ADR and Trusts

An international guide to arbitration and mediation of trust disputes

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19 Liechtenstein

With 36,942 inhabitants and an area of 160 km², Liechtenstein is a small state in the heart of Europe, which takes part in legislative developments in Europe through its membership in the European Economic Area (EEA) and the European Free Trade Association (EFTA). At the same time, it is closely connected with the neighbouring state of Switzerland through a customs union. The Commercial Register of Liechtenstein lists some 58,600 companies, among them 37,321 foundations and trusts, which is approximately 64% of the total.

19.1 Arbitration Law and Practice

In 2010, a comprehensive reform of arbitration proceedings was introduced in Liechtenstein, in particular the provisions of *§§ 594 et seq.* of the *Code of Civil Procedure, (Zivilprozessordnung, the 'ZPO')*. The new provisions are based on the *Act Concerning the Amendment of Arbitration Law (Schiedsrechts-Änderungsgesetz, SchiedsRÄG)* introduced in Austria in 2006, which in turn implemented the *UNCITRAL Model Law*. Liechtenstein has thus adjusted its arbitral proceedings to international standards. As a result of having adopted foreign law, Liechtenstein may apply Austrian doctrine and practice on arbitration proceedings.

In Liechtenstein any pecuniary claim may be the subject of arbitration. Arbitration extends to all disputes that are based on a pecuniary claim or are directed at a pecuniary performance. In addition, non-pecuniary claims may also be the subject of arbitration proceedings if the parties are able to enter into a settlement agreement on such claims. This requires that no mandatory laws are violated. Disputes in connection with a foundation or a trust may, in principle, be decided by arbitration. In the public interest, the legislator has laid down certain exceptions from objective arbitrability (such as claims under family law, official supervision of companies, foundation, and trusts) and has limited arbitration in connection with consumers and employees to disputes that already exist. Objective arbitrality relates to the subject matter of the dispute and whether it may be validly submitted to arbitration. Court practice has also ruled that the dismissal of governing bodies, for example, cannot be subject to arbitration. Subjective arbitrality relates to the capacity of a legal entity or natural person to enter into an arbitration agreement and act as a party to an arbitration agreement.

The parties may agree in writing that certain disputes shall be subject to the jurisdiction of a court of arbitration. Such an agreement may in the alternative also be included in correspondence by letters, facsimile or e-mail

messages or other forms of communication that serve to ensure the documentation of an agreement. In these cases, an agreement does not have to be in writing, so it is conceivable that a recording of a video conference or a telephone recording may serve as the basis for the agreement. The jurisdiction of a court of arbitration may also be laid down unilaterally in a disposal *mortis causa*, in articles of association, or in other unilateral legal transactions. If consumers or employees are involved, *§ 634 ZPO* prescribes stricter formal requirements (see **19.7**). Entering an appearance without reservation, mends any formal defects in the arbitration agreement.

The question whether the requirements for the jurisdiction of a court of arbitration apply is decided by the court of arbitration itself (competence-competence). It may decide on this question in a separate arbitral award, which is subject to separate challenging. The courts of law have the power to assess the jurisdiction of the court of arbitration only in the case of an action for annulment. It is, for example, not possible to bring an action in a court of law for a declaration that the court of arbitration does or does not have jurisdiction.

The parties may lay down their own rules of procedure at will, or may refer to existing rules of procedure. In 2012, the Liechtenstein Chamber of Industry and Commerce (LIHK) issued its own rules of arbitration, tailored to the requirements of Liechtenstein as a financial centre, the so-called 'Liechtenstein Rules'. The Liechtenstein Rules are essentially based on the Swiss Rules, but include special provisions concerning confidentiality, simplicity, speed, and low costs. They are, therefore, tailored to arbitration with foundations and trusts.

An exhaustive list of the reasons for setting aside an arbitral award can be found in *§ 628 ZPO*; these reasons are essentially the same as the grounds laid down in *Article V* of the *New York Convention* for setting aside arbitral awards. There is no revision as to content (*révision au fond*). The Liechtenstein provisions include the special feature that an action for setting aside an arbitral award is decided by the Princely Court of Appeal (*Obergericht*) as the only and last instance, which accelerates proceedings. A complaint to the Liechtenstein Constitutional Court (*Staatsgerichtshof*) is only possible where rights guaranteed by the Constitution and by the European Court of Human Rights (the 'ECHR') have been violated.

19.2 Trust and Foundation Law

19.2.1 Trust law

Liechtenstein trust law is based on the adoption of Anglo-American trust law on the one hand and includes elements from German *Salmann* (trustee) law on the other. The trust, which is regulated expressly in *Art. 897 et seq.* of the *Liechtenstein Persons and Companies Act* (*Personen- und Gesellschaftsrecht*, the '*PGR*'), grants an *in rem* power of management with components of property law and the law of obligations, all of which make for a *sui generis* legal institution. It is equivalent to the concept of the trust as laid down in the *Hague Trust Convention*, to which Liechtenstein acceded on 1 April 2006.

The Liechtenstein trust is an agreement with particular features between the trustee and the settlor by which one or more assets are transferred to the trustee to become his property. The trustee must manage and use the assets as laid down in the trust deed for the benefit of beneficiaries on penalty of the trustee's own liability. Provisions that bind the trustee to continuous instructions from the settlor are prohibited. The trust is not a legal entity but a special fund that is not part of the trustee's personal assets and is separated in the event of the trustee's bankruptcy.

The trust comes into being when the agreement (trust deed) has been entered into. The trust deed must be in writing to be valid. The minimum content is the designation of the settlor and the trustee, the wish to form a trust, the designation of the trust fund, the duration of the trust, and the designation of the beneficiaries or of the trust's purpose. The trust must be expressly stated to be a trust ('express trust'). The trust is subject to the law that is laid down as its governing law in the trust deed. If there is no choice of law, the law of the state in which the trust has its domicile applies, and subsidiarily the law of the state where the trust is effectively administered. In practice, the trust deed is normally written in a foreign language such as English.

In contrast to some jurisdictions influenced by Anglo-American law, Liechtenstein law permits the accumulation of income and the formation of a trust for indefinite duration. In addition, it is possible and frequent practice to lay down an enforcement privilege, according to which beneficiaries cannot be deprived of their grants from the trust by way of attachment or execution or in bankruptcy. It is also possible to form a 'purpose trust' in which merely a purpose (such as charitable activities) is laid down in the trust deed rather than an appointment of beneficiaries. Finally, Liechtenstein trust law does not recognise a rule according to which all beneficiaries may jointly give instructions to the trust, for example the rule in *Saunders v*

Vautier. The Liechtenstein trust is, therefore, particularly suitable for succession planning, the securing of family assets, and asset protection.

If a trust is formed for a term of more than 12 months, which is the rule in practice, it must be registered in the Commercial Register. Registration is done either by entering the trust's name, date of formation, duration, and trustee, or by depositing the trust deed and all amendments to it. In the latter case, an official certificate can be requested from the Commercial Register. However, information on the settlor, the beneficiaries, or on deposited documents is inaccessible to the public.

19.2.2 Foundation law

Liechtenstein foundation law is governed in *Art. 552 §§ 1 et seq.* PGR. A foundation (*Stiftung*) is a fund endowed for a specific purpose which becomes autonomous and acquires the status of a legal person. The autonomous fund is legally separated from the founder's personal assets. In contrast to the trust, the fund forms the assets of an independent legal entity, the foundation. The liability of a foundation is limited to the value of the assets held by itself. The minimum capital of a foundation is 30,000 Swiss francs, euros or US dollars.

The only purpose of a foundation's existence is to realise the wishes and intentions of the founder as prescribed in the foundation deed and the foundation statutes. The bodies of the foundation, particularly the foundation council, have primarily an administrative function to realise these wishes and intentions and are also responsible for the fulfilment of the foundation purpose. A foundation has no owners or members but does have beneficiaries, i.e. individuals in whose favour the foundation purpose is achieved.

The foundation is established by a founder's declaration of establishment; either *inter vivos* or *mortis causae*. The declaration must be in written form and requires authentication of the founder's signature. It is embodied in the foundation deed, which must be signed by the founder or a founder's agent with the signatures authenticated. The foundation deed contains the key elements of the foundation, e.g. the transferred assets, the foundation purpose, the organisation of the foundation (foundation council) and the identity of the founder or founder's agent. Provisions regarding the beneficiaries can optionally be included in the by-laws. Furthermore, the foundation can be established as common-benefit foundation to support the public or as private-benefit foundation to fulfil a private or personal purpose (e.g. family foundation). Common-benefit foundations must be entered in the

Public Register, whereas private-benefit foundations must deposit a so-called 'notification of formation'. In both cases neither the name of the founder nor the identity of beneficiaries are published.

19.3 Mediation Law and Practice

Mediation proceedings are subject to party autonomy. The parties may consult a mediator to solve a legal dispute, who will assist the parties in entering into a legally binding agreement. The mediator himself does not have any power to decide.

The *Act on Civil Law Mediation* (*Zivilrechts-Mediations-Gesetz*, the '*ZMG*') regulates the organisation of mediation in civil matters, the powers and duties of registered mediators, and the suspension of time-limits. In practice, it is the latter that is particularly relevant. The beginning and continuation of limitation and other time-limits for the assertion of claims are suspended by the starting and proper continuation of mediation. These time-limits remain suspended if any of the parties brings legal action with the Court of Justice (*Landgericht*) or the court of arbitration having jurisdiction.

The tradition of mediation in company law disputes is still young in Liechtenstein. Mediation in connection with legal disputes involving foundations or trusts is rather infrequent in Liechtenstein.

19.4 Ratification of the New York Convention ('NYC')

In connection with the revision of arbitration law, Liechtenstein acceded to the *New York Convention* on 5 October 2011.

By accession to the *NYC*, Liechtenstein has ensured that an arbitral award issued in Liechtenstein can be enforced in all contracting states of the *NYC* and therefore almost worldwide, and that all arbitral awards issued in a contracting state are in turn recognised and enforced in Liechtenstein. This is all the more remarkable as Liechtenstein has not yet joined any multilateral treaty concerning the recognition and enforcement of decisions by foreign courts of law; it has only entered into two bilateral treaties with Austria and Switzerland. Arbitral proceedings, therefore, have a considerable advantage over proceedings in courts of law.

When acceding to the *NYC*, Liechtenstein made use of the reciprocity reservation in terms of *Article I* of the *NYC*. Thus, the *NYC* only applies to arbitral awards that have been issued in the territory of another contracting state. However, Liechtenstein has refrained from making the commercial reservation.

19.5 Attitude of Local Courts and Authorities to ADR

If a party asserts that there is an arbitration agreement, the objective jurisdiction of the court of law to handle the case basically yields and the court of arbitration must now decide on its jurisdiction (competence-competence, see **19.1**). As soon as the arbitration proceedings are pending, there must be no other litigation on the asserted claim in any court of law, or in any court of arbitration. The decision on jurisdiction of the court of arbitration is binding for the court of law. The arbitration proceedings therefore take precedence over the ordinary proceedings.

An exception to this occurs in cases where a court of law must examine the arbitration agreement, before arbitration proceedings become pending and finds that either there is no such agreement, or that it cannot be implemented. The latter would be the case where a party is destitute. Another exception applies where there is a complaint to the court of arbitration concerning the latter's lack of jurisdiction and a decision of the court of arbitration cannot be obtained within a reasonable time. In these cases, the court of law must handle the claim in substantive terms.

The court of law may act even if there is an arbitration agreement if and as far as this is expressly provided in *§§ 594 et seq. ZPO* (*numerus clausus*). It may, for example, appoint the court of arbitration in parallel to arbitration proceedings, decide on the rejection of an arbitrator, provide legal assistance (such as to support the taking of evidence), and issue provisional measures. In contrast, the court of law has exclusive jurisdiction for certain forms of provisional measures (*ex parte* decisions and third party prohibitions), the enforcement of provisional measures, and the handling of an action for annulment pursuant to *§ 628 ZPO*.

Mediation proceedings do not affect the objective jurisdiction of the courts of law. The parties may call upon these at any time.

19.6 Use of ADR Clauses and Provisions in Trust and Foundation Instruments

In legal disputes in connection with a trust or a foundation, the parties are normally interested in having the proceedings handled confidentially. Options for excluding the public are limited in courts of law, not least because of *Art. 6 ECHR*, and judgments are always pronounced publicly. This is why, to maintain privacy, many foundation articles or trust deeds provide for jurisdiction of a court of arbitration for legal disputes in connection with the foundation or the trust.

The Liechtenstein Arbitration Association (*Liechtensteinischer Schiedsverein*, 'LIS') provides model arbitration clauses for foundations and trusts in German and in English on its website (www.lis.li).

19.7 Mandatory Requirements for ADR

Carrying out arbitration proceedings requires that the asserted claim is objectively arbitrable and that a formally valid arbitration agreement exists (see **19.1**).

As to content, the arbitration agreement must at least include a specific designation of the parties and the legal relationship/dispute. A general agreement that all disputes shall be subject to arbitration is invalid. In addition, the arbitration agreement must clearly state that the dispute shall be decided by a court of arbitration. Further details such as the procedure for appointing the arbitrators, or the seat of the court of arbitration may, but need not be stated.

Additional requirements are provided in *§ 634 ZPO*, in connection with employees and consumers. In these cases, the arbitration agreement must be included in a separate document which the parties must sign separately, after the legal dispute has come into being. Before entering into the arbitration agreement, written legal instructions must be provided on the essential differences between arbitration proceedings and court proceedings. The seat of the court of arbitration must be laid down in the arbitration agreement and may only be at the employee's/consumer's place of residence, habitual abode, or place of employment. If these requirements are not met, the arbitration agreement is irrelevant for the consumer/employee, but he may nevertheless refer to it.

It still remains to be settled whether the beneficiary of a foundation, or of a trust qualifies as a consumer, and whether he is, therefore, subject to the provisions of *§ 634 ZPO*. The Liechtenstein legislator has recognised the resulting problems in practice, and is in the process of removing this uncertainty by way of an amendment of the law. Under the new rules, arbitration clauses in foundation articles or trust deeds are to be binding regardless of the requirements of *§ 634 ZPO*. This proposed amendment is expected to come into force by the beginning of 2015.

In trust law, there is another special case. If the trust is subjected to a foreign law (see **19.2**), *Art. 931 (2) PGR* provides that disputes between the settlor, the trustee, and the beneficiaries shall be decided by an obligatory court of arbitration. In these cases, it is mandatory that the trust deed provide for objective jurisdiction of a court of arbitration.

Carrying out mediation proceedings in terms of the *ZMG* requires that the mediator consulted is registered in the list of mediators. Alternatively, it is possible to consult a foreign mediator, if he is a citizen of an EEA member state and meets the requirements of the *ZMG* (e.g. is licensed in the country of origin). If these requirements are not met, the *ZMG* is not applicable, which among other things has the consequence that limitation or other time-limits are not suspended. As a side-note, Liechtenstein law does not provide for mandatory mediation proceedings.

19.8 Enforcement of ADR Awards

If the court of arbitration was located in Liechtenstein the arbitral award or settlement constitutes a domestic title for execution, and can be directly enforced under the provisions of the *Execution Act* (*Exekutionsordnung*).

The recognition and enforcement of foreign arbitral awards in Liechtenstein is primarily subject to the *New York Convention*. It is required that the arbitral award be within the *NYC*'s scope of application. This means for Liechtenstein that the arbitral award must have been issued by a court of arbitration located in a contracting state. In addition, there must be no reason for setting aside the award in terms of *Article V* of the *NYC*. It should be noted in this connection that the court of arbitration's indirect jurisdiction is not verified in the course of the recognition and enforcement of a foreign arbitral award in Liechtenstein. This means that when the parties or the arbitration court determine the seat of arbitration, they do not have to consider any compulsory jurisdiction requirements under Liechtenstein law. Finally, the other formal requirements of the *NYC*, in particular of Article IV, must be met. If this is the case, the Court of Justice (*Landgericht*) will on application declare the arbitral award enforceable in Liechtenstein.

Concerning Austria and Switzerland, the bilateral treaties concluded with these states apply as a supplement to the *NYC*, since these treaties also regulate the recognition and enforcement of arbitral awards. It is therefore sufficient if an arbitral award is recognised and enforced either under the *NYC* or under the bilateral treaty. In turn, the reasons for denial both under the *NYC* and under the bilateral treaty must apply in a cumulative way to deny recognition and enforcement. In addition, the bilateral treaties also regulate the recognition and enforcement of arbitral settlements. These treaties go beyond the scope of application of the *NYC*, which only applies to arbitral awards.

Arbitral awards issued in a state that is not a contracting state of the *NYC* are subject to the legal situation as it was before the *NYC*. The lack of a treaty means such arbitral awards cannot be directly enforced in Liechtenstein.

In mediation proceedings, the mediator cannot issue a decision that is binding for the parties (see **19.3**). If, however, the parties come to a legally binding agreement with the assistance of the mediator, this constitutes a private recognition of a claim, which can then be enforced in simplified proceedings for obtaining an enforceable title under the provisions of the *Act Concerning the Securing of Rights* (*Rechtssicherungs-Ordnung*, RSO).

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