

No beneficiary principle for Liechtenstein's discretionary trusts?

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Abstract

In recent court decisions in the Principality of Liechtenstein, it was held that the beneficiary principle does not apply to discretionary trusts. This is criticized by the authors, who argue that a correct understanding of Liechtenstein's trust code also entitles discretionary beneficiaries to request a court review.

Introduction

Liechtenstein's law on Persons and Companies (PGR), which was enacted in 1926,¹ includes many principles of Swiss origin.² One of the main goals of the Liechtenstein legislation of the 1920s was to attract foreign capital, and trust assets from foreign settlors were a potential means of achieving that goal. However, Switzerland, like all other civil law jurisdictions on the European continent, had no explicit trust code which could have been incorporated into the Liechtenstein PGR.³ Necessity is the

mother of invention, and so the draftsmen of the PGR decided to shape their trust code in line with most of the main features of the common law trust. Despite the fact that the trust code has never been fundamentally revised since its enactment,⁴ the Liechtenstein trust ('Treuhänderschaft') has become an attractive alternative to the Liechtenstein foundation. By the end of the year 2015, the absolute number of Liechtenstein trusts had reached 2253.⁵

Local trust law practitioners and even some scholars tend to qualify the Treuhänderschaft as a comprehensive and pure reception of the common law trust.⁶ While such an assessment might encourage the international promotion of the Liechtenstein trust, it has nonetheless provoked criticism.⁷ In fact, the Treuhänderschaft is primarily governed by statutory law and some of these statutory provisions are difficult to reconcile with the common law trust.⁸ A more sophisticated view emphasizes the need for assimilation⁹ of the Liechtenstein trust and, therefore, qualifies the Treuhänderschaft as an early and

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1. *Liechtenstein Law Gazette* (Liechtenstein Law on Persons and Companies 1926) No 4.

2. H Bösch, *Liechtensteinisches Stiftungsrecht* (2005) 24ff.

3. In 1954, the Swiss lawyers' association dealt intensively with the topic as to whether the common law trust could be transplanted into Swiss law (C Reymond, *Le trust et le droit suisse* (ZSR 1954) 119a ff; F Gubler, *Besteht in der Schweiz ein Bedürfnis nach Einführung des Instituts der angelsächsischen Treuhand* (trust) (ZSR 1954, 215a ff)). The conclusion reached was that the trust is not consistent with Swiss law. However, on 1 July 2007, Switzerland ratified the Hague Trust Convention and additionally adapted parts of its International Private Law Act and its Debt Collection and Bankruptcy Act.

4. The PGR was amended in 1980 (Liechtenstein Law Gazette, 1980 No 39). Nineteen articles relating to trust law were revised by the amendment, but most of these changes were revisions of wording with little substantive alteration (K Biedermann, *Die Treuhänderschaft des liechtensteinischen Rechts, dargestellt an ihrem Vorbild, dem Trust des Common Law* (1981) 557ff.

5. *Report (Rechenschaftsbericht) of the Liechtenstein Government 2015*, part Ministry of Interior, Justice and Trade, 253.

6. Biedermann (n 4) 9 f and 564 ('... our legal system, which has adopted the common law trust so faithfully and intact...'); see also S Wenaweser (LJZ 2001), 1ff; F Schurr and FS Günther Roth (2011) 767.

7. See in particular H Bösch, *Die liechtensteinische Treuhänderschaft zwischen trust und Treuhand* (1995) 247ff; H Bösch, 'Trust und Fiduzia im liechtensteinischen Recht' *Jus & News* (1997) 12, 33ff.

8. This is attributable to the draftsmen's perception of a mainly contractual nature of the Treuhänderschaft (see F Weiser, *Trusts on the Continent of Europe* (1936) 50 f; Bösch (1995) (n 7) 247ff; B Lorenz, 'The Liechtenstein Experience' in NP Vogt (ed) *Disputes Involving Trusts* (1999) 215; C Hahn, *Integrationsstufen des angelsächsischen Trusts innerhalb der Heimatrechtsordnung am Beispiel der Schweiz, Frankreich sowie Liechtenstein und Monaco* (2009) 114 f.

9. The importance of assimilation for partial receptions has, eg been demonstrated by J Hein, *Die Rezeption US-amerikanischen Gesellschaftsrechts in Deutschland* (2008) 50ff.

innovative piece of continental legislation aimed at transforming the concept of the common law trust into a civil law system by assimilation.¹⁰ In addition, the Treuhänderschaft has its own peculiarities, such as the fact that Liechtenstein's law contains no rule against perpetuities¹¹ and the rule *Saunders v Vautier*¹² is not applicable.¹³

Despite its early incorporation into Liechtenstein's PGR, the Treuhänderschaft cannot be characterized as old fashioned. Some 60 years before the Hague Trust Convention¹⁴ had been agreed on, the draftsmen of the PGR anticipated a core element of the trust relationship with regard to property law. This is the premise that the trust property constitutes a separate fund ('Sondervermögen')¹⁵, administered by one or more trustees. This essential feature of the Liechtenstein trust allows a civil law jurisdiction to convincingly overcome the distinction between legal and equitable ownership characterizing the common law trust.¹⁶

Some 10 years after the enactment of the Liechtenstein trust law, *Felix Weiser*¹⁷ concluded that the Liechtenstein Treuhänderschaft comes 'functionally exceedingly close to the Anglo-Saxon trust'. Whether this conclusion is correct or not depends to a high degree on Liechtenstein's trust law in action, ie how the provisions of Liechtenstein's trust code are interpreted by the courts. This article focuses on the legal standing of discretionary beneficiaries of a Liechtenstein trust and provides for a test example, in which the Liechtenstein courts could have applied principles of the common law trust.

Under the relevant statutory law of Article 897 PGR, the trustee is under the duty to administer and to use

the trust property for the benefit of one or several third persons (beneficiaries). Article 927 paragraph 1 PGR complements this rule, stating that, unless the trustees possess absolute discretion according to the trust deed, the beneficiaries are entitled to demand the execution of the trust. All this seems to correspond with English trust law. However, attention must also be drawn to Article 927 paragraph 2 PGR, which reads as follows (translation):

Every beneficiary with a fixed interest ('anspruchsberechtigter Begünstigter'), who considers his or her rights or interests prejudiced by a disposition or an act of administration by the trustee can, in the absence of provisions to the contrary in the trust deed, request the State Court for the necessary court order in a non-contradictory proceeding to remedy the fault.

Regarding the provision's wording, the question arises of whether it must be legally concluded that, conversely, all beneficiaries without a fixed interest of this nature have no right to enforce a trustee's obligations by court order. Denying discretionary beneficiaries a right to call for a review of the trustee's exercise of his or her powers is highly relevant in practical terms as it substantially restricts their means of exercising the trust's governance. This issue was recently at the core of adjudication by Liechtenstein's higher courts and went all the way to the Constitutional Court. Both decisions, the decree of the Princely Court of Appeal as well as the judgement of the Constitutional Court,¹⁸ have been

10. Bösch, *Treuhänderschaft* (n 7) 252 f; K Moosmann, *Der angelsächsische Trust und die liechtensteinische Treuhänderschaft unter besonderer Berücksichtigung des wirtschaftlichen Begünstigten* (1999) 161.

11. See s 17, para 2 (3) of the Trust Enterprise Code authorizes the Princely Government to issue an order fixing a perpetuity period, but no use has been made of such power to date.

12. (1841) Cr & Ph 240.

13. Bösch, *Jus & News* (n 7) 12, 33.

14. Convention of 1 July 1985 on the Law Applicable to Trusts and their Recognition.

15. H Bösch, *Unklarheiten im Zusammenhang mit liechtensteinischen Trusts in der Schweiz, successio* (2015) 150, 161ff.

16. For the systematic and dogmatic difficulties of transplanting the common law trust into a civil law jurisdiction, see eg Bösch, *Treuhänderschaft* (n 7) 252ff; T Honoré, 'On Fitting Trusts into Civil Law Jurisdictions' (2008) Legal Research Paper Series No 27, Oxford University; JM Milo and JM Smits, 'Trust in Mixed Legal Systems: A Challenge to Comparative Trust Law' in Milo and Smits (eds), *Trusts in Mixed Legal Systems* (2001) 11ff; HLE Verhaegen, 'Trust in the Civil Law: Making Use of the Experience of "Mixed" Jurisdictions' *ibid* 93ff; MJ De Waal, 'In Search of a Model for the Introduction of the Trust into a Civilian Context' (2001) 12 *Stellenbosch L Rev* 63, 63ff.

17. *Trusts on the Continent of Europe* (1936) 54.

18. The judgement of the Constitutional Court of 30 June 2015, StGH 2015/647, was published in the Austrian legal journal PSR 2016/49.

heavily criticized in Austrian and German legal literature.¹⁹

Recent Liechtenstein case law questioning the beneficiary principle

In two recent decisions,²⁰ the Princely Court of First Instance and the Princely Court of Appeal held that discretionary beneficiaries of a Liechtenstein trust are not entitled to challenge a decision taken by the trustees. The case was brought before the courts by discretionary beneficiaries of the Ptarmigan Trust,²¹ a Liechtenstein trust set up in 1980 for the benefit of members of the wealthy Norwegian Olsen family. Among the trust beneficiaries were two brothers, who had already been in dispute over the 'right' management of the trust assets.²² The decision at hand concerned the allocation of expenses, which the respective trust had accrued from previous litigation.

One of the two brothers had initiated proceedings to remove the trustees, alleging that they had violated their duty to act impartially. However, the trustees were not removed by the court and then went on to allocate the costs of the removal proceedings between two sub funds of the Ptarmigan trust. One of the two brothers requested the reversal of an allocation of EUR 410,000 at the expense of Fund B of that trust.

In a rather curt statement and with a mere reference to two previous decisions²³ on the application of Article 927 paragraph 2 PGR circumscribing the rights of beneficiaries to assert a claim in the non-contradictory procedure, the courts denied the request to review the trustees' allocation of expenses. In the succinct judgements, the courts stated that, based on settled case law and the explicit wording

of Article 927 paragraph 2 PGR, a right to file claims could not be inferred for 'mere' discretionary beneficiaries.²⁴

In their subsequent complaint to the Liechtenstein Constitutional Court (StGH), the discretionary beneficiaries claimed that the decision of the Princely Court of Appeal violated their constitutional rights. To reinforce this position, they drew on the same two previous rulings of the StGH issued in 2007, but interpreted them differently than the Princely Court of Appeal.²⁵ In these judgements, the Constitutional Court had touched on the question of reviewing a trustee's decision by court order, but only made reference to the wording of Article 927 paragraph 2 PGR. The complainants argued that they were in a comparable situation, and therefore entitled to request a non-contradictory review as beneficiaries. However, in accordance with the Princely Court of Appeal, the Constitutional Court held that no right to review the trustee's decisions could be inferred from these judgements for discretionary beneficiaries. Rather, the Constitutional Court once again restricted its interpretation to the wording of Article 927 paragraph 2 PGR and concluded that the complaining parties were not absolute beneficiaries and hence had no entitlement under Article 927 paragraph 2 PGR. The Constitutional Court held that the decision of the Court of Appeal did not violate any constitutional rights of the complainants.²⁶

In its assessment, the StGH emphasized that the decisions of the year 2007 had merely set forth the standard of official intervention based on Article 927 paragraph 7 PGR in light of convincing assertions of a trustee's misconduct. In this case, it would even be

19. H Bösch, PSR (2016), 183ff; H Bösch (ZStV 2017) 55ff.

20. Liechtenstein Law Gazette (LES) (2016) 73–74.

21. In the respective judgement, referred to as 'P trust'.

22. See 10 HG.2007.17, a procedure brought before all three of Liechtenstein's authorities in the relevant non-contentious proceeding (published in LES 2008, 82ff); the decision by the Princely Court of Appeal of 14 June 2007 and the following judgement of Liechtenstein's Constitutional Court (StGH 2007/82); furthermore, the judgement of the EFTA Court of 9 July 2014, E-3/13 and E-20/13 (*Fred. Olsen a.o. and Petter Olsen u.a. v Norwegen* (2014) LES 197ff), in which it was decided that the Ptarmigan Trust is subject to the right of freedom of establishment according to art 31 EEA Agreement.

23. Namely, the decisions StGH 2007/82 and StGH 2007/148 of the Liechtenstein Constitutional Court see <www.gerichtsentscheide.li> accessed 20 February 2017.

24. See Princely Court of Appeal of 12 March 2015, 5 HG.2014.375.

25. StGH 2007/82 and 2007/148 (n 23).

26. StGH 2015/47, PSR 2016/49.

possible to issue supervisory measures on an ad hoc basis, which would be less severe than an impeachment of the trustee. The court concluded that the decision of the Court of Appeal must, however, be assessed on the basis of Article 927 paragraph 2 PGR. According to the wording of this provision, the StGH found that the decision did not violate the principle of equal treatment regarding the position of discretionary beneficiaries. However, it overlooked that this leaves discretionary beneficiaries without any possibility to actually enforce their rights by court order and sheds them of an effective legal protection.

Critical assessment

Considering the international popularity of Liechtenstein's trust law and the perceptible increase in discretionary trusts over the last decades, the significance of this adjudication by Liechtenstein's competent courts reaches far beyond the Principality's borders. Denying discretionary beneficiaries, a right to call for a review of the trustees' decisions substantially restricts their means of reviewing the proper governance of trusts.

The brief and summary explanation of the courts, asserting that such a right could not be inferred from the wording of Article 927 paragraph 2 PGR, does not sufficiently consider the importance of reviewing the operations of trustees from a trust governance perspective, the vast proliferation of beneficiary trusts in practice (approximately 80 per cent of all trusts today), and the lack of legal protection for discretionary beneficiaries resulting from this narrow interpretation of the relevant corporate provisions.²⁷

The meaning of Article 927 PGR in a systematic context

Both the Princely Court of Appeal and the Constitutional Court have restricted their assessment to the strict wording of Article 927 paragraph 2 PGR. This is questionable in terms of legal interpretation,²⁸ and even the Constitutional Court itself does not regard an interpretation based on the mere wording as sufficient.²⁹ Rather, it holds that a provision's meaning may only be comprehended adequately when put into context, that is, under consideration of its systematic position, its history and implication for a specific case.³⁰

However, even if one was to interpret the provision merely on the basis of its wording, discretionary beneficiaries could be covered by its sense. This may be inferred primarily from Article 927 paragraph 1 PGR, which allows beneficiaries as such to request the fulfilment of the trust deed where the trustee has no free discretion. This seems contradictory for 'discretionary' beneficiaries. Yet, when settling debts from the trust's assets, the trustee is legally required to regard *all* beneficiaries' interests equally.³¹ When exercising their discretion therefore, trustees have *the duty* to treat both present, as well as potential future, beneficiaries fairly.³² In the present case, the beneficiaries of the Ptarmigan trust had explicitly pointed out that the trust deed did not contain provisions requiring differentiated treatment of the related beneficiaries.³³

Moreover, the performance of the trust deed in the sense of Article 927 paragraph 1 PGR not only implies the enforcement of its provisions, but also requires the trustees to comply with statutory law and to exercise their relevant fiduciary duties.³⁴ If every beneficiary, including a discretionary beneficiary, is entitled to request that the trustees perform their duties, then the beneficiary must also be entitled to

27. Critically, Bösch, PSR (n 19) 44.

28. C Höpfner, *Die systemkonforme Auslegung* (2008) 145 with further references; EA Kramer, *Juristische Methodenlehre* (2016) 61 (referring to the wording as 'starting point' of the interpretation); also H Honsel, *BSK-ZGB I* (4th edn) art 1 N 3.

29. StGH 2011/181 with further references.

30. *Ibid.*

31. H Bösch, *Aspekte der Rechnungsführung und Rechnungslegung des liechtensteinischen Treuhänders* (1992) 36ff.

32. H Bösch, 'Duty to Act Impartially – zur Pflicht des trustees, keinen beneficiary ungebührlich zu bevorzugen oder zu benachteiligen' in H Schumacher and W Zimmermann (eds), *Festschrift für Gert Delle Karth* (2013) 71ff.

33. StGH 2015/47, 9.

34. In this regard, see Biedermann (n 4) 93; Bösch, *Treuhänderschaft* (n 7) 106; Hahn (n 8) 115.

enforce the performance of those duties in court. Otherwise, any entitlement under Article 927 paragraph 1 PGR would be ineffective.

Rights of trust beneficiaries under Articles 912, 915, and 925 PGR and amendments to Liechtenstein's foundation law

It is noteworthy that the courts have not comprehensively assessed Article 927 paragraph 2 PGR, but restricted their review merely to the provision's wording.³⁵ However, the meaning of this provision requires further interpretation and must be put into context with Article 927 paragraph 1. Even though Article 927 paragraph 1 PGR does not generally define beneficiaries with a fixed interest—thus not ruling out discretionary beneficiaries to be comprised in substance—discretionary beneficiaries are restricted in pecuniary terms as their eligibility for benefits rests upon the trustees' conditional decision.³⁶

However, this does not expose them to an arbitrary decision, as the trustees are legally bound³⁷ to exercise their powers in the best interest of all beneficiaries.³⁸ The court's review thus cannot be restricted to the trustees' competences, but to whether they have used their powers in accordance with their trust duties.³⁹ Based on this insight, a distinct conflict between the wording of Article 927 paragraphs 1 and 2 PGR becomes evident. Apart from Article 927 paragraph 1 PGR, this may also be inferred from Article 927 paragraph 7 PGR. This provision, which has been in force since the enactment of the Trust Enterprise Code (TrUG),⁴⁰

indicates a certain incompleteness of Article 927 PGR and reads as follows (translation):

In the case of charitable or comparable trusts, where there are no entitled beneficiaries and the trust deed does not provide otherwise, the entitlements otherwise granted to beneficiaries may be administered by the public representative upon application or ex officio at the expense of the trust, or, where there is fault, at the expense of the party in default.

This provision, which in our view did not introduce non-charitable purpose trusts in Liechtenstein,⁴¹ thus allows for important conclusions regarding the control and surveillance measures considered essential by the historic legislator. The latter's surveillance approach was based on two models, namely: (i) trusts with eligible beneficiaries, who could exert control themselves by means of effective governance measures; and (ii) charitable trusts, where the respective governance measures were carried out by public representatives. In both cases, the enforcement of the trust deed was ensured by the possibility of requesting a court review.⁴² The historic perception nevertheless does not take into account that a review of the appropriate enforcement of the trust duties must also be ensured where a trust only consists of discretionary beneficiaries.⁴³

In fact, the provisions of Article 912 paragraph 2 PGR, 915 paragraph 5 and Article 925 paragraph 5 PGR grant *all* beneficiaries an entitlement to request a court order in case of tracing trust assets,⁴⁴ execution against or bankruptcy of a trustee,⁴⁵ mixed assets

35. Critically, on an interpretation of the mere wording, see Kramer (n 28) 61; also Honsell (n 28) art 1 N 3.

36. Biedermann (n 4) 145; Bösch, *Treuhänderschaft* (n 7) 87.

37. Cf. art 922 PGR.

38. Thus, Bösch, *Treuhänderschaft* (n 7) 88 and Bösch, in FS Gert Delle Karth (n 32) 73.

39. Bösch, in FS Gert Delle Karth, *ibid*; see also Bösch, *Treuhänderschaft* (n 7) 201ff; Biedermann (n 4) 119; furthermore, for foundations: B Lorenz, 'Pflichten des Stiftungsrats bei Wegfall von Begünstigten' in FA Schurr (ed), *Zivil- und gesellschaftsrechtliche Fragen zur Führung und Abwicklung von Stiftungen* (2015) 109ff.

40. Cf. the PGR in the version as published in Liechtenstein Law Gazette 1928 No 6.

41. A different view was expressed by J Niegel, 'Purposeful Trusts and Foundations?' (2012) 18 *Trusts and Trustees* 451, 455. J Niegel concludes from the wording of art 927 para 7 PGR that pure (eg non-charitable) purpose trusts are lawful trusts under Liechtenstein law. However, a trust according to art 897 PGR is a trust with individually ascertained or ascertainable beneficiaries, and art 927 para 7 PGR only refers to 'comparable trusts' where there are no *entitled* beneficiaries. Moreover, art 927 para 7 PGR clearly provides that such 'comparable trusts' must be enforced by a public representative and not by a private person.

42. See art 927 paras 2 and 7, as well as art 929 PGR.

43. The fragmentariness of this legal provision has already been emphasized by Bösch (n 2) 387.

44. See art 912 para 3 PGR, which entitles a 'beneficiary' to follow the trust property.

45. See art 915 para 5 PGR, referring to a claim of a 'beneficiary'.

or self-dealing of a trustee.⁴⁶ A comprehensive assessment of all other relevant provisions of the PGR regarding beneficiaries' rights, including Article 927 paragraph 1 PGR, thus leads to the conclusion that discretionary beneficiaries are also entitled to test the decisions made by the trustee in court and, where necessary, have them corrected. This, by analogy, opens the gate for any beneficiary of a Liechtenstein trust, including discretionary beneficiaries, to claim in court that the trust property must be properly allocated and administered by the trustees.⁴⁷

Moreover, the amendments to Liechtenstein's statutory foundation law of 2008⁴⁸ differentiate between beneficiaries with a fixed interest and discretionary beneficiaries.⁴⁹ According to the new provisions,⁵⁰ the 'participants of the foundation' may request the appropriate governance of the trust's assets in non-contradictory court proceedings. Article 552 section 3 (4) PGR explicitly states that 'discretionary beneficiaries' are such participants. Accordingly, it is well-settled foundation law that present discretionary beneficiaries of a private Liechtenstein foundation are entitled to request a court review if the foundation's assets are improperly managed and employed.⁵¹ The intention of the 2008 legislation was, therefore, clearly to strengthen the legal standing of discretionary beneficiaries.⁵²

Thus, a comprehensive interpretation of Article 927 paragraph 2 PGR cannot ignore this actual intention of the legislation. There is no objective reason to treat discretionary beneficiaries of a Liechtenstein trust differently from discretionary beneficiaries of a

Liechtenstein foundation, and we have already seen that the entitlement under various provisions of the Liechtenstein trust code is not restricted to beneficiaries with a fixed interest. In spite of its wording, a proper construction of Article 927 paragraph 2 PGR requires that the interest of discretionary beneficiaries is also protected by the Liechtenstein Courts.⁵³ Accordingly, discretionary beneficiaries are entitled to file a motion in court if the trustees endanger or violate their interests.

The position of discretionary beneficiaries from a comparative legal perspective

As a final point to make, we believe this conclusion to be appropriate from a comparative legal perspective. For Liechtenstein, the comparative legal analysis is of high relevance, as vast amounts of the Principality's law have been adopted from foreign jurisdictions.⁵⁴ In view of Liechtenstein's at least partial incorporation of the Anglo-Saxon model of trusts, a comparison with English trust law should yield a comprehensive understanding of the correlation between beneficiaries' rights and procedural entitlements.⁵⁵ Only a method of this nature can ensure that the Principality's trust law is and remains a coherent trust law in action.

One of the essential features of private express trusts in English law is that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them, which is fundamental to the concept of a trust.⁵⁶ Consequently, it has been

46. See art 925 para 5 PGR, providing that the claims may be brought by 'the beneficiary'.

47. Bösch (n 19) 189.

48. Law of 26 June 2008, Liechtenstein Law Gazette 2008 No 220, in force since 4 April 2009.

49. See art 552 ss 6 and 7 PGR.

50. It is noteworthy that the structure of the provisions on trusts and foundations does not differ substantially, but has been aligned with sense and meaning of their terms. Until the reform of the Liechtenstein foundation law, academia and jurisprudence had already drawn on the trust provisions in a supplementary fashion for the purpose of interpreting beneficiary entitlements in the case of foundations. See Biedermann (n 4) 133; Bösch (n 2) 516ff.

51. Liechtenstein Supreme Court of 12 April 2012, LES 2012, 97ff, 102; D Jakob, *Die liechtensteinische Stiftung* (2009) para 430; B Hammermann in *M Schauer* (ed), *Kurzkommentar zum liechtensteinischen Stiftungsrecht* (2009) s 29, para 10.

52. The amended foundation law does not, however, provide this right of requesting a court review for prospective beneficiaries or prospective discretionary beneficiaries. See art 552 s 6 para 2 PGR. This is questionable from a dogmatic point of view in case the current beneficiaries are restricted to the trust's income, while the subsequent beneficiaries are entitled to the trust's capital (see Bösch (n 19) 183, 188).

53. Bösch (n 19) 190ff; Bösch (n 19) 59ff.

54. See Section 'Introduction' and in detail E Berger, *Rezeption im liechtensteinischen Privatrecht unter besonderer Berücksichtigung des ABGB* (2008) 7ff; Bösch (n 2) 22ff.

55. On this, see Bösch (n 19) 183, 189.

56. *Armitage v Nurse* (1998) Ch 241, 253.

determined that if beneficiaries have no rights enforceable against the trustees there are no trusts.⁵⁷

Actual or potential beneficiaries of a discretionary trust do not have proprietary rights as long as the trustees have not exercised their discretionary powers granted by the trust settlement.⁵⁸ Regardless of this fact, every beneficiary of a discretionary trust possesses an equitable interest so:

that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity.⁵⁹

Accordingly, there is no doubt that, according to English law, the beneficiary principle also applies to discretionary trusts. This of course requires that discretionary beneficiaries are comprehensively informed of the trust's existence, the trust's assets and the provisions of the trust instrument.⁶⁰ The beneficiary principle thus constitutes a central element of procedural trust governance.

Guaranteeing sufficient governance was likewise a priority of Liechtenstein's foundation law reform of 2008 and, even before that, the Liechtenstein Supreme Court had already strengthened the position of beneficiaries of a family foundation.⁶¹ Particularly when considering the legal framework of supervision,⁶² it becomes evident that private express trusts with merely discretionary beneficiaries but without sufficient enforceable rights of information and control would entail a lack of control and supervision. While in the case of charitable trusts, governance measures may be carried out as deemed necessary by public representatives, private trusts are dependent

on the beneficiaries themselves to exercise such control.⁶³ The current position of Liechtenstein's higher court is, therefore, incompatible with the legal requirements of effective governance explicitly endorsed by Liechtenstein's foundation law reform of 2008.⁶⁴

Conclusion

Putting Article 927 paragraph 2 PGR into a systematic context and reflecting upon it in accordance with other relevant complementary provisions on trust beneficiaries of the PGR, it becomes evident that its precise wording stands in stark contrast to the beneficiary principle. Since the reform of Liechtenstein's PGR of 2008 at the latest, the respective legal standing of discretionary beneficiaries has been clarified by legislation. Liechtenstein legislation has granted a statutory right to discretionary beneficiaries of a private foundation to seek protection of their interests from the court.

From a teleological and systematic perspective, the meaning of Article 927 paragraph 2 PGR must be understood from the law's basic notion of discretionary beneficiaries, including Liechtenstein trusts. Despite its wording, a proper interpretation of Article 927 paragraph 2 PGR requires that the Liechtenstein courts must also protect the interests of discretionary trust beneficiaries. Accordingly, the denial of the beneficiary principle by the Princely Court of Appeal as well as the Liechtenstein Constitutional Court was not justified.

From a comparative law perspective, the reasoning given by the Liechtenstein courts is also

57. *LJ Millet in Armitage v Nurse* (1998) Ch 241, 253.

58. AJ Oakley, *Parker and Mellows: The Modern Law of Trusts* (2008) 44; JE Martin, *Hanbury and Martin: Modern Equity* (2012) 215ff.

59. *Gartside v IRC* (1968) 1 All ER 121, 134.

60. *Underhill and Hayton Law of Trusts and Trustees* (2006) 822f with reference to *Re Murphy's Settlement* (1998) 3 All ER 1; D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (1996) 49ff; C Mitchell, 'Disclosure of Trust Information to Discretionary Beneficiaries' (1999) 115 Law Quart Rev 206ff.

61. See in particular Liechtenstein Supreme Court of 2 February 2004 (published in LES 2005, 41ff) holding that the articles of a Liechtenstein family foundation cannot exclude any (enforceable) rights of a beneficiary.

62. See Section 'Rights of trust beneficiaries under Articles 912, 915, and 925 PGR and amendments to Liechtenstein's foundation law' regarding the two models of surveillance. It is noteworthy that art 917 para 1 PGR and s 6 para (1) TrUG explicitly prescribe the priority of mandatory law over the provisions of the trust deed.

63. See art 927 paras 2 and 7, as well as art 929 PGR.

64. Cf. art 552 s 3 (4), ss 29 para 4, 35 para 1 PGR and see Section 'Rights of trust beneficiaries under Articles 912, 915, and 925 PGR and amendments to Liechtenstein's foundation law'.

disappointing. The judges sitting in court completely disregarded the beneficiary principle, which has been developed by the English courts, and therefore failed to apply the appropriate trust law

in action. Liechtenstein courts should, therefore, reconsider their view and apply the beneficiary principle to discretionary trusts as well. The sooner the better!

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