Editorial

Purposeful trusts and foundations?

Johanna Niegel*

Welcome to Private Foundations 2012, which is already in its eighth year! As always I must thank all the international authors and Oxford University Press for their unceasing support of the issue as well as of private foundations by providing us with this valuable platform for research and exchange. And as every year very special thanks also go to Mr Steve Meiklejohn, partner with Ogier, Jersey, for peer reviewing the bundle of manuscripts. This year I am proud to present a total of 25 articles, again grouped in a general and jurisdiction-specific section, which, apart from updates on international foundation legislation, deal with a variety of subjects ranging from questions circling around the foundation and trust concepts, charities, European foundations, duties of council members, rights of beneficiaries, double tax treaties, TIEAs, asset protection, and many more. It is just this very potpourri of topics that makes Private Foundations so interesting and a valuable reference manual for both common and civil law practitioners. We have now become truly international by including five new jurisdictions such as Belgium, Belize, Guernsey, Israel, and Mauritius.¹ I hope that you will not only enjoy Private Foundations 2012 but that you will also be among our readers next year!

Introduction

When we recall the classic definition of a trust given by Underhill and Hayton, Law Relating to Trusts and Trustees², which was taken up by Lord Justice Romer³, a trust is an:

equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries), of whom he may be himself one, and any one of whom may enforce the obligation. . . .

According to this definition, a trust is clearly a personal obligation between a trustee and a beneficiary. Trusts, as well as foundations are very old instruments dating back to the Middle Ages and have initially been used for an early form of succession and tax planning as well as for clerical purposes. But as modern financial transactions became more and more complex, the classic trust concept that is centred on beneficiaries, was no longer able to fulfil their needs. Trusts soon had developed into flexible investment vehicles set up solely for particular purposes with trustees inter alia holding shares of high revenue companies.

² Underhill and Hayton, Butterworths Lexis Nexis, Law Relating to Trusts and Trustees (18th edn 2010).
³ Green v Russell (1959) 2 QB 226.

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And indeed, Article 2 of the Hague Trusts Convention⁴ seems to endorse the possibility to set up such purpose trusts by defining a trust as a legal relationship created—inter vivos or on death—by a person, the settlor, when assets have been placed under the control of a trustee 'for the benefit of a beneficiary or for a specified purpose'.⁵

This year’s editorial article shall discuss the evolution, characteristics, and functioning of non-charitable purpose trusts and then, in a second step, analyse in a comparative study whether private foundations—just as trusts—can be set up to serve a particular purpose too.⁶ Are both trusts and foundations really as flexible and versatile as they are so often advertised to be?

Purpose trusts

Definition

As the very name already suggests, purpose trusts are created in favour of a specified purpose rather than individual human beneficiaries.⁷ Matthews⁸ calls such trusts ‘non-owned vehicles’. With a view to the admissibility of purpose trusts one must distinguish between the classic common law position and modern offshore legislation. Let us start by first looking at common law that still applies where it has not been repealed and then analyse the changes brought about by legislation enacted offshore.

Common law position

Common law generally does not recognize purpose trusts except if they have been created for charitable purposes, which under common law also bear a restriction as to their purposes,⁹ or if they are ‘trusts of imperfect obligation’.¹⁰

The main reasons why non-charitable purpose trusts fail under English common law are uncertainty, enforcement, perpetuity, and public policy considerations.¹¹

Trusts are special vehicles. They embody a division of ownership that is not known to civil law. The trustees become the legal owners of the assets that the settlor endows to the trust. The beneficiaries on the other hand have an equitable (beneficial) right to those assets.

As a consequence, purpose trusts, from a common law viewpoint primarily violate the so-called human beneficiary principle and consequently also the certainty of objects, meaning that a trust must have beneficiaries, either individuals or a class, who must be sufficiently identified.¹² As a trust is an equitable obligation there must also be a corresponding right to

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⁵. M Lupoi, ‘The Shapeless Trust’ (1995) 1 Trusts & Trustees 15 at 15: Lupoi argues that since the Convention neither mentions title nor beneficial ownership in its definition of a trust, it refers to shapeless trusts which indeed can be established for purposes as well as beneficiaries.
⁶. I am very grateful to Mr Toby Graham for the inspiration to research this topic as well as to Mr. Paolo Panico for the most valuable exchange of ideas.
⁹. IRC v Pemsel [1891] AC 521: a charitable trust must be established for the relief of poverty, the advancement of education, the advancement of religion, or any other purposes beneficial to the community.
¹⁰. Such trusts do not have human beneficiaries and the trustees have to fulfil certain moral obligations, such as the saying of mass, the erection and maintenance of monuments and tombs, the maintenance of particular animals or gifts to unincorporated associations.
this obligation. This right is vested in the beneficiaries.\(^{13}\) And for any right it is fundamental that it can be enforced which turns the beneficiary principle into an enforceability principle.\(^{14}\) The beneficiaries of a trust who are entitled to the enjoyment of the property are therefore given a corresponding personal right of action against the trustees before the courts of equity as well as an ownership interest in rem that can be enforced against third parties to safeguard their beneficial interest in the trust property.

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The above-mentioned human beneficiary principle was set out in Re Astor’s Settlement Trusts\(^{15}\) as follows:

A trust exists where the legal owner of property [the trustee, emphasis added] is constrained by a court of equity to deal with it as to give effect to the equitable rights of another [the beneficiaries, emphasis added]... Prima facie, therefore, a trustee would not be expected to be subject to an equitable obligation unless there was somebody who could enforce a correlative right, and the nature of that obligation would be worked out in proceedings for enforcement... In theory it is difficult to visualize the growth of equitable obligations which nobody can enforce, and in practice, because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control, or in the case of maladministration, reform.

But as purpose trusts generally have no beneficiaries, the trustees hold the legal, but not the beneficial ownership. Consequently, as purpose trusts lack human claimants who could seize the court if the trustees do not fulfil their obligations, they are bound to fail under common law. Person trusts, on the other hand, which benefit living persons, however only in a particular manner or for a particular purpose, are valid.

In addition, under common law all trusts, which are not charitable, underlie a perpetuity period which means that an interest must vest no later than 21 years after some life in being at the creation of the interest. A trust is void for perpetuity if perpetuity arises from the prospect of a contingent interest not becoming vested in persons until too remote a time.\(^{16}\) This is exactly the case with non-charitable purpose trusts as they do not benefit human beneficiaries but a specific purpose. And such purpose can principally be maintained forever, making property inalienable, which clearly contradicts public policy.

If a purpose trust however falls under the criteria of charitable, common law permits it to overcome the above-mentioned human beneficiary principle, potential uncertainties in its purposes and the rule against perpetuities. Charitable purpose trusts can also make use of the so-called cy-près doctrine,\(^{17}\) which prevents them from being struck down and declared void because of uncertainty of objects.

The final consequence resulting from a non-charitable purpose trust under common law is that the property which the settlor endowed to such trust

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13. A gift must have a *cestui que* trust, meaning that there must be somebody in whose favour the court can decree performance. *Morange v Bishop of Durham* 9 Ves Jr (1804) 399.
15. *Re Astor’s Settlement Trusts* [1952] Ch. 534.
16. P de Pourtalés, ‘Purpose Trusts in the Bahamas’ (2001) 7 Trusts & Trustees 17 at 18; *Panico* (n 11) 540, citing AW Scott, 'The welfare of society demands that the law should set limits to the power of the hand of the dead to control human affairs'. *Panico* argues that the rule against perpetuities may be more accurately described as a 'rule against remoteness of vesting', ibid at 541.
17. This doctrine allows the court to apply the trust property to a purpose as close as possible to the original one (‘aussi près que possible’). In 1996 Jersey introduced a kind of statutory cy-près doctrine for non-charitable purpose trusts. (Article 7 of the 1996 Trusts (Amendment no. 3) (Jersey) Law amending Article 38 of the 1984 Law).
is held on resulting trust for the settlor or, if he has already died, for his estate.

Yet, the line drawn by common law and hence the courts distinguishing between invalid purpose trusts and valid (non-charitable) person trusts is indeed a very frail one and has led to much debate and confusion. As Davies\(^\text{18}\) points out:

confusion can particularly arise out of the failure to distinguish on the one hand between the purpose of the trust (in the sense of the objective on establishing the trust) and on the other hand the application of trust monies for a purpose specified in the trust rather than to beneficiaries. It is only the latter category that is a purpose trust in the proper sense and which may fall foul of the beneficiary principle.

Over the years, the English courts have started to adopt a more liberal approach to the beneficiary principle,\(^\text{19}\) which however did not change the general prohibition of purpose trusts under common law. As such a prohibition clearly did no longer meet the requirements of modern business life, attempts were made to work around it.\(^\text{20}\) But the real changes were then introduced offshore.\(^\text{21}\)

### Purpose Trust Legislation

Accordingly, several offshore jurisdictions changed their laws in regard to the prohibition of non-charitable purpose trusts by enacting specific legislation that enables settlors to create trusts in favour of non-charitable purposes. Unlike traditional trusts, where the dramatis personae are the settlor, the trustees and the beneficiaries, modern purpose trusts deliberately lack one element, the beneficiaries.\(^\text{22}\) Statutory definitions now explicitly permit such trusts to exist for a purpose instead of or at the same time as for human beneficiaries.\(^\text{23}\) Thus, the uncertainty that caused purpose trusts to fail under common law was overcome by means of a statutory

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18. CLI Davies, ‘Trusts with a Purpose’ (1999) 1 Trusts & Trustees 8 at 8.
19. In 1969 Goff J held in Re Denley’s Trust Deed ([1969] 1 Ch. 373) that:
   
   “where, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle...The beneficiary principle is confined to purpose or object trusts which are abstract or impersonal. The objection is not that the trust is for a purpose or object per se, but that there is no beneficiary or cestui que trust.”
20. At the outset charitable trusts were used as ‘anchors’ to which a structure would be attached. Those charitable trusts, which were set up with a nominal sum of money, held shares in companies. Once the company was wound up, the nominal trust fund was paid out to the charity, cf P Egerton-Vernon, ‘Purpose Trusts’ (1998) 4 Trusts & Trustees 17 at 17; cf Matthews (n 8):
   
   “...there is the problem...of the ‘self-serving’ purpose, where, in effect, the purpose is directed towards the form that the assets should be held in, rather than what they should be applied to. In that case there is simply a risk that the property will be treated as held on a resulting trust, the settlor having failed to dispose of the beneficial interest. If, on the other hand, the purposes are more substantive..., then the trust begins to look like a beneficiary trust anyway and the beneficiaries may have rights to benefits (and to information) which the settlor would much rather they did not; Economic Development Committee of the States of Jersey, Consultation Paper 2004 which led to the 2006 reforms: 2.8.3. ‘To some, implicit in the use of the word ‘purpose’ is the notion of an end product, an ultimate benefit outside the trust...It is not clear, whether a non-charitable purpose can be an end in itself. This uncertainty has led to either complex drafting in an attempt to find a purpose or a preference for using charitable trusts in certain complex transactions, even though the benefit to charity will be, compared with the assets to be held by the trust, de minimis’. 2.8.5. ‘It is proposed to clarify the meaning of ‘purpose’, by confirming, for the avoidance of doubt, that holding a particular asset is, in itself, sufficient to constitute a valid purpose. This will enable purpose trusts to be used in a wide range of transactions, including holding shares in a private trust company or in an SPV as part of a securitisation structure, with greater transparency and certainty than has previously been possible’.
22. cf Egerton-Vernon (n 20) at 17.
23. Panico (n 11) 563.
definition of purpose trusts that laid out the conditions under which such purposes would be valid and comply with public policy. 24

Among the first jurisdictions to introduce non-charitable purpose trusts were Nauru in 1972, Liechtenstein in 198025 and the Cook Islands in 1984. The Bermuda Trusts (Special Provisions) Act 1989 however served as a model for the first generation of purpose trusts among others for the BVI Trustee Ordinance Cap 303, which was amended by the Trustee (Amendment) Act 1993, the Trusts (Jersey) Law 1984, as amended by the Trusts (Amendment no. 3) (Jersey) Law 1996, the Isle of Man Purpose Trusts Act 1996, and the Cayman Special Trusts (Alternative Regime) Law 1997, the latter commonly known as STAR trusts that gave rise to the second generation of purpose trusts.

Although the criteria vary from jurisdiction to jurisdiction and therefore cannot be applied universally, they however have common requirements with a view to the set-up of such non-charitable purpose trusts that:

incorporate safeguards intended to ensure, as far as possible, that a purpose trust was or could be properly established, administered and enforced. 26

Such trusts generally must be created for purposes that are specific, reasonable and possible and not immoral, unlawful, or contrary to public policy. They must be created in writing in the proper form. In addition, the trust instrument must provide for the appointment of an independent person or entity who acts as enforcer of the provisions of the trust thereby satisfying the beneficiary principle. The enforcer inspects the trust accounts and also checks that the purposes of the trust are met. He, who fulfils many of the obligations of a trust protector under non-charitable purpose trusts, is given the personal right that in ordinary trusts is enjoyed by the beneficiaries to take action against the trustees. The enforcer, depending on the nature of powers conferred upon him, fulfils some sort of fiduciary duty. The trust instrument must furthermore explicitly provide for a successor enforcer. The trustees must be designated persons, which means that they must have enjoyed a specialist education in order to put them into a position to maintain certain records with a view to the purpose trust and its financial position and to permit the attorney general and the enforcer to inspect them. Furthermore, the perpetuity period of such trusts is usually fixed at 100 years. However, there are some jurisdictions that allow non-charitable purpose trusts to last forever. 27

**Modern uses of purpose trusts**

Over the past years the use of non-charitable purpose trusts has become increasingly popular. This can be attributed to the fact that offshore purpose trust legislation was drafted with a wide flexibility in order to admit any lawful purposes, both social and commercial. 28 Purpose trusts are mainly used in international project financing, securitisation transactions, off balance sheet transactions, escrow agreements and security arrangements, pension plans, foreign agencies as well as with a view to the division of voting rights and rights to receive a dividend. In

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24. ibid, 562.
25. In 1980 Art. 927 para. 7 was included in the Liechtenstein Law on Persons and Companies (PGR), which itself dates back to 1926:

In the case of non-profit making or similar trusts where there are no entitled beneficiaries and the trust instrument does not determine otherwise, the claims conceded to the entitled beneficiaries in the case of other trusts may be exercised by the representative of public law upon application or ex officio at the expense of the trust property or, where there is fault, at the expense of the party in default.

The institution of the enforcer which was later introduced by offshore purpose trust legislation already becomes evident here.

27. Cyprus, Nevis, Barbados, The Bahamas, Bermuda under the new trust legislation, the BVI, Jersey, and Cayman STAR trusts.
28. Panico (n 11) 567; S Moerman, ‘Non-Charitable Purpose Trusts: The Mutation of Trust Law’ (2000) 6 Trusts & Trustees 15 at 19, citing Matthews:

Although the rule against purpose trusts derived from a procedural point, there is no magic reason why it must be maintained in a modern society. We can change the rules if we think it right. The law of charity itself shows that.

29. Commercial organizations create structures which in the technical sense are not owned by them, but which are in fact effectively used for the aims of the organisation which created them. In this particular case the shares in the company are owned by a purpose trust.
addition, purpose trusts are widely used to hold the shares in a family company or in a private trust company.  

A caveat however still applies. Non-charitable purpose trusts are only valid to such an extent as they are covered by special legislation. Also offshore, despite the enactment of specific legislation, the discussion continues to some extent whether a certain trust is indeed a pure purpose trust that would be regulated by the special legislation or instead a person trust in disguise which would fall under the regular trust laws of the jurisdiction in question, with the beneficiary principle and all its consequences. Cayman resolved this issue by making their STAR trusts regime applicable to both purpose and person trusts.

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‘Purpose foundations’

Distinguishing features of trusts and foundations

Let us now turn to private foundations. Foundations are a creation of civil law countries. How important is the presence of beneficiaries in civil law foundations? Is there something similar to the beneficiary principle? Are ‘purpose foundations’ permitted, and if yes, under which circumstances?

When examining these questions we need to be aware of the many changes that foundation law has undergone with common law jurisdictions starting to enact foundation laws. The legislation process presently taking place in the various common law jurisdictions is driven by the needs of today’s international client who simply wants to have multiple estate and tax planning tools available in various jurisdictions. Foundation concepts have been stretched, sometimes close to their limits, and there has also been a reception of trust law into private foundations, in particular, also with a view to foundation purposes and ‘purpose foundations’. The enactment of new foundation laws worldwide has now reached a stage where one can go as far as to speak of foundations of the first and the second generation.

Foundation concepts have been stretched

Although foundations can be used for purposes very similar to a trust, they however bear distinguishable features. The first one is that a foundation is a legal person. The foundation itself is the owner of its assets and there is no distinction between legal and equitable ownership, as such distinction is not known to civil law. Because of the legal personality of the foundation, there is also no rule against perpetuities. A foundation may, unless it is not wound up, in principle last forever. Like a trust, a foundation has beneficiaries but their position is different from trust beneficiaries. As a consequence of the legal personality of the foundation, the beneficiaries are only entitled to request the foundation board to honour and fulfil their rights and to demand certain precautionary measures. Their status is that of creditors and as such they may bring claims for damages against the foundation board in case of a breach of the foundation deed and/or the by-laws. Enforceable claims to any benefits, however, only arise if the terms of the

30. Here the main purpose is to hold the shares of a family trading company rather than to benefit persons. In contrast to an ordinary trust, to which the Saunders v Vautier rule [4 Beav 115 (1841)] applies, meaning that all the beneficiaries who are sui juris and together entitled to the whole beneficial interest in the trust, may join forces and bring the trust to an end by agreement, such a purpose trust is set up for the sole purpose of holding and retaining the shares in the settlor’s company thereby ensuring that the trustees will be in a position to block any attempts by the settlor’s family to alienate the shares and therefore guaranteeing the continuation of the family business.

31. A private trust company is set up for the exclusive purpose of serving as trustees to a single private trust of a settlor, in which the shares in a family business are held, instead of the trustees of a trust owning the shares in the family business directly. The shares of the private trust company are held by the trustees of a non-charitable purpose trust with the consequence that the shares of the private trust company will remain outside the settlor’s estate and also off the balance sheet of the parent company of the private trust company as the former will have no apparent control of its subsidiary.

foundation deed, the by-laws, the regulations or a resolution of the foundation board grant and award a beneficial interest. What foundation beneficiaries in contrast to trust beneficiaries generally cannot do is to enforce their rights against third parties. The latter is a logical consequence of the concept of legal personality. As a result of having legal personality the foundation itself enjoys legal standing and the assertion of rights against third parties is therefore safeguarded through its organ, the foundation board, which is bound to act in the interests of the beneficiaries. Should the foundation board have acted in a manner contrary to the law and/or the foundation documents, the beneficiaries may bring claims for damages against it.

But do these distinguishing features really make a difference with a view to purposes and thus ‘purpose foundations’? In order to compare equal concepts, it is definitely the classic foundation which is of interest in this discussion. For this aim we shall revert to Liechtenstein law, which enacted its private foundation as early as 1926 and which is of particular interest in this respect, as the latest amendment to the Liechtenstein foundation law took place in 2008, long after the first common law foundations had come into existence. Has this recent amendment of the law on foundations changed anything with a view to foundation purposes and ‘purpose foundations’?

**Foundation purposes**

Liechtenstein law knows charitable and non-charitable foundations that predominantly serve either charitable or non-charitable purposes, whereby only charitable foundations and such non-charitable foundations whose deed contains a corresponding provision are subject to supervision by the Foundation Supervisory Authority. In addition, a foundation generally may not exercise a commercial activity for a profit, with the exception if such activity either serves its charitable purpose or is permissible according to specialized legislation. Non-charitable foundations may in particular include pure family foundations whose funds exclusively serve the costs of child-rearing or education, the endowment or maintenance of members of one or more families, or similar family interests. Mixed family foundations are predominantly pursuing the purpose of a pure family foundation, but supplementarily also charitable or other non-charitable purposes. The amended Art. 107 para. 4a PGR now contains a definition of public benefit or charitable purposes (in the wider sense). Such purposes generally promote the common good, in particular, when the activities serve the common welfare in charitable (in the narrow sense), religious, humanitarian, scientific, cultural, moral, social, athletic, or ecological fields, even if the activity is to benefit of only a specific class of persons. It can be said that this definition resembles the definition of Lord McNaghten in 1891, but since it was drawn up more than hundred years later it is adapted to present circumstances. However, a beneficiary principle already becomes evident here. This thought is then carried on to § 1 of the Foundation Law, which generally defines a foundation as a legal entity that is established by unilateral statement of intent of the founder and consists in legally and economically separate special-purpose assets. When the founder endows the foundation with assets he sets forth the directly outward-related, specifically identified foundation purpose as well as the beneficiaries. In § 3 the participants of the foundation include among others the entitled beneficiaries, the prospective and discretionary beneficiaries as well as the ultimate

35. The new Foundation Law 2008 was included into the Liechtenstein PGR (Liechtenstein Law on Persons and Companies of 20 January, 1926; ‘PGR’) and hence enacted as Art. 552 §§ 1–41 PGR. The old PGR provisions on foundations in Arts. 553–570 PGR were simultaneously repealed. The citations of the new Foundation Law 2008 in the present article have been shortened and for the sake of simplicity only refer to the corresponding sections.
38. § 2 Liechtenstein Foundation Law 2008.
39. IRS v Pemsel, n 9 above.
beneficiary. § 5 then describes a beneficiary as a natural or legal person, who benefits or may benefit from an economic advantage arising from the foundation.

Just by going over the initial paragraphs of the new Law, we have been able to deduce a lot with a view to the purposes of foundations in general and the admissibility of ‘purpose foundations’. Just as with trusts we obviously need to distinguish between the purpose of the foundation in the sense of its objective and the application of the foundation assets for a particular activity, its objects. All foundations have to have a directly outward-related and specifically identified foundation purpose as well as beneficiaries, who may be natural or legal persons and who fall among the participants of a foundation.

What also becomes immediately evident is that civil, that is, Liechtenstein, foundation law, similar to the common law position with a view to purpose trusts, will not admit foundations whose purpose is uncertain, unclear, or vague. But how is such purpose linked to the beneficiaries? Will civil law go as far as to permit foundations that serve a mere purpose without any human beneficiary element? Can thus the purpose be separated from the beneficiaries? Can a foundation have a self-serving purpose which Matthews describes as a mere ‘investment clause’ in the sense that the purpose is directed towards the form that the assets should be held in, rather than what they should be applied to? What does ‘directly outward-related, specifically identified foundation purpose as well as beneficiaries’ mean in this respect? We will next have to examine the commentaries and judicial decisions with a view to the exact contents of foundation purposes in order to determine what exactly a foundation accomplish with a view to its purposes and objects.

**The interpretation of ‘directly outward-related’ foundation purposes**

Liechtenstein courts clearly perceive the purpose as the heart and soul of a foundation. This, because the purpose, apart from the legal personality, the endowment of assets and the organization, is the salient feature of each foundation. Each foundation needs a purpose, an objective, because only through this purpose it is determined how the assets of a foundation shall be applied to serve particular objects. The will of the founder manifests itself in the purpose and becomes independent of the founder due to the legal personality of a foundation. And by giving the foundation a purpose, by determining its objectives, the purpose of the foundation also determines its special identity. Liechtenstein law follows the principle of openness of purposes, which means that a foundation may pursue every purpose that is permitted by law and not immoral. Also a combination of purposes is possible that can be pursued simultaneously or successively.

**The purpose, apart from the legal personality, the endowment of assets and the organization, is the salient feature of each foundation**

In contrast to the old law, the new Law stipulates in § 1 that the founder himself must determine the foundation purpose in such a way so that he does not leave this determination to the foundation organs or even third parties, because this would lead to the undesirable consequence that the foundation organs could determine the foundation purpose by themselves with the foundation resembling a corporation as far as the decision-making process is concerned. Apart
from the founder reserving the right to amend the foundation documents according to § 30, an amendment of the purpose by the foundation board or other governing body is only permissible according to § 31 if the purpose has become unachievable, impermissible, or unreasonable or if the circumstances have changed in such a way that the purpose has attained a completely different significance or effect, so that the foundation has become alienated from the intent of the founder. Such amendment must correspond to the presumed intent of the founder, and the foundation deed must expressly reserve the power of amendment to the foundation board or other governing body of the foundation. Thus, initial uncertainty does not allow a foundation to come into existence, whereas restrictive subsequent changes thus can be saved by some sort of cy-près doctrine.

§ 16 para 1 lit. 4 of the Foundation Law in addition requires that the foundation deed must contain the foundation purpose, which includes the designation of specific beneficiaries or beneficiaries ascertenable according to objective criteria or a class of beneficiaries, unless the foundation is charitable or the beneficiaries are otherwise entailed by the foundation purpose or unless explicit reference is made to a supplementary foundation deed (by-laws) containing this information. Consequently, it must be possible to deduce already from the act of establishment how the foundation assets have to be applied and according to which rudimentary criteria the circle of beneficiaries is drawn. These provisions are a clear strengthening of the importance of the foundation purpose.

It becomes evident that the beneficiaries are not only seen as the addressees of the foundation’s purpose but they are a part, even the embodiment of the foundation purpose, and hence also of the objects of the foundation. An unclear (or even missing) determination of the beneficiaries, the objects for which the foundation assets have to be applied, cannot be saved by an interpretation in favorem negotii, as there are no valid criteria in which way the intent of the founder should be upheld. Hence the purpose cannot be separated from the beneficiaries, who give the foundation purpose their outward effect. The purpose of a foundation is furthermore outward-related in the sense that purposes that have an end in themselves are prohibited by law and registration is declined by the Liechtenstein Land and Public Registration Office. Purposes that are not substantive ones, that is, not dealing with the application of the foundation assets, but with internal self-serving purposes that only concern the form and the administration of the assets and consequently the upkeep of the foundation’s own existence are not recognized, making the foundation void ab initio in the sense that it even cannot lawfully come into existence as an independent foundation.

The beneficiaries are not only seen as the addressees of the foundation’s purpose but they are a part, even the embodiment of the foundation purpose, and hence also of the objects of the foundation.

Foundations pursuing such purposes would be regarded as useless ‘perpetuum mobile’ entities, as they only serve the interest of the founder to withdraw assets from any use and application. The prohibition of this kind of foundation follows from the notion, that legal persons shall only then be acknowledged if they serve a protectable human interest. The founder thus failed to dispose of the beneficial interest, which under foundation law brings about more or less the same consequences as under common law, which in such a case stipulates the holding of the

46. H Bösch (n 43) 204.
47. ibid, 210.
49. Art 107 para 5 PGR: Foundations whose objects are immoral or unlawful, may not, by virtue of the law, acquire the right of legal personality; Bösch (n 43) 209.
50. Schauer (n 44) Art. 552 § 1 at 11.
assets on resulting trust for the settlor. 51 An interesting example for such a perpetuum mobile foundation is a foundation whose sole end, without having any outward-related purpose, is to hold the shares of a company. Some argue that such a foundation is valid, because the company exercises an activity in the market thereby creating advantages for investors, employees, and clients. Schauer however correctly points out that this is a confusion of the purpose of the foundation with the effect which a foundation exerts. This, because the purpose of such foundation is not aimed at creating advantages for customers, but solely to uphold the continuance of the company. 52 Bösch accurately distinguishes between the purpose of a legal person, which focuses on its tasks and its objects which focus on its activities. 53 This is consistent, as Art. 107 PGR itself, however with a general view to legal persons, but without a particular mention of foundations, distinguishes between purposes (objectives) and objects. Consequently it seems that ‘purpose foundations’, just as non-charitable purpose trusts, can only be saved by special legislation. There can be no purpose without concurrent objects.

But as long as the foundation purpose is outward related, benefitting human beings, the purpose itself as well as the corresponding benefits can be determined in a wide manner. They can lie in granting of any economic advantage from the foundation assets. This can be achieved via a distribution of assets, the granting of a loan, the taking over of liabilities or the payment of debts, which may include certain moral obligations. In any case in order to qualify by law as a beneficiary the prospect of a future receipt of an economic advantage needs to be real. It is also possible to set up a ‘foundation for the founder’, a foundation whose (sole) beneficiary is the founder. 54 Family foundations that only serve the support of one particular family without any particular requirements with a view to distributions 55 are permissible as well.

It is even possible according to and within the criteria of § 1 paras 2 and 3 of the Foundation Law that a foundation runs an enterprise or that it holds a participation in an enterprise. This can be done either directly, where the foundation runs the enterprise itself without any intermediary capital company or in an indirect way where the foundation holds shares in companies that then run the enterprise by themselves. A private foundation that is not charitable however cannot run an enterprise in a direct way all by itself. If a foundation however holds a company via an intermediary company there are no further restrictions apart from the case that a foundation must not be a partner with unlimited liability in a partnership carrying on a commercial trade. Apart from this, a foundation can assume the task of head of companies or that of a mere holding company. 56 As stated above, the limit once again is where a holding foundation accumulates the profit and never makes any distribution (hidden self-purpose foundation). 57

Concluding Thoughts on ‘Purpose Foundations’

Mark Twain once said that history never repeats itself but that it does rhyme. And this is exactly the right starting point on how to summarize the discussion. Trusts are not foundations and vice versa. But since they rhyme with a view to their aims, the many questions that arise in connection to their existence, objectives and objects also rhyme. As we have seen, the discussion with a view to ‘purpose foundations’ follows the same line as with trusts, first under common law and then offshore legislation. In addition, we have learned from the analysis of non-charitable purpose trusts, that the question of their specific requirements has not been completely resolved. More or less the

51. Matthews (n 8).
52. Schauer (n 44) Art. 552 § 1 at 12 (2009).
53. Bösch (n 43) 206.
55. Voraussetzunglose Unterhaltsstiftung (foundation for maintenance purposes in which distributions are not tied to certain conditions).
56. Schauer (n 44) Art. 552 § 1 at 20.
same applies to ‘purpose foundations’. And a lot can
indeed be attributed to the confusion between foun-
dation purposes (objectives) and the application of
their assets (objects). While the rules for both charit-
able trusts and foundations are more relaxed with
regard to uncertainty, strict requirements apply with
a view to non-charitable purpose trusts as well as
foundations. Non-charitable trusts and foundations
that have an end in themselves and show no external
effect as to the application of their assets to benefi-
ciaries are regarded as perpetua mobiles and can only
be saved by special legislation. Without such legisla-
tion, classic, such as Liechtenstein foundation law,
prohibits ‘purpose foundations’, which show no di-
rectly outward-related effects and consequently the
Registrar will decline their registration.

Bringing the legal personality of the foundation as
well as the different treatment of beneficiaries under
foundation law into play is in my opinion the wrong
strategy. As we have seen, each legal entity, despite its
legal personality, must serve a protectable human
interest. And downplaying the position of the bene-
ciaries would mean surrendering the foundation to
an almost unlimited decision-making power of its
organs thereby turning it into a corporation, which it is definitely not.

Each legal entity, despite its legal personality,
must serve a protectable human interest

But all this does not necessarily mean that a foun-
dation, including the Liechtenstein one, is a rigid
structure. A lot of the potential problems with a
view to foundation purposes could be solved by antici-
pative and careful structuring. This of course re-
quires research, not only on the special circumstances
of the case at hand that would enable a decision on
whether to opt for a trust or a foundation, but also on
the requirements and possibilities of the various inter-
national centres. Whereas in one jurisdiction it might
not be possible to detach the beneficiaries from the
purpose of the foundation, in another one, in particu-
lar in common law jurisdictions, this might be per-
missible due to the enactment of special legislation.
Such detachment is perhaps also one of the most
prominent examples of reception of trust law into
civil foundation law.

But even without the existence of special legislation,
much can be achieved with a view to purposes by
reverting to the mechanics of regular foundation
law. As we have seen in the Liechtenstein provisions,
a foundation may not only have one purpose, it can
have several, a main as well as complimentary pur-
poses. Foundations set up for maintenance purposes
in which distributions are not tied to certain condi-
tions, as well as foundations for the founder’s (sole)
benefit are generally permissible. There are nowadays
also foundation governance mechanisms in place and
also the rights of the beneficiaries, in particular the
right to obtain information, may be regulated in a
flexible manner or even be excluded. There are
quite a few instances with a view to founder’s rights
in which the rigidity principle is relaxed. But all this
requires a careful and anticipatory implementation.
At the end of the day the most important goal is
that the foundation will not only be accepted by the
courts of the jurisdiction in which it was set up, but
also in jurisdictions where the foundation partici-
pants reside. Because in cases of uncertainty of objects
neither equity nor civil law courts will perfect an im-
perfect gift and in this respect one must not forget
that the issue of sham is prevalent in both trusts and
foundations.

But unfortunately even if great attention is paid to
the details, there is still one issue which has not yet
been resolved on an international scale. The question

58. See n 54 above, 49.
59. cf Malta Civil Code, Second Schedule, Title III; Foundations (Jersey) Law 2009, Art 5; Isle of Man Foundations Act 2011, section 7; Bahamas Foundations Act
of ‘limping trusts and foundations’, meaning valid in one jurisdiction and not in another. But this is a question of international recognition generally which might be explored in a future editorial article.

There is still one issue which has not yet been resolved on an international scale. The question of ‘limping trusts and foundations’