Private Foundations: Law & Practice

John Goldsworth

Mulberry House Press

www.mulberryhousepress.com

INTRODUCTION	1
CHAPTER I	
THE NATURE AND BASIC FEATURES OF	
PRIVATE FOUNDATIONS	
1. The General Nature of Private Foundations	5
2. Definition of a Foundation	6
3. Definition of a Private Foundation	6
4. Imprecise Use of the Name 'Foundation'	7
5. The Charitable Nature of 'European Foundations'	8
6. Basic Features of Private Foundations	9
CHAPTER 2	
THE DEVELOPMENT OF FOUNDATIONS	
1. Private Foundations as Legal Entities	11
2. The Evolution of Foundations	12
4. The Emergence of Foundations as Secular Bodies	18
5. The Modern Development of Private Foundations	19
6. Two Different Legal Systems and Foundations	20
CHAPTER 3	
THE LEGAL PERSONALITY OF FOUNDATIONS IN CIVIL	AND
COMMON LAW COUNTRIES	
1. Introduction	25
2. The Nature of a Juristic Person	25
3. The Legislative Approach to Private Foundations	27
4. Private Foundations as Legal Entitiesunder English Law	32
CHAPTER 4	
THE ESSENTIAL CHARACTERISTICS	
OF PRIVATE FOUNDATIONS	
1. Introduction	39

PRIVATE FOUNDATIONS: LAW & PRACTICE

2. The Nature of Private Foundations Compared	41
3. The Formation of Foundations	43
4. Commercial Activities of Private Foundations	45
5. Mortis Causa and Private Foundations	47
CHAPTER 5	
PRIVATE FOUNDATIONS IN SELECTED JURISDICTIONS I	
LIECHTENSTEIN AND PANAMA	
1. Introduction	49
2. Liechtenstein	50
3. Panama	56
CHAPTER 6	
PRIVATE FOUNDATIONS IN SELECTED JURISDICTIONS	
II: ANTIGUA & BARBUDA, ANGUILLA, THE BAHAMAS, ST.	
KITTSJERSEY AND NEVIS	
1. Antigua & Barbuda	63
2. Anguilla	67
4. St. Kitts	71
5. Jersey	72
6. Nevis	76
CHAPTER 7	
PRIVATE FOUNDATIONS IN SELECTED JURISDICTIONS	
III: AUSTRIA, INDONESIA, ITALY, MALTA, SWITZERLAND,	
CURASAO,SAN MARINO, SEYCHELLES AND LABUAN	
1. Austria	81
2. Indonesia	84
3. Italy	87
4. Malta	89
5. Curasao	93
6. San Marino	95
7. Switzerland	97
8. The Seychelles	98
9. Labuan	102

CHAPTER 8	
FOUNDATIONS IN SELECTED JURISDICTIONS IV:	
CANADA, THE US, JAPAN, THE NETHERLANDS,	
SPAIN AND SWEDEN	
1. Canada	109
2. United States	112
3.Japan	113
4. The Netherlands	114
5. Spain	114
6. Sweden	114
CHAPTER 9	
COMPANIES USED AS PRIVATE FOUNDATIONS:	
THE ISLE OF MAN AND GIBRALTAR	
1. Introduction	115
2. The Nature of a Guarantee Company	115
3. The Isle of Man Hybrid Guarantee Companies as Foundations	115
4. Gibraltar Companies as Private Foundations	120
CHAPTER 10	
THE CHARTER AND REGULATIONS	
1. Introduction	123
2. Legal Nature of the Charter and Regulations	123
3. The Charter	127
4. Regulations	130
CHAPTER 11	
THE VALIDITY OF A PRIVATE FOUNDATION	
1. Introduction	133
2. When Does a Foundation Fail?	135
3. The Interpretation of Foundation Documents	136
4. The Legality of Private Foundations	141
5. Foundations against Public Policy	141

PRIVATE FOUNDATIONS: LAW & PRACTICE

6. Ousting the Jurisdiction of the Court	143
7. Foundations for Unlawful, Fraudulent and Ulterior Purposes	144
8. Perpetuities	144
9. Piercing the Corporate Veil	148
10. Agency Relationship	149
CHAPTER 12	
FOUNDATIONS AND SHAMS	
1. Introduction	151
2. Foundations as Shams – the Civil Law Position	152
4. Parties Entitled to Claim a Foundation is a Sham	167
5. The Consequences of a Sham	168
CHAPTER 13	
BENEFICIARIES	
1. Introduction	171
2. The Classification and Types of Beneficiary	172
3. Rights to Information and Supervision of a Foundation	177
4. Beneficiaries in Other Jurisdictions	180
5. Identification of Beneficiaries and Anti-Money Laundering Laws	182
CHAPTER 14	
THE FOUNDER AND FOUNDATION COUNCIL	
1. Introduction	185
2. The Founder and the Founder's Reserved Powers	185
3. The Practical Nature of a Foundation Council	189
4. Foundation Councils' Duty of care	196
5. The Liability of a Foundation Councilunder the General Law	201
6. Other Executive Bodies	204
7 Supervision	205

CHAPTER 15	
THE PROTECTOR	
1. Introduction	207
2. The Origin of Protector	207
3. The Position of Protector	208
4. The Protector's Relationship with the Founder	209
5. The Protector and Management of a Private Foundation	210
6. Comparison between Foundation and Trust Protectors	211
7. The Protectors' Powers: Fiduciary orNon-Fiduciary?	213
8. The Width of the Protectors' Powers	214
CHAPTER 16	
DISSOLUTION, TERMINATION, REVOCATION AND	
CONTINUANCE	
1. Introduction	217
2. Dissolution and Termination	218
3. Conversion	222
4. Continuance	223
CHAPTER 17	
FOUNDATIONS AND MATRIMONIAL LITIGATION	
1. Introduction	231
2. Financial Settlement on Divorce	231
CHAPTER 18	
THE ASSETS OF A FOUNDATION	
1. Introduction	239
2. Foundation Assets in Selected Jurisdictions	242
CHAPTER 19	
THE INTERNATIONAL TAXATION OF FOUNDATIONS	
1. Introduction	255
2. Characterisation of Private Foundationsfor Tax Purposes	255

PRIVATE FOUNDATIONS: LAW & PRACTICE

3. Taxation of Private Foundations in the United Kingdom	256
4. International Tax Aspects	257
5. Foundation as Agent of the Founder	259
6. Taxation of Private Foundations in the United States	260
8. International Aspects	263
9. Foundations and the OECDTax Transparency Standards	264
CHAPTER 20	
FOUNDATIONS, REGISTERED COMPANIES AND TRUSTS:	
SOME FURTHER COMPARISONS	
1. Introduction	267
2. A Comparison with Companies	268
4. The Remedies for Breach	277
5. The Foundation Council v Corporate Trustees	277
6. Director Liability v Individual Trusteeship	278
7. Individual Liability of Foundation Council Members	279
8. STAR Trusts	284
CHAPTER 21	
FOUNDATIONS AND THE CONFLICT OF LAWS	
1. Introduction	291
2. Jurisdiction	292
3. The Application of the Regulation	294
4. Characterisation	295
5. The Statutory Provisions on Applicable Law Clauses	295
CHAPTER 22	
PRIVATE FOUNDATIONS AND THE HAGUE CONVENTION	
1. Introduction	297
2. The Convention's Definition of a Trust and its Application	
to Private Foundations	298
3. Analogous Institutions	299
4. A Different Emphasis	303
5. Structure and Function	304

CHAPTER 23	
PRIVATE FOUNDATIONS AS OBLIGATIONS	
1. Introduction	309
2. Private Foundations and the Rome Conventions	312
3. Convention I: Contractual Obligations	312
CHAPTER 24	
THE USES OF PRIVATE FOUNDATIONS	
1. Introduction	319
2. Forced Heirship Foundations	319
CHAPTER 25	
ASSET PROTECTION AND FOUNDATIONS	
1. Introduction	333
2. Statute of Elizabeth	333
3. Modern Law	335
3. Intention to Defraud Creditors	336
4. Claw-back	337
5. Offshore Legislation	337
CHAPTER 26	
ACTIONS TO SECURE RIGHTS UNDER A FOUNDATION	
1. Introduction	341
2. Rights against a Foundation	341
3. Nature of Remedies	343
4. Access to the Courts	345
5. Preventing a Dispute Arising	346
CONCLUSION	349
BIBLIOGRAPHY	351
INDEX	367