The Offshore Tax Planning Review

SINGLE-MEMBER AND NO-MEMBER COMPANIES AND TRUSTS: SOME TAX AVOIDANCE POSSIBILITIES

Patrick Taylor, LLB, ATII, Solicitor[1]

The starting point for the observations set forth below is the fact that the taxation of capital wealth in the hands of companies or trusts is ultimately assessed upon the company members or the trust beneficiaries. If a trust is involved, then even if it is a discretionary trust, and even if the individual values of the individual beneficiaries - actual or prospective - may be token in value, nevertheless their eligibility to benefit is regarded, at any rate in the more sophisticated tax-paying jurisdictions, as a basis for creating tax liabilities either on the wealth of the trust or at least on the value of benefits regardless of whether those benefits are out of proportion to the inherent value of their discretionary entitlements (which latter value can usually be assessed at very small amounts on account of the discretionary nature of their entitlements).

In the case of a company or other corporate body, the company is not usually liable to capital taxation on its own wealth. This is usually because the value of a company is represented by the value of its net equity capital and reserves; and these are capable of being attributed to the members of the company and therefore assessable upon them. If those members are other companies, there is an ability to link up all relevant corporate structures so as to ultimately latch on to an individual or trust which owns the ultimate equity entitlement. And if the ultimate holder is itself a trust, then the wealth can be attributed to the beneficiaries of the trust by the attribution process touched on above

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1 Patrick Taylor, LLB, ATII, Solicitor, Sole Practitioner in T P D Taylor, PO Box No 2, Port St Mary, Isle of Man.
Tel: (0624) 834903 Fax: (0624) 834921

Contributor of a number of articles on *Tax Avoidance after Ramsay* between 1981-86.

Unfortunately, taxing authorities are getting more and more sophisticated and also more and more aggressive in their efforts to counteract the accumulation of wealth, particularly if the wealth has either been created by paying less than the maximum tax on the way. In addition, there is always the belief that no matter how successful an individual may have been in his lifetime, inheritance tax on his death - or a gift tax if he attempts to dissipate his worldly wealth in advance of death - will usually catch the accumulated fortune.

The basic question which tax planners might therefore ask is - Can a way forwards be found which can escape the attention of those who would seek to tax the fortunes?

It is a prime submission put forward in this article that there is a way forwards which is not caught by existing legislation in any country. There are enterprises which can already be brought into existence which provide some measure of tax immunity; though a superficial view might be to say that this non-liability is based upon secrecy rather than upon legal considerations and that if the veil of secrecy could perhaps be swept aside, a different position might arise. The writer considers that although in some cases this view can be sustained, it may not be true. Secrecy and confidentiality is not necessarily a cover for fraudulent activity though very often it is used as a basis for sometimes perpetrating frauds upon even the most enterprising of citizens or advisers. There are, however, some other possibilities which it is proposed to examine.

The possibilities to consider are:

I Single Member Companies
II Companies without Members
III Trusts without Objects
IV Liechtenstein Entities

Very little is know about the latter except in Liechtenstein. Although there are many lawyers in that territory, the writer has not so far come across anyone willing to engage in an analysis of such entities against a context of fiscal systems in other jurisdictions. In particular, although Liechtenstein is partly common law orientated - e.g., in its trusts - it has a civil law system with codified provisions which though certain in content do not leave room for consideration outside the scope of the code or statute which govern their validity. There are no known current analyses of such entities (known to the writer, that is) from a Liechtenstein point of view. The writer therefore proposes to embark upon some kind of analysis which may offer some food for thought even if perhaps superficial in its content.

I Single Member Companies

The word "Company" has no strict legal meaning - see Buckley J in *Re Stanley* [1906] 1 Ch 131 at page 134. In legal theory the term implies an association of a number of people for a common object or objects or purpose or purposes. The word is normally identified with those groups of persons who are associated to carry on a business for economic gain.

English law historically provided two types of organisation for such activity: namely, partnerships and companies. Although often the word "Company" is colloquially applied to both, so that quite often partners carry on business in the name of "Blank & Co.", modern English law regards companies and company law as distinct from partnerships and partnership law. Historically, partnership law is based on the law of agency; each partner becoming an agent for the others is a suitable framework for a small group of persons associated in a common business activity with a view of profit and each having trust and confidence in the others. Companies contemplate much larger groups of persons with fluctuating membership and much more complicated legal rights and obligations; and in modern business society such bodies confer a distinct legal personality separated from those of its members. Briefly, what normally occurs is that the promoters of a company prepare documents which express their desire to be formed into a company with a particular name and particular objects; and these documents having been lodged with a Registrar of Companies result in the production of a Certificate of Incorporation and a company is formed. But historically the concept of a company is an association of persons, usually two or more in number. Indeed, of these the interest of one of the two need not be more than nominal, as in the so-called "one-man company".

Gower, writing as long ago as 1969 (in the Third Edition of *The Principles of Modern Company Law*, at page 3) contemplated the possibility that the number of members could be reduced to one or even to none.

On the Continent of Europe, although there are different systems of law in point, there was a similar division of partnerships and companies, the latter of more recent evolution than the former; but even on the Continent the idea of a single member company had begun to develop by the early 1970s. As appears from the proposals in the Twelfth Council Directive put out by the European Committees Commission from Brussels in May 1988, some of the EEC member states had begun to contemplate allowing single member companies to be formed. By 1987 these were Denmark (since 1973), Germany (in 1980), France (in 1985), The Netherlands (1986) and Belgium (in 1987). Draft legislation had been before the Luxembourg Parliament since 1985. On the other hand, provisions for single member companies did not exist in May 1988 in Spain, Greece, Italy, Ireland or the United Kingdom or Portugal, though legislation for single person businesses with limited liability had been introduced in Portugal in 1986. Of these jurisdictions Denmark, Germany and The Netherlands allowed such companies to be formed not only by individuals but by artificial persons such as companies; while Belgium did not allow an artificial person to be the sole member of a single member company. France had an intermediate system which allowed single member companies to be formed by companies but not by any single member company (this was envisaged in Luxembourg).

The idea of forming single member companies throughout all member states in the EEC was developed only on 21st December 1989 when the European Committee Council adopted the Twelfth Council Company Law Directive enabling the creation of single member private limited liability companies. The Directive provided that member states were to bring the relevant legislation into existence by 1st January 1992 but in regard to existing companies the Directive was not to be superseded in its application until 1st January 1993. Following promulgation of a Department of Trade consultative document in November 1991 there was enacted into English law the Companies (Single Member Private Limited Companies) Regulations 1992 which were made on 14th July 1992 and came into force the following day. Interestingly, the Regulations were brought into operation pursuant to paragraph 2(2) of Schedule 2 to the European Committees Act 1972 and not in pursuance of any provisions of the Companies Acts.

Despite the manner in which the legislation was brought into law, the contents of the Regulations had the effect of making amendments to existing legislation affecting companies and also one or two insolvency matters, the same being contained in the Companies Act 1985 and the Insolvency Act 1986 respectively. It is perhaps appropriate to summarise these as follows:-

A. Regulation 2 provided that "notwithstanding any enactment or rule of law to the contrary, a private company limited by shares or by guarantee.....may be formed by one person.....and may have one member and accordingly

(a) any enactment or rule of law which applies in relation to a private company limited by shares or by guarantee shall in the absence of any express provision to the contrary comply with such modification as may be necessary in relation to such a company which is formed by one person or which only has one person as a member as it does in relation to such a company which is formed by two or more persons or which has two or more persons as members"

(b) the Companies Act 1985 and the Insolvency Act 1986 were then to be amended. These later amendments were set forth in a Schedule to the Regulations.

Additionally, paragraph 7 of the Schedule amends s.680 Companies Act 1985 so as to abolish the prohibition upon a company having only one member registering under the Companies Act 1985 as a private company limited by shares or by guarantee.

B. The only other Regulations were those numbered 1 (giving them a title and date of commencement) and 3 (which created a transitional provision in regard to a person who might be liable to pay the debts of a private company by virtue of s.24 Companies Act 1985 - through that company having less than the statutory minimum number of members at that particular time. Such a person was not to be so liable on or after 15th July 1992.

Thus the Regulations marked a departure from the historical insistence upon a company having to be formed in English law by two or more persons and henceforth contemplate that, at any rate in the case of a private company, one person on his, her or its own could form another company.

However, a factor which is of considerable relevance to any attempt to engage in lateral thinking in regard to the new legislation, and which is of application to the United Kingdom (and may possibly be of relevance in Ireland), is that the United Kingdom and Ireland are the only two jurisdictions with the European Community which contemplate the creation of companies which are limited by guarantee rather than by shares. Such companies (since November 1980 in the case of the United Kingdom) can now only be formed without a share capital. Since it is a feature that membership of such companies is not normally transferable but comes to an end only by resignation or by death, the way is open for the contemplation that such companies may in the future function without having any members at all - though obviously they have to have a member in order to come into existence in the first place. See below.

C. Section 24 of the Companies Act 1985 contained a restriction applicable to all companies having less than the statutory minimum number of members. The section as originally enacted provided that if a company carried on business without having at least two members and did so for more than six months then any person who for the whole or any part of the period that it so carried on business after those six months was a member of the company and knew that it was carrying on business with only one member was to be liable, jointly and severally with the company, for the payment of the company's debts contracted during the period or that part of it. The Schedule to the Regulations provided that this provision was not to apply to a private company limited by shares or by guarantee.

This therefore means that in the case of a company which has less than two members s.24 does not apply to it provided the company is a private company. It appears that this non-application is equally applicable to a company with no members as it is to a company with only one member. Put another way, s.24 has been rendered virtually otiose in regard to private companies.

D. There is a provision to regularise contracts which are entered into between single member companies and sole members of the company who may be directors.

E. Section 517 Companies Act 1985, which was ultimately replaced by s.122 Insolvency Act 1986, provided a list of circumstances in which a company might be wound up by the Court. One of them - in sub-section (1)(e) - was where the number of members was reduced to below two. This section is rendered inapplicable to a private company limited by shares or by guarantee by para 8 of the Schedule to the Regulations.

Again it appears that the effect of this change is to make it possible for a company to exist without members without being liable to have its corporate existence brought to an end as a result of being compulsorily wound up.

F. Section 370 of the Companies Act 1985 provided that in the case of meetings of members of a company two or more members present personally or by proxy constituted a quorum. Paragraph 5 of the Schedule enacts s.370A which provides that in the case of a private company limited by shares or by guarantee having one member, one member present in person or by proxy shall be a quorum.

It has always been difficult to contemplate how one can have a meeting with one person present. Despite the obvious conceptual difficulties, this appears to be contemplated by the amendment.

G. An additional amendment to the Companies Act 1985 enacts s.382B which provides that a private company limited by shares or by guarantee with only one member must record in writing any decision taken by the company in general meetings unless the decision is taken by way of a written resolution.

H. Section 352 of the Companies Act 1985 creates an obligation upon a company to keep and enter a register of its members. Paragraph 4 of the Schedule to the Regulations enacts a new s.352A by which it is stated

(i) if the number of members of a private company limited by shares or by guarantee falls to one there shall then be entered in the company's Register of Members a statement that the company has only one member, the date upon which this happened, and the name and address of the sole member. If thereafter membership increases from one to two or more members then there has to be entered in the Register the name and address of the former sole member, a statement that the company has ceased to have only one member, and the date on which that event occurred. There are provisions for there to be a fine and a daily default for the continued contravention of this provision.

It is to be noted that the obligation to amend the Register of Members applies only where the number of members "falls to one".

> It does not appear to be applicable where the company had only one member from its inception and there then comes a state of affairs where there are no members. The related provision concerning a case where the membership increases to two or more members only appears to apply where the membership "increases from one to two or more members". It does not appear to apply where the membership rises form none to one but must apply from the moment when the one member becomes two members : and therefore must always apply if the membership then falls from two to one or less.

Viewed by themselves, the provisions do no more than create the commercial ability of a company to be created, and to continue, as a one-man company. Viewed purely from a commercial standpoint, the provisions appear to have no isolated tax impact. After all, in the case of a company limited by shares or having a share capital, such a company will always have one or more members. But because the United Kingdom is unique in having developed the concept of the company limited by guarantee without a share capital, the possibility of having a company without members now becomes a realistic possibility. Viewed purely commercially, this in itself may have no impact, especially as guarantee companies without share capital are not normally recognised as having commercial implications. But there could be tax advantages from having such companies.

The Isle of Man and Single Member Companies

The Isle of Man is not an EEC member state but has associated member status. This notwithstanding, the Isle of Man has tended to adopt into its law part of EEC law as enacted in the United Kingdom.

The concept of single member companies has been adopted into Isle of Man law. Legislation corresponding to the 1992 Single Member Company Regulations of the United Kingdom was enacted in 1993 as the Single Member Companies Act 1993, the legislation having been enacted during 1993 and an Appointed Day Order brought it into operation on 1st August 1993.

The significance of the enactment of single member company legislation into the Isle of Man is that under Isle of Man tax laws there are no capital taxes provisions such as are to be found in jurisdictions of EEC member states. This therefore makes the Isle of Man company a potentially much more attractive vehicle for creating a basis for avoiding offshore capital taxes than would be the case with a United Kingdom company. This is especially the case when it is borne in mind that, unlike the United Kingdom, the Isle of Man will the formation of companies both limited by guarantee and having a share capital (though it is of course the case that such companies cannot be in existence without members, there always being at least one shareholder member).

There appears to be no difference between the provisions of the 1992 Regulations and the Isle of Man Single Member Companies Act 1993 save that the daily default fine for contravention of the provisions in the Isle of Man corresponding to s.352A Companies Act 1985 is £200 per day. This is specified in paragraph 3 to the Schedule to the 1993 Act.

II Companies Without Members

At the outset it is emphasised that the proposal looks potentially absurd, even laughable. How can a company exist under normal company law without having members?

We must first establish what we mean by the term "company". By use of the term is meant a body which has a legal personality which is derived from those creating it or those who benefit from its activities, and which is recognised by virtue of a statue or codified system which in itself is recognised in the civilised world as creating a species of company law. Most, though not all, legal systems have a company law which is usually to be found in a Companies Act or a Companies Ordinance or in a battery of possible alternative company laws or statues, e.g., a Companies Act, an International Business Companies Act, an Assurance Companies Act, a Banking Companies Act, etc. The central feature of virtually all Companies Acts or Companies Ordinances is that they provide for one or more persons who being "associated for a lawful purpose may, by subscribing their names to a Memorandum of Association and otherwise comply with the requirements" of the relevant Act "in respect of registration, form an incorporated company with or without limited liability" (Companies Act 1985 s.1(1) - UK). The central feature therefore contemplates an association of persons who sign a document whereby they agree to subscribe for interests and comply with other related requirements of a statute or code and which as a result of such compliance cause there to be incorporated at the direction of the relevant State or country an incorporated company. All such companies therefore have to be formed as having members. No matter what form membership takes - whether it be membership related to the holding of shares, or merely by such persons being located on a Register of Members - nevertheless a company can only be incorporated with the assistance of members.

So far, therefore, it seems to be established that a company cannot be incorporated unless it has a member or members. The categories of companies which can be created in Great Britain are those which have limited liability or those which do not; and in the former case liability is either limited by the amount of paid-up shares issued or by the guarantee which is contained in the Memorandum of Association of the company and which creates the limit upon the amount of the guarantee per member which is given by each member as he or she (or it) becomes a member, though the guarantee is not enforced unless and until the company is put into liquidation and there is a need for the guarantee to be called upon by reason of a deficiency in the assets of the company available to discharge liabilities and pay surpluses in the winding-up. It therefore follows that if a company has shareholder members then there will always be members except in the very rare cases where the only member or members of a company decease and the Articles of Association do not contain provisions which recognise that the legal personal representatives of a deceased member are to be recognised as members of the company immediately following any such decease. However, a person can be a member of a company without necessarily holding shares in it: in particular, where the company is limited by guarantee, membership can either be identified with the holding of shares or can be established without the need to have any shares. Since 22nd November 1980 it has not been possible to incorporate a company under company law in Great Britain which is both limited by guarantee and has a share capital: after that date a company can only be incorporated so as to be limited by guarantee if it does not have a share capital. In the case of a company limited by guarantee and ignoring possible shareholders, a member of such a company cannot - at any rate where Table C of the Companies Act 1985 affects the Articles of Association of the company - transfer or transmit any interests in the company. Article 4 of Table C in fact provides:-

> "A member may at any time withdraw from the company by giving at least seven clear days notice to the company.

> Membership shall not be transferable and shall cease on death."

A similar provision is to be found in Manx company law - Article 4 of Table C as brought in by the Companies (Memorandum and Articles of Association) Regulations 1988.

It is therefore possible in the case of a company which is limited by guarantee and which does not have a share capital, for all the members of the company to resign their memberships and thereby cease to be members even though the result of the resignations is to leave the company without members. This is true equally under British and Manx company law. Professor Gower writing about the predecessor to s.24 Companies Act 1985 (s.31 Companies Act 1948) in the Third Edition of *The Principles of Modern Company Law* at page 190 stated -

> "It will be observed that this section does not operate to destroy the separate personality of the company; it still remains an existing entity even though the shareholders are too few or, presumably, although there are none. On the other hand, it goes further than to convert a limited company into an unlimited one, for in an unlimited company debts remain those of the company although the members are liable to contribute towards their payment and are in the position of quasi-sureties. Under section 31 the members may become liable directly to the creditors and, as the section expressly states, "may be severally sued therefor." But the rights of creditors are severely limited; it is only the members who remain after the six months that can be sued (not those whose withdrawal has led to the fall below the minimum), and even they are liable only if they have knowledge of the facts and only in respect of debts contracted after the expiration of the six months. Moreover, the wording suggests that they are liable only in respect of liquidated contractual obligations, but in the absence of authority it cannot be said whether the courts would give this restrictive interpretation to it. It is also noteworthy that the liability only attaches to members and not, as might have been expected, to the directors as such.

> Although the facts giving rise to a possible application of the section are of not infrequent occurrence, it seems rarely, if ever, to be invoked, doubtless because of the limitations considered, and it constitutes an exception to the general rule of theoretical interest rather than practical importance."

Company Law Problems in Memberless Companies

The principal problem to the idea of having a memberless company is one which arises with reference to United Kingdom, Irish, Isle of Man and Gibraltar company laws alike. In the United Kingdom it is to be found in s.15(1) Companies Act 1985. This provides that in the case of a company limited by guarantee and not having a share capital, every provision in the Memorandum or Articles, or non-resolution of the company, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, is void. Since a company limited by guarantee and not having a share capital is the only kind of company which having limited liability could possibly end up with no members, it obviously follows that no such company can make distributions of its assets otherwise than to a member. If, therefore, the company has no members then it cannot make distributions, so in practical terms the whole point of having a company with no members is lost. There is an identical provision to s.15(1) in Manx company law. This is to be found in s.21(1) Companies Consolidation Act 1931. There is a similar provision in the Irish Companies Act 1963 and in the Gibraltar Companies Ordinance.

But there are colonial or former colonial jurisdictions where companies can be incorporated which can cease to have any members without infringing the local company law. Those jurisdictions do not have provisions corresponding to s.15(1) Companies Act 1985. There therefore remains the possibility that if it were thought to be otherwise attractive to have a company without members then companies could be formed within jurisdictions which possess this particular feature. Examples of such jurisdictions are to be found in the Cayman Islands Exempt Company legislation, the British Virgin Islands Ordinary Companies legislation and, most recently, in the Bahamas Companies Act 1992.

Companies Without Members: Possible Compromise - Companies Without Equity Members

A way round the difficulties which are created in jurisdictions having provisions corresponding to s.15(1), above, is to have a company which has members but which confers membership not having any rights to benefit in a winding-up and which enables distribution of assets to be made otherwise than to members of the company. Such companies would be companies limited by guarantee and having a share capital, since such companies are by their nature outside the terms of s.15(1). The creation of such companies is no longer possible under British company law but such companies can still be formed under Manx company law.

Fiscal Possibilities for Companies Without Members

The upshot of the foregoing remarks is that a company can be formed which at material times does not have members or which, though it may have members, does not confer participatory rights upon such members. One now needs to look at whether there is, or could be, any fiscal advantage in the creation of such companies.

This is a potentially enormous field, and one in which it is not possible to provide exhaustive information but only a rough guide in relation to one or two jurisdictions. Two have been selected for comment - the Republic of Ireland and the United Kingdom - and one (the USA) for a brief reference.

Republic of Ireland

A. Taxation of Gifts and Inheritances

The principal provision in Ireland which attracts attention is in the field of Capital Acquisitions Tax, the tax which takes the place of Inheritance Tax or Estate Duty which used to operate in Ireland prior to the enactment of the Capital Acquisitions Tax Act 1975. Acquisition Tax differs from Inheritance Tax in that the person primarily liable for the tax is the person who takes the benefit and so acquires it, rather than a person who confers a benefit on a person and thus disposes of it. It is true that there are secondary liabilities on a disponer if the person primarily liable (the recipient of the benefit) does not pay the tax and can escape the Irish local law sanctions. But the general concept of the tax is the one of taxing the acquisition of a gift or inheritance rather than taxing the donor of the gift or inheritance.

Irish Capital Acquisitions Tax law purports to sweep aside a company by notionally lifting the corporate veil and looking at the position of the members or contributories to the company, replacing the company by such persons in regard to consideration moving into or out of the company. The operative provision is s.34 Capital Acquisitions Tax Act 1975 the provisions of which are set forth in full as follows:

"For the purposes of this Act -

(1) (a) consideration paid by, or a disposition made by, a company shall be deemed to be consideration, or a disposition, as the case may be, paid or made; and

(b) consideration, or a gift, or an inheritance taken by a company shall be deemed to be consideration, or a gift or an inheritance, as the case may be, taken,

by the beneficial owners of the shares in the company and the beneficial owners of the entitlements under any liability incurred by the company (otherwise than for the purposes of the business of the company, wholly or exclusively) in the same proportions as the amounts which would be payable to them if they company were wound up voluntarily and its assets were realised on the date of the payment, disposition, gift or inheritance, as the case may be, would bear to each other (the amount of any realisation being ascertained for this purpose in accordance with section 17 as if the date of the payment, disposition, gift or inheritance were the date of such realisation).

(2) In this section, "company" means a private company within the meaning of s.16(2).

(3) For the purposes of subs.(1) all acts, omissions and receipts of the company shall be deemed to be those of the beneficial owners of the

shares and entitlements, referred to in subs.(1), in the company, in the proportions mentioned in that subsection.

(4) Where the beneficial owner of any shares in a company or any entitlement of the kind referred to in subs.(1), is itself a company, the beneficial owners of the shares and entitlements referred to in subs.(1), in the latter company, shall be deemed to be the beneficial owners of the latter company's shares and entitlements in the former company, in the proportions in which they are the beneficial owners of the shares and entitlements in the latter company.

(5) So far as the shares and entitlements referred to in subs.(1) are held in trust and have no ascertainable beneficial owners, consideration paid, or a disposition made, by the company shall be deemed to be paid or made by the disponer who made the disposition under which the shares and entitlements are so held in trust."

One or two other provisions should be referred to in supplementation of the foregoing:-

(a) The kind of company which is within the scope of s.34 is a "private company". Such a company is defined by s.16(2) as follows:-

""private company" means a body corporate (wherever incorporated) -

(a) in which the number of shareholders (excluding employees who are not directors of the company and any shareholder who is such as nominee of a beneficial owner of shares) is not more than fifty;

(b) which has not issued any of its shares as a result of a public invitation to subscribe for shares; and

(c) which is under the control of not more than five persons;"

Under subs.(4) of s.16 there are provisions relating to control of a company which for convenience are set forth below:-

"(4) For the purposes of this section -

(a) a company shall be deemed to be under the control of not more than five persons if any five or fewer persons together exercise, or are able to exercise, or are entitled to acquire, control, whether direct or indirect, of the company; and for this purpose -

(i) persons who are relatives of any other person together with that other person;

(ii) persons who are nominees of any other person together with that other person;

(iii) persons in partnership, and

(iv) persons interested in any shares or obligations of the company which are subject to any trust or are part of the estate of a deceased person,

shall respectively be treated as a single person; and

(b) a person shall be deemed to have control of a company at any time if -

(i) he then had control of the powers of voting on all questions, or on any particular question, affecting the company as a whole, which, if exercised, would have yielded a majority of the votes capable of being exercised thereon, or could then have obtained such control by an exercise at that time of a power exercisable by him or at his direction or with his consent;

(ii) he then had the capacity, or could then by an exercise of a power exercisable by him or at his direction or with his consent obtain the capacity, to exercise or to control the exercise of any of the following powers, that is to say -

(I) the powers of a board of directors of the company;

(II) powers of a governing director of a company;

(III) power to nominate a majority of the directors of the company or a governing director thereof;

(IV) the power to veto the appointment of a director of the company; or

(V) powers of a like nature;

(iii) he then had a right to receive, or the receipt of, more than one-half of the total amount of the dividends of the company, whether declared or not, and for the purposes of this subparagraph, "dividend" shall be deemed to include interest on any debentures of the company; or

(iv) he then had an interest in the shares of the company of an aggregate nominal value representing one-half or more of the aggregate nominal value of the shares of the company."

The obvious point which arises from a consideration of s.64 is that it contemplates that all private companies must have members. It further contemplates that there must be a class of members who have participatory rights and who can therefore benefit on a winding up. It therefore appears that the section is defeated if wealth is accumulated in a company which either has no members or no participatory members.

It further appears that assets which are transferred to a company are not automatically held by the company on trust for anyone. The authority for this proposition is *Bowman v Secular Society* [1917] AC 406, a decision of the House of Lords of England in which it was held that property donated to a company belongs to the company and is not therefore held by the company on trust for its members or for anyone. In particular, it is stated (by Lord Parker at pages 440-441) that -

> "If I give property to a limited company to be applied at its discretion for any of the purposes authorised by its memorandum and articles the company takes the gift as absolutely as would a natural person to whom I give a gift to be applied by him at his discretion for any lawful purposes."

(b) It equally follows that not only does property transferred to a company not automatically become held by the company as a trustee, but that the creation of a company does not in itself create a trust. There is no definition in the Irish legislation that enables a company to be deemed a trust.

B. Taxation of Chargeable Gains (Capital Gains)

Capital Gains Tax is payable in Ireland by reference to the provisions of the Capital Gains Tax Act 1975 in respect of chargeable gains computed in accordance with that Act and accruing to someone on the disposal of assets (s.3(1)). The rate is 26% (s.3(3)). The tax is chargeable on anyone resident or ordinarily resident in Ireland and on anyone domiciled out of Ireland in respect of gains which are remitted to Ireland. Capital Gains Tax is also chargeable upon non-residents in relation to disposals of land situated in Ireland or in relation to shares in companies owning land situated in Ireland. Additionally, where a chargeable gain accrues to a company which is not resident in the State, then anyone who is resident or ordinarily resident in Ireland who, if an individual is domiciled in Ireland and holds shares in the relevant company, is treated for the purposes of the tax as if a part of the chargeable gain had accrued to him (s.36(1), (2)). The part of the chargeable gain is equal to "the proportion of the assets of the company to which that person would be entitled on a liquidation of the company at the time when the chargeable gain accrues to the company." (s.36(3)).

Section 35(4)(a) of the 1975 Act provides that -

> "A controlled company means a company resident in the State -
>
> (i) in which the number of persons holding shares is not more than;
>
> (ii) which has not issued any of its shares as a result of a public invitation to subscribe for shares; and
>
> (iii) which is under the control of not more than five persons."

The first point to note about s.36 is that if a non-resident company has no members there can be no s.36 liability. There can also be no s.36 liability if the person in question is a member who holds members' rights (not consisting of the holding of shares in the company). And a third point is that even if the person concerned holds shares, if the shares do not carry rights to participate in a winding up, then no part of the relevant chargeable gain can be apportioned to the particular person.

There are provisions in Ireland which enable the Irish Revenue to withhold capital gains tax on the proceeds of a sale of land located in the State unless the disponer obtains a capital gains tax clearance certificate from the relevant Inspector of Revenue Commissioners. In practice this cannot be obtained where the relevant company is not an Irish resident unless in addition the person benefits from a non-liability to Irish capital gains tax through being resident in a country having a double taxation convention with Ireland which does not give rise to a liability to Irish capital gains tax in relation to Irish land sales.

As regards the possibilities of avoiding the tax by reference to there being no members or a lack of participatory members, it should be realised that where the relevant company is one which does not have a share capital and has limited liability, then if that company is not resident in Ireland for tax purposes (as being managed and controlled outside Ireland), there may be problems about distributing a gain which is rendered outside the scope of the section because of the possible inability to make a distribution otherwise than to a member - as is referred to earlier in this article in the context of s.15 United Kingdom Companies Act 1985 or s.21(1) in the case of the Manx Companies Consolidation Act 1931.

C. Taxation of Income and Accumulated Income

There are provisions contained in s.57 Finance Act 1974 which basically enable the Irish Revenue to impose income tax liability upon individuals ordinarily resident in Ireland who become eligible to benefit from income which becomes payable to persons resident or domiciled outside Ireland. In practice this means that the criteria for valid assessability is that there is income which becomes payable either to a non-resident individual, a non-resident trustee or a non-resident company; and in particular a company incorporated outside the State. The income is assessable upon the individual ordinarily resident if he either has power at some time to enjoy any such income (the expression "power to enjoy" being defined as greatly extended beyond its natural meaning in later provisions of the section) or if the individual receives a repayment of a loan or any non-income amount.

In practice the section is defeated only by securing that a non-resident company does not have any income which is payable to it. This virtually restricts non-resident companies whose activities are envisaged to result in a non-liability of Irish residents to Irish income tax, to activities which do not produce income for the company but produce either capital gains only or neither income nor gains - e.g., because the assets are non-income producing.

It would seem pertinent to point out that whether or not a company has members or has only non-participatory members, or has members who do not hold shares in the company, s.57 liability is not related to membership or lack of it, but is related to ability to benefit.

United Kingdom

A. Taxation of Gifts and Inheritances

The primary legislation on Inheritance Tax is to be found in the Inheritance Tax Act 1984 which creates liability to the tax on transfers of value by an individual. Transfers of value by a company do not result in the company becoming liable to Inheritance Tax, though a transfer of value to a company which facilitates a transfer of value by the company to a third party can result in the transfer by the company being an associated operation with the transfer of value to the company.

There are other exceptions to this rule that no liability results from a transfer of value by a company. The principal provisions are:

(a) Section 94 of the Inheritance Tax Act 1984, which creates a charge to Inheritance Tax upon participators in a close company. The terms of s.94 are as follows:

"(1) Subject to the following provisions of this Part of this Act, where a close company makes a transfer of value, tax shall be charged as if each individual to whom an amount is apportioned under this section had made a transfer of value of such amount as after deduction of tax (if any) would be equal to the amount so apportioned, less the amount (if any) by which the value of his estate is more than it would be but for the company's transfer; but for this purpose his estate shall be treated as not including any rights or interests in the company.

(2) For the purpose of subs.(1) above the value transferred by the company's transfer of value shall be apportioned among the participators according to their respective rights and interests in the company immediately before the transfer, and any amount so apportioned to a close company shall be further apportioned among its participators, and so on; but

(a) so much of that value as is attributable to any payment or transfer of assets to any person which falls to be taken into account in computing that person's profits or gains or losses for the purposes of income tax or corporation tax (or would fall to be so taken into account but for s.208 of the Taxes Act 1988 shall not be apportioned, and

(b) if any amount which would otherwise be apportioned to an individual who is domiciled outside the United Kingdom is attributable to the value of any property outside the United Kingdom, that amount shall not be apportioned.

(3) In determining for the purposes of this section whether a disposition made by a close company is a transfer of value or what value is transferred by such a transfer no account shall be taken of the surrender by the company, in pursuance of s.240 or 402 of the Taxes Act 1988, of any relief or of the benefit of any amount of advance corporation tax paid by it.

(4) Where the amount apportioned to a person under this section is 5 per cent or less of the value transferred by the company's transfer of value then, notwithstanding s.3(4) above, tax chargeable under subs.(1) above shall be left out of account in determining, with respect to any time after the company's transfer, what previous transfers of value he has made.

(5) References in s.19 above to transfers of value made by a transferor and to the values transferred by them (calculated as there mentioned) shall be treated as including references to apportionments made to a person under this section and to the amounts for the tax on which (if charged) he would be liable."

(b) Attention should also be paid to s.95 of the same Act which provides as follows:-

"(1) Where -

(a) the value of the estate of a company ("the transferee company") is increased as the result of a transfer of value made by a close company ("the transferor company"), and

(b) an individual to whom part of the value transferred is apportioned under s.94 above has an interest in the transferee company (or in a company which is a participator of the transferee company or any of its participators, and so on),

subs.(2) below shall apply to the computations, for the purposes of s.94 above, of the amount to be offset, that is to say, the amount by which the value of his estate is more than it would be but for the transfer.

(2) Where this subsection applies -

(a) the increase in the value of the transferee company's estate shall be taken to be such part of the value transferred as accounts for the increase, and

(b) the increase so computed shall be apportioned among the transferee company's participators according to their respective rights and interests in the company immediately before the transfer (and, where necessary, further apportioned among their participators, and so on),

and the amount so apportioned to the individual shall be taken to be the amount to be offset."

There are supplementary definitions in the Act which define the expressions "close companies" and "participators" primarily by reference to United Kingdom income tax law but not solely by reference thereto. S.102 of the Inheritance Tax Act 1984 provides that -

> ""close company" means a company within the meaning of the Corporation Tax Acts which is (or would be if resident in the United Kingdom) a close company for the purposes of those Acts;
>
> "participator", in relation to any company, means any person who is (or would be if the company were resident in the United Kingdom) a participator in relation to that company for the purposes of Chapter I of Part XI of the Taxes Act 1988, other than a person who would be such a participator by reason only of being a loan creditor;"

and the section provides in subs.(2) that -

> "References in this Part of this Act to a person's rights and interests in a company include references to rights and interests in the assets of the company available for distribution among the participators in the event of a winding-up or in any other circumstances."

Two obvious question marks arise from the foregoing:

1. If a company has no members it probably has no participators. Further, if it has one or more members who do not participate in the equity of the company, then that member or members cannot be participators.

2. It obviously follows that a distribution of assets by a close company which is not made to a member of the company, but which is made (for example) to a non-member, cannot create a liability to the tax on the non-member recipient. The only sanction available is to tax the participators on the transfer of value resulting from the payment or transfer of

assets by the close company to the non-member. But if the participator is someone domiciled out of the United Kingdom, s.94 liability does not appear to arise.

B. Taxation of Chargeable Gains (Capital Gains)

United Kingdom legislation contains provisions broadly similar to those contained in s.36 Irish Capital Gains Tax Act 1975. The differences between Irish and United Kingdom legislation, broadly stated, is as follows:

1. United Kingdom capital gains tax does not distinguish between a chargeable gain resulting from a disposal of land (or shares in a company owning land) and other chargeable gains. Thus someone not resident in the United Kingdom for tax purposes is not liable to capital gains tax, irrespective of the nature of the asset which is disposed of to produce the relevant chargeable gain.

2. Legislation is enacted in the United Kingdom corresponding to s.36 Irish Capital Gains Tax Act 1975. The legislation originated in s.41 Finance Act 1965 (of which s.36 was a substantive copy) and is now to be found in s.13 Taxation of Chargeable Gains Act 1992.

3. Gains between companies which are members of a non-resident group are outside s.13 : the non-liability to tax is created by s.14 of the 1992 Act. There does not appear to be corresponding legislation in Ireland.

The same avoidance possibilities appear to arise in the United Kingdom to those outlined above in relation to Ireland.

C. Taxation of Income and Accumulated Income

Legislation corresponding to s.57 Finance Act 1974 was first enacted in s.18 Finance Act 1936 which with some intermediate amendment became s.412 Income Tax Act 1952 and (with further amendment) became s.478, Income and Corporation Taxes Act 1970. The present legislation is to be found in s.739 Income and Corporation Taxes Act 1988 and the seven subsequent sections of that Act. The avoidance possibilities (or lack of them) are similar in the United Kingdom to those applicable to Ireland. In particular, the fact that the liability under s.739 and later sections is not confined to company members, is equally applicable as it is in Ireland.

The USA

There are rules in the US Federal Tax Code which attribute assets of a company to its members and divide the assets between the company's members in actuarially-computed proportions. It would be difficult to apply this legislation to a company which has no members or no participatory members. But the Internal Revenue Service would no doubt find other methods of overcoming the strictures of their own rules, known as Stock Attribution Rules.

Introduction of Assets to a Company Without Members (or Without Equity Members)

When the concept of creating companies was first evolved, neither the legislator nor the company promoters contemplated that a company could be financed otherwise than by loan money or, more usually, by the provision of share capital. This in practice meant that the conventional company was one which had members who provided capital and thereby became entitled to participate in the equity of the company. In the modern age there are now many other ways of financing the growth of a company, particularly a private company. Loans can provide working capital so long as the loans made enable the company to grow in value and the loans can be repaid leaving behind the equity in the company. It does not then follow that the equity necessarily has to accrue for the benefit of the company members, particularly if it is the case that there are no members or no participatory members.

There are cases where an individual can provide monies or assets for the growth of a company on a basis which terminates that individual's participation in the company if he or she dies. Examples are an annuity ceasing on death or a pure endowment contract having no value in the event of death prior to the attainment of a specified age or the happening of a specified event, e.g., marriage. Such a method of providing finance is nowadays a perfectly feasible way of introducing capital which may be part of a company's ultimate equity for the benefit of the next generation.

A reader wishing to investigate this aspect of matters further is strongly advised to take professional advice on the legitimacy of providing finance by such methods. An alternative is to provide ordinary loan or debenture finance; but this has the disadvantage that the loan or debenture can only be extinguished by repayment of the loan or debenture capital.

Distribution of Assets, Profits and Benefits from a Company Without Members (or Without Equity Members)

It has already been pointed out that in the case of a company which is limited by guarantee without a share capital, there are provisions in most (but not all) jurisdictions which permit the incorporation of such companies and which render void any attempt to distribute "divisible profits" to persons who are not members of the company. As such companies do not have a share capital it necessarily follows that such companies must derive their working capital otherwise than from share subscription - such as from donations, subscriptions, loans or some commercial contract with a third party. In practice, therefore, the expression "divisible profits" in the case of a company having no share capital means virtually the entirety of its assets.

There are one or two jurisdictions which enable a limited company to be formed without a share capital but without having such a limitation in its statutes on the distribution of profits. But such jurisdictions nevertheless normally have legislation which contains provisions similar to those in s.24 Companies Act 1985.

The question which therefore arises is - Who can benefit from a company which does not have members (or which does not have equity members)? And as a subsidiary point, how are their abilities to benefit best protected? The answer, it is submitted, is for the relevant company to have provisions in its constitution which enable the company to make grants, endowments or payments of funds in favour of persons who are not members of the company; and to enable the selection of such persons to be within the scope of some outside person (or company) which, though not a director, and not a member of the company (and not capable of benefiting in any way form the company's munificence), is nevertheless able to sanction a distribution to a non-member if that non-member is within the contemplation of either the promoters of the company or the persons providing funds to it. A typical example of such a person is a Protector - a status which is commonly identified with overseas trusts but which, it is contended, is a position which is equally capable of being applicable to someone associated with a company.

Over the years companies have been incorporated in a variety of jurisdictions which have contemplated that the primary benefits from the company's activities are available for distribution to non-members with the sanction of a Protector. It is of course important that such a person is not, and cannot be construed as, a director or a member. Set forth below is a typical clause which might be found in a company constitution creating the status of Protector. From a legal standpoint, it is important that his powers are not fiduciary powers because if the powers are fiduciary, they would become extremely difficult to exercise in the context of selecting eligible beneficiaries and deciding whether, and by how much, any particular person should benefit. A typical clause might be as follows:

"PROTECTOR

(a) There shall at all times be a Protector of the Company. Save for the appointment of a Protector no act or resolution of the Directors shall be valid unless at the time there shall have been validly appointed as Protector a person not disqualified from so acting hereunder.

(b) The first Protector shall be (Here insert the name of the Protector)

(c) Any Protector shall be entitled at any time to nominate his, her or its successor as Protector and such nomination shall be effective from the date upon which a Protector ceases to hold that Office. Such a nomination shall constitute the appointment of the nominated person as Protector upon the existing Protector ceasing to hold such Office whether in consequence of death, retirement or any other circumstance. In the event that any Protector shall have resigned his or her Protectorship without nominating a successor or if the office of Protector shall have been vacated for any reason without there being any person nominated to succeed to that Office, then the next Protector shall be appointed by the Life

Director for the time being and in the absence of such appointment within 28 days of the office of Protector becoming vacant then the next Protector may be appointed by the Non-Shareholder Member(s) of the Company in General meeting (or if there be none, by the Shareholder Members of the Company in General Meeting).

(d) The office of the Protector may be held by any individual or body corporate (wheresoever incorporated) but no person or body corporate may be:

(i) a Member of the Company, either past or present;

(ii) a Director of Officer of the Company;

(iii) a person who has received any benefit of any kind whatsoever from the company.

(e) No Protector, either during or after holding the office of Protector shall be entitled to receive any benefit whatsoever from the Company.

(f) The Protector shall have the following rights, powers and privileges:

(i) At the request of the Directors, to attend at meetings of the Directors and to advise upon matters arising at such meetings;

(ii) to request any grants, endowments and/or funds pursuant to Article X hereof;

(iii) to approve in writing any application by any person to be admitted to Non-Shareholder Membership of the Company.

(g) The office of the Protector shall be vacated if inter alia -

(i) in any jurisdiction the Protector is certified by a duly qualified medical practitioner or by a court of law to be of unsound mind; or

(ii) the Protector resigns his office by notice in writing to the Company; or

(iii) the Protector, being an individual, dies or, being a Company, is placed in liquidation or dissolved.

(h) For the avoidance of doubt it is hereby declared that all the powers vested in the Protector are powers collateral and not fiduciary powers."

And the Result.....

The foregoing is a bare outline of the possibilities which exist for the creation of companies which either have no members or no members carrying rights of participation in equity capital. The legislation for the creation of companies obviously contemplated that companies could not be created without the existence of an association of persons willing to be formed into a company. But companies are creatures of statute and statute is traditionally inflexible so that words of interpretation cannot be added to their provisions for the purpose of giving effect to a given object or conclusion. The foregoing remarks are intended as a basis for further thought by those interested in pursuing the matter further.

III Trusts Without Objects

At first sight there is a contradiction in terms here, just as there was an apparent contradiction in terms in considering the evolution of companies without members. One of the necessary certainties in connection with the creation of a trust is that there must be certainty of objects. This, put literally, therefore means that if a trust is created which does not have trust objects, then the trust is void for uncertainty, and there is a resulting trust of the trust assets for the person making the trust.

Over the years there has evolved what is sometimes described as a "Power of Appointment Trust". This is a trust which contains discretionary powers of appointment of income and capital in favour of a wide class of discretionary objects, not all of whom may necessarily be defined at any particular time, either at the inception of the trust or subsequently. Such trusts can only be valid if there is a trust for beneficiaries in default of any appointment or appointments of income or capital - in other words what is sometimes described as a "gift over". Such trusts became common in the 1960s and have developed to the point where a power of appointment trust can be valid even if there are hardly any objects named in the power of appointment. Often there is a power to add objects to the class of persons able to benefit from the exercises of appointment powers.

But as a matter of law powers of appointment trusts do not carry a totally unlimited power of selection of unidentified beneficiaries. Although it is difficult to classify the particular rules, the following points are relevant to a consideration of the creation of such trusts:

(a) There must be an ultimate class of persons able to benefit who are identifiable and ascertained or ascertainable at any given moment. If would-be trust creators wish to make this clause as imprecise as possible, they can opt for a gift over in favour of charitable objects or charitable purposes unspecified or, in fact, for one or more particular charities. But if the charitable route is preferred, care must be taken to ensure that if a named charitable institution is nominated as the ultimate object of the gift over, then there is at least one individual already named as an eligible object of the discretionary powers of appointment. In the absence of such a nomination it is possible for the charitable body or its representatives to apply to the courts having jurisdiction over the trust's trustees and to claim that in reality the trust is a charitable trust for the exclusive benefit of a charity and that no-one else is capable of being nominated to benefit from the trust except perhaps another charity.

(b) There should be an overriding trust for accumulation of income in default of the exercise of any particular power to appoint income or capital. If this is not created then the income of the trust has to be distributed proportionately among those entitled to benefit from income in default of any exercise of a power of appointment.

(c) The trust must be framed so as to operate within the perpetuity period as defined by the local law. This can be contrasted with the situations involving companies which contemplate the distribution of their assets to non-members. Such situations do not require compliance with any perpetuity period.

(c) To reduce the risk of interference from a named charity without infringing the certainty of objects rule, preference should be given to the charitable beneficiary being (perhaps) "such charitable objects or charitable purposes as the Trustees may in their discretion select" at any particular time.

(e) If the trust contains a power to add persons to the class of objects eligible to benefit from the exercise of a power of appointment, care should be taken to ensure that this power does not lapse through (for example) the death of the relevant appointor leaving no successor. This situation has happened in the experience of the writer, in a number of trusts created in Guernsey. A further defect in Guernsey trusts is often to be found in the creation of trusts which name a particular charity as the sole beneficiary of the trust with overriding discretionary powers in favour of persons who are not named in the Instrument creating the trust. Such trusts are vulnerable to a claim that their income is exclusively charitable and therefore not able to be utilised to confer benefits upon objects of a non-charitable nature.

Fiscal Possibilities for Trusts Without Objects

It is the case that jurisdictions possessing full tax legislation and sophistry in the creation of anti-tax avoidance legislation have become more aware of the tax avoidance possibilities for trusts and have sought to kerb those possibilities. In the United Kingdom, for example, chargeable gains accruing to trusts of non-resident trusts, which would normally not be assessable upon objects eligible to benefit from those gains, have now largely been counteracted by legislation to be found in the Finance Act 1991. This is not the place to embark upon a detailed analysis of this legislation, but the opportunity is taken merely to draw attention to its existence. Similarly, the possibilities of avoiding inheritance tax (or acquisitions tax) in trusts has largely been counteracted in the United Kingdom and in Ireland; and the provisions for taxing income and accumulated income have largely had the effect of taxing resident objects of overseas trusts once any of them receive a benefit from trust assets, whether of an income nature or not.

Conclusion

The upshot of the foregoing is that in the writer's view there are currently greater possibilities for the utilisation of companies to avoid tax, particularly capital taxes, than exist for trusts. But nothing should be embarked upon without specialist professional advice and extensive consideration of the avoidance possibilities and their possible counteraction.

IV Liechtenstein Entities

Having commented at length on the possibilities for companies without members or without participatory members and trusts without objects, it seems appropriate to make some comments about the enterprises which can be created within the Liechtenstein Principality. Liechtenstein itself is a small territory situated between Austria and Switzerland on the Upper Rhine. The capital is Vaduz. The territory is a constitutional Monarchy and has been independent since 1866: prior to that time it was part of the German Confederation. It had an economic union with Austria until the end of the 1914-18 War. It is represented in its international relations by Switzerland with which it has had a Customs union since 1925 and which latter territory administers the postal, telephone and telegraph system. The local currency is the Swiss Franc.

It has some local taxation but has only one double taxation agreement and that is with Austria and does not apply to the entities with which this commentary is concerned. The entities in question are substantially not subject to Liechtenstein taxes except on Capital Duty and Incorporation Stamp Duty.

Liechtenstein itself is of interest in a tax mitigation context partly because of its bank secrecy and also because of the peculiarities of certain of its local entities. Apart from companies and trusts (both of which are obviously recognised in other jurisdictions) there are two unique enterprises. These are (a) the establishment under private law (usually described as an Anstalt) and the Foundation (often referred to as a Stiftung). Both are creatures of statute being created under the law relating to persons and companies enacted in 1926 as part of the Code of Civil Law.

The Anstalt is an entity peculiar to Liechtenstein and suffers from a principal drawback in that it has the risk of being challenged as being a valid enterprise by reference to the laws of jurisdictions other than Liechtenstein. The ground for this is that as there exists no equivalent elsewhere there can be no judicial reciprocity and hence no recognition. This disadvantage can be overcome by converting the anstalt into a more conventional entity, such as a company.

The anstalt is defined in Article 534 of the 1926 law and can fairly be described as an enterprise which has a personality which is independent to either its founder, its promoter, its directors, managers or persons eligible to benefit from its activities. Effectively, it carries out its functions for the benefit of its founder and ultimately those who may be nominated by the founder as having the ultimate entitlement to benefit if not the founder himself (or itself). There is no trust relationship between the anstalt and those benefiting from it, and indeed it has been described as a kind of alter ego of its founder or promoter. Although the format of the anstalt contemplates that its affairs will be conducted through a Board of Directors and that its Accounts will be prepared by its audit authority, both bodies are subject to overriding control on the part of the founder who is recognised as the supreme authority of the anstalt.

Sometimes the terms upon which an anstalt is created provide for its economic benefits to be made available to third parties who are beneficiaries. Such persons have to be nominated by the founder or the supreme authority. In the absence of any such persons, the beneficiary is taken to be the founder or the bearer of the founder's rights.

The founder has the power to assign his rights to a third party which then stands in his place as if he (that third party) were the founder. In practice it may be the case that the assignment, which is in a documentary form, may be in blank, in which case the holder of the assignment has the founder's rights. One can therefore readily appreciate that the founder or his assignee is effectively the anstalt, and that the latter is another manifestation of the former.

From a legal liability point of view only the anstalt's assets are available to meet its liabilities. The founder's only liability is to provide the contribution which is to be made available at the time that the anstalt is created. The minimum contribution payable on creation is Sw.Frs.30,000. Once provided and once having created the anstalt, its contribution capital is at the disposal of the anstalt acting either by its founder or his assignee or its Board of Directors/Managers if these exist.

In the context of what has so far been stated the anstalt is a legal person and is therefore a body corporate and so tends to be recognised as a company rather than as a trust. Nevertheless, the status of its founder in relation to it renders it liable to be regarded as an alter ego of the founder or his assignee.

The second local entity which can be created in Liechtenstein is the Foundation or Stiftung. This is similar to the anstalt in that it has a separate legal personality which comes into being when, as is the case with the anstalt, it is entered on the relevant register which is maintained by the Liechtenstein Government. It differs from the anstalt in that the relevant register is the Foundation Register rather than the public register though the latter can be used for certain types of foundation (very confusing). Like an anstalt, the minimum initial capital is Sw.Frs.30,000. But unlike an anstalt, the foundation exists for the benefit of those named in the Foundation's constitution as being available to benefit from its activities. It also tends to differ from the anstalt in that it is created for primarily private family purposes rather than for commercial activity. As is the case with the anstalt it only has legal liability up to the amount of its contributed capital and net assets and it cannot be made liable for liabilities in excess of such capital and assets.

Because the foundation has a legal personality it is therefore akin to a body corporate and therefore a company, though the Inland Revenue are known to hold the view that a foundation is akin to a trust rather than a company. Also, unlike the anstalt, it has to have defined objects or beneficiaries.

From the foregoing it will be appreciated that the Anstalt and the Stiftung have characters which make them potentially useful to persons who might wish to consider them as alternatives to a company without members or a trust without objects. The primary problem is the potential lack of reciprocal recognition in other jurisdictions, but in the end it is a matter for any potential user of a Liechtenstein enterprise to seek to have it evaluated in his own jurisdiction before deciding whether to avail himself of its uses.