

Liechtenstein

Batliner Gasser Rechtsanwälte

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1. THE BASIS OF CIVIL FRAUD OBLIGATIONS UNDER LIECHTENSTEIN LAW

Liechtenstein is not a common law country. Case law does exist, but it does not create binding precedent. Therefore, it does not play as important a role as it does in Anglo-American jurisdictions. The rules and findings of Liechtenstein's Supreme Court do not have binding effect. However, in similar cases the courts of lower instance need to take the Supreme Court's case law into consideration, unless there is legal cause to deviate from it (cf. Liechtenstein Supreme Court 5.2.2010, 4 CG.2008.14 in LES 2010, 239).

Therefore, civil fraud obligations in Liechtenstein arise from legislation. Liechtenstein law does not distinguish between civil and criminal fraud. Fraud is a crime pursuant to § 146 of Liechtenstein's Penal Code (STGB) dated 24 June 1987. In addition, persons who have suffered damage due to fraud in accordance with § 146 STGB are entitled to claim damages from the fraudulent person under Liechtenstein's Civil Code (ABGB) dated 1 June 1811.

However, Liechtenstein's civil law does present special provisions regarding fraud. By way of example, Liechtenstein's ABGB provides special terms so as to protect persons who have agreed to enter into a contract on account of the fraudulent behaviour of the other party (cf. § 870 Par. 1 ABGB. *See below, section 4*).

2. THE MAIN ELEMENTS OF A CAUSE OF ACTION IN LIECHTENSTEIN BASED ON CIVIL FRAUD

Fraud pursuant to Liechtenstein law requires the deliberate deceit of a person in relation to facts (cf. § 146 STGB). Deception can be committed in relation to certain circumstances, legal situations and relationships or even concerning the true intentions of the deceiving person.

The deliberate deceit can be brought by an act of deception as well as by leading the victim to a false pretence. The fraudulent person has to have the intent to enrich himself by inducing the victim to act, to acquiesce or to omit from doing something. As a result of the induction the victim suffers a pecuniary damage while the fraudster enriches himself. The cause of action is completed by the occurrence of the victim's pecuniary damage.

Deception can be committed through:

- (i) untrue assertions;
- (ii) fraudulent documents such as untrue confirmations, forged or falsified deeds; or
- (iii) other fraudulent behaviour.

The deception has to lead the deceived person astray either by:

- i) causing the misapprehension; or
- ii) exploiting or supporting an already existing misapprehension.

Deception can also be committed by breach of one's duty to resolve an existing misapprehension.

A contract is not binding for a party that has been induced to enter the contract by trick or by established fear. The cause of action based on civil fraud is similar to the cause of action based on criminal fraud.

By trick means that the defrauded contracting party has to be induced to enter a contract by deliberate deceit of the other party. Contrary to the cause of action in the penal code (cf. § 146 STGB) the defrauding party is not required to have the intent to enrich oneself. The trick can be initiated by fraudulent representation or wilful misrepresentation of the facts. As a result the trick has to influence the party's legal will. A party can also trick another party by deliberately enlarging the existing misapprehension of the other party.

There is no distinct cause of action in relation to conspiracy to defraud in the Liechtenstein Civil Law. However a conspiracy to defraud can be qualified as a distinctive form of inducing a party to enter into contract by trick.

If fear was established has to be determined by extent of fear, the possibility of imminent danger as well by the physical and psychological condition of the induced person.

3. REMEDIES AVAILABLE UNDER LIECHTENSTEIN LAW IN RELATION TO CIVIL FRAUD

Generally, persons who have suffered damage because of fraud are entitled to claim damages, restitution and compensation for resulting loss of profit from the fraudulent person (cf. § 874 and § 1295 ff. ABGB).

In addition, it is possible for someone who has entered into a contract because of the other party's deliberate deception to contest the contract by applying for declaratory relief as to the status of the contract (cf. § 870 paragraph 1 ABGB). It is also possible for the deceived person to apply to the court to specifically amend the contract. However, the amendment requires that the other party initially had entered into the amended contract as well (cf. *Pletzer in Kletečka/Schauer*, ABGB-ON 1.01 § 870 Rz. 28 (www.rdb.at)).

4. DAMAGES; BASIS OF CALCULATION

The calculation of damages resulting from unlawful acts depends on whether the wrongdoer acted deliberately, with gross negligence or just negligence. If the wrongdoer acts deliberately or with gross negligence, causing harm to a person, he must compensate for the damage caused. This damage is called positive damage (*positiver Schaden*) and includes the real damage incurred as well as any expenses incurred to redress harm caused. In addition to compensating for positive damage, the wrongdoer must further compensate the harmed person for any loss of profit (*entgangener Gewinn*) caused by his unlawful behaviour. If the wrongdoer acts only negligently, he must compensate the harmed person only for the positive damage incurred (cf. § 1293 ff. ABGB).

The calculation of damages for (civil) fraud corresponds to the above basic

calculation of damages in cases of unlawful behaviour. The deceiver must always act deliberately in fraud cases (*see above, section 3*) and, therefore, damages are calculated including positive damage and loss of profit.

In cases under § 870 paragraph 1 ABGB, the person fraudulently causing someone to enter into a contract must put the deceived person back in the position as if the harm had not occurred (*Vertrauensschaden*). As § 870 paragraph 1 ABGB requires that the deceiver acts deliberately, the deceiver must compensate the harmed person for both positive damage incurred as well as for any loss of profit (cf. § 874 ABGB).

5. AVAILABLE INTERIM RELIEF

There are no special provisions concerning an interim relief in cases of civil fraud. Instead, the general provisions for interim relief apply.

Before the start of a lawsuit and during litigation, it is possible for to apply for interim injunctions in the form of either (cf. Article 270 ff. of Liechtenstein's Law on Execution dated 24 November 1971, 'EO'):

- i) a security restraining order, which aims to secure pecuniary claims; or
- ii) a official order, which deals with any claims other than those of a pecuniary nature.

The choice of which depends on the nature of the claim. Primarily, both injunctions temporarily maintain the state of affairs prevailing at that time (eg to freeze the assets that are subject to litigation). In this context, the execution measures are limited to:

- i) the custody and administration of chattels;
- ii) the prohibition of alienation and pledging; and
- iii) in the case of claims, prohibition of payment and collection.

6. BARS TO RELIEF FOR CIVIL FRAUD

6.1 Delay

The concept of unreasonable delay as bar to relief for civil fraud cannot be applied to the Liechtenstein Civil Law due to systematic differences between common-law and civil-law jurisdictions.

6.2 (Lack of) good faith

A harmed person cannot claim relief for fraud if he has not acted in good faith.

The deception must make the harmed person act under a misapprehension of the actual situation. If the harmed person knows about the deceit, then no fraud exists.

In addition, in relation to calculating damages incurred by fraud, the amount of damages to which the harmed person is entitled is reduced relative to the degree to which the damages caused arise through the harmed person's own fault.

6.3 Applicable limitation periods

Limitation is a bar to relief for fraud. The limitation period for damage claims because of unlawful acts causing harm to a person (like fraud) is generally

three years. This limitation period starts as soon as the harmed person has knowledge of the damage incurred as well as of the fraudulent person's identity. This limitation period also applies for damage claims based on fraud under § 870 ABGB. The limitation period can only be extended beyond three years in cases of serious criminal fraud causing particularly severe damage; in which case the limitation period is 30 years (cf. § 1489 ABGB).

However, the limitation period to contest a contract (or to apply for the amendment of a contract) entered into because of the other party's deceit is 30 years from the date of conclusion of the contract (cf. Pletzer in Klete ka/Schauer, ABGB-ON 1.01 § 870 Rz. 31 (www.rdb.at)).

6.4 Position of a good faith purchaser for value without notice (innocent third parties)

The concept of "good faith purchaser for value without notice" also exists in Liechtenstein. However it is not connected to civil fraud obligations. Instead it is a part of the property law.

Cases in which an item was entrusted to the alienator must be distinguished from cases in which an item was stolen from its rightful owner.

A person who receives an item in good faith acquires ownership even though the alienator was not entitled to conduct the transfer of title. However the precondition is that the item was originally entrusted to the alienator.

The situation is different if an item was stolen from its owner. The owner can reclaim the item from the good faith purchaser within a time period of 5 years. If the good faith purchaser did purchase the stolen good on a market, auction or from a merchant, the previous owner has the right to reclaim the item. However the good faith purchaser is entitled to receive the price he did pay for respective item.

7. ASPECTS OF PLEADING FRAUD IN LIECHTENSTEIN

7.1 Lifting the corporate veil

Pleading fraud can lift the corporate veil. Lifting the corporate veil in relation to civil claims for damages in cases of fraud is possible if the fraudulent person has established and used a company with the intention to commit fraudulent acts and to deceive other persons.

The fraudulent person can also be a company. If the company is insolvent the victims still have the possibility to file a claim against the organs of a company since the corporate veil can be lifted.

7.2 Settlements/exclusion clauses

Exclusion clauses are valid in cases of gross negligence. There is no specific rule which states the invalidity of such clauses in cases of wilful misconduct. However the exclusion of liability for cases of wilful misconduct is considered as breach of the principle of good faith. Therefore exclusion clauses do not remain valid in cases of wilful misconduct.

7.3 Extension of limitation

Pleading fraud does not extend the limitation period as regard to claims for

damages. However, pleading fraud in relation to contesting a contract according to § 870 paragraph 1 ABGB does extend the period of limitation, as the ordinary period of limitation concerning the contesting of contracts based on a simple mistake (not caused by deceit) is only three years (cf. § 1487 ABGB) instead of 30 years as in cases of fraud. Furthermore, it is not possible to exclude or to waive the right to contest a contract based on § 870 ABGB in advance (cf. *Pletzer in Kletečka/Schauer*, ABGB-ON 1.01 § 870 Rz. 30 (www.rdb.at)).

7.4 Punitive damages

Like most other civil-law-jurisdictions Liechtenstein does not have any system of punitive or exemplary damages. The civil code of Liechtenstein (ABGB) stipulates that damages are only given to compensate for loss caused. Pleading fraud does not lead greater damages being recoverable.

7.5 Standard of proof

The standard of proof when pleading fraud is the same as for general civil proceedings.

7.6 Lawyers' duties when pleading

Lawyers do not have any heightened duties when acting in civil fraud matters.

8. BASIC REQUIREMENTS IN RELATION TO ISSUING PROCEEDING; APPLYING FOR INJUNCTIVE OR INTERIM RELIEF; OR SERVING PROCEEDINGS ABROAD.

Compared to trials in other jurisdictions, Liechtenstein justice is considerably swift. There is no rule requiring criminal cases to be granted priority. Once the relevant briefs are filed, a trial is scheduled within weeks. The median time from commencement of a lawsuit to judgment is 12 months. However, it may be longer, if the case is complex and international. The paperwork involved and the time taken in order to prepare the initiation of proceedings or the application for an injunctive or interim relief depends on the complexity of the case.

The proceedings must be filed with the Court of Justice of the Principality of Liechtenstein. Prior to filing it is mandatory to hold a mediation meeting. There are no particular procedure rules for civil fraud obligations. The general rules for civil proceedings which are stated in the Liechtenstein civil procedure law (ZPO) are applicable.

9. PROCEDURE AND REQUIREMENTS FOR ENFORCING INTERIM INJUNCTIONS FROM ABROAD IN LIECHTENSTEIN

Liechtenstein is not a signatory to the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1988. Under Liechtenstein law, judgments or decisions of foreign courts are not enforceable in Liechtenstein if there is no special international treaty allowing such enforcement. Liechtenstein has entered into such bilateral treaties with Austria and Switzerland. However, in relation to both of these treaties, the enforcement of interim injunctions is explicitly not possible (cf. Art. 1

paragraph 3–5 of the Treaty between Liechtenstein and Austria concerning the recognition and enforcement of civil and commercial matters dated 5 July 1973 and Art. 1 paragraph 2 of the Treaty between Liechtenstein and Switzerland concerning the recognition and enforcement of civil and arbitration matters dated 25 April 1968).

Therefore, it is not possible to enforce foreign interim injunctions in Liechtenstein. Instead, it is necessary to initiate legal proceedings in Liechtenstein, either only regarding the interim injunction or concerning the substan

