



A. The Big Picture: World of Foundations and Trusts

Lecture: Foundations and Trusts

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Literature and Materials

1. Swiss Civil Code (CC) and Liechtenstein Persons and Companies Act (PGR)
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4. **Jakob, Dominique**, Draft Revision of Swiss Inheritance Law: Impact on Estate Planning via Foundations and Trusts, in: *Trusts & Trustees*, vol. 23, no. 6, July 2017, pp. 705–708
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6. **Panico, Paolo**, Private Foundations and Trusts: Just the Same but Different?, in: *Trust & Trustees*, vol. 22, no. 1, pp. 132–139
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8. **Panico, Paolo**, *Private Foundations: Law and Practice*, Oxford 2014



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I. What is a Foundation?

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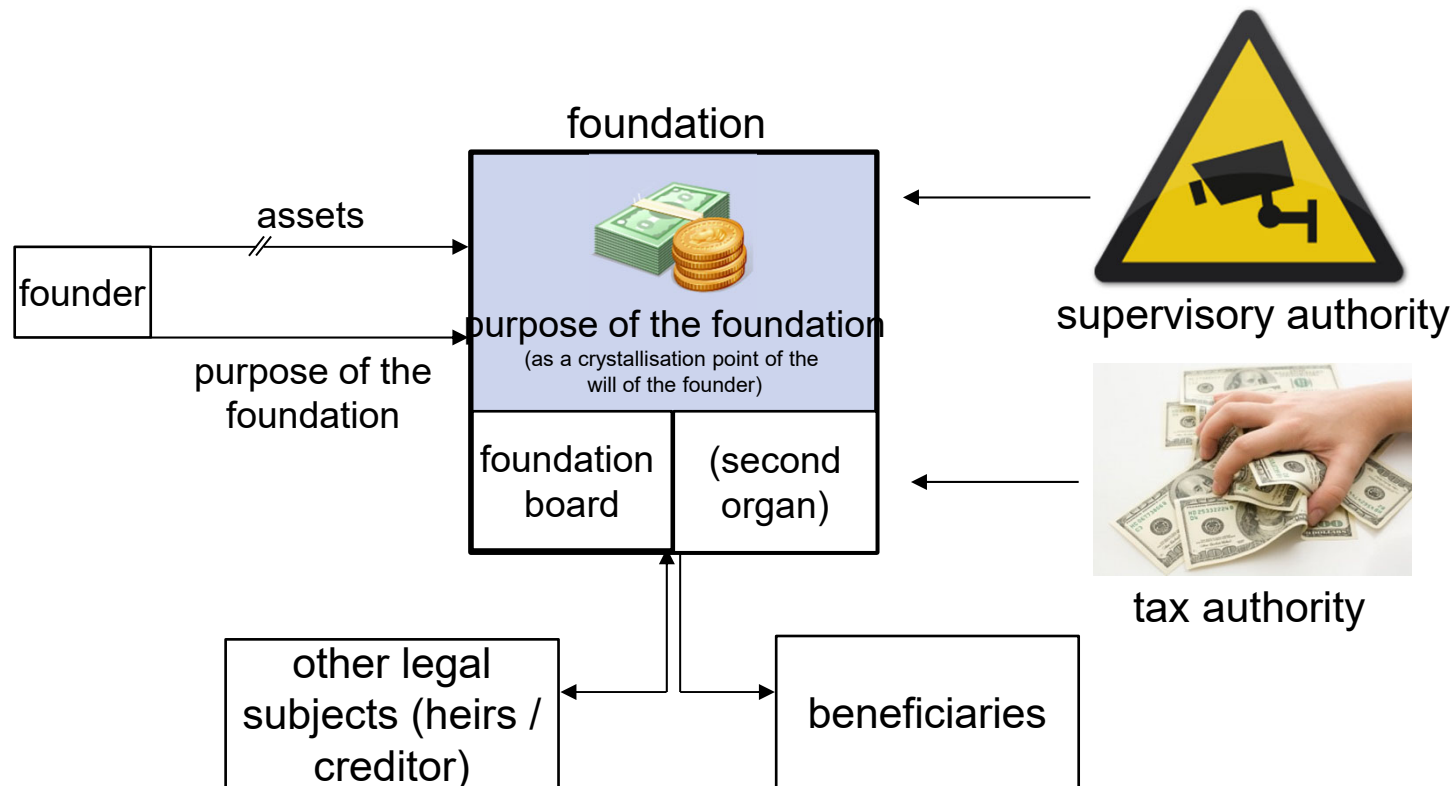
III. History of Foundations and Trusts

IV. The Landscape of Foundations and Trusts



I. What is a Foundation?

1. The Characteristics of the Foundation





I. What is a Foundation?

1. The Characteristics of the Foundation

- Legal person
- Assets endowed with legal personality and dedicated to a specific purpose; «special-purpose fund»
- Institutional nature: No members, no owners, only beneficiaries who are to benefit from the assets
- Principle of separation and solidification: Legally and economically independent, separated from the founder at the time of establishment and permanently perpetuated
- Founder's freedom to set up a foundation and to shape it according to his ideas



I. What is a Foundation?

2. Persons Involved

- Founder: Establishes the foundation by his unilateral declaration of will
- Foundation board: Manages and represents the foundation
- Beneficiaries: Are to benefit from the foundation according to the specific purpose of the foundation
- Auditor: Audits the accounts of the foundation
- Supervisory authority: Monitors the fulfillment of the purpose and protects the foundation
- Tax authority: Verifies and grants a tax exemption



I. What is a Foundation?

3. The Significance

- Worldwide economic significance for charitable and private purposes
- Over 13'000 charitable foundations in Switzerland pursue different purposes
- General significance in wealth planning and asset succession planning (family foundations, business/enterprise foundations)
- Different foundation models throughout the various jurisdictions



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II. What is a Trust?

1. The Characteristics of the Trust

Hayton's «Elephant Test»:

«Like an elephant, a trust is difficult to describe but easy to recognize.»



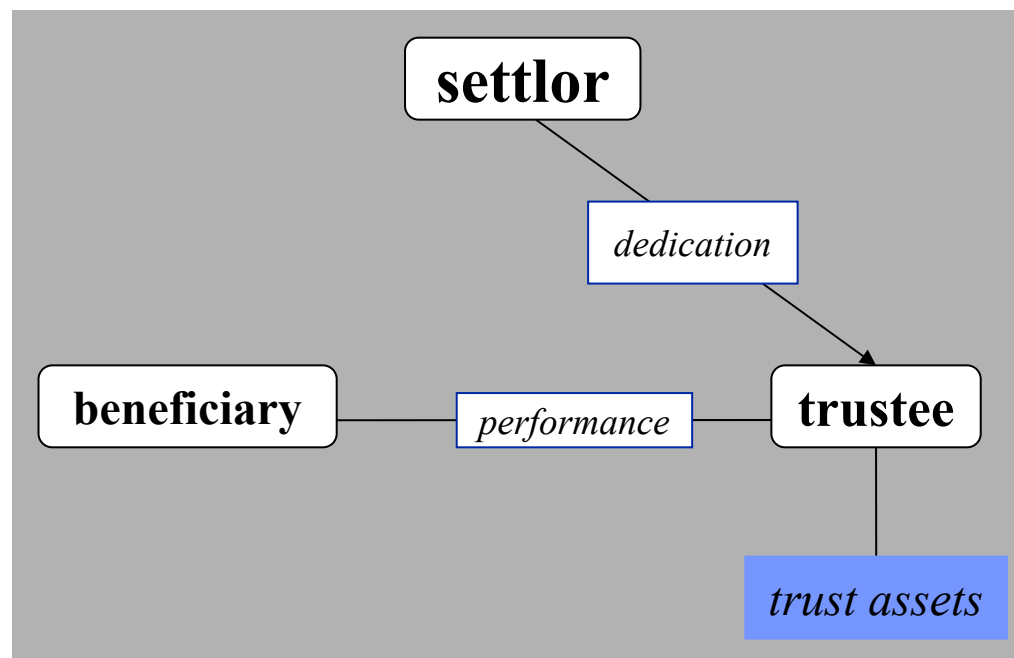


II. What is a Trust?

1. The Characteristics of the Trust

– Art. 2 HTC:

«For the purposes of this convention, the term <trust> refers to the legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.»





II. What is a Trust?

1. The Characteristics of the Trust

- No legal personality
- No mandate relationship between settlor and trustee
- Independence from the persons involved
- According to art. 2 para. 2 HTC:
 - «a) The assets constitute a separate fund and are not a part of the trustee's own estate;
 - b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
 - c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.»



II. What is a Trust?

2. Persons Involved

- Settlor: Establishes the trust by giving the trustee title to movable or immovable property. The settlor can himself be a trustee *or a* beneficiary
- Trustee: Manages and uses the trust assets for the benefit of the beneficiaries within the scope of the trust's constitution. A trust can have one or more trustees (co-trustees)
- Beneficiary: Is the person benefiting from the trust
- Protector (especially for off-shore trusts): Monitors the trustees in their performance of their functions and often has the authority to replace the trustee



II. What is a Trust?

3. The Significance

- Worldwide economic importance cannot be overestimated
- General significance for stabilising wealth planning and asset succession planning in an increasingly internationally mobile society
- Numerous operational functions: *E.g.*, in the sense of an administrative trust, transfer of ownership, foundation, family foundation, bequest, and much more
- But: Increasingly restrictive regulations



II. What is a Trust?

4. Foundations vs. Trusts

	foundations	trusts
subject matter	fund/patrimony	
object	specific purpose	
beneficiaries	receive benefits	
dedication	a founder's unilateral declaration of will	
nature	independent assets, legal personality (capable of acting, suing, being sued)	assets in legal ownership of another person, no legal personality



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III. History of Foundations and Trusts

1. How It All Started

- Trust-like relationships in Roman law
 - Emperor Augustus introduced the first jurisdiction for trusts
 - They existed before without legal sanction as «*fideicommissum*» (= object entrusted [*commissum*] to the good faith [*fide*] of the recipient, for the benefit of another person)
 - Emperor Justinian introduced actions for trusts; in front of a «*praetor*»
- Development of English trusts began in the Middle Ages from the time of the 11th/12th century crusades
 - Fighting landowners transferred title to their land to a trusted person in order to ensure feudal services
 - Split between legal and equitable owner was newly recognised in English law



III. History of Foundations and Trusts

1. How It All Started

- Foundation-like relationships in ancient times: No legal personality (see above)
- Justinian Code 530 A.D.: Established «*piae causae*»
 - Donations dedicated to religious purposes
 - Certain privileges for the donor
- Mediaeval Europe: «*Universitas*» to pursue «*piae causae*»
 - The foundation as an association of persons
 - Opportunity to endow organisations pursuing religious and other secular charitable purposes, with land and property, possibly in perpetuity by means of a foundation
- 12th century: First establishment of a «foundation» by Moses, archbishop of Ravenna (Italy)



III. History of Foundations and Trusts

1. How It All Started

- 13th century: Invention of the fiction of a «legal person», an incorporated entity with its own rights, Sinibaldo de Fieschi (later Pope Innocent IV)
- Reformation and enlightenment: Secularization of the foundations' purposes
- *Pia causa* was superseded by the idea of the communitarian benefit
- 19th century: Further development of the doctrine of legal personality, Friedrich Carl von Savigny (Germany)
 - Two categories of legal persons: Corporations and foundations, which exist by reason of a purpose for which they were established
- Secular codification of the foundation in Europe
 - 19th century: Special purpose fund/dedicated patrimony (*Zweckvermögen*) noted by Aloys von Brinz in his *Handbook of Pandects*



III. History of Foundations and Trusts

1. How It All Started

- History shows: Parallel development of several institutions
- Whereas in continental Europe *pia causa* led to the development of foundations, the same purpose was achieved in England by transferring property to the abbot to hold it on trust for the relevant charitable objects
- Related practice in the Dutch United Provinces in the form of foundations (*stichtingen*) granting goods for people in need
- Evolution of family foundations (Germany); foundations not only for charitable purposes but also serving private and business interests
- Regulation under the German Civil Code (BGB) as «neutral» purpose legal entity
- First codification of a purely «private foundation» in Liechtenstein's PGR (1926)



III. History of Foundations and Trusts

1. How It All Started

- Development from a legal basis for charity to a vehicle to pursue private property purposes and protecting assets from creditors
- Foundations evolved further in continental Europe
- Further development of trust law in England, USA and different areas of the Commonwealth
- Latest development: Integration of foundation legislation in genuine trust jurisdictions and *vice versa*



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IV. The Landscape of Foundations and Trusts

1. Foundations

- Classical foundation countries:
Foundation as legal person with
neutral purpose dedication
(charitable and non-charitable
purposes possible)
 - Germany, BGB 1900
 - Switzerland, CC 1912
- Private foundation countries:
Classical concepts are extended
towards enhanced private
autonomy and private interests
 - Liechtenstein, PGR 1926
 - Austria, PSG 1993
 - Panama, Panama
Foundation Law No. 25 1995



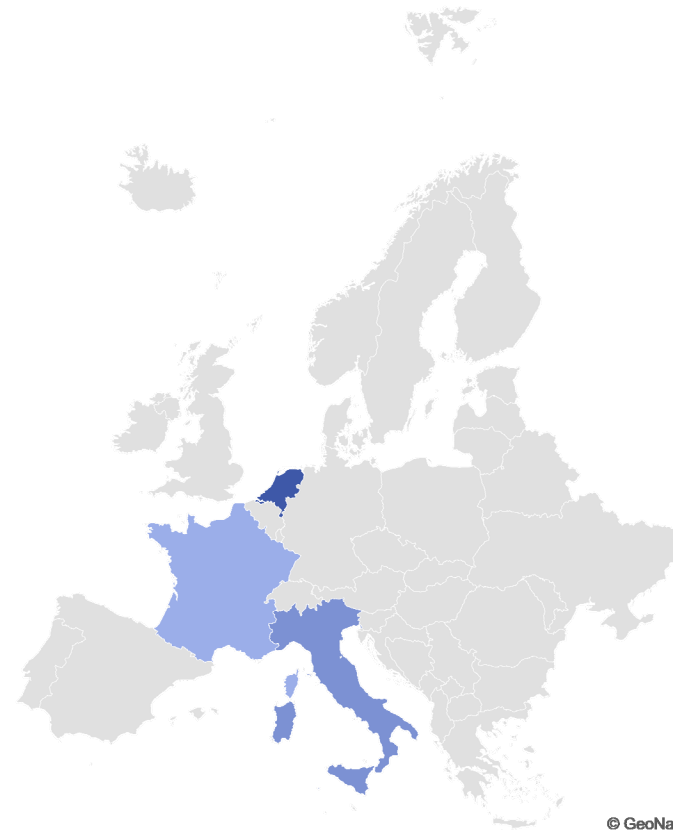
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IV. The Landscape of Foundations and Trusts

1. Foundations

- Pure charitable foundation countries (charitable purpose mandatory):
 - France, *Loi n° 87–571* 1987
 - Italy, Codice Civile 1990
- More functional foundation models
 - Netherlands: *Stichting* as an «orphan company»
 - Nordic foundations (e.g., Denmark, Sweden)



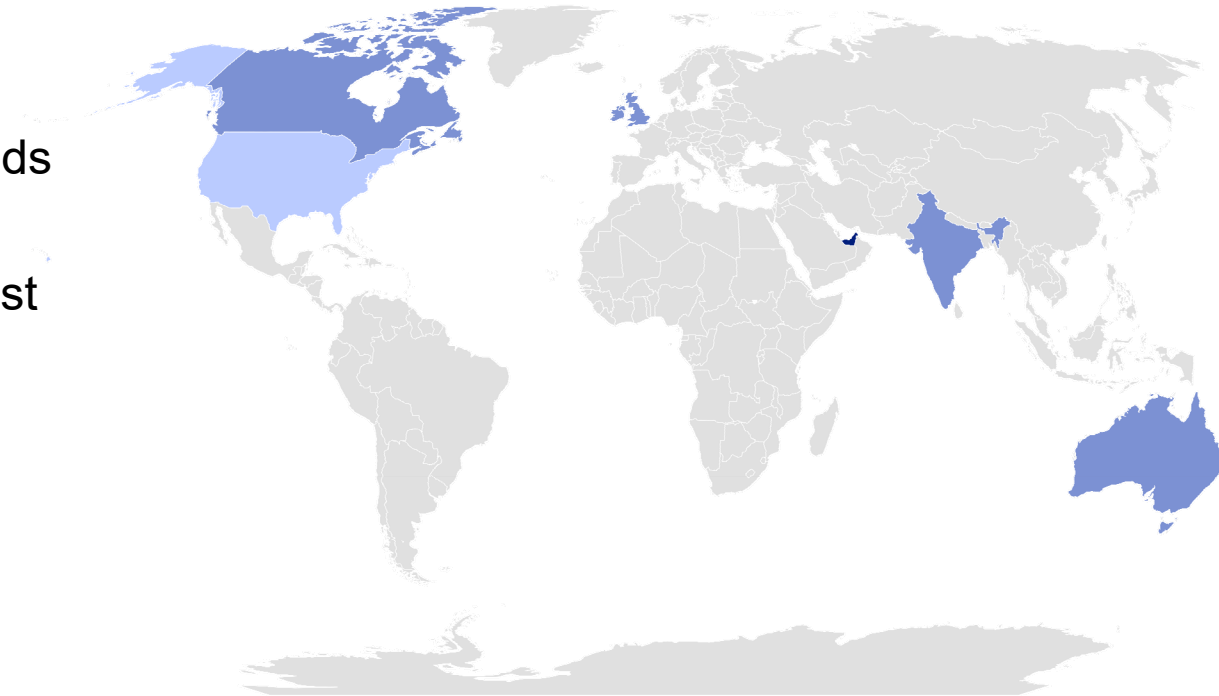
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IV. The Landscape of Foundations and Trusts

2. Classic Trust Jurisdictions

- UK/Commonwealth
- USA
- Caribbean
- Channel Islands
- Further?
 - Middle East
 - Asia





IV. The Landscape of Foundations and Trusts

3. The New Normal: Hybrid Jurisdictions

- Civil law jurisdictions with trust legislation
 - Liechtenstein
 - Hungary
 - Luxembourg
 - Czech Republic
 - San Marino
 - Curaçao
 - Saint Maarten
 - Soon also Switzerland?



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IV. The Landscape of Foundations and Trusts

3. The New Normal: Hybrid Jurisdictions

- Civil law jurisdictions with trust legislation
 - Implementation of a Swiss trust law at work:
 - Motion (18.3383) «*Einführung des Trusts in die schweizerische Rechtsordnung*»
 - The Swiss Federal Council proposed the implementation of a legal institution *sui generis* in the Swiss CC
 - The consultation process is now open from 12 January 2022 to 30 April 2022
 - The preliminary draft in general follows the common law trust model (cf. art. 529a et seqq. PD-CC) and defines a trust according to the HTC
 - Inadmissible are charitable trusts and other purpose trusts
 - The maximum period of existence of a trust is 100 years (art. 529u PD-CC)



IV. The Landscape of Foundations and Trusts

3. The New Normal: Hybrid Jurisdictions

- Civil law jurisdictions with trust legislation
 - Implementation of a Swiss trust law at work:
 - Possibility to establish a revocable trust (art. 529e para. 1 PD-CC)
 - Trust assets are separate assets of the trustee (art. 529a para. 1 PD-CC)
 - No registration in the commercial register or supervision
 - Special information and documentation requirements in accordance with money laundering and terrorism regulations (art. 529j PD-CC)
 - Various adjustments in other laws, such as the Swiss CC and tax laws



IV. The Landscape of Foundations and Trusts

3. The New Normal: Hybrid Jurisdictions

- Common law jurisdictions with foundation legislation, «offshore foundations»
 - Channel Islands (Jersey, Guernsey)
 - Caribbean (Cayman Islands, Bahamas, St. Kitts, Nevis, Antigua, Barbuda)
 - Isle of Man
 - Middle East (Dubai, Abu Dhabi)
 - USA (Wyoming, New Hampshire, ...)

