

1982

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Recommended Citation

Herbert Batliner, *Commentary on Liechtenstein Company Law*, 14 Case W. Res. J. Int'l L. 613 (1982)
Available at: <https://scholarlycommons.law.case.edu/jil/vol14/iss3/10>

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RECENT DEVELOPMENTS

Commentary on Liechtenstein Company Law

by *Herbert Batliner**

I. INTRODUCTION

The Principality of Liechtenstein became an independent State on January 23, 1719, by the union of the two Imperial Baronies of Vaduz and Schellenberg into a Sovereign Imperial Principality. It was named Liechtenstein after its governing house. The country encompasses 160 square kilometres and currently has some 26,000 inhabitants.

The Principality of Liechtenstein achieved full independence on July 13, 1806, when it joined the Confederation of the Rhine founded by Napoleon. Its subsequent dependence on Austria, and its treaties with Switzerland left its sovereignty intact.

The present Constitution dates from 1921 and describes Liechtenstein as a constitutional-hereditary monarchy with a democratic and parliamentary basis. The authority of the State is vested in the Prince and in the people.¹ The legislative body is the Diet, composed of 15 members. It is elected every four years by universal, equal, secret and direct suffrage with proportional representation.² The consent of both the Diet and the

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¹ VERFASSUNG, art. 2, (Liech.).

² VERFASSUNG, art. 46, (Liech.) LGBl 1922/8.

Prince is required for a law to be enacted.

At the end of the First World War, Liechtenstein turned away from Austria, with whom a customs union had existed from 1852 to 1918, towards a closer alliance with Switzerland. The Postal Treaty with Switzerland³ took effect on January 1, 1922, and the Customs Treaty⁴ was signed on March 29th of 1923. The Principality of Liechtenstein thereupon joined the Swiss Customs area and the Swiss Franc became the country's official currency.⁵ In 1980, the Principality and the Swiss Confederation incorporated the monetary union, which had existed on the basis of the Swiss franc since 1924, into a bilateral agreement. This monetary agreement supplements the Customs Treaty of 1923, through which the Principality had become part of the Swiss economic area.⁶

Because of the close economic ties between Liechtenstein and Switzerland, the Principality has benefited from the Swiss franc and the sound growth of the Swiss economy. The only officially recognized language in Liechtenstein is German, but English and other languages are also used in the economic sectors.

Due to its small size and economic dependence on its neighbors, the greater part of the applicable law in Liechtenstein has been adopted from Austria and Switzerland. Generally speaking, Liechtenstein's civil and criminal law and procedure fall into three areas of origin. Criminal law, criminal procedure and civil procedure are of Austrian origin. The civil law pertaining to marriages, family law, the law of succession and portions of contract law is borrowed from Austrian codes. Its law of persons, tutelage, property and remaining portions of contract law is derived from Swiss law. Some of its commercial law stems from Germany. Peculiar to Liechtenstein is its law relating to associations of persons and the company without juridical personality, which is codified in the Law on Persons and Companies (PGR Code).

Jurisdiction in civil and criminal matters is exercised firstly by the *Landgericht* (Court of Justice), secondly by the *Obergericht* (Higher Court) and lastly by the *Oberste Gerichtshof* (Supreme Court of Appeal). In matters of public law, there is a special Administrative Court and the State Court of Appeal. In accordance with the principle of the separation of powers, judicial authority is entirely independent of the executive and is exercised by elected judges.

³ Postvertrag vom 3 November 1921, 1922 Liechtengestzblatt [LGBl] 8, as amended LGBl 1978 37 and 38 (Liech.) (Postal Treaty of November 3, 1921).

⁴ Zollvertrag vom 29.3.1923, LGBl 1923/24 (Liech.). (Customs Treaty of March 29, 1923).

⁵ Gesetz betreffend die Einfuhrung der Schweizer Wahrung vom 26.5.1924, LGBl 1924/8 (Liech.) (Law Concerning the Introduction of Swiss Currency of May 26, 1924).

⁶ Wahrungsvertrag vom 19.6.81, LGBl 1981/52 (Liech.). (Monetary Treaty of June 19, 1981, which became effective November 11, 1981. *Id.*).

The system for companies is based on Liechtenstein's own company law combined with low taxation. The legal basis formed by the Law on Persons and Companies, and the Law concerning the Trust Enterprise⁷ is the principle concern addressed in this article. Other features addressed are special regulations regarding company law, the special rates of tax, banking secrecy,⁸ and the absence of treaties with other countries concerning exchange of information⁹ and absolute tax secrecy.¹⁰

II. DEVELOPMENT OF THE LAW ON PERSONS AND COMPANIES IN LIECHTENSTEIN

The business code in Liechtenstein is based on the Law on Persons and Companies (PGR Code). The PGR Code has been constantly amended, and special reference should be made to the Law concerning the Trust Enterprise, which has been incorporated in the PGR Code as Article 932a. After various changes aimed chiefly at adjusting the minimum capital, a statutory requirement was introduced in 1963¹¹ that required at least one member of the board of an association to reside in the Principality of Liechtenstein. The result of the continuing reform of company law is two acts and a set of regulations which introduced radical changes.¹² The acts and regulations were enacted in 1980. The objective of this reform was to eliminate abuse of the corporate system. However, the liberal basis on which Liechtenstein's company law is founded remained unchanged.

III. COMPANY LAW

A. General

The PGR Code allows many different kinds of corporate associations.

⁷ Personen und Gesellschaftsrecht vom 20.1.1926 (PGR), LGBI 1926 4, LGBI 1959 11, LGBI 1963 17, 19, LGBI 1974 51, LGBI 1980 39, 40, 41 (Liech.). (Law on Persons and Companies) [hereinafter cited as PGR]. Gesetz betreffend das Treuunternehmen vom 10.4.1928, LGBI 1928 6, PGR art. 932a, LGBI 1980 39, 40, 41 (Liech.) (Law concerning the Trust Enterprise of April 10, 1928).

⁸ Gesetz über Banken und Sparkassen vom 21.12.1960, LGBI 1961 3, as amended LGBI 1965 3, LGBI 1975 41 (Liech.) (Act concerning Banks and Savings Funds of December 21, 1960).

⁹ A double taxation agreement exists only with Austria, see LGBI 1970 37.

¹⁰ Steuergesetz vom 30.1.1961, LGBI 1961 17, art. 7 (3)(Liech.) (Tax Act of January 30, 1961, which says that an "absolute tax secrecy exists regarding taxes payable by holding companies, domiciliary enterprises and pensioner tax payers." *Id.*).

¹¹ See LGBI 1963 17.

¹² See LGBI 1980 39, 40 and 41, *supra* note 7. See also Heinz Josep Strotter, *Das revidierte Gesellschaftsrecht des Fürstentums Liechtenstein*, EX JURE, Volume 9, Autumn 81.

The emphasis of these legal forms, with their tax advantages, lies on the so-called holding companies and domiciliary enterprises. Holding companies and domiciliary enterprises are tax law concepts identifying enterprises operating in Liechtenstein which are liable to capital and revenue taxes.¹³ The Tax Act defines the holding company as a juridical person entered on the Public-Register and non-registered foundations whose objects are exclusively or predominantly the management of assets, participation in other enterprises, or the continuing management of holdings in other enterprises. Domiciliary enterprises are juridical persons entered on the Public-Register who have only their domicile in Liechtenstein, whether an office is kept or not, and carrying on no commercial or trading activities in the country. Any association of persons may take the form of a holding company or domiciliary enterprise since by their nature they are capable of meeting the statutory provisions. In particular they include: companies limited by shares, private limited companies, establishments, trust enterprises, and foundations. The PGR Code also provides for the limited partnership with a share capital,¹⁴ the company limited by quota shares,¹⁵ associations,¹⁶ co-operative associations,¹⁷ and companies without juridical personality.¹⁸

In addition to the wide range of various forms of companies and associations, Liechtenstein company law offers one further advantage which favours the incorporation of holding companies and domiciliary enterprises. The PGR Code contains few mandatory provisions. The major part consists of dispositive law. This permits the founders of a company to direct the company through its Articles of Association, according to their requirements. Therefore the extremely liberal conception of the PGR Code offers the widest possible individual freedom of choice.

Special features of the holding company and domiciliary enterprise, with their own juridical personality are as follows. Their name and references to their legal form may be entered on the Public-Register in a foreign language, and balance sheets may be drawn up in a foreign language. One member of the board of directors, foundation council or board of trustees authorized to conduct the business and represent the organization, must be a Liechtenstein citizen residing within the Principality and be professionally admitted as a lawyer, law agent, trustee or accountant or possess a commercial qualification recognized by the Government. Foreigners with a domicile permit for Liechtenstein have equal status, sub-

¹³ See LGBl 1963 7 *supra* note 10 at arts. 83, 84.

¹⁴ PGR art. 368.

¹⁵ PGR art. 375.

¹⁶ PGR art. 246.

¹⁷ PGR art. 428.

¹⁸ PGR art. 649.

ject to certain additional conditions. Companies are exempt from property, income and revenue tax and subject only to capital tax, at beneficial rates; and all holding companies and domiciliary enterprises must appoint a Liechtenstein citizen residing in the country or a juridical entity established in Liechtenstein as their legal representative. The legal representative is not a governing body of the company but merely an agent authorized to accept documents served on him by the Liechtenstein court and administrative authorities. The representative's fees are similarly fixed by arrangement between the licensed fiduciaries engaged in managing and forming companies.

B. Individual Forms of Company

1. The Company Limited by Shares

The company limited by shares is a company with its own trade name, whose previously determined capital is divided up into part-sums (shares) and whose assets are liable for its commitments.¹⁹ As an incorporated association of persons, the company is limited by shares and has member shareholders to whom securities (shares) are issued.²⁰ The company limited by shares may serve any lawful objectives whether commercial or otherwise.

Companies limited by shares may be formed in two ways: simultaneous formation (single legal act) or successive formation (successive legal acts). However, the company limited by shares is created as a juridical entity only when it is entered in the Public-Register. Furthermore, the entry in the Public-Register must include the date of entry; company name; domicile; date of its Articles of Association; duration; objects; share of capital; members of the board of directors, with names and residence; signing powers; and manner of signature.²¹

a. Simultaneous Formation

Under simultaneous formation²² the founders initially subscribe all shares, and provide the necessary authorized capital. Since the founders and the shareholders are the same persons, no rules are needed to protect third parties. The founders, by signing a notarized deed, declare that they have subscribed all shares and are: forming a company limited by shares determining the articles, collecting capital in cash or by contributions in kind, and appointing the necessary governing bodies.

¹⁹ PGR arts. 261-267.

²⁰ PGR art. 261.

²¹ PGR art. 291.

²² PGR art. 288.

b. Successive Formation

A successive formation²³ requires the founders to prepare for the formation of a limited company, and determine the level of the authorized capital and the number of shares. They do not contribute the initial capital, but invite the public to subscribe shares. The fact that the founders and subscribers are not the same persons has forced the legislature to institute protective measures. While the company is in formation, a constituent general meeting of subscribers is held which passes a resolution on the following matters: subscription in full of the share capital, payment of the share capital, appointment of the necessary governing bodies, and final determination of the articles. Special qualified approval by the shareholders' general meeting is required if tangible assets or rights are contributed or collected, or if founders or shareholders are granted special advantages.

c. The Company's Capital

The capital for a company limited by shares may be expressed in foreign currency. The minimum capital for a company limited by shares is Sfrs. 50,000. This must be fully paid in cash or contributed in kind of equivalent value. If the formation capital is higher and shares are to be registered, 20 percent must be paid subject to a minimum of Sfrs. 50,000. Bearer shares must be fully paid unless the articles expressly provide that they only be half paid, in which case at least Sfrs. 50,000 must be fully paid. In the case of payments in cash, the registrar must be given a confirmation from a Liechtenstein or Swiss bank that payment has been made, and in the case of contributions in kind, a valuation must be made by a recognized expert appraiser. When the formation has been completed and the company has been entered on the Commercial Register, its capital must be available to the board of directors.

d. The Share

The capital of a limited company is divided up into shares.²⁴ The articles must indicate the value and the nature of each share. The capital of a limited company may also be simultaneously divided up into various kinds of shares, as follows:

1. Bearer and Registered Shares

Shares may be issued in the name of the holder or to the bearer, and both forms may exist simultaneously.

²³ PGR art. 281.

²⁴ PGR art. 263.

2. Fixed-value and Quota Shares

The share capital may be divided up into part-sums (fixed value shares) or in fractions (quota shares). The fixed value shares are not subject to any minimum limits as to value. The quota shares, which may be uniform or varied, may also be linked to fixed value shares.

3. Voting Shares

The Articles may provide for more than one vote to be attached to a share (plural shares), and the number of votes of persons holding more than one share may be restricted. Non-voting shares may not be issued.

4. Preference Shares

Preference shares offer certain advantages over ordinary shares, as set forth in the articles and as relating to rights of membership or rights to the assets. They are otherwise equal to ordinary shares.

5. Bonus Shares

Bonus shares are shares distributed to shareholders or third parties free of charge or upon payment of the costs. The cost of shares are covered by the company from funds at its disposal. The rights and obligations arising from a bonus share are the same as those arising from other shares, except for the payment requirement.

e. Organization of the Company Limited by Shares

The supreme governing body of the limited company is the general meeting of shareholders.²⁵ The powers of the general meeting include: election of the management and appointment of the auditors; approval of the balance sheet and confirmation of profit or loss and dividend; release of the board and the auditors; resolutions concerning the adoption and amendment of the Articles and, unless the Articles provide otherwise, the setting up of branch offices; and resolutions on matters reserved to the general meeting by law or the Articles or submitted to it by the other governing bodies.

The shareholders exercise their voting rights pro rata to the number of shares they hold, and all shares have the same voting rights in proportion to their nominal value or quota unless the articles provide differently. Every shareholder has at least one vote.

In principle, the general meeting passes its resolutions on an absolute majority of votes attached to the shares. However, the articles may require qualified majorities or unanimity. The articles may confer the statutory and constitutional tasks of the general meeting completely or partially on another governing body.

²⁵ PGR art. 338.

Members of the board are elected by the general meeting.²⁶ At least one member must reside in Liechtenstein. Directors need not be shareholders and the majority of board members need not be Liechtensteiners. The board has the duty of conducting the business as a whole and representing the company. Its tasks are as follow: preparation of business for the general meeting and carrying out the resolutions of the latter; compilation of the rules required for the proper conduct of the business and distribution of the necessary instructions to the executive management for this purpose; assurance that the persons who conduct the business and represent the company do so correctly and in accordance with the law, the articles and the regulations; and collection of regular reports on the progress of business and company performance.

The board's powers of representation may not be restricted to third parties, and it is authorized to transact all business on the company's behalf. The only possible restriction may be a joint signature requirement entered in the Public-Register. Unless provided otherwise, the board of directors passes its resolutions on a majority of votes. Resolutions may be passed in writing by circular, but the vote must be unanimous.

f. The Auditors

The appointment of auditors (or "Audit Office")²⁷ is mandatory in the case of a company limited by shares. The auditors are appointed by the general meeting, initially for no more than one year. Their term may subsequently be extended to three years. The professional undertaking of audit mandates a license, and is subject to certain qualifications. The auditors examine the balance sheet, inventory, profit and loss account, and other books of the company for order, accuracy and reliability. They then submit a written report to the general meeting on the results of the audit. Without an auditors' report, the general meeting may not approve either the balance sheet or the profit and loss account.

g. Accounts and Balance Sheets

Companies limited by shares are required to prepare proper inventories, draft balance sheets and profit and loss accounts, and maintain business books. They are also required to annually submit their duly audited accounts to the Tax Administration within six months of the end of the fiscal year.

²⁶ PGR art. 341.

²⁷ PGR art. 350.

h. Dissolution and Winding-up of Limited Companies

A general meeting resolves the dissolution and winding-up of a limited company. The liquidators replace the board of directors, terminate the business at hand, discharge the company's liabilities, realize its assets, and distribute the liquidation proceeds to the shareholders. Upon completion of winding-up, the liquidators apply for the association of persons to be deleted from the Public-Register.

2. The Private Limited Company

The private company is defined as two or more persons, companies, or associations of persons under private or public law who join together to form a private limited company for any lawful objective. The liability of each participant is limited to a specified amount since private company shares are not treated like public company shares.

Notarized articles signed by each of the participants are required to form a private limited company. The same information is required as in the case of the limited company for it to be entered in the Public-Register.

The minimum capital is Sfrs. 30,000. The minimum sum subscribed by any shareholder must be at least Sfrs. 50. The initial amount subscribed by each shareholder may be different, but must form a multiple of Sfrs. 50. The initial subscription may also be stated in proportional terms. Shareholders are not obliged to make further payments to the initial subscription unless the Articles provide otherwise.²⁸

The company's assets are liable in the first instance for the company's commitments. In cases where no securities are issued, the shareholders are jointly liable to the company in accordance with the regulations applying to partnerships. This liability extends to all its commitments existing at the time of withdrawal, but only up to the amount of the total registered share capital.

The rules concerning the legal representative, the keeping of books, the drawing up of a balance sheet, and the dissolution and winding-up of the company which apply to the company limited by shares also apply to the private company.

3. The Establishment under Private Law

The establishment²⁹ is an autonomous fund with its own juridical personality. Only the resources of the undertaking are liable for the commitments of the establishment. It has no members, shareholders or par-

²⁸ PGR art. 389.

²⁹ PGR art. 534.

ticipants of any other kind. Accordingly, it has no capital distributed in the form of shares. It only acknowledges beneficiaries; persons who draw economic advantage from it.³⁰ An establishment may, however, be authorized to issue its own shares in which case it more closely resembles a corporation. This form of establishment is rarely used in Liechtenstein.³¹

a. Formation

The founders of an establishment may be natural persons or juridical entities with their residence or domicile in Liechtenstein or abroad. As previously stated, for an establishment to be formed, the founders must draft and sign notarized articles. The articles must contain the firm name, including the designation "*Anstalt*" (Establishment); the establishment's domicile, objects and capital; the powers of its supreme governing body; the appointment of bodies for management, supervision and regulation of the method of representation; the principles for preparing the balance sheet and appropriating profit; and the form in which notices are published. The establishment is created by entry in the Public-Register.

b. The Establishment's Objectives

The stated objectives of an establishment must indicate whether or not it will engage in commercial activities. The investment and management of assets, or the maintenance of holdings or other rights are not a business conducted along commercial lines. This distinction is an important one with regard to the duties of appointing an audit body, keeping books of account on a commercial basis, and submitting balance sheets to the authorities.

c. The Establishment's Capital

The capital of an establishment may be expressed in a foreign currency, but must amount to at least Sfrs. 30,000. If the initial capital is at a higher rate of exchange, at least half, and not less than the equivalent of Sfrs. 30,000 must be paid in full. In any event, only the establishment's assets are subject to liability for its debts. Further liability, and a further request for funds only exists when it is expressly provided in the articles.

d. Founder's Rights

Founder's rights are essentially those rights which the founder ac-

³⁰ PGR art. 534, Para. 1.

³¹ PGR art. 540.

quires by law and the articles.³² The founder's rights may be assigned, transferred and inherited, but they may not be pledged or otherwise encumbered. The bearers of the founder's rights constitute the establishment's supreme body.³³ The rights therefore are rights of a supreme body, and they are not property rights.

Unless the articles provide otherwise, the founder's rights are vested in several persons, resolutions are effective only with the approval of all bearers of founder's rights. Founder's rights may be transferred *inter vivos* by assignment, in which case the deed issued is evidence of the assignment and not security.³⁴ Founder's rights are transferred upon the founder's death according to the statutory provisions concerning succession that apply in the particular case.

e. Organization of the Establishment

The bearers of the founder's rights constitute the establishment's supreme body, although the articles may also vest the powers of the supreme body in the management. The supreme body has the following powers: appointment and dismissal of the board of directors and auditors; determination of signing powers for members of management and the liquidators; approval of the balance sheet and resolutions concerning the appropriation of the annual profits; release of the board and auditors; issuance of by-laws and changes to the articles and by-laws; appointment of beneficiaries and determination of their rights; appointment and dismissal of the legal representative; and dissolution of the establishment, appointment of liquidators, and resolutions concerning the appropriation of the liquidation surplus.

In principle, the board of directors is vested with the power to conduct all the business and to represent the establishment in dealings with third parties. The board may consist of one or more juridical entities or natural persons appointed by the supreme body, whose powers of representation are held by two or more members of the board jointly.

The supreme body also appoints the auditors, initially for no more than one year but subsequently for no more than three years. As in the case of the limited company, the undertaking of the office of auditor is subject to special qualifications and a license from the Government.

An audit body is mandatory if the establishment engages in commercial activities and its objectives set forth in the articles permit the carrying on of such business. Establishments whose goal only includes the in-

³² Judgment of the Liechtenstein Higher Court of Jan. 8, 1964 (J 563/341), OGH of September 9, 1981, (1C 91/72).

³³ PGR art. 541, 543.

³⁴ PGR art. 543.

vestment and management of assets or the maintenance of holdings or other rights are relieved of appointing auditors.

f. Beneficiaries

The establishment's beneficiaries are the persons to whom the profit and benefit of the establishment accrue and to whom the income, the individual assets and the surplus upon liquidation will pass. They are usually appointed by the supreme body pursuant to the establishment's by-laws. Unless third parties are nominated as beneficiaries, the law assumes that the bearer of the founder's rights is the beneficiary.

g. Accounts and Balance Sheet

As with limited companies, establishments which engage in commercial activities, and whose articles permit such a business to be carried on, are required to keep inventories, draft balance sheets and profit and loss accounts, and keep books of account. Such establishments must submit their annual accounts, which are duly audited, to the Tax Administration each year within six months after the close of the fiscal year.

Establishments which do not conduct business along commercial lines, and whose stated objectives do not permit such activity, must compile an annual statement of assets to provide sufficient information on the relationship of debtors to creditors. A declaration must be submitted to the Public-Register within six months after the close of the fiscal year. The declaration must be signed by the Liechtenstein member of the board and must confirm that the establishment has not engaged in commercial activities. The Registrar will not audit the accuracy of the statement if it is certified by an admitted Liechtenstein or foreign accountant, or accounting firm.

h. Dissolution and Winding-up of the Establishment

The dissolution and winding-up of the establishment is incumbent upon the supreme body. The supreme body also appoints the liquidators, who must terminate the business at hand, realize the establishment's assets, and distribute the liquidation surplus to the beneficiaries. Distribution must precede a waiting period of at least six months. The establishment may be deleted from the Public-Register when distribution has been completed.

4. The Foundation

A foundation is defined as an entity "set up by individuals or by associations of persons or by firms by the endowment of assets (the founda-

tion property) for a specifically prescribed purpose.”³⁵ In this way, the law permits specified assets to be ascribed, by endowment, for a specifically designated purpose. These assets become an autonomous juridical entity devoted to a specific purpose. The assets are used to enable the foundation to achieve its purpose by transferring ownership of the assets from the founder to the foundation. The purpose is achieved and the assets are managed pursuant to the provisions, principles and articles established by the founder. The transfer of ownership from founder to foundation does not impose any liability for death or gift tax in Liechtenstein upon founders who are residents abroad.

a. The Formation and Creation of the Foundation

The foundation is formed by a deed having the certified signatures of the founders, a succession agreement, or a last will and testament. The foundation deed or articles should contain the designation and domicile of the foundation, its purpose or its subject-matter, the designation of the foundation council, and provisions as to the application of the assets if the foundation is dissolved.

Theoretically, since the registration of many foundations is mandatory, the foundation is created only after it is entered in the Register for Foundations of the Public-Register. Upon request, the Registrar will supply any person with an extract from the Commercial Register concerning a recorded foundation.

Registration of ecclesiastical foundations, pure and mixed family foundations,³⁶ and foundations whose beneficiaries are determined or determinable is not mandatory. Thus these foundations may achieve juridical personality without being entered in the Register. The foundation deed, however, must be deposited with the Registrar, and foundations of this kind may be subject to mandatory registration if they conduct business along commercial lines in pursuance of their objectives.

For deposited foundations, the Registrar issues an official certificate to the concerned parties. The certificate attests to the existence of the foundation, the amount of the foundation fund and the foundation bodies.

³⁵ PGR art. 552-570.

³⁶ A family foundation exists where the foundation's assets are used consistently to meet the expenses of childrearing, education or maintenance of the members of one or more specified families. Ecclesiastical foundations are those set up to serve church purposes. Mixed family foundations arise where the assets settled on a family foundation are intended additionally or supplementally to serve religious or other purposes not connected with the family.

b. The Foundation's Field of Activities

The founder is free to select the purpose of the foundation, but it must be determinate, feasible, reasonable, lawful, and moral. The following are some examples of permissible purposes: payment of specified sums to members of the family for maintenance, upbringing, and education; collection of regular payments to specified beneficiaries and distribution of the foundation assets to these beneficiaries when the foundation is dissolved; support of charitable aims; and payment to personnel for their welfare.

When forming a foundation in Liechtenstein, the founder is not subject to any supervision by the authorities. A family foundation may be formed for maintenance purposes in just the same manner that a welfare foundation may be formed for personnel. The founder is also free to choose the purpose of the foundation. Liechtenstein foundations are governed totally by private law.

c. Foundation Assets

The foundation assets may be expressed in a foreign currency, but must amount to at least Sfrs. 30,000. The endowment of assets is a prerequisite to the formation of a foundation. However, the endowment does not mean that title to the assets must pass to the foundation immediately; it may also take the form of a commitment by the founder to transfer the assets after the foundation has been set up.

After the foundation has been created, the founder is required to pass the assets to the foundation pursuant to the foundation deed. Assets may also be endowed by creating an indebtedness against the founder or a third party. The founder or a third party undertakes to pay a fixed or variable sum or other valuable asset (endowment of annuities) annually, or at other specified intervals. It is also possible for a third party to transfer assets to the foundation. In any event, once the foundation has been created the founder or the obligated third party is required to discharge his declared endowment.

d. Liability for the Foundation's Commitments

The foundation fund is solely liable for the foundation's commitments. Neither the founder nor the foundation's other governing bodies are liable for its commitments. The founder is obliged only to transfer the assets settled on it. He has no liability for further payments unless the articles provide otherwise.

e. Organization of the Foundation

The management and representation of the foundation's governing bodies, such as the foundation council and the audit body, must be set forth in the foundation document. The legislature requires the organization of the foundation to be evident from its Articles of Foundation. Although forms of organization are numerous, one of the following forms is usually adopted: the foundation council, founder, audit body, or beneficiaries.

The foundation council is normally the foundation's supreme body. The council's powers must be precisely described in the articles. In any event, the management and representation of the foundation are incumbent on it. Unless the articles provide otherwise, all members of management are jointly entitled. The articles will also provide for the manner of passing resolutions, and the way in which the foundation is represented in dealings with the third parties. The validity of such resolutions is often made subject to approval by the founder, the auditors, individual beneficiaries or all the parties. However, this is a matter requiring an express provision in the Articles. Members of the foundation council are generally appointed by the founder in the articles. The founder and his successors may also reserve their future rights to appoint or dismiss members of the council. The articles may further provide that any council member may appoint his successor, or that the council may appoint further members by co-optation.

Members of the council may be natural persons or juridical entities with their domicile or place of residence in Liechtenstein or abroad. At least one council member must be a Liechtenstein citizen residing in the country and professionally admitted as a lawyer, legal agent, trustee or accountant, or possess a commercial qualification recognized by the government.

The foundation council is responsible for ensuring that the articles are adhered to. The foundation council frequently has the following additional tasks: appointment of beneficiaries, determination of the extent and nature of beneficial rights, amendment to the Articles and the issue and amendment of by-laws, and dissolution and winding-up. In the event of infringement, each council member is liable to the full extent of his assets to the foundation, the founder and the beneficiaries. If the council is a body with joint responsibilities, each member has joint liability unless, when a resolution is passed, individual members vote against this measure.

It is incumbent upon the founder to draw up the Articles of Foundation when the foundation is formed. Since the founder possesses supervisory rights over the foundation, he may ensure that the management observes the provisions of the Articles of Foundation. However, the founder

may have the articles grant him particular rights, such as the right to appoint or dismiss members of the council. Furthermore, he may reserve his right to revoke the foundation and the right to amend the articles.³⁷ Any natural person or juridical entity in Liechtenstein or abroad may be a founder. A juridical entity in Liechtenstein may also exercise the office of founder in a fiduciary capacity.

The articles may designate an audit body as a further governing body of the foundation. The audit body is not mandatory, but rather, it is an optional institution, and its duties are to audit the balance sheets, inventories, profit and loss account or other accounts of the foundation. Generally, the audit body is appointed by the founder under the articles.

The beneficiaries are those persons who receive any kind of present or future benefit from the foundation in accordance with the articles. The benefit may be in the form of a share in the proceeds, foundation assets, or both. The beneficiaries are appointed under the articles or by-laws by an authorized person. The beneficiaries may also be the governing body appointed to supervise the foundation council. The founder may indicate in the articles the extent to which individual beneficiaries may participate in management, and the manner in which rights to a beneficial interest are to be honored. Beneficiaries usually participate only in the earnings of the foundation, without being able to claim any right to manage or to influence the foundation's management. The nature, extent and number of beneficiaries is largely a matter for the founder to decide, under the articles or by-laws.

The articles may contain provisions stipulating that a beneficiary may not be deprived of his interest through forced sale or bankruptcy.

f. Supervision

The general rule is that foundations are supervised by the Government. This rule, however, does not apply to Ecclesiastical foundations; pure and mixed family foundations; foundations whose beneficiaries are specifically designated or determinable natural persons, or juridical entities, firms or their successors in title; and foundations which merely maintain holdings or manage property and distribute the proceeds. These foundations are under the general control of the courts.

The supervisory authorities' task is to ensure that the foundation's assets are managed and utilized in accordance with the stated objectives. Any person who can demonstrate a legal interest may lodge a complaint with the supervisory authorities alleging that the foundation's assets are being managed or utilized contrary to the foundation's purpose.

³⁷ PGR art. 559, Para. 4.

g. Amendments to the Foundation Deed

The foundation deed, or the by-laws, if any, must indicate how resolutions to amend the articles are to be passed. A significant difference from foreign foundations is that the founder may reserve the right under the articles to amend the foundation's articles and by-laws. Where such a reservation is made, the founder or successor in title is authorized to amend the articles and annexes at any time. All that is required is a resolution by the founder. Furthermore, the foundation deed may determine that to amend the articles, which is essentially a matter reserved to the foundation council, the consent of the following persons is required: the founder, the beneficiaries, the auditors, the parties, or all of them.

If the articles fail to indicate the procedure for amendment, the foundation deed may not, in principle, be amended.³⁸ More precisely, the foundation's articles may only be amended with the consent of all participants (founder, foundation council, beneficiaries, auditors), and with the consent of the Registration Court only for serious reasons.³⁹ In any event, it is expedient for the articles to contain precise rules as to how the foundation's articles may be amended.

h. Revocation and Contestation of the Foundation

Revocation of the foundation may only occur when the foundation has not been entered on the Public-Register and entry is necessary for its creation; the foundation is to take effect during the founder's life and it has not been certified; or the foundation is established by last will and testament or contract of succession, and revocation is pursuant to the rules governing succession. In the case of wills, the founder has the unrestricted right of revocation until his death. His heirs do not have this right.

The founder may have the right of revocation at any time incorporated in the articles. In such cases, the founder may revoke the foundation at any time at his discretion. Upon revocation, the foundation's assets become the founder's personal property.

A foundation may be contested by the heirs or creditors in the same manner as a gift. The founder and his heirs can contest the legality of a registered foundation on the theory that there is fault in the intention under the rules applying to defects in the conclusion of a contract.⁴⁰

³⁸ PGR art. 565.

³⁹ PGR arts. 552, Para. 4, 932a § 165.

⁴⁰ PGR art. 560.

i. Dissolution of the Foundation

The foundation deed must indicate who is empowered to dissolve the foundation, and what procedure must be adopted for this purpose. The founder in this case may state in the foundation deed that the foundation can or cannot be dissolved until after a specified period. Unless the foundation deed states which governing body is responsible for dissolving the foundation, and how this may be done, the foundation may only be dissolved with the consent of all participants (founder, foundation council and beneficiaries, including reversioners). After the foundation has been dissolved, the foundation's assets pass to the beneficiaries.

j. Accounts

A foundation which is entered on the Public-Register has the duty of taking proper inventories, drafting balance sheets and keeping books of accounts which indicate the state of the foundation's financial situation. The foundation is not, however, required to submit its books to the authorities.

IV. THE TRUST

A. Trusteeship

In Europe, the Principality of Liechtenstein is the only country that has made detailed provision in the Law on Persons & Companies for trust law.⁴¹ Based on Anglo-American examples, this was necessary since centuries of development of this legal institution was lacking on the European continent. Contrary to English common law, Liechtenstein law does not include either the prohibition on accumulation of proceeds or the rule against perpetuity.

Under the PGR, a trusteeship arises when a person (trustor) entrusts movable or immovable property or a right of any kind (the trust property) to an individual, a firm or an association of persons (the trustee). The trustee is required to administer this property in his own name as an independent legal entity, in favour of one or more third parties (the beneficiaries).⁴² The establishment of a trusteeship does not create a juridical entity.

A trusteeship is created by a written contract between the trustor and the trustee. The legal grounds need not be indicated. A trusteeship may also be formed by an unilateral declaration by the trustor. However, a written declaration of acceptance by the trustee is necessary.

⁴¹ PGR art. 897-932.

⁴² PGR art. 897.

The trusteeship must be expressly designated. Furthermore, the formal requirements for the transfer of personal, real and intangible property continue to apply.

Any trusteeship formed for more than 12 months must notify the Public-Register within 12 months after its formation. The trustee, or if there are several trustees at least one of them, must reside or be domiciled in Liechtenstein. The notification for entry on the Public-Register must include a description of the trust arrangement, the date the trust was formed, the duration of the trust relationship, and the name or trade name, and place of residence or domicile of the trustee. Any person is entitled to obtain a copy of the registration from the Register.

Mandatory entry of a trust relationship on the Public-Register is not required if an original or notarized copy of the trust deed is filed with the Public-Register Office within 12 months, in accordance with the rules concerning the deposition of deeds. The deed deposited in the case of a "deposited trusteeship" is not available to the public.⁴³

1. Trustor's Rights and Obligations

The trustor sets forth the rules for management and utilization of the trust property in the trust deed. The trustor must, however, separate the trust property from his other assets by a contractual or unilateral declaration of intent.⁴⁴ Thereafter, the trustor may draw up the trust deed in general terms or make detailed rules, such as: the procedure for appointing future trustees and beneficiaries; the procedures for revoking and dissolving the trusteeship; the procedure for amending the trust deed; and the rules governing beneficiaries or third parties.

The trustor may make no stipulations in the letters of trust which bind the trustee to the trustor's continuous directions.⁴⁵ If such stipulations are made, the trust arrangement is not subject to trust law but is an ordinary mandate governed by the law of contract. The trustee's acceptance of the trust deed binds the trustor to the provisions of the letters of trust. He is also obliged to make the promised trust property available to the trustee. Any participant may compel the trustor to perform his legal obligations. However, in the event of legal proceedings, the trustor is a party and cannot be examined as a witness.

2. Trustee's Rights and Obligations

After the trust deed has been transferred to the trustee, the trustee

⁴³ PGR art. 902.

⁴⁴ PGR art. 917.

⁴⁵ PGR art. 918.

may demand execution of the deed by the trustor under the ordinary rules of contract.⁴⁶ The trustee is also entitled to dispose of the trust property like any independent bearer of rights and obligations (and) to administer and pursue rights against all third parties in accordance with the letters of trust.

Except where the personal discharge of trust duties is concerned, the trustee may have any administrative matters undertaken by third parties. He may apply to the Princely Liechtenstein Court of Justice, F.L. Landgericht, to determine the admissibility or the adequacy of his actions.⁴⁷

The trustee under the legal obligation is to hold and administer the trust property with the care of a prudent businessman; insure the trust property against risk; make no disposal over the trust property which would adversely affect or frustrate the particular objects of the trusteeship; and keep the trust property completely separate from his personal assets. Trustees who carry on a business must maintain an inventory of their trusteeships. Finally, if several trustees are appointed, the letters of trust may expressly require the trustees to act jointly.

The trustee is also required to keep annual schedules of the assets of the trust property, and to submit accounts each year to the auditors specified in the letters of trust, the trustor, the beneficiaries, or the Liechtenstein Court of Justice.

3. Trustee's Responsibility

Initially, the trustee is responsible under the principles of contract law to the trustor, or to the beneficiaries if the trust is a testamentary trust. Accordingly, the trustee is liable for breach of trust to the full extent of his assets and joint trustees have joint liability unless each trustee can prove that he supervised his fellow trustees to the extent necessary. Trustees are also liable for the acts of their agents and delegates. Furthermore, a trustee may not receive any commercial advantage from his trusteeship beyond the recompense due to him.

4. Supervision

Trusteeships entered on the Public-Register are subject to supervision by the Liechtenstein Court of Justice, or another body designated in

⁴⁶ PGR art. 919.

⁴⁷ PGR art. 919, Para. 6: "A trustee who is in doubt as to the admissibility or appropriateness of an administrative act or of the disposal of trust property or as to an extraordinary executory transaction which places him under an obligation, or if one of several joint trustees refuses his co-operation, must where necessary, in extra-judiciary proceedings, apply for binding advice to the Liechtenstein Court, which may call upon suitable persons in making its ruling."

the trust deed.⁴⁸ However, supervision is not required if the trusteeship is a family trusteeship, or if the trust deed or court excludes such a supervisory authority. In any event, trustees or beneficiaries may appeal to the court if a trustee fails to discharge his duties. Furthermore, the court, after hearing the participants, may on its own motion *ex officio* call upon a defaulting trustee to act or to lay down his office, and procure the appointment of another trustee.⁴⁹

5. Statutory Interpretation

The terms of the trust deed are *prima facie* evidence of the nature of the trust relationship between the trustor, trustee and the beneficiaries. If the terms of the trust deed conflict with mandatory statutory requirements or public law, they must be construed to be consistent with prevailing law unless the instrument provides otherwise. The text of the statutory provisions must be consulted for clarification if the trust makes no express provisions. The statutory provisions concerning trust law are for the most part dispositive, and the provisions concerning trusteeships and other trust arrangements must be construed and applied in accordance with the principles of equity.

6. Status of the Beneficiaries

A distinction must be made between a beneficiary whose rights are individual-private rights transferable by security instruments (trust certificates), and unnamed persons whose rights are represented directly by the Liechtenstein Court as the supervisory authority.⁵⁰ The trustor must in the trust deed name the persons in whose interest the trust property must be applied and who are to draw benefit from it. In particular, it is within the trustor's discretion to designate the right of the individual beneficiaries to receive information, enforce rights against the trust property, or exercise other rights of verification.

Beneficiaries are entitled to require adherence to the trust stipulations to the extent that this right is not already vested in them by the trust deed. However, a beneficiary may enforce his rights of verification or the right to obtain compliance with the trust deed by extra-judiciary proceedings only to the extent they are vested in him. Rights vested in particular beneficiaries may only be exercised by them through application to the court in litigation.

The trustor may also be a beneficiary under a trust arrangement, but

⁴⁸ PGR art. 929 para. 1.

⁴⁹ PGR art. 929 para. 3.

⁵⁰ PGR art. 929 (Public Trust, Charitable Trust).

not also the trustee. In the case of charitable trusts, where there are no entitled beneficiaries, their rights are enforced by the representative of the public law.

7. Trust Certificates

In addition to the particular private rights which beneficiaries acquire under the letters of trust, transferable instruments of value known as "trust certificates"⁵¹ may be issued. These certificates are given to the beneficiaries as securities. They certify that the beneficiary has creditor's rights to enjoyment of the trust property, and a right to share in revenue and in the liquidation surplus. Trust certificates are transferable since they are registered.

8. Trust Property

The trust property⁵² must be treated as a single unit. It includes all assets assigned by the trustor or by force of law, and all other assets accruing while the property is being administered. The trust property also includes replacements for articles forming part of the original property which have been destroyed, damaged or withdrawn. These requirements serve to simplify identification of the trust property.

a. Individual Assets in Trust

Unless the trust deed indicates otherwise, ownership of land and rights entered on the Land Register must be transferred to the trustee. An enterprise entered on the Public-Register under a trade name must also be recorded on the Register as trust property. The same applies where trust property is entered on other registers, such as the Patents Register or Trade Mark Register.

b. Recovery of Trust Property

The trustor, joint trustees, beneficiaries, and a court-appointed trustee are entitled to recover property or rights which have been wrongfully transferred by the trustee to a third party in full knowledge of the trust. The theoretical basis of the claim is unjustified enrichment.

⁵¹ PGR art. 928.

⁵² PGR art. 911.

9. Creditors and Trusteeship

The trustee's creditors⁵³ may never seize the trust property to satisfy their claims; creditors have absolutely no access to it. In insolvency proceedings on the trustee's estate, the trust property is to be regarded as third party assets, and must be immediately separated from the trustee's private property. It is then passed on to the succeeding trustee. The claim to recover the trust property takes precedence over all other creditors.

The general rule is that trustees are liable for debts contracted by them with third parties. However, trustees are not liable to third parties if they can prove that they relied on the liability of the trust property for the debt. Their liability is unlimited and joint with other trustees, if any, but they have rights of recourse against the trustor and the beneficiaries.

10. The Trustor's and Beneficiary's Creditors

The trustor's creditors may seize the trust property only if the prerequisites for challenging a gift or succession are present, or the provisions for contestation of debtors is given. Creditors of the beneficiaries may enforce their claims against the trust property only if a beneficiary has a legal claim to beneficial interest and payment, or the trustor has not provided in the trust deed for the property to be undistrainable.

11. Termination, Dissolution and Revocation

When and in what manner the trusteeship terminates, and the method of distribution of the trust property upon termination is decided primarily by the trust deed.⁵⁴ Otherwise, the trusteeship terminates when the trust property is depleted, and is not replaced. If the trust deed contains no provisions regarding termination, the trusteeship is dissolved by a decision of the Liechtenstein Court, upon application.

The trustor may withdraw from the trust agreement and revoke the trusteeship only where the letters of trust enable him to do so. In all other cases, the trust arrangement is irrevocable and may be challenged only under the law applying to contractual defect, gifts, succession, or contestation of the avoidance of a debtor's transactions. Trusteeships set up under a will may be revoked under the law of succession; the trustor may revoke the testamentary trusteeship up to the time of his death. In the event of revocation, the trust property reverts to the trustor.

The withdrawal of trustees (by death, incapacity, cancellation of the agreement, or bankruptcy) does not affect the existence of the trusteeship. A new trustee is appointed to replace the previous one. Unless the

⁵³ PGR art. 914.

⁵⁴ PGR art. 906.

trust deed indicates otherwise, the trustor's death or bankruptcy does not terminate the trusteeship.

V. INTERNATIONAL LAW AND FOREIGN TRUSTS

Liechtenstein law applies to a trusteeship provided that the trustee, or in the case of several trustees, at least half of them reside in Liechtenstein, the trust property is located in Liechtenstein, or the trust deed expressly provide that Liechtenstein law applies.⁵⁵ Trusteeships which are not subject to Liechtenstein law may not acquire a more favorable status in Liechtenstein than accorded by Liechtenstein law.⁵⁶

Liechtenstein permits trusts to be established under foreign law in Liechtenstein. In this case, the applicable foreign law governs the relationship between the trustor, trustee and beneficiary. However, the trust is a Liechtenstein trust with a Liechtenstein domicile, and thus it is subject to local tax. The prerequisites for establishing foreign companies of this kind are: incorporation under the provisions of the foreign law governing trusts; applicability of Liechtenstein law to the relationship between trust and third parties; and mandatory arbitration for disputes between trustors, trustees and beneficiaries.

VI. THE TRUST ENTERPRISE

A trust enterprise⁵⁷ within the meaning of the PGR is an independent, fully structured undertaking conducted by one or more trustees under a Deed of Trust in the name of the trustee, or under a trade name for commercial or other purposes, and endowed with a capital of its own. The trust enterprise may be devised as an undertaking with or without juridical personality. The law describes trust enterprises without personality as "a real business trust" ("*eigentliche Geschäftstreuhand*") and those with personality as "non-real business trust" ("*uneigentliche Treuunternehmen*").⁵⁸ Only the trust enterprise with personality, the "non-real business trust" has gained significance in the Liechtenstein legal system. Trust enterprises under Liechtenstein law assume a legal form comparable to the Massachusetts Trust. The trust enterprise may be created for any desired lawful purpose, such as the investment of assets, the distribution of earnings from property, the merger of enterprises through the transfer of shares to a trustee; or family, social, charitable and other personal or impersonal purposes. As a commercial trust, the enterprise serves purely profit orientated purposes.

⁵⁵ PGR art. 930.

⁵⁶ PGR art. 931.

⁵⁷ PGR art. 932a §§ 1-170 *et seq.* (See Law concerning Trust Enterprises, *supra* note 7).

⁵⁸ PGR art. 932a § 1.

A. Formation and Creation of a Trust Enterprise

Trust enterprises are formed through a Deed of Trust signed by a trustor. The trustor declares that he has set up such a trust enterprise. The Deed of Trust must include the trade name (name, domicile, duration and objectives of the enterprise), the trust fund and its composition, the number of trustees, the manner and form of their appointment, and in cases where the trust enterprise will engage in commercial activities, the manner and form of appointment of the auditors, and the form in which notices are made to third parties. A trust enterprise is created only after it is entered in of the Register of Trusts, of the Public-Register. Accordingly, registration is a prerequisite to the achievement of juridical personality.

B. Objectives of the Trust Enterprise

The objectives stated in the Deed of Trust must clearly show whether or not the trust enterprise conducts business along commercial lines. This depends on whether the trust enterprise must provide for auditors within its organization, and whether it will be obliged to submit accounts to the authorities and maintain books of account according to commercial principles. However, the investment and management of assets or the administration of holdings and other rights is not regarded as engaging in commercially conducted activities.

C. Trust Fund and Liability

The trust fund must amount to at least Sfrs. 30,000. These assets are contributed to the enterprise by the trustor in cash or in kind.

Only the trust fund noted in the Deed of Trust and the trust enterprise's other assets, if any, are liable for the enterprise's commitments to third parties. Personal liability or a liability for further payments is imposed on the participants only to the extent that the liabilities of the trust enterprise are statutorily identical to the liabilities of certain or all of the participants. The Deed of Trust may further stipulate that, as long as the trust enterprise continues to function, a private creditor may obtain satisfaction only from those assets which are not part of the trust fund, or the accruals to the trust fund, or from neither the trust property nor the accruals. Limitations of this kind must, however, be entered on the Public-Register.

D. Organization

The trustor is the person who settles or promises to settle an endowment on the trust enterprise. As with other juridical entities, the powers of the supreme body may be vested in him.

The trustee is the trust enterprise's administrative body; several trustees together form a Board of Trustees. The trust arrangement may provide for a supreme body among the trustees themselves, and grant the managing trustee the same status as that of the Board of Management of a juridical entity. The articles, by-laws, or rules may provide the details for conducting business. The trustor, however, is not permitted to have continuous or exclusive influence on the organization or conduct of the trust enterprise.⁵⁹

One of the trustees must be a Liechtenstein national residing in Liechtenstein: a lawyer, law agent, trustee or accountant, professionally admitted in Liechtenstein or possessing a commercial qualification recognized by the Government. Foreigners holding an establishment permit for Liechtenstein have equal status, subject to certain further conditions.

The beneficiaries are the persons who draw a present or future interest from the trust enterprise in accordance with the trust arrangement. Beneficiaries are not required to have a legal claim to the enterprise and securities constituting the beneficial interest need not be issued. The beneficial interest under the trust may be subject to time limits and to conditions or restrictions.

E. Accounts and Balance Sheets

Trust enterprises which engage in commercial activities, and whose articles permit them to carry on such a business are required to prepare proper inventories, balance sheets, and profit and loss accounts, and books of account. Such trust enterprises must annually file duly audited accounts with the Tax Administration within six months after the close of the fiscal year. Trust enterprises that do not engage in commercial activities and whose constitutional objectives prohibit the conduct of commercial activities, must prepare a schedule of assets each year and keep accurate, orderly and appropriate books of account. The schedule of assets of accounts are not required to be submitted to the Tax Administration, but each year within six months after the close of the fiscal year, a statement signed by a Liechtenstein trustee must be filed with the Public-Register. This is to confirm that a schedule of assets was available at the end of the previous fiscal year, and that the trust enterprise did not engage in commercial activities during the preceding year of account. The Registrar may audit the accuracy of the statement within a period of two years. This is unnecessary, however, if the statement has been confirmed by a Liechtenstein or foreign auditor or firm of auditors approved by the Government of the Principality.

⁵⁹ PGR art. 932a § 49.

F. Termination of the Trust Enterprise

A trust enterprise may also be suspended under the rules applying to foundations. The Deed of Trust primarily establishes the manner of termination. The withdrawal or revocation by the trustor may be specified in the Deed of Trust, in which case the trust property reverts to the trustor. Furthermore, the Deed of Trust may provide who is authorized to dissolve the trust enterprise and when dissolution is permissible. Such authorization may be granted to the trustor, the trustee, and the beneficiary. Upon dissolution of the trust enterprise, the procedures for liquidation are instituted.

