Sponsored briefing: A new ADR instrument for conflicts between beneficiaries and professional fiduciaries

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Dispute resolution Walch & Schurti Disputes Yearbook 2019 Europe Sponsored briefing

Moritz Blasy, Nicolai Binkert and Simon Ott detail Liechtenstein's new conciliation procedure

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Liechtenstein's fiduciary and financial services industry has a long history of rendering high-quality services to an international clientele of high-net-worth individuals. For almost 100 years Liechtenstein's unique legal system has attracted high-net-worth individuals seeking to structure their wealth. The Liechtenstein foundation and the Liechtenstein trust have proven to be particularly popular wealth-structuring vehicles.

Many of the foundations, trusts and other private asset structures that now exist 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 were often 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.

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 and can *inter alia* order the replacement of a trustee or a foundation council member. 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 interest or severely violated fiduciary duties, thereby jeopardising the assets of the relevant asset structure, or endangering the fulfilment of the structure's 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 foundation council member. 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 proved to be very unsatisfying.

In an attempt to address the problem, the Liechtenstein Institute of Professional Trustees and Fiduciaries recently amended its Rules of Professional Conduct, 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 is sufficient ground to initiate a conciliation procedure before the newly-established Conciliation Body.

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. If no amicable solution can be reached in this meeting, the fiduciary requested to resign shall inform the board of the Institute of Professional Trustees and Fiduciaries, stating the reasons for the refusal to transfer the administration of the trust or foundation to the requesting fiduciary. The board of the Institute then defers the dispute to the Conciliation Body, which will 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 interests 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.

Although the conciliation procedure before the 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 issued by the body 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.

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 Institute: 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 Institute are an effective instrument to replace Liechtenstein fiduciary service providers who have lost the trust of the beneficiaries of a Liechtenstein trust or foundation.



*Moritz Blasy, Nicolai Binkert and Simon Ott (*left to right*), Walch & Schurti.*

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