



Common Law

Civil Law

השוואה בין נאמנות לפי שיטת המשפט המקובל ומשפט הקונטיננטלי
Comparison between “Trusts” under Common Law and Civil Law

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Overview

- Quick Overview of History of Common Law Trusts
- Liechtenstein even though Civil Law Jurisdiction – Trust Law
- Recognition of Common Law Trusts established under Foreign Law
- Foundation
- Liechtenstein Anstalt – Establishment - Etablissement
- What is better – or just different?

Comparison of Trusts under Common Law and Civil Law

- Quick overview of history of Common Law Trusts
- Common Law trusts incompatible with Civil Law legal system
 - Separation of legal title and beneficial title is unknown in civil law countries – no split ownership
 - No room for equity: courts are unfamiliar with common law traditions and the importance of case law



Liechtenstein even though Civil Law Jurisdiction – Trust Law

- Liechtenstein was the first and remains one of the few continental European countries to have its own statutory law on trusts since 1926:
 - Conventional Trust – “Treuhand”
 - Trust Reg. - Business Trust – “Treuhandunternehmen”

- Trust Law for Switzerland – Proposal failed

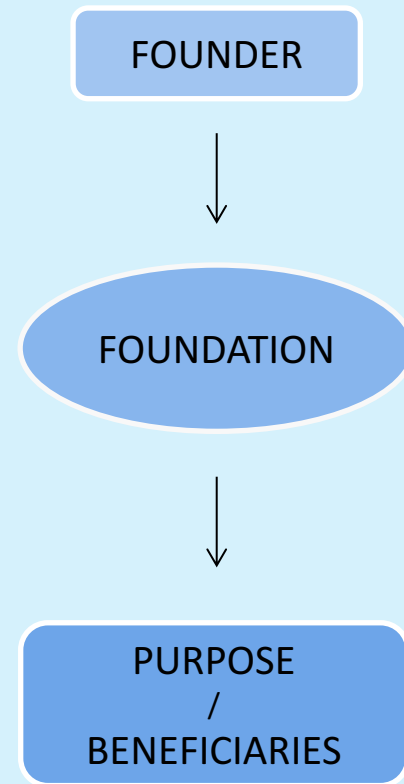


Recognition of Trusts established under foreign law

Hague Convention on the Law Applicable to Trusts and on their Recognition 1985 (HTC)

- Hague Trust Convention 1985 aimed at cross border acceptance of trusts
- Signed and ratified by 14 countries (UK, USA, Australia, Canada, Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Panama, San Marino, Switzerland)
- Recognition of trusts
 - as “trusts” (Art 11 HTC)
 - applicable law for the trust is the law chosen by the settlor (Art. 6 HTC)
 - certain limitations (Art. 4, 15, 16, 18 HTC)
- However – no substantive trust law

- Foundations – product of Civil Law
- 3 different models of foundations
- Classical foundation - Liechtenstein Law (PGR)
 - A foundation is a legally and independent special purpose fund
 - Formed as a legal entity
 - Through the unilateral declaration of will by the founder
 - And managed by the organs of the foundation



➤ Main features of a Private Foundation

- Incorporated entity – “Legal Person”
 - ✓ Comes into existence as a result of a formal incorporation process (unlike “trust relationship”)
 - ✓ A foundation “owns its own assets”
 - ✓ Dedicated Fund (Zweckvermögen)
- Foundation Council – Stiftungsrat – "מועצת הקרן"
 - ✓ Management body of the foundation
 - ✓ Limited personal liability (unlike trustees)
- Beneficiaries
 - ✓ No proprietary rights (unlike trust beneficiaries)
 - ✓ Limited rights to information (unlike trust beneficiaries)
- Founder
 - ✓ Possibility for active role, influence

Foundation – Trust – Corporation

- Unlike a trust, a Foundation is a separate legal entity which owns the assets transferred to it.
- Unlike a corporation, a Foundation has no shareholders but is regarded a self-owning entity established for a purpose.

➤ Use of foundations

- Succession planning
- Safeguarding and maintaining assets for generations
- Providing care and support to family members or other persons
- Asset Protection
- Avoid or reduce forced heirship claims
- Tax reasons – rather not

➤ Formation of foundation

- Different private foundation legislation – civil law jurisdiction
- Liechtenstein private foundation as an example (Art. 552 PGR)
 - ✓ Written declaration signed by founder
 - ✓ Endowment of certain assets – minimum capital CHF 30,000
 - ✓ Stated purpose, including designation of beneficiaries
 - ✓ Notice of formation - registration not required
- Separate legal entity – upon valid formation

➤ Constitution of a foundation

- Foundation deed - Stiftungsurkunde
- Supplementary deed (By laws – Beistatuten)
- Regulations (Reglemente= תקנון) – possible in Liechtenstein
- Letter of wishes – not binding – not part of the foundation constitution

STATUTEN

der
Stiftung
Vaduz

Art. 1

Name, Sitz und Dauer

Unter den Namen

Stiftung

Besteht mit Sitz in Vaduz eine auf Dauer errichtete Stiftung mit eigener Rechtspersönlichkeit nach den Vorschriften des Liechtensteinischen Personen- und Gesellschaftsrechtes (Art. 552 ff). Die Stiftung ist nicht im Handelsregister eingetragen.

Eine Sitzverlegung an einen anderen Ort des In- oder Auslandes kann jederzeit durch den Stiftungsrat unter Beachtung der gesetzlichen und statutarischen Vorschriften beschlossen werden.

Art. 2

Vermögen

Das Stifungskapital beträgt Fr. 30'000.—

Der Stifter und/oder Dritte können der Stiftung jederzeit weitere Vermögenswerte aller Art zuwenden.

Art. 3

Zweck

Zweck der Stiftung ist die Bestreitung der Kosten der Erziehung und Bildung, der Ausstattung und Unterstützung oder des allgemeinen Lebensunterhaltes von Angehörigen einer oder mehrere bestimmter Familien sowie die Verfolgung ähnlicher Zwecke. Darüberhinaus kann die Stiftung auch Leistungen an natürliche oder juristische Personen, Institutionen u. ä. erbringen.

Die Stiftung betreibt kein nach kaufmännischer Art geführtes Gewerbe.

Art. 4

Organe

Organe der Stiftung sind der Stiftungsrat und der gesetzliche Repräsentant.

תזכיר התאגדות

של

קרן נאמנות

ואדוז

1 עיף

שם, מוטב ומשך תקופה

תחת השם

קרן

וסדה במרצות השנים קרן אשר מקום מושבה בואדוז. הקרן המהווה "ישות משפטית עצמאית לפי תקנות המשפט האזרחי והמסחרי של ליכטנשטיין" (סעיף 552). הקרן לא רשומה אצל רשם החברות. העתקת מושב הקרן למקום אחר בגבולות המדינה או מחוץ לה, יכול להיקבע בכל עת על ידי מועצת הקרן, בפנפוף להנחיות החוק והתקנות.

2 עיף

נכסים

הון הקרן הים בסך 30,000 פרנק.

המייסד ו/או גוף שלישי רשאים להפקיד רכוש נוסף מכל סוג בכל עת.

3 עיף

יעדים

יעדי הקרן הם צמצום עלויות החינוך וההשכלה, הציוד והתמיכה, או של הוצאות המחיה הכלולות של קרובי משפחה או קרובים או מספר משפחות, וכן איתור יעדים חמים נוספים. בנוסף, רשאית הקרן לספק שירותים לפרטים, גופים, מוסדות וכדומה. הקרן לא מקיימת פעילות למטרות רווח.

4 עיף

מוסדות הקרן

מוסדות הקרן כוללים את מועצת הקרן ואת הציג המשפט.

בסמכות הקרן למנות בעלי תפקידים נוספים, כגון מנהלי חשבון, וועדות יעוץ ומשרות בקרה.

- Purpose of the foundation (dedicated special purpose fund)
 - Public benefit or private benefit purpose – combination possible

 - Family foundation
 - ✓ No specific definition
 - ✓ Assets and its earnings should mainly serve for the costs of education, equipment and upbringing of members of a certain family or should serve similar family interests

 - Liechtenstein foundation is not allowed to carry out commercial activities (alternative vehicle: Trust Reg. or Establishment)

➤ Organs of the foundation

- Foundation council
- Protectorate
- Controlling body



➤ Termination of a foundation

- Indefinite time or fixed period
- Founder may reserve the right to revoke

➤ Founder

- Reserved powers – power of revocation and of amendment
- Membership in the foundation council
- Membership in the controlling body
- Beneficial interest
- Not considered “sham” (unlike in a trust)
- However, careful! – foundation might be treated “transparent” for tax purposes

REGLEMENTE

Art. 6

Der Stiftungsrat kann im Einverständnis mit Herrn [REDACTED] die Bestimmung in Art. 2 lit. c, Ziff. 1>, resp. im Einverständnis mit [REDACTED] die Bestimmung in Art. 2, lit.c,Ziff.2> jederzeit abändern.

Die Übrigen Bestimmungen dieses Reglementes kann der Stiftungsrat nur im Einverständnis mit [REDACTED] (gemeinsam) abhändigen.

Vaduz, den

DER STIFTUNGSRAT

תקנון

סעיף 6

בכפוף להסכמת [REDACTED] רשאית מועצת הקרן לשנות בכל עת את ההוראה בסעיף 2 (א) (1), או, לפי העניין, רשאית מועצת הקרן לשנות בכל עת את ההוראה בסעיף 2 (א) (2) בכפוף לקבלת הסכמתה [REDACTED].

מועצת נאמני הקרן רשאית לשנות את שאר הוראותיו של תקנון זה אך ורק בכפוף לקבלת הסכמתם של [REDACTED] (יחד).

➤ Beneficiaries

- Different classes of beneficiaries
- No beneficial interest in the foundation assets (at the most: claim in specific performance)
- No fiduciary duty owed to them by the foundation council
- Limited access to information
- In general, beneficiaries under a foundation have a less powerful position than beneficiaries under a trust

➤ Taxation of foundations

- According to the Annex A of the Israeli Income Tax Ordinance Liechtenstein foundations are to be treated for tax purposes like trusts
 - ✓ That means: if the founder is Israeli resident the income of the foundation is taxed in Israel on its worldwide income with the highest marginal tax rate
 - ✓ Distributions – especially cash distributions no tax
 - ✓ Contributions to the foundation should not trigger a taxable event



Liechtenstein Establishment (Art 534 PGR)

- Unique entity – only in Liechtenstein
- Entity with extremely flexible planning possibility for private and commercial purposes
- As defined by law: The establishment is a legally distinct and organized enterprise with commercial or other objects which is registered in the public registry

➤ Formation of an Establishment

- Established by so called “founders” (Gründer)
 - ✓ Function of the founder usually performed by a Liechtenstein fiduciary on behalf of the provider of the assets
- Written statutes signed by all founders
 - ✓ Statutes must contain the name, registered office, the purpose, the organs and their respective powers
- Supplementary deed (By laws- Beistatuten) optional
 - ✓ If no beneficiaries designated – statutory presumption that the holder of the founder rights is beneficiary
- Minimum capital CHF 30,000 (liability of the establishment limited to its fund)
- Registration in the Public Registry mandatory

➤ Organs of Establishment

- Board of directors (Administrative Board – “Verwaltungsrat”)
 - ✓ Registered in the Public Registry
- Protector and controlling body possible



- Establishment with founder's rights or no founder's rights
 - Establishment with founder's rights – similar to corporate entity
 - ✓ Holder of the founder's rights considered the supreme organ of the Establishment
 - ✓ Extensive rights – including removal and replacement of board of directors
 - ✓ Right to establish and amend by-laws, remove and add beneficiaries at any time
 - ✓ Founder's rights transferrable and inheritable, but cannot be pledged
 - Establishment without founder's rights – similar to a foundation
 - ✓ Founder gives up his founder's rights
 - ✓ Board of directors is the supreme organ
 - ✓ Board of directors manage the assets for the benefit of beneficiaries and carry out the stated purpose

Liechtenstein Anstalt – Establishment - Etablissement

STATUTEN ANSTALT

Organe des Unternehmens

Art. 6

Die Organe des Unternehmens sind:

- a) der Gründer bzw. Rechtsnachfolger
- b) der Verwaltungsrat

Der Gründer bzw. Rechtsnachfolger

Art. 7

Das oberste Organ des Unternehmens ist der Gründer bzw. Rechtsnachfolger. In die Kompetenz des Gründers bzw. Rechtsnachfolgers fällt die Beschlussfassung über:

- a) die Bestellung der Destinatäre und die Bestimmung des Umfangs ihrer Berechtigung;
- b) die Bestellung und Abberufung des Verwaltungsrates und der Kontrollstelle;
- c) die Änderung der Statuten und deren Ergänzung, eventuell durch Beistatuen;
- d) die Verteilung des Reingewinns;
- e) die Auflösung des Unternehmens und die Verwendung des Liquidationsüberschusses.

STATUTES ESTABLISHMENT

Bodies of the entity

Article 6

The bodies of the entity are:

- a) Founder or his legal successor
- b) Board of Administration

Founder or legal successor

Article 7

The founder, or his legal successor, is the supreme body of the entity. The decisions falling within the competence of the founder, or his legal successor, are as follows:

- a) Appointment of beneficiaries and the determination of the extent of their entitlement.
- b) Appointment and dismissal of the board of administration and of the board of control.
- c) Modification of the statutes, amendments to statutes, possibly through by-statutes.
- d) Distribution of net profit.
- e) Dissolution of the entity and using of the liquidation surplus.

- Common Law Trusts incompatible with the Civil Law System, but recognized as “trusts” validly established under foreign law.
- Classical foundations such as the Liechtenstein Foundation and Liechtenstein Establishment are the product of Civil Law.
- Foundations are formed by a formal incorporation process and once formation is complete the foundation exists without doubt.
- The foundation holds the assets for an express stated purpose.
- The foundation is a separate legal entity.
- The foundation is the legal and sole owner of the assets and there is no split between legal and equitable ownership.
- A private foundation is designed to fulfill the wishes and the intentions of the founder rather than to serve the interests of the beneficiaries.

What is better?



Maybe not better, but certainly different!

Thank You



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Sources

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