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Litigation

Liechtenstein: Trends & Developments

Walch & Schurti Attorneys at Law Ltd

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Trends and Developments

Contributed by Walch & Schurti Attorneys at Law Ltd

Walch & Schurti Attorneys at Law Ltd has a dispute resolution team that consists of 12 lawyers. The firm's main areas of civil litigation and arbitration are disputes in trust and foundation matters, asset tracing, asset protection, disputes in corporate matters, directors'/trustees' liability matters, insurance matters, disputes arising out of banking and finance transactions, and general commercial disputes. Besides advising its clients on the Liechtenstein aspects of multi-jurisdictional disputes, the dispute resolution team is also often engaged to co-ordinate the steps to be taken in other jurisdictions, and the firm's long-established working relations with foreign law firms and barristers is a great asset in this context. Most members of the dispute resolution team are qualified in multiple jurisdictions, which is another benefit in multi-jurisdictional disputes. Walch & Schurti is also renowned for its expertise in criminal law, which enables it to also handle all criminal law issues that sometimes arise during civil proceedings.

Authors

Moritz Blasy is a partner specialising in representing high net worth individuals and professional trust service providers in disputes arising in connection with foundations, trusts and other private asset structures. He also represents insurance undertakings, banks and other financial intermediaries in all kinds of legal disputes. Over the past years, Mr Blasy has been involved in some of the most delicate cross-border asset protection and asset tracing disputes, in which he has either represented the Liechtenstein professional trust service providers and the private asset structures administered by them or high net worth individuals with a beneficial interest in, or a claim against, such private asset structures or their directors. He is a member of the Liechtenstein Bar Association, the Law Society of England and Wales, the Austrian Arbitration Association, the Young Austrian Arbitration Practitioners and the Liechtenstein Association of Professional Trustees.

Simon Ott is a partner who is involved in numerous white-collar crime cases as well as in high-value civil disputes. In these fields, he has gained profound and broad experience in representing individuals and companies in sophisticated and sensitive matters over the years. Due to his education and work experience, Mr Ott regularly represents clients in litigation cases relating to the financial industry as well as to trust and foundation matters. He is a member of the Liechtenstein Bar Association and the Association of Criminal Defense Attorneys in Liechtenstein.

Nicolai Binkert is a partner who represents the firm's clients in a wide variety of high-profile civil cases, with a focus on trust and foundation law matters. A member of the Liechtenstein Bar Association, Mr Binkert has a double qualification (Liechtenstein and Switzerland) and he regularly advises and represents clients in disputes that have a Liechtenstein as well as a Swiss component.

Liechtenstein and its Fiduciary Services Industry
Liechtenstein's fiduciary and financial services industry looks back on a long- standing history of rendering high-quality services to an international clientele. By enactment of the Persons and Companies Act in 1926, the Liechtenstein legislator created an unequalled legal framework that provides unique possibilities for high net worth individuals seeking to structure their wealth. Not only is Liechtenstein the jurisdiction with the greatest tradition of and success with foundations for private purposes, it is also the only jurisdiction in mainland Europe to have adopted a comprehensive codified form of the Anglo-Saxon common law trust, thereby catering to the needs of settlors with civil and common law backgrounds alike.

Many of the foundations, trusts and other private wealth structures in Liechtenstein were established decades ago, often by the parents, grandparents or even great-grandparents of today's generation of beneficiaries. These settlors and their professional Liechtenstein fiduciaries often were connected by a strong bond of trust and confidence. As personal confidants, professional fiduciaries often got deep insights not only into the business relations but also the family affairs of their clients.

Generational Changes Lead to Disputes
Over the years, settlors, who often also happened to be the first beneficiaries of their structures, passed away and were succeeded by new generations of beneficiaries. These new generations of beneficiaries often do not have the same relationship with the professional fiduciaries, chosen by the settlor generation, as their ancestors had. Likewise, fiduciaries who helped to structure the wealth of their clients decades ago passed away or passed their businesses on to the next generation. As a result of these generational changes, there have been an increasing number of disputes between today's generation of beneficiaries and professional fiduciaries in recent years, which have led to a growing desire of the beneficiaries to replace the professional fiduciaries chosen by the settlor generation with professional service providers trusted by the current generation of beneficiaries.

So far, beneficiaries who had no confidence in a trustee or a member of a foundation council only had the option to initiate supervisory proceedings with the Liechtenstein District Court. The District Court is vested with broad supervisory powers over Liechtenstein trusts and foundations, such as the powers to appoint a supervisor, to order an audit, to give binding directions or to replace trustees or members of foundation councils. These powers guarantee the protection of the interests of the beneficiaries. However, according to Liechtenstein case law, a court-ordered replacement of a trustee or member of a foundation council is considered an ultima ratio, which the court may only order if it concludes that the challenged person acted in a long-lasting and grave conflict of interests or severely violated fiduciary duties, thereby jeopardising the assets of the relevant trust or foundation, or endangering the fulfilment of its purpose. On the other hand, a mere lack of trust on the side of the beneficiaries is not sufficient for the court to replace a trustee or member of a foundation council according to Liechtenstein case law. The rationale behind this case law is that the next generation of beneficiaries should not be allowed to override the intentions of the settlors who often handpicked the trustees or foundation council members. However, in practice, situations in which the current beneficiaries do not get on with the persons who administer their family wealth turned out to be very unsatisfying for all concerned parties.

A New ADR Instrument for Conflicts Between Beneficiaries and Professional Fiduciaries
In an attempt to address the problem, the Liechtenstein Chamber of Professional Trustees and Fiduciaries (*Treuhandkammer*) recently amended its Rules of Conduct (*Standesrichtlinien*) and introduced a new instrument to deal with conflicts between beneficiaries and professional Liechtenstein fiduciaries. According to these new provisions, a loss of confidence in a professional Liechtenstein fiduciary by all parties involved in the relevant private asset structure (ie, settlor(s), beneficiaries, protector(s) and other trustee(s) or other member(s) of the foundation council, as the case may be) is sufficient ground to initiate a conciliation procedure before a newly established Conciliation Body of the Chamber of Professional Trustees and Fiduciaries.

The new procedure works as follows. As a first step, the stakeholders in a foundation or trust choose another Liechtenstein fiduciary whom they trust and who is willing to take over the administration of the trust or foundation. The new fiduciary then approaches the current fiduciary of the respective foundation or trust and requests the latter to resign. The two professional fiduciaries then hold a meeting within 30 days upon receipt of the resignation request. If no amicable solution can be reached in this meeting, the fiduciary requested to resign shall inform the board of the Chamber of Professional Trustees and Fiduciaries within 14 days stating the reasons for the refusal to transfer the administration of the trust or foundation to the requesting fiduciary. If the requested fiduciary fails to notify the board of the Chamber of Professional Trustees and Fiduciaries within the 14-day period, the requesting fiduciary may file a respective notification. The board of the Chamber of Professional Trustees and Fiduciaries then defers the resolution of the dispute to the newly implemented Conciliation Body, which shall hear both fiduciaries and then assess whether the administration of the respective trust or foundation shall be transferred to the requesting fiduciary.

In contrast to ordinary supervisory proceedings, where the focus lies on an alleged misconduct or conflict of interest of the challenged fiduciary, the procedure before the Conciliation Body primarily focuses on the question of whether

there are any reasons that speak against a transfer of the administration. In other words, while in ordinary supervisory proceedings the onus is on the beneficiary to show that there is sufficient ground to dismiss the challenged fiduciary, in the new conciliation procedure the onus is on the challenged fiduciary to show that there are reasons that prohibit a handover. If the Conciliation Body concludes that there are no such reasons, it hands down a recommendation to transfer the administration of the trust or foundation. Failure to comply with the recommendation by the requested fiduciary may lead to disciplinary professional conduct proceedings against the same. Further, in the case of a recommendation to hand over the administration, the requested fiduciary must bear the incurred costs of the conciliation procedure. On the other hand, if the recommendation is not given, the requested fiduciary may invoice the trust or foundation for the actual costs incurred, but capped at CHF5,000.

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Although the conciliation procedure before the newly established Conciliation Body cannot lead to a binding replacement of a trustee or a member of the foundation council, as this power remains with the ordinary courts, it is by no means a blunt instrument: failure to comply with a recommendation can be considered a disciplinary offence and may therefore trigger professional conduct proceedings. In such proceedings a non-compliant fiduciary can be punished by a warning, a fine or a (temporary or permanent) ban from the profession. Further, a disciplinary conviction is likely to have adverse consequences in (subsequent) supervisory proceedings before the ordinary courts.

Procedure Proves to be Effective Measure

The most recent cases the authors handled for beneficiaries of Liechtenstein private asset structures confirm the impression that the new procedure has sufficient teeth in practice. In most cases there was not even a need to address the Chamber of Professional Trustees and Fiduciaries: the requested fiduciaries agreed to transfer the administration upon receipt of respective letters of other fiduciaries referring to the new rules. Therefore, it seems that the new rules of the Liechtenstein Chamber of Professional Trustees and Fiduciaries are an effective instrument to replace Liechtenstein fiduciary service providers who have lost the trust of the beneficiaries of a Liechtenstein trust or foundation.