INTERNATIONAL TRUST DISPUTES

Second Edition

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PREFACE

When the four of us edited the first edition of this book, we would have been surprised and delighted to learn that it would ever merit a second edition and even more surprised that it would be commissioned relatively soon—in legal literature terms—after the first edition which was published in the winter of 2011/2012.

When OUP approached us to produce a second edition, we were pleased and flattered to be asked to do so. One of our number, Sara Collins, had left the law but we asked her, (without much hope of a positive response), whether she would like to re-join the editorial team for old time's sake. She declined. Instead, Sara produced a "*dazzling page-turner*" of a gothic novel. If only this publication would (or could) be described in such effusive terms as Sara's first novel, the *Confessions of Frannie Langton*. We have missed her life enhancing presence and incisive intellect on our editorial phone calls but can only rejoice in her success and wish her well.

Proceeding with a team of three, and trying not to feel too dispirited at there being no prospect of being photographed by glossy magazines and interviewed by the chat shows, our next problem was the B word—Brexit. How were we going to deal with the Jurisdiction and Cross Border chapter? Neither we nor our contributors had any idea what would happen to the various European conventions which currently govern enforcement and recognition within the EU when the United Kingdom might no longer be part of the EU (or might be in some indeterminate transition period) on publication.

We started 2019 thinking that the answer to this question would be apparent by early March 2019. That date passed and as we moved into the summer of 2019, with the date for handing over the manuscript to OUP speeding towards us and no more clarity on this question than in March, we took the editorial decision to pull the whole chapter on Jurisdiction and Cross Border issues, simply because the eminent author we had asked to write it, (who shall remain nameless), said there was no point embarking upon a project that might be entirely redundant at the point where he/she finished it or indeed on publication. We had considerable sympathy with that view and it was clearly the right decision; nearly 6 months later, as we write in November 2019, the position is no clearer.

In substitution, Michael Ashdown has written a masterful chapter 1 on English Trust Law Principles, an erudite analysis of the essential tenets of English trust law in 10,000 words. Required reading for those starting out in this area of practice, and all trainees arriving in a private client department with only a sketchy idea of what a trust is. For the more experienced practitioner, it should be a useful and easily digestible reference tool. We are hoping that by the time we come to prepare the third edition, the Brexit issue will be resolved and a comprehensive chapter on Jurisdiction and Cross Border issues will re-appear.

In terms of authors, some of the contributors to the first edition have revised their chapters; we have however taken the opportunity to seek new authors and co-authors, inviting the rising stars in this area of practice to contribute to this new edition. A number of chapters

have therefore been written by new authors and we hope that has the effect of freshening up the edition generally.

The law is as stated on 30 June 2019.

We must thank, first and foremost, each of our authors without whom none of this would have been possible. They were, as with the first edition, endlessly patient and almost universally phlegmatic when it came to the inevitable to and fro of how a chapter might be improved or better focused.

We must also thank Rachel Mullaly at OUP for her commitment to the project and particularly her help steering us through the more difficult decisions that we had to make about this second edition. We do of course extend our thanks to the whole team at OUP without whom it would not have been produced in such a timely fashion.

And finally, to our readers, we say, it may not be a "*dazzling page turner*", (what legal text book is?) but we do hope that it will at least prove itself a useful and digestible addition to reference tools in this fascinating area of practice.

Steven Kempster
Morven McMillan
Alison Meek
14 November 2019

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LIECHTENSTEIN

Stefan Wenaweser

A. Jurisdiction

Liechtenstein is the only continental European country to have adopted and codified the common law trust. The Liechtenstein trust ('*Treuhänderschaft*') was codified in 1926 in the Law on Persons and Companies[1] ('PGR') with clear inspiration from the English Trustee Act **28.01**

[1] Art 897–932 PGR.

1925.[2] Some English common law rules have been enacted (eg the equitable rules on tracing ('*Spurfolge*'; Art 912 (3) PGR, § 30 TrUG). In 1928 the Law regarding Trust Enterprises (abbreviated as 'TrUG') was passed. This law was modelled on the so-called Massachusetts Business Trust and inserted in the PGR as Art 932a and consists of 170 paragraphs.[3]

28.02 Identifying the source of Liechtenstein trust law is important because if the law needs to be interpreted, the court will apply the jurisprudence of the country of origin. Therefore, in relation to Liechtenstein trust law, in practically all cases the trust law of England and other common law countries will be referred to for interpretation purposes.[4]

28.03 The court's competence in the context of trusts goes beyond dispute resolution and comprises also a strong supervisory jurisdiction[5] which is generally dealt with in non-contentious proceedings called '*Ausserstreitverfahren*' (regulated in the 'AussStrG') as opposed to contentious proceedings which follow the rules of the Civil Procedure Law ('ZPO'). Even though they are referred to as 'non-contentious' proceedings, supervisory proceedings may become hostile, for example where a beneficiary attacks a trustee for breach of duty and applies for the removal of such a trustee by the court.

28.04 In its supervisory jurisdiction the court plays both a consulting and a controlling role. This has already been observed by Pierre Lepaulle in his work written almost nine decades ago, where he says, 'Le trust vit à l'ombre du Palais de Justice qui lui apporte à la fois le conseil et le contrôle.'[6]

28.05 Trust law has played an important role in the jurisprudence of the Liechtenstein Supreme Court ('OGH').[7] The OGH has resolved disputes involving fiduciary relationships or duties by applying Liechtenstein trust law principles.[8] The principles developed by this jurisprudence are applied by the Liechtenstein courts to all types of asset planning devices, in particular foundations and establishments, and not just the trust or the trust enterprise.[9]

28.06 The Liechtenstein courts will take jurisdiction, where international jurisdiction and national jurisdiction are applicable and where, in addition, the correct procedure is applied ('*Zulässigkeit des Rechtsweges*').[10]

[2] Beck, *Kurzer Bericht zum Personen-und Gesellschaftsrecht* (1925) Vaduz, 50.

[3] The law relating to trust enterprises is cited and abbreviated as TrUG, eg § 1 TrUG. Art 910 PGR provides for the supplementary application of the provisions of the TrUG to trusts.

[4] Court decisions in Liechtenstein are mainly published in the Liechtensteinische Entscheidungssammlung ('LES'). The Liechtenstein Supreme Court ('OGH') in LES 1989,3 ('as its Anglo-Saxon model'); OGH in LES 1991,162 ('on the basis of the Common Law trust'); see also OGH in its unpublished decision of 1 July 1996, Hp 51/94–23, p 15. Furthermore, jurisprudence of the Liechtenstein courts is published on <http://www.gerichtsentscheidungen.li>. See also: Wenaweser, 'Zur Rezeptionsfrage der Treuhänderschaft und ihrem Anwendungsbereich nach liechtensteinischem Recht' (2001) LJZ 1 and Bösch, *Die liechtensteinische Treuhänderschaft zwischen Trust und Treuhand* (1995) GMG Juris: Vaduz (subsequently referred to as: Bösch, *Treuhänderschaft*).

[5] The OGH is conscious of its important role in relation to trusts: see OGH in LES 1986,87.

[6] 'The trust lives in the shade of the Palace of Justice, which provides both guidance and control', Pierre Lepaulle, *Traité Théorique et Pratique des Trusts en droit interne, en droit fiscal et en droit international* (1932) Rousseau & Cie: Paris, 207.

[7] Jurisprudence of the Liechtenstein courts is published in LES as well as on <http://www.gerichtsentscheidungen.li>.

[8] LES 1987,114; LES 1988,60; LES 1989,3; LES 1990,105; LES 1991,162; LES 1991,143; LES 1992,45; LES 1993,12; LES 1997,119; LES 2007,479; LES 2008,272; LES 2009,45.

[9] LES 2009,45: Business Judgment Rule which is applied to trustees and also applied to directors of a company limited by shares.

[10] If the wrong procedure is applied, this will lead to nullity of the proceedings, for example if a matter is dealt with in non-contentious proceedings when it should have been dealt with in ordinary contentious proceedings (see OGH in LES 2009,199).

International Jurisdiction

28.07 Once the jurisdiction of the Liechtenstein courts is established, the international jurisdiction is also present.[11] Exceptions are only possible where there is a choice of law clause and thus the choice of a foreign court has been validly made by the parties.[12] It should be noted that the choice of a foreign court is generally not possible in relation to non-contentious proceedings ('*Aussers treitverfahren*')[13] pursuant to the court's supervisory jurisdiction in relation to trusts and foundations, for example in applications for directions from the court. But it is possible to provide for an arbitration clause for matters like the removal of a trustee.[14]

National Jurisdiction

28.08 In order for the Court of First Instance (*Fürstliches Landgericht*, 'LG') to have jurisdiction either the general jurisdiction or one of the special jurisdictions must be given. The general jurisdiction is established if a defendant is resident in Liechtenstein.[15] Unlike foundations, trusts do not have full legal capacity. This means that trusts or trust assets as such are not capable of being a party in a lawsuit.[16] In legal proceedings, the trustees must act in their own name as a party. In relation to trusts the general jurisdiction is given where the defendant is a Liechtenstein-resident trustee.[17] If the defendant is a legal entity, the company must have its domicile in Liechtenstein.[18] An exception to the general rule is where the trust deed contains an arbitration clause. In such a case the Liechtenstein courts will only have jurisdiction in exceptional cases.[19]

Special Jurisdictions

28.09 In addition to the general jurisdiction, there are several types of so-called 'special jurisdictions' which will establish national jurisdiction. For example, the LG has exclusive jurisdiction over disputes concerning immovable property located in Liechtenstein.[20] The parties may submit to Liechtenstein jurisdiction by express agreement (prorogation).[21]

[11] OGH in LES 2009,167; OGH in LES 2006,480.

[12] Frick, *Die Anerkennung und Vollstreckung ausländischer Entscheidungen in Zivilsachen im Fürstentum Liechtenstein—unter Berücksichtigung des schweizerischen, österreichischen und deutschen Rechts* (1992) Dissertation, Dike: St Gallen, 390 *et seq*; Wenaweser, *Die bindende Weisung im englischen und liechtensteinischen Trustrecht* (2001) Dissertation, Schaan (subsequently referred to as 'Wenaweser, *Die bindende Weisung*'), 93 *et seq*.

[13] Wenaweser, *Die bindende Weisung*, 94 note 427.

[14] See paragraph 28.81 (ADR).

[15] §§ 30 *et seq* JN.

[16] OGH in LES 2018,296.

[17] Up to and including 28 February 2013, Art 905 PGR provided that for trusts where a person residing outside of Liechtenstein had been appointed as trustee, at least one person or legal entity resident in Liechtenstein had to be appointed as co-trustee. This Liechtenstein residence requirement was repealed with effect from 1 March 2013. Under current law, if a Liechtenstein trust does not have a Liechtenstein-resident trustee, a legal representative must be appointed for the trust in accordance with Art 239 PGR.

[18] § 36 JN, Art 113 f, 232 PGR.

[19] See in paragraph 28.81 (ADR) below: exceptions are matters falling within the public supervision of foundations (Government Report No 53/2010, p 13) and generally proceedings which are initiated ex officio or by a public authority (ie the LG, the Foundation Supervision Authority 'STIFA' or the Attorney General) and based on mandatory law.

[20] § 38 JN.

[21] § 53 f JN.

It should be noted that the free choice of forum is restricted, for example in consumer cases.

Jurisdiction Based on Assets ('*Vermögensgerichtsstand*')

28.10 The special jurisdiction based on assets[22] is of particular importance in practice where for example the debtor is a beneficiary of a Liechtenstein trust or foundation. This special jurisdiction means that monetary claims may be pursued against an individual or a legal entity that does not have residence or domicile in Liechtenstein if such party has assets within Liechtenstein, for example, in the form of a deposit in a bank or a claim against a debtor (eg a trustee of a trust) resident in Liechtenstein. In relation to trusts a creditor of a discretionary beneficiary will not be able to file a claim against such a beneficiary of a Liechtenstein trust because she has no sufficient claim to assets in the hands of the trustee for this purpose, and therefore the jurisdiction based on assets is not satisfied.[23]

Jurisdiction in Supervisory Court Cases

28.11 The Liechtenstein courts have jurisdiction as the supervisory authority over a trustee of a Liechtenstein trust.[24]

Jurisdiction in Contentious Court Cases against Trustees

28.12 The Liechtenstein courts will always have jurisdiction when a claim is brought against a Liechtenstein-resident trustee of a trust.[25] This does not mean that in a contentious trusts case, Liechtenstein is always the appropriate forum. For example, where the trust's assets are comprised of immovable property located abroad or where a yacht forms part of the trust's assets it may well be advisable to consider whether the courts where the yacht is located or registered would be more appropriate as a jurisdiction. The primary reason for this is that, with the exception of Austria and Switzerland,[26] Liechtenstein judgments cannot be enforced abroad, although it may be possible to bring an action abroad on a Liechtenstein judgment and seek enforcement in an expedited procedure even if there is no bilateral treaty in existence.

Hague Convention on Recognition of Judgments

28.13 Liechtenstein is not a party to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971.

[22] *Vermögensgerichtsstand*, § 50 JN.

[23] See OGH eg in LES 2008,256; LES 2009,216: The OGH held that where a beneficiary has a claim which is dependent on the discretion of the trustee, the beneficiary has no fixed or certain interest as required by § 50 JN.

[24] Art 929 PGR. Wenaweser, *Die bindende Weisung*, 78 *et seq*. Exceptions are possible where an arbitration clause is contained in the trust deed. See below at paragraph 28.81 (ADR).

[25] This does not apply where the trust deed contains an arbitration clause. See to this below at paragraph 28.81 (ADR).

[26] See below at paragraph 28.18.

Hague Convention on Recognition of Trusts

28.14 The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition ('HTC') came into force for Liechtenstein on 1 April 2006.[27] The HTC does not contain any substantive trust law but governs, as its title states, the law applicable to trusts and the recognition of trusts. Art 6 and following Articles provide for the option to choose the law applicable to a trust. By default, a trust is governed by the law it is most closely connected with. Liechtenstein trusts comply with the trust definition in the convention. The Hague Trust Convention has not caused any modifications in Liechtenstein law. The reason why the convention is nevertheless important for Liechtenstein lies in Art 21, stipulating that each contracting state may reserve the right to recognize only those foreign trusts whose validity is subject to the law of a contracting state.

Conflict of Law Rules

28.15 Art 29(5) of the Liechtenstein Law on International Private Law ('IPRG') states that forced heirship claims are only admissible if they can be brought under both the law applicable to the estate of the deceased person and also the law governing the acquisition of such property, for example by a foundation or trustee of a trust ('*Erwerbsvorgang*'). This means that where limitation periods apply, the shorter period of either the law applicable to the estate of the deceased person or the law governing the acquisition of the property will apply. Where a transfer is made to a Liechtenstein trustee or foundation, Liechtenstein law may be chosen as the applicable law governing the transfer. This will lead to a two-year limitation period for the institution of forced heirship claims. Since a choice of law governing the gift to the trust or foundation is possible it would also be possible to choose a law which does not provide for forced heirship rules. However, it should be noted that there should be a sufficient connection between the donor and the law chosen, otherwise the choice may be open to challenge.[28]

28.16 According to Liechtenstein law a gift to a trust or foundation which was made two years or more before the death of the settlor cannot be challenged.[29] A forced heir cannot seek to set aside the trust or foundation as such but can merely claim from the trustee or foundation a sum of money to cover her forced heirship portion.[30]

B. Recognition and Enforcement of Foreign Judgments and Orders

28.17 The execution of a foreign judgment (or other foreign enforceable instruments) is possible in Liechtenstein according to Art 52 ff. Execution Code ('*Exekutionsordnung*' or 'EO') only if this has been provided for in treaties or if reciprocity has been guaranteed to the government

[27] For further information see: <http://www.hcch.net>.

[28] Jakob, *Die liechtensteinische Stiftung* (2009) Liechtenstein Verlag: Vaduz (subsequently referred to as, 'Jakob, *Stiftung*'), 299 N 692; Jehle, *Die Schuldverträge im Internationalen Privatrecht Liechtensteins* (2008) Dissertation, GMG Juris: Schaan, 114 *et seq;* Marxer and Partner, *Wirtschaftsrecht* (2009) Liechtenstein Verlag: Vaduz (subsequently referred to as, 'Marxer & Partner, *Wirtschaftsrecht*'), 333.

[29] § 785 (3) General Civil Code (ABGB).

[30] OGH in LES 2003,100.

by treaties or government policy statements. No such statements guaranteeing reciprocity have been given so far. Regarding the few bilateral and multilateral treaties concluded by Liechtenstein see below at paragraphs 28.18 to 28.22. Regarding the enforcement of foreign judgments in absence of an enforcement treaty see below at paragraph 28.23.

28.18 On 25 April 1968 Switzerland and Liechtenstein concluded a treaty on the Recognition and Enforcement of Court Decisions and Arbitration Awards in Civil Law Matters.[31] On 5 July 1973 Liechtenstein concluded a treaty on the same subject matter with Austria (published in LGBl 1975/20). The treaty with Austria also covers the reciprocal recognition of settlements and public documents.

28.19 Both treaties require all the following conditions to be met in order to recognize a judgment:

(a) Recognition of the judgment must not be contrary to public order of the state in which the judgment is asserted and a plea of *res judicata* must not be possible.
(b) The judgment must have been passed by a court with jurisdiction relating to the subject matter according to the principles set out in the treaty.
(c) The judgment must have entered into legal force according to the law of the state where it has been passed.
(d) In case of a default judgment, the writ of summons by which proceedings are instituted must have been served on the party in default personally or on a proper representative.

28.20 In 1972 Liechtenstein ratified the Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children (LGBl 1972/55) and in 1997 the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (LGBl 1997/110).

28.21 To date Liechtenstein has not signed or become a party to any other multilateral treaty or instrument; in particular, it is not a party to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988/2007 or the Council Regulation (EC) No 44/2001 of 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels-I Regulation).

28.22 The Liechtenstein Parliament consented on 19 May 2011 to the signing of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. It entered into force on 5 October 2011. The ratification of the New York Convention is the logical consequence of the new arbitral proceedings legislation which has been passed by Parliament in April 2010 and entered into force on 1 November 2010.[32]

28.23 Foreign judgments may generally not be enforced in Liechtenstein. Consequently a judgment creditor must obtain a Liechtenstein enforceable instrument against the judgment debtor before she can successfully levy execution in Liechtenstein. A foreign judgment is sufficient to be granted what is called '*Rechtsöffnung*', that is simplified proceedings to obtain a Liechtenstein enforceable instrument.[33] On the account of the '*Rechtsöffnung*' the creditor who has obtained a default summons[34] or other decision within summary proceedings[35]

[31] Published in LGBl 1970/14. Liechtenstein laws are advertised in the Legal Gazette which is abbreviated to LGBl. All Liechtenstein laws are available on <http://www.gesetze.li>.
[32] Reports of the Government No 151/2008 and No 53/2010, LGBl 2010/182.
[33] Art 49–53 RSO.
[34] '*Zahlbefehl*' according to §§ 577 *et seq* ZPO.
[35] '*Rechtsbot*' according to §§ 592a *et seq* ZPO.

may have the opposition ('*Widerspruch*') or legal proposal ('*Rechtsvorschlag*') filed by the debtor annulled by the court if the claim she has put forward is based on a Liechtenstein or foreign public instrument.[36] The respondent in such proceedings may avoid an enforceable instrument only by bringing an action for denial.[37] Once an action for denial has been brought, the merits of the case are decided upon in contentious proceedings before a court of law. In practice this means that if the opponent does not want a foreign judgment to be validated by *Rechtsöffnung*, the whole case has to be re-tried on the merits before the Liechtenstein courts.

C. Reserved Powers

28.24 Generally, Liechtenstein trust and foundation law permits the reservation of powers. Powers may be reserved by the settlor or founder for the exercise by herself or alternatively for example to be exercised by a protector or by another similar body. The settlor may for example reserve powers of appointment,[38] the power to appoint and remove trustees, a power to consent, or a power of amendment of the trust deed.[39]

28.25 Under Liechtenstein trust law, the possibility for the settlor to reserve powers is given in Art 917 PGR which stipulates that the settlor may, subject to mandatory rules of law, determine the conditions of the trust deed. The law thereby also includes the reservation of powers and specifically mentions a power of revocation as an example of a power that may be reserved by the settlor.

28.26 Art 918 (1) PGR limits the reservation of powers by the settlor and stipulates that the provisions in the trust deed must not lead to an obligation of the trustee to follow continuous directions of the settlor. In essence this provision draws a dividing line between a trust with reserved powers and a sham. Where the trustee according to the trust deed is bound to do nothing without a specific direction from the settlor the trust would be disregarded and a mere mandate agreement would be presumed according to Art 918 (2) PGR.

Protectors

28.27 Protectors are commonly used in relation to Liechtenstein trusts and also foundations. It is generally accepted in Liechtenstein legal writing[40] and jurisprudence[41] that trust deeds may provide for protectors and that the rights and obligations of protectors may be regulated in

[36] Art 49 (1) RSO.
[37] '*Aberkennungsklage*' according to Art 53 RSO.
[38] Art 932a § 80 (2) and (3) and § 111 (1) and (2) PGR.
[39] See eg Biedermann, *The Trust in Liechtenstein Law* (1984) Alvescot Press: London (subsequently referred to as: 'Biedermann'), 111 *et seq*; Biedermann, *Die Treuhänderschaft des liechtensteinischen Rechts, dargestellt an ihrem Vorbild, dem Trust des Common Law* (1981) Stämpfli: Berne (subsequently referred to as: 'Biedermann, *Die Treuhänderschaft*'), 139 *et seq*; Bösch, *Die liechtensteinische Treuhänderschaft zwischen trust und Treuhand* (1995) GMG Juris: Mauren (subsequently referred to as: 'Bösch, *Treuhänderschaft*'), 428 *et seq*.
[40] See eg Bösch, *Liechtensteinisches Stiftungsrecht* (2005) Stämpfli: Berne (subsequently referred to as: 'Bösch, *Stiftungsrecht*'), 240; Jakob, *Stiftung*, 179 note 414; Good, *Das Protektorat im liechtensteinischen Stiftungs- und Treuhänderschaftsrecht* (2019) GMG Juris: Mauren (subsequently referred to as: 'Good'), 85 *et seq*.
[41] See OGH in LES 1999,248: In this case the OGH held that a protector can never dispose of assets of a trust on behalf of and without the knowledge of the trustee and that the existence of a protector does not allow the trustee to dispense with her duty to obtain the legal and factual power of disposition over the trust's assets.

the trust deeds.[42] Commonly § 111(1) and (2) TrUG is regarded as a possible legal basis allowing a trust deed to provide for protectors.[43] According to this provision, the trust deed may as an alternative to the trustee give another body or a third party (referred to by the law as '*Kollator*') the right to designate beneficiaries and to determine their beneficial interest including the right to exclude beneficiaries.

28.28 It is common that protectors are given the right to add beneficiaries, to remove and appoint trustees, or to consent or object to certain proposed actions by the trustees (eg veto against a proposed payment out of capital).

28.29 It is generally accepted that where a protector violates her duties, the LG in its supervisory capacity may interfere and remove the protector.[44] Similarly where a protector without a valid reason refuses to give a required consent the court may either direct the protector to give such consent or the required consent may be given by the court itself.[45]

28.30 Protectors may be individuals or legal entities. Usually protectors are family friends or advisers of the settlor and may be based anywhere in the world as there is no requirement for a protector to be a Liechtenstein resident or national.

Statutory Reserved Powers

28.31 Liechtenstein trust law gives the settlor the freedom to define the powers of a trustee in the trust deed in a very wide sense. The law provides for a very general power of the trustee to do what is necessary to achieve the objects or purposes of the trust within the framework of the trust deed and the law.[46]

28.32 In addition, Liechtenstein trust law provides for some specific powers, for example:

(a) the power to insure the trust property;[47]
(b) the power to realize and reinvest the trust property;[48]
(c) the power to take out a liability insurance;[49]
(d) the power to enter into arbitration and mediation agreements;[50]
(e) the power of sale and mortgage;[51]
(f) the power of advancement.[52]

28.33 The power of investment provided for in Art 913 PGR is only of a subsidiary character. In practice it is of no importance because its limitations[53] do not apply where trusts for the benefit of persons residing abroad are concerned. The law itself states that this power only applies if the trust deed does not provide anything to the contrary.

[42] Bösch, *Treuhänderschaft*, 81 *et seq.*; Good, 109 *et seq.*
[43] Good, 109, sees § 40 (1) TrUG as possible basis.
[44] Bösch, *Treuhänderschaft*, 83; Good, 107 *et seq*, Art 929(3) PGR.
[45] Bösch, *Treuhänderschaft*, 83; Artd 919(6) and 927(2) PGR, § 113(4) TrUG.
[46] § 62 (4) TrUG; Biedermann, 281; Biedermann, *Die Treuhänderschaft*, 331.
[47] Art 922(1) PGR.
[48] Art 919(3) PGR.
[49] § 151(1) TrUG.
[50] § 70(2) TrUG.
[51] § 29(3) TrUG.
[52] Art 919(4) PGR and § 28(3) TrUG; see Biedermann, 270 *et seq.*; Biedermann, *Die Treuhänderschaft*, 318 *et seq.*
[53] This power of investment only permits very conservative investments.

Sham

28.34 The concept and principle of sham agreements is expressly dealt with by § 916 of the Liechtenstein General Civil Code ('ABGB'), which defines as a sham a declaration made with fictitious intent to a third person with her consent and provides that such agreement is null and void. If, however, another contract is concealed thereby, the true contract shall be considered binding. In relation to trusts, Art 918(1) PGR contains a specific additional definition for a sham and holds that where in the trust deed the settlor binds the trustee to follow his directions on a continuous basis, this will lead to the legal relationship being treated primarily as a mandate.[54]

28.35 The Liechtenstein Supreme Court in LES 2000,230 held the following in relation to sham transactions, which is applicable also to the determination whether a trust or foundation is a sham,

> A sham transaction occurs, where the parties have come to an agreement to the effect that the overtly concluded transaction shall not be valid at all or shall not be valid in the way the declarations read, where therefore the parties concertedly only bring about the (external) appearance [sham] of a legal transaction with a specific contents, yet do not intend to let the legal consequences incidental to the legal transaction in question occur or do not want these consequences to occur as laid down contractually. The sham transaction hence presupposes a mutual intent which must be given already at the time of conclusion of the sham agreement. The purpose of such a legal transaction will often be the deceit of a third party or a public authority. The transaction concluded merely in pretence has no effect between the parties, because it is not intended. If the parties did not want to conclude any legal transaction, the legal consequence [of the sham] is nullity.

28.36 In relation to trusts there are no published decisions dealing with sham issues. However, the Liechtenstein courts have had to deal with the sham concept in relation to foundations on a number of occasions and the principles developed there can be applied to trusts.[55]

28.37 According to the OGH in LES 1991,91, a foundation is considered to be a sham where the founder reserves powers with the intention to use the foundation assets for her own advantage and not according to the objects of the foundation.[56] This has been confirmed by the OGH which has clarified in LES 1998,332 that reserved powers (eg for revocation, for the amendment or other rights of intervention) are admissible and that only where the economic settlor deals with the assets in the trust or foundation as if they were her own bank account, the result is a void sham foundation or trust. In LES 1989,3 the obligation of the trustee to consult with the settlor has been qualified as permissible and complying with Art 918(1) PGR. The right of a settlor to determine beneficiaries (in the context of an establishment) has been regarded as complying with Art 918(1) PGR as it was considered to be a specific right to give directions, which is permissible, in contrast to an unspecific or general right to give directions to a trustee which was considered to infringe Art 918(1) PGR.[57]

[54] Art 918(2) PGR; no published decisions in relation to Art 918 PGR dealt with a trust according to Art 897 PGR but with other fiduciary relationships to which the Supreme Court applied the provision analogously: OGH in LES 1991,162 (the OGH held that a violation of Art 918(1) PGR where possible only leads to a partial invalidity or nullity of a fiduciary relationship); confirmed in OGH in LES 1997,119.
[55] For example OGH in LES 1991,91; LES 1998,111; LES 1998,332; LES 2002,41.
[56] Confirmed by the OGH in LES 1998,111 and LES 1998,332 and by the Constitutional Court in LES 2005,128.
[57] OGH in LES 1997,119.

28.38 The question of a foreign trust being a sham, that is a question that relates to the trust's validity, is governed by the law applicable to the trust according to Art 8(1) of the Hague Convention. Therefore, in relation to a trust governed by foreign law the sham trust doctrine of the applicable foreign law governing the trust as determined by Arts 6 and 7 of the Hague Convention will be applied by a Liechtenstein court.

D. Asset Protection and Insolvency

Fraudulent Dispositions Legislation

28.39 Art 67 of the *Rechtssicherungs-Ordnung* or 'Statute on Emergency and Interim Reliefs' ('RSO') enables a creditor of the settlor or a person who made a gift to a trust to contest the trust or the gift where:

(a) the plaintiff has an enforceable claim (ie a judgment for which she has obtained a warrant of execution from a Liechtenstein court[58]) but execution has not been successful or it has no prospects of being successful;[59] and
(b) the settlor or donor acted with the intention to defraud this creditor or to prefer certain creditors and the intention to defraud was recognizable to the recipient of the assets at the time when the funding took place.[60]

28.40 The RSO also contains provisions for the avoidance of legal acts without consideration or at an undervalue that took place within one year from the date of issuance of a warrant of execution by a Liechtenstein court.[61]

28.41 The burden of proof regarding all aspects (legal transaction, intention to deceive, recognizability of this intention) lies on the creditor instituting the action.[62]

28.42 Whether a legal act is avoidable in Liechtenstein has to be determined according to the special conflict of law rules contained in the RSO. An action[63] for the setting aside of a legal act can only be brought if the legal act is avoidable both under the law of the place of permanent or habitual residence of the debtor[64] and the law applicable to the legal act itself.[65] Where the laws so determined lead to two different applicable laws, the rules of the law which is more favourable for the transferee will be applicable.[66]

28.43 An action for the avoidance of a legal act must be filed within five years after the legal act took place.[67]

[58] Art 75(4) RSO. Since foreign judgments are generally not recognized and enforced in Liechtenstein (see paragraph 28.17 above) the creditor first has effectively to bring an action in a Liechtenstein court. The creditor may make an application to set aside the legal act only after unsuccessful execution in relation to a judgment.
[59] Art 64(2) RSO.
[60] Art 67(1) RSO.
[61] Arts 65 and 66 RSO.
[62] Arts 67(3) and 65(2) RSO.
[63] Art 72 RSO.
[64] Art 75(1) RSO.
[65] Art 75(2) RSO.
[66] Art 75(3) RSO.
[67] Art 74(1) RSO. According to Art 74(4) RSO an extension of five years may be obtained if, during the course of the first five years, the intention to file an action to avoid a legal act is notified to the debtor by formal writ with the assistance of the court. In practice such extension is very difficult to obtain since a creditor rarely obtains knowledge of a voidable legal act before she has an enforceable title.

'Piercing of the Veil'

28.44 A further possibility is that a creditor may try to pierce the (corporate) veil to access the assets directly. The Liechtenstein courts permit the piercing of the veil of a structure, for example a trust or a foundation, where the claimant is able to prove (1) an intention to abuse[68] the structure by the settlor or founder and (2) the factual control by the settlor or founder over the structure.[69] It is evident that the two required elements are difficult to prove.

Co-operation in Insolvency Matters

28.45 According to the jurisprudence of the OGH,[70] Liechtenstein insolvency law follows the principle of universality ('*Universalitätsprinzip*') in insolvency matters.[71] This means that foreign insolvency proceedings will be recognized in Liechtenstein if:

(a) no rights of separation ('*Aussonderungsrecht*') or rights for separate satisfaction ('*Absonderungsrechte*') of third parties are opposed to such recognition;
(b) no domestic insolvency proceedings have been initiated; and
(c) the respective foreign country grants reciprocal treatment.[72]

28.46 In practice a foreign insolvency court would have to apply for co-operation in an insolvency matter by way of letters rogatory. The LG would then ask the Appeal Court ('*Fürstliches Obergericht*' 'OG') for confirmation whether reciprocity is given in relation to the requesting state.

28.47 In relation to trusts it should be noted that the insolvency of the settlor has no effect on the existence of the trust. Creditors of the trust accordingly only have the possibility of challenging the trust according to the principles of fraudulent dispositions legislation.[73] Creditors of beneficiaries only may challenge the trust if and insofar as a beneficiary has a claim (legal entitlement) and where no provision is contained in the trust deed whereby the creditors of beneficiaries shall not be permitted to deprive the beneficiaries of their claim to a beneficial interest.[74]

28.48 Liechtenstein procedural laws do not provide for a process for disclosure of documents. According to § 307(2) ZPO even in relation to documents the production of which has been ordered by the court, a defendant cannot effectively be forced to produce such documents. If she refuses to present the documents, the court may only take this into consideration in the weighing of evidence in its discretion. The difficulty a plaintiff faces in this respect is that she often does not know what documents, which are in the hands of the defendant, might assist her case. Ultimately this very often leads to the result that the plaintiff cannot prove essential facts.[75]

[68] See eg OGH in LES 2010,94: precondition for the piercing of the veil of a foundation is eg the intention to frustrate the enforcement of lawful claims by creditors of the founder.
[69] See eg OGH in LES 1991,143; Constitutional Court in LES 2005,128.
[70] See OGH in LES 2004,28.
[71] See Gasser, 'Neues zum internationalen Insolvenzrecht in Liechtenstein'(2004) LJZ 24.
[72] Art 5(2) Insolvency Code ('*Konkursordnung*', 'KO').
[73] Art 907(4) PGR.
[74] Art 914(2) PGR and Art 552 § 36 PGR; Gasser, 'Neues zum internationalen Insolvenzrecht in Liechtenstein' (2004) LJZ 24 [26].
[75] Gasser, in Batliner and Gasser (eds), *Litigation and Arbitration in Liechtenstein*, 2nd edn (2013) Stämpfli: Berne, 29–30.

E. Removal and Retirement of Trustees and Protectors

Court's Power to Remove

28.49 The Liechtenstein courts have an inherent power to remove trustees[76] and protectors.[77] A trustee or protector may be removed by the court for certain reasons. Such reasons may include a gross violation of duties, or because a trustee is incapable or unsuitable to act as trustee, or where a conflict of interests exists.[78]

28.50 The court may act ex officio if it becomes aware of a gross violation of duties by a trustee.[79] Alternatively the court may initiate proceedings for the removal of a trustee upon a complaint ('*Anzeige*') filed by an interested party (eg a co-trustee,[80] a beneficiary,[81] a protector, or the settlor[82]).

Voluntary Retirement and Statutory Powers of Retirement

28.51 Art 908 PGR[83] deals with the retirement of the trustee. If a trustee has agreed to act as trustee she must continue to act for at least one year if she is capable to act ('*handlungsfähig*') and unless the trust deed contains a different rule. In practice, trust deeds often provide that no minimum period applies.

28.52 If the trust deed does not state otherwise, the trustee is entitled to retire voluntarily as at the end of each calendar year with three months' notice unless important reasons justify a shorter notice period.[84] Again in practice, trust deeds usually modify this provision to allow trustees to resign at any time with shorter notice periods.

28.53 According to Art 908(3) PGR, if the trust deed does not state otherwise and/or if there is no existing co-trustee or settlor or no beneficiary with a claim, the retirement notice must be submitted to the Commercial Register division at the Office of Justice. If no successor trustee is designated or alive or capable to act, then the LG must be informed and it will then appoint a successor trustee according to Arts 908(4) and 904 PGR.[85]

[76] Art 929(3) PGR, §54(2) TrUG; OGH (1994) 17 January Hp 28/93–30 (unpublished); confirmed by OGH in LES 2008,82, where the OGH clarifies that the supervisory competence of the LG cannot be totally excluded in the trust deed.

[77] Bösch, *Treuhänderschaft*, 83; Art 929(3) PGR.

[78] This is expressly foreseen in § 54(2) TrUG.

[79] Art 929(3) PGR and § 54(2) TrUG; OGH in LES 2017,66 [71 *et seq*]; OGH in LES 2018,125 [130, consid 11.12].

[80] Art 929(3) PGR.

[81] Art 929(3) PGR.

[82] Art 929(3) PGR only mentions trustees and beneficiaries as possible applicants, whereas § 54(2) TrUG refers to 'interested parties' ('*Beteiligte*') which includes the settlor. Due to the supplemental applicability of this provision to trusts according to the PGR the settlor is also a possible applicant.

[83] See also Biedermann, 191 *et seq*.; Biedermann, *Die Treuhänderschaft*, 231 *et seq*.

[84] Art 908(2) PGR.

[85] Art 908, 909, and 904 PGR contain detailed rules regarding the steps that need to be taken when a trustee dies, becomes incapable to act or insolvent, or is not prepared to assume the office of trustee and who can or must make the necessary notifications or applications for the appointment of a trustee. These rules apply where nothing else is foreseen in the trust deed.

Indemnities

28.54 Generally trust instruments will provide for the indemnification of outgoing trustees. Liechtenstein trust law provides for a right to a release or discharge of an outgoing trustee in Art 919(7) PGR which refers to Art 920(3) and (4) and Art 225 PGR. According to these provisions, if the trust deed does not provide for an indemnification of the outgoing trustee by the new trustee, a discharge may be obtained by the settlor or, if she is no longer alive, by the beneficiaries with a claim to capital or income.[86]

28.55 If no discharge can be obtained by the persons designated in the trust deed (ie normally the new or incoming trustee) and/or the law (ie the settlor or beneficiaries with a claim), then the outgoing trustee can obtain a discharge from the court.[87]

F. Rights to Information

28.56 The law provides for rights to information of beneficiaries in Art 923 PGR.[88] Art 923 PGR contains provisions regarding the rendering of accounts and the provision of information. Art 923 PGR foresees a mere duty to prepare annual statements of assets ('*Vermögensverzeichnis*'), whereby simple records in the sense of a revenue and expenditure account are sufficient,[89] and to provide information at any time regarding the state of the trust affairs.

28.57 Art 923 (2) PGR provides that if an auditor is named in the trust deed the right to receive accounts only vests in the auditor. If there is no auditor named in the trust deed the right vests in the settlor. Only if there is no auditor named and if the settlor is dead or for another reason unavailable (eg incapacitated) the right accrues to the beneficiary with a claim.[90] If there is neither an auditor, settlor, nor beneficiary with a claim, the law provides that the annual accounts must be submitted to the LG.[91]

28.58 Since the rules in Art 923 PGR are regarded in legal literature as unsatisfactory, some authors[92] suggest that the principles set out in § 68(1) TrUG, which governs the information rights of beneficiaries of a trust enterprise, shall be applied to trusts, as this provision expressly deals with the granting of information to beneficiaries and is much more comprehensive than Art 923 PGR.[93] § 68 TrUG provides that trustees, in the absence of contrary provisions in the trust deed, have to give, in an equitable manner, information as far as their rights are concerned to each beneficiary or beneficiary with a reversionary interest in the

[86] See Biedermann, 301 *et seq*, who criticizes the reference to the settlor contained in this provision as difficult to reconcile with the common law trust concept. Biedermann, *Die Treuhänderschaft*, 353 *et seq*.

[87] Art 919(7) in connection with Art 225(2) PGR.

[88] The provision is criticized by Biedermann, pp 251 *et seq*; Biedermann, *Die Treuhänderschaft*, 297 *et seq*.; Bösch, *Treuhänderschaft*, 79; and Summer, 'Vertrauen ist gut, Kontrolle ist besser–die Auskunftsrechte von Begünstigten im liechtensteinischen Stiftungs– und Treuhandrecht' (2005) LJZ 36, 46 (subsequently referred to as: 'Summer, *Auskunftsrecht*').

[89] Government Report No 134, 2011, p 14: the notes state that double-entry accounting in the technical sense is not required. The business development and asset development should be deducible from the records.

[90] See also: Summer, *Auskunftsrecht*, 46.

[91] Art 923(2) PGR.

[92] See eg Biedermann, 254; Biedermann, *Die Treuhänderschaft*, 300.

[93] See also OGH in LES 2005,392 regarding the extent of the information rights granted by § 68 TrUG in relation to a foundation.

trust. The information to be provided includes all facts and circumstances of the trust, in particular the value and investment of the trust's assets. Restrictions apply where the exercise of these rights is abusive or where the rights of other beneficiaries might be infringed.

28.59 The OGH confirmed in a recent leading case[94] dealing with a trust that § 68(1) and (2) TrUG supplements Art 923(2) PGR.[95] In this decision the OGH further held that because § 68 TrUG was—in comparison to Art 923(2) PGR—the more specific and comprehensive provision it was appropriate to align the two provisions in this sense and to apply Art 923(2) PGR in addition to § 68 TrUG.[96] In the same decision the OGH has further confirmed that mere discretionary beneficiaries (*'Ermessensbegünstigte'*) are not accorded information rights by the law.[97] However, the OGH made it clear that the settlor has the possibility to provide discretionary beneficiaries with such rights in the trust deed.[98]

28.60 According to the OGH the restriction or limitation of information rights is permissible and may not be categorically excluded.[99] The limitations generally seem to be accepted as long as there is an effective control over the administration of the trust.[100] The OGH held (in relation to a foundation) that the limitation of information rights of beneficiaries always has to be determined in the individual case and based on the facts of the case and it has made it clear that a general exclusion of any information rights of beneficiaries is not permissible.[101] In LES 2018,125 the OGH held that Art 923(2) PGR gives the settlor the possibility to exclude to a large extent the duty of the trustee to provide information to beneficiaries by the designation of an auditor in the trust deed.[102]

28.61 Procedurally, the OGH held that where a trust is administered by several co-trustees it is not necessary that all co-trustees are joined as defendants in an action for information but that it is sufficient to sue for example the co-trustee who is resident in Liechtenstein.[103]

Confidentiality Statutes

28.62 Liechtenstein law has no specific confidentiality statutes but Art 923 PGR and § 68 TrUG provide that the rights to accounts and information of beneficiaries may be limited by the settlor in the trust deed.[104] Restrictions in the trust deed so as to give beneficiaries only

[94] OGH 06.04.2018, 09 CG.2016.353, published in LES 2018,125.
[95] LES 2018,125 [129, consid 11.3].
[96] LES 2018,125 [129, consid 11.3] with reference to LES 2005,392.
[97] Art 923(2) PGR and § 68 TrUG only refer to beneficiaries and reversionaries with an entitlement but not to discretionary beneficiaries. The OGH, in LES 2018,125 [130, consid 11.8], held that contrary to some critical comments in literature there is no deficit in legal protection for discretionary beneficiaries of a trust and that there are effective means of control over trustees of a discretionary trust pursuant to Art 912(3), 915(5), 924, 925, 927(1) and (7), 929 PGR which also provide control mechanisms for discretionary beneficiaries. See also OGH in LES 2017,66 [79 *et seq*].
[98] OGH in LES 2018,215 [130, consid 11.8].
[99] OGH 28.04.1996, 3 C 452/92–39 (unpublished); see also OGH 07.05.1998, 5 C 219/95–56 (unpublished).
[100] OGH 10.09.1999, 3 C 134/95–75 (unpublished).
[101] OGH in LES 2008,272 (where it was held that a letter of wishes does not have to be disclosed to the beneficiaries).
[102] OGH in LES 2018,125 [130, consid 11.7 with reference to OGH in LES 2008,272]. It is apparent that the law, as confirmed by the OGH, accepts limitations to the beneficiaries' information rights provided that another person or body such as an auditor can exercise control over the trustee and if necessary enforce the trust, eg by seeking the assistance of the supervisory court pursuant to Art 929 PGR (see also OGH in LES 2018,125 [131, consid 11.12].
[103] OGH in LES 2009,52.
[104] See paragraph 28.60.

access to reports of the auditor confirming correct management of the trust by the trustee and her compliance with the terms of the trust deed have been held to be permissible.[105]

Statutory Provisions in Relation to Rights to Information

28.63 See paragraphs 28.56 to 28.61 in relation to Art 923 PGR and § 68 TrUG.

Provisions in the Deed

28.64 See paragraphs 28.59 and 28.60.

Protector's Rights to Information

28.65 Since the protector is not expressly regulated in the law relating to trusts, the protector's rights to information may be determined freely in the trust deed. Liechtenstein trust law does not expressly provide for information rights of a protector. Nevertheless, the protector will be entitled to receive all the information that is necessary for her to fulfil her duties. Therefore, the scope of the right of information of a protector will depend on the rights and duties provided for in the trust deed.[106]

G. Guidance to Trustees, Protectors, or Enforcers

Statutory Provisions

28.66 Art 919(6) PGR and § 150 TrUG enable a trustee to seek the court's guidance in cases of doubt.[107]

28.67 Art 919(6) PGR provides that where a trustee is in doubt as to the permissibility or adequacy of an administrative measure or a disposition over the trust assets or an unusual transaction creating obligations or where a co-trustee refuses to co-operate, the trustee may apply to the LG in its supervisory capacity to give a (binding) direction.

28.68 § 150 (1) TrUG clarifies that a direction may also be obtained where the interpretation of the trust deed is unclear, for example as regards the determination of capital and income.

28.69 Art 919(6) and § 150(1) TrUG expressly provide that only a selection of possible questions may be put before the LG, therefore the following types of applications for directions appear to be permissible under Liechtenstein law:[108]

(a) application for the construction of a trust deed (construction application);
(b) application to obtain directions regarding the exercise of discretion;

[105] OGH 28.04.1996, 3 C 452/92–39 (unpublished) in relation to a foundation.
[106] OGH in LES 2010,239 in relation to a foundation.
[107] Wenaweser, *Die bindende Weisung*, 91 *et seq*.
[108] Ibid 136 *et seq*.

(c) application to obtain directions regarding the exercise of a power of appointment;
(d) application to obtain directions regarding the investment of trust assets.

28.70 Where a trustee acts upon the directions given by the court no claims for damages may be asserted vis-à-vis the trustee.[109]

28.71 § 147(1) TrUG provides that where a trustee has committed a breach of trust but is able to show that she acted in good faith and that under the circumstances she was unable to obtain directions from the court, the court may in its free discretion determine whether a liability on the part of the trustee exists or not. This provision is clearly inspired by Trustee Act 1925, s 61.[110]

Administration Actions

28.72 There is no provision for administration actions under Liechtenstein trust law but there are special proceedings which may be compared to administration actions.

28.73 Liechtenstein law contains provisions for the implementation of a trust supervisory body ('*Treuüberwachungsstelle*'),[111] which may be appointed where there are problems with the administration of a trust or possible damages to the trust's assets are asserted. A member of the trust supervisory body, known as a supervising trustee ('*überwachender Treuhänder*'), has a duty to ensure the pursuance of the trust's objects. The supervisory court may appoint supervising trustees as an interlocutory measure[112] to safeguard the trust's administration and determine the rights and duties of the supervising trustees.[113]

28.74 Furthermore, Liechtenstein trust law provides for an official audit ('*Amtliche Revision*') of trusts.[114] Such audit may be applied for by beneficiaries or by a co-trustee where important reasons are given. Again, the court ordering an official audit may determine the rights and duties of the official auditors.

H. Involvement of Charitable Interests

Charity Legislation

28.75 It is possible under Liechtenstein law to create charitable trusts and charitable foundations.

28.76 Art 107(4a) PGR contains a definition of 'charitable'. Pursuant to this definition, purposes are regarded as charitable if the intended activities of the trust or foundation foster the public benefit in charitable, religious, humanitarian, scientific, cultural, moral, social, sporting, or ecological fields, even if the activities are only in favour of a determined circle of persons.

[109] § 150(1) TrUG; Wenaweser, *Die bindende Weisung*, 125 *et seq*.
[110] Biedermann, 308 *et seq*.; Biedermann, *Die Treuhänderschaft*, 361 *et seq*.
[111] §§ 147–160 TrUG; Wenaweser, *Die bindende Weisung*, 81 *et seq*; OGH 17.01.1994, Hp 28/93–30 (unpublished); OGH in LES 1983,45; LES 1984,88 and LES 1989,19; OG 28.05.2005, 10 HG. 2004.55–102 (unpublished).
[112] For example, OG 28.05.2005, 10 HG. 2004.55–102 (unpublished).
[113] § 156(1) TrUG.
[114] §§ 161–164 TrUG; the OGH has only dealt with this possibility in LES 2005,410.

28.77 Whereas charitable foundations must be entered into the Commercial Register without exceptions there are no special registration requirements for charitable trusts.[115] Charitable foundations—again as opposed to charitable trusts—must have an auditor who is appointed by the court upon proposal by the founder.[116]

28.78 In relation to charitable trusts Art 927(7) PGR stipulates that the rights which normally accrue to beneficiaries with a claim may be exercised by the Representative of the Public Law.[117] TrUG contains several provisions concerning charitable trust enterprises which may be applicable to charitable trusts if the trust deed does not exclude the application of these provisions.[118]

Position of the Attorney General (or equivalent)

28.79 The Attorney General (in the PGR referred to as 'Representative of the Public Law') is mentioned only in Art 927(7) PGR in relation to trusts. This dispositive provision gives the Attorney General the ability to exercise the same rights as a beneficiary with a claim vis-à-vis a charitable trust and comparable trusts where there are no beneficiaries with a claim (eg pure purpose trusts). It is possible to give rights of inspection etc to a protector or enforcer, in which case the applicability of Art 927(7) PGR will normally be excluded in the trust deed.

28.80 In relation to foundations, the Foundation Supervision Authority ('*Stiftungsaufsichtsbehörde*' or 'STIFA') has an important role. Charitable foundations are subject to the supervision of the STIFA. The STIFA decides on the possible necessity of supervisory measures for the protection of the foundation's assets on the basis of audit reports. If the STIFA deems specific supervisory measures necessary it must make an application to the competent judge at the LG in non-contentious proceedings. In relation to private foundations the STIFA is entitled to verify the correctness of data in deposited formation or amendment notifications.

I. Alternative Dispute Resolution

Arbitration

28.81 Trust disputes may be resolved by arbitration where the trust deed contains an arbitration clause (or where the parties to a possible dispute agree to submit to an arbitral tribunal).

28.82 Where a trust governed by a foreign law is created and registered in Liechtenstein, Art 931(2) PGR makes it mandatory that an arbitral tribunal is anticipated for any disputes between the settlor, the trustee, and the beneficiaries.

28.83 Liechtenstein passed new legislation regarding arbitration proceedings with effect from 1 November 2010.[119] The new arbitration legislation generally follows the Austrian model

[115] Charitable foundations only acquire legal personality upon registration.
[116] Exceptions to this mandatory auditor are possible where the foundation's funds are small (eg less than CHF 750,000.00) or where other special reasons apply.
[117] See paragraph 28.79.
[118] Art 910(5) PGR contains a general reference to the law on trust enterprises.
[119] §§ 594–635 ZPO; LGBl 2010/182.

which in turn is modelled upon the Model Law on International Arbitration ('UNCITRAL Model Law'). However, the Liechtenstein arbitration law departs in certain aspects from its model to make it more attractive and effective.

28.84 The new arbitration law permits the submission of practically[120] all types of disputes in relation to trusts, foundations, or companies to arbitration including in particular:

(a) the removal of trustees (or foundation council members);
(b) the challenging of resolutions of trustees (or the foundation council);
(c) the appointment of extraordinary auditors.

28.85 The advantages of arbitration are the following:

(a) the composition of the arbitral tribunal and the appointment of its members may be freely determined;[121]
(b) the seat of the arbitration tribunal and the language of the arbitration proceedings may be freely determined;[122]
(c) speedy proceedings, as there is only one instance and the arbitral award may only be challenged before the Appeal Court on very limited formal grounds;[123]
(d) arbitration proceedings are confidential;
(e) special provisions have been enacted to provide for extra confidentiality of the proceedings before the Appeal Court in case the arbitral award is challenged.[124]

Mediation

28.86 While arbitration is seen as the main alternative dispute resolution mechanism to ordinary state court litigation, mediation proceedings to date have very little practical importance in trust matters.

28.87 The rules governing mediation in Liechtenstein are contained in the Law regarding Mediation in Civil Law Matters ('ZMG'). The commencement and proper continuation of mediation suspends the statute of limitations in relation to the rights and claims subject to mediation.[125] The suspension of the statute of limitations is effective if one of the parties files a legal action with the Princely Court of First Instance ('LG') within 14 days from the termination of the mediation.[126] A settlement reached in the mediation does not constitute an enforceable instrument pursuant to the EO and thus cannot be enforced without further procedural steps. Mediation is available for all types of civil law matters. Mediation procedures are of minor importance in Liechtenstein, since Liechtenstein lawyers usually attempt

[120] Exceptions are matters falling within the public supervision of foundations (Government Report No 53/2010, p 13) and generally proceedings which are initiated ex officio or by a public authority (ie the LG, STIFA, or the Attorney General) and based on mandatory law.
[121] §§ 603 and 603 ZPO.
[122] §§ 612 and 613 ZPO. This allows the appointment of eg English trust law experts as arbitrators or the use of English language documents.
[123] § 628 ZPO. Theoretically the decision of the Appeal Court may be challenged with the extraordinary remedy of an appeal to the Constitutional Court ('StGH') for the alleged violation of constitutional rights.
[124] § 633(2), (3), and (4) ZPO. This was necessary as the proceedings before the Appeal Court are generally public. In this respect it should be noted that for example supervisory court matters are generally heard in private to protect the privacy of the involved parties (see Wenaweser, *Die bindende Weisung*, 109 *et seq*).
[125] Art 18(1) ZMG.
[126] Art 18(3) ZMG.

bilaterally to settle a case (without the involvement of a mediator), before formal proceedings are initiated.

J. Procedural Issues

28.88 The Liechtenstein court system and procedural laws were both largely copied from the Austrian model. The Liechtenstein legal system is a civil law system.

Court Structure

28.89 The Liechtenstein Courts are all located in Vaduz, the capital of the country. There are three levels of civil law courts which are also competent in relation to trust disputes:

(a) Fürstliches Landgericht (Princely Court of First Instance, 'LG')
(b) Fürstliches Obergericht (Princely Court of Appeal, 'OG')
(c) Fürstlicher Oberster Gerichtshof (Princely Supreme Court, 'OGH')

28.90 In addition to the three courts mentioned above there is the Constitutional Court (Staatsgerichtshof; 'StGH') which acts as an extraordinary court of appeal. Applications can be made to the StGH to review final decisions for alleged violations of constitutional rights or rights granted by the European Convention on Human Rights.

The Local Bar

28.91 The Chamber of Lawyers (<http;//www.rak.li>) is a corporation under public law. Its duties include the duty to maintain the honour, the reputation, and the rights as well as to monitor the duties of the legal profession. Another of its duties is the promotion of its members' economic interests. All Liechtenstein lawyers who are entered into the List of Lawyers kept by the government are members of the Chamber of Lawyers. Currently the Chamber of Lawyers has approximately 250 lawyers. All lawyers admitted to the Bar may plead before the courts and there is no distinction between solicitors and barristers as in England.

Representation and Capacity

28.92 Where a person lacks capacity (ie is under age or otherwise incapable to act), either an existing legal representative (eg a parent of a child) or a curator, who has to be appointed by the court upon application of the party filing the application or action, has to represent such person in proceedings before the court. In relation to the appointment of a curator for an incapable person the applicant has to advance the costs for the curator pending the outcome of the proceedings. The court will order the applicant to deposit adequate sums covering the costs of the curator.

28.93 There are provisions in Liechtenstein trust law[127] relating to the representation of unknown or uncertain beneficiaries or where there are numerous beneficiaries with the same interests.

[127] § 46 f TrUG; See Wenaweser, *Die bindende Weisung*, 118 *et seq*.

Appeals

28.94 Each decision on the merits of the case passed by the LG may be appealed to the OG within either 14 days if an order is concerned, or within four weeks if a judgment is concerned. Decisions of the OG may be appealed to the OGH as follows: an order overturning the decision of the LG may in general be appealed to the OGH within 14 days,[128] where an order of the OG confirms an order of the LG no further appeal is possible to the OGH. Judgments of the OG may in general be appealed to the OGH within four weeks. An appeal to the OGH is, however, not possible and the judgment of the OG is final in the following two cases: (a) small-claims proceedings (values in dispute up to 5,000 Swiss francs;[129] and (b) generally[130] cases with values in dispute up to 50,000 Swiss francs in which the OG has confirmed the decision of the LG.

28.95 Decisions of the OGH which are final and ultimately determining a matter (ie which are eg not merely referring a matter back to the lower instance(s)) and orders of the OG which are confirming a LG order may be appealed to the StGH within four weeks for the alleged violation of fundamental rights granted by the Constitution or by the European Convention on Human Rights. The StGH can only quash the order or judgment which is appealed from and cannot issue a new decision on the merits. The ordinary courts are, however, bound by the opinion of the StGH and must revise the quashed decision in accordance with its rulings.

Costs

28.96 The losing party must pay the costs of the other party as well as the court's fees. In this regard there is little discretion given to the court.

28.97 Costs are awarded according to a legal tariff which fixes costs of attorneys in accordance with the value in dispute and not based on hourly rates. Where the value in dispute is relatively low, a cost award may not cover all the attorney's fees which will then have to be borne by the client. Usually the majority of the costs involved will be recovered by the winning party where a value in dispute of several hundred thousand Swiss Francs would be involved.

28.98 In certain cases, for example supervisory court cases, the value in dispute is very often rather low (eg CHF 50,000) because there is no monetary claim at issue which lends itself to fix the value in dispute.

Security for Costs

28.99 According to § 57(1) ZPO a plaintiff or appellant who is not resident in Liechtenstein must provide security for costs to the defendant if she requests this.[131] According to § 57(2) ZPO

[128] Exceptions from this general rule apply eg with respect to orders concerning the sequence of the proceedings or costs which can, in any event, only be appealed to the OG.
[129] § 471(1) ZPO in connection with 1 535(1) ZPO.
[130] Some exceptions apply.
[131] After the StGH (StGH 2006/94, consid 2.5) held that the previous provision violated Art 4 EEA Agreement, new provisions regarding security for costs which are compatible with EEA rules were enacted in June 2009, LGBl. 2009,206.

security for costs cannot be requested where an order for costs of the Liechtenstein courts may be enforced against the plaintiff or appellant in her country of residence.

28.100 The amount of the security for costs is calculated according to the legal tariff and may be very considerable if the dispute is of high value. The defendant requesting security has to set out a fairly detailed estimate as to the presumed number and duration of hearings, the number of witnesses to be heard etc. The court then adjudicates upon this basis security for costs and sets a time for the payment or deposit of the security for costs (usually four weeks).[132] The respective order may be appealed by the plaintiff or appellant to the Appeal Court whose decision is final.[133]

28.101 If during the proceedings it emerges that the security for costs deposited is not sufficient to cover the costs, an additional security for costs may be applied for by the defendant.[134]

28.102 If the plaintiff or appellant does not deposit the security (or an additional security) within the delay prescribed by the court, the action or appeal will be declared as taken back and the case lost by the plaintiff or appellant.[135]

K. Cases of Note

LES 2009,216

28.103 Jurisdiction based on assets was denied in the case of a discretionary trust. The OGH held in the case of a trust that jurisdiction based on assets was not given in relation to a discretionary beneficiary since the questions, if, when, and how much such a beneficiary would receive out of the trust fund were matters for the full and unfettered discretion of the trustee.[136] This decision is noteworthy from an asset protection point of view.

LES 2010,226

28.104 Where the entire trust fund is frozen by an injunction the respective order must contain a reservation to the end that the costs of the ordinary administration of the trust may still be paid out of the trust fund.[137] In such a case the trustee has to apply for the determination of her compensation by the court in non-contentious proceedings according to Art 921 PGR.

LES 2017,66

28.105 Pursuant to Art 927(2) PGR only beneficiaries with an entitlement ('*anspruchsberechtigte Begünstigte*') may file an application to the court for the necessary orders to remedy the

[132] § 59(1) and § 60 ZPO.
[133] § 59(2) ZPO.
[134] § 62(2) ZPO.
[135] § 60 ZPO.
[136] See also paragraph 28.10.
[137] The OGH referred to the analogous jurisprudence in relation to foundations in LES 2000,37.

defect where such beneficiaries consider that their rights have been impaired by a disposition or administrative act of the trustee. In this case a discretionary beneficiary invoked Art 927(2) PGR unsuccessfully. The OGH firmly rejected the view expressed in legal literature that this amounted to a vacuum of control in the discretionary trust and maintained that the law clearly also accords discretionary beneficiaries with legal protection and control mechanisms.[138] In particular, the OGH has pointed out that a complaint by a discretionary beneficiary pursuant to Art 929(3) PGR triggers supervisory proceedings in which the discretionary beneficiary may also become a party depending on the facts of the case.[139] Where the discretionary beneficiary is not accorded the role of a party in proceedings based on Art 929(3) PGR the court has to act *ex officio* and if important reasons are given may remove a trustee from office.[140]

LES 2018,125

28.106 It is settled case law of the OGH that a declaration of a founder in the form of a letter of wishes falls within the sphere of privacy and confidentiality of the foundation and thus within the legally protected personal sphere of the foundation which generally precludes the information interests of beneficiaries. The same has been held by the OGH in its decision of 6 April 2018 in relation to trusts.[141] The OGH further held that it is irrelevant whether the letter of wishes has been written before or after the formation of the trust. In both cases the letter of wishes is considered to form part of the sphere of privacy and confidentiality of the trust and may therefore not be inspected by beneficiaries.[142]

L. Special Legislation

Non-charitable Purpose Trusts

28.107 Purpose trusts are generally permitted under Liechtenstein law.[143] So-called '*Zwecktreuhänderschaften*' or purpose trusts may have any purpose, with the exception of purposes that are contrary to law, immoral. or contrary to national interests.[144]

Foundation Legislation

28.108 Liechtenstein has had foundation legislation since 1926. On 1 April 2009 the revised law on foundations entered into force. It offers both common-benefit (charitable) and

[138] OGH in LES 2017,66 [80] referring to Art 912(3), 915(5), 924, 925, 927(1) and (7) and 929(3) PGR. This jurisprudence has been confirmed by the OGH in LES 2018,125 [130, consid 11.8].

[139] OGH in LES 2017,66 [80].

[140] OGH in LES 2017,66 [72].

[141] OGH in LES 2018,125.

[142] OGH in LES 2018,125 [134, consid 11.19 ('Die Zugehörigkeit einer derartigen Urkunde zur Privat- und Geheimsphäre eines Trusts ist nicht davon abhängig, ob sie im Zeitraum vor oder nach Errichtung des Trusts verfasst wurde.')] with reference to two cases dealing with foundations: LES 2014,122 and LES 2008,272.

[143] See Biedermann, 28; Biedermann, *Die Treuhänderschaft*, 42; eg, Art 910(5) PGR and § 1 and 3(1) TrUG.

[144] The following provisions deal with purpose trusts: Art 927(7) PGR, §§ 3(1) and 78 *et seq.* TrUG, in particular § 79(1) TrUG and § 80(1) TrUG; see also Wenaweser, *Die bindende Weisung*, 114 and 117 *et seq.*

private-benefit foundations an attractive legal basis and therefore puts Liechtenstein in a good position in competition with foundation law regimes.

Some of the features of a Liechtenstein foundation may be summarized as follows: **28.109**

(a) The founder has complete freedom regarding whom she wants to appoint as beneficiary of the foundation. She also has an entirely free choice as to how to shape the respective beneficial interests. Thus it is possible, inter alia, to determine the amount and timing of each and all distributions and to set terms and conditions. Distributions could be limited to income or stipulated to be dependent on a beneficiary reaching a certain age. In addition, it may be a matter entirely for the discretion of the foundation council which member of the class of beneficiaries shall, if at all, receive an amount out of the capital and/or the income of the foundation's assets. A founder may also provide for a combination of private-benefit and common-benefit purposes by dedicating some of the foundation's assets to common-benefit purposes and the remainder to private-benefit purposes like the support of family members or others. Similarly it is also possible to determine that a family foundation shall convert into a charitable foundation after a certain time or on the occurrence of a certain event.

(b) The foundation council carries out the wishes of the founder as determined in the foundation documents. Provided the founder has made appropriate provisions, the arrangements governing beneficial interest can be modified.

(c) The founder can specify the beneficiaries of the foundation's assets across many generations. The duration of a foundation may be indefinite since there is no 'rule against perpetuities' in Liechtenstein law.[145]

(d) Liechtenstein law allows the founder to retain broad powers over the foundation she has established. Thus, the founder may become a member of the foundation council or may appoint herself as one of the foundation's beneficiaries. She can reserve the right to revoke the foundation, amend the articles, or dismiss and appoint members of the foundation council.

(e) In addition, the founder may establish other executive bodies in addition to the foundation council. These may be controlling bodies which ensure the implementation of the founder's will in the long term (so-called protectors). Additionally such executive bodies may be entrusted with powers such as investment decisions or even decisions regarding distributions. The founder may designate successors for all members of the executive bodies or determine the way in which such successors shall be selected.

(f) By contrast, the foundation may also be designed by the founder in such a way that she retains no power over it whatsoever. This may be necessary or advisable in the context of asset protection.

(g) Finally, the founder may, if desired, name the foundation after herself and thereby preserve her name in a positive sense, for example in a charitable foundation.

Private Trust Companies

Liechtenstein has no special legislation governing private trust companies ('PTC'). **28.110** A Liechtenstein establishment, for example, could be used as a PTC as the objects may

[145] This also applies to Liechtenstein trusts.

provide for a mere purpose. The objects of the PTC would in such a case have to make clear that the PTC does not provide trustee services to a wider clientele and it should also exclude commercial activity as this would require it to obtain a licence to act as a professional trustee from the Financial Market Authority. An establishment ('*Anstalt*') according to Art 534 ff PGR[146] may be created without founder's rights[147] ('*Gründerrechte*'). The statutes in such a case provide that the supreme body of the establishment is the board of directors. This has as a consequence that no additional purpose trust needs to be created to hold the founder's rights. Another alternative under Liechtenstein law which provides the same advantages as an establishment is a Liechtenstein trust enterprise[148] ('*Treuunternehmen*') with separate legal personality according to Art 932a §§ 1–170 PGR.[149] The trust enterprise likewise, generally, has no shares and thus no additional holding structure in the form of a purpose trust is necessary.

Tax Information Exchange Laws

28.111 Liechtenstein has concluded a number of Tax Information Exchange Agreements ('TIEAs') and Double Taxation Agreements ('DTAs') compliant with the OECD standards for tax agreements permitting the exchange of tax information on a specific and detailed request.[150] Moreover, Liechtenstein is a party to: the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, the Agreement between the European Union and the Principality of Liechtenstein on the Automatic Exchange of Financial Account Information to Improve International Tax Compliance (AEOI-Agreement LI-EU), the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (MCAA-AEOI), and the Multilateral Competent Authority Agreement on the Exchange of Country-By-Country Reports (MCAA-CbC). Thus, Liechtenstein meets the globally accepted standards in the field of tax co-operation and appears on the OECD's white list. The law implementing the TIEAs is called *Steueramtshilfegesetz* ('*SteAHG*') and contains detailed requirements for the contents of a request for information in Art 7. Art 8 SteAHG sets out that the request must be rejected if not all preconditions set out in Art 7 SteAHG are met. Further grounds for a refusal to comply with a request for information according to Art 8 SteAHG are for example: the infringement of sovereignty, security, or public order of Liechtenstein, or where a request is based on stolen data. The main legal basis for the automatic exchange of information in Liechtenstein is the Act on the International Automatic Exchange of Information in Tax Matters ('AIA-Gesetz').

[146] See Marxer and Partner, *Wirtschaftsrecht*, 69–82.

[147] The founder's rights of an establishment may be compared to the shares of a company limited by shares as the holder of all founder's rights normally has the rights of the supreme body, ie it can decide on the composition of the board of directors, amend statutes etc. If the statutes of an establishment foresee that the supreme body is the board of directors and that no founder's rights exist then the establishment is comparable to a foundation or a trust because it has no owner but stands alone.

[148] The Liechtenstein trust enterprise has been modelled after the Massachusetts business trust and is in essence a trust with separate legal personality whose supreme body is the board of trustees and which may also be drafted as a mere purpose vehicle according to Art 932a § 3(1) PGR.

[149] See Marxer and Partner, *Wirtschaftsrecht*, 129–145.

[150] A list of the countries with which TIEAs or DTAs have been concluded can be found via the following link: <http://www.regierung.li/ministries/ministry-for-general-government-affairs-and-finance/development-of-international-tax-agreements/>.

Local Equivalent to the Variation of Trusts Act 1958

28.112 The LG in its supervisory capacity may amend a trust deed by analogous application of the provisions regarding the amendment of a foundation.[151] The law relating to foundations provides rules for both the amendment of the objects or purpose of a foundation or of its administrative provisions[152] in Art 910(4) and 552 §§ 33–35 PGR.

28.113 An amendment of the objects or purpose of a trust by the LG is possible according to the law where the objects or purpose have become:

(a) unachievable;
(b) impermissible; or
(c) irrational; or
(d) where the circumstances have changed in such a way that the objects or purpose of the trust are estranged from the intention of the settlor.[153]

The amendments must conform to the presumed intentions of the settlor.[154]

28.114 Regarding the amendment of administrative provisions of a trust see below at paragraph 28.115.

Local Equivalent of Section 57 Trustee Act 1925

28.115 The LG in its supervisory capacity may amend a trust deed to insert missing administrative powers.[155] The revised foundation law deals with the amendment of the administrative provisions of a foundation by the court in Art 552 §§ 34 and 35 PGR. The amendment of the administrative[156] provisions of the trust deed must be expedient ('*zweckmässig*'). Therefore, any power that appears to be useful in the administration and furtherance of the objects of the trust may be added to the trust deed by the LG based on Art 910 (4) and Art 552 §§ 34 and 35 PGR, unless the power for such an amendment is, according to the trust deed, reserved to the trustees or another body (eg protector or settlor) of the trust.[157]

28.116 In practice, trust deeds contain an abundance of administrative powers. As a result, this type of issue rarely comes before the courts. Furthermore, since decisions of the LG in such proceedings are rarely appealed, there are almost no decisions of higher courts available.[158]

28.117 Where a power of amendment has been reserved in the trust deed such amendment can be—and indeed based on Art 552 § 34(1) (2) PGR, must be—made, subject to the terms of the power, without the court's assistance.

[151] Art 910(4) PGR; see Biedermann, 434 *et seq*; Biedermann, *Die Treuhänderschaft*, p 506 *et seq*. The references in Biedermann do not reflect the amendment of the Liechtenstein Foundation Law with effect from 1 April 2009 which are set out above.

[152] Regarding the amendment of administrative provisions of a trust or foundation see below at paragraph 28.115.

[153] Art 552 § 33(1)(1) PGR.

[154] Art 552 § 33(2) PGR.

[155] Art 910(4) and Art 552 §§ 34 and 35 PGR.

[156] That is, all provisions other than those dealing with the objects of the trust.

[157] The subsidiary character of the court's power to amend is stipulated in Art 552 § 34(1) No 2 PGR. However, where the trustees are in doubt as to the exercise of a power reserved to them they may ask the court for directions according to Art 919(6) PGR (see paragraph 28.66).

[158] An example of the Appeal Court dealing with an amendment of a trust deed is the decision of 30.1.1997, Hp 57/96–6 (unpublished).