The year has passed quickly and it is time to present the 2013 issue of ‘Private Foundations: A World Review’. This year, the Review, already the 9th in a row, contains 27 articles covering foundation jurisdictions from all over the world. The articles are once more grouped in a general as well as jurisdiction-specific section for easy reference. In 2013, the general section contains a strong focus on charitable foundations—you will find an update on the European Foundation project as well as specialist articles on social enterprises in Canada, on the legal and financial issues of social entrepreneurship, embodying an interesting comparison between civil and common law jurisdictions, as well as on venture philanthropy.

The general section is rounded off with articles on the challenges faced by trustees in today’s legal and planning environment as well as on purpose foundations.

Selected articles in the jurisdiction-specific section likewise take up the focus on charitable foundations. Within the remaining jurisdiction-specific section an article on the Cayman Islands draft foundation law as well as updates from Cyprus, Guernsey, Jersey, Israel, Russia, and the United States can be found.

A big thank you as always not only goes to our authors but also to Steve Meiklejohn of Ogier, Jersey, for being the peer reviewer of this special issue as well as to Toby Graham and Tony Molloy, Anita Gaspar, and Emma Thomas for their continuing support throughout the production process of this special issue.

2013 is indeed a foundation year not only for me but above all for Oxford University Press. I am very pleased to inform you about two upcoming treatises on international foundations in addition to our journal issue ‘Private Foundations: A World Review’. ‘Private Foundations World Survey’, edited by Johanna Niegel and Richard Pease, will be published around August 2013. This survey book owes its origins to the annual journal issue ‘Private Foundations: A World Review’. Due to this historic link and also the fact that the book is to complement its twin book, the ‘World Trust Survey’, edited by Charles Gothard and Sanjeev Shah, it carries a very similar title. But even though the book and the Review share a common history, a similar title as well as an editor, the book contains a far wider coverage of the law of private foundations in a large number of jurisdictions. Its size and format allows the reader to compare and contrast them. Apart from chapters on the uses of international foundations, the taxation of foundations in the UK and the United States the book will feature 21 foundation jurisdictions on the basis of a specially developed questionnaire.
The second book, written by our longstanding author Paolo Panico, is expected to be published around December 2013 under the title ‘Private Foundations: Law and Practice’. It will not only cover the creation and management of private foundations, but also the powers, rights, and liabilities of their founders, officers, and beneficiaries with reference to the legislation and case law of key civil as well as selected common law jurisdictions.

On foundations and chameleons

The foundation—an entity as versatile as a chameleon?

Introduction

When working myself through a meter high staple of manuscripts that all dealt with the same basic questionnaire, I suddenly visualized the picture of a chameleon. A chameleon is a special animal not only because of its stereoscopic and separately moveable eyes, but also of its ability to change its colour. A chameleon at all times remains a chameleon but it looks different depending on which colour it takes. And the international foundation indeed comes very close to being such a chameleon. Whereas charitable foundations are very old vehicles, the history of private foundations started only in 1926 when the Principality of Liechtenstein was the first jurisdiction to introduce entirely private foundations. The success of this first European foundation made other civil law countries overseas like Panama enact private foundation legislation in 1995, basing its provisions on Liechtenstein law.

When the ‘Private Foundations: A World Review’ journal was launched back in 2005, we had a basic survey coverage of seven private foundation jurisdictions with the first common law jurisdictions entering the scene. Today, almost 10 years later, the international private foundation landscape consists of basically 22 recognized foundation jurisdictions, including civil as well as common law jurisdictions, which all have developed their very own foundation chameleon. And there are many more, like inter alia Belgium, Gibraltar, Luxemburg, Estonia, San Marino, Singapore, and Vanuatu and in the future maybe even Russia, to watch. What impressed me most when comparing the 21 answers given to the questions of the foundation questionnaire, was, that, while the basic structure of a private foundation remained the same, the different private foundations all had taken on a shade of colour of their own that is not only dependent on whether the particular foundation is of civil or common law origin, but also on the local legal traditions that influenced the foundation law of that particular jurisdiction. But there is definitely more to foundations than that.

The centrestone—legal personality—a proven advantage of private foundations over trusts

Let us start the discussion with the basic feature that all private foundations, regardless of whether they are of civil or common law origin, share, namely legal personality. Through incorporation a private foundation attains the status of a legal person with rights and obligations of its own. The foundation henceforth has a separate existence behind the shield of a corporate
It can thus best be described as a separate fund having its own organization but no members which is equipped with legal personality and donated by a founder to serve a particular purpose either public or private in nature by means of the endowment made.

Both trusts and foundations generally provide sufficient separation of ownership. Unlike a company, a foundation has no members or shareholders. And neither the board nor the beneficiaries enjoy any proprietary interest in the assets of the foundation, unless specified otherwise. The fact that a foundation enjoys legal personality is however clearly an advantage over the trust. The Foundation is an ownerless vehicle with unlimited capacity allowing it to contract on its own behalf. An outflow of said legal personality is that the foundation itself is the owner of its assets. The change of the foundation board therefore does not affect the legal ownership of the assets as the legal owner of the assets does not change simultaneously.

Especially common law jurisdictions favour the foundation due to the appealing concept of legal personality. These foundations usually carry versatile features which sometimes resemble those of a company and in some cases those of a trust.

But the decision in favour of a foundation solely out of the legal personality argument may prove to be short-sighted. As with other entities including trusts there are still certain issues private foundations have to cope with. Some are closely linked to their legal personality, others not. The following non-judgemental personal observations gained from editing the journal as well as the book are meant to simply raise awareness for certain issues that should be considered prior to the set-up of a foundation.

**Issues requiring particular attention—a caveat to prospective founders and their advisors**

**Purposes of foundations and purpose foundations**

In contrast to trusts where the powers of the trustees have to be explicitly laid down in the trust deed, a foundation attains unlimited legal personality upon its registration. It however cannot conclude transactions that are reserved to natural persons but otherwise the ultra vires doctrine generally does not apply to foundations. In addition, each foundation requires a purpose that clearly states the manner in which the foundation assets are to be applied. Both civil as well as common law jurisdictions generally support the principle of unrestricted purposes. This means that a founder may select any foundation purpose that is not explicitly prohibited by law or that contradicts accepted principles of morality. Within the purposes of a foundation a founder may basically choose between private and charitable foundations and in some cases also between mixed foundations that carry features of both private and charitable foundations. This differentiation usually entails different legal consequences with a view to the point in time when a foundation comes into existence (upon signature of the foundation documents or only upon registration), as well as to the institution of any control organs. In most jurisdictions there is also a specific requirement that the foundation purpose be clearly defined to ensure that the purpose is linked to the will of the founder, is thus not be defined by the foundation organs or even a third party at a later stage and also that the boundaries for the activities of the foundation organs are set.

But this is basically where the commonalities end. Decisive differences exist among the international foundation jurisdictions for example with a view to commercial activities of foundations and also with a view to mere purpose foundations.

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With a view to the first, trusts are clearly more flexible when it comes to meeting commercial needs. Trusts can be established for commercial purposes (the trustee acting as the legal owner of the business), which is generally impossible for foundations, although they can undertake commercial activities incidental to the fulfillment of their main purpose, which however has to be a non-commercial one. Yet, they can freely engage in trading indirectly via an underlying company. With the appearance of the first common law foundations this restriction has been loosened. For example, a Nevis Multiform Foundation has the ability to act as a direct trading entity. Seychelles law does not prevent a foundation from trading, as long as this is outside of Seychelles and any trading is in furtherance of the foundation’s objects and permitted by its charter. If a founder intends to set up a commercially active foundation, the choice of the proper jurisdiction is therefore crucial. What may be prohibited in one jurisdiction might be allowed in another. And this will most likely depend on whether a particular jurisdiction attributes more corporate features to a foundation (more likely to be a common law jurisdiction) than estate-planning features by means of the endowment made by the founder (more likely to be a civil law jurisdiction).

The same applies to another controversial question with a view to foundation purposes, namely the existence of mere purpose foundations which do not fulfil the beneficiary principle that is still upheld by the foundation jurisdictions of the first generation. In this sense private purpose foundations, in contrast to charitable foundations to whom this discussion does not apply as such, are conceived to pursue a certain purpose without having beneficiaries. In many foundation jurisdictions, in particular the classic ones, legal persons shall only then be acknowledged if they serve a protectable human interest that inseparably links the foundation purpose to the existence of foundation beneficiaries. When intending to set up a private foundation that is to serve purposes without having beneficiaries at the same time, it is crucial to check the envisaged foundation law not only with a view to its provisions on foundation purposes (objectives) but also to the application of the assets (objects) which in most cases has to show an external effect. Purpose foundations that act as self-serving perpetua mobiles insofar as they have an end in themselves can only be saved by special legislation, whereby Paolo Panico distinguishes between two different approaches. Where no such specialized legislation exists, the Registrar will most likely already decline the registration of exclusive purpose foundations.

The sham issue revisited

A question that is closely linked to legal personality is the sham issue. Once a foundation has become a legal person by registration (or deposit of its founding document) it continues to be a legal person, fully owning its assets, until it is liquidated or otherwise struck off the register. Goldsworth points out that the mere existence of a registration certificate has resulted in the perception (mostly among common law jurisdictions—emphasis added) that private

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23. cf in this respect also Nicholls (n 11).
25. cf Panico (n 6).
26. cf ibid.
foundations are free from the doctrine of sham. It is generally true that the sham discussion in its original form as it is applied to trusts as such does not apply to foundations.

This however does not mean that a similar concept that takes into account the special characteristics of a foundation is not known. The discussion in respect of invalidating foundations on reasons similar to sham takes into account the separate legal personality of the foundation and is therefore focussed on the ‘principle of separation’ that reflects the own legal existence of the foundation independent from its founder, organs, and beneficiaries, and on the ‘doctrine of piercing the corporate veil’. By bestowing legal personality on a foundation legislators have also bestowed corporate elements on foundations that provide the founder with the possibility to exert a certain influence even after the incorporation of a foundation. But neither legal personality nor reserved powers legislation will be able to protect a foundation that has turned into the alter ego of its founder from being challenged. Reserved powers legislation only acknowledges the general reservation of powers by the founder but does not validate a foundation that is established and administered without integrity. In civil law the corporate veil is pierced in cases of fictitious transactions that lead to a negation of the separate personality of the legal person. As a consequence, the assets of the foundation are singled out and attributed to the founder. Thus, the basic idea that is at the root of the famous maxim ‘Donner et Retenir Ne Vaut’ does apply also to foundations in the sense that there must be a balance between the private autonomy of the founder and a potential prejudice to third parties.

Both legislators and courts of the foundation jurisdictions of the first generation that are civil law jurisdictions have long turned back to consider the basic purposes underlying the legal person of a foundation and tend to put a halt to an excessive exercise of founders rights that renders the foundation an alter ego of its founder.

In common law jurisdictions where there is yet no case law on this issue, the likely position will be to draw on well-established principles of the law on shams in other structures particularly trusts. And the first proceedings have already commenced, with VTB Capital plc v Nutritek International Corp, being a recent English case. In the Jersey case of Dalemont Limited v Alexander Gennadievich Senatorov and others a plaintiff seeks an order enabling it to pierce the corporate veil of a Jersey foundation on the grounds to enforce Russian debt judgments against a Russian individual and against offshore structures believed to contain assets attributable to him. This case is of particular interest as Jersey foundation law has in the meantime abolished the Donner et Retenir Ne Vaut rule insofar as it applies to trusts and foundations.

Concluding, also founders generally need to be aware of the extent of influence, which they exert on their foundations and also how the foundation is implemented in practice. Substance and independent discretionary structures with a strong foundation board and restricted rights of the founder will continue to gain importance.

**Recognition**

The question of ‘limping foundations’, meaning valid in one jurisdiction but not recognized in another also has not yet been fully clarified. This question is closely linked to the legal personality of foundations and

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29. Schauer (n 21), art 552 § 1, 9.
30. Goldsworth (n 28) 155.
31. Niegel (n 27) 451, 460.
32. Goldsworth (n 28) 151.
33. [2012] EWCA Civ 808 at [71]–[72].
includes two interrelated issues. Firstly, the question of the recognition of the entity abroad and secondly the qualification of said entity according to the laws of the foreign jurisdiction, for example tax laws.

Foundations do not fall under the term ‘analogous institutions’ of the Hague Convention on the Law Applicable to Trusts and on Their Recognition of 1 July 198535 as their legal personality is regarded as a barrier for including them within the scope of the convention, as structure is of key importance to the Convention despite a foundation’s functional analogies to trusts.36

The European Union is currently tackling the recognition issue with a view to European charitable foundations by aiming to enact a European Foundation Statute in order to facilitate cross border activities of foundations in the European context, an attempt that is extensively discussed in the present issue.37 In general, the European Court of Justice rules favourably with a view to foundations and the freedom of free movement of capital as well as the freedom of establishment. Liechtenstein foundations, for example, irrespective of being private or charitable foundations may claim freedom of free movement of capital according to Article 40 of the EEA (European Economic Area) Agreement as well as freedom of establishment through the compelled application of the incorporation theory within the EEA.38

Where no specialist international provisions as the above are applicable, the question of the recognition of a foreign entity is judged according to national conflict of law provisions. The main question in this respect is whether a foreign legal entity enjoys legal personality as far as national law is concerned and also whether it will be recognized by national courts.

International corporate law in this respect distinguishes between two theories—the incorporation theory and the seat theory. The first applies to the foreign foundation the law according to which the foundation was set up. The second connects the personal law of the foundation to its main place of business, namely the place where the fundamental decisions of the management are being implemented. The main difference between these two theories lies in the legal consequences. If for example, the main place of business of a foundation were to be transferred to a country that follows the protectionist incorporation theory, such a foundation were considered null and void, or the legal personality that was conferred upon such foundation by foreign law were not recognized. Instead, national law would be applied to such ‘non-existent’ foundation that would also be newly qualified under the national rules.39

Offshore jurisdictions have tried to deal with this issue by including applicable law clauses in their foundations laws. As we have seen from the discussion above, such a clause might not be effective. It is generally a desirable development that more and more jurisdictions introduce foundations, a fact that will in the future certainly ease the question of recognition on a practical scale. On the other hand, the simultaneous creation of ‘new legal animals that represent a sharp departure from their reference models’, as Paolo Panico40 puts it, will certainly bring about problems with their recognition in foreign jurisdictions. As recognition issues basically remain national issues, prospective founders should carefully choose their foundation jurisdiction, taking into account a foundation’s place of effective management, the location of the foundation assets, and the country of residence of founder and beneficiaries. Another

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37. cf von Hippel and Vahlpahl (n 1).
40. cf Panico (n 6).
important point is local court practice, which for example might be hostile against the recognition of discretionary foundations.

Judicial precedents

A question that is closely related to both legal personality and the international recognition of foundations is the question which precedents will be applied to foundation cases. Established foundation jurisdictions like Liechtenstein and Panama dispose of jurisprudence with a view to foundations but this is not yet the case in common law jurisdictions where the versatility of foundations first needs to be tested by the courts. The problem with the introduction of foundations in common law jurisdictions is that they are introducing a concept that originally stems from civil, in fact Roman law. This reception of the foundation in common law jurisdictions has undeniably led to a mix between bestowing legal personality on common law foundations together with certain corporate aspects as well as with features of Anglo-Saxon trust law thereby varying the original legal concept. This system-overlapping reception of law will at a later stage certainly give rise to the question which precedents to apply to these newly created concepts of a private foundation. In this respect it will be very interesting to observe over the course of the coming years how the common law courts will adjudicate on their first foundation cases. In particular it is unclear whether trust precedents will be applied to foundations or whether the courts will treat foundations as a concept similar but clearly distinctive from trusts. This question is rendered even more complicated as new versions of foundations, like private purpose foundations that resemble more a company than a classic private foundation, begin to appear on the scene. The question of applicable precedents thus is certainly another vital point that should be considered when choosing a foundation jurisdiction.

Conclusion

Private Foundations 2013 is itself proof of the inherent versatility of private foundations. Today’s international private foundation with a view to its general implementation and purposes is as versatile as a chameleon and takes on various colours and shades in a total of 22 foundation jurisdictions.

Both foundations and trusts are set up quickly, but the devil is in the details. The initial choice between trusts and foundations is highly dependent on the circumstances of the client and his needs. International private foundations nowadays are flexible enough to incorporate both corporate features as well as features of a trust. As we have seen above this might be an advantage as well as a certain drawback.

Once a deliberate choice in favour of a foundation has been made, the question arises in which of the 22 jurisdictions to incorporate the foundation. No one-size-fits-all observations with a view to concepts and implementation can be made in this respect, as the practical versatility of the foundation is heavily dependent on the laws under which it is incorporated. Like a chameleon a foundation first and foremost needs to adapt its colour to reflect the shade of the laws of the jurisdiction of incorporation. This will enhance the foundation’s protection against external attacks just like a chameleon adapts its shade to remain protected against predators. Second, apart

41. cf ibid.
42. cf D Berbey de Rojas, 'Trusted Foundations'.

It is unclear whether trust precedents will be applied to foundations or whether the courts will treat foundations as a concept similar but clearly distinctive from trusts

International private foundations nowadays are flexible enough to incorporate both corporate features as well as features of a trust
from the legally admissible, a lot depends on how the foundation is actually lived. The reservation of powers by the founder mainly was an industry-driven development and extensive reservations of powers as well as its consequences have yet to be tested not only by local, but also by international courts. The institution of the private foundation is clearly undergoing an internationalization process. This means that the level playing field of private foundations has been lifted to a more international level. It is no longer possible to simply judge a foundation from an entirely national legal and judicial viewpoint without considering the longer international perspective at the same time. Clearly both foundation and trust concepts have been stretched, sometimes close to their limits. What is possible in one jurisdiction might not be possible in another. And the rules of today may not be the rules of tomorrow. On the other hand not only laws have changed or been amended but there have also been changes in both national and international court practice a fact that challenged well-accepted legal concepts.

In order to ensure that the versatility of a foundation not only remains on paper or is indeed short-lived, a foundation must both be properly structured and implemented. Especially with a view to recent developments, it is obvious that the days when a foundation was considered a stand-alone entity used for camouflage are long gone. Internationalization and substance are today’s catchwords. And to put it with Darwin, today only the fittest foundation chameleons, namely those, that are able to adapt their colour to meet the rapidly changing shades of both the national and international transparent legal environments, will be able to survive on a long-term horizon.

Especially with a view to recent developments, it is obvious that the days when a foundation was considered a stand-alone entity used for camouflage are long gone. Internationalization and substance are today’s catchwords.

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43. Niegel (n 24).