

# New means to remove trustees in Liechtenstein

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## Abstract

A trust builds upon trust. It is redundant to explain this fairly obvious statement, but reflecting on the basics of the trust makes one think: what to do with a trust without trust? The newly amended Code of Ethics and Professional Conduct ('Standesrichtlinien') of the Liechtenstein Association of Professional Trustees and Fiduciaries (hereinafter 'Association') widens the options for settlors and/or beneficiaries to dismiss a trustee. Through this amendment, it has become easier to actively intervene in the event that trust has been lost.

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## Situation previous to the amendments

When setting up a trust, Liechtenstein trust law provides a settlor with several options to influence in the composition of the trust. This includes reserving respective rights to hire and fire a trustee. In addition, a right to revoke the Trust or the Foundation can be reserved by the settlor. Furthermore, a protector could be appointed in order to grant him additional rights of control or influence on the Trust or Foundation. From a tax perspective, however, in the majority of cases it is not advisable for the settlor to maintain any direct

Previous to the amendment of the Code of Ethics and Professional Conduct, if settlors or beneficiaries wanted to replace the trustee, they were dependent either on the good will of the trustee to step down or on a formal dismissal decision by the Liechtenstein supervisory court. Whereas in the past the first option proved to be an exception, the second option, namely court proceedings to remove a trustee, proved to be even more delicate for discretionary beneficiaries of a Liechtenstein Trust, who—according to a recent decision by the Liechtenstein Supreme Court—usually do not have legal standing in these matter before court. What is more, the Liechtenstein supervisory court's jurisprudence in removal cases is rather strict, meaning that a dismissal requires a gross-negligent breach of duty by the trustee. In this context, the court asks whether from an objective point of view the beneficiaries are supposed to tolerate the trustee's misconduct (the so-called *Reasonableness*).<sup>1</sup> From a practical perspective, this threshold was rather high

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1. art 929 para 3 PGR. Cf also the decision of the Liechtenstein Constitutional Court, case reference StGH 2007/148, from 2 February 2009; for a more detailed explanation, cf H Bösch, *Die liechtensteinische Treuhänderschaft zwischen trust und Treuhand* (GMG JURIS Verlags-AG 1995) 97.

and was met only in severe cases of conflict of interest or breaches of professional duties, for example when the incriminated action seriously endangered the trust's assets.<sup>2</sup> By amending the Code of Ethics and Professional Conduct, the trust sector has recently improved the situation for beneficiaries and settlors significantly.

*Liechtenstein supervisory court's jurisprudence in removal cases is rather strict*

## Amendments to the professional guidelines

After lengthy debates in the Liechtenstein trust sector, the Code of Ethics and Professional Conduct now provides for a rather easy and informal procedure to remove trustees.

The new provisions allow 'all parties involved' (ie the settlor, all beneficiaries, Protectors, further Trustees) to remove a trustee who does not enjoy a sufficient degree of trust anymore. The newly implemented Article 7 paragraph 2 Code of Ethics and Professional Conduct<sup>3</sup> now stipulates that the lack of confidence between the trustee and all parties involved constitutes a conflict of interest. In other words, if all designated parties involved, who are not related to the trustee, declare that they have lost confidence and trust in a specific trustee, this constitutes a conflict of interest and the trustee is therefore supposed to offer his resignation. Notably, the provision speaks of parties *unrelated* to the trustee. The German wording comes with a rather broad and undefined meaning. However, it is our opinion that the wording 'parties involved not related to the trustee' excludes co-trustees being employed at the same fiduciary service provider as the trustee to be removed from the decision making. Any other conclusion would lead to the unsatisfying result that a (justified) removal of a trustee lacking

the confidence of all parties could be blocked for an indefinite period.

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## Removal procedure

The new Code of Ethics provides in Article 18 for the following procedure to remove a trustee. First, all parties involved must agree on a new trustee. Secondly, this new trustee must be willing to accept the new mandate. Once this step has been taken, the new trustee contacts the trustee still in charge with the request to step down due to a conflict of interest (loss of confidence). Within 30 days of this request the new and the old trustee shall meet at the negotiation table in order to discuss the handover of the file in the interest of the trust or foundation involved.

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If the trustees reach an agreement within this time limit, the change can take place in an uncomplicated and straightforward manner. In practice, this would be most likely done by formally handing over the case file to the new trustee as well as to apply for the necessary amendments in the commercial register.

However, if no agreement on the change can be reached, the old trustee needs to notify the board of the Trustees Association within 14 days about the

2. See also Gasser, 'Trust without Trust: The New Gun to Fire your Trustee in Liechtenstein', Gasser Partner Newsletter (June 2018).

3. An unofficial translation by the Institute is available at <<https://bit.ly/2Aizygw>> accessed 31 July 2018 (abbreviated link).

reasons for the refusal to transfer of the mandate. If the old trustee does not comply with the 14 days' time limit, the prospective new trustee is obliged to notify the board of the Trustees Association about this omission.

The board—after hearing both the old and the new trustee—examines whether a conflict of interest or any other important reason justifying the transfer of the mandate exist. Based on the outcome of its examination the board renders a recommendation to the trustees.

Failure to comply with the board's recommendation may constitute a disciplinary offense. Although the board is not entitled to directly change a trustee, it could indirectly create significant pressure by the way of imposing fines and ultimately even disbar the non-compliant trustee.

## Summary and checklist

The new provisions in the Code of Ethics and Professional Conduct provide beneficiaries and settlors of Liechtenstein foundations and trust with significant possibilities to remove a trustee, who lost the confidence of all key stakeholders. However, it must be born

in mind that, ultimately, only the supervisory court has the power to remove a trustee against his will. The previously outlined procedure before the board of the Trustees Association has only indirect mean to effect a trustee to (more or less voluntarily) step down.

Beneficiaries and settlors who wish to replace a trustee of a Liechtenstein foundation or trust are recommended to take the following steps:

- Seek informal settlement with the trustee beforehand. A Liechtenstein attorney-at-law might help you to negotiate such informal settlement. This step is not mandatory but reasonable in order to save costs and time.
- If unsuccessful, seek a written declaration of every party involved in the trust or foundation (other than the trustee about to be removed), stating that the trustee lost the confidence of all the relevant parties involved.
- Mandate a new trustee and provide him with all declarations in writing so that he can initiate the procedure according to Article 18 Code of Ethics and Professional Conduct.

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