Bulletin

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Developments in the law governing foundations

During recent weeks, various articles have appeared in the Liechtenstein press concerning the position of foundations in the Principality. We feel, therefore, that now is an appropriate moment to offer a brief review of the developments in the law so as to clear up any uncertainties to the extent presently possible. The questions which have arisen relate particularly to the definition of the object of deposited foundations and more particularly family foundations. Accordingly, the following comments focus on the deposited foundation, an entity which, to ensure additional secrecy, is not entered in the Public Register, its statutes simply being deposited with the Office of Land and Public Registry.

In accordance with Art. 552 PGR (Liechtenstein Persons and Companies Law), one of the requirements for the establishment of a foundation is that assets must be dedicated to a specified object. The main objects taken into consideration are religious, family and charitable.

In a judgement of 17 July 2003 (1 CG.2002.262), the Supreme Court of the Principality (Oberster Gerichtshof - OGH) held, inter alia, that a deposited foundation with the object «Investment and management of movable assets of all kinds. The holding of participating interests and other rights, as well as the carrying out of related transactions» had not come into existence. Such an object did not comply with the legal requirement that the beneficiary must be specified or specifiable. The object in question took into account only the existence and management of the assets of the foundation and the connected transactions. The definition of the object did not specify the application of the foundation assets, thus leaving the matter open to discretion. However, this discretion fell – the Court ruled – exclusively to the founder.

An appeal against this decision of the Supreme Court was brought before the Liechtenstein Constitutional Court (Staatsgerichtshof - STGH). In a judgement of 18 November 2003 (STGH 2003/65), the Constitutional Court set aside the decision under appeal and returned the issue to the Supreme Court for re-examination and decision, subject to the legal opinion of the Constitutional Court.

As a result of the Constitutional Court decision, existing foundations (established before 24 November 2003) hav-

ing the same or a similar object may rely on the principle of confidence (good faith) in that their statutes were accepted by the Office of Land and Public Registry. Thus, such deposited foundations came into existence legally.

However, the Constitutional Court also held – and called on the Legislator to take note – that the deposited foundations which do not satisfy the requirements of the new legal precedent must amend their foundation documents within an appropriate period. No period for this amendment was specified. The Legislator will now have to address the issue of the definition of the object and the time limits in the near future. Ultimately, it is also a question of how the scope of the founder and the foundation board to intervene, organise and manage the foundation is to be more tightly specified in legal terms so as to clarify the sense of the legal precedent. Then, depending on the legal norm, it will be possible to decide if and to what extent an amendment of the foundation documents is needed.

The judgement of the Constitutional Court also has implications for the practice of the Office of Land and Public Registry with regard to the issue of official certificates. Thus, the Registration Office will in future issue only official certificates which do not convey the impression that the deposit of the foundation deed is a constitutive act. Official certificates issued with regard to deposited foundations will be confined exclusively to the content of the deeds and documents deposited. Hence, the Office will provide no legal declaration as to the existence or non-existence of a deposited foundation but will simply confirm the content of the documents deposited with the Office.

An adequate specification (definition) of the object is crucial for the admissibility of the deposit of a foundation with the Office of Land and Public Registry. The documents to be deposited with the Office of Land and Public Registry must «contain a sufficiently specific definition of the object of the foundation» to make it possible to determine how the foundation assets are to be used and by what criteria the class of beneficiaries is to be selected.

The Office of Land and Public Registry cannot, at the present time, publish any specific standard examples of admissible definitions of the object. Instead, the admissibility of the definition of the object will be decided by the Registry Office on a case-by-case basis and further explanations will follow in the decisions of the courts as and when they arise.

We are expecting that the Parliament will proceed with the reading of the amendments to the law governing foundations in April 2004. Until that time, all we can say is that a foundation having, for example, the following form of words, «Investment and management of the foundation assets, as well as distributions to the beneficiaries in accordance with the by-laws and regulations», and with certified by-laws drawn up by the founder indicating specified beneficiaries, will sufficiently meet the criteria for the definition of its object.

It will further be noted that the practice of the Liechtenstein courts is being influenced by international developments and the laws regulating foundations in Austria and Switzerland. As Liechtenstein foundations often hold their bank accounts abroad, it makes sense for their statutes and by-laws to take due account of foreign laws and legal precedents.

US withholding tax and the problem of «Qualified Intermediary» (QI) status – amendments published on 10 July 2003

This is a matter of constant concern for Liechtenstein and Swiss banks which have entered into the qualified intermediary withholding agreement (QI agreement) with the US Inland Revenue Service (IRS) and it remains as important as ever for Liechtenstein trustees acting as governing bodies of foundations and trusts.

With effect from 2004, the IRS has added to a new Section 4A which is applicable to all QI agreements.

The amendments made by the IRS to the QI agreements also extend to agreements already concluded. A bank which is party to the agreement (the «contracting party» of the IRS) may, on the basis of the provisions of the agreement, assert the right not to deliver to the IRS the particulars of the beneficiaries of a documented account holder who receives relevant income from US investments liable to US withholding tax. These advantages apply for the so-called direct beneficiaries of an account, i.e. for example, for account holders who are natural persons, public limited companies, limited liability companies or cooperatives. In the case of non-direct beneficiaries – i.e. in «flow-through» account relationships where the account holder is not deemed to be the ultimate beneficiary – the qualified intermediary is required to notify the beneficiaries on a separate Form 1042-S.

As a rule, this will be the case with a foundation or a trust, unless it is a question of a complex trust. Most of the foundations and trusts existing in Liechtenstein may be treated as grantor trusts for US tax purposes because the beneficiary is usually also the person who brings resources into the foundation or trust and the beneficiary rights can be amended at the wish of the beneficiary.

By way of exception, the qualified intermediary can, even for trusts and foundations, simply indicate the beneficiaries collectively on Form 1042-S without naming them individually. This exception applies in the case of a foundation or trust deemed to be a «non-US grantor trust» or «non-US simple trust» which receives from the qualified intermediary no more than USD 200 000 in income covered by the agreement per calendar year. In addition:

a) the account holder must disclose to the qualified intermediary's auditor all of the documents needed to enable him to determine that all documents concerning the beneficiaries are in the stipulated correct form;

b) forms W-8IMY and W-8BEN must have been completed and signed and be in hand;

c) US withholding tax must be retained.

There are further details concerning exceptions but these are mostly irrelevant for foundations and trusts in which Liechtenstein trustees who are not qualified intermediaries constitute governing bodies.

One particularly noteworthy point is how quickly the IRS has adapted the existing agreements, notably with retroactive effect for QI agreements. Trustees and beneficiaries will be well advised to ensure that they set up appropriate structures and fall into line with the thinking of the American tax authorities.

New minimum requirement for personal particulars in applications for entry in the Liechtenstein Public Register

The Liechtenstein Office of Land and Public Registry has given notice that, with effect from 1 February 2004, applications for entry in the Public Register must contain at least the following information:

- surname, first names,
- nationality
- street name and house number,
- nationality code, postcode and place name.

We expect that in the next 4 months there will be a new requirement to add the date of birth.

The particulars of surnames and first name must correspond to the records of the relevant Civil Status Registry office and at least one first name must be written out in full.

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