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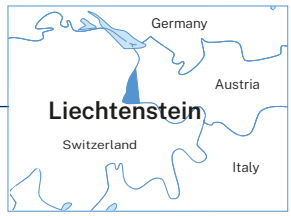
Liechtenstein: Law and Practice

Moritz Blasy, Nicolai Binkert, Simon Ott
and Christian Scheffknecht
Schurti Partners Attorneys at Law Ltd

LIECHTENSTEIN



Law and Practice

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Schurti Partners Attorneys at Law Ltd represents private and corporate clients in a wide range of contentious and non-contentious matters before the Liechtenstein courts as well as national and international arbitral tribunals. Many of the disputes handled by the firm involve multiple jurisdictions, and the firm's civil litigation and arbitration team is often tasked with co-ordinating the steps to be taken in other jurisdictions. Over several decades, the firm has developed excellent working relationships with foreign law firms that also specialise in litigation/arbitration and with barristers. Additionally, Schurti Partners' civil litigation and arbitration team has members who are qualified in multiple jurisdictions, which is also an advantage in disputes involving multiple jurisdictions. The firm's main areas of civil litigation and arbitration are trust and foundation disputes, asset tracing and recovery, asset protection, corporate disputes, directors' and trustees' liabilities and insurance disputes, banking and finance disputes, and general commercial disputes.

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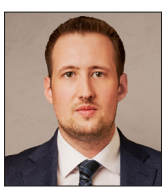

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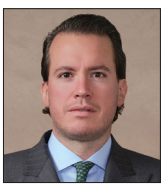

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1. General

1.1 Prevalence of Arbitration

Liechtenstein is well known for its fiduciary industry (eg, Liechtenstein foundations and Liechtenstein trusts) and for its strong banking and finance sector.

Arbitration clauses in trust deeds and foundation statutes are becoming increasingly popular in Liechtenstein. As a result, more and more disputes regarding foundation and trust matters are resolved in arbitration proceedings. Most of these trust and foundation matters are international in nature since the settlors, founders, beneficiaries and creditors of such Liechtenstein private asset structures are often from abroad.

The banking and finance sector in Liechtenstein also heavily relies on arbitration clauses in all kinds of agreements. The main reason for the popularity of arbitration in the banking and finance field is that Liechtenstein does not enforce foreign judgments (apart from Austrian and Swiss judgments and child support judgments), and likewise Liechtenstein judgments are not enforceable in many foreign jurisdictions.

However, Liechtenstein is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Therefore, unlike ordinary Liechtenstein judgments, Liechtenstein arbitral awards are enforceable in most foreign jurisdictions and, unlike foreign ordinary judgments, most foreign arbitral awards are enforceable in Liechtenstein. Another reason for the increasing popularity of arbitration as a means of dispute resolution in the banking and finance sector is the confidentiality of arbitral proceedings.

Further, Liechtenstein's highly export-orientated manufacturing industry regularly relies on arbitration clauses in agreements with foreign suppliers and customers.

Apart from the arbitration matters which stem from the Liechtenstein fiduciary industry, the Liechtenstein banking and finance sector and the manufacturing industry, Liechtenstein has, over the years, established itself as an attractive place for international arbitration in matters which have, aside from the arbitration itself, no link to Liechtenstein.

1.2 Key Industries

The Liechtenstein banking and finance sector, as well as the heavily export-orientated manufacturing industry, heavily rely on arbitration in all kinds of agreements. Further, arbitration in relation to trust and foundation matters has become very common in the past few years.

Liechtenstein has also established itself as a neutral jurisdiction for international commercial arbitration in which neither of the involved parties has a connection to the Principality.

1.3 Arbitration Institutions

The Liechtenstein Chamber of Commerce and Industry (LCCI), together with the Liechtenstein Arbitration Association (LIS), published a set of arbitration rules in 2012 (the "Liechtenstein Rules").

A peculiarity of the Liechtenstein Rules is the absence of an actual administration. The LCCI – contrary to most other arbitral institutions – does not maintain a permanent (and costly) body with regard to arbitration. Rather, the LCCI merely appoints a secretary for arbitral proceedings who has minimal duties. The activity of the secretary is limited to the appointment of a commissioner upon application of a party to arbitral proceedings. The duties of the commissioner are to decide on the appointment or dismissal of arbitrators and to review the costs of arbitral proceedings upon request of a party.

In fact, the function of the commissioner, according to the Liechtenstein Rules, is similar to that of an arbitration commissioner or a secretary general of a typical institutional arbitration. Consequently, it is possible to conduct arbitral proceedings without the involvement of the secretariat and the appointment of a commissioner. If any problems arise and the support of a third party is required, the Liechtenstein Rules provide for a mechanism to appoint an independent person who in turn is subject to a legal confidentiality obligation.

This is a major advantage of the Liechtenstein Rules, since the benefits of institutional arbitral proceedings and of ad hoc proceedings (ie, flexibility, cost-efficiency and confidentiality) are combined. The fact that the LCCI does not maintain any expensive permanent infrastructure with regard to arbitration is in line with one of the most important goals of the Liechtenstein Rules – namely, to provide for cost-efficient high-quality arbitration.

1.4 National Courts

The Liechtenstein Court of Appeal has exclusive jurisdiction to set aside an arbitral award, and a decision of the Court of Appeal setting aside an arbitral award or dismissing an action for the award to be set aside cannot be appealed. However, a complaint to the Constitutional Court is possible in case of a violation of constitutional rights.

The Liechtenstein District Court has jurisdiction to order judicial auxiliary measures during pending arbitration proceedings (ie, default procedures, and preliminary and interim relief).

2. Governing Legislation

2.1 Governing Law

If Liechtenstein is the seat of the arbitration, the arbitration proceedings are governed by the Liechtenstein Arbitration Law set forth in the Liechtenstein Civil Procedure Code (Articles 594 to 635). These provisions are mostly non-mandatory, and the parties may autonomously agree for specific arbitration rules to apply. The Liechtenstein Arbitration Law is largely based on the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") and the respective provisions of the Austrian Civil Procedure Code (which in turn are also based on the UNCITRAL Model Law).

The fact that Liechtenstein adopted many provisions from the Austrian Arbitration Law has the advantage that in the absence of specific Liechtenstein case law and legal doctrine, one can refer to Austrian case law and legal doctrine for the construction of the Liechtenstein Arbitration Law. This is a huge asset for a small jurisdiction such as Liechtenstein.

Divergence From the UNCITRAL Model Law

The Liechtenstein Arbitration Law is based on the UNCITRAL Model Law but diverges in a few noteworthy areas. Significantly, the Liechtenstein Arbitration Law does not distinguish between national and international arbitration proceedings. Also, a challenge of an arbitral award must be submitted within four weeks of the date of receipt of the award, as opposed to the three months the UNCITRAL Model Law provides for. Another example of divergence is that the Liechtenstein Arbitration Law does not contain specific conflict-of-laws rules, leaving the choice of law to the arbitral tribunal if no choice has been made by the parties.

2.2 Changes to National Law

The most recent change to the Liechtenstein Arbitration Law, by which the restriction on consumers participating in arbitration proceedings has been eased, came into effect on 1 August 2017. The change had a major impact on arbitration in corporate, foundation and trust matters, since it is now explicitly stipulated that arbitration clauses included in articles of association, trust deeds or foundation statutes are binding

irrespective of whether one of the litigants qualifies as a consumer.

3. The Arbitration Agreement

3.1 Enforceability

The arbitration agreement must either be in a written document signed by the parties or established by the parties exchanging letters, faxes, emails, or other means of communication which prove the existence of the agreement.

Further requirements must be met if a natural person is a party to the arbitration agreement. In particular, an arbitration agreement between an entrepreneur and a natural person may only be effectively concluded with regard to an already arisen dispute. However, this requirement does not apply if (i) the natural person is an entrepreneur as well, or (ii) the arbitration agreement is contained in a separate document that deals exclusively with the arbitral proceedings and the natural person has received legal advice or has been represented by an attorney with regard to the conclusion of the arbitration agreement.

3.2 Arbitrability

In principle, any claim concerning an economic interest that would fall within the jurisdiction of the ordinary courts may be subject to an arbitration agreement. Hence, the scope of a claim involving an economic interest must be interpreted extensively.

As a matter of Liechtenstein law in case of non-pecuniary claims, an arbitration agreement may be concluded and shall have legal effect to the extent that the parties are entitled to conclude a settlement on the subject matter in dispute. However, family law disputes and certain employment law disputes (namely, claims under apprenticeship agreements – the Vocational Education Act) cannot be made subject to arbitral proceedings. Further, the jurisdiction of the ordinary courts cannot be excluded with regard to proceedings which are initiated either by the court ex officio or due to an application or report of a public authority.

3.3 National Courts' Approach

Because an arbitration agreement is a procedural contract, its interpretation is subject to the provisions of the procedural law of the court in which the proceeding is brought.

If an action is filed in a matter which is subject to an arbitration agreement, the ordinary courts will reject the respective claim unless the counterparty enters an appearance on the merits without objecting to the jurisdiction of the ordinary courts.

If a claim is brought in a matter in which arbitration proceedings are already pending, the claim shall be rejected, unless the jurisdiction or the arbitral tribunal has been challenged and if it is not to be expected that the tribunal will render a decision within an appropriate period of time.

3.4 Validity

While the Liechtenstein Arbitration Law is based on the UNCITRAL Model Law, the provision regarding separability has not been implemented in Liechtenstein. However, given that the Liechtenstein Arbitration Law is also based on the Austrian Arbitration Law, Austrian case law and legal doctrine can be taken into account to answer this question. The doctrine of separability is recognised by Austrian courts.

4. The Arbitral Tribunal

4.1 Limits on Selection

Under the Liechtenstein Arbitration Law, the parties may freely agree on the number of arbitrators. However, if the parties have agreed on an even number of arbitrators, then an additional person must be appointed as chair by the party-appointed arbitrators. Unless agreed otherwise by the parties, three arbitrators shall be appointed. Further, the parties are free to agree on the procedure to appoint the arbitrator(s). The appointment procedure agreed on, however, must not affect the minimum standards as to the neutrality of arbitrators.

Also under the Liechtenstein Rules, it is up to the parties to agree on the number of arbitrators. In the absence of such an agreement, the Liechtenstein

Rules set forth that the number of arbitrators shall depend on the amount in dispute: the claim shall be decided by a three-member tribunal if the amount in dispute reaches or exceeds CHF1 million, but only one arbitrator shall be appointed if the amount in dispute is less than CHF1 million. If the parties agree in the arbitration agreement that an even number of arbitrators shall be appointed, the commissioner shall, upon request of an arbitrator (and not the parties), appoint a presiding arbitrator with a casting vote.

As a matter of Liechtenstein law, the judges of the ordinary Liechtenstein courts cannot act as arbitrators.

4.2 Default Procedures

If the parties fail to choose a method to appoint the arbitrators, or if the chosen appointing procedure fails, the Liechtenstein Arbitration Law provides for a default procedure. Most importantly, the default procedure allows the appointment of one or more arbitrators by the Liechtenstein District Court as a fallback option regardless of whether it is a two-party or multiparty arbitration.

The Liechtenstein Rules provide for a default procedure as well: in the event that the parties fail to appoint arbitrators, the commissioner will appoint the arbitrators.

4.3 Court Intervention

In principle, the ordinary courts do not intervene in the selection of arbitrators. However, there are two scenarios in which the ordinary courts can intervene: Firstly, if the parties fail to choose a method for the appointment of the arbitrators, or if the chosen method fails, the ordinary courts are competent to appoint one or more arbitrators upon application of either party. Secondly, the ordinary courts may dismiss an arbitrator upon application of a party for certain reasons.

Under the Liechtenstein Arbitration Law, the courts shall take into account any conditions laid down for the arbitrator in the arbitration agreement between the parties and any aspects ensuring the appointment of an independent and impartial arbitrator.

4.4 Challenge and Removal of Arbitrators

It is up to the parties to agree on a removal procedure. The Liechtenstein Arbitration Law, however, provides for a default procedure, in case the parties fail to agree on a removal procedure.

According to the pertinent provisions, a party that applies to challenge an arbitrator must preliminarily file a written statement to the arbitral tribunal outlining the reasons for the challenge. The written statement must be filed within four weeks upon the notification of the constitution of the arbitral tribunal or upon the party becoming aware of the reasons for the challenge.

An arbitrator may be challenged/removed if circumstances exist/arise which can cast reasonable doubt on the impartiality or independence of the arbitrator, or if the arbitrator does not fulfil (or no longer fulfils) the conditions agreed by the parties. Upon submission of the written statement, the challenged arbitrator has the possibility to resign from their office, or the other party to the arbitration may agree that the arbitrator in question shall be removed. If the challenged arbitrator does not resign and the parties do not mutually agree on their removal, the arbitral tribunal must decide on the challenge.

If the challenge to the arbitral tribunal does not lead to the dismissal of the challenged arbitrator, the challenging party may then approach the Liechtenstein District Court within four weeks to decide on the challenge. Decisions of the Liechtenstein District Court on such challenges are final, and no ordinary appeal is admissible. However, a complaint to the Constitutional Court is possible in case of a violation of constitutional rights.

The mechanism for the challenge/removal of an arbitrator under the Liechtenstein Rules is very similar to that under the Liechtenstein Arbitration Law: a party has the right to challenge an appointed arbitrator if circumstances exist/arise which cast doubt on the arbitrator's impartiality or independence. Within 15 days of the notification of the appointment or of the party becoming aware of the respective circumstances, the challenge must be made to the concerned arbitrator by indicating the relevant reasons. The challenged arbitrator can then either resign or communicate to

the parties (and the other arbitrators) in writing their unwillingness to resign.

If the challenged arbitrator refuses to resign, the challenging party has the opportunity to apply within seven days to the commissioner for the dismissal of the challenged arbitrator. The commissioner shall then decide within 30 days.

4.5 Arbitrator Requirements

As a matter of both the Liechtenstein Arbitration Law and the Liechtenstein Rules, an arbitrator must be independent and impartial. Prior to their appointment as arbitrator, the prospective arbitrator must disclose all circumstances which might cast doubt on their independence and/or impartiality. This duty is an ongoing one, which means that if such circumstances arise during the proceedings, they must be disclosed by the appointed arbitrator.

5. Jurisdiction

5.1 Challenges to Jurisdiction

As a matter of the Liechtenstein Arbitration Law, an arbitral tribunal has the competence to rule on its own jurisdiction – ie, whether it is competent to decide on the respective dispute ("competence-competence"). The arbitral tribunal may decide on its own jurisdiction together with the decision on the merits or by separate arbitral award.

An objection against the jurisdiction of an arbitral tribunal must be raised by a party no later than the first pleading on the substance of the case. If a party fails to do so, the right to object to the jurisdiction of the arbitral tribunal is forfeited. However, the appointment of an arbitrator or the participation in the appointment of an arbitrator does not preclude a party from raising an objection against the jurisdiction of the arbitral tribunal.

5.2 Circumstances for Court Intervention

The ordinary courts can only address issues of jurisdiction of an arbitral tribunal upon request of a party.

If an action is filed in a matter which is subject to an arbitration agreement, the ordinary courts will reject the respective claim unless the counterparty enters an appearance on the merits without objecting to the jurisdictions of the ordinary courts.

If a claim is brought in a matter in which arbitration proceedings are already pending, the claim shall be rejected, unless the jurisdiction or the arbitral tribunal has been challenged and if it is not to be expected that the tribunal will render a decision within an appropriate period of time.

The arbitral tribunal's decision on its own jurisdiction is not final, since a judicial reversal action (against the award on the merits or the separate arbitral award dealing exclusively with the question of jurisdiction) may be brought before the Liechtenstein Court of Appeal.

5.3 Timing of Challenge

As a general rule, an arbitral award is required in order to be able to challenge the jurisdiction of an arbitral tribunal before the Liechtenstein Court of Appeal. If a party has challenged the jurisdiction of the arbitral tribunal at the beginning of the proceedings, the arbitral tribunal may decide on the question of jurisdiction either in a separate arbitral award dealing exclusively with jurisdiction or in the final award. Both kinds of awards may then be challenged before the Court of Appeal as the sole and last ordinary instance. The only further (extraordinary) remedy is a complaint against the respective decision of the Court of Appeal to the Constitutional Court in case of a violation of constitutional rights.

That said, if the jurisdiction of the arbitral tribunal has been challenged in the arbitration proceedings and it is not to be expected that the tribunal will render a decision within an appropriate period of time, the parties can challenge the jurisdiction of the tribunal before the Court of Appeal without having to obtain an arbitral award first.

5.4 Standard of Judicial Review for Jurisdiction/Admissibility

The Liechtenstein Court of Appeal is not bound by the findings of the arbitral tribunal when deciding on the questions of admissibility and jurisdiction.

5.5 Breach of Arbitration Agreement

If a party commences court proceedings in a dispute that is subject to an arbitration agreement, the ordinary courts will reject the claim, provided that the defendant does not submit to the proceedings on the merits without raising objections against jurisdiction. However, a claim will not be dismissed by the ordinary courts if the arbitration agreement is deemed void or is not capable of being performed.

The ordinary courts do not have any discretion in this respect. If a valid arbitration agreement exists, and if a party objects to the jurisdiction of the ordinary court based on the arbitration agreement, then the ordinary court has no choice but to reject the claim for lack of jurisdiction.

5.6 Jurisdiction Over Third Parties

According to the Liechtenstein Arbitration Law, arbitration clauses in trust deeds or foundation statutes are valid and legally binding. For example, a beneficiary that wishes to bring a claim for information against a foundation or a trustee is bound by an arbitration clause contained in the statutes/trust deed of the respective foundation/trust even though the respective beneficiary has never agreed to the arbitration clause.

Further, it has to be noted that Austrian case law has established that both single and universal legal successors, assignees of a claim or contract, and beneficiaries of contracts for the benefit of a third party are bound by an arbitration agreement even if they are non-signatories. It is likely that Liechtenstein courts would take a similar approach.

Thereby, the Liechtenstein Arbitration Law does not distinguish between foreign or domestic third parties in this respect.

6. Preliminary and Interim Relief

6.1 Types of Relief

Under the Liechtenstein Arbitration Law, an arbitral tribunal may grant preliminary or interim relief, provided that the parties have not agreed otherwise in the arbitration agreement. Such preliminary or interim relief can only be granted once the counterparty has been given an opportunity to be heard; ex parte interim relief falls within the sole competence of the Liechtenstein ordinary courts.

The Liechtenstein Arbitration Law does not include a restrictive quota for interim measures. Rather, all different types of relief can be granted. If interim relief is granted which contains measures that are unknown to Liechtenstein law, the Liechtenstein Arbitration Law expects the enforcing ordinary court to interpret and amend the remedy in the light of the purpose to be achieved and grant an equivalent relief available under Liechtenstein enforcement law.

The Liechtenstein Rules provide rules on interim or protective measures as well. According to these provisions, the arbitral tribunal may grant any interim relief it deems appropriate upon respective application of a party. Pursuant to the Liechtenstein Rules (and provided that the parties have not agreed otherwise), the arbitral tribunal shall have exclusive jurisdiction for interim relief once it has been constituted.

If a party wishes to apply for (ex parte) interim relief from the ordinary court, it must first obtain the consent of the arbitral tribunal (or the presiding arbitrator if three arbitrators are appointed). The consent of the arbitral tribunal (or the presiding arbitrator) may be granted ex parte. If a party is in breach of its duty to obtain the arbitral tribunal's consent prior to requesting interim relief from the ordinary court, a contractual penalty may be ordered by the arbitral tribunal.

6.2 Role of Courts

While arbitration proceedings are pending, the parties can either apply to the ordinary courts (ie, the Liechtenstein District Court) or to the arbitral tribunal for preliminary or interim relief. The competence of the arbitral tribunal to grant preliminary or interim relief can be excluded by the parties. The competence of the ordinary courts to grant preliminary or interim relief cannot be excluded. However, if the parties have agreed that the Liechtenstein Rules apply, once arbitral proceedings have commenced, the prior consent of the arbitral tribunal has to be obtained before applying for interim relief with the Liechtenstein District Court.

In any case, under Liechtenstein law, ex parte injunctive relief can only be granted by the ordinary courts.

Under the Liechtenstein Arbitration Law, interim relief can also be granted in relation to foreign-seated arbitrations.

The Liechtenstein Arbitration Law is not familiar with the concept of emergency arbitrators. Rather, under the Liechtenstein Arbitration Law, the competence to grant interim relief prior to the constitution of the arbitral tribunal lies with the ordinary courts.

6.3 Security for Costs

The Liechtenstein Arbitration Law does not contain a provision explicitly allowing the arbitral tribunal to order a party to provide security for costs. However, there are views that it is within the discretion of the arbitral tribunal to order security for costs unless the parties agree otherwise.

Under the Liechtenstein Rules, the arbitral tribunal may order, and is expected to order, the provision of sufficient security for costs.

7. Procedure

7.1 Governing Rules

The Liechtenstein Arbitration Law is intended to give the parties the greatest possible autonomy. Therefore, only a few procedural rules are mandatory, while the majority of the provisions are to be seen as default rules which apply only if the parties have failed to agree on specific procedural rules.

Under the Liechtenstein Rules, subject to (i) the provisions of the Rules themselves, and (ii) the provisions in the arbitration agreement or the arbitration clause, if any, the procedure is determined by the arbitral tribunal. Thereby, the arbitrators must observe the rules of fairness and efficiency. Like the Liechtenstein Arbitration Law, the Liechtenstein Rules also provide default rules which apply if the parties have failed to agree on procedural rules.

The most important mandatory procedural principles under the Liechtenstein Arbitration Law are the right to be heard and the right to be treated fairly. If these procedural principles are violated, this may constitute grounds for setting aside the arbitral award.

7.2 Procedural Steps

Under the Liechtenstein Arbitration Law, no particular procedural steps are to be observed. Rather, it is up to the parties to agree on how the arbitral proceedings shall be conducted. In the absence of such agreement, the non-mandatory provisions of the Liechtenstein Arbitration Law apply as default rules.

Within the very wide frame of the default rules set forth in the Liechtenstein Arbitration Law, it is at the discretion of the arbitrators to decide how to conduct the proceedings. The discretion of the arbitrators is limited by the few mandatory provisions, such as the requirement of the arbitrators to observe the parties' right to fair treatment and to be heard.

Also, under the Liechtenstein Rules, the arbitral tribunal has the discretion to determine how the arbitration shall be conducted, unless the parties have agreed otherwise.

7.3 Powers and Duties of Arbitrators

Under the Liechtenstein Arbitration Law, an arbitral tribunal has the power to decide on its own jurisdiction and on the merits of the case. If there is no agreement between the parties, the arbitral tribunal has to decide on the rules according to which the proceedings are to be conducted. Moreover, the arbitral tribunal has the power to decide on the admissibility of evidence and to determine its relevance as well as to grant preliminary or interim relief.

The arbitral tribunal has a duty to treat the parties equally and must ensure that each party can exercise its right to be heard. The arbitrators must remain impartial and independent and have an ongoing obligation to disclose any circumstances which might cast doubt on their impartiality or independence.

7.4 Legal Representatives

There are no legal requirements or particular qualifications for legal representatives in arbitration proceedings in Liechtenstein. Furthermore, agreements by which representation by certain persons or groups

of persons is excluded are inadmissible and invalid according to the Liechtenstein Arbitration Law. As a consequence, a free choice of legal representation is ensured, which also includes legal representatives with qualifications not obtained in Liechtenstein.

8. Evidence

8.1 Collection and Submission of Evidence

The collection and submission of evidence is not separately and explicitly dealt with in the Liechtenstein Arbitration Law. The arbitral tribunal is entitled to decide at its own discretion on the collection and submission of evidence. In arbitration proceedings conducted in Liechtenstein, both civil and common law rules on the collection and submission of evidence are admissible. For example, common-law-style written witness statements and cross-examinations are very popular in arbitration proceedings in Liechtenstein, whereas common-law-style discovery proceedings are out of favour.

In line with the Liechtenstein Arbitration Law, the Liechtenstein Rules also stipulate that the collection and submission of evidence is to be decided by the arbitral tribunal at its own discretion. When performing this discretion, the arbitral tribunal must consider the principles of equal treatment of the parties and their right to be heard.

In regard to the submission of documents, the Liechtenstein Rules refer to the pertinent provisions of the Liechtenstein Civil Procedure Code, which provides quite restrictive rules as to what documents have to be submitted to the counterparty, and at what time. A specific feature of the Liechtenstein Rules with regard to the submission of evidence is that the arbitral tribunal must not order the forwarding of certain documents to the opposing party if the submitting party can, at first sight, prove to have an interest in confidentiality. In such a case, the relevant documents can be made available at an appropriate location for inspection.

Further, the Liechtenstein Rules contain provisions on the refusal of testimony and the refusal of document production. The provisions on collecting and submitting evidence set forth in the Liechtenstein Rules aim to protect confidentiality in arbitration proceedings conducted in Liechtenstein.

Under both the Liechtenstein Arbitration Law and the Liechtenstein Rules, in the absence of an agreement by the parties to the contrary, an arbitral tribunal is entitled to decide at its discretion on the taking of evidence.

8.2 Rules of Evidence

Neither the Liechtenstein Arbitration Law nor the Liechtenstein Rules provide specific rules on the taking of evidence to be applied in arbitral proceedings conducted in Liechtenstein. As a general rule, the arbitral tribunal shall assess the evidence freely.

8.3 Powers of Compulsion

Under the Liechtenstein Arbitration Law, arbitral tribunals do not have any powers of compulsion. In this regard, the Liechtenstein Arbitration Law does not distinguish between parties, representatives, members of the arbitral tribunal or third parties. However, an arbitral tribunal (or a party to the arbitral proceedings with the respective consent of the arbitral tribunal) may apply to the ordinary courts for legal assistance regarding the collection of evidence or the interrogation of witnesses. Consequently, the interrogation of a witness or the production of a document can only be indirectly forced by an arbitral tribunal in Liechtenstein through legal assistance by Liechtenstein and/or foreign ordinary courts.

9. Confidentiality

9.1 Extent of Confidentiality

The Liechtenstein Arbitration Law does not contain any provisions explicitly dealing with confidentiality of arbitral proceedings. Nevertheless, confidentiality is a matter of high priority in Liechtenstein. In fact, confidentiality is one of the most important features of the Liechtenstein Rules. Confidentiality is, inter alia, protected by the following provisions of the Liechtenstein Rules:

- Only persons subject to a statutory duty of confidentiality may be appointed as arbitrators.

- The production of documents is based on the Liechtenstein Civil Procedure Code and, therefore, regulated very strictly in comparison to common law tradition.
- The arbitral tribunal may order that copies of documents and evidence should not be physically handed over to the other party. Instead, such documents should be presented for inspection at the seat of the arbitral tribunal or at another appropriate location.
- All parties involved in the arbitration proceedings are obliged to protect confidentiality. The breach of confidentiality is sanctioned by a penalty. The obligation to protect confidentiality continues after the termination of the arbitration proceeding.
- The arbitral tribunal is obliged to make all appropriate arrangements to protect confidentiality. In particular, it may order that an expert witness (who in turn is subject to professional secrecy) reviews documents and reports on the content of such documents to the arbitral tribunal. As a result, there is no need to produce the documents concerned for inspection by the arbitral tribunal or the opposing party.
- Due to a de facto exclusion of the public at the setting-aside proceedings, the protection of confidentiality is even ensured if the proceedings are brought before the ordinary court.

No other set of arbitration rules contains such wide-ranging provisions to protect confidentiality. Therefore, the Liechtenstein Rules are particularly attractive in highly sensitive matters which require the utmost discretion and confidentiality.

The Liechtenstein Arbitration Law does not contain any provisions explicitly dealing with confidentiality of arbitral proceedings. Therefore, unless the parties expressly agree otherwise, parties to arbitration proceedings which are governed by the Liechtenstein Arbitration Law are not prohibited to disclose information obtained in arbitral proceedings in subsequent proceedings.

The Liechtenstein Rules contain an explicit provision stating that unless the parties expressly agree in writing to the contrary, the parties, their representatives, experts, the arbitrators, any commissioner, the secretariat and their auxiliary persons shall, as a general principle, keep confidential all awards and orders, as well as all materials submitted and facts made available by other participants in the proceedings in the framework of the arbitral proceedings, unless a right to them exists in other ways, save and to the extent that a disclosure by a party may be imperative to fulfil a legal duty to protect or pursue a legal right or to enforce or challenge an award. Hence, the obligation to maintain confidentiality shall persist even after conclusion of the arbitral proceedings.

10. The Award

10.1 Legal Requirements

Under the Liechtenstein Arbitration Law, unless the parties agree otherwise, the arbitral award shall be made by majority vote of the arbitrators in arbitration proceedings with more than one arbitrator. The Liechtenstein Rules contain the same provision. In addition, the Liechtenstein Rules stipulate that the presiding arbitrator shall have the casting vote in case of a tie vote. Further, it is stated that no arbitrator shall abstain from voting.

As a matter of the Liechtenstein Arbitration Law, an arbitral award shall be issued in writing, showing the date on which it was rendered and the seat of the arbitral tribunal. In the absence of any agreement between the parties, (i) it suffices when the arbitral award is signed by the majority of arbitrators (the award shall name the reasons for the absence of the signatures), and (ii) the award shall state the grounds which led to the decision. In fact, the Liechtenstein Rules contain the same provisions on the form of the arbitral award.

Neither the Liechtenstein Arbitration Law nor the Liechtenstein Rules stipulate time limits within which the arbitration award must be delivered.

10.2 Types of Remedies

The Liechtenstein Arbitration Law does not contain any specific provisions on the types of remedies that an arbitral tribunal may award. In general, the awarded remedy shall be defined by reference to the applicable substantive law on merits. However, there are limits to be considered. For example, an arbitral award ren-

dered in Liechtenstein must not contravene public policy in Liechtenstein ("*ordre public*"). A rendered arbitral award which is not in accordance with Liechtenstein public policy is vulnerable to being set aside by the Liechtenstein Court of Appeal.

In regard to punitive damages, it has to be said that this remedy is unknown under Liechtenstein law and might be considered a violation of the Liechtenstein public policy.

10.3 Recovering Interest and Legal Costs

The recovery of interest being a question of the applicable substantive law (rather than the procedural law) from a Liechtenstein law perspective, the Liechtenstein Arbitration Law does not contain any provisions in this respect.

In regard to the entitlement of a party to recover costs, the Liechtenstein Arbitration Law provides that the arbitral tribunal shall decide on the recovery of costs upon termination of the arbitration proceedings, unless the parties have agreed otherwise. Concerning the allocation of the costs between the parties, the arbitral tribunal has to take into consideration all aspects of the case, in particular the outcome of the proceedings.

The pertinent provision of the Liechtenstein Rules states that the arbitral tribunal shall decide on the costs of arbitration in its arbitral award. The Liechtenstein Rules are based on the so-called "loser pays" principle. However, the arbitral tribunal may decide on a different allocation of costs if it considers it appropriate in light of the circumstances of the case.

11. Review of an Award

11.1 Grounds for Appeal

The grounds for challenging an arbitral award, according to the Liechtenstein Arbitration Law, correspond largely with the grounds provided for in the UNCITRAL Model Law. Notably, the Liechtenstein Arbitration Law contains two significant deviations from the UNCITRAL Model Law in this respect: (i) the challenge must be submitted within four weeks of the date of receipt of the award; and (ii) the Liechtenstein Arbitration Law provides only for one ordinary instance for setting aside the award (ie, the Liechtenstein Court of Appeal).

The procedure is public in principle, but the public may be excluded upon request of a party if the party has a legitimate interest. Moreover, any person involved in the proceedings may ban third parties from being granted access to the files.

In summary, the distinctive features of the Liechtenstein Arbitration Law ensure that swift and confidential arbitral proceedings are not thwarted by lengthy and public proceedings before the ordinary courts. As mentioned, the Court of Appeal renders a final decision against which no further ordinary appeal is admissible. While, in theory, a complaint to the Constitutional Court in case of a violation of constitutional law is possible, the Constitutional Court has held that arbitral awards are only to a very limited extent bound by constitutional norms. In particular, an arbitral award will not be reviewed on the grounds of arbitrariness. Consequently, the chances of success with a constitutional complaint are very limited.

11.2 Excluding/Expanding the Scope of Appeal

As a matter of the Liechtenstein Arbitration Law, the parties cannot agree to exclude or expand the scope of appeal or challenge to the ordinary courts. On the other hand, it is within the autonomy of the parties to agree to a further arbitral tribunal as a second instance.

11.3 Standard of Judicial Review

The Liechtenstein Court of Appeal does not review the merits of the case.

12. Enforcement of an Award

12.1 New York Convention

Liechtenstein signed and ratified the New York Convention in 2011, but has submitted a reservation on reciprocity. Unlike some other signatories to the Convention, Liechtenstein has not submitted a reservation on commercial trade.

12.2 Enforcement Procedure

The enforcement of an arbitral award does not require a separate recognition procedure in Liechtenstein since arbitral awards are deemed to be equal to judgments of the ordinary (Liechtenstein) courts. Arbitral awards will be enforced in the same way as judgments of the ordinary courts – ie, by means of an application for enforcement to the Liechtenstein District Court.

The enforcement of a foreign arbitral award in Liechtenstein is governed by the provisions of the New York Convention. Accordingly, to enforce a foreign arbitral award, the enforcing party must enclose with the application for enforcement the certified original or a duly certified copy of the arbitral award and a certified translation of the arbitral award. Further, the Liechtenstein District Court must confirm the enforceability of the arbitral award (what may be applied for in the application for enforcement).

The main difference between enforcement on the basis of a domestic arbitral award and enforcement on the basis of a foreign arbitral award is that, in the latter case, the Enforcement Act provides for a special opposition procedure (*Widerspruchsverfahren*) in which the debtor can raise objections that are specifically (and only) available against the enforcement of foreign arbitral awards – eg, that the conditions set forth in the New York Convention are not fulfilled, or that the foreign arbitral award violates Liechtenstein public policy (*ordre public*). The opposition is to be raised with the Liechtenstein District Court and is to be dealt with in an oral hearing. An opposition can be raised in parallel to an appeal against the enforcement order with the Liechtenstein Court of Appeal. If an award has been set aside by the courts in the seat of arbitration in a binding decision, the respective award cannot be enforced in Liechtenstein under the New York Convention. It is up to the party against which enforcement is sought to argue and prove that the award has been set aside in a binding decision. The mere challenge of the award does not constitute an obstacle to recognition.

However, the enforcement may be suspended upon request if an action for the award to be set aside was filed.

According to Liechtenstein and Austrian case law, a state or state entity may successfully raise the defence of sovereign immunity in all areas of sovereign activity. Actions performed by a state iure gestionis (ie, like a private individual) are not covered by this immunity. The decision as to whether a state activity is to be qualified as sovereign or private shall be made according to Liechtenstein law.

12.3 Approach of the Courts

According to Liechtenstein case law, the New York Convention must be interpreted in a manner supporting the arbitration and enforcement thereof. The public policy grounds must reach a high threshold for the enforcement of an arbitral award to be impeded.

According to Liechtenstein case law, not every deviation from Liechtenstein law constitutes a violation of public policy – a severe violation of the fundamental values of the Liechtenstein legal order as a whole is required. Therefore, the public policy exemption is applied extremely restrictively.

13. Miscellaneous

13.1 Class Action or Group Arbitration

In principle, the Liechtenstein Arbitration Law and the Liechtenstein Rules do not provide for class actions or group arbitrations. However, the Liechtenstein Arbitration Law provides for the joint appointment of one or more arbitrators by more than one party “on the same side”.

13.2 Ethical Codes

Neither the Liechtenstein Arbitration Law nor the Liechtenstein Rules contain specific provisions for the ethical conduct of the legal representatives conducting arbitration proceedings. Relevant provisions may in this regard result from the IBA Rules of Ethics for International Arbitrators, the Liechtenstein Code of Civil Procedure, the Liechtenstein Lawyer Act, the professional guidelines of lawyers, or other professionals’ codes of conduct.

13.3 Third-Party Funding

There are no rules in Liechtenstein concerning litigation funding by third parties. Thus, third-party litiga-

tion funding is permitted and there are no particular restrictions.

13.4 Consolidation

Neither the Liechtenstein Arbitration Law nor the Liechtenstein Rules contain specific provisions on the consolidation of separate arbitral proceedings. As a consequence, a consolidation of separate arbitral proceedings is not permissible without the consent of all concerned parties.

13.5 Binding of Third Parties

According to the Liechtenstein Arbitration Law, arbitration clauses in articles of association, trust deeds or foundation statutes are valid and legally binding. For example, a beneficiary that wishes to bring a claim for information against a foundation or a trustee is bound by an arbitration clause contained in the statutes/trust deed of the respective foundation/trust even though the respective beneficiary never agreed to the arbitration clause.

Further, it has to be noted that Austrian case law has established that both single and universal legal successors, assignees of a claim or contract, and beneficiaries of contracts for the benefit of a third party are bound by an arbitration agreement, even if they are non-signatories. It is likely that Liechtenstein courts would take a similar approach.

In addition to these established principles of third-party binding, recent case law of the Liechtenstein Supreme Court has further clarified the functional scope of arbitration clauses in articles of association, trust deeds or foundation statutes. In particular, the Liechtenstein Supreme Court emphasised that arbitration clauses contained in such documents may cover not only claims arising under company, trust or foundation law, but also those that are formally characterised as non-contractual (eg, restitution or unjust enrichment claims), provided that such claims have their economic origin in such a relationship.

In principle, judgments of the ordinary courts are only binding on the parties to the proceedings.

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