PRIVATE FOUNDATIONS

Law and Practice

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INTRODUCTION

The World of Private Foundations

Introduction

The first decade of the twenty-first century has witnessed an unparalleled development in private foundations legislation, mainly in common law jurisdictions with a tradition as international financial centres. The newly enacted private foundation statutes are primarily intended to expand the armoury of wealth management vehicles available to international clients with a legal and cultural background other than the Anglo-American common law. **1.01**

Foundations are in fact a civil law concept that dates back to the Middle Ages, where they originally developed to serve the same purposes as the English charitable trust. Similarly to trusts, foundations gradually evolved as an estate planning and asset protection arrangement meant to support the members of a family and to facilitate the transfer of its property to the subsequent generations (family foundations). **1.02**

The development of the foundation as a legal institution in the civil law tradition relied on the 'invention' of a notion that would prove to be fundamental for all Western legal systems, that of 'legal personality'. This legal fiction allowed scholars and practitioners in Continental Europe to address the same social and economic **1.03**

issues which were solved by means of the notion of 'equitable ownership' that was the basis for the development of uses and, in turn, trusts in England and in its overseas colonies.[1]

1.04 The development of private foundations in common law jurisdictions during the last decade bears some similarities to the introduction of trusts in civil law jurisdictions as a consequence of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, that has been ratified or respectively acceded to by 12 jurisdictions, eight of which belong to the civil law tradition,[2] and three of them have enacted their own trust statutes.[3]

1.05 Grafting trusts onto a civilian legal environment is in principle more complex than introducing foundations into a common law context. The civil law ignores equity and as a result the notion of fiduciary duties as they are understood in the common law jurisdictions. On the other hand, 'legal persons'—ie companies—have been recognized in all common law jurisdictions for at least two centuries, including in a form that does not contemplate shareholders (companies limited by guarantee).

1.06 Some difficulties may exist however, as is the case in all 'legal transplants'. Private foundations in the civil law tradition are *sui generis* legal persons. On the one hand, they share some similarities to companies, but on the other hand they have evolved to serve the same purposes that are achieved with trusts in the common law world. Furthermore, to the extent that foundations are 'orphan entities' that have no shareholders or 'owners', a 'foundation governance' system needs to be put in place to ensure proper administration and enforcement. The courts may play a role to this effect, in the same way as they have jurisdiction on trustees and fiduciaries in the jurisdictions that practise equity.

1.07 The newly enacted legislation of many common law offshore centres is intended to lay the grounds for a practice of private foundations alongside their consolidated tradition as leading trust jurisdictions. The historical development of foundations in Continental Europe and the current practice of private foundations as wealth management vehicles in the civil law international financial centres may offer insight into the development of such practice. This book aims to provide some inputs to this discussion.

[1] 'Uses' were the Medieval precursors of trusts, where a landlord (feoffor) made a conveyance of land to a group of persons (feoffees to uses) who would hold it in freehold for the benefit of certain beneficiaries or *cestui que use*.

[2] Italy, the Netherlands, Malta, Luxembourg, Liechtenstein, San Marino, Switzerland, and Monaco.

[3] Liechtenstein, PGR, Arts 897–832; Malta, Trusts and Trustees Act 1988 (as amended, 2004); San Marino, Law of 1st March 2010, No 42 'The institution of the trust'.

Foundations and the Birth of 'Legal Personality'

1.08 The recognition of foundations in Medieval Europe is intrinsically connected to the development of the notion of 'legal personality'. The issue appears to have been addressed for the first time by Moses, archbishop of Ravenna, who died in 1154,[4] in terms of the following question: who owns the property of a monastery that has been abandoned by all the monks? Moses approached a notion of legal personality by his suggestion that the building itself (or more precisely, 'the walls') should be deemed to own the property both during the occupancy of the monks and after their departure.

1.09 A discussion on the express terms of legal personality was conducted for the first time in the works of the Italian thirteenth-century legal scholar, Sinibaldo de' Fieschi, Pope Innocent IV from 1243 to 1254, who stated that in the above circumstances, the monastery in respect of its property should be deemed to be a person ('*collegium in causa universitatis fingatur una persona*').[5] The phrase '*fingatur una persona*', which may be literally rendered as 'it shall be pretended to be a person', paved the way for the legal fiction of a collective organization capable of owning property, holding rights, and owing duties as a person, or a 'legal person'.

1.10 This Medieval question was not purely hypothetical; it had an 'asset protection' component, especially if we view it in contemporary terms. The legal fiction of a monastery owning assets in its own right implied that such assets could not be seized by the papal fiscus as *res nullius*, or 'no man's property'.

1.11 It may be interesting to note that the same legal question was considered under quite similar terms by the Court of Appeal of Malta in *Curmi et v Giuseppe dei Marchesi Depiro*, a decision of 12 February 1936,[6] in relation to the 'Istitut Curmi', a charitable institution founded by a benefactor, whose property was used for the purposes of the Institute. To the extent that Maltese law did not include an express statutory recognition of legal personality at that time, the heirs contended that the property should form part of the benefactor's estate. The Court concluded that the Institute should be recognized as a moral person with legal personality, relying on the Italian legal notion of '*ente morale*'

[4] For a detailed account of the historical development of foundations in the civil law tradition cf R Feenstra, 'Foundations in Continental Law since the 12th Century: The Legal Person Concept and Trust-like Devices', in R Helmholtz and E Zimmermann (eds), *Itinera Fiduciae, Trust and Treuhand in Historical Perspective* (Berlin: Duncker & Humblot, 1998).

[5] In this context the term *collegium* corresponds to a monastery or any other collective institution, while the *universitas* refers to the 'universality of things' that constitute its property. Cf Art 26 of the Second Schedule to the Maltese Civil Code, that defines a foundation in terms of a 'universality of things'.

[6] *Maltese Cases and Materials on Trusts and Related Topics*, Vol 2, p 234 (Valletta: Institute of Financial Services Practitioners, 2009).

(moral entity), so that any property found in the Institute after the demise of the founder should be deemed to be owned and possessed by the Instituite in its own right. A comprehensive regulation of legal persons under Maltese law was enacted under the Second Schedule to the Civil Code[7] which came into force as of 1 January 2008 and relies on the notion of a 'universality of things [. . .] destined either (a) for the fulfilment of a specified purpose or (b) for the benefit of a named person or class of persons'.[8]

1.12 Thus, at the basis of the notion of a foundation there is a pool of assets dedicated to a particular purpose, which was originally religious or charitable (*piae causae*). The 'fiction' of legal personality was meant to ensure that such assets could be treated as an independent, ring-fenced fund, and only appropriated in order to further an intended purpose.

1.13 An important distinction within the notion of legal personality, corresponding to the difference between companies and foundations, was laid down by the German legal scholar, Friederich Carl von Savigny, in the second volume of his 'System of the Modern Roman Law' of 1840.[9] Savigny conceived of two categories of legal persons: (a) those that consist of a plurality of individual members acting together as a single body, which he called *Korporationen*, or companies, and (b) those who do not rely on such a structure but whose existence corresponds to the purpose for which they have been established, which he designated as *Stiftungen*, or foundations.

1.14 The doctrine of a *Zweckvermögen*, ie, property (*Vermögen*), that has no owners and is dedicated to a specified purpose (*Zweck*), sometimes rendered in English as a 'special-purpose fund',[10] was thus developed in connection with foundations—as opposed to companies—and can still be recognized in the definition of a foundation under Liechtenstein law.[11]

The Making of Private Foundations

1.15 The historical development of foundations, which gave rise to the notion of legal personality, was originally associated with monasteries and other charitable organizations. *Stiftung*, the German term for a foundation, is indeed related to *Stift*, a word used mainly in Austria to indicate a cloister or monastery.

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[7] Malta, Act XIII of 2007.
[8] Malta, Civil Code, Schedule 2, Art 26(1).
[9] F C von Savigny, *System des heutigen Römischen Rechts* (Berlin: Veit und Comp., 1840).
[10] The term *Zweckvermögen* appears to have been coined by the Bavarian legal scholar, Aloys von Brinz, in the first volume of his Handbook of the Pandects (*Lehrbuch der Pandekten*), first published in 1868.
[11] Liechtenstein, PGR, Art 552 s 1(1).

A practice of family foundations (*Familienstiftungen*) pursuing the support of a specified family and the preservation of its property gradually evolved in Germany and became a widespread practice in the nineteenth century, mainly for the same reasons that led to the development of trusts in the urban industrial classes of Victorian England. A few foundations from the Imperial age still control some prominent business enterprises,[12] and the notion was consecrated by a statutory recognition under the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) which came into force on 1 January 1900.[13] **1.16**

In turn, all German *Länder*—including those of the former German Democratic Republic—have enacted their own state legislation on foundations, which usually includes a recognition of some form of family foundation. **1.17**

Liechtenstein and other civil law private foundations

A general notion of a private foundation (*Privatstiftung*) was developed in the context of the visionary and pioneering legislative exercise that was the Liechtenstein Law on Persons and Companies (*Personen- und Gesellschaftsrecht*, PGR), which came into force on 19 February 1926. This historic piece of legislation, owed to Wilhelm Beck und Emil Beck, may be seen as the first attempt to create an offshore financial centre. After the end of the First World War and the collapse of the Austro-Hungarian Empire, the Principality of Liechtenstein had lost its main geopolitical reference and as a result attempted to attract investors and resources into its economy by the provision of a wide array of legal arrangements, ranging from a codification of the English trust under the German denomination of *Treuhand*,[14] to the creation of a new form of legal person, the *Anstalt* (sometimes described in English as an 'establishment'),[15] to a codification of the private foundation (*Privatstiftung*),[16] partially under the influence of the Swiss practice of family foundations as it was transposed into the Swiss Civil Code in force since 1 January 1912.[17] **1.18**

An additional legal arrangement, the Trust Enterprise (*Treuunternehmen*)—often referred to as 'Trust Reg', a sort of 'incorporated trust' with legal personality modelled after the example of the late nineteenth-century 'Massachusetts trust'[18] that was essentially used as a holding company—was enacted under the Law on Trust Enterprises (*Treuunternehmensgesetz*) of 10 April 1928, which became Article 932a **1.19**

[12] An outstanding example is the *Carl-Zeiss Stiftung*, created in 1889, that controls the glass, lens, and optical tool manufacturer that employs some 30,000 people.
[13] Germany, BGB, s 80 and ff.
[14] Liechtenstein, PGR, Arts 897–932.
[15] Liechtenstein, PGR, Arts 534- 551.
[16] Liechtenstein, PGR, Arts 552–570 (now repealed).
[17] Switzerland, Civil Code, Art 80 *et seq*.
[18] *State Street Trust Co v Hall*, 31 Mass 299, 41 NE 2.d 30 (1942).

of the PGR and was a reference for all matters not expressly dealt with under the Foundations Law until the reform of 2009.

1.20 A complete overhaul or 'total revision' (*Totalrevision*) of the Liechtenstein law of foundations was operated by the Law of 26 June 2008 on the Amendment of the PGR, which came into force on 1 April 2009 and repealed the original Articles 552–570 of the PGR (occasionally referred to as the 'old law'), replacing them with a new Article 552 consisting of 41 paragraphs (the 'new law'), that is sometimes described as 'the Liechtenstein Foundations Law'.

1.21 The original Liechtenstein model was followed by the Principality's former motherland under the Austrian Private Foundations Law (*Privatstiftungsgesetz*, PSG) that came into force on 1 September 1993. Some of the solutions adopted in the Austrian statute influenced in turn the new Liechtenstein foundations law under the 'total revision' of 2009. A limited reform of the Austrian foundations law was enacted under the Law Accompanying the 2011 Budget (*Budgetbegleitgesetz*) as of 30 December 2010,[19] concerning in particular some aspects of foundation governance such as the 'incompatibility rules'.

1.22 Private foundations have played an important role in the law and practice of the civil law jurisdictions that followed the German and Austrian codifications. However, they have been almost non-existent in the parts of Europe that adopted the French *Code Napoléon* of 1804 as a model, which rejected foundations as arrangements intended to perpetuate the concentration of wealth in the hands of the feudal aristocracy.

1.23 An example of this was the Dutch Civil Code of 1838, which followed the French example and did not provide for foundations although they had played an important role in the organization of scholarships and religious communities since the seventeenth century both in the Netherlands and in Flanders.[20] A foundation statute was passed in 1956, the rules of which were incorporated into the regulation of the Dutch *stichting* under the new Civil Code of the Netherlands of 1976.

1.24 On the other hand, a notion of private foundation, or *stichting particulier fonds* (SPF), was enacted as at 1 March 2004 under Book 2 of the Netherlands Antilles Code (sections 50 to 57), still in force in Curaçao and St Maarten after the dissolution of the Netherlands Antilles on 10 October 2010 and reformed as of 1 January 2012.

[19] The reform was published in the Austrian Federal Legal Gazette (*Bundesgesetzblatt*) in the context of a review of the 2011 budget: BGBl I 2010/111.

[20] Nevertheless, in a judgment of 30 June 1882 (HR 30 June 1882, W 4800) the Supreme Court of the Netherlands recognized that foundations may be incorporated with no need for government approval and suggested that the lack of legislation in that area should be viewed as an omission.

A recent evolution in the field of private foundation legislation occurred in Belgium and Luxembourg, where the *Code Napoléon* is still the basis of the civil law. The Belgian Law of 2 May 2002, which came into force on 1 July 2003, inserted a new Title II on foundations into the Belgian Law of 27 June 1921 on Not-for-profit Associations, International Associations and Foundations, which deals also with 'private foundations' (*fondations privées*). The Bill No 6595 on 'patrimonial foundations' (*fondations patrimoniales*) was filed with the Luxembourg Parliament on 22 July 2013 and it represents the latest example to date of private foundations legislation in a civil law jurisdiction. **1.25**

In the American continent, the 'classic' model of private foundation according to the Liechtenstein and Austrian legislation influenced the Panamanian Law No 25 of 12 June 1995 regulating 'private interest foundations' (*Ley No 25 de 12 de Junio de 1995 por la cual se regulan las Fundaciones de Interés Privado*, LFIP). This highly successful piece of legislation was enacted in order to complete Panama's range of offshore financial arrangements, which dates from the mid-1920s.[21] **1.26**

The Second Schedule to the Maltese Civil Code (Act XIII of 2007), in force since 1 April 2008, contains a systematic treatment of all legal persons under Maltese law, including private foundations, that follow the 'classic' model and at the same time are heavily influenced by the corresponding provisions of the Maltese Trusts and Trustees Act 1988 (as amended, 2004). **1.27**

Common law private foundations legislation

The first pioneering exercise in stand-alone private foundations legislation in a common law jurisdiction was attempted with the Foundations Act 2003 of St Kitts, passed by the National Assembly on 18 September 2003 thanks to the ambitious vision of two English practitioners, Nigel Goodeve-Docker and Richard Pease.[22] **1.28**

A slightly earlier example of private foundations legislation in a common law context was the Private Foundation Law of Liberia of 2002, enacted as an amendment to the Liberian Associations Law of 1976. The Liberian statute was conceived after the Austrian Private Foundations Law of 1993 but appears to have been less influential on the subsequent development of common law private foundations legislation than the St Kitts Act of 2003. **1.29**

[21] The first notion of an 'offshore company' was enacted in Panama under the Law No 32 of 26 February 1927. A concept of trust (*fideicomiso*) was introduced into Panamanian law under the Law No 9 of 6 January 1925, replaced in 1941 and eventually by the Law No 1 of 1 January 1984, that is still in force.

[22] R Pease, 'Foundations in St Kitts: imitation is the sincerest form of flattery' (2010) *16 Trusts & Trustees* 6, p 517.

1.30 The enactment of private foundations legislation in the main offshore financial centres from the Caribbean to the Pacific, passing through the European Crown Dependencies, has taken place at an impressive, pace, snow-balling during the subsequent decade. The private foundation statutes in force as at the time of writing, and in chronological order since the St Kitts Foundations Act 2003 came into force, are:

- The Bahamas, Foundations Act 2004 (amended in 2005, 2007, and 2011)
- Antigua and Barbuda, International Foundations Act 2007
- Anguilla, Foundations Act 2008
- Foundations (Jersey) Law 2009
- Vanuatu, Foundation Act 2009
- Seychelles, Foundations Act 2009 (amended in 2011)
- Labuan, Foundations Act 2010
- Belize, International Foundations Act 2010
- Isle of Man, Foundations Act 2011
- Mauritius, Foundations Act 2012
- Cook Islands, Foundations Act 2012
- Foundations (Guernsey) Law 2012, in force since 8 January 2013.

1.31 The Cayman Islands was planning to introduce foundations legislation as this book went to print. This trend shows that both the developing international financial centres and the leading trust jurisdictions are determined to be recognized as 'private foundation jurisdictions' in the same way as the 'classic' civil law ones.

Translation and terminology issues

1.32 A discussion of private foundations legislation in civil law and common law jurisdictions raises some issues in terms of the translation of legal provisions and concepts from languages other than English as well as in respect of the terminology in use in the different 'private foundation jurisdictions'.

1.33 An official English translation of the Liechtenstein Foundations Law in force since 1 April 2009, ie essentially Article 552 of the PGR, exists and and is free to download from the Liechtenstein Ministry of Justice.[23] This translation is followed throughout this book.

1.34 No official English translation is available of the Austrian Private Foundation Law of 1993 (PSG) or the Panamanian Law regulating Private Interest Foundations of 1995 (LFIP). Three published English translations of the Austrian statute[24] and

[23] <http://www.llv.li/pdf-llv-rfl-justiz-20082906.pdf>.

[24] C Kerres and F Proell, *Austrian Private Foundation Act* (Vienna: LexisNexis, 2013); M Eiselberg's translation in *The Private Foundations Handbook, Edited and with an Introduction by Milton Grundy* (St Helier: International Tax Planning Association, ITPA, 2007); an anonymous translation available in the website of the Foundations Society <http://www.foundationsociety.com>.

two of the Panamanian one[25] have been considered in this book. None has been followed exclusively in order to ensure continuity and consistency in the terminology used here, both within the same statute, and between the English rendering of the Austrian and Panamanian statutes, on the one hand, and the official translation of the Liechtenstein one, on the other. Accordingly, the Austrian and Panamanian statutory provisions quoted in English in this book are a combination of the translations referred to in the footnotes 19, 20, and 21.

1.35 The private foundations legislation of the common law jurisdictions is of course drafted in English but no uniform terminology is used in the different statutes. The key terms are taken from the law and practice of the main civil law jurisdictions, yet their English language equivalents vary from one common law jurisdiction to another to the point that sometimes the same English term is associated with two different concepts under the statutes of two different English-speaking jurisdictions.

1.36 The main differences concern the foundation documents. According to the Liechtenstein and Austrian practice, the constitutive documents of a foundation, usually collectively referred to as the 'declaration of establishment' (*Stiftungserklärung*), consist of a main document or 'deed of foundation' (*Stiftungsurkunde*) that is deposited with a public register where this is a required incorporation formality,[26] and a 'supplemental deed of foundation' (*Stiftungszusatzurkunde*) that is usually a private document with no requirements for public lodging. The law specifies the mandatory minimum contents of the main 'deed of foundation' while a number of matters may be dealt with in either document. In this book, when a distinction is not relevant, a general reference is made to the 'foundation documents' under the laws of any jurisdictions.

1.37 The terms for each 'foundation document' vary from one English-speaking private foundation jurisdiction to another. More precisely, the main 'deed of foundation' and the 'supplemental' one are styled as follows in the jurisdictions below:

St Kitts: articles and by-laws
Anguilla: declaration of establishment and by-laws
Bahamas: charter and articles
Mauritius: charter and articles
Labuan: charter and articles (collectively referred to as constituent documents)
Belize: charter and by-laws
Vanuatu: charter and by-laws
Seychelles: charter and regulations
Jersey: charter and regulations

[25] I Braxator, *Grundlagen der Panama-Stiftung* (Frankfurt: Peter Lang, 2009); M H Wanger, *Panamanian Private Interest Foundation Law. A Commentary for Practitioners* (Vaduz: Wanger Global, 2012).

[26] The deposit of the 'deed of foundation' is a mandatory requirement in Austria under s 13(1) of the PSG but not in Liechtenstein. Cf the discussion at para 2.38 and ff.

Guernsey: charter and rules
Isle of Man: instrument and rules
Cook Islands: instrument and rules

1.38 It may be noted that the same term 'articles' refers to the main foundation document under St Kitts law, but it indicates the supplemental document under Bahamian and Mauritian law.

1.39 The management body of a foundation is referred to as a management board or *Vorstand* under Austrian law, the same term used under company law, while it is described as a 'foundation council' under Liechtenstein (*Stiftungsrat*) as well as Panamanian law (*consejo de fundación*). The latter expression was uniformly followed in the common law jurisdictions, where private foundations are managed by a 'foundation council', whose members—or 'councillors'—perform a similar function to the directors of a company.

1.40 Another area of diverging terminology relates to the supervisory or controlling officer of a foundation, often styled as a 'guardian' but in some jurisdictions referred to as a 'protector' or as an 'enforcer' in the same way as under the corresponding trust legislation. A review of these terms is made at paragraph 5.93 of this book.

1.41 When a reference is made to a particular jurisdiction, its specific terminology is followed in this book. Generally accepted terms that are not specific to any jurisdiction, such as 'foundation documents', 'terms of the foundation', and 'foundation council' and 'councillors', are used in all the other cases.

Migration and Transformation of Foundations

1.42 The proliferation of private foundations legislation in the international financial centres both of the civil law and of the common law tradition has set the stage for a competition among 'private foundation jurisdictions' to attract wealthy founders. This may happen by way of new incorporations or as a result of the migration and continuation of overseas foundations, a matter that many instances of modern private foundations legislation regulate in detail.

1.43 To the extent that private foundations compete with their counterparties in different jurisdictions as well as with alternative legal arrangements, primarily with trusts, the laws of some jurisdictions provide for the transformation of a foundation into another legal entity or vice versa.

Migration and continuation of private foundations

1.44 A detailed regulation of the process by which an overseas private foundation may be re-domiciled to Panama is provided under Articles 28 to 31 of the Panamanian Law regulating Private Interest Foundations of 1995 (LFIP). Among others, this

relatively straightforward procedure was probably aimed at attracting existing Liechtenstein foundations to Panama and there appears to be anecdotal evidence that it has been at least partially successful.

1.45 The migration of an overseas foundation to Panama and its continuation as a Panamanian 'private interest foundation', provided that the required formalities in its jurisdiction of origin are complied with, requires the issue of a 'certificate of continuation' (*certificado de continuación*) by the management body of the overseas foundation, stating the name and details of registration of the foundation in its jurisdiction of origin as well as a declaration of its intention to continue its legal existence as a Panamanian foundation and any provisions required to adapt its constitutive documents to the mandatory contents of a 'deed of foundation' (*acta fundacional*) under Article 5 of the LFIP.[27] A certified copy of the original foundation documents and a power of attorney to a Panamanian lawyer must be attached to the 'certificate of continuation' in order for the overseas foundation to be registered in Panama.[28]

1.46 The outbound re-domiciliation of a Panamanian foundation is equally possible under Article 32 of the LFIP, provided that it is expressly contemplated in the foundation documents.

1.47 The inbound migration of a Liechtenstein legal entity overseas and of a foreign entity to Liechtenstein is provided for under Articles 233 and 234 of the PGR, respectively. This procedure used to require a court approval until 18 February 2003, when the Law on the 'total revision' of the Liechtenstein Public Register (*Öffentlichkeitsregister*)[29] came into force and brought this matter within the exclusive jurisdiction of the Register.

1.48 As regards Austria, there is reason to believe that a consequence of the European Court of Justice decision in the *Vale* case, which stated the principle that a legal person may continue its existence under the laws of another EU member state,[30] should be that Austrian private foundations can migrate to a jurisdiction that recognizes their legal nature, at least within the European Union.

1.49 A procedure for the 'continuation' of overseas foundations as St Kitts ones, and vice versa, was enacted under Part VIII of the Foundations Act 2003 of St Kitts, consisting of sections 39 to 45, along similar lines to those of the Panamanian law referred to earlier. The process relies on the issuance of 'articles of continuation' signed by all councillors and stating the name, jurisdiction or origin, and date of establishment of the overseas foundation as well as 'such other provisions as are

[27] Panama, LFIP, Art 29.
[28] Pamna, LFIP, Art 30.
[29] The law was published in the Liechtenstein official journal, LGBl No 63 of 2003.
[30] ECJ 12.07.2012, C-378/10. The case concerned an Italian company that transferred its registered office to Hungary.

required for the articles of a foundation under this act'.[31] The 'articles of continuation' become the articles of the foundation after its registration in St Kitts.[32]

1.50 To the extent that this process provides for the 'continuation' of a foreign foundation in St Kitts, all the existing legal relationships, including any claims, causes of action, and liabilities, continue to be owed by the 'continued foundation'.[33] An equivalent safeguard for the creditors and beneficiaries of a 'private interest foundation' is equally provided under Panamanian law.[34]

1.51 Equivalent procedures, closely following the St Kitts model with some variance in the required formalities, have been enacted under the private foundation statutes of the Bahamas,[35] Anguilla,[36] the Seychelles,[37] Belize,[38] and Mauritius,[39] as well as, in almost identical terms, the Cook Islands[40] and Guernsey.[41]

1.52 This is another area where the terminology in use varies across the common law private foundation jurisdictions: this process is described as 'continuation' in St Kitts and the Seychelles, 're-domiciliation' in the Bahamas and Mauritius, 'continuance' in Anguilla and Belize, and 'migration' in the Cook Islands and in Guernsey.

Transformation and conversion of foundations

1.53 A peculiarity of the Second Schedule to the Maltese Civil Code is the express provision for the 'conversion' of a foundation into a trust and vice versa. This unique exercise, representing an almost unprecedented conceptual leap for a legal system and evidence of the bridge between the common law and the civil law tradition within the Maltese legal system, is contemplated under Article 47(1), deserves to be quoted in full:

> It shall be lawful to convert a foundation into a trust and a trust into a foundation:
> (a) with the consent in writing of:
> (i) all trustees or administrators, as the case may be; and
> (ii) all beneficiaries with fixed interests under the trusts or having similar rights under the foundation; and
> (iii) any other person appointed in the trust instrument or deed of foundation, as the case may be, whose consent may be required for the taking of material decisions in relation to the relevant assets; and

[31] St Kitts, Foundations Act 2003, s 40(2)(e).
[32] St Kitts, Foundations Act 2003, s 41(b).
[33] St Kitts, Foundations Act 2003, s 42.
[34] Panama. LFIP, Art 31.
[35] Bahamas, Foundations Act 2004, s 51.
[36] Anguilla, Foundations Act 2008, ss 38–44.
[37] Seychelles, Foundations Act 2009, ss 78–85.
[38] Belize, International Foundations Act 2010, ss 85–91.
[39] Mauritius, Foundations Act 2012, s 47.
[40] Cook Islands, Foundations Act 2012, ss 51–65.
[41] Foundations (Guernsey) Law 2012, Schedule 2, ss 1–19.

(b) by executing a deed of foundation or instrument of trust in the appropriate form and with content so as to faithfully reflect the intentions of the settlor of the trusts or the founder of the foundation and the rights of beneficiaries as the case may be.

1.54 The procedure is perfected with the required registration, or cancellation, to be performed by the administrators, or trustees, within 30 days of the execution of the deed of foundation, or trust instrument.[42]

1.55 The conversion of a foundation into a trust, or vice versa, is an application of the general rule under Article 21 of the Second Schedule to the Maltese Civil Code that provides for the conversion of any legal person into another or into a trust, and vice versa.

1.56 A similar provision, under the heading of 'conversion' (*Umwandlung*), is equally possible within the creative legal environment of the Liechtenstein Law on Persons and Companies (*Personen- und Gesellschaftsrecht*, PGR) but under slightly more restrictive circumstances than under Maltese law, to the extent that a 'conversion' is restricted within the legal arrangements that are recognized as 'legal persons' under Liechtenstein law, ie the *Anstalt* and the 'trust enterprise' (*Treuunternehmen*). More precisely, Article 552 section 41 of the PGR, as amended with effect as of 1 April 2009 and in this case building upon an equivalent provision under the 'old law',[43] provides that:

> Subject to a mandatory preservation of the essence of the foundation in general and the intention of the founder in particular, a private-benefit foundation can be converted, without being wound up or liquidated, into an establishment (*Anstalt*) organised in accordance with the law on foundations, or a trust enterprise with legal personality organised in accordance with the law on foundations, by way of a deed drawn up in due form, if the conversion:
> 1. is contingent upon the laying down of the prerequisites in the foundation deed; and
> 2. is conducive to the realisation of the purpose of the foundation.

1.57 Some limited opportunities for 'conversion' appear to exist under Austrian law, but only in the sense of another entity being 'converted' into a private foundation and not vice versa. For example, section 2(1) of the 'Conversion Law' (*Umwandlungsgesetz*) provides for the transformation of a limited company (*Kapitalgesellschaft*) into its main shareholder, which may happen to be a private foundation. The special legislation on savings banks and insurance companies allow their transformation of the respective entities into a private foundation[44] while section 38(1) of the PSG provides for the conversion of a charitable foundation into a private one.

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[42] Malta, Civil Code, Second Schedule, Art 47(2) and (3).
[43] Liechtenstein, PGR, Art 570 (now repealed).
[44] Austria, Law on Savings Bank (*Sparkassengesetz*), s 27a and s 27b; Law on the Supervision of Insurance Companies (*Versicherungsaufsichtsgesetz*), s 61e.

1.58 A particular case of transformation is the entity resulting from the Multiform Foundations Ordinance 2004 of Nevis, that is referred to as a 'foundation' but may take the forms of a trust, a partnership, or a company, according to the founder's wishes. To the extent that this 'multiform' entity does not correspond to the 'classic' model of a private foundation, as it was established under Liechtenstein and Austrian law and replicated in the recently enacted common law legislation, it is not dealt with in this book.

Arrangement of Matters and Possible Reading Paths

1.59 This book provides an analysis of private foundations legislation in some selected civil law and common law jurisdictions. In particular, it attempts to cover what is referred to as the 'classic' model of civil law private foundations as it was originally established and developed in Liechtenstein and Austria, as well as its evolution within the civilian legal systems such as in Panama and, occasionally, the Netherlands and Luxembourg. The law of foundations under the Second Schedule to the Maltese Civil Code represents in many respects a 'bridge' between the 'classic' model of a private foundation and the English trust, which in turn has an influence on the private foundations legislation of many leading common law trust jurisdictions. Accordingly, it is considered throughout the book.

1.60 Ten common law private foundation statutes are reviewed, starting from the path-breaking Foundations Act 2003 of St Kitts and proceeding to the most recently enacted Foundations (Guernsey) Law 2012, by way of the foundation statutes of the Bahamas, Anguilla, Jersey, the Seychelles, Belize, the Isle of Man, Mauritius, and the Cook Islands. Although it is not a complete coverage of all the existing private foundation jurisdictions, this review provides a comprehensive picture of the main trends in common law private foundations legislation, both in terms of the similarities between the approaches followed in the various jurisdictions, and in relation to the different solutions adopted by the 'newcomers' building upon the experience of the 'forerunners'.

1.61 The analysis is not arranged on a jurisdiction-by-jurisdiction basis[45] but follows some main topics, primarily with regard to the '*dramatis personae*' that revolve around a private foundation, ie the founder, the management bodies, the beneficiaries, and the supervisory bodies, with a dedicated chapter on each. The asset protection and estate planning requirements of the founder and the beneficiaries, with a special focus on forced heirship issues, are dealt with in a separate chapter, while the case of a foundation with no specified beneficiaries, or 'private purpose

[45] An excellent analysis of the main private foundation jurisdictions is conducted in J Niegel and R Pease (eds), *Private Foundations. World Survey* (Oxford: Oxford University Press, 2013).

foundation', concludes this book. A number of issues are considered from the vantage point of the different '*dramatis personae*' and the related impact on their rights, duties, and liabilities.[46]

1.62 Two reading paths may be envisaged for this book. First, it may allow a comparison of private foundation jurisdictions, both of the civil law and of the common law traditions, with reference to the treatment of some specified issues. This exercise may facilitate the selection of a suitable jurisdiction for the incorporation—or the migration—of a foundation based on the particular requirements of the founder and his or her family.

1.63 A second reading path relates to the very recent enactment of many new private foundation statutes, mainly but not only in common law jurisdictions. The implications of the new legislation are still largely untested because of the lack of a consolidated practice and of case law. An analysis of the foreseeable effects and consequences of the new private foundations legislation may be attempted on the grounds of the experience of the 'classic' civil law jurisdictions. To the extent that Austrian private foundations have a domestic as well as an international dimension, a considerable body of case law, with a number of decisions by the Supreme Court (*Oberster Gerichtshof*, OGH), has developed in the first two decades since the enactment of the Private Foundation Law of 1993. These judgments, as well as those of the Liechtenstein Princely Supreme Court (FL-OGH), may provide useful guidance on the enactments that attempt to replicate the legal relationships of a civil law institution in a common law context. In addition to that, this book considers the two other main references for common law private foundations legislation, ie the trust and company laws of the same jurisdictions.

[46] A treatise on private foundations, covering a number of theoretical and practical issues, is J Goldsworth, *Private Foundations: Law & Practice* (Wendens Albo, Saffron Walden: Mulberry House Press, 2011).