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ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

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TA THE INTERNATIONAL ACADEMY
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I Executive summary

While the enforceability of foreign judgments is very limited and as a civil law jurisdiction, Liechtenstein is not familiar with information-gathering tools such as discovery and disclosure procedures known to many common law jurisdictions, Liechtenstein law nevertheless provides for a number of legal tools that, if deployed the right way, may prove very effective in fraud, asset tracing and recovery cases. Apart from injunctive relief as an important tool in the context of asset tracing and recovery matters, criminal proceedings can also prove useful, in particular for the purposes of gathering information and the preservation of assets for later enforcement. Also, Liechtenstein has a well-established and highly developed court system and due to Liechtenstein's highly international financial sector, Liechtenstein courts are experienced in handling cross-border disputes, which is also important in asset tracing and recovery matters.

II Important legal framework and statutory underpinnings to fraud, asset tracing and recovery schemes

There are a number of tools available under Liechtenstein law that are important in the context of asset tracing and recovery:

A. Injunctive relief

In many asset tracing and asset recovery cases, time is of the essence. Therefore, often the first step is to apply for injunctive relief in order to preserve assets and secure future enforcement. In Liechtenstein, injunctive relief is available to prevent irreparable damage or a change in circumstances that might frustrate or significantly complicate enforcement of a claim or right at a later stage. In such cases, injunctive relief can be granted in the form of conservatory measures in order to preserve the matter in dispute or otherwise secure future enforcement pending conclusion of the main proceedings, for example, by





➔ means of freezing orders, attachments or restraint orders.

Applications for injunctive relief can be made prior to the initiation of a lawsuit, together with a statement of claim initiating a lawsuit, or during a pending lawsuit whenever the need arises. In the application, the applicant needs to show a *prima facie* case (e.g., a claim the enforcement of which needs to be secured, supported by *prima facie* evidence), show reasons justifying injunctive relief (i.e., a risk of irreparable damage or irreversible change in circumstances), and specify the injunctive measure sought. While most foreign judgments are not enforceable in Liechtenstein, they may be used as *prima facie* evidence for the existence of a claim and, therefore, often prove very useful in practice when it comes to injunctive relief.

In urgent cases, injunctive relief is usually granted by the court within 24 to 72 hours upon receipt of the application if the court concludes that the requirements are fulfilled. Where circumstances are even more urgent, super-provisional measures can be ordered, which are valid for two days and cease automatically at the end of this period unless the applicant files an application for injunctive relief with the court.

It is in the court's discretion to decide whether the circumstances of the case require that injunctive relief be granted on an *ex parte* basis or whether the respondent should be heard in advance. Injunctive relief is usually granted on an *ex parte* basis in cases of great urgency or where there is a risk that the effectiveness of the relief would otherwise be impaired. On the other hand, the respondent is usually heard in

advance if the court has doubts that the requirements for injunctive relief are fulfilled. If injunctive relief is granted on an *ex parte* basis, the respondent can subsequently seek to have the injunctive measure set aside.

Liechtenstein statutory law does not explicitly restrict injunctive relief to assets located in Liechtenstein. Thus, injunctive measures can be ordered with respect to assets outside the jurisdiction. It is then a question of the laws applicable in the jurisdictions where the relevant assets are located as to whether an order from a Liechtenstein court will be recognised there.

As a rule, injunctive measures can only be imposed on the applicant's counterparty. However, injunctive relief can also be ordered against third parties to the extent that the relief relates to a relationship (contractual or otherwise) between a third party and the applicant's counterparty. For example, a third party who is a debtor or who holds assets of the applicant's counterparty can be ordered not to settle the respective debt or not to dispose of the respective assets.

Court orders granting injunctive relief are immediately enforceable against their addressees and will be enforced by the Liechtenstein enforcement authorities in case of non-compliance. Non-compliance with an injunction can be punished by the court with a fine or imprisonment upon application by the party who applied for the injunctive relief.

B. Ordinary civil proceedings

As mentioned, most foreign judgments are not enforceable in Liechtenstein. Thus, even if there is a foreign judgment in favour of a damaged party, the damaged party will, in most cases, nevertheless have to initiate fresh proceedings in Liechtenstein in order to enforce against assets located in Liechtenstein. Notably, Liechtenstein courts assume jurisdiction over any defendant who holds assets in Liechtenstein.

As a rule, a lawsuit is initiated by means of a written statement of claim, which is to be filed with the District Court. In the statement of claim, the claimant must clearly identify the parties, their procedural roles (i.e., claimant or defendant), their representatives (if any) and the subject matter of the lawsuit. The statement of claim must contain a pleading of the facts on which the claim is based, indicate the evidence on which the claimant intends to rely and specify the remedy sought.

There are a number of legal grounds under substantive Liechtenstein law that are of particular relevance in the context of asset tracing and asset recovery:

- As a matter of Liechtenstein civil law, a person who has suffered financial damage can seek compensation from the person who unlawfully and culpably caused the damage.
- Further, a person who has been deceived or coerced by his counterparty into the conclusion of a contract can challenge the contract and request the modification or cancellation of the contract and seek the restitution of the alienated assets on the basis of unjust enrichment, or he can leave the contract unchallenged and seek compensation for the resulted damage.

- Where a debtor has sought to put assets out of the reach of his creditors by transferring the assets to a third party (for example, a foundation or a trust), the creditor may seek to challenge such transfer on the basis that the transfer was abusive or made gratuitously, or the creditor may seek to hold the third party liable on the basis of the concept of piercing the corporate veil.

C. Enforcement of a foreign judgment or arbitral award

Liechtenstein has entered into bilateral treaties with Switzerland and the Republic of Austria on the recognition and enforcement of judgments in civil matters. Further, Liechtenstein has ratified the Hague Convention on Child Support. Therefore, judgments of foreign courts that fall within the ambit of these treaties are directly enforceable in Liechtenstein (subject to the fulfilment of the conditions stipulated in these treaties). In addition, Liechtenstein is a party to the New York Convention. Therefore, foreign arbitral awards are enforceable in Liechtenstein subject to the fulfilment of the conditions stipulated in the New York Convention.

D. Criminal proceedings

Last but not least, criminal complaints have become an important instrument of asset tracing and recovery in Liechtenstein in recent years. A person who has suffered financial damage as a result of a criminal offence (e.g., fraud or embezzlement) can file a criminal complaint with the Liechtenstein prosecution authorities and seek the initiation of a criminal investigation and then join the investigation as a private party in order to seek compensation for the damage suffered.

A private party in criminal proceedings has a number of procedural rights (e.g., the right to inspect the court files or the right to request the taking of evidence) and can submit evidence in support of the investigation. In case of a conviction, the court may award compensation for damages to the private party if it concludes that sufficient grounds can be established based on the findings in the criminal proceedings. If the criminal court concludes that such grounds cannot be sufficiently established, the private party is referred to the civil courts in order to pursue the civil claim there (i.e., the private party is then required to file a civil action). Importantly, a civil claim does not become time-barred as long as an application for compensation in criminal proceedings is pending (i.e., an application for compensation in criminal proceedings has the effect of suspending the limitation period).

Further, in the course of a criminal investigation, investigative measures can be imposed by the Liechtenstein District Court. Amongst others, the seizure of documents from financial intermediaries (e.g., banks, trust service providers, asset managers or insurance companies) and the freezing of assets in order to secure forfeiture are of particular relevance in cases of asset tracing and recovery, in that they

assist a creditor in gaining information and prevent further dispositions of assets.

III Case triage: main stages of fraud, asset tracing and recovery cases

The stages of fraud, asset tracing and asset recovery cases largely depend on the circumstances of the particular case.

Many fraud, asset tracing and asset recovery cases involving Liechtenstein are international in nature, with the parties and assets being spread across a number of jurisdictions. Often, litigation is already pending in other jurisdictions before steps are initiated in Liechtenstein (for example, because it only comes to light in the litigation abroad that assets are held in Liechtenstein). In such cases, it is important to make sure that the steps taken in the various jurisdictions are properly aligned. For instance, where litigation is pending in another jurisdiction and it is to be expected that a judgment of the foreign court or a foreign arbitral award will be enforceable in Liechtenstein, it may make sense to merely apply for injunctive relief in Liechtenstein in order to secure the enforcement of the foreign judgment or award and then proceed with enforcement proceedings in Liechtenstein once the foreign judgment or award is handed down. By contrast, where the judgment will not be enforceable in Liechtenstein (as is often the case), it may still make sense to run parallel cases in Liechtenstein and abroad because, even though the foreign judgment will not be enforceable in Liechtenstein, the foreign proceedings may prove a useful source of information, which can then help pursuing the case in Liechtenstein.

Often, creditors have difficulties gathering information. In such cases, it may make sense for a creditor to try to initiate criminal proceedings and then join the investigation as a private party, as the prosecution authorities have means to obtain information that private parties do not have, and they also have the power to freeze assets.

IV Parallel proceedings: a combined civil and criminal approach

Under Liechtenstein law, it is possible to pursue civil and criminal proceedings in parallel, and such approach may make particular sense where only limited information and evidence is available. Often, information becomes available in the course of criminal proceedings that can later be used to pursue a civil claim against the debtor. In addition, the prosecution authorities have the possibility to freeze assets, thereby preventing further dispositions of assets.

The advantage of criminal proceedings is that information can be obtained and assets can be secured at moderate cost. Also, criminal proceedings may put pressure on a debtor and prompt the debtor to enter into a settlement. The downside of



➔ criminal proceedings is that once a criminal investigation is ongoing, the creditor does not have full control anymore and the prosecution authorities may take steps that are not in the creditor's interest. Also, where civil and criminal proceedings are pending, it is likely that the civil courts will stay the civil proceedings until the criminal proceedings are concluded. This can lead to considerable delay because criminal proceedings can take several years to be concluded. Therefore, the decision as to whether or not to pursue criminal proceedings in parallel to civil proceedings takes careful consideration.

V Key challenges

The major difficulty in handling fraud, asset tracing and asset recovery cases in Liechtenstein is lack of information. Liechtenstein civil procedure law does not provide for the discovery and disclosure procedures known in other (in particular, common law) jurisdictions, and the possibilities to obtain information are therefore relatively limited. That said, there are a number of registers in Liechtenstein that can prove useful in this regard.

A. Commercial Register

The Commercial Register (*Handelsregister*) contains useful information on a number of types of legal entities registered in Liechtenstein. In particular, all legal entities that are established under Liechtenstein law and pursue commercial activities must be registered with the Commercial Register, and most types of legal entities must be registered with the Commercial Register regardless of whether or not they pursue commercial activities. However, there are certain (practically important) exemptions to this rule. Most significantly, Liechtenstein foundations do not have to be registered with the Commercial Register unless they are charitable or pursue commercial activities. Therefore, the vast majority of Liechtenstein private foundations are not registered with the Commercial Register. In principle, Liechtenstein trusts must also be registered with the Commercial Register. An exception exists if the trust deed or a certified copy thereof is deposited with the Commercial Register, in which case the trust is not registered while the trust deed is not open to the public either.

The Commercial Register contains, amongst other things, information on a legal entity's statutory capital, its purpose and its directors. Furthermore, all stock companies (*Aktiengesellschaften*), limited liability companies (*Gesellschaften mit beschränkter Haftung*) and establishments (*Anstalten*) are required to file their annual financial statements with the Commercial Register. On the other hand, the Commercial Register does not contain information on the shareholders of a company, except in the case of limited liability companies (which are not very common in Liechtenstein). The Commercial Register is public and can be inspected by anyone without the need to show any specific legal interest.

B. Beneficial Ownership Register

The Beneficial Ownership Register (maintained by the Office of Justice) was introduced in order to implement the EU Money Laundering Directives in Liechtenstein. It contains information on the "beneficial owners" (within the meaning of Liechtenstein anti-money laundering legislation) of all legal entities established in Liechtenstein. Unlike the Commercial Register, the Beneficial Ownership Register is not open to the public. In principle, it may only be inspected by interested persons if they can show that inspection is required for the purpose of combating money laundering or terrorism financing or if they are beneficial owners of such entity.

VI Cross-jurisdictional mechanisms: issues and solutions in recent times

As already mentioned, Liechtenstein has entered into treaties on the mutual recognition and enforcement of judgments in civil matters with Switzerland and the Republic of Austria. Further, Liechtenstein is a party to the Hague Convention on Child Support and the New York Convention. Apart from that, it is worth mentioning in the context of civil proceedings that Liechtenstein is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention), which enables the provision of legal assistance upon the request of a foreign court. It should also be noted that service of court documents on the state's territory is an official act under Liechtenstein law that is exclusively reserved to Liechtenstein authorities.

In terms of criminal matters, Liechtenstein heavily relies on mutual legal assistance. International mutual legal assistance in criminal matters is primarily governed by international and bilateral treaties, *inter alia*, the European Convention on Mutual Assistance in Criminal Matters, the European Convention on Extradition and the European Convention on the Transfer of Proceedings in Crim-



inal Matters. Further, the provisions of the Schengen Convention dealing with mutual legal assistance in criminal matters are also applicable in Liechtenstein. In addition, Liechtenstein has concluded bilateral treaties in criminal matters with a number of countries such as Austria, Belgium, Germany, Switzerland and the United States of America. In the absence of a treaty, the prerequisites for the provision of mutual legal assistance in criminal matters are set forth in the Liechtenstein Mutual Legal Assistance in Criminal Matters Act.

Aside from information deficiencies, costs may also be a hurdle. Claimants in civil proceedings who are resident or domiciled abroad may be ordered to post security for costs, which can be significant, depending on the amount in dispute and the complexity of the case.

VII Using technology to aid asset recovery

The Liechtenstein Government recently decided to set up its own cybersecurity unit in order to assist businesses with the development of security concepts and specific specialist information. Banks in particular have placed a special focus on cybersecurity in order to prevent the interception of sensitive data and the initiation of transactions by attackers.

In addition, the Liechtenstein National Police has also set up its own cybercrime unit in order to tackle cybercrime more effectively and implement new forms of digital forensics.

Furthermore, Liechtenstein is a party to the Budapest Convention on Cybercrime.

VIII Highlighting the influence of digital currencies: is this a game changer?

In January 2020, the Token and TT Service Provider Act came into force in Liechtenstein, which provides

for the civil law classification of the legal nature and effect of tokens. This law is to be applied if tokens are generated or issued by a trustworthy technology (TT) service provider domiciled or resident in Liechtenstein, or the parties to a transaction concerning tokens expressly declare its provisions to be applicable. In those cases, Liechtenstein deems the token to be an asset located in Liechtenstein.

On the regulatory side, it bears noting that since the introduction of the Token and TT Service Provider Act, virtual asset service providers are subject to the Liechtenstein Due Diligence Act. As a consequence, the Liechtenstein Financial Intelligence Unit (FIU) records a drastic increase in the number of submitted suspicious activity reports (accounting for approximately 41% of the total number of reports), with the reports relating to various categories of suspicions such as unauthorised access to wallets, fraud schemes, identity theft and exposure of transaction participants to Darknet markets.

In addition, the Liechtenstein Criminal Procedure Code was amended in 2021, introducing the possibility of freezing virtual assets by way of transferring the same to a wallet maintained by the Liechtenstein Police. By the introduction of these provisions, the legislator wanted to effectively curtail fraudsters' access to misappropriated virtual assets or virtual assets acquired with misappropriated fiat assets, respectively, in order to secure the same for forfeiture. The law also provides for the possibility of liquidating frozen virtual assets prematurely if there is a risk of unforeseeable price losses in view of the assets' high volatility.

IX Recent developments and other impacting factors

In recent years, Liechtenstein authorities have put a special focus and emphasis on their proclaimed policy to protect Liechtenstein's financial sector and meet international standards, in particular by seeking to create a coherent system for the effective prosecution and sanctioning of money laundering and terrorism financing.

In this context, the increasingly expanded Due Diligence Act is of major importance. Persons subject to the Liechtenstein Due Diligence Act (e.g., banks, asset managers, insurance companies, investment firms or professional providers of fiduciary services) are obliged to take the necessary measures to combat money laundering and are required, amongst other things, to report to the FIU any suspicion of money laundering, a predicate offence to money laundering, organised crime or the financing of terrorism. Therefore, investigations in relation to the suspicion of any kind of predicate offence abroad can trigger a reporting obligation in Liechtenstein if assets relating to these investigations are held in Liechtenstein. Violations of such reporting obligation on the part of the financial intermediary are punishable. **CDR**



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Schurti Partners Attorneys at Law Ltd advises and represents private and corporate clients in asset tracing and recovery cases as well as in white-collar crime matters before the Liechtenstein courts and authorities. Over several decades, the firm has handled some of the most delicate and high-profile cases in these fields in Liechtenstein. Due to the firm's close working relationships with leading foreign firms and barristers specialised in the field of asset tracing and recovery as well as in white-collar crime law, Schurti Partners is regularly retained to co-ordinate the overall strategy and actions in multi-jurisdictional cases. Since fraud as well as asset tracing and recovery issues are frequently linked to various jurisdictions, it is of huge benefit that Schurti Partners' experts are trained and qualified in different common and civil law jurisdictions.

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