

Bochumer Studien zum Stiftungswesen

Herausgegeben von Karlheinz Muscheler

6

Irena Braxator

Fundamental Principles of Panamanian Foundations

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List of Abbreviations

A.	Auflage
ABGB	General Civil Code (of Liechtenstein) dated 1 June 1811, ASW, LR 210.1
Para	Paragraph
AG	Joint stock corporation
AO	Tax Regulations
OL	Old Law (Liechtenstein law governing foundations, valid until 01.04.2009)
Art.	Article
AS	Official collection of Swiss federal laws and directives, in order of year and page number
ASW	Official collection of Liechtenstein legal regulations issued prior to 1 January 1863, as amended
Vol.	Volume
BG	Federal Act
BGB	Civil Code (of Germany) dated 18 August 1896
BGB1	Federal Law Gazette
BGE	Federal court ruling
BJM	Basler Juristische Mitteilungen (Basle legal notifications)
BV	Federal Constitution of the Swiss Confederation, SR 101
CC	Código Civil, (Civil Code of Panama)
Ccom	Código Comercial, (Commercial Code of Panama)
CP	Constitución Política de la República de Panamá (Political Constitution of Panama)
<i>i.e.</i>	id est
Ed.	Edition
EheG	(Liechtenstein) Marriage Act dated 13 December 1973, LGB1 1974/20, LR 212.10
ELG	Rulings by Liechtenstein's courts of justice (up to 1978)
ErbStG	Inheritance Tax Act
Etc.	etcetera
et seq/et seqq	et sequens/et sequentia
FL	Principality of Liechtenstein

FLOGH	(Liechtenstein) Supreme Court of Justice
G.	Gesetz
GB1.	Law Gazette
GBOeR	(Liechtenstein) Office of Land and Public Registration
a.a.	as amended
IPL	International private law
IPRG	Swiss Act governing International Private Law
(IPRG)	dated 18 December 1987
LES	(Liechtenstein) collection of rulings
LF	La Ley No. 1/84 por la cual se regulan el fideicomiso y se adoptan otras disposiciones, 5 de Enero del año 1984, Gaceta Oficial No. 19971; Law No. 1/84 dated 5 January 1984 governing trusts, published in Gazette No. 19971 (Panama).
LFIP	La Ley No. 25/95 por la cual se regulan las fundaciones de interés privado, 6 de Junio del año 1995, Gaceta Oficial No. 22804; Law No. 25/95 dated 12 June 1995 governing private-benefit foundations, published in Gazette No. 22804 (Panama)
LGBI	(Liechtenstein) National Law Gazette
lit.	litera
LJZ	Liechtensteinische Juristen Zeitung
LR	Systematic collection of legal regulations in Liechtenstein, classified in accordance with Register 1993, published by the Legal Office of the Government of the Principality of Liechtenstein
N	Note
rev.	revised
No.	Number
NL	New Law (Liechtenstein law governing foundations, valid from 01.04.2009)
OG	(Liechtenstein) High Court
OGH	(Liechtenstein) Supreme Court of Justice
OR BG	dated 30 March 1911 concerning additions to the Swiss Civil Code, Section Five: Code of Obligations, SR 220.
ÖRegV	Liechtenstein Public Register Decree dated 11 February 2003, LGBI 2003 No.66 dated 18.02.2003
PGR	(Liechtenstein) Person and Companies Act dated 20 January 1926, LGBI.1926 No.4, as amended (LR 216.0) Private Schriftenreihe von KPMG, Zurich.
PSG	(Austrian) Private Foundations Act, BGBI 1993/694
resp.	respectively

RIW	Recht der Internationalen Wirtschaft, (German trade magazine focusing on international business law), Heidelberg
RSO	(Liechtenstein) Rights Protection Act, LGBI 1923/8, LR 283.0
SR	Systematic collection of (Swiss) federal laws
SteG	(Liechtenstein) Taxation Act, LGBI 1961/7, LR 640.1
StGB	(Liechtenstein) Criminal Code dated 24 June 1984, LGBI 1988/37, LR 311.0
StGH	(Liechtenstein) State Court of Justice
TruG/TrUG	(Liechtenstein) Trust Companies Act, Law governing trust companies (incorporated into the PGR as Art.932a with own paragraph numbering)
i.a.	Inter alia
VBI	(Liechtenstein) Court of Administrative Appeal
VE	Preliminary draft of the new Swiss Foundations Act
Cf.	compare
VO	Regulation
ZGB	Swiss Civil Code dated 10 December 1907, SR 210
ZSR	Zeitschrift für Schweizerisches Recht (trade magazine focusing on Swiss law)
ZVW	Zeitschrift für Vormundschaftswesen (trade magazine focusing on issues of probate)

Section 1 Introduction / Preface

Private foundations were codified in Panama on 12 June 1995 by Law No. 25 *La Ley de Fundaciones de Interés Privado* (“LFIP”). Panama used the law governing foundations in Liechtenstein as its basis and adopted some of the wording literally. It would, however, be wrong to assume that the interpretation of Liechtenstein norms can be transferred to the Panamanian legal standards without further ado. On the contrary, future administrative and legal practice in Panama and Liechtenstein will show the extent to which the two countries adopt the same or differing approaches to administering their laws governing foundations.

The legal system in Panama is based on Roman law and is classified as a “civil law system”, also known as continental law or codification. It does, however, also include numerous elements of Anglo-Saxon law (“common law”). Added to which, Panama frequently incorporates modern and current elements from other systems into its own legal system and will probably continue to do so in the future.

Since the Panama foundation that forms the basis of this work is also compared with a normal joint stock company,¹ the creation of the joint stock company (**Panama Company**) in 1927 is also worth mentioning in relation to the law governing foundations in Panama.² The Liechtenstein Foundation Act was by far not the only source of inspiration for the Panamanian foundation; it was also influenced to a major extent by the ideology behind the Panamanian “fideicommiss” and the Anglo-Saxon “trust”.³ Eleven years before the Foundation Act was introduced, the **Anglo-Saxon trust** was codified in Panama, in 1984,⁴ and contains many similarities with the foundation that was introduced at a later date. According to the opinion of some Panamanian academics, the foundation (private foundation) represents an incorporation of the Anglo-Saxon trust into the continental legal system of civil law, which is why they call it a “continental

¹ Cf. below: Section 3 Systematic Interpretation / The Incorporation of the LFIP into Panama’s Legal System

² Law No. 32 from 1927, *La Ley de La Sociedad Anónima* (SA).

³ Via the ratification and recognition of the trust pursuant to the Hague Convention, 1985.

⁴ Law No. 1 dated 5 January 1984, *La Ley de Fideicomisos*. (hereafter: LF). Cf. also the global recognition of trusts in the Hague Convention, 1985.

trust”.⁵ In light of the responsibility associated with, and functions of, asset management, **fiduciary** regulations and norms must also be considered; in both Panama and Liechtenstein these are subject to **subsidiary application**.⁶

The aim of this book is to examine the Panamanian foundation – *La Fundación de Interés Privado* – in more detail. By interpreting the articles of the law and associated rulings, and taking account of legal teachings, it aims to promote a better understanding of the legal institution of the “Panama Foundation”.

⁵ Boutin, 2000, p.17 et seqq.

⁶ Cf. the description and delimitation of the foundation in Liechtenstein pursuant to OL Art.552 Para.3 PGR: “The judge shall decide in the individual case the extent to which separately administered assets (fund) shall be entitled to independence according to private law or to the character of trust property”.

Section 2 Historical Interpretation / History of the Origins of the LFIP

At some point during the evolution of mankind, “man” claimed the right to individual self-awareness, started to focus on his “being”, which automatically included the aspect of “*no longer being*”, ventured the leap to the Gods – the “immortals” – and finally wrestled with his fate of “being mortal”.⁷

By developing a legal system, individualized “man” finally searched for, and created, the tools he needed firstly to realize the symbiosis of his rebellion against mortality and his wish to continue to “rule” even after his death and, in doing so, to continue shaping the history of his family, and secondly to give him the means of making his dreams come true: First of all, he developed the *law of succession* and stipulated as an absolute right *in rem* that “the legal powers of a person, which we know as that person’s assets and the sum of which constitutes the wealth of that person, do not dissolve into nothing upon the death of said person”.⁸

The transfer of ownership is determined by the law or by the deceased testator. An analysis of history teaches us that the law of succession has its roots in the family in every nation, albeit with differing principles and legal norms.⁹

From a historical perspective, the evolution of the purpose of foundations can be roughly divided into five phases of European foundation law history. These are: pre-Christian ancient times, the middle ages under the influence of Christianity, the trend towards secularization in the late middle and early modern ages, the national codification in the 19th century, and the rediscovery of the foundation in modern times.¹⁰

Foundations not only played a significant role in the social development of Europe; early foundations emerged in **Egypt** and can still be seen today in various representations of the philosophy behind foundations, such as the “Wakf”

⁷ *Santo-Passo*, p.44.

⁸ *Santo-Passo*, p.44.

⁹ Cf. *Santo-Passo*, p.44.

¹⁰ Cf. *Schlüter*, p.36.

or “Habous”.¹¹ These were not, however, private foundations – they were aimed at common welfare.

I. Foundation elements in ancient times

The primary element in Roman law was the will (*successio ab intestato* was deemed “undesirably makeshift”).¹² One thing is certain: neither the Greeks nor the Romans created the foundation (for private or common benefit) as we know it today. Establishments and independent foundations as they are understood in modern legal terms did not exist in Greek or Roman law. The model of a legal entity was unknown to these legal systems.¹³ A model or theoretical legal entity was not an aspect in Roman law. If such a model did exist at all, then only as a model of corporations.¹⁴ Contrary to the definition of the legal entity, Roman law has always known the term of corporation as an association of individuals, where the members can change but the legal identity remains intact in spite of the altered composition.¹⁵

Pursuant to the **Justinian Code**, for example, institutions existed, which were dedicated to so-called *piae causae* (pious causes); these were generally public charity organizations whose activities are reminiscent of modern-day **common-benefit foundations**.¹⁶ Other charitable institutions in the day of Justinian include the *venerabiles domus*.¹⁷ The legal capacity of both the *piae causae* and the *venerabiles domus* was limited. On the one hand, they were granted proprietary rights, mainly in the form of privileges,¹⁸ which virtually gave them legal entity status. On the other hand, they were comparable to, if not even treated the same as, natural persons.¹⁹ For example, the monks (in a monastery) or the poor

¹¹ Cf. Schlüter, p.36.

¹² Santo-Passo, p.45.

¹³ Alexander, Introduction.

¹⁴ Alexander, p.4.

¹⁵ Kaser, RPI § 72 I.

¹⁶ See Alexander, p.9; Cf. also recital 19 Foundations in the middle ages (first paragraph after this heading) in this book.

¹⁷ Alexander, p.19 et seqq. The Codex Justinianus and the Justinian amendments are the main sources. In the first case, primarily the second and third headings of the first book. The amendments include primarily 7, 120 and 131.

¹⁸ Alexander, p.23. These institutions were allowed to inherit, they were allowed to accept bequests or entails, they were allowed to sign contracts and rental contracts for a maximum term of 30 years under the law of obligations.

¹⁹ Alexander, p.20 et seqq.