Editorial

Accompanying private foundations over a decade: reception—recognition—harmonization issues

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This is it—the 10th year anniversary issue of ‘Private Foundations: A World Review’, which in 2004 was one of the first publications to tread into the then slowly emerging world of private foundations and has ever since attentively followed their development!1

Looking back

Recognition problems

At the beginning of the millennium, private foundations only existed in civil law countries. The most prominent ones at that time were Liechtenstein, Austria, Panama, as well as the former Netherlands Antilles. But this was more or less about it. The reason for this civil law predominance was quite simple—the concept of a foundation has its origin in Roman law, the predecessor of continental civil law, which is not judge-made, but codified law.

One basically distinguishes between two types of foundations. The first type comprises charitable foundations, which in their pure form are very old, dating back to the Middle Ages. The second type of foundations is composed of private foundations in the sense of family foundations, which stand in contrast to these charitable foundations. Instead of pursuing the main objective of public benefit, private foundations have modified their purpose to achieve objectives of a more specific private character, mainly the financial support of a specified family. Compared to charitable foundations private foundations are relatively young. The prototype concept was practically born with the enactment of the Liechtenstein Law on Persons and Companies (PGR) in 1926, thereby introducing a civil law incorporated entity with functions similar to the Anglo-Saxon trust.4

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3. cf P Panico, Private Foundations: Law and Practice (OUP 2014) 1.08ff, regarding the development of foundations.


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This new entity that carries sui generis as well as corporate features was very well received in the civil law world, which could comprehend the concept of an incorporated fund with legal personality donated by a founder to serve a particular purpose. But the introduction of private foundations did nevertheless pose recognition problems, in particular in the common law world, whose law is based on the distinction between common law and equity, which in this strict form is not known to the codified civil law. In addition, matters were complicated by the fact that the Anglo-Saxon counterpart of the private foundation, the trust, does not enjoy legal personality. Similar, but diverging concepts.

Where no specialist international provisions, such as for example the Hague Trust Convention of 1 July 1985 are applicable to a case with a foreign element, it has been determined that the forum court has jurisdiction over the parties, the question of the recognition of a foreign entity depends on national conflict of law provisions which might only be partially open to a choice of law. These provisions aim to ascertain in a first step whether a foreign legal entity will enjoy legal personality within the domestic law of the recognizing state.

International conflict of law rules in this respect distinguish between two theories on establishing the connecting factor for the personal statute of a foreign entity—the incorporation theory and the seat theory. The first one has a liberal approach and applies to the foreign entity the law according to which it was set up. Thus, if this law bestows legal personality on that very entity, the recognizing state according to the incorporation theory accepts this legal personality. The second one, the seat theory, connects the personal law of the entity to its main place of business, namely the law of the state 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 validly incorporated foreign entity were to be transferred to a country that follows the protectionist seat theory, the legal personality that was initially conferred upon such entity by the foreign law would not be recognized. Instead, national law would be applied to such ‘non-existent’ foreign legal entity and a reincorporation according to the laws of the state where it has its seat would be required.

The second step following the determination of the personal statute of the foreign legal entity would be the qualification, i.e. the legal subsumption of a concrete matter with a foreign element under the definitions of the applicable conflict of law rules, which may once more point to a different law. The third and final step then would be a classification of the foreign legal entity under the national laws of a state. The outcome of such classification has always been unsure and unequivocal, in particular as general questions of classification are hardly dealt with in national legislation and for foreign entities it is

sometimes hard to find a suitable domestic equivalent or an appropriate classification criterion.

International financial centres as well as individual founders have thus tried to deal with this issue by making use of applicable law clauses. But as can be already deduced from the discussion laid out above, such clauses might turn out to be ineffective. Not every issue can be resolved by the application of the governing law and it is furthermore possible that a court exercises long arm jurisdiction and apply its own conflict of law rules which point to its own material law to be applied. ⁸

Reception of the private foundation concept in the common law world

Introduction

Matters got even more complicated when St Kitts, the forerunner of many other common law jurisdictions, introduced private foundation by enacting its Foundations Act in 2003.⁹ The Bahamas and Nevis rapidly followed suit in 2004 and 2005, respectively. As of that time the foundation world has become more complicated as we no longer distinguish between private foundations in civil law countries only, but between the foundation concept in civil law countries and the foundation concept in common law countries.

The primary result of this new development seemed to lie in the future reduction of recognition and classification problems, as the private foundation concept was widened to include the common law world and more and more international jurisdictions worldwide had generally started to recognize the basic concept of a private foundation. But how was the take-over of the foundation concept achieved and which effects did it have on the international recognition of the entity?

Sui generis but inconsistent reception of the foundation concept

When common-law jurisdictions started to introduce the civil law concept of the private foundations into their legal systems, a system-overlapping reception of law took place. Through this reception of law a foreign concept was suddenly installed sui generis into time-honoured and proven common law legal orders.

Problems arising from this could be anticipated both on a national as well as international scale. In the common law world, the process of the sui generis take-over of private foundations has further proven to be more heterogeneous than homogenous. Common law regimes nowadays not only reflect the civil law origin of the foundation but at the same time understandably mix it with local legal traditions and concepts. Thus, some of the private foundations that were created are neither a classical civil law foundation sui generis, nor a trust in corporate form, nor a company endowed with fiduciary characteristics.

Cross-fertilization

At the same time also civil law foundation jurisdictions have undeniably been influenced by their common law counterparts, which led to the simultaneous take-over of certain aspects of Anglo-Saxon trust law (eg with a view to purposes, the protector or a concept similar to sham)¹⁰ into their national legal order, more often into national customary law via recognition of the courts.

⁸ cf MS Parkinson (Society of Trust and Estate Practitioners), Diploma in International Trust Management: Trust Creation, Law and Practice, 239 (2008), citing the Anderson case [FTC v Affordable Media 179 F2d 13130 (9th Gr 1999)] as an example.
⁹ Liberia had already enacted its foundation law in 2002 in the form of an amendment to the Liberian Associations Law of 1976. Yet, this piece of legislation attracted little attention and thus had a minor influence on the creation of private foundations in common law jurisdictions.
Consequently, the classic concept has once more been distorted and the unifying factor between these established as well as the newly created private foundations suddenly seems to be their distinguishing factor to the Anglo-Saxon trust, their legal personality. What does this mean for the national implementation of the foundation concept?

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National implementation of the private foundation concept

The all-embracing question that is consequential to the sui generis adoption of the foundation concept by common law countries is how this concept can and will be applied on a national level, in particular by national courts. The primary source of such implementation will always start with the provisions of the national law, which after all will most likely be a product of the above developments. But whereas established foundation jurisdictions like for example Liechtenstein dispose of jurisprudence with a view to their private foundations this is still not the case in common law jurisdictions where private foundations still need to be tested by the courts and thus brought into a context with the prevailing legal systems. How will this most likely be done?

Despite the fact that Liechtenstein law disposes of extensive jurisprudence with a view to foundations, it does not so with a view to trusts. Legal history repeats itself and we are nowadays faced with a very similar development with a view to private foundations as the one that took place with trusts back in 1926 when Liechtenstein took over the Anglo-Saxon trust into its civil law system via a sui generis adoption. Over the course of 88 years the Liechtenstein trust concept has been used extensively, in particular in the sense of family trusts, but there is still a lack of trust precedents, thus leaving the concept basically stand with legal provisions that have a thorough bone but little meat. So, when we reflect how a common law judge would deal with his first foundation cases, we may as well ask ourselves how a Liechtenstein judge would go about a case involving a Liechtenstein trust because the situation in which they are in, is very similar. The Liechtenstein judge would primarily apply the provisions of the national trust law and if these prove to be underproductive or even contradictory, he would refer to similar concepts contained in national law. Such a way of proceeding would be fully covered by Liechtenstein law which provides for a supplemental and analogous application of the relevant provisions on the Liechtenstein trust enterprise, which resembles a Massachusetts business trust as well as a private trust settlement insofar as its main characteristics are concerned. In addition, this very Law on the Trust Enterprise specifically also refers to the provisions on foundations which therefore can be applied to the trust by analogy, as the typical Liechtenstein trust has always displayed certain elements of a foundation character. Only if the Liechtenstein judge were not successful with an analogous application of similar concepts including case law, would he take into account foreign decisions.

It is most likely that common law judges would follow a similar way of procedure with a view to private foundation cases. In one of the first foundation cases decided on 22 March 2013, the Royal Court of Jersey has already followed a similar line of argumentation with a view to foundations as the one contained in the Liechtenstein law which connects the trust to its legal system not only by providing for special provisions but also by an analogous application of the pertinent provisions of

similar concepts. In its reasoning, the Jersey court concluded that the sui generis nature of Jersey foundations has to be fully recognized and legal issues arising from the existence of a Jersey foundation and its uses have to be addressed first from principles derived from the Foundations Law, with analogous reasoning that has developed in relation to other legal relationships and entities being ‘cautiously deployed, whereby analogies that could be drawn with trust law principles were “important but not exact”.

Where are we now?

As of today, the foundation landscape encompasses 22 main jurisdictions, among them civil as well as common law jurisdictions, including Jersey, Guernsey, and the Isle of Man. These 22 jurisdictions with many more already in the pipeline are a living proof for the growing universality as well as versatility of the international private foundation. But has this finally resolved recognition issues?

Goldsworth correctly summarizes the current state of affairs by saying that each created foundation law is original, but that there is no equivalent to the English trust law which has inspired trust laws internationally. Consequently, it would indeed be overambitious to say there is a recognized international foundation, the principles of which are common from jurisdiction to jurisdiction as having been derived from some foundation equivalent in the way that trusts have developed internationally. Yet, many principles are slowly forming towards a true international foundation law. Consequently, foundation law can be seen in some sort of harmonization process, probably still more factual than yet legal.

On the other hand, this vague harmonization process means that as long as there are no specialist international provisions, for example similar to the Hague Trusts Convention that the principles of national conflicts of law with the above consequences will continue to apply. As of now, the international expansion of the private foundation concept certainly bears a positive aspect with a view to the equally important political acceptance of private foundations as well as to their national classification. But as the reception of private foundations is inconsistent on an international scale, a foreign foundation may still prove to be a conceptually different entity in the recognizing state which likewise has enacted private foundations and thus pose classification problems. An example may be foundations pursuing commercial or other non-charitable purposes without at the same time having beneficiaries, which are generally recognized in common law, but not necessarily in classic civil law jurisdictions.

Looking ahead: harmonization?

The task for the future is, if at all, how and to which extent these different national foundation laws could

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16. The Hague Trust Convention however does not include foundations under the term ‘analogous institutions’ on account of their legal personality.
and should be harmonized in order to develop an internationally accepted standard to overcome recognition and classification problems.

The task for the future is, if at all, how and to which extent these different national foundation laws could and should be harmonized in order to develop an internationally accepted standard to overcome recognition and classification problems.

As regards the question about the harmonization of foundation law on an international scale, one has to distinguish between solving international recognition issues via international agreements like the Hague Trusts Convention and the development of a uniform body of law by an international organization. As regards the latter, the European Union has already gone as far as to elaborate and discuss a draft of a European Foundation Statute for European charitable foundations. Taking into account the difficulties and disagreements that have already arisen here and also the early stages of international private foundation law, including the geographical location of the various foundation jurisdictions, such an undertaking at least at present seems unrealistic with regard to private foundations.

For the very same reasons, the development of an instrument for foundations similar to the Hague Trust Convention seems to be a project for the more distant future. Despite the fact that the first foundation cases have already been decided in common law foundation jurisdictions, international foundation law in contrast to trust law seems to be too young and fragmented for such a step. As we have seen above we are still in the process where many principles are slowly forming into a true international foundation law, whereby speaking of the development of a uniform standard still would be too far-reaching. In addition, if we have a look at the Hague Trust Convention, this instrument is mainly aimed at solving recognition problems for those states who have not adopted a national trust law. With private foundations such a discussion would already be different from the outset, as many jurisdictions have already adopted the foundation concept so that we are strictly no longer speaking of the recognition of a foreign concept. Any future international foundation convention thus would need not only the support of sovereign states but also to address both recognition as well as harmonization issues.

Nevertheless, international foundation law would be in need of some sort future harmonization, not only for recognition matters, but primarily also for related classification matters, for example in the tax domain. In order to successfully go along the path towards harmonization, it needs to be stressed that any harmonization first needs the development of customary foundation law that may in the future provide the basis of international agreements.

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20. Goldsworth (n 15).
International foundation law is clearly in flux and with a view to the creation of customary law it primarily would be the task of responsible and far-sighted sovereign legislators to not only have regard to the national implementation of their foundation law but also to international developments, including any reverse developments, as one is dependent on the other. In this respect, the creation of ‘new legal animals’ that represent a sharp departure from their reference models solely out of industry-driven concerns, is as detrimental as the take-over of a foreign foundation concept, its mere copying off, without further thought for a proper future implementation. A thorough national implementation of the concept is a prerequisite of any future international action, because if national foundation laws are not implemented on a national level, they will remain alien and untried concepts both nationally as well as internationally. And to shift the resolution of such issues as well as the corresponding legal uncertainty to the level of individual founders and beneficiaries clearly contradicts the initial impetus for the creation of international foundation laws.

Personal recognition

Many people have contributed to the success of ‘Private Foundations: A World Review’ in the course of these 10 years. In particular, I sincerely want to thank Professor John Goldsworth for initially entrusting me with the task of editing ‘Private Foundations: A World Review’. In addition, my sincere thanks go to Oxford University Press as well as to Mr Roger Frick for their continuing support of the issues, to Steve Meiklejohn of Ogier, Jersey, for being the peer reviewer of this special issue, to Toby Graham, Tony Molloy, Anita Gaspar, and Anna Sulman for their invaluable support throughout the production process as well as all the authors who have extensively contributed with their many articles. And of course also to you, the loyal readers of this publication.

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