Editorial

Fifteen years of Private Foundations and yet back to the roots!?

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Abstract

In this 15th anniversary issue of ‘Private Foundations: A World Review’ the Editor herself establishes an assessment and highlights the most important topics and articles that have over the past 15 years engaged the interest of trust and foundation practitioners alike. With a view to the Swiss initiative to introduce the trust in its civil law legal order, the Editor reflects on the experiences made by the Principality of Liechtenstein, a civil law country that went through the same exercise 93 years earlier than Switzerland and in this respect also looks at the position of common law countries that have introduced the civil law concept of a private foundation.

Introduction

The Trusts & Trustees issue you have just opened is the 15th Anniversary Issue of Private Foundations: A World Review! To duly celebrate such an important anniversary I have once more aimed at a very special coverage. Before I introduce you to the contents of this year’s issue I want to extend my sincere thanks to Toby Graham, David Russell AM QC and Anita Gaspar, our peer reviewers, Steve Meiklejohn and Josephine Howe, and Mary Ejlali, Dr. Jude Roberts and Laura Jose for their support, without whom this issue would not have been possible in the way it lies before you. As always, I am also greatly indebted to our 21 international authors whom I unfortunately cannot mention individually but who all have sacrificed valuable time to keep us abreast with the latest developments regarding private foundations on a worldwide level.

What you will notice this year, is, that the latest material has been moved into an In Focus subsection within the General Section, despite the fact that an article may deal with a jurisdictional topic. This has been done out of practicality reasons so that you will notice the most current developments regarding private foundations early on in the issue.

The Anniversary Issue is opened by Dr John Goldsworth, a distinguished academic who founded Trusts & Trustees in 1995. I am greatly indebted to him for having introduced me to academic publishing with ‘Private Foundations: A World Review’. Dr Goldsworth in his introductory article acquaints us with the conflict of law issues that may arise when administering a private foundation.

Dr Natalie Peter then introduces us to the Swiss plans to implement the trust in Switzerland. Switzerland has so far not enacted its own trust law but ratified The Hague Convention on the Law Applicable to Trusts and their Recognition. Her article opens the floor for
the contribution of Professor Francesco Schurr who in an in-depth article examines the uses of trusts and private foundations as well as the cultural and legal differences between the two legal instruments.

The Issue also provides extensive coverage of new foundation laws: Yann Mrazek has contributed on the Abu Dhabi Foundation, Dr. Ákos Menyhei provides us with a first glimpse of the newly enacted Hungarian Asset Management Foundation, which combines features of a private foundation and a trust. Christophe Jolk and David Russell AM QC have taken a deeper look into the Qatar Foundation Law and last, but certainly not least, Jordan Chandler, Geoffrey Cone, Paolo Panico and Amy Staehr report on the Wyoming Foundation Law that has come fresh off the press.

Then we also dive into topics such as blockchain and cryptocurrency and the future challenges of trustees in this respect, the complex and constantly changing taxation of UK real estate, how to measure impact in the non-profit sector, the implementation of the First Ultimate Beneficial Owner Registers, as well as foundation governance.

Considering also the variety of topics featured in the Jurisdiction-Specific Section there should be a topic of interest for everyone.

After having followed the development of international private foundations for 15 years, it is about time to establish a deeper assessment of how they are faring.

When we started the Review back in 2005 the main focus lay on introducing the reader to the various international foundation laws that had been in existence then, with a particular focus on the newly enacted or pending foundation laws in common law jurisdictions such as The Bahamas, Jersey, St. Kitts, and Nevis, Gibraltar and the Isle of Man at that time were still using companies limited by guarantee to fulfil functions similar to private foundations. In addition, the 2005 Review elaborated on the main features of and distinctions between trusts and private foundations to provide guidance on how to resolve ‘the practitioners’ dilemma’ of choice between trusts and private foundations. As you will see, this latter approach in one form or another will continue through almost all of the issues of Private Foundations and is thus a particularly important point to keep in mind when...
approaching the issue of trusts and private foundations.

To provide guidance on how to resolve ‘the practitioners’ dilemma’ of choice between trusts and private foundations

Apart from these topics the taxation and specific uses of foundations, for example in international real estate transactions, provided food for discussion. But in its basic concept the 2005 Review, as the first in a row of many, was in fact an overview of the then status quo of private international foundations, which was also reflected by the questionnaire that tried to cater for the easy comparability of the various foundation laws.

The urge to distinguish between private foundations and common law trusts strongly continued also in the 2006 Review, but it was already noticeable that a discussion of specialized legal issues regarding private foundations started to gain momentum. And also the proposed Anguilla Foundation Act 2006 as well private charitable foundations first appeared on the stage.

The 2007 Review featured the European Foundation, the role of foundations in international anti-money laundering, the classification of private foundations for US federal income tax purposes, and presented the new Liechtenstein Foundation Law 2008 and noticeably widened the geographical horizon for discussion by including legal aspects concerning the regulation of trusts and private foundations in the Russian Federation. But despite all of these new features the well-established discussion on the qualifying criteria of foundations, in particular with a view to the first common law jurisdictions, continued.

In 2008 we were introduced to both The Anguilla and Barbuda International Foundations Bill and the Maltese Foundation. Charitable Foundations were also notably present as was again the distinction between trusts and private foundations.

The 2009 Review took up the issue of considering private foundations as an alternative to trusts as well as trust substitutes under US Federal Tax Law. Private foundations were once more and in much detail compared to trusts and we also read the first contributions from Canada and San Marino.
2010, apart from continuing to compare between the civil and the newly established common law foundations, clearly evidenced the first shift in topics that would also prove a heavy shift in the daily work of trustees and foundation council members in the years to come. Transparency was the catchword of the year and the coming to an end of banking secrecy, financial privacy and the first Tax Information Exchange Agreements (TIEAs) were discussed in detail. We had finally entered the path to the international information superhighway.

The year 2011 brought with it the first contributions from Cyprus and Sweden, a wide range of new foundation laws—Isle of Man, Labuan, Liberia, and Seychelles—as well as an in-depth contrast of private foundations and trusts as well as founder’s powers in civil and common law private foundations.

2012 witnessed the introduction of the Belize international foundation, the Guernsey foundation and the Mauritius foundation. We had our first contributions from Belgium and Israel, a strong focus on the tax treatment of foundations and a discussion of the common-law based Curacao Trust in the Curacao civil law legal order and of purposeful trusts and foundations.

2013 first of all saw the publication of the book ‘Private Foundations A World Survey’, Conceived to complement the ‘The World Trust Survey’ and ‘Private Foundations Law and Practice’ the book provides a comprehensive guide to the law and practice of private foundations on an international basis and contains three general chapters on the uses of international private foundations, the taxation of international foundations in the UK and the USA and 21 jurisdiction-specific chapters. In addition to the publication of the Survey Book, the Review continued in its usual form and in 2013 covered many of the challenges that were faced by trustees in an unpredictable legal and planning environment, in particular disclosure and privacy issues. The year 2013 also saw the first mention of Cayman Islands Foundations as well as an article on private purpose foundations.

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2014 was the year of the 10th Anniversary Issue that brought along the Foreign Account Tax Compliance Act (FATCA),
trusts challenged by technology and politics, an article how a trust lawyer ended up drafting a law on foundations, the<br>Cook Islands Foundation, the Vanuatu Private Foundation and the Luxembourg Patrimonial foundation Draft Law.

Private Foundations 2015 as the first ‘transparency issue’ was concerned with private foundations in a<br>transparent, but also fragile world of glass. The issue featured topics concerning privacy in the context of<br>new communication systems and again FATCA and the broader tax crackdown. We also read articles on the<br>Russian de-offshorization rules and their potential impact on Cyrus holding and finance structures. Furthermore saw the first contributions on Turkish vakifs, foundations and trusts in the Czech Republic and private foundations in Hungary.

2016 was the second ‘transparency issue’. Apart from the introduction of Gibraltar foundations and the Hungarian trust, the issue centred on the cross-fire between privacy and transparency, namely the Common Reporting Standard, the European Union Anti-Money-Laundering Directive, the European Union Ultimate Beneficial Owner Registers and also the Russian Controlled Foreign Company Rules.

The third ‘transparency issue’ followed a year later in 2017. The CRS, the Beneficial Ownership Registers, The Panama Papers, the Brexit and also the recognition of common law foundations were the hot topics of this third transparency issue that also saw the Barbados, Estonian, and Samoan foundations.

2018 yet again was under the continuing motto of transparency, the CRS and the latest European Union and Organisation for Economic Co-operation and Development initiatives. The 2018 issue also

included blockchain and cryptocurrency and witnessed the first private foundations in the Gulf and New Hampshire as well as the second generation foundation legislation in common law countries.\textsuperscript{80}

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Now we have arrived back at the present 2019 issue. And yet, with Switzerland, a civil law jurisdiction aiming at introducing the trust concept, we have also somehow arrived back at the very roots of the question ‘trust and/or foundation’, a question that, as you have seen, has followed us throughout the entire 15 year lifespan of Private Foundations.

Switzerland, as Dr Natalie Peter\textsuperscript{81} points out in her article is unique and particularly interesting with a view to the introduction of the trust concept, as Switzerland has not yet enacted its own trust law but ratified The Hague Convention on Trusts. Where will this latest development lead us—back to delimiting trusts and foundations as rival concepts? Hopefully not. Because, when looking at Switzerland we must not forget that Switzerland also knows family foundations whose use until today has been restricted by Article 335 Swiss Civil Code in the sense that Swiss family foundation can only be used to pay the costs of educating, endowing, and supporting family members.\textsuperscript{82}

The Swiss plans of today are similar to those of the Principality of Liechtenstein, also a civil law jurisdiction like Switzerland, which went through the same exercise 93 years earlier than Switzerland, namely in 1926 when the Principality introduced both the private foundation as well as the common law trust by enacting its Personen- und Gesellschaftsrecht (PGR). I am therefore very grateful to have been given the opportunity to include an article by Professor Francesco Schurr\textsuperscript{83} of the University of Liechtenstein in addition to Dr Natalie Peter’s on the Swiss trust initiative.\textsuperscript{84} Professor Schurr’s article is of particular relevance in this context as it addresses both the historic as well as current opportunities and problems arising from the early introduction of the trust in a civil law jurisdiction, such as Liechtenstein.

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In 1926, when Liechtenstein created its own legal order,\textsuperscript{85} its initial laws were in a first phase assimilated to the Swiss laws and then in a second phase Liechtenstein enacted own laws. This was mainly due to the fact that on 2 August 1919 Liechtenstein

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  \item 81. Peter (n 2).
  \item 82. ibid.
  \item 83. Schurr (n 3).
  \item 84. Peter (n 2).
\end{itemize}
had terminated its 1852 Customs Treaty with Austria and had begun to orientate itself towards the Swiss Confederation. On 1 January 1924, Liechtenstein became part of the Swiss customs territory after having concluded a bilateral Customs Treaty with Switzerland. The Customs Treaty between Switzerland and Liechtenstein is still in force which is also evidenced by the fact that the Swiss franc is the official currency of the Principality of Liechtenstein.

Legal milestones during the second phase of Liechtenstein’s own law enactment, were the enactment of the said PGR and also of the Law on the Trust Enterprise (TruG) which was added to the PGR as Article 932a on 10 April 1928. Despite the fact that the PGR orientates itself on the Swiss Civil Code, Liechtenstein, in its second phase of law enactment, however also adopted legal institutes, which are either received from foreign law or which represent own Liechtenstein creations.86

The first of those received foreign concepts is the private trust settlement (Treuhänderschaft; Treuhandverhältnis) which is based on the common law trust.87 The trust concept of the common law proved of great interest in the years after World War I but the main intention of the Liechtenstein legislator at that time first of all was, apart from adopting the Anglo-Saxon trust, to enact an encompassing regulation of fiduciary relationships in general, which can be defined as any legal relationship containing an element of trust, and of which the Liechtenstein civil law until that time had only contained a rudimentary regulation. Matters became even more complicated, as Liechtenstein by enacting the Law on the Trust Enterprise in 1928, took over the second foreign concept, namely the Massachusetts business trust, which is nowadays more commonly known as the Liechtenstein trust enterprise, trust reg. or trust registered.

As the Law on the Trust Enterprise provides for a supplemental and analogous application of its relevant provisions on the Liechtenstein trust enterprise to the Liechtenstein private trust settlement, the trust enterprise is very often confused with the Liechtenstein trust settlement. This confusion is deepened as the Law on the Trust Enterprise simultaneously also provides for a supplemental application of the PGR provisions on the trust settlement to the trust enterprise.88

88. In addition, the Law on the Trust Enterprise still refers to the provisions of the foundation law in certain cases. In the Liechtenstein Foundation Law of 2008 the paragraph containing a subsidiary application of the provisions of the foundation law to the trust settlement was deleted. However, art 898 PGR still contains a subsidiary application of trust law provisions to the Liechtenstein Foundation. Thus, the venture to extend the regulation to fiduciary relationships in general in the outcome resulted in a fragmented law with a view to trusts as well as fiduciary relationships with subsequent additions and amendments and in an inconsistent terminology.
89. K Moosmann, ‘Der Angelsächsische Trust und die liechtensteinische Treuhänderschaft unter besonderer Berücksichtigung des wirtschaftlich Begünstigten (Schulthess Polygraphischer Verlag 1999) 173. This functional approximation also becomes evident in the definition of art 897 PGR.
a solution for the Liechtenstein trust settlement which was a sui generis implementation of the concept and according to Dr Kurt Moosmann also the synthesis of two different legal spheres, namely the Anglo-Saxon and the German. Liechtenstein authority is also divided about the qualification of the rights of the trustee.

Despite the fact that the Liechtenstein legislator was determined to adopt the Anglo-Saxon concept of the trust, this however could only be done in the sense of a functional approximation because of the specifics of common law and equity which allow for a separation of ownership that is not known to the Liechtenstein numerus clausus of in rem rights.

The Liechtenstein trust concept thereafter has indeed been used extensively, but this use has mainly been restricted to so-called family trusts. In addition, one must not forget that in some cases the very distinction between legal and equitable ownership might prove vital in order to make full use of the trust concept. And the all-embracing question that is consequential to the sui generis adoption of the trust is still how this concept is looked upon by national courts in a particular case.

When then common-law jurisdictions started to introduce the civil law concept of the private foundations into their legal systems, yet another system-overlapping reception of law took place, this time going the other way. Also through this reception of law, a foreign concept, namely the private foundation, was suddenly installed into time-honoured and proven common law legal orders.

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In the common law world the process of the reception of private foundations has thus proven to be more heterogeneous than homogenous. Common law regimes nowadays not only reflect the civil law origin of the foundation but also at the same time mix it with local legal traditions and concepts. Some of the private foundations that were created are not a classical civil law foundation, but rather a trust in corporate form, or a company endowed with fiduciary characteristics.

Also civil law foundation jurisdictions have undeniably been influenced by their common law counterparts.

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90. K Moosmann, Der Angelsächsische Trust und die liechtensteinische Treuhänderschaft unter besonderer Berücksichtigung des wirtschaftlich Begünstigten (Schulthess Polygraphischer 1999) 180.
91. Liechtenstein authority basically distinguishes between the transfer of a full right to the trustee in the sense of a modified fiducia (the trustee becomes the full owner of the trust assets but is limited in his powers vis-a-vis third parties) and an erga omnes right of administration, cf Moosmann, ibid 183ff.
92. cf Niegel (n 86) 360–93.
93. Chandler, and others (n 7).
94. cf Picht and Kopp (n 77).
Through these developments also civil law foundation jurisdictions have undeniably been influenced by their common law counterparts, which led to the simultaneous take-over of certain aspects of Anglo-Saxon trust law (eg with a view to purposes, the protector or a concept similar to sham 95) into their national legal order, more often into national customary law via the recognition of the courts.

Consequently, the classic foundation concept has somehow been distorted in order to fit the common law legal orders and the unifying factor between the established as well as the newly created private foundations suddenly seems to be their very distinguishing factor to the Anglo-Saxon trust, their legal personality. Matters may become even more interesting when one looks at the introduction of the first US Foundations in New Hampshire and Wyoming and also the new Hungarian Asset Management Foundation (AMF)96 which combines features of a private foundation and a trust.97

As we have seen from the Liechtenstein experience when it introduced the common-law trust into its civil law order, it more or less encountered similar problems as the common law jurisdictions, when introducing the civil law foundation concept. In order to achieve a similar outcome, the trust concept had to be introduced sui generis in Liechtenstein in the sense of a functional approximation and this foreign legal concept until today had to be somehow translated into civil law terms. By doing this, the Liechtenstein trust concept was not only assimilated to the Liechtenstein law, but also developed further and adapted to the national law and it contains peculiarities that are not known to the Anglo-Saxon trust.98

From what we have already witnessed over the course of the past 15 years, it will be interesting to see how the Swiss plans to introduce the trust concept will be advanced and then implemented.99 This, in particular also, as the Swiss trust is mainly intended for use by Swiss nationals.100 But yet again it will be the practical implementation of the concept and also the acceptance by its users that will finally determine its integration into and compatibility with the Swiss legal order. This might then either lead us back to the roots of the discussion ‘trusts and/or foundations’, with which also Private Foundations started 15 years ago and which has accompanied us since, or maybe also to something totally new. Only time will tell. As Mark Twain correctly said, history doesn’t repeat itself, but it often rhymes.

I hope that you will enjoy Private Foundations 2019 and that we meet again next year.

95. Niegel (n 38) 260ff; Panico (n 38) 273ff; Hayton (n 49) 462 at 463.
96. TD Mayo, ‘An Update on the New Hampshire Foundation Act’ (2019) 25(6) Trusts & Trustees; Chandler and others (n 7); Menyhei (n 5).
97. cf Niegel (n 65) 503–09.
98. Biedermann (n 85).
100. Peter (n 2).
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