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on

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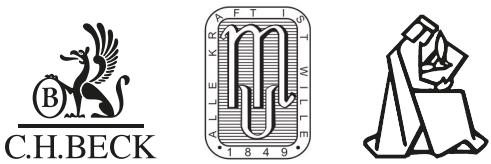

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Introduction

The 2018 edition of the Austrian Yearbook on International Arbitration is the 12th edition of the Yearbook. It has – hopefully – become a standard reference work for the arbitration community.

This Yearbook covers a number of areas of both topical and enduring importance which are likely to be of relevance to academics, practitioners or persons who may become involved in arbitration in Austria or in any other place. Some of the articles in the Yearbook analyze significant trends in international arbitration, like the idea of a multilateral investment court, the enforcement of settlement agreements, transparency in international commercial arbitration and in arbitration institutions, arbitration as a means of private enforcement as well as unilateral arbitration clauses.

It also includes the Vienna Repositioning Propositions, a proposal by 27 experts on how to reposition actors and actions in international arbitrations.

We are grateful for each contribution contained in this Yearbook and hope that you will find the 2018 edition of the Yearbook to be an essential tool and up-to-date reference in your arbitration library.

Vienna, January 2018

The Editors

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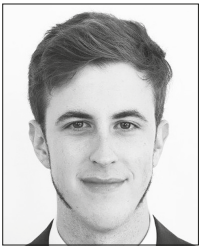

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Arbitration Of Foundation And Trust Disputes In Liechtenstein

Johannes Gasser/Michael Nueber

I. Introduction

Liechtenstein has a long standing tradition as one of the major financial centers across the globe. This is, inter alia, owed to the fact that the Principality has a well-functioning court system, involving both lay and professional judges. In average, civil- and criminal proceedings do not take longer than two years and go through three instances. In addition, there always exists the possibility to submit appeals against arbitrary decisions to the Constitutional Court. However, according to its own definition the Constitutional Court does not serve as fourth instance.[1])

In general, parties value the increased legal certainty provided by the above court system. However, since Liechtenstein foundations, trusts and establishments are popular means for both UHNWI/HNWI[2]) as well as institutional investors, discretion and speed are crucial when solving disputes in these areas. The commonly known set of advantages of arbitration particularly applies to the realm of asset protection and estate planning, which is still an important line of business of Liechtenstein fiduciaries.

In order to meet the above needs, Liechtenstein decided a few years ago to adjust its arbitration legislation to international standards instead of concluding multiple recognition- and enforcement treaties on a bilateral level. Accordingly, the Principality joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) in 2011.[3]) In this context it is noteworthy that Liechtenstein has issued a reservation of reciprocity and only recognizes and enforces arbitral awards rendered in the territory of another member state of the NYC. However, different to the USA or China Liechtenstein has not declared a reservation to recognize and enforce arbitral awards in commercial matters only.[4])

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[1]) Constitutional Court Liechtenstein, docket no. 2008/82, 2010/057.

[2]) Ultra High Net Worth Individual: investable assets of at least $ 30 million/ High Net Worth Individual: investable assets of at least $ 1 million.

[3]) LGBl 2011/325.

[4]) Johannes Gasser, *Das neue Schiedsverfahren in Liechtenstein und die Auswirkungen auf die Stiftungspraxis,* PSR 109, 111 (2012).

In a second step Liechtenstein amended its arbitration law pursuant to the UNCITRAL Model Law on International Commercial Arbitration as well as the Austrian example.[5])

Finally, the Liechtenstein Chamber of Industry and Commerce issued arbitration rules ("Liechtenstein Rules") which serve as an addition to the country's modern legislation.

II. Liechtenstein Arbitration Act 2010

A. Introduction

The present section serves the purpose to provide an overview about Liechtenstein arbitration law. The declared goal of the 2010 reform was to strengthen the Principality's position as place for international arbitration. In this respect the legislator explicitly referred to the combination of Liechtenstein's liberal corporate law and the newly established modern and internationally harmonized arbitration law.[6])

Notably, the total revision of Austria's arbitration law in 2006 had a trigger function for reforms in Liechtenstein. Those who are familiar with conducting arbitration proceedings in Austria will swiftly recognize the similarities between both legislations.[7]) Due to these similarities jurisprudence and literature on Austrian arbitration law can easily be consulted in Liechtenstein as well.[8])

B. Arbitrability

According to § 599(1) Liechtenstein Code of Civil Procedure (*Zivilprozessordnung,* LCCP) any claim involving an economic interest and lying within the jurisdiction of (state) courts can be subject to an arbitration agreement. Similar to Austria the notion "economic interest" has to be interpreted broadly.[9]) According to Austrian judicature the economic nature of a claim has to be assessed based on its material content,[10]) resulting in the

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[5]) *Id.* at 111.

[6]) Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Totalrevision des schiedsrichterlichen Verfahrens vom 28. 10. 2008, Nr 151/2008, 9.

[7]) Michael Nueber, *Schiedsfähigkeit stiftungsrechtlicher Streitigkeiten – Zugleich eine Besprechung von FL OGH 05 HG.2011.28*, PSR 10 (2012).

[8]) Gasser, *supra* note 4, at 111.

[9]) For Austria: Paul Oberhammer, Entwurf Eines Neuen Schiedsverfahrensrechts 40 (2002); for Liechtenstein: Gasser, *supra* note 4, at 112.

[10]) Austrian Supreme Court, docket no. 6 Ob 521/91.

inheritable nature of such claims.[11]) In addition, claims not involving an economic interest are only arbitrable if the parties are entitled to settle the underlying dispute.

Similar to Austria family law matters but also certain corporate law matters (*e.g.* company- and land register matters) are not arbitrable. § 599(2) LCCP indicates that proceedings which are initiated *sua sponte* or involve the mandatory competence to supervise corporations are not arbitrable.[12]) However, legal scholars nevertheless consider the dismissal of organs, the challenge of resolutions and the extraordinary appointment of auditors to be arbitrable.[13])

C. Arbitration Agreement

The capacity to conclude arbitration agreements under Liechtenstein law derives from the capacity to independently act before courts (*Prozessfähigkeit*).[14])

Furthermore, § 600 LCCP stipulates that arbitration agreements must be concluded in written form. This includes two (or more) parties signing the same document or the exchange of written documents, emails etc. However, since this form requirement has a purely evidential function the lack of written form can be healed if not objected in time. Additionally, the Austrian Supreme Court recently decided that a signature is not necessary in case of the exchange of documents.[15])

In this context it is noteworthy that the Liechtenstein Arbitration Act 2010 abolished the requirement to publicly record an arbitration agreement providing for the jurisdiction of an arbitral tribunal seated abroad.[16])

D. Relationship Between Courts And Arbitral Tribunals

The Liechtenstein Arbitration Act 2010 also changed the relationship between arbitral tribunals and courts. The main principle in this respect constitutes the priority of an arbitration agreement towards the initiation of state court proceedings. In line with international standards arbitral tribunals have the "competence-competence" to decide on their own jurisdiction. In

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[11]) Austrian Supreme Court legal holding RS0007110; *cf.* Michael Nueber *in,* JN/ZPO-PRAXISKOMMENTAR § 582 mn 3 (Höllwerth & Ziehensack eds., to be published 2018).

[12]) *Cf.* further IV.C.

[13]) Gasser, *supra* note 4, at 112.

[14]) Michael Nueber, *supra* note 11, at § 582 mn 21.

[15]) Austrian Supreme Court, docket no. 18 OCg 1/15v.

[16]) Gasser, *supra* note 4, at 115.

order to effectively object to an arbitral tribunal's jurisdiction a party must raise a respective objection in time, *i.e.* with the first plea in the proceedings. Otherwise the lack of jurisdiction is deemed to be healed. § 601 LCCP governs how to deal with the competing jurisdiction of an arbitral tribunal and state courts in additional situations.

However, as it happens from time to time that state courts conduct proceedings parallel to already pending arbitrations, it is noteworthy that an arbitral award has *res iudicta*-effect only between the parties of the arbitration but not towards third parties who haven't been involved in the arbitral proceedings.[17]) What is more, state courts in subsequent proceedings are only bound by the verdict but not by the reasoning and findings of the arbitral tribunal.[18])

E. Interim Measures

Parties to arbitration proceedings can submit applications for interim measures both to an arbitral tribunal and to a state court. However, arbitral tribunals are entitled to render interim measures only if the other party to the proceedings has been heard (prohibition of ex-parte measures). Of course, since the jurisdiction of the arbitral tribunal is based on the arbitration agreement, interim measures by the same have effect only between the parties of the proceedings.[19])

If the parties decide to apply for interim measures to a state court, the Landgericht Vaduz would be the competent venue. The latter also has jurisdiction regarding requests from arbitral tribunals seated abroad.

F. Annulment Claims

In contrast to Austrian law that provides for a three-month period to challenge an arbitral award, parties in Liechtenstein only have four weeks to submit a respective claim to the Court of Appeal (*Obergericht*), which functions as the first and last instance in challenge proceedings as well as proceedings involving declaratory claims regarding the existence or non-existence of an arbitral award. By the Constitutional Court's own definition and as already mentioned above the possibility to raise a claim against arbitrary decisions does not constitute another procedural instance and thus the Court of Appeal is the only instance in above mentioned proceedings.[20])

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[17]) Liechtenstein Supreme Court, docket no. 05 CG.2001.384.

[18]) Liechtenstein Supreme Court, docket no. CG.2008.251.

[19]) Gasser, *supra* note 4, at 117.

[20]) Michael Nueber, *OGH als einzige Instanz in Verfahren zur Aufhebung von Schiedssprüchen (rechts)politisch möglich?*, ZfRV 73, 76 (2013).

G. Miscellaneous

Especially in Liechtenstein, where usually parties domiciled abroad are involved in court proceedings, security deposits for court fees are common practice. However, Liechtenstein law does not provide for the same in respect to arbitration proceedings. In order to benefit from security deposits in arbitration proceedings an explicit agreement between the parties would be necessary.[21]) In this respect the application of the Liechtenstein Rules might be of advantage.[22])

H. Liechtenstein Arbitration Act 2017

In 2013 the Austrian Supreme Court[23]) decided that the consumer protection provisions of § 617 Austrian Code of Civil Procedure (*Zivilprozessordnung,* ACCP) are also applicable to shareholders who qualify as consumers. Since § 617 ACCP rules out arbitration proceedings with consumers this decision has been considered to be catastrophic for the arbitration of corporate disputes in Austria.[24])

The Liechtenstein Arbitration Act 2010 introduced a parallel provision to § 617 ACCP into Liechtenstein law. § 634 LCCP in the version before the Liechtenstein Arbitration Act 2017[25]) stipulated that the conclusion of arbitration agreements with consumers are only valid if a dispute has already arisen. Furthermore, an arbitration agreement had to be included in a separate document. In the light of these provisions and the unlucky decision of the Austrian Supreme Court, arbitration clauses in articles of association or foundation deeds seemed to be massively endangered.

The Liechtenstein legislator reacted swiftly and introduced amendments to § 634 LCCP, which have come into force on 1 August 2017. Now, the new § 634 LCCP captures only natural persons and explicitly permits arbitration clauses in statutes, articles of associations and foundation- and trust deeds.

It is noteworthy that the Liechtenstein Arbitration Act 2017 contains specific transitional provisions, which declare newly concluded arbitration clauses or arbitration clauses concluded before 2010 to be valid regardless of the involvement of a consumer. The same does not apply to arbitration agreements concluded between 2010 and 2017. The defective arbitration clause is deemed to be healed in these case only if the consumer invokes the jurisdiction of the

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[21]) Gasser, *supra* note 4, at 118.
[22]) *See* III.
[23]) Austrian Supreme Court, docket no. 6 Ob 43/13m.
[24]) Michael Nueber, *OGH 16. 12. 2013, 6 Ob 43/13m:Cui Bono?,* wbl 194 (2014).
[25]) LGBl 2017/170.

arbitral tribunal. It might therefore be necessary to re-negotiate arbitration clauses concluded in the latter period of time.[26])

Another major reform concerned a requirement stipulated by § 1008 Liechtenstein Civil Code (*Allgemeines Bürgerliches Gesetzbuch,* LCC) according to which a special power of attorney had been necessary in order to conclude a valid arbitration agreement on behalf of someone else. Interestingly, the same legal situation still applies in Austria, only with the exception that according to both § 49(1) Austrian Commercial Code (*Unternehmensgesetzbuch,* ACC) and § 54(1) ACC a general proxy suffices in a commercial context.[27])

As of 1 August 2017 § 1008 LCC does not govern arbitration agreements anymore and thus no special power of attorney is required in order to conclude arbitration agreements on behalf of someone else. At the same time the Liechtenstein Commercial Code has been adjusted to Austrian standards, meaning that every proxy in a commercial context empowers to conclude arbitration agreements as well.

The recent amendments of Liechtenstein Arbitration law strengthen the country's position as preferred venue for the arbitration of corporate disputes. Especially in combination with the Rules of Arbitration of the Liechtenstein Chamber of Industry and Commerce ("Liechtenstein Rules") the Principality provides the ideal environment to discreetly deal with foundation- and trust disputes where usually – next to significant amounts in dispute – a variety of conflicting interests are involved.

III. Liechtenstein Rules

After the establishment of the Liechtenstein Arbitration Association (*Liechtensteinischer Schiedsverein,* LIS) the Liechtenstein Chamber of Commerce and Industry introduced its own arbitration rules, the "Liechtenstein Rules". Although the rules have predominantly been drafted in line with the UNCITRAL Arbitration Rules, they also reflect amendments of the Swiss Rules as well as developments in international arbitration in general.

The present section serves the purpose to briefly outline the benefits of conducting foundation- and trust-related arbitrations under the Liechtenstein Arbitration Act and the Liechtenstein Rules. Since according to § 611 LCCP the parties are basically independent in deciding how to conduct their proceedings, the application of the Liechtenstein Rules can be agreed both in advance but also after the dispute has arisen.

It is noteworthy that from time to time the authors witness arbitration clauses referring to the application of Liechtenstein arbitration law, regardless

[26]) Dietmar Czernich, 43. Liechtensteinischer Rechtsprechtag, September 19, 2017, University of Liechtenstein.

[27]) Michael Nueber, *supra* note 11, § 583 mn 15.

of the fact that the seat of the arbitral tribunal is located in Liechtenstein.[28]) Such referral is usually redundant because already §§ 594(1) and 612 LCCP provide for the application of Liechtenstein arbitration law if the arbitral tribunal is seated in the Principality.

A. Confidentiality

One of the major milestones of the Liechtenstein Rules is the increased confidentiality obligation of all involved actors. According to Art 29 all parties to the arbitration but also all arbitrators, witnesses and experts are bound by a strict confidentiality obligation. A violation of this obligation will be executed by a fine of CHF 50,000.- and – in case of a damage – by subsequent damage proceedings. In this context it is also noteworthy that Art 18(2) gives the parties the right to request that certain documents and other means of evidence may only be inspected by the counterparty at the seat of the tribunal or at another appropriate place. Especially in regard to arbitrations involving sensible – family-related – documents this provision might be crucial.

Another measure to increase the confidentiality of proceedings under the Liechtenstein Rules can be found in Art 6(1) according to which only persons underlying a confidentiality duty stipulated by law can be appointed as arbitrators, *e.g.* attorneys at law, trustees and accountants.

In practice the increased confidentiality under the Liechtenstein Rules plays a significant role which is owed to the fact that many of the currently pending arbitrations involve matters in the realm of the Liechtenstein fiduciary business.[29])

B. Procedure

The conduct of the proceedings under the Liechtenstein Rules has been regulated in quite some detail. The Rules provide for a time limit of 30 days to submit an answer to a claim, which can include a counterclaim as well as objections to the arbitral tribunal's jurisdiction.

Another specialty of the Liechtenstein Rules concerns the application for interim relief. According to Art 17 parties can only address requests for interim relief to the arbitral tribunal and not a state court. A violation might result in a breach of the above described confidentiality obligation and further trigger damage claims pursuant to Art 29(7).

[28]) *See also* Bericht und Antrag 55.
[29]) Gasser, *supra* note 4, at 121.

Furthermore, Art 27(1) contains the "costs-follow the event"-rule which is well-known in international arbitration. Interestingly, arbitrations under the Liechtenstein Rules are up to 15% cheaper than under the Swiss Rules.[30])

Upon claimant's request the arbitral tribunal can order the respondent to deposit a security for the costs of the proceedings. In this context it has to be borne in mind that the Liechtenstein Supreme Court decided that in case of impecunious respondents the arbitration agreement is deemed to be repealed and the way to Liechtenstein courts stands open.[31])

Finally, the Liechtenstein Rules foresee a special appointing authority in case the parties omit or the arbitrators cannot agree to appoint an arbitrator. So-called Commissioners (*Kommissäre*) will be appointed by the Secretariat of the Liechtenstein Chamber of Commerce and Industry for a specific arbitration. The decision of the Commissioners is final and binding.

IV. Foundation Disputes

A. Introduction

After having established that Liechtenstein's legal framework is ideal to handle disputes where both efficiency and confidentiality is crucial, a closer look on foundation- and trust disputes appear to be appropriate.

Liechtenstein foundations are a success story of international dimension. This is also reflected by the fact that Austria, Jersey, Panama and others have implemented the Liechtenstein foundation law into their legislation.[32]) In respect to foundations but also to trusts[33]) it is immanent that conflicting interests – quite often concerning sensitive family matters – and a significant amount of assets are at stake before a court or an arbitral tribunal.

B. Admissibility Of Arbitration Clauses In Foundation Deeds

Recent trends show that foundations deeds quite often contain arbitration clauses. However, form an arbitration practitioner's point of view quite a few of these clauses would need to be re-drafted in order to be valid in an international context.[34])

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[30]) *Id.* at 121 with further references.

[31]) Liechtenstein Supreme Court, docket no. CG.2008.251.

[32]) Johannes Gasser, Liechtensteinisches Stiftungsrecht 6 (2013).

[33]) *See* V.

[34]) For Model Arbitration Clauses and substantial deliberations on dispute resolution involving Liechtenstein foundationas and Austrian private foundations *see* Matthias Gass & Michael Nueber, Konfliktlösung in Privatstiftungen (to be published 2018).

In general, arbitration clauses in foundation deeds are permitted according to § 598(2) LCCP. The situation is similar to Austria where legal scholars advocated in this respect already before the Austrian Arbitration Act 2006 came into force.[35])

However, according to Art 114(2) Liechtenstein Company Law (*Personen- und Gesellschaftsrecht,* PGR) and a line of decisions of the Liechtenstein Supreme Court[36]) arbitration clauses do not govern disputes between a corporation and its members regarding their membership status. These disputes have to be mandatorily submitted to the state court located at the corporation's seat. Nevertheless, in later decisions the Liechtenstein Supreme Court[37]) qualified such disputes to be arbitrable by arguing that Art 114 PGR does not address arbitration as a question of substantive law. Accordingly, the Supreme Court qualified Art 114(2) PGR as provision solely dealing with the forum in state court proceedings.

Finally, in a recent decision the Liechtenstein Supreme Court decided in favor of the invalidity of clauses providing for the loss of a beneficiary's claim in case of the latter initiating arbitral proceedings (so-called *kassatorische Klausel*).[38])

C. Arbitrability Of Foundation Disputes[39])

§ 599 LCCP considers all claims of an economic nature to be arbitrable. Legal scholars thus advocate in favor of the arbitrability of all corporate disputes.[40]) In regard to the comparable Austrian legal situation it has been put forward that foundation-related disputes are generally arbitrable.[41]) These disputes, inter alia, concern claims of beneficiaries against the foundation or damage claims against members of the foundation council as well as actions claiming that certain resolutions are void.[42])

However, in a recent decision the Liechtenstein Supreme Court decided that arbitration clauses can never result in the exclusion of the state courts supervisory function in respect to foundations.[43]) In other words: despite the

[35]) Hans Fasching, Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht 50 (1973).

[36]) Liechtenstein Supreme Court, LES 1981, 174.

[37]) LES 1982, 16; LES 1987, 14, LES 2012, 122.

[38]) Liechtenstein Supreme Court, CG.2008.251.

[39]) For a detailed analysis of the arbitrability of all potential foundation-related claims *see* Matthias Gass & Michael Nueber, *supra* note 34.

[40]) Gasser, *supra* note 4, at 112.

[41]) Nueber, *supra* note 11, § 582 mn 12.

[42]) Georg Kodek, *Schiedsvereinbarungen bei Privatstiftungen – Möglichkeiten und Grenzen, in* Liber Amicorum Waldemar Jud 351, 358 (2012); Michael Nueber, *Die Privatstiftung als Partei vor „österreichischen" Schiedsgerichten,* GesRZ 339, 341 (2012).

[43]) Liechtenstein Supreme Court, docket no. 05 HG.2011.28.

existence of an arbitration clause beneficiaries still have the right to request the dismissal of a member of the foundation council before a state court. The Supreme Court's decision has subsequently been confirmed by the Constitutional Court.[44]) Unfortunately and despite criticism of both Liechtenstein and Austrian scholars,[45]) the Liechtenstein legislator recently confirmed this perception by amending § 599(3) LCCP. The new provision refuses the arbitrability of proceedings which can be initiated *sua sponte*. However, the Liechtenstein Supreme Court clarified that this restriction of arbitrability only comprises matters in the competence of the supervisory authority, *i.e.* the competent state court, but not other issues in regard to Liechtenstein foundations.[46])

Austrian scholars have correctly put forward that despite the mandatory jurisdiction of state courts in the above matters, arbitral tribunals could decide preliminary questions and an arbitral award would bind the state court in subsequent supervisory proceedings.[47]) In the authors' opinion the same considerations apply under Liechtenstein law.

In sum, Liechtenstein courts decided the following matters to be arbitrable:

- Information rights of beneficiaries[48])
- Interpretation of foundation deeds[49])
- Claims by the foundations against its organs[50])

In addition, it can be assumed in the light of § 599 LCCP that all other foundation disputes are of an economic nature and therefore arbitrable as well.

The Liechtenstein Supreme Court made only two exceptions from the previous rule:

- Dismissal of Members of the Foundation Council[51])
- Declaration of the invalidity of a resolution by the foundation council[52])

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[44]) Liechtenstein Constitutional Court, docket no. 2011/181.

[45] Gasser, *supra* note 4, at 113; Michael Nueber, *Schiedsfähigkeit stiftungsrechtlicher Streitigkeiten – Zugleich eine Besprechung von FL OGH 05 HG.2011.28*, PSR 10 (2012).

[46]) Liechtenstein Supreme Court, docket no. 05 HG.2015.123.

[47]) Michael Nueber, *Schiedsklauseln in Stiftungsurkunden*, *in* Konfliktlösung in Privatstiftungen (Gasser & Nueber eds., to be published 2018) with further references.

[48]) Liechtenstein Court of Appeal, LJZ 2012, 67; Constitutional Court, docket no. 2012/94.

[49]) Liechtenstein Supreme Court, docket no. 04 CG.2008.14.

[50]) Liechtenstein Supreme Court, LES 2012, 122.

[51]) Liechtenstein Supreme Court, docket no. 05 HG2011.28; *see* in detail already above.

[52]) Liechtenstein Supreme Court, docket no. 05 HG.2015.123.

D. Scope Of The Arbitration Clause

It is commonly recognized in (international) arbitration that an arbitration clause constitutes an agreement between the parties to establish the jurisdiction of an arbitral tribunal for present and/or future disputes.[53])

Although not based on an agreement between the parties, § 598(2) LCCP explicitly permits arbitration clauses in articles of association, *e.g.* foundation deeds. The relevant legal issue in this context is how to deal with the fact that beneficiaries of a foundation have not (explicitly) consented to submit to the jurisdiction of an arbitral tribunal stipulated in the foundation deed.

In Austria this issue has raised concerns regarding the binding effect of such "unilateral" arbitration clauses on so-called non-signatories. Whereas the binding effect of an arbitration agreement towards the foundation and the council members has been affirmed, Austrian scholars differentiate between discretionary beneficiaries and those who have an enforceable claim against the foundation.[54]) It has been advocated that only for the latter group an arbitration clause in the foundation deed can have binding effect, whereas in all other cases beneficiaries must expressly submit to arbitration.[55])

It is obvious that the situation under Austrian law results in legal insecurity. However, in Liechtenstein the Court of Appeal – in its function as last instance in annulment proceedings – clarified that arbitration clauses in foundation deeds have binding effect also on so-called non-signatories, regardless whether they have submitted to arbitration or not.[56]) According to the court it would be contradictory to claim as beneficiary for a distribution but at the same time refuse to accept the jurisdiction of an arbitral tribunal stipulated in the foundation deed.

The same reasoning has been applied by the Austrian Supreme Court in an early decision dealing with an arbitration clause in a contract to the benefit of a third party.[57]) It thus that Austrian legal scholars advocate in favor of applying this principle to arbitration clauses in foundation deeds as well.[58]) So far, Austrian courts have not decided in this respect, which is why Liechtenstein provides for more security regarding the validity of arbitration clauses in foundation deeds.

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[53]) Nueber, *supra* note 11, § 581 mn 7.

[54]) Nueber, *supra* note 47.

[55]) *Ibid*.

[56]) Liechtenstein Court of Appeal, docket no. 05 HG.2011.172; Liechtenstein Court of Appeal, docket no. 02 CG.2012.367; *see also* Liechtenstein Constitutional Court, docket no. 2012/94.

[57]) Austrian Supreme Court, docket no. 4 Ob 533/95.

[58]) Andreas Reiner, *Schiedsverfahren und Gesellschaftsrecht,* GesRZ 151 (2007); Michael Nueber, *supra* note 7, at 11; Katharina Müller *in* Stiftungsmanagement mn 50 (Müller ed., 2014); Michael Nueber, *supra* note 47.

E. Consumer Protection

As already briefly outlined above § 617 ACCP and the accompanying judicature of the Austrian Supreme Court constitute potential obstacles for the arbitration of corporate disputes in Austria.[59])

Furthermore, the Austrian Supreme Court – by the way of an obiter dictum – held that a foundation can be considered as consumer pursuant to § 617 ACCP.[60]) The Austrian Supreme Court's derived its perception from the fact that both under Austrian and Liechtenstein law foundations are prohibited to run a business in a commercial sense.[61]) This obiter dictum by the Austrian Supreme Court could result in an end of arbitration clauses in foundation deeds.[62])

However, the Liechtenstein legislator swiftly reacted and in the course of the Liechtenstein Arbitration Act 2017 amended § 634 LCCP accordingly. As of 1 August 2017 the consumer protection provisions of § 634 LCCP are only applicable to natural persons and arbitration clauses in foundation- and trust deeds have been declared permissible.

V. Trust Disputes

Liechtenstein is the only civil law country having implemented the common law trust into its legislation. Accordingly, Liechtenstein trust law adheres to the common law model.[63]) Indeed, provisions on the trust have already been contained in the original version of the PGR back in 1926.

Since Liechtenstein trusts and foundations are similar legal institutions – and foundation law complementarily applies to trusts as well – the considerations in respect to the arbitration of foundation disputes can be applied to the arbitration of trust disputes as well. However, it is noteworthy that in contrast to foundations, Liechtenstein trust law permits parties to agree on another supervisory authority, *i.e.* an arbitral tribunal.[64]) Thus, in relation to the Liechtenstein trust even claims for the dismissal of trustees can be subject to an arbitration agreement. Thus, the vast majority of trust disputes in Liechtenstein are internal disputes that involve controversies between the settlor, the trustees, the protectors and the beneficiaries.[65]

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[59]) II.H.

[60]) Austrian Supreme Court, docket no. 6 Ob 43/13m.

[61]) § 1(2) Austrian Foundation Act (*Privatstiftungsgesetz*, PSG); Art 552 § 1(2) PGR.

[62]) Michael Nueber, *supra* note 25.

[63]) Stefan Wenaweser, *Liechtenstein*, *in* International Trust Disputes para. 29.01 (Collins et al. eds., 2012).

[64]) Art 929(1) PGR.

[65]) Gasser/Saurer, *Trust Arbitration in Liechtenstein and Austria, in* arbitration of trust disputes para. 18.76 (Strong ed., 2016).

In regard to a trust established under foreign law, Art 931(2) PGR provides that disputes between trustees, the settlor or beneficiaries shall be mandatorily submitted to arbitration. There exists, however, no judicature on this provision. In the authors' opinion and from a teleological point of view, Art 931(2) PGR can only aim to submit all disputes regarding a trust established under foreign law to arbitration. However, since no permanent arbitration institution has been established in Liechtenstein parties would have to separately agree to submit their dispute to arbitration. Despite the noble goal to promote arbitration in these matters, it is uncertain whether such provision can be deemed to be valid in consideration of Art 6 ECHR.[66]) This is so, because – as already indicated above – arbitration is based on the parties' free will to submit their disputes out of or in connection with a certain (contractual) relationship to arbitration.

However, since the benefits of arbitration particularly prevail in disputes concerning trusts established under foreign law, Art 931(2) PGR has no practical effect at all. In fact, almost all trust deeds contain arbitration clauses and the possibility to appoint arbitrators from different legal backgrounds ultimately makes the case for arbitration.

VI. Outlook

Liechtenstein's liberal corporate law together with its up to date arbitration legislation makes it an ideal venue to arbitrate foundation and trust disputes. The positive legal framework has already been recognized by international clients and the past years have shown a significant rise in the number of arbitrations in Liechtenstein.

As it is particularly typical for foundation and trust disputes, confidentiality is of utmost importance. It is thus up to the parties to agree on the application of the Liechtenstein Rules which provide as much discretion as possible.

Considering the current trend of the (relatively young) Liechtenstein arbitration market, the future developments can be expected with substantial interest.

[66]) *Cf.* as regards the binding effect of arbitration clauses towards third parties Herbert Batliner & Johannes Gasser, *Sind Schiedsklauseln zulasten Dritter gemäss Art. 6 EMRK zulässig?*, *in* Liber Amicorum Baudenbacher 13 (2007).