

How to protect the assets of a Liechtenstein foundation from the onslaught of creditors and forced heirs

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Abstract

Whether a creditor can seize assets which actually should have been part of a debtor's (bankruptcy) estate but had previously been transferred into a Liechtenstein private foundation, and whether those conveyances are likely to be subject to challenge by the founder's heirs, mainly depends on when the transaction was actually executed and whether the founder had reserved particular rights in order to maintain considerable influence on the foundation and its assets. This article explores how to provide for reserved powers in order to avoid such challenges, and how to implement adequate protection measures against creditor clawbacks or attacks by the founder's heirs.

against litigation and to defeat creditor claims, particularly to shield these monies from the onslaught of creditors in a bankruptcy scenario.

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The dilemma

The Liechtenstein foundation is not only a well-known, reliable estate planning tool but also particularly attractive to those clients for whom asset protection is a major issue since it serves the demand for long-term preservation of family property during the founder's lifetime and upon his death.

Most investors—whether investing a fortune or modest savings—share a common goal: to generate high returns, but also to protect their investment

The basic principles

The Liechtenstein foundation can be characterized as an incorporated entity without any 'shareholders' or members, having its own internal organization. The founder provides the foundation with (tangible or intangible) assets from his personal estate in order to achieve a particular purpose specified by the founder upon formation of the foundation. This fund is subsequently held, administered, managed, used etc

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by the foundation and the foundation council, respectively, for the purpose set out by the founder, but it is no longer subject to (direct) control of the founder.

Therefore, the founder will, most likely, endeavour to maintain a certain influence on the foundation either indirectly through the foundation's administrative bodies (eg establishment of a foundation council closely related to the founder), or directly by providing the founder with certain 'reserved powers' (such as the right to amend the foundation deed (the statutes) and the supplementary formation deed (by-laws), or the right to revoke the foundation¹).²

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When the founder contributes assets to the foundation the legal title to those assets is vested in the foundation requiring the founder to irrevocably give up control over these assets. The Liechtenstein Supreme Court recently held that—among other criteria—whenever revocation and amendment rights are reserved, the founder has not yet made any 'pecuniary sacrifices'³ with regard to the establishment of the foundation, thus, has not yet irrevocably transferred any of the assets to the foundation until he either waives such reserved powers or until he

finally dies, thereby irretrievably giving up any control over the foundation and its assets.⁴ This of course might adversely impact any asset protection strategies pursued by the founder; for instance, the statute of limitations for clawback⁵ or forced heirship claims⁶ is tolled and will start running only when an irrevocable transfer of assets to the foundation can finally be assumed.⁷

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According to Article 552 section 38 PGR (Persons and Companies Act) contributions to foundations may be challenged by the founder's heirs and his creditors just in the same manner as a voluntary conveyance (gratuitous transfer, ie made, by definition, in exchange for no consideration) may be challenged.⁸

Creditor clawback claims

According to Article 64 paragraph 2 RSO (Legal Remedy Code) any creditor having an enforceable claim against the founder may dispute conveyances of assets to the foundation if such creditor was not fully compensated by enforcement of his claim against the debtor (founder) or if, at the time the writ of

1. The right to revoke the foundation is usually combined with the founder being designated as the sole and ultimate beneficiary of the foundation, ie when the founder finally exercises the right to revoke the foundation, the founder will re-collect any and all assets then owned by the foundation.

2. Art 552 §§ 16 para 2 and 30 para 1 PGR.

3. Austrian Supreme Court 10 Ob 45/07a; referring to the so called 'Vermögensopfertheorie'. Please note that reference to Austrian Private Foundation Law and the decisions rendered by the Austrian Supreme Court dealing with private foundations can actually be made because when developing the Austrian Foundation Law, the Austrian legislator was drawing inspiration from the legal framework established in Liechtenstein. Therefore, Austrian Private Foundation Law (*Privatstiftungsgesetz*, PSG) and Liechtenstein Private Foundation Law are broadly similar.

4. Liechtenstein Supreme Court 03 CG.2011.93. Bösch, PSR 2013/16; Atlmayr/Rabanser, Das neue Liechtensteinische Stiftungsrecht, § 38.

5. 'Actio Pauliana'.

6. So called 'Pflichtteilsergänzungsklage'.

7. Bösch, PSR 2013/16; Gasser, Praxiskommentar Liechtensteinisches Stiftungsrecht, art 552 § 38 mn 15.

8. Gasser, Praxiskommentar Liechtensteinisches Stiftungsrecht, art 552 § 38 mn 4, with further references; Schauer, Kurzkomentar zum Liechtensteinischen Stiftungsrecht, art 552 § 38 mn 1 et seq.

execution was issued (ie approval of enforcement of the claim), the claim was yet to be assumed uncollectible.

However, with regard to voluntary conveyances by the debtor, the creditor, when initiating clawback litigation must comply with certain limitations set up by the RSO: Any voluntary conveyance may be challenged if and only if such conveyance was made within a one-year period prior to the issuance of the writ of execution,⁹ unless the creditor can prove fraudulent or preferential conveyance by the debtor (founder)¹⁰ in which case the transaction may be challenged by the donor's creditors regardless of when the illicit conveyance was actually made.¹¹ Article 74 RSO however sets up a statute of limitations of five-years (starting to run when the respective transfer of assets is made) which is to be equally applied to fraudulent or preferential conveyances.¹² In essence, Liechtenstein law thus provides that after five years the assets transferred to a Liechtenstein foundation will be immune from being challenged by creditors in any event.

Generally, fraudulent conveyance is assumed if the recipient (here, the foundation) was acting recklessly, ie should have known about the debtor's (founder's) intent to defraud. The burden is laid on the creditor challenging the transaction to show proof of the founder's intent or actual or potential knowledge on the part of the recipient.¹³ In this regard, the Austrian Supreme Court has recently ruled that the founder's intent is to be attributed to the foundation board of a Liechtenstein foundation, even if the board is acting bona fide and without any knowledge whatsoever of

the fraud being perpetrated by attributing the assets to the foundation.¹⁴

In case of clawback litigation instigated against the foundation, reserved powers will often have a great impact on whether the creditor's claim will be successful, since the aforementioned one-year period for creditors to clawback (voluntary) contributions will be tolled and will not start before the founder has waived such rights. Thus, the transfer may be voidable and the assets placed in the foundation may be determined to be the de facto (legal or equitable) property of the debtor/founder irrespective of where they are located or who is actually holding them.

In addition to attacking the disposition the creditor may also try to obtain a court order attaching the founder's rights.¹⁵

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By virtue of a writ of attachment the creditors could then attempt to revoke the foundation and nominate and entitle the (indebted) founder as the sole and ultimate beneficiary of the foundation thereby depriving all beneficiaries designated by the founder of their benefits. Although Liechtenstein foundation law was totally revised only in 2008, it yet remains silent on whether reserved powers may be so attached by the founder's creditors. A good argument can be made that attachment is inadmissible as these rights reserved to the founder are non-seizable (since any of the founder's rights with regard to a foundation

9. Art 65 para 1 lit a RSO. *Bösch*, Liechtensteinisches Stiftungsrecht, 729; *Gasser*, Praxiskommentar Liechtensteinisches Stiftungsrecht, art 552 § 38 mn. 22; *Schauer*, Kurzkomentar zum Liechtensteinischen Stiftungsrecht, art 552 § 38 mn. 11.

10. A conveyance will generally be qualified as fraudulent if it was made for the purpose and with the intent to delay, hinder or defraud the debtor's creditors or at least with the intent to favour one creditor to the detriment of the others (preferential conveyance).

11. Art 67 para 1 RSO, *Actio Pauliana*.

12. See art 74 para 1 RSO requiring any claim to be brought by the creditor within five years from the occurrence of an alleged fraud. *Bösch*, Liechtensteinisches Stiftungsrecht, 730; *Schauer*, Kurzkomentar zum Liechtensteinischen Stiftungsrecht, art 552 § 38 mn. 11, with further references.

13. Art 67 para 2 and 3 RSO.

14. *Gasser*, Praxiskommentar Liechtensteinisches Stiftungsrecht, art 552 § 1 mn. 3; Austrian Supreme Court 3 Ob 1/10h. This ruling is likely to affect Liechtenstein foundation law although the Supreme Court has not yet adopted the Austrian highest court's approach.

15. *Bösch*, Liechtensteinisches Stiftungsrecht, 730; *Gasser*, Praxiskommentar Liechtensteinisches Stiftungsrecht, art 552 § 38 mn. 22; *Schauer*, Kurzkomentar zum Liechtensteinischen Stiftungsrecht, art 552 § 38 mn. 11; *Jakob*, Die Liechtensteinische Stiftung, mn. 710.

are actually non-transferable, non-inheritable, etc).¹⁶ However, the Liechtenstein Supreme Court has not yet ruled on that threshold question.¹⁷

Regardless of whether these rights are qualified as seizable or non-seizable assets, immunity from attachment of reserved powers may be achieved by using a new legal approach

Regardless of whether these rights are qualified as seizable or non-seizable assets, immunity from attachment of reserved powers may be achieved by using a new legal approach: Combined with a provision in the statutes that beneficial interests are to be privileged in the sense that they are to be exempted from creditors' enforcement,¹⁸ the appointment of a particular controlling body, eg a Protector, Protector Committee or similar, and vesting such body with veto or consent powers in relation to the exercise of reserved powers, will utterly frustrate the attachment of reserved powers by the founder's creditors.¹⁹ Further, when such controlling body is installed and the reserved powers of the founder are subject to consent of such body the statute of limitations for voluntary conveyance will not be tolled and will therefore start running immediately upon formation of the foundation.²⁰

Forced heirship claims

With regard to claims grounded in forced heirship rights, the Liechtenstein Civil Code (ABGB) provides

as follows: Any voluntary conveyance by the decedent within a two-year period before death to any other person than the children (or, if the decedent dies without leaving any descendants, the decedent's parents) or the spouse²¹ is to be taken into account when calculating the compulsory share of forced heirs unless the gift was made for charitable reasons.²² Thus, any contribution of the decedent's property to a foundation within the aforementioned period is likely to curtail the rights of the founder's heirs if they are deprived of their compulsory share of the decedent's estate.²³ On the other hand, if any such transfer to the foundation took place (at least) two years before the founder died, and if he had abstained from reserving powers over the foundation, the claim must fail.

As indicated above, the Liechtenstein Supreme Court held that whenever revocation and amendment rights are retained by the founder and the founder is designated as the (ultimate) beneficiary of the foundation, the assets placed in the foundation may be determined to be the de facto (legal or equitable) property of the founder. As a consequence, just as the statute of limitations regarding creditor claims, the aforementioned two-year period for forced heirship claims shall be tolled and will only start running when either the founder waives such reserved powers or he eventually dies.²⁴ If, however, an independent protector holds veto powers (power to consent or approve) with regard to any such rights retained by the founder, the two-year period will not be tolled and will thus start

16. So called 'höchstpersönliche Rechte'.

17. Gasser Praxiskommentar Liechtensteinisches Stiftungsrecht, art 552 § 36 mn. 15.

18. Art 552 § 36 PGR.

19. According to art 552 § 28 PGR further controlling bodies may be established (eg in order to decide on distributions, to supervise and support the board, etc). Frequently, a so called protector is appointed to supervise the activities of the board after the demise of the (economic) founder. Most likely, the protector will be a person of trust to the founder but in any event should be fully independent from any influence of the founder (eg no family relationship, not otherwise closely related to the founder). Of course, this independent, third party will still ensure that the founder's interests will be best preserved, even if these interests are detrimental to those of the creditor now entitled to exercise such rights and powers.

20. Austrian Supreme Court 6 Ob 49/07k; 6 Ob 50/07g. Arnold, GesRZ 2008, 163; Oberndorfer, ZfS 208, 27; Gasser, Asset versus Creditor Protection – Exekutions- und anfechtungsfeste Ausgestaltung von Stifter- und Begünstigtenrechten in liechtensteinischen Stiftungen, FS Delle Karth; Gasser, Praxiskommentar Liechtensteinisches Stiftungsrecht, art 552 § 36 mn. 16; Czoklich, ÖBA 2008, 422.

21. These particular group of heirs entitled to receive a mandatory legitimate share of the estate of a testator is called 'forced heirs', 'Pflichtteilsberechtigte'; § 785 para 3 ABGB.

22. LES 2003, 100. Gasser, Praxiskommentar Liechtensteinisches Stiftungsrecht, Art 552 § 38 mn. 15.

23. Unless there was just cause to disinherit them, of course.

24. Liechtenstein Supreme Court 03 CG.2011.93. Bösch, PSR 2013/16; Attlmayr/Rabanser, Das neue Liechtensteinische Stiftungsrecht, § 38; Gasser, Praxiskommentar Liechtensteinisches Stiftungsrecht, Art 552 § 38 mn. 15.

running immediately upon formation of the foundation.²⁵

A hypothetical case

F, a world famous surgeon, is a French citizen but resident of Switzerland. In 2010, he established a Liechtenstein foundation ('Foundation'), placing substantially all of his private property (Liechtenstein bank accounts) into the foundation. F has two children from his first marriage (A and B) and one child from his second marriage (C). C and his mother, F's second wife, are the sole designated beneficiaries of the Foundation. Unfortunately, F reserves the power to amend and revoke the Foundation, but he agrees to accept that the exercise of such powers is subjected to the veto of a third party Protector of the Foundation. In 2013, F dies intestate. The decedent's estate, however, is indebted. He does not only leave behind disgruntled children A and B, but also a former patient who claims damages alleging medical malpractice by F and in 2014, assisted by an armada of US lawyers, wins a multi-million Dollar judgement against F and his estate. Which law governs the claims asserted against the Foundation, and would such law provide a successful challenge?

A and B (as forced heirs), allegedly deprived of their compulsory share of F's estate may attempt to attack the contribution to the Foundation in 2010 (since the estate is indebted).

In order to assert a forced heirship claim against a Liechtenstein foundation having received contributions during the decedent's lifetime, a two-prong test must be met.

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As a general rule, the law of the country of citizenship of the decedent will govern the descent and the distribution of his estate.²⁶ A forced heir allegedly deprived of his compulsory portion of an estate, however, must meet a two-prong test: First, such claim must be admissible under the laws governing the descent and distribution (here, French law) and, second, such claim must also be admissible under the laws applicable to the contribution (here, Liechtenstein law).²⁷

Although the Foundation clearly received a voluntary contribution, the two-year period defined under Section 785 paragraph 3 ABGB had already elapsed in 2012. Hence, the contribution is not voidable and A and B's forced heirship claims against the Foundation must fail.²⁸ Most importantly, this is owing to the advice of F's Liechtenstein lawyers to subject his reserved powers to a Protector's veto right, failing which the two-year deadline would have started to run only in 2013 when F died. And then, A and B would have won the lawsuit.

Finally, F's judgement creditor will try to collect his claim from the Foundation rather than from the indebted estate, but, again, with no success. Despite the powers reserved by F, the Foundation's assets remain protected from challenge, as the powers are subjected to the Protector's veto rights and because four years have passed between the asset contribution and F's demise.

25. Austrian Supreme Court 6 Ob 49/07k; 6 Ob 50/07g, *Arnold*, GesRZ 2008, 163; *Oberndorfer*, ZfS 208, 27; *Gasser*, Asset versus Creditor Protection – Exekutions- und anfechtungsfeste Ausgestaltung von Stifter- und Begünstigtenrechten in liechtensteinischen Stiftungen, FS Delle Karth; *Gasser*, Praxiskommentar Liechtensteinisches Stiftungsrecht, art 552 § 36 mn. 16; *Czoklich*, ÖBA 2008, 422.

26. Art 29 para 1 Liechtenstein International Private Law (IPRG).

27. Art 29 para 5 IPRG.

28. § 785 para 3 ABGB; art 552 § 38 PGR.

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