The Liechtenstein Foundation

1925
MARXER
ATTORNEYS

Offprint
Chapter 9 The foundation
from Marxer & Partner (Eds.)
Liechtenstein Business Law
Vienna: Manz, 2022.
ISBN 978-3-214-02579-3

(Up-to-date as of 01 January 2021)

Chapter 9
The foundation

Overview

9. Kapitel
Die Stiftung

I. Basic principles

A. Definition

9.1 According to the **legal definition** in Article 552 Section 1 of the Persons and Companies Act (Personen- und Gesellschaftsrecht, PGR), foundations are „legally and economically independent special-purpose assets which are formed as a legal entity (legal person) through the unilateral declaration of intent of the founder. The founder allocates the specifically designated foundation assets, stipulates the purpose of the foundation, which must be immediately non-selfserving and specifically designated, and also stipulates the beneficiaries." In other words, it is an asset which becomes autonomous and acquires the status of a legal person, which serves the permanent realization of a purpose determined by the founder with the help of specific assets. The foundation assets are separated from the founder's personal assets.

9.2 A foundation as a personalized special-purpose asset does not have owners or members, but beneficiaries, thus those persons for whose benefit the realization of the foundation's objects occurs and of whom the founder may be one. However, the founder has the right to reserve certain rights in the course of the foundation's formation. In order to realize the founder's intent, the foundation makes use of its governing bodies, first of all the foundation council. As of the end of 2019, a total of 11,028 foundations existed under Liechtenstein law.[135]

B. Total revision of foundation law in 2009

9.3 Liechtenstein's foundation law has existed since 1926. Over the decades, only selective adjustments had been made to it. The provisions served as a model for many foreign foundation laws, such as the 1993 Austrian Private Foundation Act (Privatstiftungsgesetz) or the Panamanian fundación de interés privado of 1995. At the beginning of the new millennium, however, it became increasingly apparent that some major points of foundation law were not stipulated clearly enough by law: many questions had to be clarified by the courts, which was not always conducive to enhancing legal certainty.

[135] Regierung des Fürstentums Liechtenstein, Rechenschaftsbericht 2019 (2020).

However, the greatest possible degree of legal certainty is desirable especially in the area of foundation law, where continuity plays a major role.

9.4 Works on a **total revision of the foundation law** thus commenced in 2001. To heed the practical requirements, the Government involved Liechtenstein financial service providers in its reform work. Market participants, in turn, submitted comments, in part in close consultation with business partners and clients. After an in-depth analysis of the numerous contributions, and with the assistance of international experts on foundation law (above all from the Universities of Vienna and Zurich), a government bill[136] was introduced in February 2008. It had its first reading in Parliament on 14 March 2008.[137] In June 2008, the Government issued another statement to Parliament.[138] On 26 June 2008, the new foundation law was passed by Parliament[139] and published in the Law Gazette on 26 August 2008.

9.5 The new foundation law is laid down in Article 552 Sections 1- 41 PGR and entered into force on 1 April 2009, together with the Foundation Law Ordinance (Stiftungsrechtsverordnung, StRV) and the Ordinance amending the Public Register Ordinance (Öffentlichkeitsregisterverordnung, ÖRegV). The previous foundation law (Articles 552-570 PGR) was repealed in its entirety. The transitional provisions were published in LGBl 2008/220, Art II and LGBl 2009/247, Art I. In the latter act, Parliament extended the adjustment periods originally provided for by six months in each case.[140] All decrees, as well as the Government bills and Landtag Protocols (Landtagsprotokolle, LTP) cited, are made available on the Foundation Supervisory Authority's[141] website. A link to the official translation of the new law's provisions into English is provided as well.

9.6 The total revision provides a clear and concise standardization of Liechtenstein foundation law. Outside Article 552 Sections 1-41 PGR (hereinafter in each case only referred to as Sections 1-41), the general provisions on legal entities (Articles 106-245 PGR) apply – as in the case of all legal persons – unless this conflicts with special features of the foundation law[142].

136 Report and Motion 2008/13.
137 LTP 2008, 238.
138 Report and Motion 2008/85.
139 LTP 2008, 1350.
140 Report and Motion 2009/65.
141 www.stifa.li.
142 OGH Judgment 7 February 2007, 03 CG.2004.342 LES 2008, 29.

The references of the old foundation law to the law on business trusts (Article 932a Sections 1-170 PGR) and to the law on establishments (Articles 534-551 PGR), which were unclear as to their scope and thus often the subject of legal disputes, were deleted.

9.7 The new law is partly based on the Austrian Private Foundation Act, which in turn is itself a further development of the previous Liechtenstein law. While preserving the traditional liberality of Liechtenstein foundation law, for many issues, new and innovative solutions have been found that meet the highest standards of foundation governance. Supervisory regulations to protect legal entities from misconduct by its governing bodies are extremely important, especially in the case of foundations, as there are no owners who might assume a supervisory function and counteract conflicts of interest on the part of the foundation's representatives. International legal commentaries hence described the new foundation law as a „systematically and substantively successful overall concept" (Prof. Dominique Jakob, University of Zurich) and as trend-setting. The total revision of foundation law provides an attractive legal basis for both public- and private-benefit foundations, such as family and enterprise foundations, and thus places Liechtenstein in a good starting position in the competition among foundation law systems. This is a particularly welcome development, as Liechtenstein legal entities have to struggle less and less with recognition problems abroad.

9.8 The new foundation law has remained virtually unchanged for the last ten years. The few changes that were made related to new terminology, notably the introduction of the non-contentious proceedings (Außerstreitverfahren, previously called Rechtsfürsorgeverfahren), the commercial register (Handelsregister, previously called Öffentlichkeitsregister), and the insolvency proceedings, as well as an item of the register entry.

9.9 The following chapter will provide only a brief outline of the new foundation law. Reference is made to the compendium „The Liechtenstein Foundation" by Prof. Dominique Jakob, which was published in spring 2009 as volume 4 of the series of publications on Liechtenstein corporate, tax, and banking law published by Marxer & Partner Rechtsanwälte. The book provides a coherent presentation of the new foundation law, together with comprehensive analysis of the case law of the highest courts and legal commentaries under the old law, to the extent that it is also applicable under the new law. The transitional provisions stipulated in LGBl 2008/220, Art II are described in more detail at the end of this chapter. Marxer & Partner Rechtsanwälte (eds.), Gesellschaften und Steuern in Liechtenstein (2003) provides a description of the foundation law applicable until 31 March 2009.

II. Forms (foundation purpose)

9.10 The founder has to specify the purpose of the foundation pursuant to Section 16 para. 1 no. 4.[143] This is an essentiale negotii: every foundation must have a foundation purpose. The purpose must be determined by the founders themselves (in case of fiduciary establishments by their representative). It cannot be determined by the foundation council. While the founder is free to choose the purpose, the foundation may conduct a business in a commercial manner (Article 107 para. 3 PGR in conj. w. Article 42 para. 3 of the Commercial Register Ordinance (Handelsregisterverordnung, HRV)) only under the conditions of Section 1 para. 2.[144] This is the case, for example, if the business directly serves to achieve the foundation's public-benefit purpose (e.g., operation of a hospital) or if a private-benefit foundation has such high assets that a commercial infrastructure must be set up to administer the foundation. Within the scope of these limits, the foundation has full legal capacity and authority to conclude legal transactions of any kind.

9.11 The qualification of the foundation purpose as public- or private-benefit is of key importance: as will be shown, this has consequences for the supervisory regime and also the requirement to register and to set up an audit office. Pursuant to Section 2 para. 2, a **public-benefit foundation** is a foundation whose activity is entirely or predominantly intended to serve public-benefit purposes in accordance with Article 107 para. 4a PGR. Thus, it must be dedicated to the common good, e.g., in a charitable, religious, scientific, cultural, athletic, or ecological field. In this respect, it does not harm the qualification as a public-benefit foundation if only a particular group of persons is to be supported by the foundation's activities (e.g., the financial support of needy employees of a particular company, together with their families). However, a family foundation is never a public-benefit foundation, even if its sole purpose is to support needy family members.

[143] Cf. also Section 1 para. 1.
[144] Of course, the purpose must not be immoral or unlawful, cf. Article 107 para. 5 PGR.

9.12 Section 2 para. 3 provides that a **private-benefit foundation** is entirely or predominantly intended to serve private or selfbenefiting purposes. The main forms of the private-benefit foundation are the family foundation and the enterprise foundation. In case of doubt, a foundation is to be qualified as a public-benefit foundation if it is unclear whether the public- or the private-benefit purpose predominates. The founder may also provide for „time stages" in the statutes. For example, during the founder's lifetime, the foundation is a family foundation, but becomes a charitable foundation upon their death.

9.13 Section 2 para. 4 provides a legal definition of a **family foundation**. While pure family foundations are foundations whose assets „serve solely to meet the costs of upbringing or education, the endowment or support of members of one or more families, or similar family interests", mixed family foundations are foundations which „predominantly pursue the purpose of a pure family foundation, but which on a supplemental basis also serve public-benefit or other private-benefit purposes". Any other (public- or private-benefit) purposes may only be subordinate secondary purposes; otherwise the foundation is not a family foundation. Section 36 para. 1 gives family foundations privileges under enforcement law (cf. 9.92 et seqq.). Liechtenstein also provides for the option of setting up a foundation as a **maintenance foundation** (Unterhaltsstiftung). It is dedicated to generally support specific individuals or a family. However, it does not require to specify a particular need, e.g., child-rearing or educational expenses, etc.

9.14 Another important area of application of the foundation is the **enterprise foundation**. A so-called business bearer foundation („Unternehmensträgerstiftung"), which directly operates a business, is permissible only under the already described conditions of Section 1 para. 2. This might be, for example, a charitable foundation that operates a hospital. So-called „**holding foundations**" (Holdingstiftung) are far more common. Here, the foundation holds shares in a company that in turn operates a business. Since the foundation as a shareholder regularly exerts a controlling influence on business policy, the participation is not a mere investment of the foundation's assets, but may in fact be part of the foundation's purpose. Holding business participations thus is a permissible purpose of the foundation.[145]

[145] OGH Order 8 January 2004, 10 HG 2002.58-39 LES 2005, 174.

By contrast, a foundation as an end in itself, i.e., a so-called „**Selbstzweckstiftung**", is not permitted. The sole purpose of this type of foundation is to hold participations and manage its own assets, thus perpetuating their own existence. Unlike enterprise foundations, a „Selbstzweckstiftung" does not aim to pursue a non-selfserving purpose (Section 1 para. 1 sent. 2), such as influencing corporate policy, maintaining the company or supporting beneficiaries or the general public.

III. Formation

A. Declaration of foundation

9.15 A foundation is formed inter vivos by means of a declaration of foundation and upon death by way of last will and testament or contract of inheritance. As will be shown in the following, private-benefit foundations do not need to be entered in the commercial register. They do in fact acquire legal personality already upon the declaration of foundation. However, the notification of formation must be deposited with the commercial register. In contrast, public- as well as private-benefit foundations that operate a business conducted in a commercial manner must be entered in the commercial register following the declaration of foundation: they do become a legal person only upon registration. While private-benefit foundations that do not operate a business in a commercial manner may also apply to be entered in the commercial register, this is not a prerequisite for legal personality.

9.16 The **declaration of foundation** („Stiftungserklärung", Section 14) is a unilateral declaration of intent by the founder, which does not require receipt. In it, the founder manifests their intention to form a foundation. A foundation inter vivos may have one or more founders. They may be Liechtenstein or foreign natural or legal persons and may be resident or domiciled anywhere. The declaration of foundation must be in writing and the signature of the founder(s) must be authenticated. According to Article 81 para. 4 of the Act on the Protection of Rights (Rechtssicherungs-Ordnung, RSO), authentication may be done by the Princely Court, by the Office of Justice or by a domestic notary. If such authentication is not possible, as a rule, the declarations certified by a foreign authority must be provided with a Hague apostille or with a certification of signature (Überbeglaubigung).

Austrian authentications are recognized directly. Further information is provided in the leaflet „Authentication of foreign documents and signatures" (Beglaubigungen ausländischer Urkunden bzw Unterschriften), published by the Office of Justice.[146]

9.17 In practice, a so-called „fiduciary formation" („**Treuhandgründung**") is usually carried out by a Liechtenstein fiduciary as the representative of the founder. The founder's identity thus is not disclosed to the authorities. It thus is therefore a case of indirect representation, where – in contrast to traditional civil law dogmatics – the legal effects of the representative's actions pursuant to Section 4 para. 3 occur directly with the economic backer. The legal consequences thus correspond to direct (immediate) representation. Accordingly, the founder is the economic backer (who remains anonymous to the outside world), i.e., the principal, but does not act themselves, but through the fiduciary instead. All rights reserved to the founder accrue directly to the founder, rather than to the fiduciary (Section 30). It is also possible, albeit uncommon, for a foundation to be formed by way of direct representation (Section 14 para. 3). The fiduciary in such case discloses the founder's identity. The direct representative requires a special power of attorney from the founder for this transaction.

9.18 The **foundation capital** (Stiftungskapital) is the amount specified in the statutes, which is dedicated to the foundation on the occasion of its formation. Section 13 provides that the minimum capital of a foundation is CHF 30,000 or, if it is raised in USD or EUR, USD 30,000 or EUR 30,000. After acquiring legal personality, the founder may make a so-called „**subsequent endowment**" („Nachstiftung") at any time. If there is a transfer of assets to the foundation by a third party, this is treated as a **donation** (Zustiftung). The foundation assets are the entire **assets** of the foundation, including subsequent endowments and donations. Liechtenstein foundation law does not provide for a duty to preserve assets or a prohibition of reinvestment; however, Section 37 para. 2 bans foundation councils from making distributions to beneficiaries if this would reduce the claims of foundation creditors.

[146] www.llv.li, „Onlineschalter".

9.19 Pursuant to Section 38 para. 2, in the event of **defects of the founder's intent** („Willensmangel") when forming the foundation, the foundation may be challenged by the founder and their heirs in accordance with the provisions on defects in the conclusion of a contract (Sections 870 et seqq. of the General Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB)), even after the foundation has been entered in the commercial register or notification of formation has been filed.

B. Foundation documents

9.20 The declaration of foundation is embodied in the **foundation documents**. The **statutes** (in the Act also called „foundation deed" („Stiftungsurkunde")) contain the key elements of the foundation and must be signed by the founder (or instead of the founder, by their direct or indirect representative) and authenticated. Section 16 para. 1 enumerates the mandatory contents to be regulated in the foundation deed, e.g.,

- name of the foundation,
- purpose of the foundation,
- appointment and functioning of the foundation council, and
- identity of the founder or, in the case of indirect representation, identity of the indirect representative (fiduciary).

9.21 This means that in case of a fiduciary formation, the founder does not have to sign a foundation document and is also not identified in the foundation deed, i.e., the founder may remain anonymous. Section 16 para. 2 contains the so-called „optional-obligatory elements", i.e., contents which do not have to be provided for in the specific foundation, but must be included in the foundation deed if they are provided for. They include, for example,

- the reservation of founder's rights,
- the reservation of the right to amend the foundation deed or the supplementary foundation deed by the foundation council,
- a statement that a supplementary foundation deed has been drawn up or may be drawn up.

9.22 According to Section 17, the founder may also draw up a **supplementary foundation deed** (bylaws; „Beistatuten" or „Stiftungszusatzurkunde") in addition to the foundation deed (statutes) which may include those components of the declaration of foundation which do not have to be recorded in the foundation deed. The supplementary foundation deed must also be signed by the founder, or instead of the founder, by their direct or indirect representatives. The signature must be authenticated. Supplementary foundation deeds may only be established if the foundation deed provides for a specific reference in this regard. Moreover, supplementary foundation deeds must not contradict the foundation deed.[147]

9.23 By now, some case law exists on the **interpretation** of foundation deeds and supplementary foundation deeds based on the principle of intent.[148]

9.24 In addition to foundation deeds and supplementary foundation deeds, which must originate from the founder or the founder's representative, it is also possible to issue regulations under Section 18. They may be issued not only by the founder, or the founder's representative, but also by the foundation council, or another governing body of the foundation, and contain internal arrangements. Such regulations may be, for example, asset management requirements (Section 25 para. 2) or specify on the technical modalities of distributing amounts to the beneficiaries. Regulations may only be issued if the foundation deed includes an authorization to do so (Section 16 para. 2 no. 2). Regulations originating from the founder or from the founder's representative take precedence over those of the foundation council or any other foundation body.

9.25 Finally, in the case of discretionary foundations („Ermessensstiftung"), the founder sometimes writes a so-called **letter of wishes**. This is not a foundation document, but a declaration of intent issued by the founder, which contains more precise information on the founder's intent and thus aims to guide the discretion of the foundation council. The letter of wishes does not have a binding effect, but it may be considered when interpreting the founder's intent.

147 OGH Order 6 May 2003, 4 Cg 2001.492-29 LES 2004, 67.
148 OGH Order 1 February 2019, 03 CG.2012.236 LES 2019, 36 = GE 2019, 205 or OGH Judgment 1 February 2019, 09 CG.2016.416 LES 2019, 47.

9.26 When forming a foundation, the focus must be, in particular, on the foundation's purpose. Pursuant to Section 16 para. 1 no. 4, the foundation deed has to specify the purpose of the foundation, including the designation of specific beneficiaries, or beneficiaries identifiable on the basis of objective criteria, or of the group of beneficiaries, unless the foundation is a public-benefit foundation. In practice, this provision also opens up the option – which is indeed used in most cases – of not specifying the beneficiaries or the group of beneficiaries in the foundation deed, but to expressly refer to the supplementary foundation deed, which includes the required specification. However, an express reference must be included in the foundation deed (Section 16 para. 2 no. 1; in the case of foundations formed prior to the revision of foundation law (Altstiftung), however, an explicit reference is not necessary).

C. Entry in the register

9.27 Public- as well as private-benefit foundations that operate a business conducted in a commercial manner must be entered in the commercial register following the declaration of foundation. Pursuant to Section 19, each member of the foundation council is required to **enter** the foundation in the commercial register. However, this may also be done by the representative pursuant to Article 239 PGR or by court order (e.g., in the case of a foundation upon death by the probate court judge). The application for entry must include the foundation deed or the testamentary disposition or the contract of inheritance, as well as a confirmation of the foundation council, stating that the statutory minimum capital is at the free disposal of the foundation. Moreover, the foundation council's organization and the signatory power must be indicated (Article 89 HRV). Any change in a fact subject to registration must also be entered. Under Section 66c in the Final Section of the Persons and Companies Act (Schlussabteilung des Personen- und Gesellschaftsrechts, SchlT PGR)), the failure to register is punished by the Princely Court with an administrative fine of up to CHF 10,000.

9.28 After reviewing the application, together with its supporting documents, the Office of Justice enters the foundation in the commercial register. The entry must contain the information pursuant to Section 19 para. 3 and Article 90 HRV, for example

- the name or legal name of the foundation,
- the purpose of the foundation, as well as
- the identity of the foundation council, and
- the audit office (if appointed).

9.29 The entry is then announced pursuant to Article 957 para. 1 no. 1 PGR. Any person may request the Office of Justice pursuant to Article 954 PGR to issue an extract from the register containing the registered facts. Other details, such as the names of the founder and the beneficiaries, are not entered and hence not published.

9.30 A foundation that is subject to the legal obligation to be entered acquires legal personality only by being entered in the commercial register. If an existing foundation that is not subject to the legal obligation to be entered becomes subject to the legal obligation to be entered, for example, due to a change in the statutes or due to the passage of time, the members of the foundation council must apply for registration of the foundation within 30 days. Foundations that are not subject to the legal obligation to be entered generally can also be entered in the commercial register upon application. However, this is not constitutive for the acquisition of legal personality.

D. Deposit of the notification of formation

9.31 Private-benefit foundations that do not operate a business conducted in a commercial manner are not subject to the legal obligation to be entered under Section 14 para. 3. Such foundations acquire legal personality already upon their formation. Section 20 provides that within 30 days of formation, the foundation council or the representative have to deposit a so-called „notification of formation" with the Office of Justice. The **notification of formation** must include the information according to Section 20 para. 2, i.e., in particular, the name and purpose of the foundation as well as the identity of the representative and the members of the foundation council. Among other things, it must be confirmed that the designation of the beneficiaries or the group of beneficiaries has been made by the founder. The correctness of the notification of formation must be confirmed in writing by an attorney, a professional fiduciary or holder of an entitlement under Article 180a PGR authorized in Liechtenstein. If a member of the foundation council belongs to one of these groups of persons, such member may sign the notification of formation as a foundation council member and at the same time confirm the correctness of the notification of formation (cf. expressly item 5 of GBOERA Newsletter 2009/4[149]).

[149] www.llv.li, „AJU-Newsletter".

9.32 In case of any change to a fact contained in the notification of formation, Section 20 para. 3 requires a **notification of amendment** to be deposited within 30 days. The correctness of such notification of amendment must be confirmed in writing by an attorney, a professional fiduciary or holder of an entitlement under Article 180a PGR who is authorized in Liechtenstein. According to Section 21, as the Foundation Supervisory Authority, the Office of Justice is entitled to verify the accuracy of the deposited notifications of formation and amendment. For this purpose, the authority may demand information from the foundation or may inspect the foundation documents through the controlling body according to Section 11 or, if no such body has been set up, through an authorized third party (Article 3 StRV). Sample notifications of formation and amendment can be found on the website of the Foundation Supervisory Authority.[150]

9.33 On the application of a foundation, the Office of Justice issues an official confirmation („Amtsbestätigung") following each notification of formation or amendment, unless the notified purpose is illegal or immoral or the foundation is not subject to an obligation to be entered. The official confirmation hence does not concern the content of the reported facts, but only the fact of filing the report and constitutes a legitimacy certificate that the legal procedure has been followed.

9.34 With the exception of the information listed in Article 552 Section 20 para. 2 no. 1 to 7 and 10 PGR, the Office of Justice must not disclose any **information to third parties** about foundations not entered in the commercial register (Article 91a HRV; Article 955a PGR). Such information comprises

- the name or legal name, registered office and purpose as well as date of formation of the foundation,
- the members of the foundation council and their signing authority,
- the representative, and
- supervision, if any.

[150] www.stifa.li.

9.35 The right to access data pursuant to Article 955b para. 2 no. 2 PGR by the domestic law enforcement authorities, the Financial Intelligence Unit (FIU)[151], the Liechtenstein Financial Market Supervisory Authority (FMA)[152] and the Liechtenstein Tax authority[153] remains reserved.

9.36 Failure to deposit a notification of formation or amendment is punished by the Princely Court with an administrative fine of up to CHF 10,000. The intentional deposit of a notification with incorrect content or the intentional incorrect confirmation of the information constitutes an infringement that is punished by a fine of up to CHF 50,000 or, as an alternative, imprisonment of up to six months. If the infringement is negligent, the penalty is reduced to a fine of up to CHF 20,000 or an alternative term of imprisonment of up to three months (Section 66c SchlT PGR).

IV. Founder and founder's rights

9.37 The **founder** is the key person in foundation law: the foundation serves to realize the founder's intention. The founder may be a Liechtenstein or foreign natural or legal person and may be resident or domiciled anywhere (Section 4). A foundation may also have more than one founder – except in the case of a foundation formed by way of last will and testament. As the founder is a participant within the meaning of Section 3, the founder is entitled to all rights arising from the position as a participant. This includes, in particular, the right to request supervisory measures or the amendment of the foundation purpose or other content of the declaration of foundation before the Princely Court (Section 29 para. 4, Sections 33 et seqq.). In addition, the right to seek the annulment of a resolution on dissolution adopted in breach of duty or, conversely, the adoption of a resolution on dissolution omitted in breach of duty must also be mentioned. A founder may also be a member (or president) of the foundation council or of another body and/or a beneficiary of the foundation, and indeed may even be the sole beneficiary. As a consequence, the founder has the rights due to these positions.

[151] www.llv.li.
[152] www.fma-li.li.
[153] www.llv.li.

9.38 Even in case of the fiduciary formation of a foundation by a fiduciary as representative, the economic backer, i.e., the principal, is always the founder as defined in the Act. This means that the founder can remain anonymous to the outside world. The foundation council must, of course, be notified of the identity of the founder (Section 4 para. 3), as the founder's intention can be implemented only in this way. The founder's anonymity vis-à-vis third parties is revoked only in the case of Section 36 para. 2 if a creditor of the foundation is unable to obtain satisfaction from the foundation assets, and the founder has not yet fully endowed the assets.

A. Right of revocation

9.39 Section 22 provides that the founder may **revoke the declaration of foundation** at any time if the foundation has not yet been entered in the commercial register. If entry is required for its formation, this is possible until the foundation has been entered in the commercial register. If entry of the foundation is not required, it can be done until the founder's signature or that of the founder's representative is certified in the foundation deed. In case of foundations formed by way of last will and testament (Section 15), only the last will and testament will be amended accordingly.

9.40 Once formed, however, the foundation is generally irrevocable: the founder definitively divests themselves of the dedicated assets. The foundation becomes a legal entity of its own, detached from the founder; the founder's intention is solidified with the instrument of formation (principle of solidification or petrification). However, breaking this principle, Section 30 gives the founder the option to expressly reserve the right to revoke the foundation or to amend the declaration of foundation in the foundation deed. These are unilateral declarations of intent that must be received by the foundation council. They do not require a specific form.

9.41 The **founder's rights** cannot be assigned or bequeathed and cannot be delegated to the foundation council. If the founder is a legal person, it cannot reserve any founder's rights according to Section 30. If a foundation has more than one founder, the founder's rights can be exercised by all founders only jointly, unless the declaration of foundation provides otherwise (Section 4 para. 2). If one of the founders is no longer available, then, in case of doubt, the founder's rights expire. In the case of a fiduciary formation of a foundation by a fiduciary, the economic backer, thus the principal, is deemed to be the founder. As a consequence, the founder's rights accrue directly to such backer and not to the fiduciary. Section 30 provides that the founder's foun-

dation rights may also be exercised by a fiduciary as a direct or indirect representative. Again, the legal effects accrue directly to the founder. According to Section 30 para. 1, in case of direct representation (which is very rare in practice), the representative requires a special power of attorney, issued by the founder.

9.42 As a consequence of the founder exercising the right of revocation, Section 39 para. 2 no. 1 requires the foundation council to adopt a resolution on dissolution and liquidate the foundation. The assets remaining after liquidation are distributed to the ultimate beneficiary. According to Section 8 para. 3, if the right of revocation is exercised, the founder is deemed the ultimate beneficiary, irrespective of whether the founder previously had the status of a beneficiary. This does not apply, however, if a special provision has been issued on the use of assets in the event of revocation according to Section 30 para. 1.

B. Right to make amendments

9.43 When exercising a **right to make amendments** pursuant to Section 30, the founder may freely amend the declaration of foundation and, together with it, the foundations documents, without revoking the foundation. For example, inter alia, other beneficiaries may be designated with new, even large distribution quotas – in fact not only with regard to foundation income, but also with regard to foundation assets – and furthermore, the founder can appoint themselves as beneficiary. The only restriction is provided in Section 37 para. 2, which provides that the foundation council may make payments to beneficiaries only if claims by creditors of the foundation are not thereby curtailed. A declaration of amendment generally leads directly to an amendment of the relevant foundation documents. However, the provisions on the entry in the register and on depositing of the notification of formation are significant.

C. Consequences of granting founder's rights

9.44 The founder's significant influence on „their" foundation, which continues to apply on the basis of a reservation of revocation and/or amendment, has consequences in many respects. In practice, such cases are called „controlled foundations". For example, it is possible to reason that the reservation of founder's rights under Section 30 does not constitute an irrevocable transfer of assets from the founder to the foundation and that the founder has not yet „sacrificed assets". This is why the Austrian Supreme Court has ruled that in case of a reservation of revocation or comprehensive amendment in favor

of the founder, the two-year period for asserting a claim against the foundation under Section 785 para. 3 ABGB (cf. 9.88 et seqq.) to pay out the compulsory portion only begins to run upon the death of the founder.[154] The Liechtenstein Supreme Court has adopted this view, including for other cases where the founder effectively influences the foundations assets.[155] By contrast, if the founder has appointed a third party as the ultimate beneficiary in case of a reservation of revocation, it is not possible to return assets to the founder, which is why assets probably have been sacrificed. The same applies in the event of an effective and unconditional waiver of the reserved founder's rights.

9.45 Furthermore, it is questionable whether a founder's right is subject to enforcement even though it is personal and thus can be seized by the founder's creditors under Articles 241 et seqq. of the Enforcement Act (Exekutionsordnung, EO). The creditor could then declare revocation or designate the founder as beneficiary using their power of amendment. In this regard, the Austrian Supreme Court has in turn ruled that founder's rights may be exercised if the founder has reserved the right of revocation, and is at least in part the ultimate beneficiary or has reserved a comprehensive right of amendment.[156] The Liechtenstein Supreme Court referred to this Austrian case law with regard to the attachability of joint rights which are merely indirectly realizable.[157]

9.46 In addition, Section 10 provides that in the event of a reserved right of revocation on the part of the founder, the beneficiaries are not entitled to information and disclosure rights pursuant to Section 9 if the founder is the ultimate beneficiary (Section 8). Pursuant to Section 11, the founder also may appoint themselves, an audit office or a trusted person as the controlling body, which is required to audit once a year whether the foundation assets are being managed and appropriated in accordance with their purposes. If a controlling body has been set up according to Section 11, the beneficiary may demand information only about purpose and organization of the foundation as well as about the beneficiary's own rights vis-à-vis the foundation.

[154] Austrian OGH 10 Ob 45/07a RIS-Justiz RS0122172.
[155] OGH Judgment 5 July 2013, 10 CG.2010.152 LES 2013, 156 (163).
[156] Austrian OGH 3 Ob 16/06h RIS-Justiz RS0120752.
[157] OGH B 7.9.2018, 08 EX.2016.5802 LES 2018, 277.

9.47 Finally, the reservation of the founder's rights has consequences for the tax recognition of the foundation abroad. Due to the economic approach underlying tax law, in case of controlled foundations, the foundation assets in many cases are still attributed to the founder. By contrast, in the absence of an economic disposal, there is generally no obligation to pay gift or inheritance tax.

D. Mandate agreements

9.48 In addition to the actual founder's rights, there are other ways in which the founder can influence the foundation. For example, so-called „**mandate agreements**" are concluded between the founder and the members of the foundation council, with the founder being granted authority to issue instructions within the context of a commissioned relationship under Sections 1002 et seqq. ABGB, for example, with regard to the exercise of the foundation council's discretion in the case of discretionary foundations (Section 7). Mandate agreements are also used in all other legal entities, such as public companies limited by shares (AG) and establishments.

9.49 These are merely obligations inter partes of the members of the foundation council under the law of obligations: the obligations of the foundation council and its members, which accrue to them on the basis of foundation law or the foundation documents, take precedence over the obligations under the mandate agreement (double obligation nexus[158]). If the foundation council's duties as a governing body contradict any of its duties under the mandate agreement, the former take precedence in any case, even if this is not expressly stipulated in the mandate agreement.[159] While foundation council members may indeed effectively conclude mandate agreements within the limits of foundation law, they cannot be validly required to follow instructions that conflict with mandatory law, morality, or the foundation documents. The foundation council members have the right to object to such instructions in good faith.

[158] OGH Order 8 January 2004, 10 HG 2002.58-39 LES 2005, 174.
[159] OGH Judgment 4 October 2001, 9 Cg 68/99-64 LES 2002, 109.

9.50 According to case law, the person giving the instructions can be considered a de facto body of the foundation if they occupy a controlling position.[160] As such, they may also be subject to the responsibilities of an ordinary member of a governing body.[161] According to case law, the founder's extensive information rights associated with a mandate agreement are inheritable.[162]

V. The foundation council

A. Composition and tasks

9.51 In order to realize the founder's intent, the foundation makes use of its **governing bodies**. They are serving bodies which have to realize the founder's intent as primarily expressed in the foundation documents. The only mandatory body of each foundation is the foundation council („Stiftungsrat", Sections 24 et seqq.), but in addition, an audit office („Revisionsstelle", Section 27; mandatory for foundations supervised by the Foundation Supervisory Authority pursuant to Section 29), a controlling body („Kontrollorgan", Section 11), or other bodies pursuant to Section 28 may be designated.

9.52 Every foundation must have a foundation council which must implement the founder's intent (Sections 24 et seqq.). The foundation council manages the business of the foundation and represents it. In particular, taking account of the founder's intent, the foundation council has to manage the foundation assets and is responsible for its accounting. The foundation council must be composed of at least two members, who may be Liechtenstein or foreign natural or legal persons and may be resident or domiciled anywhere. However, pursuant to Article 180a PGR, a foundation council member who is authorized to manage and represent the foundation must be a Liechtenstein fiduciary or equivalent („180a person"). The founder and the beneficiaries may also be members of the foundation council.

[160] OGH Judgment 9 March 2011, 5 CG.2008.194 GE 2011, 50 = LES 2011, 76, with further references
[161] OGH Judgment 4 May 2005, 1 C 472/97 LES 2006, 205.
[162] OGH Judgment 7 February 2020, 09 CG.2018.215 LES 2020, 36.

9.53 The requirement of two foundation council members is based on the notion of foundation governance, with the dual control principle ensuring mutual internal control. In addition, the foundation remains capable of acting in the event of the death of a member. According to the „Factsheet on the composition of the foundation council" issued by the Foundation Supervisory Authority in May 2020[163], the two foundation council members may also be a fiduciary A and their trust enterprise, provided that a natural person other than fiduciary A signs for the company and the perception of the dual control principle is effectively ensured. It is also permissible to appoint a fiduciary A and their employee B, as long as the latter is independent as regards the activity as a foundation council member, for example by being released from instructions.

9.54 Section 16 para. 1 no. 7 requires that the foundation deed includes regulations on the appointment, dismissal, term of office, and nature of business management (adoption of resolutions) and power of representation (signing authority) of the foundation council. In case of foundations that are subject to the legal obligation to be entered, surname, first name, date of birth, nationality, and domicile or firm address or the legal name and registered office of the members of the foundation council as well as the signatory powers must be specified (Section 19 para. 3 no. 6). In case of foundations that are not subject to the legal obligation to be entered, this information must be included in the notification of formation according to Section 20. The foundation council members may perform their activity with or without remuneration. The foundation council must be initially appointed by the founder or their representative in the course of the foundation's formation. Unless provided otherwise, the appointment pursuant to Section 24 para. 3 is effective for a term of office of three years; reappointment is permissible. Foundation council members often are granted the right to elect additional members (co-optation). Also, in many cases, members must appoint a successor in the event they become incapacitated to act or resign from office.

[163] www.stifa.li.

B. Rights of the foundation council

9.55 Under the conditions of Sections 31 et seq., the foundation council has the right to amend the foundation deed or the supplementary foundation deed. Section 31 provides that an amendment of the purpose of the foundation by the foundation council or another governing body (Section 28) is permitted only, „if the purpose has become unachievable, impermissible, or irrational, or if circumstances have changed to the extent that the purpose has acquired an entirely different significance or effect, so that the foundation is alienated from the intent of the founder". The presumed intent of the founder thus is crucial. In addition, the power of amendment must be expressly reserved in the foundation deed. If no power of amendment in accordance with Section 31 is stipulated, the matter must be referred to a court under Sections 33, 35. If the purpose of the foundation has become unattainable, it is also possible to dissolve the foundation pursuant to Section 39 para. 1 no. 4. However, the foundation council must always examine a change of purpose in the sense of the favor fundationis and implement such a change if this corresponds to the founder's presumed intent and is permissible under the foundation deed. If it is not possible to determine the founder's presumed intent or if it indicates against a change of purpose, the foundation must be dissolved as an ultima ratio.

9.56 Pursuant to Section 32, the foundation council or another body under Section 28 may be granted the right in the foundation deed to amend other contents of the foundation deed (other than the purpose) or the supplementary foundation deed, such as in particular the organization of the foundation or the regulations regarding beneficiaries, provided that the purpose of the foundation is not affected. However, amendments require a materially justified reason to do so, and the purpose of the foundation must be safeguarded by the foundation council. If the foundation council has not been granted any rights under Section 32, Sections 34 et seq. provide that only a court may order an amendment to the foundation deed or to the supplementary foundation deed.

C. Liability of the foundation council

9.57 Pursuant to Section 24 para. 1, the foundation council is responsible for the fulfillment of the purpose of the foundation by observing the provisions in the foundation documents. Pursuant to Articles 218 et seqq. PGR, the **members of the foundation** council are personally liable for any damage they have caused intentionally or negligently, whereby the claim for damages is primarily due to the injured foundation or, in the event of its bankruptcy, its assets (responsibility). The creditors themselves can make a subsidiary claim. As liability standard, Article 182 para. 2 PGR explicitly provides for the so-called „business judgment rule", which stipulates that a member of the foundation council is deemed to act in accordance with these rules „if the business decision was not guided by interests beyond that of the business and if the member of the foundation could reasonably have expected to be acting on the basis of appropriate information for the benefit of the legal person." Article 24 para. 6 provides that in the declaration of foundation, the liability for minor negligence may be excluded for members of the foundation council who serve without remuneration.

9.58 Liechtenstein's liability law is very strict. Article 226 PGR provides that it constitutes liability under a contract, which means that the reversal of the burden of proof under Section 1298 ABGB applies and the body is liable to prove that it is not at fault.[164] If several persons are liable, each of them is jointly and severally liable with the others. Article 222 PGR specifies who has the right of action.[165] Supreme Court case law on liability law is available in abundance. In addition to the foundation council, other foundation bodies such as the audit office, the controlling body pursuant to Section 11 or other bodies (Section 28) may also be liable.

[164] OGH Judgment 8 May 2008, 01 CG.2006.276 LES 2008, 363.

[165] For details see OGH Order 10 January 2001, 3 C 69/96-88 LES 2001, 41.

VI. The audit office

9.59 Pursuant to Section 27, every foundation subject to the supervision of the Foundation Supervisory Authority (Section 29) must establish an audit office as a foundation body. The **audit office** thus is a mandatory body for public-benefit foundations as well as for private-benefit foundations if their foundation deeds have stipulated that they are subject to voluntary supervision by the Foundation Supervisory Authority. Because of Article 192 para. 8 PGR, this also applies to private-benefit foundations which operate a business in a commercial manner, which is permissable in exceptional cases only (Section 1 para. 2). According to Section 27 para. 4 in conj. w. Article 8 StRV, the audit office is required to audit once a year whether the foundation assets are being managed and appropriated in accordance with their purposes. The audit report must be submitted to the foundation council and the Foundation Supervisory Authority.

9.60 Pursuant to Article 191a para. 1 PGR, auditors, audit firms, fiduciaries or trust enterprises may be appointed as audit office. Section 19 para. 3 in conj. w. Article 90 para. 1 HRV requires the audit office to be entered in the commercial register. Section 27 para. 2 provides that the audit office must be independent of the foundation. In particular, anyone who belongs to another foundation body, e.g., the foundation council, who is in an employment relationship with the foundation, who has close family ties to members of foundation bodies or who is a beneficiary of the foundation is excluded from the audit office. The audit office is to be appointed by the court in non-contentious proceedings, with the foundation and the Foundation Supervisory Authority having party status. The founder or the foundation council may communicate two proposals, indicating their preference. The Office of Justice has published a factsheet on the individual procedural steps for appointment, dismissal and reappointment of the audit office (consultation with the Office of Justice, the Foundation Supervisory Authority and the Princely Court).[166]

9.61 In the case of public-benefit foundations, in accordance with Section 27 para. 5 in conj. w. Articles 4 et seqq. StRV, there are two instances where the Foundation Supervisory Authority may waive the appointment of an audit office at the foundation's request. One such case is if the foundation manages assets of less than CHF 750,000, does not publicly solicit donations or operates a business conducted in a commercial manner.

[166] www.stifa.li.

The second is where this appears appropriate for other reasons. In this regard, Article 6 StRV states that the foundation must be subject to ecclesiastical supervision and must pursue an investment policy and use assets permitting direct supervision by the Foundation Supervisory Authority. This is the case if the selected forms of investment allow for an assessment of the financial position and performance based on the clear asset situation and the appropriate use of funds is readily traceable for the supervisory authority. On its website, the Foundation Supervisory Authority[167] has published a fact-sheet and sample templates on the exemption criteria and applications.

9.62 Outside the above cases of mandatory appointment of an audit office, it is possible to voluntarily establish an audit office as a controlling body under Section 11 or as an optional monitoring body under Section 28. Section 16 para. 2 requires that the option of a voluntary appointment of an audit office is included in the foundation deed and does not entail any supervision obligation by the Foundation Supervisory Authority. Finally, the foundation council is free to entrust an external audit office with auditing particular transactions.

[167] www.stifa.li.

VII. The controlling body and other bodies

A. Controlling body

9.63 According to Section 16 para. 2 no. 3, the founder may provide in the foundation deed that a **controlling body** pursuant to Section 11 be or may be established. The controlling body is required to audit once a year whether the foundation assets are being managed and appropriated in accordance with their purposes. It must submit a report to the foundation council on the outcome of this audit. In the event of objections, the controlling body must report to the beneficiaries, to the extent they are known to the controlling body, as well as to the court. If a controlling body has been set up, the beneficiary cannot assert all rights of a beneficiary under Section 9, but may only demand information only about purpose and organization of the foundation as well as about the beneficiary's own rights vis-à-vis the foundation and inspect the foundation documents. In addition, the beneficiary may request to be provided with the audit reports.

9.64 The persons mentioned in Section 11 para. 2 may be appointed as the controlling body. In addition to the founder, this may also be an audit office or a person trusted by the founder. As Section 27 is to be applied analogously to the appointment of an audit office, it must be appointed by the court and comply with the mentioned incompatibility provisions. One or more natural persons named by the founder „who have sufficient specialist knowledge in the sphere of law and business economics to be able to perform their duties" may be appointed as the person trusted by the founder. This includes, for example, an attorney who is a friend of the founder. Such a person of trust does not need to be appointed by the court, but the independence criteria of Section 27 para. 2 apply here as well.

B. Other bodies

9.65 The foundation deed may also provide that **other bodies** within the meaning of Section 28 be or may be designated. The founder is largely free in this regard, both in terms of selection and also in terms of powers. Section 28 mentions bodies „to determine a beneficiary from the group of beneficiaries, to determine the time, level, and condition of a disbursement, to manage the assets, to advise and assist the foundation council, to monitor the administration of the foundation in order to safeguard the purpose of the foundation, to reserve consent or issue instructions, as well as to safeguard the interests of the foundation participants." The bodies may be given

advisory, consenting, directive, or veto rights, but have no power of representation. However, the foundation council may, of course, grant them legal powers of attorney – just like any other third party.

9.66 The appointment of protectors, collators or asset managers is relatively frequent in practice. As these bodies are not defined by law, their competences must be described in the foundation documents. However, a certain common understanding has formed by now. For example, a **protector** („Protektor") serves as an optional supervisory body of the foundation to mediate between the foundation council and the beneficiaries. Protectors usually are family members or friends of the founder or a family advisory board. Section 11 is of course not applicable to protectors. The protector may also be granted rights of consent to amendments to the foundation deed and supplementary foundation deed or to the dissolution of the foundation, as well as the right to appoint and dismiss members of the foundation council (**appointor**) or a relevant right of consent.

9.67 In case of discretionary foundations, a **collator** („Kollator") is at times given the right to determine a beneficiary from the group of beneficiaries or the right to determine the time, amount and terms of a distribution. Of course, these powers are often also granted to the protector, especially, if no collator is appointed. Finally, an asset manager is at times appointed as an optional body responsible for the investment of the foundation's bank assets. The asset manager may in this respect be granted administrative power of attorney vis-à-vis the bank.

VIII. The representative

9.68 Articles 239 et seqq. PGR provide that foundations must appoint a natural person as their representative to represent them vis-à-vis Liechtenstein authorities. A domestic legal person may also be designated as **representative**, if it in turn appoints a natural person as a representative. The obligation to appoint a representative may be waived with the approval of the Office of Justice if the representation of the foundation is otherwise secured, or, as is often the case, a domestic address for service has been designated. The foundation must be dissolved and liquidated if no representative is appointed and none of the said exceptions apply (Article 971 para. 1 no. 2 PGR).

9.69 The representative is appointed on the occasion of the declaration of foundation and, in the case of foundations subject to the legal obligation to be entered, must be entered in the commercial register (Section 19). In this case, the representative's name is stated in the register extracts. In the case of foundations not subject to the legal obligation to be entered, the notification of formation pursuant to Section 20 must contain information on the representative. The representative's identity is disclosed to third parties with a legitimate interest and to domestic authorities in accordance with Article 955a PGR. The representative is the foundation's official service agent and by law is authorized to receive declarations and notifications of any kind on behalf of the foundation by all domestic courts and administrative authorities in all matters.

IX. The beneficiaries

A. Classification

9.70 As the beneficiaries are the **targets of the foundation's purpose**, their designation is one of the essentialia negotii of forming a foundation. Section 5 defines the beneficiary as „the natural or legal person which, with or without consideration, in fact, unconditionally or subject to certain prerequisites or conditions, for a limited or unlimited period, with or without restrictions, with or without the possibility of revocation, 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)." The beneficiaries' identity is not made public and is also not entered in the commercial register or included in the notification of formation.

9.71 The law provides for four categories of beneficiaries. **Beneficiaries with a legal entitlement** („Begünstigungsberechtigter") pursuant to Section 6 para. 1 are beneficiaries who, on the basis of the foundation documents (foundation deed, the supplementary foundation deed, or the regulations), have a legal entitlement to a specified or specifiable benefit, also in terms of the amount, from the foundation assets or foundation income. Beneficiaries therefore have an actionable claim against the foundation for their status as a beneficiary; any discretion on the part of the foundation council is excluded.

9.72 **A prospective beneficiary** („Anwartschaftsberechtigter", Section 6 para. 2) is a person who, on the basis of the foundation documents, has a legal entitlement to become an entitled beneficiary at a later point in time. This may be the case after the occurrence of a condition precedent or at a specified

time (for example, after a prior ranking beneficiary is no longer available). Those who do not have a right to succeed to the status as a beneficiary, but have only an uncertain prospect of acquiring it, are not prospective beneficiaries. Whether or not a legal claim exists must be determined by interpreting the foundation documents.[168]

9.73 The third category is that of **discretionary beneficiaries** („Ermessensbegünstigter", Section 7). A discretionary beneficiary is a beneficiary who belongs to the group of beneficiaries specified by the founder and whose possible beneficial interest is placed within the discretion of the foundation council or another body (e.g., a protector or collator). Foundations with discretionary beneficiaries are called „discretionary foundations" („Ermessensstiftung"). Discretionary beneficiaries do not have an actionable claim to receive any particular foundation benefit: they obtain a legal claim only once a valid resolution has been passed on the specific distribution. Once the distribution has been made, any and all of the discretionary beneficiaries' claims expire. However, discretionary beneficiaries are entitled to the control rights under Section 9 and to rights of application as foundation participants.

9.74 And lastly, the **ultimate beneficiary** („Letztbegünstigter", Section 8) is the beneficiary who, in accordance with the foundation documents, is intended to receive the remaining assets following the liquidation of the foundation. If there is no beneficiary, the foundation assets revert to the Principality of Liechtenstein, which pursuant to Article 129 para. 2 PGR has to use the assets as far as possible in accordance with the foundation's purpose.

9.75 Since the designation of the beneficiaries is one of the essentialia negotii of a foundation formation transaction, the foundation deed pursuant to Section 16 para. 1 no. 4 has to include a „designation of specific beneficiaries, or beneficiaries identifiable on the basis of objective criteria, or of the group of beneficiaries". There are, however, three exceptions. On the one hand, this provision does not apply to public-benefit foundations since, according to Article 107 para. 4a PGR, they serve by definition the benefit of the general public. On the other hand, it is permissible to expressly refer in the foundation deed to a supplementary foundation deed and to stipulate the specification of the beneficiaries or the group of beneficiaries in the supplementary foundation deed. This if often the case in practice. Finally, in some cases it may exceptionally happen that the beneficiaries „follow otherwise from the purpose of the foundation."

[168] StGH Judgment 3 September 2019, StGH 2019/008 LES 2020, 1.

9.76 As a general rule, a beneficial interest can refer only to the foundation's income or also the foundation's assets as such (limited-term foundation („Verbrauchsstiftung")). The beneficiary in the first case is called „income beneficiary" („Ertragsbegünstigter"), and in the latter a „capital or substance beneficiary" („Kapital- oder Substanzbegünstigter"). Liechtenstein foundation law does not provide for a duty to preserve assets or a prohibition of reinvestment. However, Section 37 para. 2 bans foundation councils from making distributions to beneficiaries if this would reduce the claims of foundation creditors. The founder may also appoint themselves as sole or co-beneficiary. Furthermore, according to Section 30, the founder may reserve the right to amend the beneficiary regulation at any time by changing the declaration of foundation. Within the context of Sections 31 et seq., the foundation council may be granted a right to amend the beneficiary regulation in the foundation deed or in the supplementary foundation deed.

9.77 In most cases, the foundation documents define a cascade of beneficiaries: the first beneficiaries („Erstbegünstigte"; in the foundation's assets or only in the income) are designated and it is determined who will be the second beneficiaries (again, in the foundation's assets or in the income) after the death of the first beneficiaries. In many cases, even the third, fourth, fifth, etc. beneficiaries are determined. If a particular beneficiary dies, their claim to a beneficial interest does not a priori form part of their estate, as this claim ceased to exist upon the beneficiary's death and it is the subsequent beneficiaries' turn. The legal status as beneficiary is personal and cannot be transferred nor inherited, unless the founder has expressly ordered the opposite. Pursuant to Section 16 para. 1 no. 8, the foundation deed or supplementary foundation deed must also contain a provision on the appropriation of the assets in the event of the dissolution of the foundation.

B. Rights of beneficiaries

9.78 The foundation is not a corporation, where the partners can exert influence by virtue of their status as partners. To counter the risk of foundation councils acting like the owners of the foundation assets, Section 9 grants the beneficiaries rights to information and disclosure. The rights are only available to beneficiaries as defined in Section 5, and thus also to the current discretionary beneficiaries, but not to any persons who merely have the prospect of a future status as a discretionary beneficiary. **Information rights** include the right to inspect the foundation documents and the right to the disclosure of information, reporting and accounting. The beneficiary has the right to inspect

all account books and business papers and to make copies, and also to examine and investigate all facts and circumstances, personally or through a representative.

9.79 However, the Act provides for restrictions on information rights in several respects. First of all, the beneficiary has these rights only „insofar as the beneficiary's rights are concerned", i.e., if the beneficiary is directly and personally affected. For example, past events, thus, events that occurred prior to obtaining the status as a beneficiary, are controllable only if they directly affect current rights of the beneficiary. Secondly, Section 9 para. 2 provides for a comprehensive general abuse clause, which stipulates that the right may 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". Thirdly, on an exceptional basis, beneficiary rights may also be denied „on important grounds to protect the beneficiary", for example, to prevent a young beneficiary from indolence when they learn of their substantial beneficial interest.

9.80 The information rights must be asserted in court in non-contentious proceedings. They are presumed to exist: the admissibility of restrictions must be demonstrated by the foundation council. Foundation documents often state reasons, why a request for information or disclosure may be denied. While these reasons do not bind either the court or the foundation council, as Section 9 para. 2 constitutes mandatory law, the relevant provisions must be considered when weighing all interests. However, the beneficiaries of a foundation do not have a right to trace („Spurfolgerecht"), as the beneficiaries of a trust or a business trust do.

9.81 Sections 10-12 provide for important exceptions that partially suspend the information rights under Section 9 when other parties control the foundation council. If the founder has reserved a right of revocation pursuant to Section 30, and if the founder is the ultimate beneficiary, the beneficiaries are not entitled to any information and disclosure rights pursuant to Section 10, because the founder in this case has considerable options of influence and control. If a controlling body has been set up according to Section 11, the beneficiary may demand information only about purpose and organization of the foundation as well as about the beneficiary's own rights vis-à-vis the foundation. The founder, a person trusted by the founder or an audit office may be appointed as controlling body. Section 12 provides that the beneficiary does not have any information and disclosure rights if the foundation is supervised by the Foundation Supervisory Authority.

9.82 At any rate, however, beneficiaries as participants pursuant to Section 3 have the unalienable right to apply to a judge for an order to remedy deficiencies (Section 29 para. 4).

X. Foundation governance (Stiftungsaufsicht)

9.83 **Foundation governance** refers to all rules and regulations that assist in the foundation bodies acting prudently in the interests of the founder. Regulations to protect the foundation from misconduct by its governing bodies are extremely important, as there are no owners who might assume a supervisory function (e.g., shareholders) and also due to potential conflicts of interests of the foundation's representatives. A distinction can be made between external governance in the sense of foundation supervision by state authorities and internal governance within the context of mutual control rights of the foundation participants (Section 3). In creating Liechtenstein's new foundation law, special emphasis was placed on a modern system of foundation governance. For example, the fact that the Foundation Supervisory Authority cannot itself order supervisory enforcement measures, but – just like the foundation participants – has to apply for them in court in non-contentious proceedings, is a groundbreaking development. This combination of ongoing regulatory supervision and judicial decision-making authority (application-based judicial review) certainly has exemplary character.

A. Public-benefit foundations

9.84 Section 29 provides that public-benefit foundations are subject to the supervision of the Foundation Supervisory Authority (Stiftungsaufsichtsbehörde, STIFA). The STIFA is a department of the Office of Justice. It's website[169] provides a wealth of information. STIFA must ensure ex officio that the foundation assets are managed and appropriated in accordance with the purpose of the foundation (Articles 7 et seqq. StRV). For this purpose, STIFA may request all information from the foundation bodies and inspect the books. In addition, it also has to review the annual audit report to be submitted each year by the audit office. However, enforcement actions, such as the dismissal of the foundation bodies, conducting special audits or the annulment of resolutions of the foundation bodies, must be applied for by STIFA at the Princely Court in non-contentious proceedings. A STIFA motion seeking coercive measures cannot be appealed.

[169] www.stifa.li.

9.85 For internal governance, every public-interest foundation must appoint an independent audit office in accordance with Section 27 as one of the foundation's governing bodies. Moreover, each participant as defined in Section 3, i.e., the founder, beneficiaries and all foundation bodies as well as their members, have the right to apply pursuant to Section 29 para. 4 to the Princely Court to initiate supervisory measures. The Foundation Supervisory Authority has party status in these proceedings.

B. Private-benefit foundations

9.86 Private-benefit foundations, which according to their foundation deeds are subject to foundation supervision, in terms of supervision are governed by the same regime as public-benefit foundations. If not stipulated in the foundation deed, private-benefit foundations are not supervised by the authorities. In such case, the foundations have strong internal governance. On the one hand, the beneficiaries are entitled to the extensive information and disclosure rights under Section 9: they have the right to inspect all account books and papers, to make copies and to examine and investigate all facts and circumstances of the foundation in person or through a representative, unless this right is restricted on the basis of Sections 9 et seqq.

9.87 Moreover, even in the case of private-benefit foundations, all **foundation participants** (founder, beneficiaries and foundation bodies as well as their members) have the right pursuant to Section 29 para. 4 to apply directly to the Princely Court for supervisory measures, such as the **dismissal of foundation** bodies, the performance of a special audit or the **cancellation of resolutions** of the foundation bodies. Finally, upon application by participants or ex officio, the court may, at the most on the basis of a notification by the Foundation Supervisory Authority or the public prosecutor's office, order an amendment of the foundation documents, provided that the requirements of Sections 33 et seq. are met. The Foundation Supervisory Authority has party status in these proceedings.

XI. Foundation and right of inheritance

9.88 As a rule, since a beneficial interest is given to a specific person, after the beneficiary's death, the designated subsequent beneficiaries are entitled to the benefit, and not the heirs of the deceased beneficiary. If the **beneficial interest is to be heritable**, this must be explicitly provided for in the foundation documents. If the testator was a beneficiary only while still alive, their claim to a beneficial interest does not a priori form part of their estate, as this claim ceases to exist upon the beneficiary's death.[170]

9.89 This is unrelated to the question of whether and how a contribution of assets by the testator to a foundation may be challenged by the testator's heirs on the grounds of violation of their compulsory portion. Section 38 para. 1 provides that any contribution of assets to the foundation, including donations or subsequent endowments (Section 13), may be challenged by the heirs in the same manner as a gift. In practice, forced heirs, whose compulsory portion has been reduced, at times assert **claims to supplement compulsory portions** („Pflichtteilsergänzungsanspruch") against Liechtenstein foundations if the testator has violated their rights to a compulsory portion by forming the foundation or by making a subsequent endowment. Action against a Liechtenstein foundation to supplement the compulsory portion must be brought before the Princely Court (Sections 30, 36 of the Act on Court Jurisdiction (Jurisdiktionsnorm, JN)). The challenge is not directed against the existence of the foundation, but, if granted, seeks the surrender of the part of the foundation assets which is required to procure for the founder's forced heirs, whose compulsory portion has been reduced, what they are entitled to by law. The foundation is thus ordered to pay a certain amount of money.

9.90 If Liechtenstein law is applicable according to the rules of international law of succession, Section 785 ABGB applies, which provides that upon request of a child or the spouse entitled to a compulsory portion, donations – thus including endowments of assets to a foundation – must to be taken into account when calculating the estate (extra compulsory share). However, paragraph 3 stipulates that, for example, endowments of assets to public-benefit foundations are not taken into account. The same applies to endowments of assets made to a foundation earlier than two years before the testator's death. However, if the founder has reserved founder's rights pursuant to Section 30 or otherwise controls the foundation assets (cf. 9.37 et seqq.), this two-year period starts only with the founder's death or upon their effective renunciation.

[170] StGH Decision 16 September 2002, StGH 2002/17 LES 2005, 128 = Pool 2002, 67/P16.

9.91 In cases with a foreign connection, i.e., if the testator is not a Liechtenstein citizen and domiciled in Liechtenstein, claims to supplement compulsory portions must be assessed according to the law stipulated in Article 29 of the Act on Private International Law (Gesetz über das internationale Privatrecht, IPRG). Pursuant to Article 29 para. 5 IPRG, such rights may be asserted only if this is permissible both according to the law governing the testator's succession (Article 29 para. 1-4) and also according to the law governing the acquisition process. For example, if a French testator made an endowment contribution to a Liechtenstein foundation during their lifetime and if Liechtenstein law is applicable to such endowment contribution, an action to compel the testamentary heirs to pay out the compulsory portion in full („Pflichtteilsergänzungsklage") is only successful if all the requirements of French and Liechtenstein law are met (e.g., compliance with the French and Liechtenstein limitation periods). If the claim to supplement the compulsory portion under Liechtenstein law has lapsed (Sections 785, 1487 ABGB), it is no longer possible to assert a claim.

XII. Foundation and asset protection

9.92 **Asset protection** is generally understood to mean the protection of private assets against liability and any resulting third-party access. As will be shown, the Liechtenstein legislator has succeeded in striking an appropriate balance between the founder's legitimate interests in protecting their endowed assets (asset protection), on the one hand, and the creditors' interests in the ability to collect their claims against the foundation, the founder or the beneficiaries, on the other hand.

A. Creditors of the foundation

9.93 Section 37 para. 1 provides that only the foundation assets are liable for the debts of the foundation vis-à-vis the creditors. Any personal liability of the founder is excluded, as is the obligation to make additional contributions. Only if the founder has not yet fully endowed the assets and if claims of creditors against the foundation thus are not covered, the foundation council is obligated pursuant to Section 36 para. 2 to provide the creditors with all information they require to take legal action, including the founder's identity. However, the founder can avert this by paying the (remaining) contribution. Section 37 para. 2 finally prohibits the foundation from making distributions to beneficiaries if this would reduce the claims of any of its creditors. If the foundation bodies breach this liability barrier, they become liable for damages (cf. 9.51 et seqq.).

B. Creditors of the founder

9.94 **Creditors of the founder**, who do not obtain satisfaction from the founder because the latter has transferred parts of the assets to a foundation may, pursuant to Section 38 para. 1, challenge the contribution of the assets, including any subsequent endowment, „in the same manner as a gift", thus applying the avoidance provisions of the RSO, in particular its Article 65. Moreover, in exceptional cases, creditors of the founder may access the assets of the foundation within the scope of a so-called „reversed recourse" if the founder is using the foundation as an excuse in an abusive manner (Article 2 PGR). This is the case where the founder indeed formally transfers assets to a foundation, but exercises a controlling influence on facts and circumstances of the foundation to an extent as if it were still their private assets and if there really were in fact no foundation, i.e., if the founder does not play the „foundation game" and, e.g., makes all decisions without ever involving the foundation council. As the Constitutional Court clarified, the mere reservation of founder's rights is, of course, not sufficient to enforce liability.[171] Similarly, the mere existence of a mandate agreement between the founder and the members of the foundation council does not lead to an imputed liability.

9.95 Finally, enforcement against founder's rights under Section 30 is not excluded by law. Thus, it might indeed be possible that the courts would affirm that the founder's rights can be made the object of enforcement in favor of the creditors, at least if the founder has reserved the right of revocation, and is at least in part the ultimate beneficiary or has reserved a comprehensive right of amendment.

C. Creditors of beneficiaries

9.96 Under the general rules of enforcement law, creditors of beneficiaries generally may seek to enforce their claims against distributions already made to beneficiaries, as the distribution amounts constitute a component of the debtor's assets. Section 36 para. 1 provides that in case of family foundations (Section 2 para. 4, cf. 9.10 et seqq.), the founder may provide „that the creditors of beneficiaries may not deprive these beneficiaries of their status as an entitled or prospective beneficiary, where such status has been obtained without consideration, or individual claims arising from such a status,

[171] StGH Decision 16 September 2002, StGH 2002/17 LES 2005, 128 = Pool 2002, 67/P16.

by way of proceedings to secure rights, compulsory execution, or insolvency proceedings." This means that the founder may stipulate that such claims of the beneficiaries and prospective beneficiaries (Section 6) against the family foundation – but not any amounts already distributed – cannot be made the object of enforcement in favor of the beneficiaries' creditors.

9.97 In case of a mixed family foundation (Section 2 para. 4 no. 2), the **enforcement privilege** applies only to such claims which serve to defray the costs of upbringing or education, the endowment or support of family members or similar family interests. The enforcement privilege according to Section 36 para. 1 must be included in the foundation statutes (Section 16 para. 2 no. 6). Similar regulations also exist in other legal systems, for example in numerous U.S. states (spendthrift trusts or protective trusts).

D. Private international law

9.98 The applicable law in case of creditor challenges with a foreign connection is stipulated in Article 75 RSO. To put it simply, there is a cumulative connection: a challenge can be enforced only if the claim is admissible under the law of the debtor's domicile or registered office and under the law governing the acquisition transaction. However, enforcing the enforcement privilege under Section 36 para. 1 in enforcement proceedings with a foreign connection is problematic. As no relevant case law exists, it is unclear how foreign courts would rule. However, there is a possibility that foundation assets located abroad, such as a securities deposit of the foundation with a foreign bank, would be seized by the competent court at the bank's registered seat.

E. Segmented foundation (PCC)

9.99 For registered holding foundations and exclusively public-benefit foundations, the possibility of so-called „segmentation" has existed since the beginning of 2015 (PCC; Protected Cell Company, Articles 243 to 243g PGR). The assets of the **segmented foundation** comprise the core assets and the separate assets of the individual segments. However, only the foundation has its own legal personality, not the individual segments. It is possible to agree in contracts with third parties that a specific segment is liable and that the core assets are only subordinated. In addition to the mandatory contents of the foundation deed pursuant to Section 16, the foundation deed of a segmented foundation must include

- a statement that it is a segmented foundation,
- provisions on the organization and representation of the segmented foundation,
- the designation of the individual segments by name, and also
- the areas of activity of the individual segments.

9.100 The last two items of information may also be regulated in regulations according to Section 18. Segmentation is also possible retrospectively, as long as a reservation of amendment in favor of the founder or the bodies of the foundation is anchored in the foundation deed. Otherwise it is also possible to seek a conversion in court. All segmented legal entities are subject to the obligation to set up an audit office.

XIII. Accounting

9.101 Foundations operating a business conducted in a commercial manner as defined in Article 107 para. 3 PGR in conj. w. Article 42 para. 3 HRV, which is permissible only under the conditions of Section 1 para. 2, are subject to the generally accepted **accounting standards** of Articles 1045 et seqq. PGR. They must prepare a balance sheet as of the date of entry in the commercial register and thereafter, an audited financial statement (balance sheet, income statement and possibly notes) every year. In case of all other public- or private-benefit foundations, the foundation council is required by Section 26 to maintain records in respect of the management and appropriation of the foundation assets, taking into account the principles of orderly bookkeeping. The level of detail of the records depends on the foundation's financial situation. There is, however, no general accounting obligation. Moreover, a schedule of assets must be

maintained, showing the foundation's asset position and the asset investments. Account books, supporting documents and business correspondence must be retained for a period of ten years.

9.102 In case of registered foundations that do not operate a business conducted in a commercial manner and whose foundation deeds also do not permit this, the foundation council must complete an annual declaration procedure in accordance with Article 182b PGR. A declaration signed by each member of the foundation council who meets the requirements under Article 180a PGR must be submitted annually to the Office of Justice, confirming that for the previous fiscal year, a statement of assets and liabilities is available and that no business has been conducted in a commercial manner. In the event of default, the Office of Justice has to remind the foundation and, after at least a further twelve months, initiate dissolution and liquidation proceedings ex officio (Article 971 PGR). In addition, the imposition of a penalty according to Section 66a SchlT PGR is possible. The Office of Justice may verify the accuracy of the declaration within two years if the declaration is not confirmed by an auditor or an auditing company. Foundations that are not entered in the commercial register do not need to complete a declaration procedure under Article 182b PGR.

XIV. Taxes and fees

9.103 The tax treatment of foundations is explained in chapter 16, paragraphs 16.9 et seqq (see information brochure „Liechtenstein Tax Law").

9.104 The fees for official acts of the Office of Justice in commercial register matters (entries, deposits, issuance of official confirmations, etc.) are stipulated in Annex 2 to the Ordinance on Land Register and Commercial Register Fees (Verordnung über Grundbuch- und Handelsregistergebühren). For example, the fee for entering a foundation in the commercial register is CHF 700, for filing the notification of formation CHF 300, and for issuing a certified official confirmation or a certified register extract CHF 15. The fees of the Foundation Supervisory Authority for the evaluation of audit reports (CHF 200 to 1,000), for decisions on the exemption from the obligation to appoint an audit office (CHF 150), and for inspecting foundation documents (CHF 150 to 2,000) are specified in Article 13 StRV. If STIFA has to apply to the Princely Court for an order for supervisory measures, the expenses are calculated on the basis of an hourly rate of CHF 150.

XV. Termination

A. Dissolution

9.105 The termination of a foundation requires a reason for dissolution, a subsequent liquidation procedure and a confirmation of exstinction from the Office of Justice. The general provisions of Articles 130 et seqq. PGR apply. Special features under foundation law are stipulated in Sections 39 et seq. **Dissolution** changes the purpose of the foundation: the foundation must now direct all of its activities towards ending its existence. The possible grounds for dissolution are listed in Section 39, e.g., the opening of bankruptcy proceedings in respect of the foundation assets, a court ordering dissolution, or the foundation council adopting a resolution on dissolution Moreover, the grounds for dissolution pursuant to Article 971 PGR and Section 21 para. 3 must be taken into account, e.g., in case taxes or duties owed are not paid or in the case of an immoral or unlawful purpose of the foundation.

9.106 The standard case is a resolution of the foundation council to dissolve the foundation. The foundation council has to adopt a resolution on dissolution if

- it has received a permissible revocation by the founder,
- the purpose of the foundation has been achieved or is no longer achievable,
- the duration envisaged in the foundation deed has expired, or
- other grounds for dissolution are stated in the foundation deed.

9.107 If the entire assets of the foundation have been distributed to the beneficiaries, this constitutes, for example, a case under Section 39 para. 2 no. 2: the foundation council must pass a resolution on dissolution. In the absence of any other provision in the foundation deed, a resolution on dissolution must be adopted unanimously. If the foundation council does not adopt a resolution on dissolution, even though grounds for dissolution exist, the judge has to dissolve the foundation at the request of foundation participants (Section 3) or of the Foundation Supervisory Authority. Conversely, the court has to annul an unjustified dissolution resolution at the request of foundation participants or STIFA.

B. Liquidation

9.108 The dissolution of the foundation results in the initiation of **liquidation proceedings** according to Articles 130 et seqq. PGR. The foundation retains its legal personality throughout this process. The current operations must be terminated, the foundation's liabilities discharged, its assets sold and the liquidation proceeds distributed among the ultimate beneficiaries (Section 8). If there are no beneficiaries, the liquidation proceeds revert to the Principality of Liechtenstein, which has to use the assets as far as possible in accordance with the foundation's previous purpose (Article 129 para. 2 PGR). As a rule, in case of foundations that are entered in the commercial register, the distribution may not take place before six months have elapsed from the date of the announcement of the dissolution (waiting period of six months), with three public calls to file claims (notice to creditors). No notice to creditors is issued in case of foundations not entered in the commercial register.

C. Exstinction

9.109 After the liquidation has been completed, pursuant to Section 40 para. 3, the Office of Justice issues a confirmation of extinction in the form of a register extract, and in the case of foundations not entered in the commercial register, an official confirmation. This requires the tax authority's consent to extinction, confirming that all taxes have been paid. In case of foundations subject to STIFA supervision, STIFA must be notified of the termination. If, after the **extinction** of the foundation, further foundation assets surface, on the application of parties involved such as former beneficiaries, foundation council members, or creditors or ex officio, the Office of Justice must, pursuant to Article 139 PGR, place the extinguished foundation in subsequent liquidation and have the assets distributed by official subsequent liquidators in accordance with the order of priority under bankruptcy law. The foundations subject to supervision must notify STIFA of the subsequent liquidation.

D. Termination without dissolution and liquidation

9.110 Pursuant to Section 41, subject to mandatory preservation of the essence of the foundation in general and the intent of the founder in particular, private-benefit foundations may be converted, without resolution or liquidation, into an establishment organized under foundation law, or a trust enterprise with legal personality organized under foundation law. Such a **conversion** may only take place if it is reserved in the foundation deed, and if it is conducive to realizing the purpose of the foundation. The conversion leads to an automatic transfer of assets to the new legal entity upon its coming into effect; rights of third parties, such as creditors of the foundation, continue to exist. The Liechtenstein legislator does not allow a **merger of foundations**: it is „currently refraining from creating corresponding provisions."[172] The same applies to **splitting foundations**. Subject to compliance with the requirements of Article 234 PGR, it is also possible to **transfer the registered office** of a Liechtenstein foundation abroad while preserving its identity.

E. Assertion of claims against or by a terminated foundation

9.111 In order to assert claims against an extinguished foundation, pursuant to Article 141 PGR, the Princely Court must, on the application of a party involved, appoint a **counsel** („Kurator") for the extinguished foundation. According to case law, the same applies to the assertion of possible claims of the foundation, which no longer has any bodies, but still exists due to (presumed) claims.[173] Following a change to previous Constitutional Court case law, the former bodies of the foundation are entitled to party status already in the proceedings of appointing counsel.[174]

[172] Report and Motion 2008/13.

[173] OGH Order 2 July 2009, 10 HG.2008.27 LES 2010, 38 and OGH Order 6 November 2013, 5 HG.2012.454 LES 2014, 12 = GE 2014, 136. It remains to be seen whether the amendment of Article 141 PGR by LGBl 2016/402 has an effect on this analogy.

[174] StGH Judgment 15 May 2017, StGH 2016/84 LES 2017, 125.

XVI. Transitional provisions

A. Principle and limitations

9.112 The foundation law presented here came into force on 1 April 2009 and brought significant innovations to the previous law in many areas. The important question as to which provisions of the new law should apply to the large number of foundations established prior to said date (so-called „**legacy foundations**" („Altstiftungen")) was regulated in detailed transitional provisions (Article II LGBl 2008/220). On 29 September 2009, Parliament extended the time limits specified in the above Act by LGBl 2009/247, Article I, by six months in each case, and with regard to Article 2 para. 1 of the Transitional Provisions (TP), by twelve months.[175] Below, the extended deadlines will be shown.

9.113 Article 1 para. 1 TP laid down the principle that the new foundation law should only apply to foundations established on or after 1 April 2009. The new foundation law hence did not force foundations formed prior to that date to adapt to the new legal situation within a certain period of time with regard to all areas. Marxer & Partner Rechtsanwälte (eds.), Gesellschaften und Steuern in Liechtenstein (2003) provides a description of the foundation law applicable until 31 March 2009.

9.114 However, the „old law for legacy foundations" principle was significantly limited in two respects. For one, Article 1 para. 2 and 3 TP provided for a smooth transition to the new law with regard to the legal relationship between the foundation and the Office of Justice. If facts occurred in the case of existing foundations, which required reporting to the Office of Justice under Section 20 para. 3, a notification with the contents of the notification of formation (Section 20 para. 2) had to be made. In practice, this was referred to as a **transitional notice** („Überführungsanzeige") and had to contain, in particular, the name and purpose of the foundation as well as the identity of the representative and the members of the foundation council. Among other things, it had to be confirmed that the designation of the beneficiaries or the group of beneficiaries had been made by the founder. It was advantageous that when a transitional notification was

[175] Report and Motion 2009/65.

submitted, the Office of Justice could demand the surrender of the foundation documents that had to be deposited under the old foundation law. If no transitional notification was submitted or if an incorrect declaration was made, the penal provisions in Section 66c SchlT PGR were applicable accordingly (fine of up to CHF 10,000 or CHF 50,000).

9.115 The second departure from the principle of „old law for legacy foundations" was stipulated in Article 1 para. 4 TP. This clause listed the provisions of the new law that were also applicable from 1 April 2009 to legacy foundations. These were provisions on foundation governance in the broader sense, e.g., on the rights of foundation participants, foundation supervision and on the right of foundation bodies to amend the foundation documents. For private-benefit foundations, this meant, in particular, that the provisions on the beneficiaries' information and disclosure rights (Sections 5-12, cf. 9.70 et seqq.) also applied to all existing foundations. Until 1 April 2010, the founder or the founder's indirect representative (fiduciary) – and under certain circumstances, the foundation council – was entitled to appoint a controlling body under Section 11, even if this right was not reserved in the statutes. All existing public-benefit foundations had to be entered in the commercial register and reported to the Foundation Supervisory Authority by 1 April 2010. Except in exceptional cases, audit offices were appointed for these foundations in a next step (cf. 9.59 et seqq.).

B. Recovery of legacy foundations

9.116 Finally, Article 2 TP provided in detail for the option of legal **recovery** of legacy foundations established prior to 31 December 2003, whose purpose was not sufficiently determined with regard to the beneficiaries. The Supreme Court had pronounced that foundations are void which „do not reveal even to a minimum degree how the foundation assets are used and which at least rudimentary criteria were used to define the circle of beneficiaries."[176] This affected foundations, whose purpose was merely to invest and manage the foundation's assets and where the foundation council was authorized by the foundation deed to determine the foundation's beneficiaries. The foundation council was at complete liberty in this respect. While the Constitutional Court substantively confirmed this

[176] OGH Order 17 July 2003, 1 CG.2002.262-55.
[177] StGH Decision 18 November 2003, StGH 2003/65 Jus & News 2003, 281.

decision, it elaborated that previous foundations were not eo ipso void for reasons of the protection of good faith.[177] The court also appealed to the legislator to enact regulations for the recovery of previous foundations with similarly undefined foundation purposes, which was done in Article 2 TP. Since the legal situation should have been generally known upon the publication of the Constitutional Court ruling, at the latest, the recovery option under Article 2 TP applied only to foundations established prior to 31 December 2003. Affected legacy foundations were recovered by giving the founder the extraordinary right to specify the regulations on beneficiaries in the foundation deed and, if applicable, in the supplementary foundation deed, even if the founder had not reserved any founder's rights. If the founder had died or was legally incapacitated, this right fell to the foundation council, provided that the founder's intent could be determined on the basis of documents of the founder, the founder's representative or a foundation body, e.g., in memos, emails, minutes or a mandate agreement. If the document did not originate from the founder, only documents drawn up prior to 1 December 2006 could be used. The recovery of legacy foundations was permitted only until 31 December 2010.

9.117 Pursuant to Article 2 para. 4-6 TP, the foundation council of each unregistered foundation had to confirm by 31 December 2010 that the foundation documents complied with the requirements of Section 16 para. 1 no. 4 regarding the specification of beneficiaries. It was, however, not required that the foundation deed includes an explicit reference to the supplementary foundation deed. If the deadline was missed, grace periods were granted, after which the judge had to declare the foundation dissolved. The issuance of an incorrect confirmation under Article 2 para. 4 TP was punishable pursuant to Article 3 para. 2 TP. If it was not possible to determine the founder's intent or if the foundation established after 31 December 2003 was defective, no recovery was possible and the foundation had to be dissolved.

Sources:

On the old foundations (in force until 31 March 2009; many statements apply, however, to the new law as well):

Bösch, Liechtensteinisches Stiftungsrecht (2005);

Delle Karth, Die aktuelle Rechtsprechung des OGH im Stiftungsrecht, LJZ 2008, 51;

Frick-Tabarelli, Die besondere Bedeutung der Treuhänderschaft gem Art 879 ff PGR für die privatrechtliche Stiftung nach liechtensteinischem Recht (1993);

Heiss, Zur Sanierung fehlerhafter Stiftungsstatuten. Kein Handlungsbedarf des liechtensteinischen Gesetzgebers infolge des Urteils des StGH vom 18.11.2003, Az. StGH 2003/65, LJZ 2004, 80;

Hier, Die Unternehmensstiftung in Liechtenstein (1995);

L. Marxer, Die liechtensteinische Familienstiftung. Ihre Eigenart im Verhältnis zum schweizerischen Recht (1990);

Marxer & Partner Rechtsanwälte (Hrsg), Gesellschaften und Steuern in Liechtenstein11 (2003);

Öhri, Die Grundlagen der zivilrechtlichen Verantwortlichkeit der mit der Verwaltung und Geschäftsführung einer AG, Anstalt oder Stiftung betrauten Organe, LJZ 2007, 100;

Quaderer, Die Rechtsstellung des Anwartschaftsberechtigten bei der liechtensteinischen Familienstiftung (1999);

Summer, „Vertrauen ist gut, Kontrolle ist besser". Die Auskunftsrechte von Begünstigten im liechtensteinischen Stiftungs- und Treuhandrecht, LJZ 2005, 36;

U. Torggler, Zur Business Judgment Rule gem Art 182 Abs 2 PGR, LJZ 2009, 56.

Zum neuen Stiftungsrecht (in Kraft seit 1.4.2009):

Baur, Bestreitungsklauseln bei privatnützigen Stiftungen, in S*chumacher/ Zimmermann* (Hrsg), FS Gert Delle Karth (2013) 23;

Böckle, Die Unternehmensstiftung im Spannungsfeld zum Pflichtteilsrecht, LJZ 2013, 141;

Bösch, Vermögensopfer und Stiftung, LJZ 2013, 141;

Büch, Durchgriff und Stiftung (2015);

Butterstein, Die zivilrechtliche Anerkennung der liechtensteinischen Stiftung in Deutschland (2015);

Butterstein, Rechtsvergleichende Betrachtung der Errichtung einer Substiftung und des Trust Decanting, LJZ 2020, 208;

Gasser, Liechtensteinisches Stiftungsrecht. Praxiskommentar (2019);

Hammermann, Die neue Stiftungsrechtsverordnung, liechtenstein-journal 2009, 34;

Hochschule Liechtenstein (Hrsg), Das neue liechtensteinische Stiftungsrecht (2008);

Hosp, Das Kontrollorgan als Element der Foundation Governance. Erste Praxiserfahrungen, in *Schumacher/Zimmermann* (Hrsg), FS Gert Delle Karth (2013) 465;

Hosp, Neue Haftungsregeln für Stiftungsvorstände liechtensteinischer Stiftungen, ZfS 2008, 91;

Jakob, Das neue System der Foundation Governance. Interne und externe Stiftungsaufsicht im neuen liechtensteinischen Stiftungsrecht, LJZ 2008, 83;

Jakob, Die liechtensteinische Stiftung. Eine strukturelle Darstellung des Stiftungsrechts nach der Totalrevision vom 26. Juni 2008 (2009);

Lins, Stiftungsrechtsreform. Informations- und Auskunftsrechte von (Ermessens)Begünstigten. Hat der Gesetzgeber seine Ziele erreicht? liechtenstein-journal 2009, 38;

Motal, Der stiftungsrechtliche Informationsanspruch (2015);
Motal, Informationsanspruch eines Begünstigten für die Vergangenheit, LJZ 2015, 91;

Schauer (Hrsg), Kurzkommentar zum liechtensteinischen Stiftungsrecht (2009);

Schauer, Der Schutz der Stifterinteressen im neuen Stiftungsrecht, LJZ 2009, 40;

Schauer/Rick/Hammermann, Aktuelle Probleme der Übergangsbestimmungen im neuen Stiftungsrecht, liechtenstein-journal 2009, 51;

Schurr, Das neue liechtensteinische Stiftungsrecht. Anwendung, Auslegung und Alternativen (2012);

Sotbarn, Änderung des Beistatutes einer liechtensteinischen Familienstiftung, LJZ 2013, 59;

Tschütscher, Das neue liechtensteinische Stiftungsrecht. Entstehungsgeschichte und Gesamtüberblick, LJZ 2008, 79;

Walser, Revisionspflicht bei Holding-Stiftungen, LJZ 2018, 43;

Walser, Informations- und Auskunftsrechte von Begünstigten, insbesondere im Hinblick auf die Ermessensbegünstigten, LJZ 2019, 143.

What Marxer Rechtsanwälte Can Do for You

Marxer Attorneys was founded in June 1925. Our history is marked by growth and transformation. Today, our firm is not only the oldest but also the largest law practice in the Principality of Liechtenstein, with around 40 lawyers and associates and more than 60 staff members.

Over the past 100 years, we have evolved into a law firm deeply rooted locally while operating on an international scale. We advise clients across all areas of law.

Our lawyers and associates are leaders not only in Liechtenstein law but also trusted partners in complex cross-border matters involving multiple jurisdictions. Our core areas of expertise include private clients, foundations, trusts, corporate law and M&A, banking, financial and capital markets law, as well as international tax law, particularly tax treaties. In addition, we serve as expert witnesses, arbitrators, and legal representatives.

As the exclusive member in Liechtenstein of Lex Mundi - the world's leading network of independent law firms with partner firms in over 100 countries - and as a top-tier firm, Marxer Attorneys collaborates with renowned law firms, auditors, and tax advisors worldwide.

We are always happy to meet with you. An overview of our partners, lawyers, and associates, including biographical details, can be found at **www.marxer.law**

Marxer Attorneys

Heiligkreuz 6 I 9490 Vaduz, Liechtenstein I info@marxer.law I www.marxer.law