

Legitimate Asset Protection in Liechtenstein

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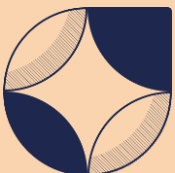
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1. Introduction

There is no one solution but rather legitimate asset protection is a combination of measures to make a succession plan robust. Essentially, all trusts are asset protection trusts as they are designed to ring-fence assets for the enjoyment of their beneficiaries.

It is about guarding against future risks by creating trust or foundation structures (hereinafter referred to as "Wealth Structures") in jurisdictions that have legislation in place that protect the trust assets from claims (e.g. in the event of the death of the settlor, insolvency, divorce, family members looking for part of the pie or excluded beneficiaries arguing that they ought to benefit) with a view to ensuring that assets are kept beyond reach of claimants who do not have a legitimate claim.

In particular for wealth owners living in politically and economically instable countries, wealth owners with large families, business owners and those who are eager to set aside a nest-egg for future generations, setting up a Wealth Structure that is tightly sown and well managed is of paramount importance.

Liechtenstein's laws and stable political and economic environment coupled with a pool of experienced practitioners with sound administration principles provides a suitable platform to create an asset protection structure.

SYNOPSIS

- Asset protection requires a combination of measures.
- Trust/foundations protect wealth from creditors, divorce, and inheritance disputes
- Genuine intent and giving up control by the settlor are essential
- Early and properly executed transfers under Liechtenstein law are recommended
- Settlers should not retain revocation or amendment rights
- Dividing assets among family branches reduces risk
- Creditors can only challenge transfers under strict conditions and short time limits
- Liechtenstein offers strong protection and rarely recognizes foreign court judgments
- Structures must work internationally to avoid becoming "limping structures"
- Liechtenstein combines strong asset protection with global legitimacy – not a typical offshore center

2. Ensuring a genuine intention to create a Wealth Structure

Asset protection starts when a Wealth Structure is set up. Is it important that there is a true intention to set up the structure and that the wealth owner understands its implications. The transfer of assets into the Wealth Structure must be duly completed and it is advisable to stipulate in the Deed of Gift/Donation that the laws of Liechtenstein shall apply to such a transfer. That gives you the comfort of the short periods of limitation under Liechtenstein law (see paragraphs 5 and 6 hereinafter).

3. Parting with control over assets

What is clear is that the settlor/founder should give up dominion over the assets that he/she wishes to settle into the Wealth Structure. For this purpose, it is helpful to ensure that the Wealth Structure is of an irrevocable, discretionary nature and that the integrity of this set-up is maintained avoiding any tilting of the balance of powers to the settlors/founders.

4. Diversification within the family

Creating different nest-eggs for different family branches and subsequent generations also plays a vital role in safeguarding and ring-fencing assets. Often, each family branch will have their own dynamics. Therefore, creating different structures (including sub-trusts) allows a clearer segregation of assets and thus a diversification of risk in respect of the overall structure.

5. Exclusion of foreign inheritance laws

In respect of the exclusion of foreign inheritance laws, any contribution of the settlor's/founder's property to a foundation or trust within two years of the founder's death is likely to curtail the rights of the settlor's/founder's heirs if they are deprived of their compulsory share of the settlor's/founder's estate. On the other hand, if any such transfer to the foundation or trust took place (at least) two years before the settlor/founder died, and if he had abstained from reserving powers over the foundation or trust, the claim will fail (art. 783 para. 3 ABGB).

6. Fraudulent dispositions laws

Based on the *Liechtenstein Legal Remedy Code (RSO)*, creditors of the settlor/founder may contest the settlement of assets into a trust/foundation in Liechtenstein if they can prove that the settlor/founder acted in order to defraud his creditor (or to prefer certain creditors) (see also art. 552, Sec. 38(1) PGR). Unless a creditor can prove such a fraudulent intent, a claim may only be brought by the creditor within one year of the transfer of assets into a trust/foundation. If the creditor can prove the intent to defraud, transfers by settlors/founders into a trust/foundation made at least five years prior to the settlor/founder being sued by a creditor will be open to contest.

Under Liechtenstein law, the challenge of a transfer of assets to a foundation or trust by a creditor is only permissible if valid under both the laws of the country of the debtor's residence and the law governing the transfer itself. Hence, if the law governing the transfer of assets to a Liechtenstein foundation or trust is Liechtenstein law, the challenge must be permissible not only under the laws of the country of residence of the foreign settlor/founder, but also under Liechtenstein law.

The Liechtenstein Constitutional Court has ruled that a mere reservation of a settlor's/founder's rights or the existence of a contract of mandate between the settlor/founder and the trustee/board of the foundation will not per se expose the Wealth Structure to a piercing of its veil and attaching such rights for the satisfaction of the creditor's claim. It is, however, important to ensure that no revocation and amendment rights are retained by the settlor and that the settlor is not designated as the (ultimate) beneficiary.

7. Recognition of foreign judgements

Having ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition in 2006, Liechtenstein courts judge all preliminary issues such as the validity of the trust in accordance with the proper law of the Trust.

According to the Liechtenstein Enforcement Act from 1971, a formal recognition of foreign judgements is contingent upon reciprocity and thus generally not possible. Foreign judgments can only be automatically enforced if they have been rendered by Austrian or Swiss courts. As a result of Liechtenstein's non-ratification of the Lugano Convention, foreign judgments from other countries are not directly enforced in Liechtenstein which requires renewed litigation before the Liechtenstein courts.

In Liechtenstein the burden to litigate is high. A plaintiff resident in a foreign country may have to pay a security deposit under certain circumstances for a possible lawsuit to secure the defendant's claim for reimbursement of the legal costs. Furthermore, the losing party will be compelled to pay the winning party's lawyers' fees as well as the court costs. Contingency fee arrangements are not permitted.

8. Private international law and geographic diversification

In a globalised world in which international mobility has become the norm, it is important to take into consideration private international law principles. Asset protection will also be a function of which court takes jurisdictions in the event of a dispute and when foreign law elements will be applied. Inserting a clear jurisdiction clause into the trust deed is of paramount importance in order to provide some certainty in this regard. Despite such a jurisdiction clause, however, there remains a danger that a competent court in the location of the assets will take jurisdiction.

Furthermore, a trust that legitimately protects the assets it holds needs to work in all jurisdictions it is exposed to or else it runs the danger of being a "limping trust" which works in one jurisdiction but maybe not valid in other. In many cases, the situs of the asset may determine whether the court of the situs will take jurisdiction. The trust assets should to the extent possible be spread geographically and kept out of any jurisdiction where there is feared a significant risk of attack, e.g. the residence or domicile of the settlor/founder, or where he carries on business.

9. Dispute resolution

Asset protection is also about streamlining decision making processes and reducing costs that deplete assets where possible. For dispute resolution, it is not uncommon to insert arbitration clauses into trust deeds in order to cater for the possibility to settle disputes outside of court. However, not every court will accept such an arbitration clause, especially if the beneficiaries are bound by it. And the costs to get a judgment from an arbitration panel are significantly higher than for a judgement from a regular court.

10. Comparison to other jurisdictions

The limitation period is the period by which a claim must be made for it to be enforceable against the settlor/founder. Both in the Cayman Islands and in the Bahamas, a claim must be brought within two years of the filing of the bankruptcy petition or within ten years unless the parties claiming under the settlement can show that the settlor/founder was at the time of the settlement able to pay his debts without the aid of the property settled.

In the case of a fraudulent disposition, in the Cayman Islands, a creditor must make a claim within six years of the date of disposition. In the Bahamas, actions or proceedings must be commenced within two years.

In both jurisdictions, the onus will be on the creditor to prove that the claim existed before the Wealth Structure was set up.

In relation to potential future creditors, in the Cayman Islands, an obligation must have existed on or before the date of the disposition and the settlor must have had notice of his obligation. In the Bahamas, the rules are similar but the settlor must have willfully made the disposition to defeat an obligation owed to a creditor and must have had actual notice of his obligation which would exclude constructive or implied notice.

It should be noted that the UK Insolvency Act 1986 provides for reciprocal enforcement of judgements to which the Cayman Islands have signed up. The Bahamas have similar laws applying to the UK and other Commonwealth countries.

Whereas the Cayman courts have ruled in favour of trustees and settlors seeking to uphold trusts that are attacked, it is not as watertight as it might seem at first sight. In the Cayman Islands s6 of the Trusts (Foreign Element) Law 1987 provides for exclusion of foreign law for trusts governed by the laws of the Cayman Islands. Whereas on first sight this seems robust in terms of asset protection, this refers to rights and interests by reference to a personal relationship, i.e. heirs, and as it seems not creditors. Accordingly, it is not entirely clear if there will be protection from an order of a foreign court in relation to creditors being enforced in the Cayman Islands even if it relates to the setting aside of a disposition to a Cayman Islands Trust.

With regard to anti-forced heirship legislation, both the Cayman Islands and the Bahamas provide that foreign judgments which relate to heirship (and matrimonial claims in the Bahamas) are unenforceable in their respective courts.

11. Conclusion

It is not only the “classical” financial centres (e.g. in the Caribbean) that offer laws favourable to legitimately protecting assets. Liechtenstein is in the unique position of having strong asset protection laws with the additional benefit of being more amenable to international bodies like the OECD and a relatively large network of double taxation treaties, making Liechtenstein coming under similar international pressure as the classical offshore financial centres unlikely in the midterm.

A Wealth Structure that legitimately protects the assets it holds needs to work in all jurisdictions it is exposed to or else it runs the danger of being a “limping structure” which works in one jurisdiction but is maybe not valid in another. In many cases, the situs of the asset may determine whether the court will take jurisdiction. Therefore, depending on the circumstances, applying a progressive asset protection jurisdiction, may not bring the desired effect.

When setting up a Wealth Structure, it is important to keep the above points in mind and to work with a trusted and experienced trustee/service provider that manages the Wealth Structure carefully.

However, whenever the primary purpose of Wealth Structures is to protect assets against claims made by creditors and such a Wealth Structure is used for persons embarking on a risky business venture or persons asked to give personal guarantees relating to the activities of that business, then without any consideration to other virtues of a Wealth Structure, the intentions in setting it up may well be the wrong ones.

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