



A Study on Foundation Law

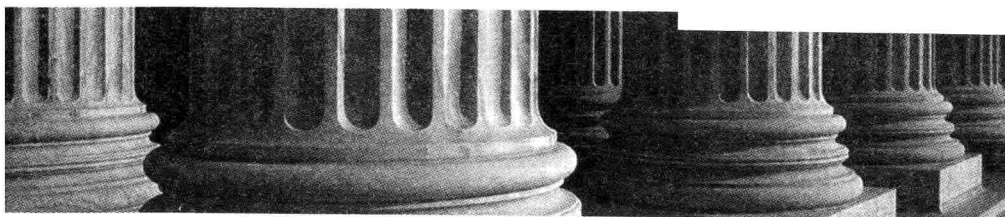


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张晓冬 / 著



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谨以此书献给我的父母和亲人们



## 中文摘要

基金会制度如同信托和公司制度一样,已经为人类社会发展和进步起到重大作用,它在促进社会公益和慈善事业、平衡社会状态和保护财产方面发挥着独特影响。基金会自中世纪欧洲产生至今已有 1000 多年历史,它由传统单一目的公益、慈善或私益基金会演变到公益和私益混合和私益的现代基金会及离岸基金会,从民法制度国家发展到普通法制度国家的事实足以说明基金会制度在社会和经济进步中的意义。本书以具有代表性的数个民法和普通法国家基金会法律为基础,分析和比较公益和私益基金会包括离岸基金会的法律特征,以了解基金会法律制度的独到之处并以此抛砖引玉,引起学界和实务界人士对基金会法律制度和作用的关注和更深入研究。

本书分为六章。第一章为基金会的界定包括其起源及历史发展、概念、特征、规范其行为的准则及作用。第一节分析基金会起源及历史发展,按照不同历史时期分析基金会民法和普通法制度国家在不同社会和经济制度中的作用。本节分为中世纪、近代和现代几个阶段,从古罗马时期基金会的起源开始,介绍中世纪和近代欧洲基金会在不同法系国家的发展。1927 年列支敦士登的《人与公司法》是私益基金会法的先例,是数千年传统的私益基金会行为由民法和习惯法规范转变到专门法规范的转折点,1995 年巴拿马《私益基金会法》是离岸基金会发展的里程碑。圣基茨 2003 年《基金会法》是普通法系国家引进基金会制度的先例,英联邦成员泽西在

2009年将基金会独立于普通法体系单独立法。这些国际立法新理念对于世界各国的基金会立法都产生了深远影响。第二节重点分析基金会概念在民法和普通法制度中的不同表述以及基金会性质。民法制度的基金会是一个独立概念,与公司和其他商业组织不同。基金会创立的目的决定其是否被批准或通过登记而取得法人身份,而普通法的基金会以目的决定其是否可以享受税收豁免。另外,普通法制度中没有民法基金会的概念,而是将慈善目的的有限担保公司称为基金会。第三节着重介绍基金会法人属性,特别是基金会没有股东等有别于公司和其他商业组织的特征。第四节是关于创立基金会重要法律文件的章程和规则。通过章程备案登记,基金会登记并取得法人身份,章程是基金会创立的法律依据和行为准则,章程也是基金会被外国法院识别其创立适用法律以及管理适用法律的依据。公益基金会章程和规则必须在政府机构备案登记以备受益人或公众查询,而私益基金会章程备案,规则却不一定备案,因为其目的是私人利益而非公共利益。第五节关于基金会的作用。传统意义的基金会总是与公益和慈善有关,其实,在信托制度无法解决的社会财产法律关系问题中,私益基金会却能够发挥重要作用。

第二章对基金会法人行为的成立和消灭进行分析,涉及公益基金会和私益基金会的创立、撤销、解散及迁册以及登记、管理、监督和信息披露方面的介绍和分析。重点分析迁册问题,因为迁册意味着基金会法人消灭、延续及改变法律适用及各方关系人的法律关系。基金会得以创立必须满足三个“确定性”,即创立人意愿确定性、基金会目的确定性和财产确定性。这一点与信托人设立信托的三个“确定性”不同,但是存在相似之处,即信托目的确定性、财产确定性和受益人确定性。创立人本人或通过代理人创立基金会并捐赠财产,创立人既可以以遗嘱、公证契约、见证契约、章程及声明,也可以以财产继承合同等文件创立基金会。在信托关系中受益人是

信托关系人,而基金会受益人在不特定情况下是否为基金会关系人目前学界还有争论。本章也分析了离岸基金会这个全新的法律概念。离岸基金会通常是离岸金融中心或离岸中心法律制度规范的现代基金会的一种形式,它的重要特征是离岸基金会法人完全自治、任意选择最方便自己的法律、创立人对基金会的权利保留及对基金会迁册或改变法律适用。各国对于公益界定不同,公益基金会中宗教是否为公益在一些国家也有不同表述。基金会是否为公益,在大陆法国家表现为公益基金会是否得以批准创立,而在普通法国家却与能否创立无关,关键问题是能否享受税收豁免。私益基金会信息披露由其章程和规则约定,特别是作为约定受益人利益及基金会内部管理事务的私人契约不备案不公示成为契约自由的典型范例,这也是私益基金会得以迅速发展的前提,这一点使其在财产保护制度中独树一帜。

第三章分析基金会当事人的法律特征及在基金会中彼此的法律关系。创立人通过第三人创立基金会之行为是否属于代理行为,这关系到捐赠行为是否属于代理行为或被禁止代理的身份行为。创立人或第三人可以以遗嘱创立基金会,遗产执行人处置财产的行为是否为身份行为、代理行为还是信义行为。如果财产所有人或捐赠人通过第三人创立基金会,由此产生的各种法律关系应该如何处理,特别是财产所有人如何在章程和规则中保留权利、财产权利最后如何回归财产所有人而非第三人,以及对于管理人、保护人和受益人的关系处理都是需要明确的问题。因为各国法律规定不同,管理人的构成人数、资格、监督和其他条件存在差异,所以本章着重分析不同法律制度管理人权利与义务的特征。基金会制度中的管理人不是信托制度的受托人或公司制度中的董事,他们既不占有财产也不受制于股东,笔者尝试分析管理人与财产捐赠人、作为创立人的第三人和受益人之间存在信托关系、信义关系或合同关系及与信托和公司制度的不同之处。基金会受益人与信托受益人或者公司



股权受益人的不同之处在于,受益人没有有效对价,即在章程和规则约定的时间和条件下受益人没有有效对价,他们只能享有基金会财产收益和孳息。虽然公益基金会与私益基金会在受益人约定方面存在差异,但是各国法律均把受益人列为实现基金会目的的载体,而不是信托制度中的信托关系人(所有权益人)或者三个确定性之一。对于基金会受益人是否为基金会关系人,各国法律规定有差异。除了列支敦士登《人与公司法》将受益人分类为有权受益人、预期受益人、任意受益人和最终受益人外,大部分国家只规定一种受益人,只有少数国家法律将受益人分为受益人和最终受益人。基于对各国基金会法律分析,笔者将受益人分为固定受益人或定向受益人和不定受益人或不定向受益人。国际学界对于受益人权利与义务研究甚少,因此,本章重点分析受益人的受益权、受益权是债权还是物权性质、制约受益人的权利、受益权的转让和继承。公益基金会与私益基金会对于保护人要求不同,一般公益基金会的保护人由政府机构委任,而私益基金会根据基金会性质不同保护人也可能不同。例如,家庭基金会的保护人有可能是创立人本人或其家庭成员或创立人的继承人。保护人权利约定至关重要,因为事关监督管理人是否依照章程和规则行事的重要问题。保护人如果为创立人本人,其权利过大会使基金会目的无法实现,也可能使基金会创立无效。

第四章关于基金会行为的分析主要在于基金会行为的有效性及其创立人或第三人因捐赠行为产生基金会各种法律关系。在基金会国际研究领域,没有人以其外部和内部因素分析基金会产生的现象,对于受益人与基金会及相关关系人之间存在债权还是物权关系,也很少有人讨论。在分析各国法律后,笔者提出了外部与内部因素是基金会创立的原因,受益人与基金会和基金会关系人根据章程和规则约定不同存在债权和物权关系。这一点分析必须明确,因为信托受益人制度是建立在衡平法制度上,一些学者仍然以这种制



度对比基金会受益人权利与义务。基金会与信托的不同在于,基金会是财产所有人,而信托仅是民事法律关系,其财产受让人并非信托关系本身而是受托人,这是信托与基金会的重要区别。

第五章研究基金会独立财产制度。基金会财产不同于创立人、捐赠人或受益人财产,其法人身份说明独立占有财产的合法性并因此对抗第三人或创立人、第三人、捐赠人或受益人的债权人和继承人。基金会财产最终处置由章程和规则约定,即可以让渡于其他基金会或归为国有,也可以回归创立人或第三人,还可以让渡于受益人。

第六章重点分析基金会法律适用问题,集中在创立、管理和财产的法律适用。现代基金会特别是离岸基金会的发展为创立人选择有利于自己的法律创造了条件,法律适用问题因此变得突出,特别是离岸基金会关系人可能分别适用不同国家法律使得法院在识别时困难加大。法院审理外国基金会案件时如何依照冲突规则找到适用的准据法,或者外国基金会是否适用本国法、基金会国际公约或条约都是本章探讨的问题。

## **Abstract**

Foundations, as trusts and companies, have played a major role in the development and progress of human society. They have casted the unique influence on promotion of social welfares and charities, on social status balance and on property protection. With their 1000 years or more of history since medieval Europe, foundations have been evolved from the traditional singlepurpose public and charitable or private foundations to the combination of public and private ones, or / and the modern foundations of private interest and offshore foundations. The fact of the change from civil law countries to common law countries shows the foundations' significance in social and economic progress. This book compares and analyzes the unique legal characteristics of public and private foundations including offshore foundations based on several representative foundations of civil law and common law countries for the purpose of full and systematical understanding about the legal system of these foundations and their unique parts and to open the subject to the academia and practitioners for their attention on the role and the legal system of foundations with the hope for a more indepth study.

The book has six chapters. Chapter One is the foundation's definition including the origin of the foundation and its development, the concept, features, regulated behaviour codes and their functions.

The first section analyzes the origin of the foundation, its development in history in civil law and common law countries, and the roles of public and private foundations in different social and economic systems. This section will deal with the Middle Ages, Modern and Contemporary Stages, starting with the foundation in Ancient Rome, mainly on the impact on the foundation by different legal and social systems of the Middle Ages and Modern and Contemporary Europe with a continuous historical background and logical relations to prove the inevitable existence of the modern foundations and offshore foundations. Liechtenstein's Persons and Companies Act 1926 is the precedent of the private interest foundation, which marked a turning point from thousands of years of traditional private interest foundations and customary law norms in the civil law to specialized law norms. The Panama's Law No. 25 of 12th June, 1995 on Private Foundations is a milestone in the development of modern foundation that started a new era of offshore foundations. St. Kitts' Foundation Act 2003 is the precedent of first introduction of civil law foundation in common law countries. In 2009, Jersey, a member of the Commonwealth, adopted the legislation for foundations with the concept independent of the common law system. These international new concepts of legislation have had a profound impact on the world legislation. Section Two focuses on different interpretations of foundation concept in civil and common laws, as well as foundation natures. The foundation in civil law is an independent concept, unlike corporations and other business organizations. The purpose of foundation establishment determines whether it would be approved or obtains legal status via registration, while the purpose of the foundation in common law determines whether it can enjoy tax exemption. In addition, in civil law system

there is no such foundation concept as in common law, rather the foundation in common law is the limited guarantee company with a charitable purpose. Section Three focuses on the attribute of the legal person of a foundation, especially foundations without shareholders or other features that are different from companies and other business organizations. Section Four is about the important legal documents of setting up a foundation—the Charter and Regulations. A foundation obtains its legal status by registration of its Charter. The Charter is the legal basis and the code of conduct on which foreign courts recognize it with certain governing laws on creation and applicable laws on management. The Charter and Regulations of a public foundation must be registered and filed for the easy access by beneficiaries or inquiries from the public. However, the Charter of a private foundation must be registered, but its Regulations do not have to be registered and filed as its purpose is for private interests rather than public interests. Section Five is on the foundation role. A traditional foundation always has close relationship with or be associated with public welfare and charity. The role of modern foundations, especially offshore foundations has been rarely mentioned. In fact, in a social property problem concerning various legal relationships where a trust can't provide solutions, a foundation is able to play an important role.

Chapter Two analyzes the foundation's establishment and eradication of legal entity including a public and/or a private foundation's creation, revocation, dissolution and the redomicile, and registration, management, supervision and information disclosure, focusing on redomiciling issue, because it means the legal entity's eradication, continuation, change of applicable laws, and the legal relationship among all the parties. The creation of a foundation must

meet three “certainties”. They are the certainty of the founder’s willingness, the certainty of a foundation’s purpose, and the certainty of its property. This is different to the three “certainties” when a trust is created by a trustee but with similarities, which are the certainty of a trust purpose, the certainty of property, and the certainty of beneficiaries. The founder himself or through a proxy by a founder creates a foundation and donates property. The founder can create a foundation by wills, notarized contract, and oath, as well as by documents such as heritage disposal contracts. In a trust, a beneficiary is one with a fiduciary relationship, while if a beneficiary of a public foundation, when not specified, is one as the foundation party is still under discussion in the academic world. This Chapter also studies a brand new legal concept—offshore foundation. An offshore foundation is usually a form of modern foundation standardized legal system by offshore financial centers. One of its important features is its legal person. It is self – governed, free to choose the legal system at its convenience and free to redomicile the foundation and change the offshore foundation’s jurisdiction. Definition on the concept of “public” varies from country to country, and if religion in a public foundation can be said “for public” has different expressions in different countries. If a foundation can be registered it will depend on whether it has the nature of “being for public” in the civil law system, but in common law countries, it has nothing to do, when creating, with the “public” concept. The key question is, in common law system, whether it can enjoy tax exemption. Information disclosure of private foundations is subject to its Charter and its Regulations and conventions, especially as private contracts agreed upon the interests of the beneficiaries and the Foundation’s internal affairs are not registered

for publicity, which has made it a typical example of contract freedom. This is the prerequisite for the rapid development of private foundations, making it unique in protection of property.

Chapter Three analyzes the legal characteristics of the parties, and their legal connections, and the issue that if the behavior of the creation of a foundation by a third party is defined as an agent behavior, which will explain if the donation is defined as the conduct of the agents or prohibited behavior. The founder or a third person can create a foundation by wills, and if the disposal of property is the identical behavior, agent behavior, or trust behavior. If the property owner or donator(s) create a foundation by a third person, then there comes the issue of how to deal with various legal relationships resulted, in particular, how the property owner reserves the right in the Charter and Regulations how property rights return to the property owner rather than a third party, and how to deal with relationship between foundation administrators, protectors and beneficiaries. Different countries have different legal regulations, so there are differences in the composing number(s), qualifications, supervision and other conditions concerning foundation councils. Thus this chapter mainly discusses the characteristics of the rights and obligations of administrators under the different legal systems. Administrators under a foundation are not the trustee in a trust or the directors in a company. They neither possess the property nor subject to shareholders. The discussion is trying to make clear if there are fiduciary relationship and contractual relationship between the administrators and the property donor, between the founder as a third person and the beneficiaries, as well as differences between a trust and company system. A foundation beneficiary distinguishes a trust beneficiary or a company shares

beneficiary by the fact that a foundation beneficiary does not have a valid consideration, that is beneficiaries do not have a valid consideration in the time and under the conditions stipulated in the Charter and Regulations, they are able to enjoy the benefit in the foundation property and propagate interest rates. Although charity Foundation and private interest foundations are different in the beneficiary conventions, laws in different countries regard the beneficiaries as an important means to realize the Foundation for the purpose of the carrier rather than the trust relationship between people in the trust system or one of the three uncertainty, because there is no legal certainty in a foundation, the beneficiary is the foundation for the creation of one of the three uncertainties. Different laws have various definitions on the concept of whether foundation beneficiaries are foundation related parties. Liechtenstein Companies Act classifies beneficiaries as the entitled beneficiaries, the intended beneficiary, any beneficiary, and the ultimate beneficiary. Most countries have only one kind of beneficiary. Only a few jurisdictions classify beneficiary as beneficiary and ultimate beneficiary. Based on a legal analysis of foundations in different countries, beneficiaries will be, in this paper, divided into fixed beneficiary or directional beneficiaries and indefinite beneficiary or non - directional beneficiaries. International academia has little research on the beneficiary rights and obligations with few complete papers discussing this issue. This paper will focus on analysis of the beneficiary's beneficial interest of beneficiary claims or property nature of restricting the rights of the beneficiary, the beneficial interest benefit rights and transfer and inheritance. Public foundations and private foundations have different requirements on protectors. Usually the protectors of a public foundation is appointed by government



agencies, while private foundations may have different protectors according to the nature of the foundation, for example, the protector of a family foundation may be the creator or his family members or the heir of the creator. Protector rights convention is essential, as this is related to the issue how administrators manage the foundation, and whether the protector has too strong rights so as to interfere managers to act in accordance with Charters and Regulations. If the protector is the founder himself or herself, his or her too strong rights would probably fail the purpose of the foundation, and therefore may make the foundation invalid.

Chapter Four is on foundation behavior analysis: the effectiveness of such behavior and the various foundation legal relationships generated by its founder (s) or the donation behavior by a third person. In international studies on foundations, nobody analyzes the reasons of the emerging of foundations by the external and internal factors. There are rarely discussions on the relationships between the beneficiary and the foundation, and the real right and creditor's right relationship existed among related parties. After the analysis of laws in different countries, I propose that the external and internal factors are the reasons for the establishment of a foundation. According to the Articles and Regulations the beneficiaries and the foundation as well as the related parties agree that there existed relationships with different real right and creditor's right among them. This point must be made clear because trust beneficiary system is based on equitable system, but some scholars still contrast foundation beneficiary rights and obligations in this system. The difference between a foundation and a trust lies in that a foundation is the owner of the property while a trust is only a civil legal relationship. The trustee instead of the trust owns

the trust property. This is an important distinguish between a foundation and a trust.

Chapter Five refers to a foundation's independent property regime. Foundation property is different from the property of the founder, the donor or the beneficiary. The legal status means the legality of the possession of the separate property, and therefore against a third party or creditors of a founder a donor or a beneficiary. Foundation property disposal eventually will be agreed upon by Charter and Regulations, that is, it may be transferable to other foundations or classified as state-owned. It can also be returned to the founder or a third person, as well as being transferred to beneficiaries.

Chapter Six concerns the laws applicable to foundations, mainly on the creation, the management and the property. Modern foundations, particularly the development of offshore foundations create chances and favorable conditions for the founders to choose laws in their own favor. Thus, the issue of applicable law becomes prominent, especially offshore foundations relate to applicable laws of different countries so that it is difficult for courts to recognize. This chapter will study the issues how courts find applicable laws to foreign foundations or national laws applicable to foreign foundations, and whether they can be applied to the International Foundation Conventions or other international treaties.