report or if he has contravened the law by approving of such an action in another way,

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3. If he had knowledge of the subscribers' inability to pay or otherwise to perform in respect of the capital resources or the legal entity's own assets.

4. If the company's entry in the Public Register was effected on the basis of a certification or document, which actually contained untruthful statements, to which he contributed.

2) This provision shall be applicable analogously where after the formation the same acts or omissions have led to damage.

3) Where such a company with legal personality or legal entity has issued shares, share certificates or bonds, either itself or through a third party, each person who was active in this matter shall be liable for the damage caused or circulated by the person concerned by way of untruthful statements in prospectuses or circulars.

4) Whoever, contrary to the provisions of the law, has received payments such as profits or interest on building finance from the legal entity shall be required to return the said payments insofar as the recipient was demonstrably in bad faith at the time of receiving the said payments.

5) Where, on the other hand, contrary to the provisions of the law, a share of the dissolution assets has been obtained by the members or, insofar as transactions without value are involved, by third parties, they shall be liable to the extent of their enrichment, even though they are in good faith.

b) Management and Audit Authority

1) The persons entrusted with the administration and the auditing of a company shall be responsible for the damage caused by the non-fulfilment of the duties incumbent upon them.

2) Where the neglect of duty is committed as the result of the passing or the omission of a resolution by a body comprised of a number of members, organised on a collegiate basis, all members of the said body who were bound to take part in the resolution concerned shall be responsible.

3) The members who voted against the resolution which established the responsibility or, where the omission of a

The Foundation Law contains no special provision for liabilities but only defines its purpose in Art. 552 § 24 PGR<sup>56</sup>.

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resolution voted for the resolution that was rejected by the majority shall be free from the liability.

4) Members of a collegiate body who have also taken part in the said collegiate body's deliberations shall be liable if the assertion of their votes, for whose lack of assertion they were to blame, could have prevented the neglect of duty on the part of the said collegiate body or if in demonstrable agreement with them other members brought about a liability establishing a neglect of duty on the part of the collegiate body.

5) Where the omission of a resolution in breach of duty is involved, without the collegiate body having deliberated concerning this, each member shall be liable from the time he became aware of the matter and did not take steps within his authority to bring about the deliberation of the said matter by the collegiate bodies.

6) Where the administration or one of its members receives an instruction from an overriding body, such as the supreme body or the audit authority, whose execution would violate the duties incumbent upon the said administration or member pursuant to paragraph 1, execution may be refused without the legal entity being able to assert a responsibility as a consequence thereof.

7) The provisions concerning the responsibility of the liquidators are reserved.

56

I. Foundation board

§ 24

1. In General

1) The foundation board manages the business of the foundation and represents it. It is responsible for the fulfilment of the

If the foundation board acts against this purpose, it is liable according to the general provisions of the private law.

The basis for the liability of the responsible persons is the provisions of contractual liability.

## **5.2 Limitation of Time**

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purpose of the foundation, in compliance with the provisions in the foundation documents.

2) The foundation board shall be composed of at least two members. Legal entities can be a member of the foundation board.

3) Unless otherwise provided in the foundation deed, the appointment of the foundation board shall be effective for a period of office of three years, whereby a reappointment is permissible and the members can perform their activity for or without remuneration.

4) The provisions drawn up for the members of the foundation board also apply to possible representatives.

5) The members of the foundation board shall sign in such manner that they append their signature to the name of the foundation.

6) If members of the foundation board act without remuneration, liability for minor negligence may be excluded in the declaration of establishment, unless the creditors of the foundation are adversely affected thereby.

Normally the liability expires after ten years and, when it is not a case of providing false information knowingly or of causing damage intentionally, in two years after the knowledge of the damage by the damaged party. When more than one person is responsible for causing the damages, they are jointly and severally liable (Art. 226 PGR<sup>57</sup>).

The founder or any third party who has committed to transfer a specific asset to the foundation is obliged to transfer the corresponding asset to the

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57 Art. 226

#### 4. Nature of Liability

1) The liability of the persons responsible pursuant to the foregoing provisions is subject to the provisions concerning liability as determined by contract expires after three years, calculated from the time when the transaction to which the injury is attributed took place. Where knowingly false statements or intentional infliction of injury are involved, the liability expires after 10 years, calculated from the time when the transaction to which the injury is attributed took place.

2) Where several persons are responsible for the injury inflicted, they shall be jointly and severally liable for the compensation.

3) Liability arising from the illegal receipt of payments of the legal entity expires for the recipient in bad faith in ten years where the dissolution share is involved and in five years in the other cases and for the recipient of a dissolution share in good faith, in two years, calculated from the day of receipt.



foundation. If this obligation is not honoured, the founder and the co-founder are liable.

With regard to the creditors only the foundation assets serve as certainty and neither the founder nor the foundation board or the beneficiaries of the foundation (Art. 552 § 37 PGR<sup>58</sup>) bears the liability. There is also no funding commitment. This means that the founder is not liable with his private assets. As the foundation is a foreign legal person and it cannot have any owner the concept of the largest shareholder does not apply.

The liability is also applicable for ordinary negligence and therefore the foundation board must keep an eye on the principles of management and representation according to Art. 182 Para 2 PGR<sup>59</sup>.

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58 § 37

*H. Liability*

1) With regard to the creditors of the foundation, only the foundation assets serve as certainty for the debts of the foundation. There is no obligation to put up further certainty.

2) The foundation board is only permitted to make distributions to beneficiaries to fulfil the purpose of the foundation if claims by creditors of the foundation are not thereby curtailed.

59 Authority and obligations

Art 182

The liability cannot be excluded. Only in the case of a gratuitous action order, which is very rarely the case, the liability for ordinary negligence can be waived in the foundation statement.

It should be noted that liability exclusion according to a gratuitous action order applies with respect to the foundation itself. But this provision will not be effective against creditors. The need to protect the creditor is considered to be more important.

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aa) General

- 1). Obligations which are not transferred to or reserved for another body as, for example, the vesting and retraction of the power of "Procura", i.e., of signature rights; in particular, the administration shall also be concerned with the preservation of the capital resources and/or the legal entity's own assets in the case of legal entities whose capital resources are not required to be expressed as a sum of money as well as with the certainty and success of the undertaking.
- 2.) It shall conduct and promote the legal entity's business undertaking with care and shall be liable for the observance of the principles of careful management and representation.
- 3.) The administration shall receive from the founders all the written documents relating to the formation of the legal entity.
- 4.) The administration shall be under obligation to the legal entity to observe all restrictions which are determined by law, articles, resolutions of the competent body or in any other way.
- 5.) Unless determined to the contrary, the administration of a legal entity shall be entitled to the same authority and obligations as the administration of a registered cooperative society.

A menacing provision for the foundation board is given in the Art. 552 § 37 Para 2 PGR, according to which a foundation board can only distribute the benefits to the beneficiaries if the claims of the creditors are not compromised in any way.

The foundation board must analyse very carefully and ensure that the creditors are not harmed by the distributions. The foundation board must also consider if and how much is available for the creditors and which claims they could have. This is a collectable debt and therefore the foundation board has to be active. If one follows the law word for word, then the board cannot rely on the books or even revised budgets. The legislators have been given freedom to act for the foundation with the intend to weaken the disproportionate liability burden.

The Foundation Law has exceeded international norms with the provision that the foundation board must find creditors before every distribution, whether they are compulsory, other creditors or tax authorities; if they expect a breakthrough. (United States of America or federal Republic Germany)

In most cases, the foundation board is in no position to make such investigations with the result that all

future distributions are refused with reference to pervading liabilities.

That the foundation board therefore oppose to the purpose of the foundation or the beneficiaries no longer receive their benefits, is in the eyes of some trustees, a lesser evil.

The trustees are therefore obliged to pay damage claims to the beneficiaries which may extend to the range of profits resulting in that investments initiated cannot be completed or are counteracted.

This control is internationally known as „solvency test“. According to this test, it must be assessed before a planned distribution of profits whether the payment will lead to a situation where the foundation will not be able to pay the creditors. A distribution is untenable if it will lead to an inability to pay the creditors or if it would hamper the purpose of the foundation. It is in fact tested whether the foundation in a limited time period will have the ability to pay potential liabilities after the planned distribution. A balance sheet test is also recommended according to which only those distributions after which the commitments of the foundation can be fulfilled are allowed.

These liability scenarios show that the foundation board has to consider more than just the recommend accounting principles for the foundations. In fact preparation of a statement of assets is not only no longer appropriate, even in case of family foundations, but also grossly negligent.

## **6. Foundation Participants**

### **6.1 Generally**

Art. 552 § 3 PGR<sup>60</sup> defines the foundation participants. According to the law the participants are entitled beneficiaries, prospective beneficiaries, discretionary beneficiaries, ultimate beneficiaries, the executive bodies of the foundation and their members.

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<sup>60</sup> II. Foundation Participants

§ 3

1. Definition

The following are deemed to be participants in the foundation:

1. the founder;
2. the entitled beneficiaries;
3. the prospective beneficiaries;
4. the discretionary beneficiaries;
5. the ultimate beneficiaries;
6. the executive bodies of the foundation pursuant to §§ 11, 24, 27 and 28 as well as the members of these executive bodies.

The list is exhaustive<sup>61</sup>. Those who are included have a special interest in the management of the foundation and its properties and also in the satisfaction of the foundation purpose.

Another category of people, the creditors, have a special interest in the foundation as well, i.e. the satisfaction of their claim. Upon notification to the foundation supervision, the creditors can, after petition to the court, also enforce their claims as special participants in order to prevent distributions to beneficiaries' when these distributions could endanger or prevent the satisfaction of their claims.

Each foundation has the necessary organs and if the regulation prescribes so the foundation can hire auditors. Only then is the foundation ready to act.

The foundation organs, as the board, the auditors and other, as well as the nature of the management, representation and the like, is determined by the law, the foundation deed or by testamentary dispositions or inheritance.

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<sup>61</sup> Another opinion Schauer, Kurzkommentar zum Liechtensteinischen Stiftungsrecht, Par 3 RZ 1

Independently from the foundation management and also the foundation board, another organ, earlier known as collators, can be established with the purpose to divide the benefits of the foundation

## **6.2 Founder**

### **6.2.1 General**

The new Foundation Law states in Art. 552 § 4 PGR<sup>62</sup> the personality of the founder, the founder majority

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<sup>62</sup> § 4 2. Founders

1) Founders may be one or more natural persons or legal entities. A foundation formed by way of last will and testament may only have one founder.

2) If a foundation has more than one founder, the rights to which the founder is entitled or which are reserved to the founder may only be exercised jointly by all founders, unless the declaration of establishment provides otherwise. If one of the founders ceases to hold office the above cited rights, shall lapse.

3) If the foundation is formed by an indirect representative, the principal (authoriser) shall be deemed to be the founder. If the latter also acts as indirect representative for a third party, the latter's principal (authoriser) shall be deemed to be the founder. In any event the indirect representative shall be under an obligation to notify the foundation board of the identity of the founder.

and the representation. The old Foundation Law did not expressly govern this.

### 6.2.2 Founder

According to Para 1 one or more natural or legal persons can be a founder(s).

In order to be a founder, a person needs legal capacity<sup>63</sup>, a capacity that is determined by the personal statute of the founder (in Art. 10 IPGRG).

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<sup>63</sup> Art. 9 PGR

#### A. Legal Capacity

- 1) Everyone has legal capacity.
- 2) All humans (natural) have accordingly in the legal hierarchy the same capacity and the same private rights and obligations.
- 3) This provision is also mandatory international.

<sup>63</sup> Art. 10 IPRG

*Personal statute for a natural person*



In practice this provision is likely to cause problems related to direct or indirect representatives, mostly accountants or lawyers in Liechtenstein, before they can act actively, the legal capacity according to the personal status of the founder (owner of business) has to be checked, so that they do not become party to the formation of a destructible foundation.

Also the capacity to act must be checked. In case the person has no capacity to act, the actions have to be approved by the trusteeship authority.

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1) The personal statute of a natural person is that of the law of the state to which he belongs. If a person has a foreign nationality, in addition to the Liechtenstein national citizenship, it will decide the applicable law. For persons with multiple nationalities, the law of the state to which the person has the strongest bond will apply.

2) If a person is stateless or their nationality cannot be resolved, then their personal statute will be the law of the State in which he has his usual residence.

3) The personal statute of a person who is a refugee within the meaning of the applicable Liechtenstein international Conventions or if their relations with their home state are broken for similar serious reasons and the law of the State in which they reside, has the absence of such a habitual residence; a Referral of this right to the right of the home country is irrelevant.

The international importance of the Liechtenstein foundation decreases even more, by the person statute and the fact that some women may not be granted the right to transfer properties and the decision of the foundation board in this respect has to be respected and accepted.

### **6.2.3 Representative of the founder**

The founder is always a participant also if he uses a trustee or a representative to establish the foundation. However, when interpreting the wording of the law, the representative of the founder is not a participant in the foundation. This cannot have been the intention of the legislators and therefore a clear gap exists in the Foundation Law that needs to be filled by case law according to the general rules of interpretation. The legislature is unlikely to close this gap in the soon awaited revision of the Foundation Law.

### **6.2.4 Founder Majority**

The foundation can be established by a legal or a natural person. It can also be founded by a mixture of legal or natural persons. In such case they are all together regarded as the founder and thereby as foundation participants.

According to the law, there is no upper limit for the number of founders but for practical reasons an upper limit does exist.

The rights of the founder can only be exercised jointly. The founders form a legal community. When exercising the rights, all founders have to participate collectively. Staying silent cannot be accepted according to the purpose of the law although a circular decision or action according to Art. 112 PGR<sup>64</sup>, PGR is allowed as long as one of the founders

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<sup>64</sup> Art. 112

b) Passing of Resolutions

1) Where the law or the articles do not determine to the contrary, the subject of the resolution shall be stated when a multiple member body is convened.

2) In the absence of other provisions, the resolutions of a multiple-member body shall be validly passed by a simple majority of the countable votes.

3) Countable votes shall be deemed to be those, which in individual cases are represented and have taken part in the voting and are not excluded from the right to vote.

4) Where the law or the articles do not determine to the contrary, resolutions of the bodies may also be passed by

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written assent to a motion put forward (resolution by circular letter) if a member of the body does not demand verbal deliberation.

<sup>64</sup> *B. Capacity to act I. Majority*

Art. 10 PGR

*1. Content*

1) Anyone who has the capacity to act has the ability, through their acts or omission of private rights and obligations to establish, modify, cancel or transfer.

2) The representatives will have only the deciding capacity in this context.

3) Everyone is liable for his obligations as long as neither law nor legal transactions say anything different, with all his assets (in entirety).

2. Pre conditions

Art. 11

*a) In general*

1) Everyone who is of age and competent to judge have the capacity to act, unless the law in individual cases, as in the limited capacity to act and the testamentary capacity, makes an exception.

2) The capacity to act is presumed, unless the absence is obvious, such as in children.

Art. 12

*b) Of Age*

Whoever has attained the age of 18 is of age.

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c) Declaration of majority

Art. 13

Repealed

Art. 14

Repealed

Art. 15

*d) Capacity to Decide*

1) Capacity to act within the meaning of a private law has anyone who does not because of his childhood, or as a result of mental illness, mental weakness, drunkenness, or similar conditions, lack the ability, the motives and consequences of his behaviour to recognize and act according to a correct knowledge.

2) The judge must determine in each case whether the person in question lacks the ability to act reasonably.

*II. Legal capacity*

Art. 16

*1. In General*

Persons who are incapacitated, underage or incompetent lack legal capacity.

Art. 17

*2. Lack of capacity to decide.*

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A person who is not competent to decide, can, subject to the statutory exemptions and the provisions on the liability of third parties, produce no legal effects.

### *3. Judicious minors or Incapacitated*

Art. 18

#### *a) In General*

1) Minors, who has turned 14 years of age or incapacitated persons have, when in doubt, no legal capacity. They can only through their acts be committed or give up right with the consent of their legal representatives.

2) Without such consent, they can, even without the participation of legal representatives obtain benefits that are free and, where the law does not provide an exception, exercise rights that they deserve for their personal sake.

3) They will be liable for damages in tort.

4) The assertion of strictly personal rights to the legitimate can, unless the law decides otherwise, only be exercised under the participation of the legal representative.

#### *b) Own actions of the principal*

Art. 19

#### *aa) Consent of the guardian*

1) If a patronized person has legal capacity to decide, he can enter into obligations or give up rights, if the guardian has expressly or tacitly given his consent in advance or later approved the deal

2) If the approval is not received within a reasonable time, the other party is free from the agreement that he has put in making by a declaration of intention or subsequently attaches to the guardian.

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Art. 20

*bb) Lack of consent*

1) If the approval of the guardian is not obtained, any part of the completed services can be claimed back, however the patronized person is only liable if the services were of benefit or he at the time of the recovery still has the services or if the malicious enrichment has divested.

2) If the patronized person leads the other part to the mistaken assumption that he has no legal capacity, he is responsible to him for the damage caused by the rules governing civil affairs.

Art. 21

*cc) Professional or Commercial*

The patronized person who the guardianship authority explicitly or implicitly allows to operate independently in a profession or trade, can make all the transactions that belong to the regular operations and is responsible for this with all of his property, unless exceptions are approved.

Art. 22

*c) Limited legal capacity of a child*

1) The child has under the parental control the same limited capacity to act as a person patronized.

2) The provisions on the representation by the guardian shall apply to the exclusion of the rules concerning the participation of the guardianship authority.

3) Obligations for the child's assets shall be liable regardless of the parental asset rights.

Art. 22a

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*Subject to the Civil Code*

The detailed rules for Article 9 to 22 are included in the general civil code.

<sup>64</sup> Art. 112

*b) Decision*

1) If no other law or statute determine to the contrary, the subject of the resolution is the organization of a multi-pronged organ.

2) Decisions that require a multi-pronged organ, where it is not provided otherwise, is valid by a majority of countable votes.

3) Countable votes are those that are represented in individual cases and agreed so they are not excluded from the vote.

4) If the law or the statutes do not decide otherwise, decisions of the organs can also be made by written consent to a request made (Circular Resolution) unless a member of the assembly requires oral negotiation.

<sup>64</sup> *Inheritance*

Requirements for the validity of the inheritance

§ 1249

Between the spouses there can also be an inheritance, so that the future estate or part of it is promised and the promise is assumed final (§ 602). If the inheritance agreement does not live up to the specific conditions of validity for such an agreement, it is still valid as a testamentary disposition, so far as the key requirements have been met.

§ 1250

A spouse can accept the promised, not disadvantaged estate, but the disposition of his own estate, can without approbation of the Court, only exist insofar as there is a valid will.



does not seek a meeting of the founders or an oral discussion.

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§ 1251

*Rule on indented conditions*

What has been said of conditions in contracts at all, must be applied also to contracts of inheritance between spouses.

Effect of an inheritance agreement

§ 1252

Even an inheritance agreement incorporated into the public books does not prevent the spouses from getting pleasure from spending his assets as long as he is alive. The right that arises if the testator does not die before the person that was supposed to inherit him, the inheritance is to be transferred to another.

§1253

Through the inheritance agreement a spouse cannot entirely waiver the right to make a will. A pure-fourth, to which no one has a right, shall be liable to another debt remains, if the deceased did not leave it to someone, it becomes a part of the agreement of inheritance, even though the entire estate had been promised to the legal heirs.

§ 1254

*Cancellation*

The inheritance can be to the detriment of the other spouse, with which it has been concluded, not revoked, but only after provision of the laws will be invalidated. The legitimate heirs of their rights to stay, as reserved for another final order.

In case of a foundation formed due to an inheritance, both the spouses will be regarded as founders and thereby constituting a founder majority.

The foundation comes into existence immediately after the death of the person. The freedom to interpretate that the foundation does not come into existence until after the death of the second spouse, no longer exists. This is against the meaning and purpose of the marriage contract under § 1249 ff ABGB20.

The rights conferred on the founder are given because of his position as the founder and has nothing to do with his concurrent position as a beneficiary, which is completely independent from his role as a founder.

The jointly exercised rights of the founder include the right to revoke the foundation or to change the foundation statement. (Art. 552 § 30 PGR).

According to Art. 552 § 4 Para 2, founder majority is a default right. However, the foundation statement can decide differently. If the foundation statement contains no provision, then the right of one of the

joint founders is lost in case of doubt. This is not applicable in the case of foundations formed due to inheritance.

#### **6.2.5 Fiduciary Establishment**

Most of the 40000 foundations in Liechtenstein are fiduciary establishments. This is likely to change within a considerable time when Liechtenstein foundations acquire the same status as that of Austrian foundations that will result in that the foundations no longer will be significant for Liechtenstein as a financial centre.

In case of a fiduciary foundation, the foundation is established by a trustee who acts in his own name. A controversial decision by the Supreme Court<sup>65</sup> has differentiated between an economic founder (customer) and a legal founder. This resulted in the empowerment of the legal founder to change the statutes and by statutes of the foundation even after the death of the economic founder.

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<sup>65</sup> OGH 6.December 2001, 1 Cg 378/99-50, LES 2002, 41

This has on several occasions resulted in the absurd situation that close persons of the trustee have been established as beneficiaries instead of as legal heirs of the economic founder in situations where there is doubt about the establishment of the beneficiaries of the foundation.

The new Foundation Law solves the problem of the relationship between the founder (source of power) and the trustee through the institution of representation. This way it has been ensured that the founder rights are above all associated with personality and these cannot be circumvented by the trustee<sup>66</sup>.

The Foundation Law has been formulated presuming that the trustee is the root cause of all evils and the authors and co-authors have anticipated the evil intentions of the trustee and attempt to keep them in check. It is undisputed that there have been incidents of abuse but given the large number of fiduciary foundations the abuse was marginal.

Although there is freedom of contract when appointing a trustee, the appointment must be specific and clear otherwise it is null and void. The

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<sup>66</sup> More on that, short commentary on Liechtenstein law, § 4 RZ 13.

provisions that have to be clear include the essential provisions of the establishment of a foundation and therefore the essential and necessary contents of the foundation statement (Statute).

If the foundation is established using a proxy, a special power of attorney authority will be needed. The special power of attorney has to be so specific that it clearly states the essential and necessary contents of the foundation deed. Other legal opinions state that only information regarding the purpose of the foundation has to be contained in the power of attorney. This however bypasses the sense of the Foundation Law and the legal nature of the power of attorney.

As long as the power of attorney does not contain sufficient information, the transfer of power is invalid and therefore the established foundation is also destructible.

The action for the establishment of a foundation by a third party must be in accordance with Art. 552 § 16 PGR. The name of the principal trustor may not be given. The confidentiality is maintained at least in the short term. During a legal dispute, the trustee has to prove that he acted for a third party and therefore he has to give the name of the principal trustor.

The foundation board must also give information (names) to the creditors as it is duty bound under Art. 552 § 36 Para 2 PGR<sup>67</sup> to give them the information that they demand.

In case of bankruptcy this applies to the manager of assets as well as advisers and curators. They have the same rights as the creditor.

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<sup>67</sup> § 36

*G. Provisions under the Law of Enforcement*

1) In case of family foundations, the founder can provide that the creditors of the beneficiaries shall not be permitted to deprive these beneficiaries of their entitlement to a beneficial interest or respective beneficial interest acquired without valuable consideration, or individual claims arising from such an interest, by way of safeguarding proceedings, compulsory enforcement or bankruptcy. In case of mixed family foundations, such a directive can only be issued insofar as the entitlement concerned serves the purposes of the family foundation.

2) If a creditor of the foundation obtains no satisfaction from the foundation assets, and the founder has not yet fully provided the allocated assets, the foundation board shall be under an obligation to provide the creditor with the information he requires in order to take legal action. In the event of bankruptcy of the foundation, this applies mutatis mutandis with regard to the administrator of the estate.

#### **6.2.6 Change of Trustee**

The law does, not govern whether a change of trustee is possible. Moreover when founder rights are personal, changes apply only to these rights and not to the relationship to the trustee. The purpose of this provision is to ensure that founder rights do not last forever i.e. that they are not perpetuated in the course of time.

Therefore a change of trustee must be allowed. The founder can end the trusteeship and form a new trusteeship with a new person. To whom this right belongs after the death of the founder is unclear. One should assume, at least till an amendment to the Foundation Law has been made, that a trustee cannot be changed after the death of the founder. At least here there is a perpetuation against the spirit of the Foundation Law.

It is however to be noted that this provision does not apply to the members of the board of the foundation, where changes are in agreement with the provisions about the board.

#### **6.3 Beneficiaries**

### 6.3.1 Generally

The law recognizes all legal and natural persons as beneficiaries according to Art. 552 §r 5 PGR<sup>68</sup>, who

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<sup>68</sup> § 5

#### *3. Beneficiaries*

1) The beneficiary is deemed to be the natural person or legal entity that with or without valuable consideration in fact, unconditionally or subject to certain prerequisites or conditions, for a limited or unlimited period, with or without restrictions, revocable or irrevocably, at any time during the legal existence of the foundation or on its termination derives or may derive an economic benefit from the foundation (beneficial interest).

2) Beneficiaries within the meaning of para. 1 are:

1. the entitled beneficiaries (§ 6, para. 1);
2. the prospective beneficiaries (§ 6, para. 2);
3. the discretionary beneficiaries (§ 7); and
4. the ultimate beneficiaries (§ 8).

<sup>68</sup> Also the conflict of interest provision in § 66 TrUG: „ The trustor has to take care of some of his obligations regarding the beneficiaries like information duties (§ 68 TrUG). Such fiduciary duties can only exist between different entities, so that it can be argued that no identity is allowed to exist between the entities. "

<sup>68</sup> § 277 ABGB

1. Case: The prevention and collision guardianship



with or without consideration, with or without preconditions, temporary, permanent or restricted or unrestricted, at any point of time during the legal life of the foundation or its end get or may get economic benefit.

Beneficiaries can be both legal and natural persons. Although it's not clear from the law whether a trust or a partnership can be a beneficiary.

The beneficiaries must be determined or determinable and may also be foreign natural or legal persons.

The beneficiary must get an economic advantage from the foundation. This advantage can consist of money or money values, the transfer of rights, granting of loans, performance of securities, payment of obligations, in short and without any restrictions, everything that can be an economic advantage.

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At the request of a party or ex officio, the court appoints a curator specifically provided, for action in the following cases:

1. If an adult due to a matter of urgency in view of illness, absence or inability to act like themselves is not able to designate a representative;
2. If the legal representative of a minor or under persons with curatorship (curator) has interests in a matter that conflict with those of his principal;
3. If the legal representative is unable to represent.

Anyone who is entitled to get benefits from the foundation is called a beneficiary by the law i.e. common beneficiary, discretionary beneficiary and final beneficiaries.

The benefits are generally not stated in the foundation declaration, foundation deed or supplementary foundation deed.

### **6.3.2 Founder and foundation board as beneficiary**

Quite often the founder makes himself the beneficiary. This is certainly possible and legitimate. In fact this is the main rule when it comes to family foundations. The founder does not have the benefits as the founder but as a beneficiary with the corresponding rights.

What is the situation with the foundation board? It is rare but possible that the founder or the board itself establishes benefits for the foundation board in any form (parts, percentages, etc.).

In such a situation the foundation board will be a beneficiary. My opinion is that this situation is highly questionable, even if one ignores the risk of a conflict of interests.

We increasingly see a combination of the above-mentioned functions in pure and mixed family foundations. It applies in every case that the foundation board cannot determine its own benefits. This could lead to a situation where colleagues challenge each other in the foundation board. In this condition a collision curator have to be appointed according to § 277 Para 1 Zif 2 ABGB, if one has not already been appointed.

Moreover this position is not recommendable from a tax perspective, as the foundation capital as well as the income will be attributed to the tax subject for taxation.

### **6.3.3 The Entitlement to Benefits**

We talk of entitlement to foundation benefits as given in Art 552 § 6 Abs 1 PGR<sup>69</sup> PGR, when a legal or natural person has a legal claim based on a defined or undefined claim which can be derived from the foundation deed, the supplementary foundation deed or other regulations.

The entitled person has an actionable claim, which must be calculable. The foundation board and other organs must be given no discretion relating to provisions regarding the benefits.

One can think of a certain percentage of foundation assets as a defined benefit. This amount can then be determined by way of accounting. As far as an

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<sup>69</sup> § 6

#### *4. Beneficiary with a Legal Claim*

1) An entitled beneficiary is a beneficiary who on the basis of the foundation deed, the supplementary foundation deed or the regulations has a legal claim to benefit, to a specified or specifiable extent, from the foundation assets or foundation income.

2) A prospective beneficiary is a beneficiary who after the occurrence of a condition precedent or at a specified time, in particular after the exclusion of a prior-ranking beneficiary, on the basis of the foundation deed, the supplementary foundation deed or a regulation has a legal claim to acquire an entitlement to a beneficial interest.

actionable claim is concerned, a step action <sup>70</sup> in accordance with civil procedure is to be brought.

#### **6.3.4 The Prospective Beneficiaries**

According to Art. 552 § 6 Para 2 PGR, prospective beneficiaries are those who may get benefits and acquire a legal claim after the fulfilment of certain preconditions or upon reaching a certain date; This is only after the beneficiaries who are in rank above the prospective beneficiaries. This claim must have a basis in the foundation deed, supplementary foundation deed or in the regulations.

In practice it is mostly formulated as – first beneficiary, second and third beneficiary etc.

These beneficiaries normally acquire a legal claim to foundation benefits after the removal (generally death) of beneficiaries higher in rank than them. Except in case of a specially created foundation deed, they are regarded as prospective beneficiaries

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<sup>70</sup> Art. XV Law of 10 December 1912 concerning the introduction of the Civil Procedure Code and the jurisdiction rule

and have no information rights. They do not have the status of discretionary beneficiaries either.

In practice, however, they are given benefits in situations of necessity and illness, for education and training and in similar situations registered in the documents. In these situations, the beneficiaries have all the same rights to information as foundation participants.

### **6.3.5 The Discretionary Beneficiaries**

Discretionary beneficiaries are those legal or natural persons who are described in Art. 552 § 7 PGR<sup>71</sup> and

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<sup>71</sup> § 7

#### *5. Discretionary Beneficiary (Beneficiary without a Legal Claim)*

1) A discretionary beneficiary is a beneficiary who belongs to the category of beneficiaries specified by the founder and whose possible beneficial interest is placed within the discretion of the foundation board or another body appointed for this purpose. A person who only has an expectancy to such a future beneficial interest shall not be treated as a discretionary beneficiary.

2) A legal claim by the discretionary beneficiary to a specific benefit from the foundation assets or foundation income shall in any event not come into being until there is a valid resolution by the foundation board, or another executive body vested with this

whose possible benefits depend on the discretion of the foundation board or who are mentioned to be in such a position.

The law expressly states that the prospective beneficiaries who may receive a benefit in the future are not discretionary beneficiaries.

In discretionary beneficiaries like prospective beneficiaries, first second or others should be mentioned where there is a previous rank and the next ranking beneficiary is only a contingent one.

#### **6.3.6. Ultimate beneficiaries**

Final beneficiaries are those who according to the foundation deed or supplementary foundation deed are to acquire the remaining assets after the liquidation of the foundation. (Art. 552 § 8 PGR<sup>72</sup>).

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responsibility (§ 28), on an actual distribution to the relevant discretionary beneficiaries and such claim shall lapse on receipt of this distribution.

<sup>72</sup> § 8

If the founder has reserved the right to revoke the foundation according to Art. 552 § 30 PGR, then he is a valid candidate as an ultimate beneficiary; even if the founder has not explicitly declared himself as an ultimate beneficiary.

In case the founder dies and the ultimate beneficiary situation occur, his legal heir will be the ultimate beneficiary. This is not contrary to the spirit of the law and the prohibition against perpetuation of the founders will.

The legal provision that states that the lack of a clear description of an ultimate beneficiary will mean

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#### *6. Ultimate Beneficiary*

- 1) An ultimate beneficiary is a beneficiary who in accordance with the foundation deed or supplementary foundation deed is intended to receive the remaining assets after the liquidation of the foundation.
- 2) If there is no designation of an ultimate beneficiary or no existence of the ultimate beneficiary, the remaining assets following the liquidation shall pass to the state.
- 3) If there is no specification of the appropriation of assets in the event of a revocation pursuant to § 30, para. 1, the founder himself shall be deemed to be the ultimate beneficiary irrespective of whether he previously had the status of a beneficiary.



that the state will receive the property will be used only as a last resort.

This will be applicable also if the state is credited that the assets quickly will be used to the achievement of the purpose.

In addition Art. 127 PGR<sup>73</sup> PGR is to be used. If the foundation was repealed for pursuing a wrongful or immoral purpose the property will be taken over by

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<sup>73</sup> Art. 129

I. Application of assets

1. Unless the law, the articles or the competent bodies determine to the contrary, the assets of a legal entity which is cancelled shall devolve upon the state which, as universal successor, shall be liable for the indebtedness solely to the extent of the assets taken over and in the same way as the bona fide owner.

2. Pursuant to the provisions concerning the implied trust relationship, the application of the assets shall correspond as closely as possible to the existing purpose and the former participants in the cancelled legal entity may demand the said application through administrative channels.

3. Where a legal entity is judicially cancelled because immoral or unlawful purposes have been pursued, the assets, after the liquidation has been officially implemented, shall devolve upon the State for discretionary utilization, even though the provisions determine otherwise.

the state of Liechtenstein not withstanding any provision stating otherwise.

What is to be described as immoral or illegal purposes are to be decided by jurisprudence in future. However, if any assets derived from a crime, be it infidelity, fraud blackmail or something else, were to be brought into a foundation it is expected that in future the state of Liechtenstein will conduct legal proceedings in order to control this.

In view of the fact that money laundering and tax fraud are widely prevalent, any future founder who intends to bring any such asset into a foundation in Liechtenstein has to be very careful. In case of tax fraud the proceeds after the dissolution will be divided by the related states.

If foreign authorities were to learn of a foundation that contains money that has a criminal source, the forced dissolution procedure will be initiated (possibly with the help of the state of Liechtenstein) which will lead to the forfeiture of the money. Additionally it has to be remembered that the Liechtenstein foundation board due to the "Solvency Test" is well prepared to see the country as a potential creditor and to ensure that no distributions are made that should be avoided, also when the country is to be a creditor.

### **6.3.7 Information- and Access rights of the Beneficiaries**

#### **6.3.7.1 The Law**

*Art 552 § 9 PGR*

##### *1. In General*

*1) Insofar as his rights are concerned, the beneficiary is entitled to inspect the foundation deed, the supplementary foundation deed and possible regulations.*

*2) In addition, insofar as his rights are concerned, he is entitled to the disclosure of information, reports and accounts. For this purpose he has the right to inspect the business records and documents and to produce copies, and also to examine and investigate all facts and circumstances, in particular the accounting, personally or through a representative. However, this right must not be exercised with dishonest intent, in an abusive manner or in a manner in conflict with the interests of the*

*foundation or other beneficiaries. By way of exception, the right may also be denied for important reasons to protect the beneficiary.*

*3) The ultimate beneficiary shall not be entitled to these rights until after the dissolution of the foundation.*

*4) The rights of the beneficiary shall be asserted in special noncontentious civil proceedings.*

*5) The exceptions pursuant to §§ 10 to 12 are reserved.*

## *§ 10*

### *2. The Founder's Right of Revocation*

*1) If in the declaration of establishment the founder has reserved for himself the right to revoke the foundation (§ 30) and he is himself the ultimate beneficiary, the beneficiary shall not be entitled to the rights pursuant to § 9.*

*2) If the foundation has been formed by more than one beneficiary, these rights may be exercised by each individual founder who has reserved for himself the right of revocation.*

## *§ 11*

### *3. Setting-up of a Supervisory Organ*

*1) If in the declaration of establishment the founder has included a supervisory organ for the foundation, the beneficiary can only demand disclosure of information concerning the purpose and organization of the foundation and concerning his own rights vis-à-vis the foundation, and can only verify the accuracy of this information by inspecting the foundation deed, the supplementary foundation deed and the regulations.*

*2) The following can be set up as a supervisory organ:*

*1. an audit authority, to which § 27 shall be applied mutatis mutandis;*

*2. one or more natural persons specified by name by the founder, who have sufficient specialist knowledge in the sphere of law and business to be able to perform the duties; or*

*3. the founder.*

*3) the supervisory organ must be independent of the foundation. § 27, Para. 2, applies mutatis mutandis.*

*4) the supervisory organ shall be under an obligation to verify once a year whether the foundation assets are being managed and appropriated in accordance with the purposes. The foundation board shall submit a report on the outcome of this verification. If there is no reason for objection, it shall be sufficient to provide confirmation that the foundation assets have been managed and appropriated in accordance with the purpose of the foundation and in conformity with the provisions of the law and the foundation documents. If this is not the case, or while performing its duties the supervisory organ ascertains circumstances, which jeopardize the existence of the foundation, it shall notify the beneficiaries and the court as soon as it becomes aware of these circumstances. The court shall if necessary take action in accordance with § 35.*

*5) If a supervisory organ has been set up, the beneficiary may demand from the foundation and the supervisory organ the forwarding of the reports pursuant to Para. 4.*

*6) If the beneficiary asserts his rights pursuant to § 9, the foundation shall be under an obligation to prove that there exists a supervisory organ, which satisfies the requirements of Para. 2 in conjunction with Para. 3.*

## *§ 12*

### *4. Supervised Foundations*

*The beneficiary shall not be entitled to the rights pursuant to § 9 if the foundation is subject to the supervision of the foundation supervisory authority (§ 29).*

#### **6.3.7.2 General**

Art. 552 § 9 PGR regulates the general information rights of the beneficiaries and is a central provision of the Foundation Law.

The beneficiary has a right to access the Deed of the Foundation, Supplementary Foundation Deed and any additional Regulations.

Additionally, he also has the right to access the declaration, reports and accounts. This allows the beneficiary to inspect all books and papers and also produce copies.

He may also examine all facts and circumstances (including the accounting). The beneficiary is not obliged to do this all by himself but can appoint a representative to do the checking and analysis as long as the representative is not an advocate or another beneficiary.

This central right cannot be waived either explicitly or tacitly.

The beneficiaries have this right to access information even after the dissolution of the foundation. The beneficiaries have non-contentious procedures<sup>74</sup> available to enforce this right.

Recently this access right has been guaranteed to ensure that no wrongful usage could be done by trustees or trust companies. Even if the data of a trust company is stolen, the trust company cannot

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<sup>74</sup> See annex: non-contentious procedure



restrict the right of access or suppress facts or blacken parts. In an international context the right of the beneficiaries is more important than that of a trust company which has failed to keep the data safe and secure.

The beneficiary also has this right according to data protection law<sup>75</sup> that states that the beneficiary, as well as the founder has right to access the data that is directly or indirectly related to him and has been held or collected.

Often the foundation organs have a secrecy clause to deny information to a beneficiary seeking it. The right to information is always above any such secrecy clause and no violation of the provisions of any institution is made by providing information. To protect it, it is advised that the foundation board refer to the legal procedures in case of even the slightest doubt regarding information requests.

In such a situation the Liechtenstein courts will decide. The judge will do the task instead of the highest organ of the foundation. The judge will collect all the relevant information according to the non-contentious procedures including the entire

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<sup>75</sup> See annex: Data protection law

foundation acts and also the notes added by the foundation board.

In any case the beneficiary can demand to see all information dating back to the time he was instated as a beneficiary. But in order to be able to examine the management of the trust assets properly, it will be necessary to grant the beneficiaries access to the information from the time of the establishment of the foundation. Any other way undermines the purpose of the rule of law and could open the door to concealment of any negligent or unlawful foundation management. It will depend on the courts<sup>76</sup> to take into consideration all interests. The legislature has refrained from doing so.

#### **6.3.7.3 on revocation right of the founder**

If the foundation board reserves the right of revocation according to Art. 552 § 30 PGR and appoints itself as the ultimate beneficiary, right of access is not provided to all other beneficiaries.

In this case, the information rights are only provided to the founder in his position as a beneficiary.

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<sup>76</sup> First experiments were set by the Supreme Court: Supreme Court E-LES 2006, 192 and Supreme Court February 7, 2008 LES 2008, 272 At that time, however, was the new Foundation Law still not in force. We will have to wait to be seen how the Supreme Court will decide under the new law will.

#### **6.3.7.4 on the establishment of a controlling organ/ regulating authority**

If the founder in the foundation deed has established a supervisory organ for the foundation according to Art. 552 § 11 PGR, the beneficiary can approach it only for information relating to the purpose and structure of the foundation and for his rights towards the foundation and the legality of this right in the context of foundation deed, supplementary foundation deed and regulations.

One can say that this way the founder has delegated the information right to the supervisory organ.

The beneficiary can then demand reports of the supervisory organ.

This provision prohibits the right to access in the context of Art. 552 § 9 PGR regarding the foundation and foundation organs.

Naturally the right to access information can be applied directly against the supervisory organ if there is suspicion regarding actions of the supervisory organ, or if there is doubt about the independence of the supervisory organ.

The independence of a supervisory organ comes into question if the same trustee or trust company or foundation board provides more than 10 % of the turnover or if the trustee or the trust company either directly or indirectly holds shares in the supervisory organ even if it is only as a minority shareholder. In addition the provisions of Art. 552 § 27 Par 2 PGR apply, according to which the supervisory organ can neither be owned by any other organ nor be in any employment relationship to another organ. Also independence is not assured if a close relationship with any participant exists or if the control organ itself is a beneficiary.

#### **6.3.7.4 on supervised foundations**

In case of foundation that are supervised according to Art. 552 § 12 PGR the right to access does not apply.

Foundations, that are under foundation supervision are normally public purpose foundations (including religious foundations) together with all other foundations which the founder on a voluntarily basis has put under supervision. (Art. 552 § 29 Para 1PGR.)

In case a natural or legal person has an actionable claim against a foundation, he has to be given right to access. This right is based on the general principals of the Foundation Law but also in the concept of good faith, which needs to be specially protected.

The claims can be made step by step: First the financial analysis and then based on that, the actual claim is made (and thereafter further).

#### **6.4 The controlling organ /regulating authority**

According to the new Foundation Law a controlling organ<sup>77</sup> may be established. It is generally for the

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<sup>77</sup> § 11

*3. Setting-up of a Controlling Body*

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1) If in the declaration of establishment the founder has set up a controlling body for the foundation, the beneficiary can only demand disclosure of information concerning the purpose and organization of the foundation, and concerning his own rights vis-à-vis the foundation, and can verify the accuracy of this information by inspecting the foundation deed, the supplementary foundation deed and the regulations.

2) The following may be set up as controlling body:

1. an audit authority, to which § 27 shall be applied *mutatis mutandis*;

2. one or more natural persons specified by name by the founder, who have sufficient specialist knowledge in the sphere of law and business to be able to perform their duties; or

3. the founder.

3) The controlling body must be independent of the foundation. § 27, para. 2 applies *mutatis mutandis*.

4) The controlling body shall be under an obligation to verify once a year whether the foundation assets are being managed and appropriated in accordance with their purposes. The foundation board shall submit a report on the outcome of this audit. If there is no reason for objection, it shall be sufficient to provide confirmation that the foundation assets have been managed and appropriated in accordance with the purpose of the foundation and in conformity with the provisions of the law and the foundation documents. If this is not the case, or while performing its duties the controlling body ascertains circumstances which jeopardize the existence of the foundation, it shall notify the beneficiaries and the court as soon as it is aware of these circumstances. The court shall if necessary take action in accordance with § 35.

5) If a controlling body has been set up, the beneficiary can demand from the foundation and the controlling body the forwarding of the reports pursuant to para. 4.

audit authority to decide if it can also undertake the role of a control organ, but this is not the case in foundations where the audit authority is also an organ of the foundation.

A responsibility to control is given to an auditing authority according to provisions of Art. 55 § 27 Para. 2 PGR. The founder can submit two proposals of his preference for the auditing authority. If the founder has not made use of this provision, the foundation board can make these suggestions in front of a judge. The court generally chooses the proposed auditors. These must be independent of the foundation.

The task of the control organ is to make a yearly check in order to assure that the foundation assets are used and managed for the defined purpose only. This check is neither ongoing nor random but concerns the overall management of the foundation and the use of foundation assets over the period from the last examination according to the last report.

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6) If the beneficiary asserts his rights pursuant to § 9, the foundation shall be under an obligation to prove that there exists a controlling body that satisfies the requirements of para. 2 in conjunction with para. 3.

The control organ is also an organ of the foundation. The control organ can be an audit authority or can be one or more natural persons. These persons must have sufficient expertise in the field of law and economics in order to be able to perform their tasks.

The persons chosen for the control organ must be suitable according to the opinion of different experts in all the questions that might arise under Art. 180a PGR. The text of the law mentions expertise in the area of law and economics. Therefore it depends on the person if he has the extra capability of handling the issues under 180a PGR. The next amendment must intervene here, as very few people know both law and economics. According to the new Foundation Law, an authorization according to 180a PGR is not automatically sufficient.

The establishment of a control organ seems to be an attempt to make things more transparent and to give the tasks to a more professional section. In the end though, it is a disadvantage to the founder as the costs of running the foundation and achieving the foundation purpose have increased. The high costs will make Liechtenstein foundations even more unattractive.

The control organ has to make a report on the findings of its check. If there is no cause for a



complaint, a declaration have to state that the management and use of the foundation assets is in the direction of the fulfilment of the foundation purpose and that it is in agreement with the provisions of the law and the foundation documents. Only if this is not the case, the control organ must report to the court.

The court will then act according to Art. 552 § 35.

If such a control organ exists, the beneficiaries are entitled to see the reports that have been issued. (Art. 552 § 11 Para 5 PGR).

If the beneficiaries use their right to access information, the rule of evidence is that the foundation has to prove that the control organ have acted in accordance with the particular claim, especially regarding the independence of the organ.

## **6.5 The Foundation Board**

### **6.5.1 The law**

The law governs the rights and the duties of the foundation board in Art. 552 § 24 and 25 PGR as follows:

*§ 24*

*1. In General*

*1) The foundation board manages the business of the foundation and represents it. It is responsible for the fulfilment of the purpose of the foundation in compliance with the provisions in the foundation documents.*

*2) The foundation board shall be composed of at least two members. A legal entity can be a member of the foundation board.*

*3) Unless otherwise provided in the foundation deed, the appointment of the foundation board shall be effective for a period of three years, whereby a reappointment is permissible and the members can perform their job with or without remuneration.*

*4) The provisions drawn up for the members of the foundation board also apply to possible representatives.*

*5) The members of the foundation board shall sign in such a way that they append their signature to the name of the foundation.*

*6) If members of the foundation board act without remuneration, liability for minor negligence may be excluded in the declaration of establishment, unless the creditors of the foundation are adversely affected thereby.*

## *2. Special Obligations*

### *§ 25*

#### *a) Asset Management*

*1) The foundation board shall manage the foundation assets in compliance with the founder's intention, in conformity with the purpose of the foundation and in accordance with principles of good management*

*2) The founder may set down specific and binding management criteria in the foundation deed, supplementary foundation deed or in a regulation.*

### 6.5.2 General

The foundation board is the executive body of the foundation, which represents the foundation in relation to third parties and manages its affairs. The foundation board is responsible for the fulfilment of the foundation purpose under the provisions of the foundation documents. The trustees have to act as properly and orderly businessmen in the exercise of the management of the foundation much like the way they would do with their own business. They have to carry out their duties, take responsibility for their actions and they are liable for their decisions.

This organ is mentioned by the founder in the foundation deed or added to the deed, in the last will testament or in an inheritance agreement.

There are no extra and specific provisions in the Foundation Law stating the duties and rights of the foundation board. The provisions regarding the trusts (Salmannschaft)<sup>78</sup> however can be used, as

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<sup>78</sup> Art. 180a

1) At least one member of the administration of a legal entity authorised to manage and represent must be a Liechtenstein citizen domiciled in the Principality of Liechtenstein and be in possession of the professional licence to act as lawyer, legal

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agent, trustee or auditor, or a government-recognised business qualification.

2) Similarly are persons residents in states party to the agreements forming the European economic space or who possess a government-recognised certificate of qualification, which corresponds to one of the requirements laid down in para. 1, whose fixed, main employment is with a lawyer, legal agent, trustee, auditor or a juridical person with licence to act as trustee or auditor, or with a bank, and pursue their activity within the intentment of para. 1, within the framework of this employment.

3) Excepted from the obligations pursuant to para. 1 are Legal entities, which, on the basis of the law concerning trade, have a qualified manager.

4) Anyone who intends to exercise the activities referred to in paragraph 1 and 2, must notify the government. The government checks the existence of conditions, and where appropriate, issues a statement and keeps a list of the persons concerned. Changes in relationships are communicated to the Government without delay.

5) By means of an Executive Order the Government may assign to a government office, for independent settlement, the issuance of confirmations relating to the recognition of business qualifications (para 4), with reservation of recourse to the Government's collegial jurisdiction.

<sup>78</sup> § 35

## *2. Other foundations*

1) In the case of foundations not subject to the supervision of the foundation supervisory authority the judge may, on the application of a foundation participant and, in urgent cases, if necessary on the basis of a communication from the foundation supervisory authority (§ 21, para. 3) or from the Office of the Public Prosecutor, also ex officio in special non-contentious civil

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proceedings, exercise the powers pursuant to §§ 33 and 34, and pronounce the orders required pursuant to § 29, Para. 3. There is deemed to be an urgent case in particular if there is a strong suspicion of a punishable act by an executive body of the foundation.

2) Unknown beneficiaries may upon application be ascertained by the judge in public citation proceedings.

#### <sup>78</sup> IV Rights and duties of the trustee

##### 1. Rights

##### Art 919

##### a) General

1) After the agreement has been concluded, the trustee may require the trustor to comply with the said agreement, unless the trust deed determines otherwise.

2) Unless the trust deed or the special circumstances determine otherwise, the trustee may, after having accepted the trusteeship, demand that the trustor or other legally bound third parties, such as heirs or similar, comply with the terms of the trust agreement.

3) Subject to his obligations pursuant to the provisions of the trust deed, the trustee shall be entitled to dispose of the trust property in the same manner as an independent holder of rights and duties as, for instance, an owner, a creditor, a member or a governing body of a legal entity or partnership or similar entity and he may represent the trust before the authorities in his own name as a party to an action in any capacity including that of an intervener participant, co-summoned person. The trustee may also administer and exercise the pertinent rights against all third parties pursuant to the trust deed and, insofar as this is necessary, convert the trust property into cash and reinvest same unless the purpose of the trust determines otherwise.

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4) Provided the trust deed does not determine otherwise, the trustee shall be empowered to advance to a beneficiary an appropriate part of the property, which will subsequently devolve upon him.

5) Insofar as obligations under the trust do not require fulfilment by the trustee personally, the trustee may delegate all acts of administration to third parties.

6) If the trustee is in doubt concerning the admissibility or appropriateness of an act of administration or a disposition of the trust property or unusual acts which create obligations at the expense of the trust or if, in the case of co-trustees, one of these refuses to cooperate, he shall, if necessary, appeal for binding information to the Princely Liechtenstein Court of Justice in extrajudicial proceedings and the Court may call in suitable persons to assist in the legal findings.

7) Pursuant to the regulations concerning the administration of companies with legal personality, the trustee has a right to request discharge relating to his activity pursuant to the last two paragraphs of the following Article.

b) Indemnification, trustee fees, etc.

Art 920

aa) Claims

1) The trustee is entitled to claim reimbursement for all necessary expenses and costs incurred by him in the interest of the trust. The trustee is also entitled to be indemnified against damage resulting from the trust property, to be released from obligations entered into on behalf of the trust or otherwise incurred and, furthermore, to appropriate remuneration for his services, insofar as the trust deed or another legal relationship does not determine otherwise.

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2) The trustee may claim interest at the rate, which is usual in the country on expenses or costs, calculated from the day on which such expenses or costs were incurred.

3) In the absence of any provision to the contrary contained in the trust deed or any conclusions to the contrary, which could be drawn from the legal relationship between the trustee and the trustor, any claim shall be made in the first place against the trustor and then against the beneficiary entitled to the trust property or the income therefrom.

4) Alternatively, the claims may be made against the trust property direct, against the designation pursuant to the trust deed, or against the persons liable as mentioned in the previous paragraph.<sup>1</sup>

#### Art. 921

##### bb) Enforcement

1) Without prejudice to his right to bring a claim in contentious proceedings, the trustee may petition the Princely Liechtenstein Court of Justice to determine the remuneration for his services in extrajudicial proceedings after hearing the participating parties.

2) He may be reimbursed from the trust property in preference to the beneficiaries and for this he may set off the claims he may have against the trustor or beneficiary and may assert a lien on the assets of the trust property.

#### 2. Duties of the Trust

#### Art. 922

##### a) General

1) The trustee shall be under obligation to comply with the provisions of the trust deed and the regulations of this law which



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are not in contradiction with the said provisions of the trust deed, to preserve and administer the trust property with the care of a prudent business man and where customary or appropriate he shall insure the trust property against risk.

2) The trustee may not dispose of the trust property in a manner, which could affect adversely or frustrate the purpose of the trust.

3) In the absence of provisions to the contrary or unless an emergency requires urgent measures, co-trustees must act jointly (collectively).

4) Trustees who conduct a business of deposit banking must strictly segregate trust property from other assets, insofar as the trust relationship does not determine otherwise (trust deposits).

5) Special records must be kept by persons whose business it is to act as trustees.

#### Art. 923

b) Inventory of assets and liabilities and the rendering of accounts

1) If an inventory has not already been prepared, the trustee must draw up an inventory of the assets and liabilities of the trust and the said inventory must be revised annually.

2) He is required to render accounts annually and to provide information at any time concerning the state of the trust affairs to the audit authority provided for in the trust instrument or, in the absence of such audit authority to the settlor or, if the settlor should have died or be otherwise unavailable, to the beneficiary

who has a right of claim and in the absence of such beneficiary to the Princely Liechtenstein Court of Justice, unless the

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circumstances necessitate a deviation as, for instance, in the case of banking trusts, small trusts or similar.

3) Where the entitled beneficiary is a partnership or a legal entity the accounts must be submitted and the information disclosed to the partner representing the partnership or to the governing bodies in the case of a legal entity.

4) Where the beneficiary (ies) is (are) not of age, legally incapacitated, insane or mentally deficient, or the rendering of accounts is impracticable for any other reason, the trustee shall submit the accounts to the Princely Liechtenstein Court of Justice.

5) The trust deed may also provide for the submission of accounts in another manner or it may release the trustee from such requirement.

6) If the trust property is comprised of an undertaking, which is subject to the provisions of this law concerning commercial accounting, the trustee shall be required to comply with such provisions.

7) Unless the trust deed determines otherwise, the judge in extrajudicial proceedings may for important reasons order an official audit upon application by an entitled participant. The result of such audit shall be submitted to the Court as in the case of legal entities.

#### c) Responsibility

##### Art 924

#### aa) Breach of trust etc.

1.) Where the trustee is in breach of the provisions of the trust deed or of those of this title otherwise relevant (breach of trust), he shall be personally liable to the trustor with his entire assets or, where the trustor is no longer present, to the beneficiary,

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pursuant to the principles of the law of contract. The third party acting in bad faith, however, shall be liable for damages to the settlor and to the beneficiary pursuant to the regulations relating to tortuous acts, but only insofar as they did not themselves cause the breach.

2.) In the case of a breach of trust, co-trustees shall be liable jointly and severally, without limit, if the trust instrument does not determine otherwise, unless they can prove that they acted with the care of a prudent businessman in the supervision of the co-trustee and with reservation of their right of recourse against the guilty party.

3.) With reservation of the right of recourse or insofar as it does not result otherwise owing to the circumstances of the particular trust, the trustee shall be liable for the acts and omissions of a third party to whom he has delegated the performance of transactions on behalf of the trust or engaged in any other way as, for instance, an authorised signatory, authorised agent and similar.

#### Art. 925

##### bb) Transaction in favour of the trustee

1) In the absence of a provision to the contrary in the trust deed and with the exception of his claims for expenses and compensation, the trustee is not entitled to take any advantages from the trust.

2) Where the trust deed does not make provision otherwise, the trustee is therefore only entitled to conclude transactions with the trust property on his own account as, for example, renting or leasing for himself, using money of the trust property for his own business purposes, making loans to himself, appropriating assets of the trust property for his own account or giving it to close relatives or friends, insofar as the transactions in question do not go beyond the scope of orderly administration.

the duties and rights of foundations are only slightly different than those of individual trustees.

In the absence of other statutory provisions, the foundation board as an organization appoints its own chairman, secretary etc. from among its members and also decides the relevant powers and duties. The Board of Trustees consists of at least two members. Legal persons may be members of the Board.

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3) Any other transaction which cannot be rescinded renders the trustee liable for damages to the settlor or the beneficiary subject to a right of claim against a third party acting in bad faith.

4) Where it becomes apparent that the trustee has mixed trust property money with his own money, he must pay interest on these monies at one and a half times the normal domestic rate and, if he has used these moneys profitably in business transactions, he must render account of such business and provide information and deliver up in full the share of the profit accruing to the trust property.

5) Where the amount of profit cannot be determined, the trustee must also pay interest on such monies at a higher rate, depending on the circumstances.

6) Unless the trust deed determines otherwise, the claims referred to in the foregoing may be brought by the trustor or, if the trustor is no longer alive or is otherwise unable to act, by the beneficiary and, if a beneficiary does not take action, by a trustee appointed by the Princely Liechtenstein Court of Justice for the benefit of the trust.

The period of a foundation board is three years provided that nothing else is stated in the foundation document. At the end of this period the foundation board is appointed again.

The members of the board may or may not be paid. If there is any doubt they are to be paid.

In case the member is not paid, liability for ordinary negligence may be excluded in the foundation declaration provided the creditors of the foundation are not harmed. This exclusion is only valid internally.

The foundation deed or supplementary foundation deed may be used to set up a detailed organization.

As long as the statutes or the law do not state otherwise, the management of entire foundation board is collective and they are collectively obliged to act and make decisions in good faith. This, on the other hand, means that the decisions of the foundation board require unanimity in the absence of any statutory provision.

The general statutory provisions of Art. 187 and 187a apply here as well.

The authority for the foundation applies accordingly. The foundation board or the representative, who is the authorized person, must apply his signature in the name of the foundation.

Within the framework of the law and regulations, the foundation board may transfer the management of the foundation to one of its members or any third party. They can also appoint representatives or other helping hands and can issue regulations about the care of business management.

The extent of the foundation board's powers in relation to duration, effect, exercise and similar should be within the framework of the law and statutes. It is to be mentioned in the statutes, how the signing authority of the foundation is regulated and who decides it.

As mentioned before, in the absence of regulations, the foundation board has the authority to act but only jointly. Art. 188 Para 3 PGR t applies here. It means that a successful representation is possible only if at least two members of the foundation board

participate or put down their signatures. The four eyes principle applies here. This can be waived off only if the foundation deed or supplementary foundation deed says so.

### **6.5.3 Appointment of the foundation board**

The Foundation Law contains no special provisions for the appointment of the foundation board.

The foundation deed must however according to Art. 552 § 16 par. 1 Zif 7 PGR, contain provisions for the appointment and replacement of foundation board members in case of death or inability, termination, expiration of duration, or any other reason.

The right to appointment and remove or nominate/recommendate potential members to the foundation board can be entrusted to each or all board members or to individual or all participants or to third parties. Often it is seen that the termination of a member of the foundation board in itself leads to the appointment of another. In case more members are to be chosen to the board, the foundation board as a whole has to choose them.

The provisions of Art. 180a PGR also apply to the foundations.

#### **6.5.4 Prohibition of competition**

A prohibition of competition also applies to the foundation board according to the general provisions of the PGR<sup>79</sup> and even if the statutes or by-laws

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<sup>79</sup> Art. 187

##### *d) Power to the organs and the Representative*

1) The bodies as well as the other persons appointed to manage and represent are authorised by virtue of the law to conclude on behalf of the legal entity all transactions with bona fide third parties which may promote the purpose or object of the undertaking. Applicable law and statutory provisions regarding the nature of the exercise of the authority are the preconditions.

2) Third parties may also be legal entities or firms in which the legal entity participates as member.

3) In respect of this definition and also with regard to the meaning of the restriction of their power of agency in the relationship with the legal entity and bona fide third parties, the bodies and the persons mentioned are subject to the provisions drawn up for the general partnership, insofar as special provisions do not exist.

4) The transactions which they undertake shall be deemed to be valid for the legal entity even if they do not ensue expressly in



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the name of the said legal entity, but the circumstances pertaining to their execution indicate that they are undertaken on behalf of the legal entity in accordance with the intentions of the participants.

5) The authority of persons (firms) appointed for management and representation shall be in accordance with the authority assigned to them. In case of doubt, it shall extend to all lawful acts, which are usually associated with the execution of such transactions.

Art. 187a

*e) Limitations on effective representation*

1) The legal entity is not bound/obliged by the actions of a representative who exceeds the powers assigned to him or exceeds the powers that may be assigned to him under the law.

2) The legal entity is not bound/obliged by the actions of a representative who exceeds the powers assigned to him, if it proves that any third party knew or could have known under the circumstances that by acting in the particular way the representative was exceeding his powers. The knowledge of relevant statutes and decisions of relevant organs will not suffice as proof.

3) Whenever the representative body has crossed its assigned competency given by statutes or decisions of relevant organs, the legal entity is not bound by these decisions, if it is able to prove that the third party knew or could have known that by acting in the way the representative did, it was exceeding its assigned competency.

<sup>79</sup> Art. 188

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*f) Execution*

1) The articles of all legal entities should determine the manner in which the administration shall declare its intentions, who is authorised to sign and, where several are authorised to sign, who shall sign validly with sole and who with collective signature rights. For the corporation, the limited partnership and limited liability company, the articles of association shall contain such provisions in any case.

2) In particular, the articles may determine that a member of the administration comprised of several members is authorised to sign validly only in combination with an authorised signatory; however, this circumstance must be notified to the Public Register, entered therein and published.

3) Where the law or the articles do not determine to the contrary and the administration is comprised of several members, the participation and the signature of at least two members shall be required for the representation of the legal entity and for valid signature on behalf of the said legal entity. However, also in the case of joint management and representation, expressions of intent as, in particular, summonses and other processes served upon the legal entity shall be validly served when served upon only one of the members entitled to represent or a representative.

<sup>79</sup> Art. 180a

1) At least one member of the administration of a legal entity authorised to manage and represent must be a Liechtenstein citizen domiciled in the Principality of Liechtenstein and be in possession of the professional licence to act as lawyer, legal agent, trustee or auditor, or a government-recognised business qualification.

2) Similarly are persons resident in states party to the agreements forming the European economic space or who possess a government-recognised certificate of qualification that corresponds to one of the requirements laid down in para. 1,

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whose fixed, main employment is with a lawyer, legal agent, trustee, auditor or a juridical person with licence to act as trustee or auditor, or with a bank, and pursue their activity within the intendment of para. 1, within the framework of this employment.

3) Excepted from the obligations pursuant to para. 1 are Legal entities that, on the basis of the law concerning trade, have a qualified manager.

4) Anyone who intends to exercise the activities referred to in paragraph 1 and 2, must notify the government. The government checks the existence of conditions, where appropriate, issues a statement and keeps a list of the persons concerned. Changes in relationships are communicated to the Government without delay.

5) By means of an Executive Order the Government may assign to a government office, for independent settlement, the issuance of confirmations relating to the recognition of business qualifications (para 4), with reservation of recourse to the Government's collegial jurisdiction.

<sup>79</sup> Art 183

c) Restraint of competition

1) Where the articles do not determine to the contrary, the members of the administration of companies with legal personality which pursue commercial objects and of other legal entities whose status is equal to these may not, without the consent of the supreme body or, in the absence of a supreme body, without the

approval of the judge in an extrajudicial proceeding, either effect transactions in the line of business for their own account or for the account of third parties or participate as a partner or member with unlimited liability or occupy a position in the administration or the audit authority in a company without legal personality or

in a legal entity in the same line of business.

(Beistatuten) approve it or it could lead to more comfortable price ability.

Moreover the provisions of the fiduciary duties in relation to the trusteeship are used particularly in situations where conflict of interests may arise.

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2) The consent may be expressed in general terms in the articles. Furthermore, the said consent may be assumed where, on the occasion of the appointment as member of the administration of the legal entity such an activity or participation was known and its termination was nevertheless not expressly required.

3) Members of the administration who infringe the restraint stated in the first paragraph may be removed at any time without obligation to compensate. Moreover, the legal entity may demand compensation for damage or, instead of this, demand that the business effected for the account of the member of the administration be deemed to have been concluded for its account and, regarding the business concluded for the account of others, demand the surrender of the emolument obtained for this or the assignment of the claim for emolument.

4) The rights of the legal entity referred to in the foregoing lapse three months from the day on which the other members of the administration and, if members do not exist, the members of the audit authority gained knowledge of the substantiating fact and in all cases after the expiration of one year.

5) Other contractual arrangements, such as the agreement not to compete, etc., are reserved.

## **6.6 Audit Authority**

### **6.6.1 The Law**

*Art 552 § 27 PGR*

#### *II. Audit Authority*

*1) For each foundation subject to the supervision of the foundation supervisory authority pursuant to § 29 the court shall in special noncontentious civil proceedings appoint an audit authority in accordance*

*with Art. 191a, para. 1. In these proceedings the foundation supervisory authority shall have the status of a party.*

*2) The audit authority must be independent of the foundation. It is under an obligation to notify the court and the foundation supervisory authority of reasons, which rule out its independence. The foundation supervisory authority may demand from the audit authority the certification and evidence necessary for the assessment of independence.*

*The following persons in particular shall be excluded as audit authority:*

- 1. members of another executive body of the foundation;*
- 2. persons with an employment relationship to the foundation;*
- 3. persons with close family connections with members of executive bodies of the foundation; or*
- 4. persons who are beneficiaries of the foundation.*

*3) The founder may submit two proposals for the audit authority, stating his preference. If the founder has not taken advantage of this right, the foundation board may refer such a proposal to the court.*

*Subject to Para. 2, the court shall as a rule appoint the preferentially proposed audit authority.*

*4) As executive body of the foundation, the audit authority shall be under an obligation to verify once a year whether the foundation assets are being managed and appropriated in accordance with their purposes. It shall submit to the foundation board and the foundation supervisory authority a report on the outcome of this audit.*

*If there is no reason for objection, it shall be sufficient to provide confirmation that the assets have been managed and appropriated in accordance with the purpose of the foundation and in conformity with the provisions of the law and the foundation documents. If while performing its duties the audit authority ascertains circumstances, which jeopardize the existence of the foundation, it shall also report on this. The foundation supervisory authority may demand from the audit authority disclosure of all facts of which it has become aware during the course of its audit.*

*5) In the case of common-benefit foundations, the foundation supervisory authority may on request dispense with the appointment of an audit authority if the foundation only manages minor-value assets or if this seems expedient for other reasons. The Government shall by way of Executive Order lay down the prerequisites for exemption from the obligation to appoint an audit authority.*

#### **6.6.2. General**

As long as a foundation is under a foundation supervision authority it has a duty to appoint an audit authority.

Moreover, all foundations in which the founder is under observation have a duty to appoint an audit authority.

The audit authority cannot be appointed for more than one year the first time and no more than three years at any time. (Art. 193 PGR). Other general provisions relating to the audit authority given in PGR also apply.

Those who belong to another organ of the foundation, who is in an employment agreement with the foundation, who is in close family relation with the participants in the foundation organ or who is a beneficiary of the foundation cannot be appointed as auditors.

The auditors have to check the financial statements, inventories, profit and loss accounts and other accounts of the foundation on their legality, correctness and reliability. Moreover they must check whether these documents give the correct



portrayal of the performance and financial position of the foundation (Art. 195 PGR).

The audit authority is under duty to immediately bring to the attention of the parent organization any irregularities or violations of the statutory provisions or law. It has to be mentioned by the founder in the foundation deed or by laws, what the parent organ is.

The transfer of professional mandate of the audit authority requires permission from the government. It is subject to certain conditions.

If special reasons are presented foreign auditors or audit companies may be allowed.

## **6.7 Other organs**

### **6.7.1 General**

The founder can also make other organs and provide them with rights. Their duties can be to determine a beneficiary from a list of beneficiaries, to determine the time period, amount and conditions of a profit

distribution, management of the assets, to advise and support the foundation board, to keep an eye on the foundation assets, to safeguard the purpose of the foundation, to reserve provisions or issue instructions and to protect the interests of the foundation participants.

These organs cannot have representation power.

## **6.8. Representation**

### **6.8 General**

Domestic legal entities and therefore foundations are obliged to appoint representatives in Liechtenstein. This representative must be living permanently in Liechtenstein and must be a resident of a state belonging to the European economic area. He should be an independent representative of the foundation for the authorities and must be an empowered authorized signatory without requiring the effective participation of any others (Art. 239 PGR<sup>80</sup>). One can

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<sup>80</sup> *III. Audit authority*

Art. 191a

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*1. Execution of the foundation authority*

1) Unless otherwise provided by law, these are competent to perform the duties of an auditor:

1. Accountant;
2. Auditing companies;
3. Trustee;
4. Legal entities and trust companies with trustee approval.

2) Where the law speaks of recognized auditors or experts, persons according to Law on Accountants and Auditing companies are concerned, where companies are involved in the transaction within the meaning of Article 1063 and Article 182e para 3.

Art. 192

*2. Appointment*

1) The supreme authority may appoint one or several auditors as audit authority who can neither belong to the administration nor be employees of the legal entity assigned to the said administration and shall exercise their authority and obligations pursuant to the law, the articles and possible resolutions of the supreme body, with or without money consideration.

2) The auditors are not allowed to share the burden of checking the accounts of the company, not even to third parties, through whom they may influence the management or direction of the company.

3) An audit authority in which the company holds any shares cannot be chosen even if it is through a third party the company may exercise influence on the management or direction of the audit authority.

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4) Establishment of an audit authority with responsibility for individual businesses, business divisions or subsidiaries can be foreseen and provisioned for in the statutes.

5) The statutes can foresee, apart from the participation of the community, and other third party creditors, loans and obligations, allow non-profit enterprises, the right to appoint individual members or chairmen of the auditors (tied auditors).

6) For companies that are required to disclose pursuant to Article 1057, an auditor is absolutely essential. As statutory auditors, auditors and auditing must be used for the purposes of auditing as defined by law.

7) Where the audit authority is not appointed or is not completed pursuant to the law or the articles, the court shall, upon application of a participant in the legal entity, in the extrajudicial proceedings, determine a three-month period of time during which the audit authority shall be appointed or completed and should this period of time elapse without the said audit authority being appointed or completed, the court itself shall designate the required audit authority members for the period until the appointment is made.

8) A legal entity which undertakes commercial activities or whose purpose or object laid down in regulations allows the pursuit of commercial objects, must appoint an audit authority pursuant to para 1.

9) The resolutions or other documents governing the appointment, termination of auditors and the identities of the auditors must be registered and deposited with the Public Registry Office.

Art. 193

*3. Position*

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1) In the case of companies with legal personality and equally legal entities, the audit authority may not be appointed for longer than one year in the first instance and, later, for not longer than three years.

2) If doubt exists, this latter duration shall be applicable to the audit authority for all the legal entities.

3) The members of the auditors cannot transfer their obligations unless the provisions allow it or when deposing before courts or other administrative bodies.

4) Provisions established for the members of the Audit provisions apply *mutatis mutandis* to their deputy if they are to appear or act as such.

5) Insofar as exceptions are not determined, the audit authority shall act towards third parties as a body and shall be represented by its chairman.

Art. 194

Repealed

#### *4. Tasks*

Art. 195

##### *a) In General*

1) The balance sheets, inventories, profit and loss accounts and other books of account of companies with legal personality and other legal entities, insofar as the latter pursue commercial objects, shall, as far as possible, be examined by the appointed audit authority with respect to regularity, accuracy and reliability and to determine whether the financial situation and the business result are presented correctly.

2) A legal entity that undertakes commercial activities or whose purpose or object as laid down in regulations allows the pursuit

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of commercial objects must appoint an audit authority pursuant to para 1.

3) For this purpose, the audit authority may, as a body or through individual members, demand that the books of account and documentary material be submitted to it, that as far as possible it is called in for the inventory taking and that the administration explains certain individual items to it.

4) The audit authority may demand that certain subjects be handled by the administration or placed on the agenda of the supreme body for consideration and decision by resolution.

#### Art. 196

##### *b) Reporting*

1) In the case of companies with legal personality, the audit authority must report in writing to the supreme body concerning the balance sheet and profit and loss account submitted to it by the administration and, as far as possible, this report shall furnish information concerning the following:

1. the financial statements submitted to the governing body's annual report and in accordance with the appropriate law and statutes for companies within the meaning of Article 1063, the purpose of the report is to give information as to whether the financial statements in accordance with the relevant authoritative accounting standards give a true and fair view and if so, whether it meets the statutory requirements;

2. Whether the balance sheet and profit and loss account agree with the books of account and the inventory,

a) The annual report under Article 1096, if one has to be made;

b) In the Corporate Governance report information to be in accordance with article 1096a paragraph 1 item. 3 and 4, where one needs to be created, with regard to the remaining

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information under Article 1096a para 1 of the report is to give information on whether the corporate governance report has been prepared

3. the auditor to the governing body recommends to approve the financial statements, with or without restrictions or to the administration reject them if they are not in a position to express an audit opinion;

4. The request of the administration in relation to the profit law and articles of incorporation.

In addition, the report has to indicate in the introduction which of the financial statements that are subject to examination and under which financial reporting framework they are to be assessed, then the persons who have led the inspection are to be named and it has to be confirmed that the requirements for competence and independence are met, as well describe the nature and scope of the inspection, but this description must at least identify the auditing principles based on which the study was conducted as well as require the report, and the date where the responsible auditors are to sign.

2) Where a consolidated annual report is compiled, paragraph 1 item. 1-3 and para 2a, 3 and 4 shall apply by analogy.

2a) The audit authority shall draw to the attention of the management board and in important cases the general body as well, any irregularities or infringements of the provisions contained in the law or the articles which come to the notice of the said audit authority in the performance of its duties.

3) Where an auditor is required, it can be approved without prior presentation by the highest authorities without a report. In addition, the auditor for medium and large companies within the meaning of Article 1064 para 2 and 3, has to be present at the meeting of the supreme organ. If no auditor is present, the decision of the supreme body is voidable. In the presence of an auditor the governing body can by an unanimous decision waive.

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4) A minority identical to that which may demand that the supreme body shall be summoned has the right to draw to the notice of the audit authority certain objects which require examination on the understanding that the audit authority shall report this to the next meeting of the supreme body for the purpose of passing a resolution.

Art. 197

*c) Pledge of secrecy*

Outside the meeting of the supreme body, communications from the auditors to persons other than members of the administration and the audit authority concerning the observations made are, save for when another responsibility is present, inadmissible, pursuant to the provisions concerning the right of privacy in particular.

Art. 198

*5. Other legal provisions*

1) Concerning the organisation of the audit authority, further provisions for the expansion of the audit authority's powers and obligations and in particular for the undertaking of interim audits, may be specified in the Articles.

2) In addition to the ordinary auditors (audit authority), the supreme body may at any time appoint special inspectors or experts to investigate the management or individual parts thereof.

<sup>80</sup> IV Legal representative

Art 239

1.Obligation to appoint



also appoint a legal person as a representative provided this legal representative has a natural person as a representative.

The representation is to be entered in the public register (Art. 240 PGR<sup>81</sup>).

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1) Domestic Vervol personal and registered trust companies as well as branches of foreign legal persons have to appoint a permanent resident of a EEA member state to represent the Vervol personal to the authorities.

2) Instead a representative can also be described as domestic VerVol personal which means that a natural person is appointed as a representative in the spirit of para 1.

3) Notwithstanding the provision concerning the appointment of a legal advisor, the observance of the provisions of this article may be supervised by the Government in administrative proceedings.

4) The obligation to appoint may be dropped with the agreement of the Government where important reasons exist, for example, where a legal entity or its branch establishment brings into the country work and earnings or significant public proceeds or similar and in the event that the legal entity's remaining representation provides adequate warranty as a substitute for the legal representative.

<sup>81</sup> Art 240

Registration in the Public Register

1) In the event that the legal entity is not entered into the domestic Public Register, the bodies of the legal entity entitled to represent, shall notify the legal representatives to the Public Register, enclosing an excerpt from the registers kept abroad, or a credible proof of the identity of the representatives or a mailing address. The following information shall be provided:

1. The name of the firm or the name of the legal entity, or besides the domestic mailing address, the exact address

The representative is empowered by law to represent the Foundation in all matters in front of all domestic judicial and administrative authorities, and to receive any kind of communication, including notifications and the like. He is also authorized to store files and to keep records to the extent required by the domestic operation (Art. 241 PGR<sup>82</sup>).

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consisting of the street name, number in order to guarantee the regular delivery of the required information.

2. The name, domicile and nationality of the legal representative or - besides the domestic mailing address - the exact address, consisting of the street name, number in order to guarantee the regular delivery of the required information.

2) Repealed

3) If the notification of the names that sign on behalf of the company is not certified they have to be handed to the head of the Land and Public Register to be put in the record.

4) Repealed

<sup>82</sup> Art 241

3. Legal power of attorney

1) By virtue of the law, the legal representative is empowered in respect of all domestic courts and administrative authorities, in all matters, notwithstanding a possible obligation to compensate the legal entity, to receive declarations and communications of all kinds including service and the like, to keep files in safe custody and to keep books of account, where and insofar as the domestic business requires this.

Apart from this power of representation, the representative can only commit the foundation if has authorization to do so. (Art. 241 Para 2 PGR).

Representatives must make the signature in such a way that the wordings of the signature or any other additional symbol of the company always signify the representation of the company (Art. 241 Para 5 PGR).

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2) Apart from representation towards authorities, the legal representative can only put a legal entity under obligation insofar as he has been empowered to do so by the said legal entity.

3) Receipt of messages and documents from public officials and private individuals, which are aimed at legal entity or trust company is effective when they are delivered to the address designated by Article 240. Delivery carried out to the authorities is subject to the provisions regarding delivery of documents.

4) Where doubt exists, several legal representatives appointed by one legal entity shall have joint power of attorney.

5) Legal representatives shall sign on behalf of the legal entity by signing their own name or attaching the company name to their name or attaching legal representative to their own name.

6) Otherwise, the provisions concerning signature rights in the case of legal entities shall apply analogously to the signing effected by the legal representative.

The representative is liable to the foundation for any kind of harm arising out of his actions in the same way as in a contract. If there is more than one representative, they are collectively responsible for their actions (Art. 242 PGR<sup>83</sup>).

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<sup>83</sup> Art 242 Responsibility  
4. Responsibility

- 1) The legal representative shall be liable to the legal entity for all damage caused as a result of the said legal representative's activities, in the same manner as a mandatory.
- 2) Several legal representatives shall be liable jointly and severally for all the damage caused by them as a result of their activities.

## **7. Foundation supervision**

### **7.1 The Law**

*Art 552 § 29 PGR*

#### *E. Supervision*

*1) Common-benefit foundations shall be subject to the supervision of the foundation supervisory authority. The same applies to private benefit foundations, which are subject to supervision pursuant to a provision in the foundation deed.*

*2) The foundation supervisory authority is the Office of Land and Public Registration.*

*3) The foundation supervisory authority shall ex officio ensure that the foundation assets are managed and appropriated in accordance with their purposes. It shall for this purpose be entitled to demand information from the foundation and, through the audit authority, to inspect the books and documents of the foundation. If the appointment of an audit authority has been dispensed with pursuant to § 27,*

*Para. 5, the foundation supervisory authority shall exercise the right of inspection. In addition, it may obtain information from other administrative authorities and the courts and may through special noncontentious civil proceedings apply to the judge for the required orders, such as the control and dismissal of the executive bodies of the foundation, carrying out of special audits or cancellation of resolutions of executive bodies of the foundation.*

*4) Furthermore, to avoid that asset management and appropriation by the executive bodies of the foundation is in conflict with the purpose of the foundation, each foundation participant may through special noncontentious civil proceedings apply to the judge for an order for the required measures in accordance with Para. 3. If there is a strong suspicion that a punishable act has been committed by an executive body of the foundation, the judge may also intervene ex officio, particularly on the basis of a communication from the Office of the Public Prosecutor. In such proceedings the foundation supervisory authority shall have the status of a party.*

*5) Unknown beneficiaries shall be ascertained by way of public citation*

*proceedings on the application of the foundation supervisory authority.*

*6) The Government may, by way of Executive Order, issue more detailed provisions concerning the activity of the foundation supervisory authority as well as the setting and imposition of fees by the foundation supervisory authority.*

## **7.1 General**

Public purpose foundations are under the supervision of the foundation supervision authorities. The same applies to private purpose foundations that are under supervision due to a provision in the foundation deed.

Land and public register offices are the foundation supervision authorities.

If the management or use of the assets by the foundation board waivers from the assigned purpose, every participant who has an interest in the legally appropriate management and use of the

assets or its proceeds may complain to the supervision authority.



## **8. Amending the foundation documents**

### **8.1 By the founder**

According to Art. 552 § 30 PGR<sup>84</sup> the founder can reserve the right to revoke the foundation or to make amendments in the foundation declaration in the foundation deed. This right only exist if the founder has reserved this right.

These rights are strictly personal and cannot be inherited or transferred. If one of these rights is to be exercised by a direct representative he has to

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<sup>84</sup> Art 30

I. Rights of the Founder to Revoke or Amend the Foundation Documents

1) The founder may in the foundation deed reserve for himself the right to revoke the foundation or to amend the declaration of establishment. These rights cannot be assigned or inherited. Should one of these rights be exercised by a direct representative, this shall require a special power of attorney referring to this transaction.

2) If the founder is a legal entity, it cannot reserve for itself the rights in accordance with para. 1.

3) If the rights in accordance with para. 1 are exercised by an indirect representative (§ 4, para. 3), the legal consequences shall revert directly to the founder.

have a power of attorney specifically regarding this act.

If the founder is a legal person he cannot reserve these rights.

If the rights under Para 1 are exercised by an indirect representative (Art. 552 § 4 Para 3 PGR), the founder will be responsible for the legal consequences.

The scope of the right to amend (documents) is not regulated by the law. It is therefore decided by the founder himself. It is recommended to keep an unrestricted right to amend so that the foundation declaration can be amended and by that adaptable to changed circumstances. The amendment can have effect on the foundation purpose and the organization of the foundation. Also the list of beneficiaries can be changed.

This right can only be used by the founder. If he dies, the foundation will become unchangeable. A legal person cannot reserve the right to amend the documents of the foundation as a founder.

## **8.2 Amendment of the purpose of the foundation**

### **8.2.1 The Law**

#### *§ 31*

##### *1. Amendment of the Purpose*

*1) An amendment of the purpose of the foundation by the foundation board or another executive body shall be allowed only if the purpose has become unachievable, illegal or irrational or if circumstances have changed to the extent that the purpose has acquired a quite different significance or effect, so that the foundation is estranged from the intention of the founder.*

*2) The amendment must comply with the presumed intention of the founder and the power to amend must be expressly reserved to the foundation board or to another executive body of the foundation in the foundation deed.*

### **8.2.2 General**

The law allows for the amendment of the purpose of the foundation by the founder himself along with the foundation board or any other foundation organ.

The precondition is that the purpose must have become unachievable, illegal or unreasonable. The purpose of the foundation may also be amended if the circumstances have changed so much that the purpose has a completely different meaning and effect resulting in that the foundation no longer corresponds to the will of the founder.

The possibility of amending the purpose is open present if the power to amend has been expressly reserved in the foundation deed. However the change must correspond to the presumed will of the founder.

With this regulation the founder can prevent the stonewalling of the foundation, which might happen after his death.

However, this concerns only the purpose of the Foundation. Often, however, the change of purpose will lead to a change of beneficiaries with it. In case this is unavoidable and corresponds to the will of the founder, this must also be made possible.

### 8.3 Amending Other Contents

According to Art. 552 § 32 PGR<sup>85</sup>, any amendment to other contents of the foundation deed or the supplementary foundation deed, like for example in the organization of the foundation, by the foundation board or another organ is admissible.

The power to amend must be expressly reserved to the foundation board or any other organ in the foundation deed.

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<sup>85</sup> § 32

#### *2. Amendment of Other Contents*

An amendment of other contents of the foundation deed or the supplementary foundation deed, such as in particular the organisation of the foundation, is permissible by the foundation board or another executive body if and insofar as the power of amendment is expressly reserved in the foundation deed to the foundation board or to another executive body of the foundation. The foundation board shall, safeguarding the purpose of the foundation, exercise the right to an end if there a substantially justified reason to do so.

If a specific justifiable reason exists, the foundation board can make amendments but only if the amendments are in agreement with the foundation purpose.

The amendments made on the basis of this legal empowerment should not amend the foundation purpose. Besides this option to amend this option is to be used in a very restrictive way.

## 9. Office Registered Abroad

### 9.1 The Former law

In Liechtenstein, the old law allowed foundations abroad to shift head office if it was not against the law and the statutes and if prior permission was given from the government.

In case this approval was not given, an attempt to shift head office would result in an automatic dissolution of the foundation. Transfer of the head office without a simultaneous transfer of all its management was not allowed.

The general consequence for tax purposes<sup>86, 87</sup> of shifting the head office of the foundation was that

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<sup>86</sup> Art. 33 SteG  
*Time Limit on Tax Liability*

1) The tax liability of a natural person begins at the point in time where an asset subject to tax liability is acquired and ends the day the conditions for the tax liability are no longer present.

2) The tax liability of companies begins, according to Art. 31 Para 1 Bst. c and d, when the company is constituted and end when it is dissolved.

the foundation no longer paid taxes in Liechtenstein but in its new home and that applies even today.

## **9.2 The New law**

The new Foundation Law does not expressly govern the possibility of a head office in another country. If a domicile (seat) was not moved to a foreign place according to the old law before the new law came into force on 1. April 2009 it is no longer possible.

Some already speak of a "foundation trap-situation" in Liechtenstein, where the stonewalling of a foundation is inevitable although this, with the above-mentioned exceptions, is not desirable.

There are well known examples, where Liechtenstein trustees have made distributions in a foreign country in accordance with the declared wishes of a living founder. In many of these situations, compulsory beneficiaries and other creditors have been

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3) In relation to tax domestic relocation is to be regarded as a new foundation and relocation abroad is considered as a dissolution. Intergovernmental agreements are reserved.

<sup>87</sup> Art. 88I SteG  
Emergence of the tax demand.



successful in making claims. Several trustees did prefer to settle the matter out of court.

Several trustees have found and followed their own solution, to let the foundation establish subsidiaries in BVI (British Virgin Islands), Panama or other tax havens. Afterwards is the entire fortune of the foundation distributed to the new companies. The distributions are thereafter done through these companies. At first glance an alternative, but upon closer inspection possibly connected to significant violations of the law. It has to be tested whether or not it is possible to do this without violating the law, foundation deed or the supplement deed, if it is an invalid "show-off" or if the offences - fraud etc. - have not been satisfied in the main part of money laundering, because in most situations, the enrichments of the trusted is at least in the top of the additional honoraria. This kind of subtleties will not be possible in the future.

Many of the founders or beneficiaries from the old Liechtenstein Foundation Law will be able to make successful claims against Liechtenstein foundation boards. The claims are derived from damages/ torts and based on wrong advice or poor advice.

Some Liechtenstein trustees have deliberately not told their foreign customers or (intermediaries of

trust clients) financial intermediaries and shows that there is no obligation to act. The reason for misadjudgement was the deliberate stonewalling of the foundation so that the mandate for management of the foundation was not withdrawn.

Today the trustees are happy, as it is possible to loosen the stonewalling as the old foundations bring more problems than income. Already many foundation boards are refusing distributions to beneficiaries so that in case of liability in relation to foundation assets, claims and other damage claims may be prevented.

The fact that foundations must undergo a "solvency test" before each distribution, in order to ensure that no creditor is damaged, is also a reason for many foundation boards to stop making distributions.

However the general provisions of Art 234 ff PGR will also apply here. That a change in the head office is now seen as a change in the statute means that preconditions for a change in the statute will apply here.

Since the preconditions for a change in the foundation statute is- above all that the founder is

still alive and the foundation deed and supplementary foundation deed allow for a change in the head office – all the general provisions of the PGR<sup>88</sup> in relation to head office will apply. Moreover,

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<sup>88</sup> Art 234

1. The subordination of a domestic legal entity to foreign law and thus the transfer abroad of its domicile without dissolution is admissible only with the permission of a public office designated by the Government by ordinance.

2) The authorization of the registered office of a domestic legal entity abroad shall be granted only if:

1. The legal entity continues to exist under foreign law ;

2. A decision has been taken by the competent organ of the legal entity of the registered office abroad,;

3. The legal entity has regard to the forthcoming change of the company statute, and has asked its creditors to notify the public of existing claims;

4. Is prima facie evidence that the claims of all creditors who are entitled to ensure their claims were reasonably assured to the extent that creditors cannot demand satisfaction. The right to ensure is available to creditors only if:

a) The demands of a working day before or after the call to originate according to point 3.

b) They demonstrate that the performance of their debts by transferring the seat is at risk abroad, and

c) They register their claim to reason and amount within two months from the date of the invitation in writing.

The creditors point out under para. 3 that;

5. settled at accountancy obligations legal entities, the financial statements and the annual report of the last fiscal year, together

even with the new Foundation Law, the government's approval for the transfer of registered office abroad is still necessary. For tax purposes the transfer of the foundation head office will be treated as dissolution of the foundation according to Art 33 of the tax law.

But no power to the foundation board in relation to this transfer was given according to the law; the actual transfer is only possible under the provisions of the new law. This includes compliance with the intention of the law (particularly the petrification of the Donors will).

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with the audit report, which were from the Land and Public Register Office under Article 956 made ff known to the application are, and the members and creditors have the right to inspect these documents and the to request free delivery of copies;

6. The legal entity submits a certificate from the tax, stating that all taxes due are paid in Liechtenstein.

3) Legal entities can be deleted abroad only because of transfer of the seat, where it is established that:

1. Accordance with provisions of paragraph 2 points. 4, the creditors whose claims are satisfied or reasonably assured, or

2. The creditors agree with the closing of business decision.

## **10. Action for nullification of gifts and other property donations to the foundation properties**

### **10.1 General**

§38 regulates the various possibilities of making an act for nullification that are available to the founder, his heirs or creditors. This Article corresponds to the earlier Article 560 of the PGR.

### **10.2 Action for nullification**

Both the compulsory beneficiaries as well as creditors can challenge gifts and other property dedications, the law speaks of "property donations" to foundations if the corresponding preconditions are met.

Art. 560 § 38 PGR<sup>89</sup> states that a foundation can be challenged by the heirs or the creditors in the same way as gifts.

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<sup>89</sup> § 38

Art 560 § 38 PGR

The challenge is not against the existence of the Foundation as such but a challenge to the compulsory portion or the asset allocation.

The founder or his heirs may challenge the foundation itself in the absence of will.

In this case, the challenge is against the foundation itself and according to the wording of the law, the provisions apply *mutatis mutandis* on the challenge to contracts. The grounds for nullification are: error (§ 871 ABGB), deceit (§ 870 ABGB) or threat (§ 870 ABGB).

### **10.3 Nullification by compulsory beneficiary**

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#### *1. Voidability*

1) The contribution of assets to the foundation can be challenged by the heirs or the creditors in the same manner as a gift.

2) The founder and his heirs can challenge the foundation on account of deficiencies of intention in the same manner as the rules concerning deficiencies in the conclusion of a contract, even after the registration of the foundation.

### **10.3.1 General**

The law regards any beneficiary (§ 762ff ABGB) who is mentioned as `could be` heir in the last will as a compulsory beneficiary. These are his children, his spouse or, if he has neither children nor spouse, the heirs are his parents.

If the deceased did not carry out this duty of his, then the compulsory beneficiary can contest the testamentary disposition. If this contains too little, he can bring a claim for finishing of this compulsory portion.

### **10.3.2 Applicable Law**

First, the question arises, which law is applicable in Liechtenstein. The Liechtenstein Supreme Court had solved the question regarding the collision law according to Art. 29 IPGR. According to the international private law, the legal successor of the deceased has to be determined while he is still alive (so called heir statute).

The personal statute of a natural person is the law of the land to which the person belonged (§10 Para 1 IPRG).

According to Art. 29 IPRG all inheritance questions according to the personal statute of the deceased have to be ascertained at the time of his death, unless there are conflicting special regulations. It is also to be assessed according to the relevant inheritance statute, if, to whom and under which conditions the compulsory claims will arise.

It is also to be assessed according to the Inheritance Statute whether the compulsory beneficiaries can make a "compulsory completion claim" against the inheritance or directly against the gifts and most importantly when such a claim lapses in time.

### **10.3.3 Legitimate Portion and Supplement to the Legitimate Portion**

As mentioned above, the principle of personal statute decides that the question whether a legitimate portion exists is assessed according to the law of the state to which this person belong. This also applies to supplement claims. The same was



described by Supreme Court<sup>90</sup> of Liechtenstein as inheritance law. Therefore the same is accepted as

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§ 871 Error

Was a part of the contents of the declaration from him or the other caught in a mistake that concerns the main or essential part where the intention was directed and explained, there is no liability, unless the mistake was caused by the other party or this clearly appears from the circumstances or has been enlightened in time.

§ 870 Deceit and Threats

1) Who have been induced by the other party with cunning or unjust behaviour and has founded a treaty out of fear is not obligated by this. 2) Whether fears were founded, must be judged from the size and probability of the danger and the emotional nature of the threatened person.

90 14. Main body

From the legitimate Portion and the Qualifications in the Legitimate Portion or Inheritance

Who is as a legitimate heir entitled to a legitimate portion.

§ 762

The people who are remembered by the deceased in the final order shall in the absence of his parents, be his children and spouse.

§ 763

The general rule is that under the name of children is also the (§ 42) grandchildren and great-grandchildren included and conceived under the name of parents, grandparents are also included. There is in this context no difference between legitimate and illegitimate children, as soon as the right and the order of legal succession come into force.

§ 764

The part of the inheritance that these people are entitled to is called the legitimate portion: the person entitled to this is called the legitimate heirs.

§ 765

Every child and spouse is entitled to half of what they would have received under the legal succession.

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§ 766

The ascending line of any legitimate heir as a legitimate portion entitled to one third of what he would have received under the legal succession.

§ 767

*And under what restrictions*

1) A person who has waived the inheritance, which is excluded under the provisions in the eighth major pieces of legislation of inheritance or has been disinherited by the testator legally, has a no claim and is in the measuring regarded as if he does not exist.

2) A compulsory reduction under § 773A does not increase the compulsory portion of the remaining legitimate heir.

*Requirements of a legitimate disinheritance*

§ 768

A child may be disinherited:

1. If the deceased has been left helpless in an emergency;
2. If it has been convicted of imprisonment for life or 20 years because of one or more criminal acts committed;
3. If it consistently leads a life contrary to public morality.

§ 769

For the same reasons the spouse and parents can be disinherited, the spouse also if his duty to assist the parents with the nature of the testator has been grossly neglected.

§ 770

In general, the inheritance of a legitimate heir that commits such acts can under § § 540-542 be withdrawn to the legitimate portion by the last expression of the compulsory portion.

§ 771

The cause for disinheritance must always be expressed by the testator or be proved by the heirs in the words and the meaning established by the law.

§ 772

The disinheritance is repealed only by an express declaration in statutory form.

§ 773

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If the legitimate heir is indebted or very lavish, the likely concern that prevails is that his children would miss his legitimate portion completely or mostly, he can require the testator to withdraw his legitimate portion in order to give it to the children of the legitimate heir.

§ 773a

*Compulsory reduction*

- 1) Were the deceased and the legitimate heir at no time stands in a close relationship as otherwise usual in family relations, the testator may reduce the compulsory portion in half.
- 2) § 771 and 772 shall apply mutatis mutandis to the compulsory reduction.
- 3) The right to compulsory reduction is not available for the deceased if he has exercised the right to deduct the compulsory portion groundless.

§ 774

*How to Leave the Legitimate Portion*

The compulsory portion can be left in the form of an inheritance or legacy, also without explicit identification of the legitimate portion. However, the legitimate heirs must be held completely free. Each of the same restrictive condition is invalid. If the legitimate heirs is intended a large inheritance, it may be related only to the part which exceeds the legitimate portion.

*Appeal of the legitimate heir*

§ 775

- a) For an unlawful disinheritance or shortening of the legitimate portions

A legitimate heir, who was disinherited without those conditions prescribed in § § 768-773 were fulfilled, can demand to be supplemented with what has been shortened in the legitimate portion.

*b) for a total disregard*

§ 776

If out of several children, whose existence was known to the deceased, one is entirely passed over in silence, it can request only the legitimate portion.

§ 777

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If, however, it can be proved from the circumstances that one out of several children has been disregarded because the testator was unknown of the existence of that child, the passed over is not guilty of being satisfied with the legal portions, but can demand a similar inheritance.

§ 778

If the deceased has a single legitimate heir, and he by mistaken passes it in silence or if a childless deceased only after declaration of his last will receives a legitimate heir, for which no providence is made, the public institutions reward services cannot exceed a fourth part of all, property amount paid fairly, all other orders of the last will, however, ruled out entirely. They gain, however, if the legitimate heir died before testator, her strength back.

§ 779

- 1) When a child dies before the testator and leaves "Abstämmlinge," they enter with silence in the place of the child in respect of the inheritance.
- 2) The descendants of a predeceased legitimate heir, whose legitimate portion has been reduced, can only demand the reduced legitimate portion.

§ 780

The "Abstämmlinge" (Descendants) of a disinherited child are only authorized to require the legitimate portion, also if the disinherited survives the testator.

§ 781

If the spouse or parents are passed over in silence, they may only require the legitimate portion.

§ 782

If the heir can prove that it has been passed over in silence that a legitimate heir is guilty of §§ 768-770 above, the disregard is seen as a tacit legal disinheritance.

§ 783

*Those who contribute have to pay the inheritance or legitimate portion*

In all cases where the legitimate portion of a legitimate heir is not at all or not fully measured, both the appointed heirs and the

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legatees, but not the spouse with the statutory legacy advance, contribute proportionally up to full payment.

*Type of measuring and calculating the legitimate portion*

§ 784

To measure the legitimate portion properly, all belongings to the deceased, the movable and immovable property, rights and demands which the testator was free to testate to his successors, and all that a heir or legatee is guilty of to the mass, has to be described and estimated. The legitimate heirs are free to attend the estimate and to make their memories here. On the one offered for sale left over pieces the collection of the true value of them cannot be penetrated. Debts and other charges that were liable even in the lifetime of the deceased on the property will be settled from the crowd.

§ 785

1) At the request of a legitimate beneficiary child or spouse of the legitimate heir gifts have to be brought into the calculation of the estate of the deceased. The object of the gift is the estate with the added value that is indicative of the credit provided for in § 794th

2) The right under paragraph one is only available to a child only in respect of who such gifts were given by the deceased at a time where the child was a legitimate heir, the right is only available to the spouse in respect of such donations, which were made during his marriage to the deceased.

3) In any case donations that were made by the testator from income without reduction of his estate's assets to charitable purposes, in correspondence of a moral obligation or from considerations of decency shall remain unconsidered. The same applies to donations that have been made earlier than two years before the death of the decedent to not legitimate heirs.

§ 786

The statutory share is calculated without regard to legacies and others from the last will. Until the actual delivery is the legacy, in respect of profits and the losses, is the proportional relation between the main- and legitimate heir good.

*Credit to the legal portions*

§ 787

1) All that the legitimate heirs actually receive with their inheritance or other disposition of the deceased from the estate is taken into account in their legitimate portion.

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2) When it is determined that gifts are to be taken into account in the legitimate portion all legitimate heir must be consequently increase their legitimate portion under § 785 for with the gifts that he has received from the deceased.

§ 788

What the deceased in his lifetime has given to his daughter or granddaughter for dowry, or to his son or grandson for equipment or has given an office or a given industry or to pay the debts of a grown child, is included in the compulsory portion.

§ 789

In general, advance payments granted to the deceased among the living, in the compulsory portion of the spouse plus all that he receives according to § 758 (§) is to be included in the legitimate portion.

*Or inheritances in the legal succession*

§ 790

The credit for the inheritance of the children from a last testament will only happen if the testator prescribes it explicitly. On the other hand the legal succession to a child who has received from the testator in his lifetime (§ 788) purposes mentioned must be credited. A grandson does not only have to include what he directly received, but also what his parents, in whose place he shall have received, received.

§ 791

What parents in addition to the above mentioned have not credited if the parents are not expressly stipulated to have the refund, considered a gift and not credited.

§ 792

The parents may adopt a child into the imputation of legal succession. But the necessary education and care of other children not of their own could be denied from the assets of the parents, the child must be that which has received it in § 788 purposes mentioned in advance, is credited to the extent to leave than it is to educate and care for siblings is necessary.

§ 793

The recognition of the received inheritances is that each child receives the same amount before the split. If the deceased cannot help enough, so although the child does not respond

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earlier favoured inheritance, but are encouraged also to no refund.

§ 794

For each credit, if the receivable was not in cash but in other movable or immovable property, determines the value of the latter after the time of the reception, the former contrast, after the dates of hereditary succession.

§ 795

A legitimate heir, who due to the law is excluded from his legitimate portions, must always measure out the necessary maintenance.

§ 796

*And the spouse to maintain decent*

The spouse has a claim, except in the cases of § 759 and 795, as long as he is not married that entitles him to the values of the deceased when he lives a decent and fair live. In this claim is to be included all what the spouse after the decedent by contractual or testamentary gift, as the legal inheritance, as a legitimate portion, by public or private benefit inherited; also assets belonging to the spouse exercised by him or such work that can be expected from him under the circumstances.

Article 29

*Succession on death*

- 1) The succession is to be decided according to the personal status of the deceased at the time of his death.
- 2) If a probate carried out by a Liechtenstein court, the legal successor of death, subject to section 3 and 4 is to be assessed under Liechtenstein law.
- 3) The foreign testator may by testamentary disposition or inheritance his legal successor to one of his own rights or the law of the State assume his last habitual residence.
- 4) The domestic testator residing abroad may by testamentary disposition or inheritance his legal successor to one of his own rights or the law of the State assume his last habitual residence.

Art. 10

*Personal law of a natural person*

- 1) The personal status of a natural person is the law of the state where the person belongs. If a person has a foreign nationality, in addition to the Liechtenstein national citizenship, this is the

the inheritance statute in the absence of legal choice of personal laws of the deceased and the founder.

Since no state recognizes entitlement to legitimate portion, no claim for an heir's legitimate portion can be made in Liechtenstein.

The law governing the legitimate heirs claim for a supplement to the legitimate portion is according to Art. 29 Abs 5 IPRG treated the same way as the challenging right of the creditors according to Art. 75 RSO in case of conflict of laws.

#### **10.3.4 Dispute the gift**

In principle, Article 552 § r 38 PGR states, that property donation to the foundation by the heirs or the creditors can be disputed in the same way as a gift.

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relevant. For other multiple nationals of the State is binding on which is the strongest relationship.

<sup>90</sup> OGH 7. March 2002 LES 2003, 100; OGH 9. February 2006 LES 2006, 468; OGH 5. July 2007 LES 2008, 95



The foundation establishment in itself is not a gift according to the prevailing doctrine and jurisprudence, unless the founder makes a unilateral declaration of intention of his own free will. In way of declaration the founder dedicates assets to the foundation. It follows that the establishment is itself is subject to disputes, such as defects, absence of will, etc.

It is important to note that Article 552 § 38 PGR refers only to the establishment of the Foundation itself and not to the post-endowments of the founder or third parties. Such post-endowments are also seen as gifts due to their consensual character. Post-endowments are bilateral transactions between the founder and the foundation (as receiver).

#### **10.3.5 Type of dispute**

According to §785 and §951 ABGB a legitimate heir can bring his legitimate portion from the deceased for the determination of his compulsory share into the calculation and dispose over the foundation in relation to a supplement to the legitimate portion.

Art. 552 § 38 PGR speaks only about the disputes. Under dispute however all disputes are to be done collectively in the sense of the Challenge Ordinance (RSO). It is therefore applicable in all cases of claims by the legitimate heirs that the foundation brings into calculation at least one asset donated by the founder according to § 785, 951 Para 1 ABGB and demand from the Foundation a corresponding compulsory supplement.

It is to be noted that the gift is legally valid. The claim is only for failure of payment in the legitimate portion. The donation is therefore not valid, nor can the legitimate heirs demand its repeal.

#### **10.3.6 Limitation**

Whether a claim regarding legitimate portion exists or whether it is already time-barred will be decided by the Statute of Inheritance.

According to Liechtenstein law, §785 Para 2 ABGB, all gifts are to be taken into account the deceased gave to a person not entitled to legitimate portion two years before his death. The foundation is a person not entitled to a legitimate portion.

In the assessment of the beginning of the time period of two years, one has to distinguish between the period between the first donation to the foundation, mostly the minimum capital of the foundation (CHF 30'000.00), and possible later donations.

For every property donation, the period begins separately. Only the asset allocations, made by the testator and not those that were made by a third party to the foundation are regarded as significant.

Therefore the asset donation plus the legal interests can be challenged but no further than the capital gains made by the legal interests and not on the capital gains that the foundation has achieved on account of its own management.

Interestingly the foundation cannot successfully argue that the value of the property will be much less because of losses due to asset management.

Whether the type of structure of the foundation has any effect on the assessment of the time period is open to debate.

It is important to clarify that the Foundation is a legal entity independent of the founder. The time when the gift or donation came into being is clearly important for the time period. This is the time when the gift was accepted, expressly or implicitly. This is due to the legal nature of the gift, which judges legally qualify as consensual contract. A deferred limitation period (with the death of the testator) will interfere with legal persons and certainly go against the Liechtenstein legal norms.

This is partly because of the fact that the foundation is not being disputed but the donation of the assets as such.

Bösch<sup>91</sup> disagrees and points out: If the foundation is freely revocable by the founder or if it is

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91 § 785

1) At the request of a legitimate beneficiary child or spouse gifts can be brought into account in calculating the legitimate portion in the estate of the deceased. The object of the gift is the estate with the added value that is indicative of the credit provided for in § 794th

2) The right under paragraph one is only applicable to a child in respect of such gifts, made by the deceased at a time, where he has a legitimate child, the spouse only in respect of such donations, which have been made during his marriage to the deceased.

economically dominated by the founder then the deadline for the calculation of the gift will not be set in motion in the lifetime of the economic founder.

Because of the divergent legal opinions, it is appropriate, in any event, to establish the Foundation as a discretionary and irrevocable foundation.

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3) In any case donations made by the testator from income without reduction of his estate's assets to charitable purposes, in correspondence of a moral obligation or from considerations of decency remain unconsidered. The same applies to donations that have been made earlier than two years before the death of the decedent not a compulsory people.

#### *4. Legitimate portion*

##### **§ 951**

1) Where a provision regarding donations to legitimate heir are attacked (§ 785), but the estate is insufficient to cover, the legitimate heir can require the person receiving the gift to cover the shortfall. The recipient can avoid the issue by payment of the shortfall.

2) If the donor himself is a legitimate beneficiary, he is liable to the other only as far as his result of the donation is more than he would receive from donations due to his legitimate portion.

3) Among several recipients, the recipient is liable only in proportion as the recipient for later donation is not required or is not able. Recipients are liable in the same proportion.

<sup>91</sup> Bösch, Liechtenstein Foundation Law, 712ff

From the above it follows that in a foundation, properly dedicated assets to a foundation in favour of "beneficiaries that are not entitled to a legitimate portion", that became effective two years before the death of the founder or testator, cannot be challenged<sup>92</sup>. This is only valid if the applicable law does not allow claims to be made against beneficiaries not entitled to a legitimate portion. (The way it is permitted under the German law).

## **10.4 Disputing a gift/ donation by the creditor**

### **10.4.1 Claim of nullification**

According to Art. 64 RSO, legal acts that concern the assets of a debtor can be disputed for the satisfaction of a creditor and be declared as ineffective. Such legal acts are particularly gifts, but also all other acts which are mentioned in Art. 65-68 RSO .

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<sup>92</sup> Vgl. Hepberger 2003, Page 79.

The prerequisite for a successful dispute is that the creditor has an enforceable claim<sup>93</sup>. Other preconditions are that the compulsory enforcement has not satisfied the creditor or that even if the enforcement were to be carried out, the creditor will not be satisfied.

The dispute can be made by a claim( in all cases through a reclaim), or plea through an order of payment (§ 577 ff ZPO) or as a legal offer. (§ 593a ZPO).

The general dispute period is one year. The legal action must be carried out within one year after the approval of the enforcement. The burden of proof for the evidence of disputed claim lies on the disputing creditor.

Other legal actions can also be voidable if they were carried out by the debtor within the last years before the approval of the enforcement and the debtor was still in debt at the time when the claim was made.

However art. 66 Para 2 RSO says that a dispute is excluded if the beneficiary proves that he did not know the financial position of the debtor. As long as

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<sup>93</sup> Art.64 para 2 RSO

the foundation board and therefore the foundation can prove this, the dispute will become hollow. More and more legal ordinances are missing this principle of `creditor protection grounds` and approving general challenge claims. Liechtenstein will not be able to resist this trend for long.

### **10.5 General claim of challenge/nullification**

Moreover a general claim of nullification/challenge also exists. According to Art. 67 RSO , without considering the time of the action, all legal acts committed by the debtor at a different time period to disadvantage the creditor or to advantage one creditor over the other are disputable.

In this case we speak of claim regarding the intent. For the existence of such a discriminatory intention, it suffices if the third party was aware of the discriminatory intention or preferential treatment under the actual circumstances of the case<sup>94</sup>.

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<sup>94</sup> Para 2, for example, called RSO close relatives, other personal relationship with the debtor or the debtor circulating rumours.



Therefore it is sufficient if the third party knew that the intention of the debtor was to disadvantage the creditor or to give one creditor an advantage on behalf of another.

Again the burden of prove all the facts of the case like legal action, disadvantaging and/ or discriminating intention of the debtor and his conscious decision to do so, lies on the shoulders of the creditor.

Intentional legal acts according to Art. 67 Para 1 are voidable irrespective of the time of action. However, there is the 5-year limitation period pursuant to Art. 74 Para 1 RSO (More related to that is given below).

#### **10.6 Scope of Action- what must be returned?**

The Foundation as a bona fide recipient of a gift (as a service for no consideration) is only obligated to repay the amount that it has accumulated gratuitously. Excluded is the case that the enrichment is also voidable.

## **10.7 Limitation**

### **10.7.1 Period of 5 years**

According to Art. 74 RSO, the action of annulment (reclaim) is barred after a period of 5 years after the legal action has been carried out. This also applies to claims against intentional acts.

This period will only be extended if the creditor, the debtor and the foundation give a written statement in a court of law stating that they want the period to be extended to contest the legal action. In this case the period of the claim will be calculated again from the issue of the statement provided that at that point the creditor is unsatisfied with the action regarding the property of the debtor and the period of five years after this action is already over.

### **10.7.2 Period of 1 year**

If there is no intention to cause damage, the period of dispute in case of gratuitous and its equivalent

orders will be one year. The period starts with the authorization of the action<sup>95</sup>. This means that the

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Article 64

*Purpose - Authority to Challenge*

1) The rights (Articles 65-68) hereafter called legal acts concerning the property of a debtor may appeal in accordance with the following provisions for the satisfaction of a creditor and this will be stated to be ineffective.

2) Any creditor with an enforceable claim, regardless of the origin of the claim (action for power), has the authority to challenge if the foreclosure has not led to the complete satisfaction of the creditor and if the approval of the enforcement does not lead to the complete satisfaction.

3) The dispute can be made, by action (counterclaim) or by raising an objection to the legal offer.

4) If the opposing party proves that the contesting creditors approved of the voidable act, agreed with it or if it the circumstances that makes the claim voidable was not known until afterwards, the claim must be dismissed.

Article 65

*Challenge them without charge and assimilated orders*

1) In the following legal acts carried out within one year prior to the authorization of enforcement are voidable if the debtor knew he was in debt:

a) unpaid orders (such as waiver of a not yet established right, the disclaimer of an inheritance), to which the debtor was not required by law and all completed donations, so far it is not these acts to fulfil a legal obligation to common occasional gifts (e.g. Christmas - New Year, birthday, engagement or wedding gifts), if they do not exceed the usual bounds, or is orders of an

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appropriate size that were made for charitable purposes or by a moral obligation (such as entering into an appropriate life insurance for woman and children) or considerations of decency have been satisfied;

b) The free or national equivalent acquisition of property of the debtor that authoritarian available (e.g. in enforcement and administrative enforcement proceedings) if the remuneration is paid from the funds of the debtor;

c) Legal transactions where the debtor has at present its performance in return accepted, which is to his own performance in a mismatch, especially commitments to buy, exchange or supply agreements, provided the other part in the business a mismatch between performance and compensation or otherwise a creditor of the detrimental asset accumulation recognized or had to know;

d) Transactions, has acquired, through which the debtor or a third party an annuity or a usufruct;

e) the seizure or return of the marriage, unless the debtor to either a marriage or when participating in the order of the marriage contract made, nor in the event of termination of the marriage union was required by law, as well as the seizure or delivery of the counterclaim or Widow content.

2) The burden of proof for the existence of the disputed claims is up to the creditors.

#### Article 66

##### *Avoidance for indebtedness*

1) Challengeable are further following acts, if made by the debtor within the last year prior to the authorization of the execution dates in the making and he was in debt already:

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a) Establishment of a lien or legal effect of this, equivalent in rights to secure existing debts, ensure the fulfilment of the debtor previously legally or not legally required was;

b) repayment of a monetary obligation other than through normal cash or other payment;

c) the payment of a debt not expired.

2) The contestability, however, is excluded, where the beneficiary proves that he was unaware of the assets of the debtor.

#### Article 67

##### *General Contesting Claim*

1) Regardless of the date of the legal actions, all actions that the debtor in the other parts of the implementation has the obvious intention of doing something for the disadvantage of individual creditors to the detriment of others.

2) It is sufficient if the third party have been under the actual circumstances of the individual (e.g., close relatives or other personal relationship of the debtor to third parties about the debtor circulating rumours) one time to be able to recognize that the intent of the debtor is to discriminate his creditors or one of them to the disadvantage the others.

3) The burden of proof for all the factual circumstances (legal action, detriment or advantage intention recognition of same) is with the contesting creditors.

#### Article 68

##### *Avoidance of Omissions*

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1) The legal acts within the meaning of the preceding Articles are omissions of the debtor, by which he loses a right, or by which a claims against him, is maintained or secured.

2) The same is true of the omission:

a) to enter into an inheritance, or

b) Challenging the violation of the legitimate portions or

c) Finally, challenge unlawful disinheritance.

Art.64, para 2 RSO

7th Section

*a) Debt Procedures*<sup>198</sup>

§ 577

1) For the collection of debts or other property acceptable to the creditors by way of debt relief procedures (order for payment) the issuance of a conditional order number for any amount.

2) Claims, which in general or at the time cannot be claimed through the courts are not suitable for the debt relief procedures.

§ 578

To issue the conditional number of the district court order is called when the domicile or residence of the debtor is known.

§ 579

Against persons, whose residence is unknown, the conditional number cannot be granted.

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§ 580

- 1) The application for issuance of the conditional number of command may be placed orally or in writing.
- 2) In the same, the creditor has to:
  1. To describe his and the debtor's name, rank and place of residence or business;
  2. The amount of the claim and the same legal grounds and, if the claim consists of several items to indicate the amount of each individual post and its legal grounds.
- 3) If the claim is not in money but in other reasonable things for its object, the creditor must call in the applications the amount he is willing to accept them instead.
- 4) Repealed

§ 581

- 1) The request is made without hearing the debtor.
- 2) The same is done if he does not comply with § § 577-580, or if the information submitted by an applicant shows that the claim at all or is currently inadmissible or that the same is due to return.
- 3) Against the issue of the number of command is there no appeal; against the refusal is an appeal possible within eight days.

§ 582

- 1) The number of command must include:

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1. The inscription number command;
  2. In § 580 Para. 1 and 2, as this information;
  3. The contract to the debtor to correct within 14 days after service of the number of command to prevent the execution of the claim, together with the interest claimed and the costs of the number of command, if the replacement was raised in the petitions to amend by the judge certain amount or against the Code number of disputing;
  4. The observation that the number of command could be set only by elevation of the contradiction expires.
- 2) Is the issue of the number for multiple command has been applied for in specific monetary amounts expressed or evaluated claims, in the numerical order the correction of the claims is applied separately.
  - 3) If the claim is not money but other reasonable things to object, then the debtor is exempt in the numerical commands, instead of the required things to make the applications described in the amount of money.

#### § 583

The number of command is the debtor and, if it is directed against several debtors, each one of them served under the rules governing the service of complaints.

#### § 584

In order to collect enough of the opposition by the debtor with the court an oral or written declaration that he raise objection against the number command. The required notice for any reason does not exist.



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§ 585 203

1) If the debtor has made timely objection, it loses its power of the number command.

2) The debtor disputes only some, he has the disputed amount must be clearly specified, failing which the opposition for the entire claim is. For the undisputed portion enforcement can be required. The number of command will lose its force, even if it is brought against a debtor for the same claim against several provisions adopted by order of the number one opposition only from the debtor.

3) Was, however, been through the numerical order the correction of several expressed in specific monetary amounts receivable applied separately and became the opposition raised explicitly only against one or other of these claims, it remains the number command in respect of the other and the imposed costs in force.

§ 586

1) From the time raised opposition of the creditors and the debtor must be notified.

2) A delayed any opposition must be rejected by pointing to the elapsed time, requires an understanding of the creditor is not in this case.

§ 587

1) The costs of issuance are the conditional number command when in time against the same opposition was brought to bear by the creditors, and it is the same of the replacement cost of the contradiction, if it is addressed by the debtor, in which the judge to be determined amount. Impose

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2) If charged as a result of the opposition proceedings or requesting the opening of the mandate process, it is to be raised costs of debt relief procedures as a part of the cost of litigation to erkennen.204

#### § 588

Against the decisions, which the opposition is rejected and the creditors of the replacement cost of the contradiction is imposed, the appeal is admissible within the period of eight days.

#### § 589

1) The application for issue of the number of command has in regard to the dependence on dispute and suspension of the limitation the effect of an action, however, on the grounds of jurisdiction of the counterclaim and the main process this request is no effect.

2) If the number of command by raising the contradiction except in force, until the statute of limitations for the collection of contradiction to be considered as suspended.

#### § 590

1) The re-establishment of rights for no fault of missing the deadline for the variance is within 14 days after the debtor of the failure to become aware of and the obstacle has been removed solicit. The granting of reinstatement has the effect of contradiction, without the need of a recent survey of it.

2) If the debtor has applied for the re-establishment of rights, application, the execution only led to the freezing.

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§ 591

1) The debtor has made no payment, made in time contradiction; the creditor is about to grant his request the execution because of the number command.

2) If the number of orders given on claims that have no money, but other reasonable things for its object, it remains the debtor is free to free themselves from the guided to bring in these matters execution through performance specified in the payment orders amount of money along with additional charges.

3) Aufgehoben<sup>205</sup>

§ 592

1) Written petitions for remission of the number of command and the collection of the objection must be present in one copy and contained with the court.

2) The number and the commands to the common understanding of the creditor and debtor of the opposition copies are required to write officially to the provision of headings is not required for this purpose.

3) The communication of a copy of the will on the request for issuing of a command or number on the collection of contradiction recorded logs to the other party does not take place.

4) Persons who collect on behalf of the debtor contrary are not required to be disclosed to this intervention with a power of attorney. The service of judicial execution, however, when a power of attorney was not taught to be sent to the client itself.

§ 593

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1) The creditor may make the request to issue of the number in a command to collect the debt action brought (Main claim).

2) In this case, the Court has adopted for the number using command decision, in response, the action and with the addition that in case of contradiction would be held further proceedings on the action (§ 256). A handing-over of the applicant to copies of the application is contained.

3) If an objection by the defendant against the number of command conflict, the court shall order the Diet to a hearing on the action and for this purpose to summon both parties in execution of contradiction.

4) If the court's desire to issue of the number of command inadmissible, it shall immediately order the same, in dismissing the action on the Diet on the legal proceedings.

5) The demand claim has to depending on the dispute and interruption of limitation periods has the same effect as any other action.

#### b) Legal offers procedures

##### § 593a

1) To exercise any claim for a declaration of law making, performance or omission of action, and the like can be applied for in advance or simultaneously with the same (Legal offers claim) in district courts around the issue of a Legal offers.

2) The property protection procedures in advance can also be carried out Legal offers procedures.

3) Claims that are to be made in matrimonial proceedings, in exchange disputes before arbitration, in bankruptcy proceedings or by means of recovery or revocation action that, on claims for challenging the legitimacy of a child and paternity matters will be the Legal offers procedures not apply.

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§ 593b

- 1) The application for an adoption can be attached Legal offers orally or in writing.
- 2) The Legal offer advertiser has applications:
  1. To call his own and the Legal offers name, rank and place of residence or business;
  2. Specify the value of the claim;
  3. Specify the alleged claim by him and the reason of it, and if more of them want to be claimed each claim and its reason than desire.
  - 3) Finds the claimed right to a land register entry or such, or require amendment or repeal, the necessary land register information should be provided, at best situation is a plan or partition plan the applications attached.
  - 4) If the alleged claim is dependent on a return, so that consideration is to offer according to the provisions of civil law.

§ 593c

- 1) The Legal offers search without consulting the Legal offers adopted.
- 2) It is rejected if it does not correspond with the above provisions, if the information submitted by the Legal offers advertisers clear that the claim is or is currently untenable, particularly when the court is aware that the desire of a judicial or administrative procedures adopted final decision contrary.
- 3) Against the issue of the Legal offers is no appeal against the refusal of it and allowed the appeal.

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§ 593d

1) The District Court of subsequent Legal offer must contain:

1. Marked: Legal offer;

2. In § 593 b Para. 1 and 2, as this information;

3. The contract to the Legal offer to respond within 14 days after service of the Legal offers to avoid the enforcement of the unspecified desire and the cost of Legal offers if their compensation was raised in the petitions to correct certain extent by the judge in the same or within the period against the Legal offer law proposal (to raise objection);

4. The observation that the Legal offer can be set only by elevation of the right proposal, terminate in the event of failure would force but.

2) The issuance of Legal offers is because of several particularly given claims had been requested, then in the Legal offer rectification applied separately and perhaps also mention that the Legal offers would meet its exact contribution be cited.

§ 593e

1) Find on the Legal offer procedures, except as contained in the foregoing provisions, no deviation, and the rules on the debt relief procedures (debts) apply additionally.

2) If the request was connected to a Legal offers enactment of an action (Legal offers claim), the action must simultaneously resolve a dispute.

Article 74

voidable action must have taken place within one year prior to the authorization of the enforcement.

Also in this situation, the period may be extended if the creditor, the debtor together with the foundation give a statement in the court of law that they want the period to be extended in order to be able to dispute the legal act.

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*Avoidance period – extension*

1) Avoidance Action (Counterclaim) barred with the expiration of five years since making the reviewable act.

2) Objection way of challenging the opposing party claim to be made within the permitted time limit also disputed claims.

3) When the challenged act is done is usually in the times in which it was effective for the creditor.

4) Extension. If the creditor, before his claim has become enforceable, or before it is shown that for enforcement in the assets of the debtor not led to its complete satisfaction or no cause, would those who has been made against a reviewable act or his heirs or a third party advised of his avoidance intention by judicial service of a pleading, then the challenge period calculated back from the time of notification to accept far is that the foreclosure would have the property of the debtor has not currently run this service to the complete satisfaction of the creditor and the challenge to expiration of five years has taken place since that time.

In this case the period during which the claim can be made, will be calculated from the issue of the statement provided that at that point the creditor is unsatisfied with the action regarding the property of the debtor and the period of one year has already expired. Such a notification is recommended in all cases because experience shows that judicial proceedings normally take more than one year.

### **10.8 Summary**

After the expiry of the period, the asset donation to the foundation cannot be disputed by the creditors. Some states though still allow disputes to be made (such as the United States) even if at the time of the transfer of donation to the foundation there was no intent to cause damage and in fact these creditors were also available/present.

Such a legal attitude is alien to Liechtenstein and in my view such foreign legal views are so problematic that they will be considered against "ordre public."

### **10.9 Liability Reserves**



Only the foundation assets are liable towards the creditors for the debts of the foundation. (Art. 552 § 37 PGR)<sup>96</sup>. This also applies for the designated legal heir<sup>97</sup>.

The foundation board is only allowed to make payments to the beneficiaries in order to fulfil the purpose of the foundation if the claims of the creditors vis a vis the foundation are not reduced (Art. 552 § 38 Abs 2 PGR). This is one of the strongest provisions for the protection of creditors and may be seen in context of the capital holding obligation which lack in Liechtenstein<sup>98</sup>.

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<sup>96</sup> Art. 65 para 1 RSO

<sup>96</sup> Vgl. Art 552 § 37 PGR:

§ 37

H. Liability

1) With regard to the creditors of the foundation, only the foundation assets serve as certainty for the debts of the foundation. There is no obligation to put up further certainty.

2) The foundation board is only permitted to make distributions to beneficiaries to fulfil the purpose of the foundation if claim s by creditors of the foundation is not thereby curtailed.

<sup>97</sup> Vgl. Hepberger, S. 80

<sup>98</sup> More on that, Martin Schauer, Commentary on Liechtenstein Foundation Law, Art 552 Par 38 RZ 3

The foundation board is obliged to check before making any distribution if whether the foundation after the distribution will be in a position to meet its obligations from the creditors. This does not only cover the existing liabilities but also the liabilities that might arise in the future.

The foundation board must make a „Solvency Test,<sup>99</sup> <sup>100</sup> <sup>101</sup> which is quite common in the Anglo-

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<sup>99</sup> More on that, Martin Schauer, Commentary on Liechtenstein Foundation Law, Art 552 Par 38 RZ 3

<sup>100</sup> The Statutory Solvency Test - according Guernsey Law  
The solvency test and its related sections in the Company Law borrow heavily from New Zealand's Companies Act 1993. This in turn follows a formula similar to the solvency test as employed in the United States (particularly the Model Business Corporations Act).

Section 527 "... the company satisfies the solvency test if:

(a) The company is able to pay its debts as they become due;

(b) The value of the company's assets is greater than the value of its liabilities"

The solvency test therefore comprises two tests known colloquially as:

(a) The liquidity or cash flow test; and

(b) The balance sheet solvency test.

The company may be suffering a temporary liquidity crisis whilst still solvent within the balance sheet test. Should the board wish to make a distribution in this case, directors would need to convert sufficient assets to a readily usable form so that the company is in a position to meet all of the debts as they become due and hence satisfy the liquidity test. However, a position where there is liquidity whilst the balance sheet test is not met is

Saxon law. In practice it means that the foundation board must not only find information about the inheritance of the deceased but also about the tax legislation and even more importantly about the solvency of the founder.

Failure in doing so may lead to accusations of grossly negligent act. The result would be an obligation to compensate, something that the insurance companies would hardly be interested in covering. The important case is still pending with the court where persons entitled to a compulsory position make valid claims against the foundation board stating that the foundation board has made more payments to the founder in the violation of law in his position as one of the beneficiaries.

The foundation boards are today faced with a huge liability risk resulting in that it is nearly impossible to undertake the mandate of a foundation board and if it is done no distributions are made without a solvency test.

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not as easily corrected. Asset values would need to increase or shareholders would need to inject further equity capital.

<sup>101</sup> Guernsey law under the Companies (Guernsey) Law 2008 (the "Company Law"), which came into effect on the 1 July 2008

As long as the foundation assets are used or distributed according to the purpose of the foundation, the heirs have no claim to these of assets. Neither the creditors have a claim. In this case there is no legal successor law as in the Anglo Saxon legal sphere.

The general rules of liability apply for the foundation board provided the legal preconditions for the same are met. The type of liability and the limitation period are governed by Art. 226 PGR<sup>102</sup>. It should be

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<sup>102</sup> Art 226

4. Nature of liability

1 The liability of the persons responsible pursuant to the foregoing provisions is subject to the provisions concerning liability as determined by contract and becomes statute-barred in ten years and where knowingly false statements or intentional infliction of injury are not involved, in two years, calculated from the time when the transaction to which the injury is attributed took place.

2 Where several persons are responsible for the injury inflicted, they shall be jointly and severally liable for the compensation.

3 Liability arising from the illegal receipt of payments of the legal entity becomes statute-barred for the recipient in bad faith in ten years where the dissolution share is involved and in five years in the other cases and for the recipient of a dissolution share in good faith, in two years, calculated from the day of receipt.

Art. 227

5. Proceedings

considered that the period will start after the knowledge of the damage and the person causing the damage. It normally means that the limitation period does not begin until the foundation board has taken control of its mandate.

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1 In the event of the litigation and liability for all the injury sustained by the company or the members of company bodies being otherwise invalid, the plaintiff members shall not surrender their membership rights and the plaintiff creditors may not surrender the demands which establish the characteristics of a creditor

For the duration of the litigation.

2 In the case of action to rescind against resolutions of the supreme body, relevant provisions shall be analogously applicable to the lodging of certainty on grounds of damage accruing to the company or the other defendants, to the combination of several actions and to the liability for damage.

#### Art. 228

1 Insofar as companies with legal personality or legal entities on the same footing are not under consideration, the principles of liability corresponding to the underlying contractual relationship between the bodies and the legal entity shall be applicable with respect to the responsibility and the liability of the bodies; in cases of doubt those regulations concerning the mandate relationship shall be applicable.

2 The foregoing provisions are analogously applicable with respect to the claim of the legal entity and the individual members, the release and the kind of liability.

## 10.10 Exclusion of enforcement

In case of family foundations the founder can make a provision according to Art. 552 § 36 PGR<sup>103</sup> stating that the creditor cannot withdraw the gratuitous foundation profits by using bankruptcy proceedings from certain stated and empowered beneficiaries

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<sup>103</sup> § 36

### G. Provisions under the Law of Enforcement

1) In the case of family foundations, the founder may provide that the creditors of beneficiaries shall not be permitted to deprive these beneficiaries of their entitlement to a beneficial interest or prospective beneficial interest acquired without valuable consideration, or individual claims arising from such an interest, by way of safeguarding proceedings, compulsory enforcement or bankruptcy. In the case of mixed family foundations, such a directive can only be issued insofar as the entitlement

concerned serves the purposes of the family foundation.

2) If a creditor of the foundation can obtain no satisfaction from the foundation assets, and the founder has not yet fully provided the allocated assets, the foundation board shall be under an obligation to

provide the creditor with the information he requires to take legal action. In the event of bankruptcy of the foundation, this applies *mutatis mutandis* with regard to the administrator of the estate.

using insurance procedures, bankruptcy proceedings and through judicial enforcement<sup>104</sup>.

It is a basic principle that from every foundations income, that only as much can be gratuitously extracted through insurance procedures, bankruptcy proceedings and judicial enforcement that the remaining amount can take care of the person, his wife and the needs of their children<sup>105</sup>.

In fact it is to be noted that in case of completed distribution of assets or a successful transfer of property to the beneficiary, the creditor can extract only as much money through the general principles of liability. Other options are simply not available.

#### **10.11 Procedural**

If the claim is filed in Liechtenstein, all information and accounts related to the donated assets and other assets brought into the foundation will be demanded in accordance with Art. XV EGZPO. As a result the payment made out finally will be

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<sup>104</sup> Vgl Hepberger, S 52

<sup>105</sup> Vgl. Art 552 Par 36 PGR

according to the calculation made using the  
calculations regarding the claim.



## 11 Foreign judgements

There is always a possibility that there will be an action filed against a foundation in a foreign country. A corresponding decision by the court abroad does not necessarily mean that there is an enforceable claim against a Liechtenstein foundation, especially since foreign judgements, with the exception of Swiss and Austrian judgments cannot be enforced in Liechtenstein. Liechtenstein has no enforcement agreements except with Switzerland and Austria. The claims should be asserted in the courts of Liechtenstein before the decision can be effective. Under certain circumstances, a summary trial is available.

Liechtenstein has till date neither signed the Lugano Convention<sup>106</sup>, nor the New York Arbitration Agreement<sup>107</sup>.

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106 Art. XV EGZPO

1) Who provided under the provisions of civil law is an asset or debt obligation, or who by concealment or concealment of an asset probably aware, can act through judgment, to indicate at best, provide a list of the assets or the debt, leaving him This property, known by the debt or the concealment or concealment of an asset, and an oath to make meaning that his statements are correct and complete.

2) The claim is accepted for persons who have a private interest in identifying the assets or debt.

It follows from this that it is possible for foreign claimants to file claims against Liechtenstein foundation abroad in order to strengthen their case regarding assets in Liechtenstein. The final results emerging from cases filed abroad may also be implemented abroad against Liechtenstein foundations. Because most of the foundations do have foundations abroad, the lack of an agreement should not be a hindrance. It should not be left out that a legally binding decision made in any EU state is valid and enforceable in any other state according to the Lugano Convention and therefore also in Switzerland, Norway and Iceland.

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3) If the action for the solemn statement of the assets of the application is connected to restitution of that which is owed by the defendant in the underlying legal relations, then the certain indication of the benefits, which claimed the applicant, are reserved to the sworn statement.

<sup>106</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16.9.1988

<sup>107</sup> New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 07th 1958 1988

## 12. Commercial accounting and Balance sheet preparation

### 12.1 General

Foundations, which operate with commercial activities, shall appoint an auditor (Art. 192 Para 6 PGR). They need a business Accounting<sup>108</sup>).

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<sup>108</sup> 20. Title

Business accountancy

1. Section

General provisions of Business accountancy

Art. 1045

*A. Financial Accountability*

1) Whosoever is obliged to register his company in the public register office (Article 945) or whose business comes under commercial umbrella activities (Article 107), is Obligated to maintain orderly business to account.

2) Limited liability companies, limited partnerships, limited liability companies and general partnerships and limited partnerships referred to in paragraph 2 of Article 1063 are also required for the proper accounting, if they do not operate according to commercial activities.

*B. As business records, inventory*

Article 1046

*I. Business Books*

1) The books must be such that a knowledgeable third party can provide within a reasonable time an overview of the business transactions and on the situation of the company. The transactions have to be traced in their origin and settlement.

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- 2) The keeping of books and other records required in a living language is used. Are abbreviations, numbers, letters or symbols used, in individual fixed their meaning clear?
  - 3) The entries in the books and other records required to be made complete, accurate, timely and orderly manner.
  - 4) An entry or record may not be altered in a way that the original content is no longer detectable. Also, such changes may be made; the nature of it can be uncertain whether they were made originally or later.

Article 1046bis  
Repealed

Article 1047  
*II Inventory*

Who is required to have proper accounting, the timing of the corresponding entry in public registers and then at the end of each fiscal year to create an accurate inventory of all assets and liabilities and specify its value in detail.

*C. Financial Statements*  
*I. General rules to the Financial Statements*

Article 1048  
*1. Components*

- 1) Who is required to have proper accounting, the timing of the corresponding entry in the Public Register, an assessment and then at the end of each fiscal year a financial statement drawn up.
- 2) The financial statements consist of balance sheet, income statement and, if necessary, an appendix and shall be drawn up within six months of fiscal year end.
- 3) The financial year shall not exceed twelve months. In justified cases, particularly in regard to the first fiscal year or for the modification of the balance sheet, may also take the business to a maximum of 18 months.

Article 1049  
*2. Language and currency*

- 1) The financial statements and, where he created under the provisions of this title shall, to the annual report should be prepared in German and in Swiss francs, Euros or U.S. dollars.

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- 2) Established firms may set up the documents pursuant to Para 1, also exclusively in English, French, Italian, Spanish or Portuguese, and in any freely convertible foreign currency.
  - 3) The Government may by regulation allow more foreign languages for the preparation of the dossier according to Paragraph 1.

*II Orderly accounting; structure, assessment, Annex*

Article 1050

*1. Orderly accounting*

- 1) The annual accounts shall be in accordance with the principles of proper accounting.
- 2) They must be clear, concise and complete. It has all the assets, liabilities, provisions to contain deferred income, expenses and income, the assets may not post item with the liabilities, expenses, not income, property rights are not charged with plot loads.

Article 1051

*2. Structure*

- 1) The balance sheet has the ratio between assets and liabilities, the income has to bring the relationship between income and expenses expressed.
- 2) The balance sheet shows the current and fixed assets, liabilities and shareholders' equity and deferred income.
- 3) For the classification of the property or assets to circulate their purpose will prevail.
- 4) Under the fixed assets only those assets must be shown to be determined on a continuing basis the business.

*3. Assessment*

Article 1052

*a) General provisions*

- 1) The property should be accounted for more than the purchase price or production, these are generally higher than the prevailing market price at the balance sheet, this shall prevail.
- 2) The liabilities are accounted at their repayment amount, the equity is to be measured at nominal amount or at least to its historical value.
- 3) Depreciation and provisions shall be applied unless they are economically necessary. Any further by additional depreciation, value adjustments and provisions are educated hidden reserves allowed.

Article 1053

*b) Costs Activatable*

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Expenses for the construction and expansion of business operations and research and development costs should be turned on and are, from the time of activation expected to write off within five years.

Article 1054

*c) Goodwill value*

As a business or goodwill, the difference amount be set by which the caused for the acquisition of a company in return the value of assets exceeds the company's net debt at the time of the acquisition. The depreciation of the goodwill value may be distributed as planned to the financial years in which he used before.

Article 1055

*4. Annex*

The Annex shall contain the following information:

1. The total amount of the Guarantees, commitments and pledges and any other contingent liabilities;
2. The fire insurance value of tangible assets.

Article 1056

*III. Signing*

The financial statements and, if they have to be created under the provisions of this title, the consolidated financial statements, annual report and the consolidated annual report must be signed in partnerships of all general partners and legal entities and the trust enterprise to the Verwaltungsbetrachten people.

*D. Other obligations*

Article 1057

*I. Mandatory disclosure*

are, if bonds by public subscription issued wurdenoder shares listed on a stock exchange, the financial statements to be published after acceptance by the governing body together with the audit report, either in the official gazette or anyone who requires it within one year of purchase, at its expense in one of the copies served, unless the documents are not in accordance with article 1122 and following must be disclosed.

Article 1058

*II Obligation to check*

- 1) The financial statements and the consolidated financial statements, insofar as such must be created under the provisions of this title shall be audited by an auditor or an

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auditing company. Where under the provisions of this title, an annual report and a consolidated annual report must be created, has the auditor or the audit company to deliver a verdict on whether the annual report is consistent with the financial statements and the consolidated annual report in accordance with the consolidated financial statements or not.

2) Partnerships have had the documents in accordance with paragraph 1 only to be audited by an auditor or an auditing company to perform as the provisions of this title shall be disclosed.

#### Article 1059

##### *III. Duty of keeping and retention of business records*

1) Who is required for the proper accounting, business books, records and business correspondence for ten years has kept.

2) The financial statements and, if they have to be created under the provisions of this title, the consolidated financial statements, annual report and the consolidated annual report must be kept in writing and signed, the other business books, records and business correspondence may, in writing, electronically, or in a comparable manner and retained as far as this ensures consistency with the underlying transactions and if they can be made readable at any time. The Government shall by regulations establish the detailed requirements.

3) Electronically or in a comparable way, kept the books, records and business correspondence have the same force as those that are readable without tools.

4) The retention period begins at the end of the fiscal year in which the last entries were made, the documents supporting the developed and the business papers are one-or assumed.

#### Article 1060

##### *IV Obligation to disclose*

1) Who is required to procedures relating to accounting, in disputes concerning the business, to be stopped due to the court upon request or on the Office to submit the accounts, the accounting documents and business correspondence, when a legitimate interest is demonstrated.

2) If the business books, accounting documents or business correspondence electronically or stored in a similar manner, the judge may order or the authority, which may require the submission, that:

- 
1. They are so presented that they can be read without assistance, or
  2. The funds are made available, with which they can be made readable.
  - 3) The accounts of the bankruptcy can still be recovered either by way of execution, except that the company would be sold as a whole and they are indispensable for the continuation. A lien cannot be claimed.

Article 1061

*V. Inspection of the books*

- 1) In an official procedure are the books presented, this is as far as the subject of proceedings is concerned, if necessary with the concurrence of the parties to inspect and, in appropriate make a statement.
- 2) The remaining contents of the books of the court is set to open only in so far as it is necessary to examine their procedures relating leadership.
- 3) When property disputes, especially in inheritance, in matrimonial property and social division of property or where otherwise there is an obligation of accounting or information request, the court may in the legal care proceedings or in contested proceedings, the submission of accounts, for information, either of its content. Article 1060 paragraph 2 shall apply accordingly.

Article 1062

*E. Penal provisions*

Subject to any penalties for the infringement of the obligations provided in this title.

Article 1062a

*F. International Law*

- 1) The provisions of this title and domestic branches of foreign companies.
- 2) The probative value of the business records within the country is also directed to foreign companies under Liechtenstein rights.
- 3) The obligation to produce business records assessed when one is under punishment in public-sector duty is concerned, according to the business offices authoritative law, however, the obligation to refer a dispute or legal care proceedings against a party under the law of the trial court.



Moreover they are obliged to prepare proper inventories, keep balance and manage accounts from which the property assessment of the foundation can be done. They must also keep an account of business activities and debt and claims in order to show the financial situation of the foundation (Art. 1045 PGR).

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<sup>108</sup> Art. 4 finance law dated 19. November 2009, for the year 2010

- 1) In all cases where the established federal legislation on stamp collection on establishment, installation, relocation or recapitalization of commercial entities, companies and specific assets donations do not apply, a general establishment and stamp fee of 1% of the capital for 1 million Franks will be charged. This establishment and stamp fee will be reduced to 0.5 % of capital for five million Franks or more and 0.3 % of the capital for ten million francs or more. This is subject to Para 3.
- 2) The general establishment and stamp fee in regard to Para 1 is also charged for transfer of equity to commercial entities, companies and specific assets donations that are economically liquidated or are placed in liquid form.
- 3) Religious, charitable, family foundations, other foundations and specific property dedications, the purpose of whose is solely asset management, the participation or periodical participation in the management of other companies are to pay, if they do not operate under the commercial activities banner, an establishment or stamp fee of two ‰, and at least 200 francs.
- 4) The establishment and stamp fee is to be decided and charged by the tax authorities.
- 5) The Land and Public Register Office may allow the publication of the register entry or issue the certificate of deposit only if evidence is provided for the payment of start-up fee or value stamp.

The balance sheet is prepared in accordance with recognized commercial rules in order to ensure a complete, clear, and true picture of the economic situation of the foundation. Commercial hidden reserves usually stay that way (Art. 1051 PGR).

The balance sheet should show the asset situation of the foundation in relation to the commercial success according to the general principles of commercial accounting (Art. 1045 PGR).

The balance sheets and inventories are drawn up annually and at least within six months after the end of the fiscal year (Art. 1049 PGR).

Only some already mentioned foundations are allowed to prepare inventory and balance sheets in a foreign currency; others must prepare their inventory and balance sheet in the local currency (Art. 1050 PGR).

The business papers and supporting documents must be kept for ten years. Profit and loss accounts and original balance sheets, other business books and records can be stored as visual media or data. (Art. 1063 PGR).

Foundations with commercial activities must annually submit their properly audited financial statements within six months after the end of the fiscal year to the tax authorities.

The tax authorities have to monitor compliance with this filing requirement. If the balance statement, that has already been checked by the audit authority, is not submitted according to the time period, the tax authorities must warn and notify the foundation and after the continued non-compliance for at least a period of 12 months (from the date of notice) the public register office could order to initiate dissolution and dissolution procedures (Art. 82 of tax law).

Registered foundations with no commercial activities and where the statutory purpose of the foundation does not contain any commercial activity as well as unregistered foundations, must submit and attest a declaration to the public register office endorsed by a Liechtenstein trustee, that by the end of the previous financial year a statement of assets did exist and that the foundation has not indulged in any commercial activity.

This duty to submit documents is monitored by the public register office. If the document has not been submitted in the due time, the public register office must warn the defaulting foundation and if this non-compliance last for 12 months the Public Register can introduce dissolution and dissolution procedures (Art. 1063 bis PGR).

## **13. Charges and taxes of the foundation**

### **13.1 Establishment fee**

In General

An establishment fee is to be paid when the companies are established. This establishment fee was determined annually by the parliament in the Finance Bill. The new tax law is no determining in Article 66 this imposed tax.

For companies the establishment fee or stamp fee is 1 % of the capital.

For the first 1'000'000 Swiss Francs no fee is imposed.

This fee is reduced for a capital exceeding 5'000'000 Francs to 0.5% and for the capital exceeding 10'000'000 Francs it is reduced to 0.3%.

The capital is defined as the registered capital and not the capital of the company. Therefore it is advisable to keep the registered capital low.

## Foundations

For Foundations the establishing fee is reduced to 0,2%, minimum 200 Swiss Francs.

### **13.2 Profit tax**

Foundations like all legal entities have to pay a profit (income) tax<sup>109</sup> of 12.5%.

This tax is a flat tax rate. Some deductions from the profit can be made (capital interest deduction, losses and others).

A minimum tax<sup>110</sup> of 1200 Swiss Francs has to be paid.

### **13.3 Private Asset Structure (PAS)**

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<sup>109</sup> Article 44 ff Tax Law

<sup>110</sup> Article 62 Tax Law

If a Foundation qualifies as a Private Asset Structure the foundation has to pay the Minimum Profit tax according art 62 Tax Law, which is 1200 Francs.

However, this tax regime has to be agreed and accepted by the European Surveillance Authority (ESA).

The foundation has to apply for this kind of tax. The Inland Revenue will then decide on the basis of the documents of the Foundation. The Inland Revenue may ask for any additional evidence which they may find appropriate.

An appeal against the decision is possible. This appeal<sup>111</sup> has to be addressed to the Liechtenstein "Landessteuerkommission".

Only those foundations qualify as Private Asset Structure, whose Beneficiaries do not have any influence on the administration<sup>112</sup> of the foundation and the companies controlled by the PAS.

Influence is defined as direct or indirect influence, personally or through intermediaries, employees,

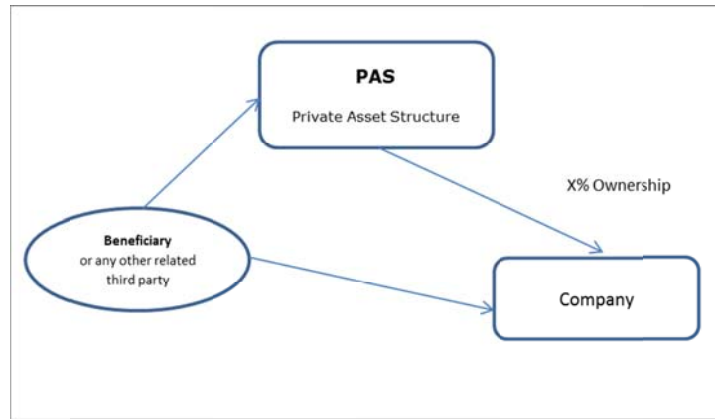
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<sup>111</sup> Art 117 SteG

<sup>112</sup> Art 64 par 2 Tax Law

relatives etc. on the company owned by the PAS. This influence may be on the company directly or through the PAS. If one of the beneficiaries would live in a property owned by the company, the control is evident as the tenant would take influence on the administration of the company.

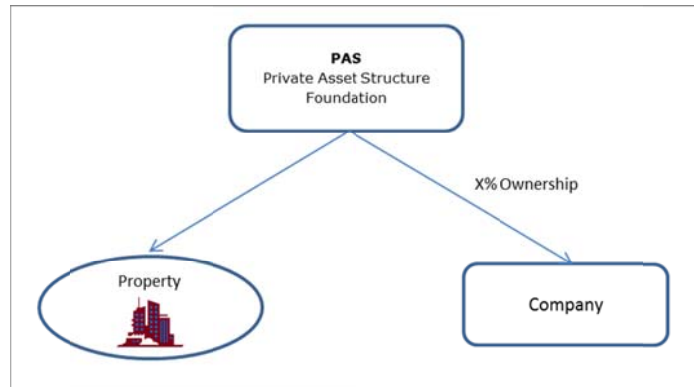




### Bankable Assets

In addition to that, these Structures must not have assets other than bankable assets or cash. They are not allowed to own property. They are allowed to own companies, if the beneficiary has no direct or indirect control on the company

The following structure would not qualify as PAS as they foundation owns bankable assets and property.



## Conclusion

Most grantor- or non-discretionary foundation would not qualify as such Private Asset Structures, as their beneficiaries usually have direct or indirect control of the companies held by the foundation.

All foundations owning property directly would not qualify as PAS.

## 13.4 Foundation inbound tax

This is a new tax imposed by the new Tax law with Article 13.

The foundation inbound tax (Widmungssteuer) is fixed with 2.5%.

The one who is transferring assets into a foundation has to pay a 2.5% tax. Such a tax is known in other countries like Austria.

The tax has to be paid if, after the transfer, the assets are no longer subject to a wealth tax. Further it is requested that the benefit is not taxed with any other property or wealth tax

### **13.5 Coupon tax**

The new tax law abolished the coupon tax.

However, coupon tax liabilities existing on the 31 December 2010 are still due. If they are paid within a time period of 2 years the coupon tax of 4% is reduced to 2%.

## **14. Outlook**

The legal status of a foundation has a quite special meaning in Liechtenstein. Most of the companies registered in Liechtenstein (around 50000) are private foundations (30000) of which most are established, unregistered foundations and among those most are family or mixed foundations.

The tendency in Europe is to regulate the foundations using only one uniform law and this tendency has also has its influence in Liechtenstein.

Within the area of public purpose foundations, there will be a European standard from which Liechtenstein cannot waiver. The public purpose foundations will always have a special meaning in Liechtenstein and it is important to a founder who wants to transfer his assets to a public purpose foundation that he is offered European standards particularly in the context of supervision of the foundation.

In view of the new law, the Liechtenstein foundations will lose the special importance that they used to have. The new Liechtenstein law makes the Liechtenstein foundations less attractive and

many foundations will be closed. This is not the fault of the new Liechtenstein politics regarding international tax law, but they are well-meant changes for the worse.

It will be necessary to revise the Foundation Law again and also to create a separate Foundation Law for public purpose foundations. The International Private Law may also be looked upon in order to protect the interests of the founder in a better way.

The new tax law is a further disadvantage for the private foundation, imposing new taxes and additional control.

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