

# The Trust in the Principality of Liechtenstein – Tradition, Legal Structure and Future Developments

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# I. Trusts – Codification in Liechtenstein

- First continental European legal system with its own trust law regime
- Classification of the Liechtenstein trust law into two categories
  - > Trusts in general (conventional trust), Arts. 897 – 932 Persons- and Company Law (PGR) (Personen- und Gesellschaftsrecht, LGBl. 1926/4)
  - > Business trust (trust reg.): incorporated into the PGR by the TrUG (*Gesetz über das Treuunternehmen von 1928*, LGBl. 1928/6), Art. 932a §§ 1-170 PGR (= Reception of the Massachusetts Business Trust)
- Focus in today's presentation: conventional trust

## II. Trusts – Hague Convention/1

- The Convention was concluded at The Hague on 1 July 1985 – scope
  - > Definition of a trust
  - > Applicable law
  - > Recognition of trusts internationally
- Ratification by Liechtenstein
  - > Liechtenstein has ratified the Hague Convention on Trusts
  - > In force since 1 April 2006
- Ratification by Switzerland
  - > Switzerland has ratified the Hague Convention on Trusts
  - > In force since 1 July 2007

## II. Trusts – Hague Convention/2

- Consequences of ratification by Liechtenstein
  - > Recognition of Liechtenstein trusts in the other signatory countries
  - > Leading to increased political pressure on politics
  - > Liechtenstein trust must be made more competitive
  - > A direct comparison is now possible with other legal systems with trust law, especially those in typical offshore legal systems

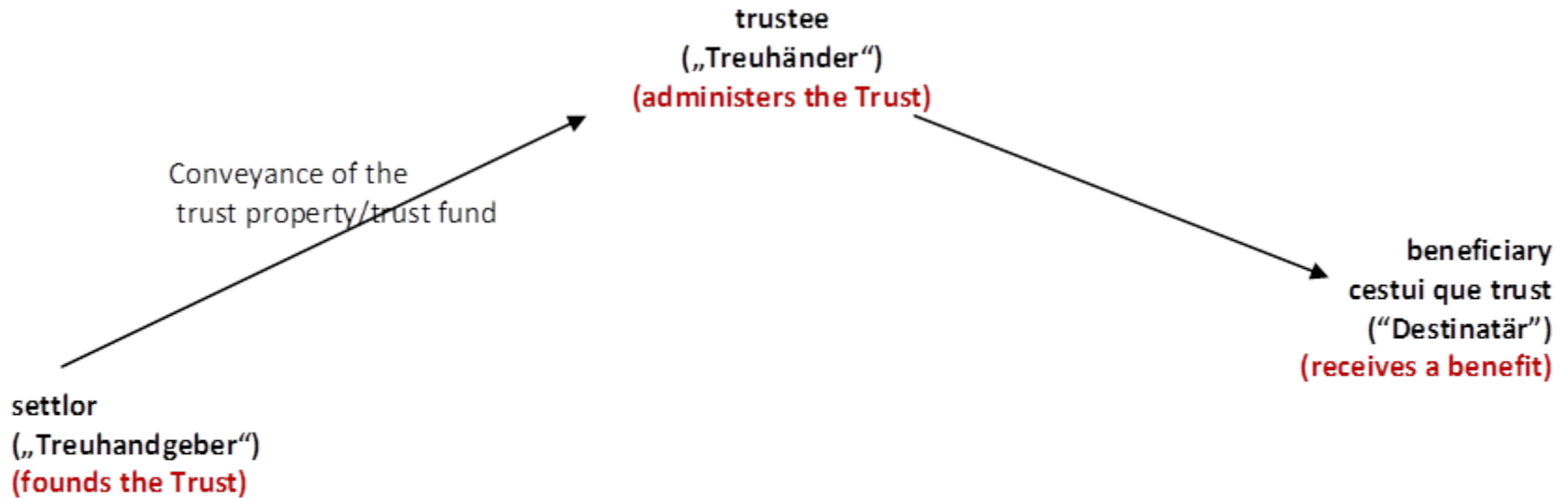
### III. Trusts in Liechtenstein – Status Quo/1

- Economic significance (Arts. 897 – 932 PGR)
  - > Established in Liechtenstein since 1926
  - > Great economic importance, but mostly for foreigners
  - > Hardly a legal instrument for the population of Liechtenstein
  - > In Liechtenstein itself, only the express trust would actually be of practical importance, as Liechtenstein has a continental European legal system
  - > Resulting trusts and constructive trusts serve the purpose of counterbalancing deficits in common law legal systems; anyway application in Liechtenstein case law

### III. Trusts in Liechtenstein – Status Quo/2

- Compatibility of trusts (Arts. 897 – 932 PGR) with the rest of the Liechtenstein legal system
  - > It is actually a foreign matter, which has nothing in common with the other legal institutions in Liechtenstein law
  - > Decisive in rem feature: effect in rem of the trust; there is a so called in rem burden to the trustee's estate
  - > This does not concern the subject relating to the rights of the individual, therefore it is actually alien to the system in the PGR
  - > Business law, inheritance law, or the law of property are often likely to play a crucial role

### III. Trusts in Liechtenstein – Status Quo/3



The trust property is separated from the assets of the trustee!

## IV. Trusts in Liechtenstein – Parties involved/1

- Settlor
  - > Natural person or legal entity with legal capacity
  - > Creates the trust: conveys the trust property to the trustee
  - > Settlor may also be one of the beneficiaries
- Trustee
  - > Natural person or legal entity
  - > Administers the trust property for the benefit of one or several beneficiaries with effect towards all other persons
- Beneficiaries
  - > Natural person or legal entity (exception: charitable trust)
  - > Entitled to demand execution of the provisions of the trust
  - > The trustee may not be the sole beneficiary



## IV. Trusts in Liechtenstein – Parties involved/2

- Duty of the trustee to administer the trust property
- Unlimited rights (legal property) of the trustee concerning the trust property
- Administration for the benefit of the beneficiaries, who have a legal title regarding to the trust property (equitable rights)
- Settlor can be the trustee? (risk for asset protection)
- Settlor is able to reserve special powers? (risk for asset protection)
- Trustee can also be a beneficiary?

## V. Trusts in Liechtenstein – Creation

- The settlor transfers certain property to one or more trustees
- The trustees agree that they hold the property upon the trusts
- Bilateral or multilateral creation of a trust
- Documents of a trust
  - > Deed of settlement
  - > Declaration of trust
  - > Will of the settlor

## VI. Trusts in Liechtenstein – Three Certainties

- Three Certainties
  - > Certainty of intention
  - > Certainty of subject
  - > Certainty of objects

## VII. Trusts – Relation between trustee and beneficiary

- A trust is an obligation owed by the trustee to the beneficiaries
- The fiduciary obligation is based on honesty, integrity and good faith
- Fiduciary duty
  - > Compliance with directions contained in the trust instrument
  - > Primacy of the interests of the beneficiaries and of the trust itself
  - > Exercise of discretionary powers in good faith

## VIII. Trusts in Liechtenstein – Issues of ownership

- Dualism of the ownership
  - > The trustee is the legal owner of the trust property (legal ownership)
  - > The beneficiary has an equitable right to those assets (equitable ownership)
  - > The rights of the beneficiary operate in personam against the trustee

## IX. Trusts in Liechtenstein – Tracing Trust Property

- Conflict between continental European tradition of property law and the law of trusts
- Breach of Trust
  - > Act on the part of a trustee not authorized or excused by the terms of the trust instrument or the law
- Equitable tracing
  - > Tracing into assets even where the form of the asset has changed
- Limits to equitable tracing
  - > no tracing against bona fide purchasers for value

## X. Trusts in Liechtenstein – Business enterprises/1

- Trusts with an underlying company
  - > Trustee is acting as a shareholder of a business enterprise
  - > Trust fund may be concentrated in a single asset: the shares of a business enterprise

## X. Trusts in Liechtenstein – Business enterprises/2

- Issues faced by a trustee holding a controlling interest in a business enterprise
- Investment diversification: is there a duty of the trustee to consider the need to diversify their investments?
- Active shareholder's role: proper exercise of the rights as shareholders in the best interest of the beneficiaries (*Re Lucking's Will Trusts*)



## X. Trusts in Liechtenstein – Business enterprises/3

- Liability (*Bartlett v Barclays Bank Trust Co Ltd.*)
  - > Limited liability because of underlying companies?
  
- Categories of risk
  - > Failing of monitoring
  - > Disregard of the corporate vehicle for some purposes, if the trustee is directly engaged in the administration of the underlying company
    - assets viewed as directly held trust assets

## XI. Trusts in Liechtenstein – Drafting techniques/1

- Drafting techniques (“Anti-Bartlett” clauses)
  - > Trustees shall not be bound or required in the management or conduct of the business of any company, wherever resident or incorporated, the ownership, equity or debt interests in or of which are comprised in the trust fund
  - > Trustee may leave the conduct of it’s business wholly to the directors as long as he has no actual notice of any act of dishonesty or misappropriation by any of the directors of the company.

## XI. Trusts in Liechtenstein – Drafting techniques/2

- Drafting techniques (exemption or indemnity clauses)
  - > Strengthen the retention clauses restricting the trustees` right to dispose of company shares held in the trust fund
  - > Strengthen the anti-Bartlett clauses, which enable the trustees to take a limited role in the management of the underlying companies

## XII. Trusts in Liechtenstein – Indirect control of the settlor

- Reservation of certain powers
- Letter of wishes
- Appointment of a protector
- Power to revoke or amend the trust instrument

## XIII. Trusts in Liechtenstein – Asset Protection/1

- Concept of a discretionary trust
- Authority of the trustee to form resolutions autonomously regarding
  - > the appointment of beneficiaries
  - > the type, extent, and time of a benefit
- Decisions are subject to the stipulations in the trust documents

## XIII. Trusts in Liechtenstein – Asset Protection/2

- Advantage/disadvantage of discretionary financial structures
  - > Beneficiaries do not have an enforceable claim
  - > But letter of wishes can be a risk factor
  - > Beneficiaries have limited access to information
  - > Control mechanisms are required: appointment of a protector or an audit authority
  - > Risk in appointing the settlor as protector

# Questions?