

The Foundation

1. The Significance, Meaning and Legal Basis of the Foundation

The Liechtenstein Foundation has been in existence since 1926, when the Persons and Companies Law (Personen- und Gesellschaftsrecht "PGR") was introduced. An updated version of the foundation law came into force on 1 April 2009, by which earlier case law was mainly placed in statutory form, some uncertainties were cleared up and certain organizational changes were undertaken. Nothing has changed concerning the protection of the privacy of the Foundation. On the contrary, this has even been further strengthened. The Foundation Law is set out in Art. 522 §§ 1 - 41 PGR. Foundations, which were founded prior to 1 April 2009, are still partially governed by the old law.

Throughout the world, Liechtenstein is the country with the greatest tradition of, and success with, foundations for private purposes. Liechtenstein Foundations offer a high degree of privacy, wide ranging possibilities for their organization, especially regarding estate planning and asset protection as well as providing for a favourable taxation frame-

work. The foundation is one of the most popular forms of legal entity in Liechtenstein.

A foundation is a legal entity, which is established by its founder. The founder determines the purpose of the foundation and endows it with its assets. The foundation council then manages and applies the assets (for the beneficiaries) according to the stipulations of the founder set out in the foundation documents and the purpose of the foundation.

2. The various Forms of the Foundation

The law allows for either charitable or private foundations.

A charitable purpose exists if the public good should be promoted through the activity of the foundation, particularly when the activity serves to support the public good in charitable, religious, humanitarian, scientific, cultural, moral, social, sporting or ecological areas, even when only a certain group of persons is promoted.

A private foundation is founded for the private benefit of the beneficiaries. The most common forms are the family foundation and the company foundation. Family foundations apply their assets for the benefit of members of one or more families. A family foundation can additionally pursue charitable or other purposes.

In a so-called "mixed family foundation" there are other additional purposes outside the scope of the family, so there can be some additional charitable or other purposes. Company foundations serve particularly to hold interests in companies. They often have the function of a holding structure.

3. The Formation of the Foundation

A foundation is usually established through a certified foundation deed drawn up by the founder. The founder can in this regard allow himself to be represented. The founder does not necessarily have to appear in person insofar as the formation can be undertaken by a fiduciary.

Nevertheless, certain rights of the founder accrue to the person commissioning the fiduciary (as the economic founder). In addition, it is possible to establish a foundation on death by testamentary disposition or by inheritance contract in accordance with the formal documentary requirements.

A foundation may have several founders. In this case, the exercise of possible founder's rights by one founder or by the majority of founders can be specified in the foundation deed.

Foundation documents consist of the (mandatory) prescribed foundation deed as well as the optional supplementary foundation deeds and the regulations.

The foundation deed (issued by the founder or his representative) must include the following information:

- the intention of the founder to establish the foundation;
- name or title as the case may be and seat of the foundation;
- the dedication of specified assets;
- the purpose of the foundation or a reference to a purpose stipulated in the supplementary foundation deed;
- provisions concerning the appointment, removal and duration of office as well as the means of management and the powers of representation of the foundation council;
- provisions for the distribution of the foundation's assets in the event the foundation is dissolved;
- name, first name and residence or title and registered office as the case may be of the founder or – as the case may be – those of the fiduciary founder.

If a supplementary foundation deed is issued by the founder or his representative, then this has to be at the same time as the foundation deed is issued. The supplementary foundation deed contains further provisions.

The beneficiaries do not have to be named or otherwise exactly specified either in the foundation deed or in the supplementary foundation deed. It is sufficient, if a class of beneficiaries such as for example a defined family or a person closely related to the family member(s) concerned is specified.

The specification of the precise beneficiaries may be reserved to a separate set of regulations. Regulations may be issued by the founder, the foundation council or other bodies of the foundation, if this is provided for in the foundation deed. Such regulations can be issued at the time of the establishment

of the foundation or at a later date, and may be capable of general amendment, amended only under certain conditions or totally incapable of being amended.

Charitable foundations on their formation must be registered with the Commercial Register. Other foundations (so-called "deposited foundations") only have to file a notice of formation with the Commercial Register. In this notice of formation, a Liechtenstein attorney or trustee confirms the following information:

- name, seat and date of formation;
- foundation purpose, without it however being compulsory to specify names;
- duration of the foundation if there is a limitation in this regard;
- identity of the foundation council and the legal representative and the signatory powers of the foundation council;
- confirmation, that the foundation purpose is specified to the required extent and that the foundation is not charitable;
- declaration, whether the foundation is subject to supervision or not;
- confirmation that the minimum foundation capital is at the disposal of the foundation council.

Information concerning the founder and the beneficiaries does not have to be provided. Furthermore, the foundation documents do not need to be filed. The Commercial Register issues an official confirmation which confirms the existence of the foundation and the powers of representation. The Commercial Register is not open to the public as regards deposited foundations. An official confirmation may only be obtained by the executive bodies of the foundation.

The minimum capital of the foundation amounts to either CHF/EUR/USD 30,000.00. This minimum

capital does not need to be retained permanently and can be utilized for the purposes of the foundation.

A Liechtenstein foundation may hold all types of assets and is not subject to any special restrictions in this regard.

4. Accounting

The foundation council is obliged to keep appropriate records concerning the management and application of the foundation assets according to generally accepted accounting principles and to keep records in such a way that the use of the foundation assets and their performance can be monitored. Furthermore, the foundation council has to keep a list of assets from which both the status and the investment of the assets is apparent. Commercial accounting is only necessary provided that a corresponding business is maintained. Private foundations are not allowed to establish a commercial business, unless such business is necessary for proper investment and management of the foundation assets, e.g. for the management of participations in businesses. Charitable foundations may set up a commercial business, if this is necessary for attaining their charitable purpose.

5. The Organisation of the Foundation

One of the most important differences of the foundation in comparison to other legal entities is the lack of a legal owner. In other words, while in other legal entities, e.g. in the case of a corporation, the shareholders control the legal entity, a foundation lacks this element of continuous control from outside. The founder stipulates in the foundation deed, at least in the key elements, the way in which the foundation's assets shall be used during the lifetime of the foundation (purpose).

When establishing the foundation the founder may reserve to himself special rights to intervene, to supervise or to amend. He can also reserve the right to revoke the foundation as a whole (founder's rights). These rights cannot be transferred or inherited but they may be exercised by a representative.

It is up to the foundation council to provide for management and representation of the foundation. The foundation council is also responsible for the fulfilment of the foundation purpose having due regard to the provisions in the foundation documents.

The foundation council must consist of at least two members. Legal entities may also be members of the foundation council. One member of the foundation council has to be a citizen of an EEA-Member State and also be admitted as a Liechtenstein fiduciary with an office in Liechtenstein.

The legal representative is provided for as an additional organ of the foundation. It serves as a domestic authorized recipient that is entitled to accept service of official documents and correspondence.

Additional bodies such as protectors or advisory/management committees may be created. These may exercise rights of supervision, instruction or veto as regards resolutions of the foundation council or similar duties.

In addition, a special supervising body may be established which examines at least once a year the management and application of the foundation assets and issues a corresponding report for the foundation council. If such body exists, the rights of information of the beneficiaries are restricted. The special supervising body has to be established at the time the foundation is set up.

For foundations which are supervised by the Foundation Supervisory Authority, an auditor is mandatory. This auditor has to be independent from the foundation. He must audit the management and application of the foundation assets and give a report to the Foundation Supervisory Authority.

6. Beneficiaries

Among the beneficiaries, a distinction is made between entitled beneficiaries, prospective beneficiaries, discretionary beneficiaries and ultimate beneficiaries.

An **entitled beneficiary** is a person who according to the foundation documents is legally entitled to receive by way of benefit a determined amount or an amount capable of being determined out of the foundation's assets or the income from the foundation's assets. Thus, such an entitled beneficiary has an actionable right to benefit.

A **prospective beneficiary** is a person who has according to the foundation documents a legal right to beneficial entitlement upon the occurrence of a condition precedent or on attainment of a specified date, especially upon ceasing of entitlement of a beneficiary higher in rank.

A **discretionary beneficiary** is a person who belongs to the class of beneficiaries named by the founder, whose potential benefit however is in the discretion of the foundation council or another body appointed for that purpose. A person who only has a mere expectation to be eligible in the future to receive a discretionary benefit does not belong to the beneficiaries.

An **ultimate beneficiary** is a person who shall according to the foundation documents receive the remaining assets after the liquidation of the foundation.

In the case of a family foundation the founder may stipulate that the beneficiaries may not be deprived of their gratuitously acquired beneficial entitlement or their prospective rights or individual claims by their creditors by means of proceedings for protective relief, enforcement or bankruptcy. In a mixed family foundation, such a stipulation is possible insofar as the respective entitlement serves the family foundation purpose. In addition, discretionary beneficiaries are protected by the fact that their status as discretionary beneficiary is not an asset or a claim of theirs capable of being pledged.

Beneficiaries have a right of inspection of the foundation documents insofar as their own rights are concerned. Thereafter beneficiaries have a right insofar as their own rights are concerned for provision of information, provision of reports and provision of accounts and also audit thereof, although this right may not be exercised in an abusive way or used against the interests of the foundation or other beneficiaries. Exceptionally this right may be denied for good reason for the protection of the beneficiary. The ultimate beneficiary is only entitled to the rights of disclosure and information after the foundation has been dissolved.

Insofar as the founder has reserved to himself a right of revocation and he himself is the ultimate beneficiary, other beneficiaries are not entitled to the rights of disclosure and information. If a supervising body has been established, then the rights of disclosure and information are restricted, in that the supervising body takes over the duties of control. The beneficiaries do not have any rights for disclosure and information if a foundation is supervised by the Foundation Supervision Authority.

7. The Supervision of Foundations

Charitable foundations are under the supervision of the Foundation Supervisory Authority. Private founda-

tions may submit themselves voluntarily to such supervision by a corresponding stipulation in the foundation documents. The Foundation Supervision Authority is the Department of Justice.

The Foundation Supervision Authority has to ensure in the case of foundations subject to supervision that the foundation assets are managed and applied in accordance with its purpose. It has for this purpose the right to request information from the foundation and by means of the auditor to inspect the books and records of the foundation. Furthermore, it may through special proceedings before a judge apply for court orders, such as the control and removal of foundation bodies, the carrying out of special audits or the revocation of resolutions of the foundation council.

8. Alteration of the Foundation Deed

The founder, provided he is an individual, may reserve to himself in the foundation deed the right to amend the foundation documents.

An amendment of the foundation purpose by the foundation council or another body of the foundation is only permitted if the purpose has become unattainable, is no longer permitted or unreasonable or circumstances have changed so much that the original purpose now has an entirely different meaning or effect, such that it no longer corresponds to the will of the founder.

The amendment has to coincide with the presumed will of the founder and the power to decide upon amendments been specifically reserved to the foundation council or another organ of the foundation.

An amendment of other stipulations in the foundation deed or the by-laws, namely the organizational structure of the foundation, is only admissible, if and in so far as the power to do so is specifically reserved

in the foundation deed to the foundation council or another organ of the foundation and there is an objectively founded reason to make the amendment.

9. Dissolution, Conversion and Change of the Registered Office of a Foundation

The foundation will be dissolved if:

- bankruptcy proceedings have been instituted over the assets of the foundation or a request to institute such proceedings has been refused due to lack of assets;
- the court has ordered the dissolution of the foundation; or
- the foundation council has adopted a legally binding resolution to dissolve the foundation.

The foundation council has to adopt a resolution for dissolution, if:

- the foundation council has received a (permissible) revocation notice from the founder;
- the foundation purpose either has been achieved or cannot be achieved anymore;
- the duration specified in the articles has expired; or
- other reasons as mentioned in the foundation deed are given.

Conversion (into an establishment or a trust enterprise) may only take place if expressly provided for in the articles and if it is beneficial to the achievement of the foundation purpose. Furthermore, depending on corresponding provisions in the articles, the foundation's seat can be moved to a different jurisdiction.

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