

The legal position of beneficiaries

The Austrian experience

Survey of contents

- I. Introduction
- II. Beneficiaries in general
- III. Monetary and non-monetary rights of beneficiaries
- IV. Right to information
- V. Right to request the removal of a board member

I. Introduction

- Private foundations are laid down in a special law (Private Foundation Act) of 1993
- Characteristic features:
 - legal persons
 - any purpose possible (which is not illegal)
private, public benefits, charitable purposes
 - any activity possible
except for operating a business and directing companies the shares of which it holds (comparable to § 307 czOZ)
- private foundations may serve as a functional equivalent to a trust
 - could be the reason why there has never been a discussion on introducing trust in Austrian law

I. Introduction

- Basic elements of foundation governance
 - foundation board must have at least three members (natural persons) (comparable to § 362 czOZ)
 - annual auditing by professional appointed by court
 - beneficiaries' right to information
 - members of the foundation board or other organs of the foundation may be removed by court for severe reasons (e.g. breach of duties)
 - foundation may a supervisory board (mandatory only in rare cases)
 - other organs such as advisory board may be implemented in the foundation documents

II. Beneficiaries in general

- no definition of beneficiaries in the Private Foundation Act
- beneficiary is anybody who shall receive benefits from the foundation
- beneficiaries may be designated in the foundation documents or chosen by a foundation organ (e.g. foundation board) within the purpose of the foundation or within the guidelines as laid down in the foundation documents

II. Beneficiaries in general

- legal position of a beneficiary begins
 - when designated in the foundation documents (by name or in a similar way) by entry of the foundation
 - if designation depends on a condition, only when the condition has been met
 - when appointment by foundation organ is required only after appointment („discretionary beneficiaries“)
 - beneficiaries are only those persons whose current beneficiary status is directly established without any intervening act (e.g. Austrian Supreme Court 6 Ob 24/21d; 6 Ob 179/21y).
 - The same applies if the determination of the beneficiary still depends on a resolution of the governing body or the decision of a body appointed by the founder for this purpose, even if the person has already been specified in the declaration of foundation (Austrian Supreme Court 6 Ob 24/21d).

III. Monetary and non-monetary rights

- monetary rights: as provided in the foundation documents
 - in general dependent on a board resolution
 - as a general rule monetary claims cannot be enforced before courts
 - if not provided otherwise in the foundation documents
 - or if board resolution on the distribution of benefits to a beneficiary has been made
- non-monetary rights:
 - right to information
 - right to request the removal of a board member
 - right to apply for the dissolution of the foundation if the foundation did not pass a resolution although a reason for dissolution has occurred
- legal nature of beneficiaries' rights?
 - no in-depth discussion in Austrian law: similar to membership rights of shareholder?

IV. Right to information

- fundamental element of foundation governance
- every beneficiary whose legal position has begun
 - and potential beneficiaries if they belong to a group of beneficiaries which is largely determined by the foundation documents so that there is more or less no discretionary power left to the foundation board
 - circle of persons entitled to claim information should not be interpreted too narrowly in order to avoid a lack of control within the foundation
- no right to information if there is a wide range of potential beneficiaries (e.g. law students at Masaryk University)
- no right to information if the foundation's purpose is to promote the welfare of the general public

IV. Right to information

- may request
 - information on the fulfilment of the foundation's purpose
 - inspect the annual financial statements, the management report, the audit report, the books of account, the foundation deed and the supplementary foundation deed
 - no original documents have to be provided to the beneficiary
 - but beneficiary may produce copies on his own expenses
 - extension to inspect documents of companies the shares of which are held by the foundation?

IV. Right to information

- right to information is an individual right which cannot be taken or restricted in the foundation documents
- right to information can be claimed without a given reason any time without restrictions
 - limited only by abuse of law (e.g. risk of passing on the information to a competitor)
- enforcement in a non-contentious procedure (*Verfahren außer Streitsachen, freiwillige Gerichtsbarkeit*)
- liability of the foundation if information is incorrect or access to information is denied

V. Right to request removal of board member

- beneficiaries may request removal of a board member if there a severe reason, such as:
 - gross breach of duty
 - lack of ability to proper performance of duties
 - Bankruptcy
- right to information may serve as an instrument to prepare a request for removal from office