THE COMPLEX COMMERCIAL LITIGATION LAW REVIEW

SECOND EDITION

Editor
Steven M Bierman

THE LAWREVIEWS

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CONTENTS

PREFACE

I am privileged, once again, to be the editor of *The Complex Commercial Litigation Law Review*, now in its second edition. This volume is published at a time when the world grows ever smaller and commercial relationships are the common currency that links countries and cultures across the globe. And, with apologies to the poet Robert Burns, because the best laid plans of commercial counterparties go oft awry, businesses and their legal counsel in every jurisdiction must be familiar not only with the law governing commerce but also must be keenly aware of the legal issues that most frequently arise in commercial disputes.

I have had the good fortune to practise law for many years as a litigation partner of a global law firm, Sidley Austin LLP, in New York City, one of the world's great commercial and financial centers, and a crossroads where many significant and complex disputes are litigated and tried, whether in our US federal or state courts or arbitrated under the auspices of pre-eminent ADR providers. I also have had the pleasure of working alongside, or opposite, some of the most accomplished disputes practitioners anywhere, whether down the street or halfway around the world, in matters both domestic and cross-border in nature. In serving our respective clients, I would like to think that we have learned from each other, and have become better and more effective for the education. I know I have.

It is with that spirit and intention that we have assembled a truly distinguished roster of leading practitioners to contribute to this second edition, which significantly expands the range of jurisdictions from those covered in the inaugural edition. The authors of this publication are from among the most widely respected law firms in their jurisdictions. Their practices run the gamut of complex commercial litigation experience, and the home jurisdictions about which they write span the world's geography. We hope you will find their experience invaluable and enlightening when dealing with issues arising in commercial litigation in your own experience or practice.

These authors practise in disparate legal systems under dissimilar procedural regimes. One of the great strengths and, we hope, utility, of this volume is that, notwithstanding these differences, we have asked the authors to report on core principles and recent developments in the law of their country concerning the same set of fundamentally important legal issues likely to feature in complex commercial disputes, wherever they may arise. These issues include contract formation and modification; contract interpretation; breach of contract; defences to enforcement; fraud, misrepresentation, and other claims impacting contracts; dispute resolution; and remedies. The emphasis is on the law and practice of each jurisdiction, but discussion of emerging or unsettled issues is included where appropriate.

Whether you are a corporate counsel, a business executive, a private practitioner, or a government official, and whether you are facing litigation or arbitration of a commercial

dispute, negotiating a contract with an eye toward minimising litigation risk, or simply interested in learning more about this important area of law as related by seasoned and savvy practitioners, we hope you will find this volume informative, instructive, and enjoyable.

Steven M Bierman
Sidley Austin LLP
New York
November 2019

Chapter 16

LIECHTENSTEIN

Thomas Nigg, Johannes Sander and Eva-Maria Rhomberg[1]

I OVERVIEW

In light of Liechtenstein's history, which has always been closely related to Austria's, it does not come as a surprise that Liechtenstein's legal system and the organisation of its courts depend heavily on Austrian law. Nonetheless, Swiss law has also left significant marks on Liechtenstein's legal system. Liechtenstein's summary proceedings for the recovery of debt are a typical hybrid of both legal systems; these proceedings originate from Austria and lead to proceedings implemented according to Swiss law. Therefore, an in-depth examination of both legal systems is necessary.[2]

With regard to contract law in a wider context and commercial contracts in particular, generally Austrian law applies. Nevertheless, it is essential to look at the individual provisions of the contracts in order to obtain certainty as to which law applies.

However, the private law order provides the opportunity to freely shape legal relations with its environment according to will, within the bounds of good morals.

II CONTRACT FORMATION

With regard to the conclusion of contracts, reference should be made to the general principles as well as the legal requirements set forth in Section 861 et seq. of the Liechtenstein Civil Code (ABGB).

According to the general principles (Section 861 ABGB), a contract is concluded by the concordant declaration of will of (at least) two persons. The introductory declaration of intent is called an offer. This offer (promise) must be sufficiently defined in terms of content, and the applicant's willingness to commit must be sufficiently clear. As long as negotiations are pending and the offer has not yet been made or has neither been accepted in advance nor afterwards, no contract is established.

The offer must be accepted within the period that has been determined by the offeror. In lack of such, an offer made to a person who is present or via phone from one person to another must generally be accepted immediately. An offer made to an absent person must be delivered in a reasonable time in order to receive a timely answer, failing which the offer

1 Thomas Nigg is a senior partner, Johannes Sander is a senior associate and Eva-Maria Rhomberg is an associate at Gasser Partner Attorneys at Law.

2 Gasser in Batliner/Gasser (eds), *Litigation and Arbitration in Liechtenstein*, 14.

expires. The offer cannot be withdrawn prior to the expiry of the term of acceptance. It also does not expire if one party dies during the term of acceptance or becomes incapable of acting unless a different intent of the offeror is evident owing to the circumstances.[3]

The consent to a contract must be declared freely, seriously, determinedly and clearly. If the declaration is incomprehensible, fully undetermined or the acceptance is made subject to other determinations as those subject to which the promise has been made, no contract is established. Whoever uses unclear expressions to take advantage of someone else, or undertakes a sham action, must provide satisfaction.[4] In this context, for example, dissent and error have different consequences. In the case of dissent, no contract is concluded at all, but in the case of error it is. A contract concluded in error must therefore be challenged.

In general, contracts can be concluded verbally, in writing or implied by the behaviour of the parties. For reasons of evidence, however, it is strongly advisable to always conclude contracts in writing. Under Liechtenstein law, there are very few formal provisions. There are only certain formal requirements for gift contracts, property purchase contracts or, for example, contracts between spouses.

All of the above applies to commercial contracts as well as to other contracts.

Agreements (contracts) in favour of third parties are possible. If someone has been promised a performance to a third party, he or she can demand that performance is delivered to the third party.[5] However, if the third party rejects the right acquired in connection with the contract, the right is deemed not to have been acquired.[6]

As mentioned above, there are contracts in favour of, but not at the expense of third parties. The latter contradict the nature of private autonomy and are therefore inadmissible.[7]

III CONTRACT INTERPRETATION

When interpreting contracts, one should not adhere to the literal meaning of an expression but must determine the intention of the parties and the contract to be understood in line with due commercial practice.[8] In the case of contracts that are only obligatory for one party, if in doubt, it is assumed that the obliged party wanted to assume the lesser rather than the more cumbersome burden. In the case of contracts that are obligatory for both parties, an unclear expression is interpreted to the detriment of the party who used such expression (Section 869 ABGB).[9] A declaration of intent that has been declared to someone else as sham, be it with or without his or her consent, is void. If another transaction is concealed in such a way, it should be assessed in accordance with its true nature. Objection to a sham transaction cannot be raised against a third party who acquired rights in reliance on the declaration.[10]

According to the case law of the Liechtenstein Supreme Court,[11] contractual provisions are to be interpreted (with due caution) in such a way that they do not contain any

3 Section 862 ABGB.
4 Section 869 ABGB.
5 Section 881 Paragraph 1 ABGB.
6 Section 882 ABGB.
7 See Austrian Supreme Court, RIS Justiz RS0084880.
8 Section 914 ABGB.
9 Section 915 ABGB.
10 Section 916 ABGB.
11 For instance, OGH U 01.10.2004, 03 CG.2001.310, LES 2007, 150.

contradictions and remain as effective as possible (*favor negotii*). The intended meaning and purpose – the 'intention to the parties' to be determined by teleological interpretation – rather than the words of a contractual provision are at the forefront of the interpretation.

The interpretation of contracts and written declarations should also take into account the declarations made by the contracting parties occasionally and the resulting intention. The interpretation should be measured against the 'recipient's horizon'. The legal consequences to be derived from the declaration are not judged on the basis of what the declarant wanted to say or what the recipient of the declaration understood by it, but on the basis of an objective assessment on the facts by a bona fide and circumspect person. The concrete circumstances, in particular the business purpose and the interest situation, must be taken into consideration here.[12]

According to Liechtenstein Supreme Court rulings, a mere actual conduct of the contracting parties directed against contractual provisions is insufficient to conclude that the contractual provisions have been amended by implication with the certainty required by 863 ABGB.[13]

However, when interpreting contracts, it is not strictly the literal meaning of the term that should be held responsible, but it is the intention of the parties to the contract that must be explored; and the contract must be understood in accordance with the practice of fair dealing.[14]

IV DISPUTE RESOLUTION

In general, Liechtenstein has a very efficient court system. The latest reform of the Liechtenstein Code of Civil Procedure (LCCP) came into force on 1 January 2019 and aimed to enhance procedural efficiency.[15] This project was a success. By enacting this reform, Liechtenstein civil procedure law follows the Austrian model more closely.

Located between Switzerland and Austria, Liechtenstein is not a common law but a civil law country. Case law does exist, but it does not play as important a role as it does in Anglo-Saxon jurisdictions. As mentioned in Section I, Liechtenstein law is a hybrid of Austrian and Swiss law. Nonetheless, the most common, and thus fatal, error committed by lawyers regularly dealing exclusively with either Austrian or Swiss law is to ignore Liechtenstein specifics, at least as far as procedural law is concerned. However, litigation in Liechtenstein is not always the first choice either for foreign parties or their legal advisors. Most parties wish to seek justice in their home country, being unaware of the efficiency and competence of Liechtenstein lawyers and courts. Compared with other jurisdictions, Liechtenstein justice is considerably swift. There is no rule requiring criminal cases to be granted priority. Once the relevant documents are filed, a hearing is scheduled within weeks. The median time from commencement of a lawsuit to a judgment of first instance is 12 months. It may take longer if the case is complex or has an international aspect to it, if foreign courts or foreign law must be applied or if witnesses who live abroad must be heard in court. In the vast majority of civil cases, a final decision can be obtained within two or three years

12 OGH U 13.01.2015, 02 CG.2002.4, LES 2006,138.

13 OGH U 06.07.2000, 05 C 303/98-53, LES 2000,148.

14 OGH U 01.07.1999, 04 C 260/98, LES 2000,169.

15 See *Official Liechtenstein Legal Gazette* LGBl 2018.207.

There is no specific commercial court in Liechtenstein. The following courts in Liechtenstein exercise jurisdiction in civil matters, including, *inter alia*, commercial contracts:

a first instance: District Court;
b second instance: Superior Court; and
c final instance: Supreme Court.

The first step for a plaintiff undertaking proceedings in Liechtenstein courts is to ascertain that the court has jurisdiction to hear the case. Presumably, as in most other jurisdictions, Liechtenstein courts first check on their duty and competence to accept the case. The case may easily be dismissed if the court has no jurisdiction. However, there are no minimum amounts in dispute or specific threshold requirements to bring a dispute before court. That means that nearly every contract dispute is litigable before courts.

As foreign judgments are usually not enforceable in Liechtenstein,[16] plaintiffs must therefore sue Liechtenstein residents before a Liechtenstein court because of the general forum at the domicile of the defendant.[17] In addition, there are several other aspects leading to the jurisdiction of Liechtenstein Courts, such as the location of assets,[18] an established jurisdiction of the main proceedings[19] or, particularly with regard to contracts, the jurisdiction of Liechtenstein Courts based on the place of performance.[20]

Contracting parties may, by means of express agreement, submit to a specific court, which is not actually competent. However such an agreement must already be evidenced to the courts in a document in the claim. Further, such an agreement only has legal effect if it relates to a specific legal dispute or to the legal disputes arising from a specific legal relationship. However, matters that are beyond the jurisdiction of the courts cannot be brought to court by such an agreement.[21]

Owing to the principle of freedom of contract, parties may also agree to resolve disputes outside of the court process, by alternative dispute resolution methods such as mediation or arbitration. That said, Liechtenstein as a jurisdiction is arbitration-friendly, and thus nearly every matter that could be subject to state-court proceedings may be submitted to arbitration as well. Following the standards of the United Nations Commission on International Trade Law, nearly any pecuniary claim to be decided by state courts may be subject to arbitration agreements.[22]

V BREACH OF CONTRACT CLAIMS

Three types of claims are distinguished:

a action for a declaratory judgment;
b action for performance (e.g., damages); and
c action for shaping the law

16 There are bilateral agreements with the neighbouring states, Austria and Switzerland, when it comes to the acknowledgement and enforcement of judgments in civil law matters, provided that the decisions are in compliance with certain prerequisites and formal requirements set forth in these agreements.
17 Section 30 Court Jurisdiction Act [JN].
18 Section 50 JN.
19 Section 47 JN.
20 Section 43 JN.
21 Section 53 JN.
22 Section 599 LCCP.

The basic element of a claim for breach of contract is always a valid contract. However, culpable violation of contractual or pre-contractual obligations (*culpa in contrahendo*) also leads to a claim for damages. In principle, what applies in general also applies to culpability: anyone who invokes a circumstance that is more favourable to him or her in the proceedings must prove that this circumstance has actually occurred. The aggrieved party must, therefore, also prove the fault of the tortfeasor (liable party). However, there is an exception to this rule.

A highly significant reversal of the burden of proof for *culpa in contrahendo* exists, for example, in the event of a breach of contractual or contract-like obligations.[23] This means that it is not the aggrieved party who must prove that the tortfeasor is at default, but the tortfeasor who must prove that he or she is not at fault. The determination of the burden of proof in Section 1298 ABGB only applies to the area of culpability, but not to the area of causality.[24]

In the event of a breach of contract, a party is, based on Sections 1293 et seq. of the ABGB, entitled to sue the other party or parties for damages.

However, contracts can also be challenged on usury (Section 879, Paragraph 2 Z4 ABGB) or owing to material imbalance (*leasio enormis*, Section 934 ABGB). A contract may also be contested on the grounds of error, cunning or threat.

In the event of defective performance of a contract, the party concerned is entitled to the statutory warranty rights, provided by Section 932 ABGB. According to the law, the transferee can demand rectification (repair of or providing the missing), the replacement of the asset, a reasonable reduction of the price (price reduction) or the rescission of the contract (redhibition). The right to the legal warranty must be claimed at court within three years if it relates to immovable assets, and within two years if it relates to movable assets. Warrant law does not apply if assets are transferred outright, in the case of obvious defects or in case of contractual exclusion. Therefore, in principle,the warranty right can be excluded contractually; in the case of a consumer contract, however, it is compulsive. In addition, contractually agreed warranty clauses can be made subject to a law suit as well.

VI DEFENCES TO ENFORCEMENT

It is within the scope of normal practice that sometimes one of the contract parties, under certain circumstances, attempts to avoid any obligation to perform a contract or to avoid enforcement of contractual obligations. In addition, this party could try to challenge claims of breach of contract.

Under Liechtenstein law, there are several options to try to defend yourself against unjust enforcement of contractual obligations. In general, every party can object that no contract has been formed at all (e.g., unenforceable agreements, indefinite or missing essential terms). Further, it can be argued that the limitation periods are over, the contract was formed under duress or there was a lack of any consideration. One could also argue that the contract is against public policy or unenforceable because of fraudulent inducement, misstatement or misrepresentation.

23 Section 1298 ABGB.

24 OGH U 5.11.1998, 03 C 311/94-44, LES 1999,191; OGH U 09.03.2012, 02 CG.2010.273, GE 2012,75.

Where contractual exclusions of liability have been agreed, it may be argued that the liability out of the contract is limited – this also with regard to punitive or consequential damages, contractual agreed limits on representation or other disclaimers.

Depending on the case, the objection of *force majeure* may also be taken up.

VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

As mentioned in Section V, a party has many more available applications beyond breach of contract claims. These claims vary from breach of the implied covenant of good faith to quasi-contractual claims, including promissory estoppel (e.g., pre-contractual relations or contractual accessory obligations).

Further, fraud, misrepresentation or tortious interference with contract gives rise to claims in addition to claims out of breach of contract. As mentioned above, contracts can also be challenged on usury (Section 879, Paragraph 2 Z4 ABGB), owing to material imbalance (*leasio enormis*, Section 934 ABGB) or on the grounds of error, cunning or threat.

However, the most commonly asserted tort-based claims are based on Section 1293 et seq. ABGB. In this context, tort-based claims are also very relevant with regard to the piercing of the corporate veil.[25] In accordance with Liechtenstein Supreme Court rulings, liability is governed by the provisions on liability arising from contracts. Therefore, pursuant to Article 182(1) of the Persons and Companies Act (PGR), the respective body has the duty to ensure the preservation of the legal minimum capital of a legal entity to prove that it is free from culpability.[26]

In each case, however, the following criteria are required for the award of damages:

a damage (loss);
b unlawful behaviour (e.g., breach of contract, breach of law);
c culpability; and
d causal connection between culpability and unlawful behaviour.

In addition, creditors of contract parties have the possibility of challenging legal transactions via the challenging order.[27] If creditors are grossly disadvantaged by a contracting party, there is, of course, the possibility of criminal prosecution according to Section 157 of the Liechtenstein Criminal Code.

Remedies vary, depending on the nature of the claim (see Section VIII).

VIII REMEDIES

There are several remedies with different ranges when it comes to a civil recovery action (Section 1323 et seq. ABGB). However, applicable remedies usually depend on the cause of action. According to Section 1323 of the ABGB, the first remedy is always restitution in kind if the cause of action allows it. If restitution in kind is not possible, damages may be awarded in cash. Regarding a breach of contract, a party may seek fulfilment of the agreement

25 Claims based on Section 1293 et seq. ABGB in connection with Article 218 et seq. PGR.

26 See OGH U 08.05.2008, 01 CG.2006.276, GE 2008,37.

27 Article 64 et seq. of the Liechtenstein Act on the Protection of Rights – Rechtssicherungsordnung (RSO).

(specific performance) or sue the other party for damages. The available remedies for a breach of contract, however, range from compensation and damages to non-monetary remedies such as specific performance, rescission and reformation of the contract.

The law also expressly states that contracting parties may reach a special agreement that, in the case of a contract that is not fulfilled, fulfilled too late or not fulfilled in a proper manner, a certain amount of money should be paid in compensation for the disadvantage (a contractual penalty).[28] In general, it is up to the parties whether they agree on specific punitive or monetary damages. The obligation to pay such contractual penalty presupposes a valid principal obligation.[29]

The amount of contractually agreed interest should, in principle, be determined by the parties, only being limited by the usury provisions.[30] However, the general legal interest rate is 5 per cent.[31] In commercial matters, the general legal interest rate is 8 per cent above the basis interest rate.[32] Default interest does not presuppose culpability. It must be paid if there is an objective delay in performance of the contract.[33] Under Liechtenstein law, pre- and post-judgment interests are possible.

In this context, however, it is always necessary to examine why a contract was breached. This is commonly referred to as 'performance disruption'. This includes impossibility of performance, delay of performance, defective performance or breach of contract. Depending on whether these disruptions to performance occur accidentally or are attributable to one of the contracting parties, resulting damages should be compensated to different extents. In the case of actual indemnification, only damage actually suffered (positive damage) is subject to compensation, while 'full compensation' also includes the lost profit (compensation of expected profit). However, in the case of, for example, breach of contract, the scope of compensation is generally determined by the degree of culpability of the liable party:

In the case of slight culpability (slight negligence), only the damage actually suffered (positive damage) must be compensated.[34] In the event of gross culpability (intent or gross negligence), full compensation must be provided. As mentioned above, this means that the liable party must compensate not only the loss suffered but also cover the lost or expected profit.[35]

The success of court actions often depends on the effectiveness of interim remedies or provisional measures, conservatory measures or summary judgments taken before or in lieu of the main proceedings. Generally, for preventing (irreparable) injuries to the applicant, a party might obtain measures for interim relief from a court upon motion.

Article 277 of the Liechtenstein Enforcement Act grants provisional remedies, such as security restraining orders and official orders.

28 Section 1336 ABGB.

29 Welser/Zöchling-Jud, Bürgerliches Recht II14 (2015) 23 et seq.

30 See Section 879 ABGB.

31 Section 1000 ABGB.

32 Article 336b of the General German Commercial Code (ADHGB), which also applies in Liechtenstein.

33 Welser/Zöchling-Jud, Bürgerliches Recht II14 (2015) 42; Reischauer in Rummel (eds), ABGB3 Section 1333 ABGB, minute 6 (www.rdb.at).

34 Welser/Zöchling-Jud, Bürgerliches Recht II14 (2015) 363.

35 Welser/Zöchling-Jud, Bürgerliches Recht II14 (2015), 364.

IX CONCLUSIONS

Based on the principle of contractual freedom and private autonomy, Liechtenstein's contract law is very liberal. There are hardly any formal requirements, and, if there are any, they usually require written form or certified signatures. As long as it is not contrary to *boni mores*, anything can be subject to commercial contracts.

With regard to relevant developments, Liechtenstein law has not changed in this area for decades. This provides for legal certainty. High court case law with regard to the formation of contracts, interpretation, etc., has also largely remained the same and provides for a good understanding of the respective provisions.

In addition, Liechtenstein has been a member of the New York Convention since 2011. The forthcoming years will show which commercial disputes will increasingly shift from ordinary court proceedings to arbitral tribunals.

Appendix 1

ABOUT THE AUTHORS

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Thomas Nigg is a Liechtenstein lawyer and citizen, currently practising in Vaduz. He studied law at the University of St Gallen (Switzerland), where he obtained his Master of Arts in legal studies HSG (MA HSG) in 2008. In 2008 he started his professional career as a lawyer in Liechtenstein and was admitted to the Liechtenstein Bar in 2010. In 2014 he was appointed partner in Batliner Gasser Attorneys at Law (now Gasser Partner Attorneys at Law). In 2016 he was appointed a senior partner at Gasser Partner Attorneys at Law. In 2018 he obtained his executive Master of Laws (LLM) in corporate, foundation and trust law at the University of Liechtenstein. The greater part of his work involves representing clients, mostly corporations or high-net-worth individuals, before courts in civil, criminal and administrative matters, and assisting clients in commercial, corporate and criminal law, pertaining to both national and international affairs. In addition, he is the author of the Liechtenstein chapter in *The Asset Tracing and Recovery Review* and has authored articles on various legal topics.

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Johannes Sander is an Austrian citizen, currently practising as a lawyer in Vaduz. He studied law at the Sheffield Hallam University, UK, and the University of Innsbruck, Austria, where he earned his master's degree in law (*Mag.iur.*) in 2011. In 2012 he began practising as an associate in Austria and passed the Austrian Bar exam in 2015. After that, he joined Gasser Partner Attorneys at Law. Johannes passed his Liechtenstein Bar exam in 2018 and is admitted to the Liechtenstein Bar. His main areas of practice include civil law, criminal law, corporate law and foundation and trust law as well as litigation.

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