Transferring property to a Liechtenstein trustee: a review of trust, property and constitutional law

DISSERTATION

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Introduction

The Principality of Liechtenstein is one of few civil law jurisdictions providing for its own trust statutes and interpretative case law. Long standing practice in application of the trust within its civil law jurisdiction has lead to legal uncertainties, enabling practitioners to elaborate on key problems. One specific uncertainty is the question of ownership of assets held in trust. Practically, most Liechtenstein trusts' assets are transferred from abroad. The transfer of legal title to property per se may be subject to cogent law designated by the conflict rules of the forum, hence non-Liechtenstein law. Consequently, this practical importance of Liechtenstein specific rules regarding the transfer of legal ownership may seem limited. However, its understanding becomes crucial when foreign courts and practitioners are bound to apply and interpret Liechtenstein law, specifically the position of a Liechtenstein trustee to the assets transferred. The importance of this role may become evident with regard to other civil law jurisdictions that have ratified the Hague Trust Convention. Not only for the recognition of the Liechtenstein trust but also for its substantial law that may be applicable and may serve as a role model for the parallel application of both, trust and property law.

This paper examines whether the title to ownership of property held in trust can be

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1 Art 15 para 1 lit. d of the Convention.
2 Art 8 Convention refers to the law chosen by the settlor and stipulates its applicability to the validity of the trust, its construction, its effects, and the administration of the trust.
4 Art 11 et seq. Convention; the Liechtenstein trust pursuant to art 897 et seq. PGR corresponds to the trust definition of the Convention pursuant to art 2; see Bericht und Antrag der Regierung an den Landtag des Fürstentum Liechtenstein betreffend das Übereinkommen über das auf die Anerkennung von Trusts anzuwendende Recht (Haager Trust-Übereinkommen; “HTÜ”) vom 1. Juli 1985, Nr. 84/2004.
5 Possession may only be discussed in relation to personal property and the principle of bona fide of third parties.
proven in light of imperfect historic evidence⁶ pinpointing a high degree of “grey matter” that lead to various conflicting arguments⁷. Based on the model of a Liechtenstein trust endowed with real property⁸ situated in Liechtenstein⁹ it will be demonstrated, that the existing set of rules regarding trusts in the Persons- and Companies Act¹⁰ (PGR) and the Liechtenstein Property Law Act¹¹ provide for a clear structure of legal ownership of the trustee according to the prevailing principle of *numerus clausus*¹² and that no system-incoherent¹³ new kind of *right in rem* in favour of the trustee is required. Subsequently, personal property as trust assets will be discussed under the same set of rules.

Part I briefly outlines the contemporary and historic background of Liechtenstein trust law followed by Part II on basic specific elements in relation to creation of a trusts. The formal requirements of the registration process, the capacity of the settlor and the manifestation of his intention will be discussed, thereby highlighting systemic

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7 Bösch, *Liechtensteinische Treuhänderschaft* (n 6) 248 et seq; urt Moosmann, 'Der angelsächsische Trust und die liechtensteinische Treuhänderschaft unter besonderer Berücksichtigung des wirtschaftlich Begünstigten' in Dieter Zobl, Mario Giovanni and Gérard Hertig (eds), *Schweizer Schriften zum Bankenrecht* vol 56 (Schulthess 1999) 183 et seq; Moosmann, following in general Bösch's idea of German legal influence, developed his own theory of contingent property (*resolutiv bedingtes Eigentum*) assuming the cause of the transfer to be resolutive conditional. Whereas other scholars and practitioners follow the theory of the trustee having unrestricted ownership of trust assets; a.o. see Klaus Biedermann, *The Trust in Liechtenstein Law – A Comparison with its Prototype the Common Law Trust* (Gerald Crossland (tr), The Alvescot Press 1984) 12; Francesco Schurr, 'Verhältnis des Trustee zum Errichter und zu den Begünstigten beim liechtensteinischen Trust' (2011) 1 Liechtenstein Journal 7; Stefan Wenaweser, 'Zur Rezeptionsfrage der Treuhänderschaft und ihrem Anwendungsbereich nach liechtensteinischem Recht' (2001) 1 Liechtensteinische Juristen-Zeitung 1.
8 According to art 897 PGR properties will include besides real- also personal property as well as other legal interests. However, focus will be set on real property in order to prove the doubtless allocation of rights to the interested parties of a trust.
9 Although the model seems not relevant in practice it serves as viable model to prove the idea of the Liechtenstein legislators idea of the trustee's ownership of trust assets and its coherence with its model in English common law.
12 See infra Part II IV C
13 Neither the domestic legal system nor with regard to its role model, the English common law nor with the international legal system in the form of the Trust Convention of Hague, to which Lichtenstein had committed itself by ratification and enactment on 1 April 2006.
Introduction

inconsistencies between historic theory and current practice.

Part III will focus on the classification of different types of properties following the basic division of Liechtenstein property law in real and personal property. Following the examination of the applicable Roman law principle of causal tradition, Part IV will subsequently examine the conveyance of real and personal property to a Liechtenstein trustee, outlining some specifications of different types of properties.

Moreover, following the examination of the transfer of assets, Part V will consider the protection of trust property under a constitutional law perspective. It will be demonstrated, that despite all contrary indications the trust cannot be held to have its own legal capacity and hence cannot be bearer of the fundamental right of protection of property. Finally, this theory will also be verified for civil legal and bankruptcy proceedings underpinning the findings pursuant to substantial law as discussed in previous parts.
Part I

Review of the Liechtenstein trust concept

I. Historic and recent developments

Having enacted their own statutory trust law in art 897 to 932 as part of the PGR, the Principality of Liechtenstein was at the time the first European continental jurisdiction to have introduced the concept of trusts to their own civil law jurisdiction. Since then the statutory law has been subject only to minor changes. However, the relevant case law has changed quite significantly with respect to the legal nature of “the trust”. Had it been the common understanding that the Liechtenstein trust law was drafted solely from the role model of an English common law trust, since the year 2000 it is the prevailing theory and set precedent that a significant part of the statutes had been drafted under influence of continental legal background.

Besides the dynamics in case law, steps for redrafting statutes have already been taken by the government in 1998. Subsequently the government undertook efforts

15 Biedermann, Liechtenstein Trust (n 7) 10.
16 Statutory amendments have been made in 1928 (LGBl 1928/6), 1980 (LGBl 1980/39), 1997 (LGBl 1997/19) and in 2000 (LGBl 2000/136; LGBl 2000/279).
17 The correct wording of the Supreme Court's findings are “he convincingly proved, that upon drafting the trust the Liechtenstein historic legislator had a model in mind, which distinguished clearly between the “germanic/english trustee” from a “roman” fiduciary, and that by drafting the trust pursuant to art 897 PGR et seq. they had a form of trust in mind, based on a trust- and german-legal model.” (non binding translation).
for a complete makeover of the trust law. The draft results presented in 2007 reflected new modern Liechtenstein trust law based on the comparison of several other “offshore” jurisdictions\(^\text{20}\). The intention was to gain market share since Liechtenstein may have been an offshore centre established and well known for foundations but not for trusts.\(^\text{21}\) However, it has remained a draft and yet, in 2016, has not been enacted. There is no reliable information available on when the trust law may be passed in Parliament since it is not even on the current political and legislative agenda. Consequently, the present reflection on the Liechtenstein trust continues to be based on art 897 to 932 of the Liechtenstein PGR of 20 January 1926, published in Liechtenstein Law Gazette No 4 of 19 February 1926 as amended and currently in force.

II. The legal concept of the Liechtenstein trust

A) The elementary idea

A Liechtenstein trust relationship is characterised within art 897 – 932 PGR, but certain provisions may only be classified by their legal nature as references to other particular fields of civil law and its principles. This causes a necessary but challenging perforation of what otherwise could be seen as a homogenous subject. With regard to the transfer of trust assets it is art 899 para 4 PGR that includes a legal caveat for specific rules applicable to certain categories of assets. Consequently, the investiture\(^\text{22}\) of the trustee - whose rights and duties are basically guided by art 897 PGR et seq. - with rights to certain assets is subjected to the legal regime and principles these assets are embedded in. Assets in legal terms may only qualify as

\[^{20}\text{Tschütscher, 'Die liechtensteinische Treuhänderschaft' (n 19) 10;}
\[^{21}\text{ibid 4, 10.}
\[^{22}\text{Friedrich T. Gubler, Besteht in der Schweiz ein Bedürfnis nach Einführung des Instituts der angelsächsischen Treuhand (trust)\?, Verhandlungen des Schweizerischen Juristenvereins [Vol. 3 – Fasc. 3, Helbing & Lichtenhahn, Basel 1954) 228, esp fn 19; with further reference to Schultze who, based on the “Langobard Trust” and with focus on the executor of a will, found that the creation of a trust is done upon a contract with an in rem character. He further elaborates on the transfer of immoveable property (“tradere res”) which required the formal investiture, hence the conveyance or transfer of assets to the trustee not just in by deed but with the chain of title and/or with symbols.}

real - or personal objects or rights of any kinds as set out in art 897 PGR. With respect to the applicable basic principle of certainty of subject the trust property must be legally defined in order for the valid creation of the trust itself. Again, the definition as per trust law requires the application of the law of property and its classes of property including their formal requirements\(^{23}\) for transfer. For real estate and/or chattels, this is the law of objects, commonly referred to as law of property, specifically in the Liechtenstein Property Law Act\(^ {24}\). The subtle difference with significant effect between the non-legal term “law of objects” and law of property will be examined in part III in order to define a trustee's position according to Liechtenstein law.

B) Terminology

The pivotal issue of understanding Liechtenstein trust law seems causal by the absence of common German terminology within the domestic legal framework\(^ {25}\). Besides, the intermingle between the trust according to art 897 et seq PGR and “trust-like” institutions\(^ {26}\) and similar constructs with civil law origins\(^ {27}\) which sometimes use same expressions, adds to the confusion of terminology a (foreign) lawyer / personal property might face when trying to understand Liechtenstein law. Although, it will not be possible to resolve this pivotal issue, a trial to clarify the terminology for the present paper shall be undertaken.

As opposed to English common law practice and case law in its language of origin

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23 See art 899 para 4 PGR.
25 In several occasions the legal statutes refer to legal expressions and in brackets next to them to further expressions. This has led to different interpretations of the legislator's intentions reaching either from mere translations in brackets to indications of legal origin of the trust. Further see Stefan Wenaweser, 'Zur Rezeptionsfrage der Treuhänderschaft und ihrem Anwendungsbereich nach liechtensteinischem Recht' [2001] LJZ 1; Harald Bösch, Liechtensteinische Trustrezeption und Anwendungsbereich der Bestimmungen über die Treuhänderschaft – Neue Erkenntnisse oder nur alter Wein in neuen Schläuchen? (2001) 2 LJZ 42, and (2001) 3 LJZ 73.
26 e.g. trust enterprise (business trust) according to art 932a para 1 – 170 PGR. According to art 910 para 5 PGR rules and regulations of the trust enterprise are subsidiarily applicable.
27 Such as fiduciary relationships or fiducia or fiduciary as treuhändisch.
Review of the Liechtenstein trust concept

the relevant Liechtenstein statutory law does not apply the word trust but a plurality of different terms expressing the same legal construct. The term “trust” or alternatively and factually more precisely trust relationship shall refer to the legal relationships captured in art 897 PGR to 932 PGR only. For reasons of clarity, art 897 PGR shall in the present context refer to the equivalent of what is to be understood as the express trust in English common law.

Art 898 PGR shall be understood as a framework for trusts by operation of law and implied trusts, the latter including both types, the resulting trust as well as the constructive trust.

The institution known in Liechtenstein as Treuunternehmen governed by art 932a para 1 to 170 PGR refers to the trust enterprise. This paper will not further consider the trust enterprise unless where statutes governing the trust enterprise may apply to the trust pursuant to art 897 et seq.

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28 Referring only to art 897 to 932 PGR re. the trust relationship and art 932a para 1 to 170 PGR re. the ‘trust enterprise’.
29 With the exception of art 927 para 6 PGR and art 932a para 138 para 6 PGR, though both only synonymously.
30 See heading of chapter 16 of the PGR.
32 Or synonymously statutory trusts.
33 Formerly known in Liechtenstein law as implied trusts (stillschweigendes Treuhandverhältnis) which has been abandoned in 1980 (amendment act LGBl. 1980 Nr. 39).
34 Also known as para 1 to 170 TrUG.
35 Art 910 para 5 PGR, that provides for their subsidiary application and will therefore be taken into consideration.
C) The trust relationship

Liechtenstein statutory law does not provide for a definition of a trust, but sets focus on the duties of a trustee, consequently elaborating for cases in which no trustee has been elected. Pursuant to art 897 PGR a trustee is:

[W]ithin the intendment of this law, a natural person, firm or legal entity to whom another (the settlor) transfers moveable or immoveable property or a right (as trust property) of whatever kind with the obligation to administer or use such property in his own name as an independent legal owner for the benefit of one or several third persons (beneficiaries) with effect towards all other persons.36

There are doubts amongst scholars, whether this art 897 PGR qualifies as a definition.37 From a civil law perspective this may be upheld since it does not qualify as a definition equally to those of legal entities or partnerships defined in the PGR. Though, the trust is neither a legal entity nor a partnership and cannot be viewed or analysed under such a civil legal scheme38. It ought to be seen as a basic framework39 for various forms of relationships which cannot be captured by one definition but rather by general description where a trust relationship had explicitly been created.40

Since the focus is set on the trustee and his duties this definition does not capture cases where initially no trustee had been explicitly appointed. To provide for these art 898 para 1 PGR stipulates “wherever by operation of law or disposition of an official authority (...)” providing for the legal basis for trusts by operation of law, and consequently for implied trusts:


37 Harald Bösch, Liechtensteinische Treuhänderschaft (n 6) 69; Moosmann, Angelsächsischer Trust (n 7) 166.

38 Gubler even refers to a metaphysic nature of the trust. See Gubler (n 2) Treuhand 234.

39 For the legislators intention: Kurzer Bericht zum Personen- und Gesellschaftsrecht, undated, 1: “The title of the draft is a nomenclatur which does not entirely capture the contents of the draft […]. The fourth part on special endowment of assets […] is not captured by the title.” and 45: “Besides it shall be noted, that the systematic integration of the trust relation […] proofs to be problematic.” and ibid: “The nature of the trust relationship arises of art 897 and 899” (non binding translation).

40 See also Biedermann, Liechtenstein Trust (n 7) 561 et seq.
[In any other way, a person, without being specifically appointed as trustee, receives property or rights of any kind in his own name, but for the benefit of the owner hitherto or a third party, the relationship existing between such person and the third party shall, in the absence of any other provision, be treated as a trust by operation of law.]

Besides, the wording of art 897 PGR appears to exclude private purpose trusts since it explicitly stipulates the trustee’s obligation with regard to beneficiaries. This seems consistent with the basic principle of the certainty of objects, as applied under English common law and adopted by Liechtenstein law. However, it only reflects the intention of the legislator for creating a legal framework with focus on the most “common” trust relationship with identified or identifiable beneficiaries. It is misleading to interpret art 897 PGR to have excluding effect. Quite to the contrary, a holistic view of the general statutes on trust relationships reveals that the Liechtenstein law does accept private purpose trusts. Art 910 para 5 PGR “terms and effect of the trust relationship” refers to subsidiary application of legal statutes concerning the trust enterprise. Pursuant to art 3 TrUG

[A] trust enterprise may be formed for any defined, specific, reasonable and possible object which is not unlawful, immoral or dangerous to the state, in particular also for the investment of assets, the distribution of income, the integration of undertakings by the transfer of shares on trust or for acquisition, for family welfare, non-profit making, charitable, other personal, non-personal or similar objects.

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41 Jeeves, Liechtenstein Company Law (n 36).
42 OGH 04 C 322/84-40, decision of 8 January 1987, LES 1989, 3.
43 Biedermann, Liechtenstein Trust (n 7) 42, 79.
44 Proof thereof may be found in art 906 para 4 PGR, art 927 and art 929 PGR; Biedermann, Liechtenstein Trust (n 1) 42.
45 According to art 99 HRV (Ordinance on the Commercial Register of 11 February 2003, as published in Liechtenstein Law Gazette No 66 of 18 February 2003) the purpose of a trust is not required to be entered into the Commercial Register. Factually, an examination based on an extract of the Commercial Register on whether the trust is a mere purpose trust or has beneficiaries is not possible.
46 see infra.
47 Translation according to Liechtenstein Company Law by Brian Jeeves (n 36).
In brief, it has to be emphasised that as opposed to the restrictions known to English common law and apart from charitable trusts, the Liechtenstein law does not prevent a settlor in his options to create a private purpose trust. With regard to the purpose the limit shall be drawn with the *certainty* of objects.\(^48\) Case law specifies that the beneficiaries must be either identified or identifiable at the time of constitution of the trust settlement.\(^49\) The reference within the trust deed to further documentation specifying the beneficiaries, replacing the identifiability with the actual identification shall suffice in order to consider a trust settlement as validly concluded.\(^50\)

### i) Trust and trust enterprise\(^51\)

Although the *trust enterprise* (Treuunternehmen; Geschäftstreuhand) may be considered to be a trust – like relationship\(^52\) several differences occur to trusts pursuant to art 897 et seq. PGR. The trust enterprise has been introduced to Liechtenstein jurisdiction in 1928\(^53\) as part of the Persons - and Companies Act of 1926. It is governed by art 932a para 1 to 170 PGR but commonly referred to as para 1 to 170 TrUG (Treuunternehmensgesetz). Besides specific provisions for trust enterprises the TrUG contains many basic provisions applicable to trusts.\(^54\) Based on the Commissioner's Report presented in 1928 the intention was expressly to deliver an addendum of the PGR in general and also in particular of the trust provisions according to art 897 et seq. PGR.\(^55\) Though, based on conflicting provisions, doubts remain\(^56\) as to whether the legislator in 1928 initially aimed at only complementing

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\(^{48}\) See below Chapter III, E, iii.

\(^{49}\) OGH 04 C 322/84 decision of 8 January 1987, published in LES 1989, 3; with further reference to Biedermann, Liechtenstein Trust (n 7) 384 [the actual reference to p. 449 relates to the german edition].

\(^{50}\) ibid.

\(^{51}\) The terms *trust enterprise* or *business trust* are used synonymously.

\(^{52}\) Wilhelm Beck, *Kommissionsbericht zum Treuunternehmen* (undated) 2, 10.


\(^{54}\) Art 910 para 5 PGR generally refers to the subsidiary application of the TrUG to trusts according to 897 PGR; Bösch, *Treuhänderschaft* (n 6) 53.

\(^{55}\) Wilhelm Beck, *Kommissionsbericht zum Treuunternehmen* (undated) 1.

\(^{56}\) Bösch, *Liechtensteinische Treuhänderschaft* (n 6) 53, 75 et seq. and 119. Bösch sees a clear intention of the legislator to create a) a regular framework for the trust enterprise and b) to complement the existing general statutes on trusts. He elaborates in detail the differences between the right to follow the trust property according to art 913 para PGR
the basic trust provisions enacted two years earlier or whether the creation of the trust enterprise was the initial objective.\textsuperscript{57}

The coexistence of provisions regarding the trust and reference to the trust enterprise has led to uncertainties in the practical application of the TrUG, since no clear statute or ruling exists on when the TrUG should be subsidiarily applied.\textsuperscript{58} However, current efforts are being made for a general revision of the TrUG to bring clarity to the subject matter also in relation to further cross-references some statutes make to provisions regarding foundations and establishments.\textsuperscript{59}

The trust enterprise is a Liechtenstein specific legal construct based on the business trust (Massachusetts trust\textsuperscript{60})\textsuperscript{61} and may have any purpose within the scope of application as set out in art 3 TrUG, and may also be used for charitable or family purposes. The variety of the design of a trust enterprise is manifold. It can either serve similar purposes like a foundation or a trust in which case it would be rather set up without legal personality\textsuperscript{62}, corresponding to the statutory basic model\textsuperscript{63}. Or it can be used to run and/or hold commercial businesses and consequently be shaped more

and art 30 TrUG. Based on the criterion of the bona fide protection of third party purchaser he comes to the conclusion that there is even a basic legal contradiction between TrUG and the PGR trust related rules. In my opinion this may seem doubtful and cannot be upheld. Art 912 para 3 PGR has to be read in combination with art 899 para 4 PGR – and consequently in accordance with the principle of protection of the bona fide purchaser according to art 512 SR (Swiss art 933 ZGB). Art 512 PGR resp. art 933 PGR only protects the for value purchaser. See Honsell, OR BT, 196; also Arnold F. Rusch, Gutgläubiger Fahrniswerbs als Anwendungsfall der Rechtsscheinlehre (28 January 2008) Jusletter 13. Therefore, a separate mentioning of the for value purchaser in art 912 para 3 PGR as done in the TrUG would only be unnecessary redundancy repeating principles of property law within the trust provisions.

\textsuperscript{57} Biedermann, \textit{Liechtenstein Trust} (n 7) 87.

\textsuperscript{58} for further discussion see: Biedermann, \textit{Liechtenstein Trust} (n 7) 87; also Bösch, \textit{Liechtensteinische Treuhänderschaft} (n 6) 52.

\textsuperscript{59} Interpellationsantwortung der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Interpellation zum Gesellschaftsrecht, BuA Nr 28/2013, 21 et seq.

\textsuperscript{60} Though the Commission Report additionally refers to Oklahoma as the single other state known to have enacted provisions regarding the trust enterprise.


\textsuperscript{62} Referred to as the proper or actual trust enterprise.

\textsuperscript{63} See para 2 sub-para 3 TrUG: Bösch, \textit{Treuhänderschaft} (n 6) 53.
like a corporation in which case it would be conceptualised as legal entity\textsuperscript{64}.

Although both, the trust enterprise and the trust are considered as special funds\textsuperscript{65} and consequently both are subjected to the same set of general\textsuperscript{66} rules for trusts, the trust enterprise may only be legally constituted upon registration with the Commercial Register and requires a trust capital, which is not applicable to trusts.\textsuperscript{67} This applies whether or not a trust enterprise undertakes a commercial business.\textsuperscript{68} In light of the (subsidiary) application of the trust rules, this seems highly questionable and may contain a systemic error created from recent amendments of the statutes. In fact the historic legislator provided for the mandatory entry as requirement only in case of commercial activities.\textsuperscript{69}

\textbf{ii) Trust enterprise as trustee}

With regard to the trust para 2 sub-para 2 TrUG is of practical interest because it provides for the trust enterprise to act as a trustee pursuant to art 897 para 1 PGR. A trusteeship may also be possible for several trusts without endangering the assets of the single trusts for other liabilities but their own. The professional trustee, in the form of the trust enterprise, is obliged to act in its own name for and on behalf of the trust it administers. It seems important to stress that the trust relationship according to art 897 para 1 does not have a \textit{name}. The statutes refer to a \textit{denomination}\textsuperscript{70}, whereas the trust enterprise according to para 9 TrUG requires a name or company name. Further, pursuant to art 897 PGR providing for the trustee to act in its own name, the trust enterprise may need – especially with regard to the bona fide of third parties – to act in its own name or company name. However, if the trust enterprise

\begin{itemize}
  \item \textsuperscript{64} The Commission Report refers to the \textit{improper} trust enterprise.
  \item \textsuperscript{65} For the trust enterprise see para 25 et seq. TrUG.
  \item \textsuperscript{66} For mutual cross-references see art 5 para 4 TrUG referring to art 897 et seq. PGR and for trusts pursuant to art 897 et seq. PGR see art 910 para 4 PGR.
  \item \textsuperscript{67} Para 7 TrUG.
  \item \textsuperscript{68} Differences occur with regard to bookkeeping requirements and or the instalment of an auditor.
  \item \textsuperscript{69} Para 7 TrUG as published in Liechtenstein Law Gazette No 6 of 18 June 1928, enacting the Law of 10 April 1928 on the Trust Enterprise (and other amendments to the Persons- and Companies Act of 19 February 1926).
  \item \textsuperscript{70} Art 900 para 2 lit. a PGR.
\end{itemize}
itself is designed without legal personality it cannot have a name. For such cases the legislator has, in correspondence with art. 919 para 3 PGR, provided for the individuals as *directors* of the trust enterprise to act as party in court or administrative proceedings. They must act in their name and in their quality as trustees for and on behalf of the trust enterprise. As a consequence, the chain of representation for interests regarding a trust relation with a trust enterprise as its trustee is secured.
III. Summary

It has been established that the character of Liechtenstein trust provisions can be presented in various forms. On the one hand, they are substantial but do not provide for a definition of what a *trust* is. The need for a definition has been circumvented by a description of the trustee's rights and duties and elaborate on how a Liechtenstein trust relationship is to be understood. Implicitly the statutes provide for all common types of trust (i.e. express, implied, inter vivos, mortis causa, purpose trust and trust by operation of law). Also, a mere private purpose trust may be validly created. If the latter will hinder a Liechtenstein trust's recognition in jurisdictions that do not allow for private purpose trusts, or if such trust may not be compatible with a trust definition according to the Hague Trust Convention must remain open at this point.

On the other hand, some provisions merely provide references to interlink trust provisions to existing civil law statutes.

For this paper, the most relevant reference is the application of the law of property and its classes of properties including their formal requirements for transfer which will be examined in detail in Part IV.

The Liechtenstein law provides for the trust enterprise a different and younger form of a *business trust*. The exhaustive provisions for the trust enterprise, the TrUG, may only subsidiarily apply to the trust pursuant to art 897 PGR or where the TrUG explicitly provides for, vice versa. Besides, the general rules on legal entities apply to trust enterprises. These references are unclear as to when the TrUG must be applied to trusts. The main distinction to a trust pursuant to art 897 PGR may be found in the minimum statutory capital of either CHF, EUR or USD 30'000.00 and the capacity to establish a trust enterprise with legal personality. Such set up allows for application of the benefits of a corporate structure in connection with a trusteeship and is mostly of practical importance where a trust enterprise acts as a professional trustee of one or several trusts pursuant to art 897 PGR.
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Part II

Creation of trusts

I. Introduction

The creation of a trust relationship requires besides the settlor’s capacity and the three certainties, its formal constitution. Constitution may be understood as part of the creation and relates to actions of the settlor to perfectly set up the trust by trust deed and the transfer of property to the trustee. This does not apply in the same way where a trust is constituted by testamentary disposition and by declaration of self as trustee. The latter two cases will therefore be exempt from the following analysis and be discussed separately.

For civil lawyers it may appear trivial to mention the difference between the constitution and creation, a basic distinction within company law. Despite legal statutes for trusts being integrated in the Liechtenstein company law, the terminological differentiation also applied for trusts seems impractical because of the lack of a corporate element which arises from an entry in any register. As a statutory requirement trusts need to be registered in the Commercial Register. The

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71 The settlor’s capacity is not explicitly mentioned in the trust provisions. Thus, art 899 PGR and art 907 PGR give clear indication for the application of contract law and its common principles on the legal requirements for contracting parties. Nothing else may apply with regard to the trust provisions being embedded within the PGR and consequently the general rules on the legal capacity (art 9 PGR), the capacity to act (art 10 and 16 PGR) and the capacity to judge (art 17 PGR).
72 Where a trust is constituted by testamentary disposition the manifestation of intention to create a trust and the transfer of trust property coincide both at the time of death of the settlor. See Biedermann, Liechtenstein Trust (n 7) 464.
73 Biedermann, Liechtenstein Trust (n 7) 462.
74 Section B (title above art 899 PGR) refers to “creation of trusts” whereas margin I of art 899 PGR refers to the constitution and art 900 PGR of its creation.
75 For legal entities the entry in the Commercial Register has constitutive hence creative effect.
76 Registered according to art 900 PGR; deposited according to art 902 PGR.
77 The initial draft of 1926 used “Public Register”. By changing the terminology (back) to “Commercial Register” (used also before 1926) it seems that the legislator has created an
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registration has no constitutive effect. At which point a trust shall be considered to be perfectly created is not entirely clear and may depend on whether the transfer of assets or the formal set up has been done first.\textsuperscript{78} For trusts the constitution and creation must be, despite different terminological indication, identical because the trust is not a legal entity.

II. Formal requirements

A differentiation between formal requirements for the creation and those for the transfer of assets\textsuperscript{79} must be made. The transfer of assets requires formalities defined by statutory law for specific types of assets.\textsuperscript{80} These formal requirements for the trust settlement are different.

Unlike English common law, where in general and apart from statute\textsuperscript{81}, no formal requirements are necessary to create a trust, Liechtenstein statutory law lays down written proof of the declaration of trust or the declaration of acceptance of the trustee as an imperative in general\textsuperscript{82}. Thereby, two models have to be distinguished: the creation of a trust inter vivos (during lifetime) and the creation mortis causa (by testamentary disposition). During lifetime a purported settlor can create a trust either by written agreement with the trustee or by unilateral declaration.\textsuperscript{83} The latter requires a written declaration of acceptance issued by the trustee in order to give rise to the trust.\textsuperscript{84} Where the settlor intends to constitute a trust by testamentary

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{78} Biedermann, \textit{Liechtenstein Trust} (n 7) 388.
  \item \textsuperscript{79} See art 899 para 4 PGR as a general reference provision.
  \item \textsuperscript{80} See art 899 para 4 PGR with a caveat for specific statutory law.
  \item \textsuperscript{81} Special formal requirements do apply where property is being disposed of and the trust must be evidenced in writing: S.53 (1) (b), (c) Property Law Act; see also David Hayton and Charles Mitchell, \textit{Hayton and Marshall: Commentary and Cases on The Law of Trusts and Equitable Remedies} (12\textsuperscript{th} ed, Sweet and Maxwell 2005) 67; also Philip H. Pettit, \textit{Equity and the Law of Trusts} (12\textsuperscript{th} ed, Oxford University Press 2012) 87.
  \item \textsuperscript{82} Special provisions may apply for the transfer of tangible property and other assets (art 899 para 4 PGR).
  \item \textsuperscript{83} Art 899 para 1 and 2 PGR.
  \item \textsuperscript{84} Art 899 para 2 PGR.
\end{itemize}
\end{footnotesize}
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disposition, a written declaration of acceptance of the trustee is necessary. 85 Hence, the trustee may accept during life time or after the settlor has deceased. 86

A) Exception: trust by operation of law

The principle of a declaration of acceptance in writing is not without exception. If the settlor does not appoint a trustee by name or otherwise in his unilateral disposition or the trustee does not accept or cannot act as a trustee, and the deed of settlement does not provide otherwise on how to appoint a trustee or how to dispose of the trust property, a trustee may be appointed by the court. 87

B) Exception: implied trust

Where a person holds assets or any kind of rights in his/her own name for the benefit of the previous owner or a third party but no trustee has been explicitly appointed, it is then considered to be an implied trust pursuant to art 898 PGR. An implied trust does not need written proof and consequently rendering the principle of art 899 PGR inapplicable.

C) Exception: Declaration of self as trustee

Liechtenstein law does not explicitly refer to the creation of a trust by declaration of self as trustee. However, pursuant to art 899 para 2 PGR a settlor may unilaterally appoint a trustee. A written declaration of acceptance of the trustee as required in para 2 leg. cit. may be omitted where a unilateral act of declaration and acceptance fall together in one person. Practically, there will not be a formal separation between the manifestation of the intention to create a trust and the declaration of self as a trustee. This has to be strictly differentiated in order to understand the difference

86 Biedermann, Liechtenstein Trust (n 7) 565.
87 Art 904 PGR.
between the binding declaration and the disposition.\footnote{Biedermann, \textit{Liechtenstein Trust} (n 7) 454.} The intention to create a trust without the transfer of the specified assets will not give rise to the trust. Only if the settlor declares himself as a trustee and \textit{transfers} the assets he holds for the beneficiary a trust will be validly created. Transfer in this context may be understood as the simple commitment to hold the certain assets as trust assets. Additionally, where real estate or rights registered in the Land Register are part of the trust property, they must, in absence of other provisions in the trust instrument, be transferred to the name of the trustee in order to be effective towards third parties, whether with or without restraint on disposal. This can be noted or annotated in the Land Register.\footnote{Art 903 para 1 PGR.}

\section*{D) The quality of a deed}

The written settlement must have the quality of a private deed.\footnote{Art 907 para 2 PGR refers to legal grounds on which a settlor may invoke a trust settlement to be nill and void according to the principles of contract law. As previously mentioned, contract law does not require a contract to be in writing. Therefore, the manifestation may only refer to a process of though and consequently a mutual understanding between settlor and trustee, rather than the manifestation in paper.} In general, a private deed is a written manifestation of thoughts that state facts.\footnote{Art 899 PGR uses the wording “written agreement”, whereas historic art 899 PGR (as of 1926) more explicitly carried the title “1. Trust Deed”\footnote{Walter H. Rechberger, \textit{Zivilprozessordnung - Kommentar} (2nd ed., Springer 2000) vor § 292 Rz 11; vgl Hans W. Fasching, \textit{Lehrbuch des österreichischen Zivilprozessrechts} (2nd ed., Manz 1990) Rz 944.}. Within trust law these facts may be the three certainties, which must be present at the time of creation of a trust. Although, it would seem wrong to conclude, that they manifest within the process of writing. They must have manifested before and are independent of the form since the creation in general follows the basic principles of contract law which does not require a certain form for a contract.\footnote{Art 912 PGR.} This can not apply in cases where the settlor has left a written trust declaration and/or for testamentary trusts.\footnote{The written form must therefore be interpreted as a consequence of the requirement for a trust deed to be filed with the registrar.} The written form must therefore be interpreted as a consequence of the requirement for a trust deed to be filed with the registrar.

\begin{flushright}
88 Biedermann, \textit{Liechtenstein Trust} (n 7) 454.
89 Art 912 PGR.
92 Art 907 para 2 PGR refers to legal grounds on which a settlor may invoke a trust settlement to be nill and void according to the principles of contract law. As previously mentioned, contract law does not require a contract to be in writing. Therefore, the manifestation may only refer to a process of though and consequently a mutual understanding between settlor and trustee, rather than the manifestation in paper.
93 Art 903 para 1 PGR.
\end{flushright}
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In its original historic form of 1926 the written form was ultimately not mandatory. Although historic art 899 PGR provided for a written trust deed, the lack of requirement for registration allowed for a trust relation to be created without written proof. The relevance may be questioned since the transfer of assets without written evidence may not seem practical for purposes of proof. However, it allows for the conclusion, that the written form was not mandatory but only recommended in order to protect the trust settlement against it being challenged. Therefore, the written form may had a more protective element against third parties, than just public credential and the bona fide principle to it.

Only in 1980 the legislator enacted the rule for any trust relationship to require a written instrument, being it a settlement between settlor and trustee, or a unilateral trust declaration and an acceptance by the trustee. The formal requirement was intended to be a constitutive element. In cases where the settlor unilaterally declares a trust to be created, it is the consent of the trustee that has to be in writing in order to validate such declaration of trust. This still applies to today's legal framework which provides for a mandatory entry in or deposit with the Commercial...
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Register for any trust relation created for a period more than 12 months.\textsuperscript{103} As a consequence, any trust settlement for the creation of an express trust must be in writing in order to be legally valid.\textsuperscript{104} In light of the historic idea, this cannot be correct, because today the writing may have either constitutive\textsuperscript{105} or declaratory\textsuperscript{106} effect from a contract law perspective. In any case the lack of the written element unfolds destructive effect, if a trust settlement is not formally correctly established and filed within the time period required.\textsuperscript{107}

E) The denomination as trust settlement

The trust settlement must expressly be denominated as such\textsuperscript{108}, hence have a name. Though, the right of name and its protection may not apply to the trust settlement, since it does not qualify as a holder of rights\textsuperscript{109}.\textsuperscript{110} Art 900 para 2 PGR therefore clearly distinguishes between the denomination\textsuperscript{111} of the trust settlement and the

\textsuperscript{103} For trusts existing longer than 12 months (art 900 PGR).
\textsuperscript{104} The exceptions do not apply with regard to formalities, because also art 901 PGR refers to entries in other registers and art 902 PGR, providing for the deposit, requires an original or a certified copy of the trust deed to be deposited with the Commercial Register.
\textsuperscript{105} Where assets have not been transferred before the settlement was established.
\textsuperscript{106} Where assets were transferred previous to the settlement.
\textsuperscript{107} Although in ELG 1947, 65, decision of the Supreme Court of 6 September 1948, J 420/141, the Court distinguishes between the obligation of entry in the register and the constitutive effect, this is not applicable anymore since it refers to art 902 et seq. of the old PGR which did not provide for a mandatory entry. Besides, the entry according to art 902 PGR (as of 1926) does not correspond to what is understood as an entry according to art 900 PGR today.
\textsuperscript{108} Art 899 para 3 PGR.
\textsuperscript{109} See Chapter IV (Relations of Legal entities) art 26 Liechtenstein Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) of 1 June 1811, enacted with Liechtenstein Law Gazette No ASW of 1 June 1811, which provides as follows: “[R]egarding relationships against others legitimate companies in general enjoy same rights as individuals. Illegitimate companies as such have no rights, neither against members, nor others and they are incapable of acquiring rights. Illegitimate companies are such, that are especially prohibited by political laws, or which conflict security, public policy or moral.” Historic Art 897 para 4 PGR (as of 1926) contained a caveat which prohibited trusts to be used for immoral and illegal purposes, sham businesses or to illegally bypass laws. Although in 1981 the legislator found para 4 leg.cit. to be irrelevant, with regard to art 26 Civil Code, it may prove to be of relevance to render the code applicable (and avoid it to be considered as illegitimate) with regard to trusts although the Civil Code basically does not provide for anything else but individuals and legal entities.
\textsuperscript{110} See also art 1011 PGR et seq. which are not applicable to trust relationships.
\textsuperscript{111} Art 900 para 2 lit a) PGR.
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name of the trustee\textsuperscript{112}. Although in practice it is often referred to the name of the trust, this is incorrect and misleading. A trust can not have a name in a legal sense. This had been highlighted by the historic legislator, who did not envisage the denomination of the trust to be filed for registration but the trustee's name,\textsuperscript{113} notwithstanding the fact that a trust had to be denominated as such\textsuperscript{114}. This may find support in the statutes that – still today – refer to the trustee, who acts in his own name wherever he represents the interests of the trust vis-à-vis third parties or public authorities.\textsuperscript{115} Consequently, the supplementary application of provisions regarding the trust enterprise as provided for in art 910 para 5 PGR is not applicable with regard to the right of name for trust enterprises.\textsuperscript{116} Therefore, in light of the historic intention and legal clarity, it seems questionable to factually consider the denomination of a trust settlement similar to a company, as currently practiced on registry extracts.

Besides, this raises (systemic) issues in relation to the principle of certainty of intention. According to case law the declaration of trust is based on the three certainties similar to common law and referred to the general principle of interpretation of contracts\textsuperscript{117} according to which the intention of the contracting parties may be explored rather than the literal interpretation. This is consistent in itself and with the common law principle of equity, that sets focus on the intention of the settlor rather than on the form.\textsuperscript{118} However, under the rule of art 899 para 3 PGR, the Court held that no doubt may be raised on the certainty of intention if the word “in trust” was used, or the fact that the founder formally acted “in fiduciary capacity”.\textsuperscript{119} This is very much in contrary to common law. According to the latter

\begin{itemize}
\item \textsuperscript{112} Art 900 para 2 lit d) PGR.
\item \textsuperscript{113} See historic art 900 para 2 PGR: besides the trustee's name, the duration of the trust was a prerequisite for registration.
\item \textsuperscript{114} Historic art 899 para 3 PGR.
\item \textsuperscript{115} e.g. art 897 PGR or art 919 para 2 PGR; more detailed see Chapter IV.
\item \textsuperscript{116} Pursuant to art 1032a et seq. PGR trust enterprises are subject to special provisions for a “company name”. Nothing else may appear from the fact that the legislator refers to a “trust register” but not a company register, historically enabling a register different from the Company Register but part of the Public Register.
\item \textsuperscript{117} Art 914 ABGB et seq.
\item \textsuperscript{118} Philip H. Pettit, \textit{Equity and the Law of Trusts} (12\textsuperscript{th} ed, Oxford University Press 2012) 48.
\item \textsuperscript{119} OGH 04 C 322/84-40, decision of 8 January 1987, LES 1989, 3.
\end{itemize}
there is no need for any technical expression for a (potential) trust to be validly created but it was held that the word 'trust' in a statute does not even guarantee for the valid constitution of a trust.120

III. The capacity of the settlor

A) The applicable law

The legal capacity of a settlor at the time of the trust settlement depends on the legal question121 of the applicable law. According to Liechtenstein law (lex fori)122 the capacity to act follows the settlor's personal statute.123 With individuals this is their nationality or in case where a person holds several nationalities the statute of that country to which the person has the strongest link.124 If a person holds a Liechtenstein citizenship amongst several other citizenships, Liechtenstein law applies.125 As a consequence, the law applicable under which a settlor's capacity to act may be judged varies amongst cases and in most cases would not be subject to Liechtenstein law.

With regard to art 930 PGR being a trust specific conflict-of-law rule the question may arise, which statute prevails. The question of the applicable law was addressed by the Supreme Court in several occasions. In LES 1997, 119 the plaintiff, an alleged beneficiary of a Liechtenstein establishment, claimed for his beneficial interest which was withheld by the bank who happened to be the legal representative of the establishment and defendant. Payments were withheld based on the argument, that the Greek settlor, at the age of 98 years, had not mentally been capable anymore to

120 ibid 48; with reference to: Wellington Harness Racing Club v Hutt City Council [2004] 1 NZLR 82.
121 OGH 10 CG 2002.345-24, decision (Order) of 17 July 2003, LES 2004, 218; although the Court's findings are based on Swiss law it held it to correspond to Austrian/Liechtenstein law.
122 OGH 10 CG.2009.137, decision of 13 April 2012; the Court held that upon legal assessment of the conflict of law rules Liechtenstein law primarily prevails and consequently Liechtenstein conflict of law rules.
124 Art 10 para 1 third case IPRG.
125 Art 10 para 1 second case IPRG.
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appoint the plaintiff as a beneficiary of the establishment. In correspondence with the Courts of first and second instance and with regard to a (constructive) trust relationship the Supreme Court held primarily the conflict-of-law rule of art 930 para 1 PGR applicable.

Although, with regard the settlor's ability for clear judgement, the personal statute pursuant to art 10 and 12 IPRG should “also” be addressed. The Court ruled that “if the personal statute was decisive, the law applicable was Greek and hence, it had to be decided based on Greek law.”

However, based on applicable Austrian prevailing theory on art 10 and 12 IPRG, case law exists upon which the capacity to act depends upon the context of the transaction. It distinguishes between the capacity to act in general and the specific capacity with regard to the transaction under dispute. According to the Court's findings, it is justified to subject the capacity to act to the statute of the legal transaction, especially with regard to a Liechtenstein legal entity to Liechtenstein law. Based on the facts of the case that the settlor had lived in Switzerland and that the centre of her personal life did not indicate a link to Greece, her country of origin. It concluded that Liechtenstein law was applicable.

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126 Based on a mandate agreement between the Greek settlor and the bank in its capacity as director of the establishment the Court considered the relationship to be a constructive trust settlement and consequently applied the statutory rules pursuant to art 898 et seq. PGR. Regarding the question on whether the mandate agreement does not cause the constructive trust to be a sham pursuant to art 918 PGR it referred to previous case law LES 1993, 12 (points 23 and 24). Accordingly it held, that in the specific case it was not a continuous influence of the settlor causing the settlement to be a sham pursuant to art 918 PGR (for partial invalidity see OGH 02 C 341/87-61, decision of 25 February 1991, LES 1991, 162) but that such mandate agreement in the form as it happened may be classified as a permissible determined instruction pursuant to art 917 PGR.

127 Accordingly, domestic law applies to any trust relationship, if a trustee has its seat in Liechtenstein or if the trust assets are located in Liechtenstein.

128 Art 9 and 12 Austrian IPRG.

129 OGH 01 C.192/87-130, decision of 11 September 1995, LES 1997, 119-129 with further reference to Schwimann in Rummel, Rz 3 zu § 12 öIPRG.

130 Referring to the establishment which is a legal entity.
B) Liechtenstein substantial and case law

In general, any person whose actions or omissions are capable to create, change, terminate or transfer rights or duties is considered to have the capacity to act. This only applies to a discerning person that is of age or exceptionally where statutory law provides otherwise such as for limited capacity to act or as for testamentary capacity. The capacity to act is legally assumed if there is no obvious indicator that proves differently, such as underage. As a consequence, the party contesting the capacity of a person has the burden of proof. Rather than with age, this may be of interest where the ability for clear judgement of a person at a certain time is under dispute, e.g. by persons not having received any beneficial interest although they assume and claim being entitled to part of the funds.

In LES 2004, 218, the Court had to decide on an interim injunction filed by the sister of a deceased Swiss national, who during his lifetime under domestic care, transferred a substantial amount to a Liechtenstein foundation, of whom he was assumed to be the economic founder. His sister claimed parts of the funds to be the undistributed inheritance of their common father which belonged to the children in

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131 Art 10 para 1 PGR.
132 Discerning indicates the persons ability for a clear judgement. This may not be applicable for children, mentally incapable or affected persons, drunk people or similar situations, which does not allow for a clear understanding of the reasons and consequences of the persons actions or hinders them to take a corresponding action despite a just and right view, which may be examined by the judge in each case individually (art 15 para 1 and 2 PGR).
133 According to art 12 PGR this is 18 years.
134 Additionally, the statutes refer to third parties who may act in the name of the person lacking capacity to act. For underaged these may be parents pursuant to their child custody obligation or for persons that have come of age close relatives or other custodial guardians. With these legal representatives any person lacking the capacity to act may enter any kind of contractual relationship, in some cases with the consent of the court (Perner, Spitzer, Kodek, Bürgerliches Recht (3rd ed.) 28).
135 The capacity to act is legally presumed if it is not obviously indicated differently such as with underaged (art 11 para 2 PGR).
136 Proof in general may also refer to mere attestation such as required for (super-) injunctions. See OGH 10 CG 2002.345-24, decision (Order) of 17 July 2003, LES 2004, 218.
137 OGH 01 C 192/87-130, decision of 11 September 1995, LES 1997, 119. As the Court ruled, only exceptionally the burden of proof may be put upon the party who pleads for the capacity to act in cases where a person suffering under notorious mental incapacity has concluded a contract and it is argued to be done during an lucid moment. In such cases the burden of proof according to art 6 PGR may apply.
equal parts. The injunction was based upon the reasoning that at the time of transfer of the funds to the foundation (the adversary party to the injunction) her brother as the transferor had not been in possession of his mental capacity anymore and had been under undue influence of his caretaker.

The court based its decision on the applicability of the personal statute\textsuperscript{139} of the settlor and consequently applied Swiss law to determine the settlor's capacity to act.

Despite substantial application of Swiss law, it may also be referenced to Liechtenstein law due to the absence of Liechtenstein specific interpretation.\textsuperscript{140} In the specific case the Court concluded that the ability to judge (as part of the capacity to act) contains “on the one hand an intellectual moment, namely the ability, to see and weigh the sense and the use as well as the effect of a certain behaviour. On the other hand there must be a moment of intention, namely the capacity to act according to this insight and with free will.” But it set a limit at “a mere moment of inadequacy” which shall be insufficient to deny a person's capacity to act.

Although, a differentiation must be made between the facts that may or may not prove a person's mental state or its type and effects if such has been proven and the legal implication it may have. The Court ruled that “it is not a question of facts but of law to state whether the conclusions drawn from a person's mental state with regard to its capacity to act are true or not.”\textsuperscript{141}

An exception to this general rule of the capacity to act may apply with regard to trusts mortis causa. As previously mentioned, the capacity to testate does not correspond to the capacity to act. The capacity to testate is a special subjective right which does not require the same intensity of mental capacity as for the capacity to act.\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{139} Art 10 and 12 IPRG
\item \textsuperscript{140} The Court held that in with regard to the point under dispute, the general rule applies also to Liechtenstein; see OGH 10 Cg 2002.345-24, decision of 17 July 2003, LES 2004, 218.
\item \textsuperscript{141} OGH 10 CG 2002.345-24, decision (Order) of 17 July 2003, LES 2004, 218.
\item \textsuperscript{142} OGH 06 CG. 2003.312, decision of 3 January 2005, LES 2006, 152.
\end{itemize}
IV. The manifestation of intention to create a trust

According to Liechtenstein law, a purported settlor may either create a trust during lifetime with a written agreement, by unilateral written act or by testamentary disposition. Liechtenstein statutory law does not explicitly provide for any specific requirements in content with regard to the manifestation of purported settlor’s intention to create a trust. Though, the Courts have established that the “Liechtenstein law requires like its Anglo-Saxon role model certainties in three different ways: the certainty of intention, the certainty of objects and the certainty of subject or purpose”. Deviating from its role model, Liechtenstein statutory law sets forth formal imperatives on how these certainties must manifest. As for the settlor’s intention to create a trust it must predominantly always be in writing. Besides, a trust has to be explicitly named as such. These formal hurdles shall ensure the certainty of the settlor’s intention to create a trust and shall, according to some scholars, protect the settlor of haste; in general they shall serve for evidence.

As for the certainty of subject matter and objects, the statutes merely implicitly refer to the legislator’s idea of incorporating these principles to Lichtenstein law. Art 897 para 1 PGR applies the wording “assets transferred” indicating the certainty of

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143 Moosmann, Angelsächsischer Trust (n 7) 213.
144 Certainty of purpose, as opposed to English law was necessary since a mere non charitable purpose trust, as explained earlier, is a legally valid construct under Liechtenstein law. See OGH 04 C 322/84-40, decision of 8 January 1987, LES 1989, 3.
145 The original provisions of the Persons and Companies Act regarding trusts did not require for written proof. Only during the reform of the said act in 1980 the written form has been enacted as a constitutive legal requirement. See also Moosmann, Angelsächsischer Trust (n 7) 216.
146 See above.
147 Art 899 para 3 PGR.
148 Except for implied trusts (“tacit trust”) pursuant to art 899 PGR.
149 Biedermann argues that the requirement to denominate a trust as set forth in art 899 para 3 PGR manifests the principle of certainty of intention. Accordingly it has to be assumed that a formal approach should ensure the settlor’s intention quite contradictive to the English role model where even the explicit mention of the word in trust does not guarantee the settlors intention.
150 Biedermann, Liechtenstein Trust (n 7) 388 fn 144; Biedermann refers to “over-hasty action”.
151 Bösch, Liechtensteinische Treuhänderschaft (n 6) 71.
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subject matter.\textsuperscript{152} No question on the certainty will arise if the assets have been transferred to the trustee prior to the written manifestation of intention. In such case writing has only character of proof but no constitutive effect.\textsuperscript{153} Problems may arise whenever the assets have not been previously transferred and the manifestation of intention or the declaration of self as trustee does not clarify the assets concerned.\textsuperscript{154} In the latter cases based on the findings of Biedermann the Liechtenstein Supreme Court held that the written manifestation of intention has constitutive effect.\textsuperscript{155}

The wording applied in art 897 para 1 PGR “for the benefit of a third party (the beneficiary)” shall manifest the certainty of objects. Accordingly, beneficiaries must be designated or definable. Where the manifestation of intention does not designate beneficiaries it must at least refer to (future) by-laws which designate the beneficiaries.\textsuperscript{156}

A) Certainty of intention

The certainty of intention has been constricted in Liechtenstein law by the formal requirement\textsuperscript{157} of art 898 para 3 PGR which requires any trust relationship to be denominated as such. “Any trust” relationship refers to the types mentioned in para 1 and 2 leg.cit. These are trusts created bilaterally by written contract between the settlor and the trustee or by unilateral trust declaration. As a consequence the legal requirement of explicit denomination does not apply to any other types of trust pursuant to art 899 PGR (constructive trust, resulting trust, declaration of self as trustee) but also to trusts mortis causa\textsuperscript{158}. It is presumed by some scholars that this formal requirement should reflect to what is known in civil law as the protection

\begin{footnotesize}
\begin{enumerate}
\item[152] Biedermann, \textit{Liechtenstein Trust} (n 7) 448.
\item[153] OGH 04 C 322/84-40, decision of 8 January 1987, LES 1989, 3; see also Moosmann, \textit{Angelsächsischer Trust} (n 7) 216.
\item[154] Biedermann, \textit{Liechtenstein Trust} (n 7) 449.
\item[155] OGH 04 C 322/84-40, decision of 8 January 1987, LES 1989, 3; see also Moosmann, \textit{Angelsächsischer Trust} (n 7) 216.
\item[156] OGH 04 C 322/84-40, decision of 8 January 1987, LES 1989, 3, 10; also Moosmann, \textit{Angelsächsischer Trust} (n 7) 218.
\item[157] According to the general principle of art 883 ABGB on the “form of contracts” contracts may be concluded orally or in writing […] without any difference for its binding character with regard to the contracting parties. Exceptions thereof may apply where legal statutes provides differently.
\item[158] See historic art 899 para 2 PGR.
\end{enumerate}
\end{footnotesize}
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from overhasty decisions. In light of art 919 PGR which provides for the power of the trustee to claim for execution of the trust deed by and against the settlor this may seem applicable since it is the settlor who “burdens” himself by disposing of his property. However, the fact that the historic legislator set focus on the “denomination in a clear obvious manner” rather than on the formal element of “writing”, allows for the conclusion that the purpose was to emphasise the third-party-effect, hence the quality as evidence. This conclusion may find support in art 920 para 4 PGR which provides for the trustee's claim against the “trust property under its denomination pursuant to the trust deed”.

Also with regard to art 923 PGR it seems to be of significance. The latter statute provides for the trustee's duty to maintain separate statement of assets of the trust property. With regard to potential trust certificates according to art 928 PGR which are comparable to shares by their nature or with an (institutional) trustee who administers more than one trust clear evidence must be present in order to allow for claims for and against the trust property. This can be only achieved by separation of assets and consequently separate denomination of the respective contract under which certain property is being held upon trust.

The explicit formal requirement of denomination partially opposes the otherwise liberal idea of reception from its Anglo-saxon role model. The formal requirement contradicts the basic principle of the equity maxim “equity regards the intention rather than the form”. It is therefore interesting, that the Liechtenstein Courts had to overcome the Liechtenstein specific formal restrictions by drawing upon a basic principle of civil law pursuant to art 914 Civil Code. The latter provides for the interpretation of contracts or contractual declarations focusing on the intention of the

159 “Übereilungsschutz”. See Biedermann, Liechtenstein Trust (n 7) 388 fn 144.
160 Historic art 899 para 3 PGR.
161 Art 883 ABGB refers to “written” or “oral” rather than on the a certain denomination.
162 e.g. a trust reg. pursuant to art. 932A § 2 subpara 2 PGR who is serving as a trustee to several trusts pursuant to art 897 PGR.
163 e.g. art 912 para 3 and 4 PGR, art 915 PGR, art 919 PGR, art 920 PGR, art 921 PGR, art 924 PGR, art 927 PGR.
164 e.g. art 914 PGR, art 916 PGR.
165 See art 922 para 4 and 5 PGR which provide for a professional trustee's duty to separate deposited assets(art 922 PGR) and keep a separate register of such trust related transactions.
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parties involved rather than on the wording applied therein.

Accordingly, the Court moderated the mandatory form set forth by art 899 para 3 PGR and found that – in the given context- the appearance of the professional trustee under the title “founder in fiduciary capacity” was sufficient to ascertain the intention of the settlor expressed in the formation deed. The intention can also be linked to the two other certainties and consequently the determinability of the intention - rather than its certainty - may suffice. However, the effect is two-sided. An explicit denomination of a trust pursuant to art 898 para 3 PGR may not safeguard its existence if, within the context given, the legal relationship does not qualify as a trust. It is permissible to conclude that with regard to the certainty of intention in Liechtenstein law substance prevails over form. The denomination criterion pursuant to art 899 para 3 PGR may serve as indication but not as conclusive element for the certainty of intention.

B) Certainty of subject matter

Liechtenstein statutory law does not explicitly provide for the certainty subject and consequently not for a legal definition. Various statutes implicitly contain elements providing for the certainty of subject to be a substantial element of the valid creation of a trust, although, the creation of a trust and transfer of assets theoretically can fall apart. Besides, the general reference in art 897 PGR to “these assets to be held in trust”, it is art 911 para 1 PGR that provides for the initial trust fund which is determined either by the settlor or with implied trust by law. Thus, the constitutive effect of the certainty of subject matter evolved in case law. In its decision LES 1989,3 (partially overruled) the Supreme Court held the certainty of subject matter to be an elementary part for the creation of trust. It based its decision on findings of Biedermann, who refers to the wording of art 897 para 1 PGR: “Trustee within the understanding of the present law is the person, firm or corporation that, to whom another (the settlor) transfers assets or a specific asset or a right of any kind (as trust

166 Biedermann, Liechtenstein Trust (n 7) 383.
167 With reference to art 897 para 1 PGR Biedermann distinguishes between “transfers” or “which he intends to transfer to”; see Biedermann, Liechtenstein Trust (n 7) 384 fn 115.
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property) (...).” He concluded the duty of the trustee to be central, which he could only exercise with regard to “certain” assets.

Stricto sensu, the duties of the trustee arise with signing the deed or declaration of acceptance. This understanding is supported by art 919 para 1 PGR which allows the trustee to claim for execution of the contract with the settlor.\footnote{169} Nevertheless, the enforcement of a contract, respectively the civil claim on grounds of execution of the contract must be in accordance with the principle of completeness and definiteness.\footnote{170} As a consequence, despite assets not having been transferred upon creation of the trust\footnote{171} they must be dedicated in order to grant enforceability.

No other conclusion results from art 911 PGR which stipulates that trust property is what has been dedicated either by the settlor or, for implied trusts, by law. The necessity of a schedule listing the initial assets transferred as trust fund arises implicitly out art 911 para 1 last part PGR. It provides for the legal assumption that products gained out of the initial trust fund (e.g. interest) are part of the assets, whether they had been included in an inventory or schedule or not. The wording indicates – a fortiori – that the legislator thought the initial trust fund to be subject to a schedule.

Wherever no schedule or inventory of the initial trust fund had been made the degree of dedication may be open to discussion and consequently cause liabilities for the trustees. In LES 1989, 3 the Supreme Court held obiter dictum, that “certain doubts with regard to the certainty of subject concerning the transferred funds and securities could arise due to the absence of a schedule of assets.” Since the claimant did not claim for moneys transferred upon trust but for the founder's rights of an establishment held upon trust (it was the establishment which was endowed with the said assets) the Court did not finally decide upon the trustee's liability caused by lack of documentation. Thus, it mentioned that in such a case the legal title, upon which the defendant (trustees) or the establishment held the transferred assets, would be of

\footnote{169}{Art 919 para 2 PGR stipulates, that the trustee may also enforce the execution of the trust deed against third parties (e.g. heirs or similar persons).}
\footnote{170}{Art 232 ZPO; Art XV EGZPO.}
\footnote{171}{Not applicable for the resulting trust; see OGH 05 C 303/98-53, decision of 6 June 2000, LES 2000, 148.}
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the essence.

The Court's indication shows, that a legal schedule is essential in order to avoid a trust's existence to be challenged. Art 911 para 1 PGR should give enough statutory substance to justify a mandatory schedule or inventory. Although it is common practice to differentiate between the initial trust fund as a symbolic payment and subsequent assets that are not included in a trust deed's schedule, this should not be understood as an exemption of the trustee's obligation for keeping a schedule of the initial trust fund, as well as of its subsequent assets and products which is a permanent one.

C) Certainty of objects

There is no statutory law defining the certainty of objects. However, art 897 PGR refers to the trustee upon whom assets are transferred in trust for the benefit of “one or more third parties (beneficiaries)”. In congruence with the certainty of subject matter the duty of the trustee may serve as reasonable grounds for the certainty of objects, because such duty can only be exercised with regard to a definite circle of persons and only such definite circle of persons is able to enforce said duty. As part of Liechtenstein specific practice with regard to the element of “certainty” the degree of determination is not interpreted strictly. Accordingly, the determinability rather than the final determination of the beneficiaries at the time of creation shall suffice.

As to the degree of determinability in LES 2008, 279 the Court held with regard to a “family foundation”, that beneficiaries do not require to be explicitly named in the deed, if it was clear for the board of foundation – based on previous meetings and instructions – which family and/or descendants shall benefit of the funds.

In practice, the deed or the declaration of trust can refer to a certain family or a line

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172 The advantage thereof is to separate the information contained in the trust deed and financial information.
173 See also art 912 para 3 PGR.
175 OGH 04 C 322/84-40, decision of 8 January 1987, LES 1989, 3.
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of descendants as to benefit from the trust assets in general and at the same time shall refer to an instrument with which the settlor at a later time may precise the beneficiaries. This may be done with a letter of wishes or any instrument in writing determining the single beneficiaries and their beneficial interest. Upon constitution of that written instrument the determinability can be replaced by the determination of the beneficiaries.¹⁷⁷ If such written instrument has not been set up during the lifetime of the economic founder, a foundation shall not necessarily fail to exist.

As for the trust the same must apply correspondingly upon reference to art 897 ABGB on the legal effects of contractual conditions and art 689 ABGB on impossible or illegal conditions within the law of succession. For the time between the written deed and the instrument in writing determining the single beneficiaries or classes of beneficiaries the trust shall not be considered to have no legal effect but mere as a pending legal instrument.¹⁷⁸ A trust may therefore only be declared as legally invalid if such determination by written deed is held impossible based upon the general object as set out in the written trust deed.

The object of a trust may also be to further a charitable or a private purpose¹⁷⁹. Indications for private purposes may be found in art 898, 906, 927 and 929 PGR.¹⁸⁰ The interpretation of certainty with regard to a mere (private) purpose trust has not yet been subject to case law. However, with regard to the determinable and determined purpose of foundations case law exists which stipulates that object must sufficiently clear unfold in the deed upon interpretation of the settlor's intention.¹⁸¹ In order to interpret a settlor's intention additional circumstances may be considered such as the initial meeting where the settlor manifested his wish to create a trust.¹⁸²

¹⁷⁸ OGH 03 C 96/86-36, decision of 26 January 1988, LES 1990, 105; with further references to Austrian case law OGH 6 Ob 729/78, decision of 9. 11. 1978, SZ 51/155; OGH 2 Ob 559/78 , decision of 9 January 1979, SZ 52/1; OGH 1 Ob 32/79, decision of 12 November 1979, SZ 52/165; OGH 4 Ob 599/79, decision of 4 November 1980, SZ 53/140.
¹⁷⁹ It is common understanding and practice that Liechtenstein law allows for a mere private purpose trust. The legal foundations are held to be references made in art 898, 906, 927 and 929 PGR as well as the supplementary application of rules regarding the trust enterprise upon application of art 910 para 5 PGR.
¹⁸⁰ Biedermann, Liechtenstein Trust (n 7) 383.
¹⁸² ibid.
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However, the result of interpretation must be within the boundaries of the statutes.\textsuperscript{183}

With regard to the subsequent definition of the object, being it beneficiaries or a purpose after the death of the settlor, the question may arise if the power of appointment or the discretion for definition accrues to the trustee. With regard to the subsequent change of statutes of a foundation the Court held that based on the specific legal provisions\textsuperscript{184}, such rights may be reserved not just for the economic founder but also for the board of foundation; included in those rights shall be the right for changes with regard to beneficiaries in by-laws.\textsuperscript{185} Changes may only be restricted where a beneficiary has a legal (enforceable) entitlement against the foundation.\textsuperscript{186} Based on art 910 para 4 PGR providing the subsidiary application of legal provisions of foundation law the same may be applicable for trustees competences with regard to changes of beneficiaries of to trusts.

V. Trust and Commercial Register

A) Registration

Pursuant to art 900 PGR a trust relationship, that is set up for a period longer than twelve months\textsuperscript{187}, has to be filed for registration with the Liechtenstein Commercial Register.

\begin{footnotesize}
\begin{enumerate}
\item ibid.
\item Art 559 para 4, art 565 para 1 and art 566 para 2 PGR as in force before 26 August 2008.
\item Ibid; with further references to Nikolaus Arnold, Privatstiftungsgesetz – Kommentar (2nd ed, LexisNexis ARD ORAC, Vienna 2007) § 3 Rz 43; § 33 Rz 43; Stephan Groess, 'Rechtsfragen der Begünstigtenstellung' in Peter Doralt and Susanne Kalss (eds.), Aktuelle Fragen des Privatstiftungsrechtes (Linde Verlag), 205, 225; Dominique Jakob, Schutz der Stiftung – Die Stiftung und ihre Rechtsverhältnisse im Widerstreit der Interessen (Tübingen 2006) 167 et seq.
\item This may refer to what was in its original version of 1926 considered as “transitory trust relationships” such as trust created for winding up proceedings.
\end{enumerate}
\end{footnotesize}
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Register within the first twelve months of its creation. Information to be provided includes the name, the date of creation, the duration, the surname, first name and place of residence or firm and domicile of the trustee. The names of the settlor and the beneficiaries remain anonymous.

An exception to this rule exists where assets held of the trust are entered in any other register such as the Land Register or Patent Register and is approved by the Commercial Register Office.

Confusion may occur with regard to the term “Commercial Register” since older texts and judgements refer to “Public Register”. With the Liechtenstein Law to Merge the Land Register, the Public Registry and the Office for Victims Aid of 23 November 2012 published in Liechtenstein Law Gazette No 6 of 21 January 2013, the name has been changed to “Commercial Register”, in fact the very original name which existed before the enactment of the PGR in 1926. The reason thereof is a change of the organizational structure, since the Commercial Register now forms part of the Liechtenstein Office for Justice. The term “company register” is not applied in Liechtenstein.

The actual wording includes “if at least one trustee has its residence or company seat in Liechtenstein”. Until 1 March 2013 it was not possible for a trustee residing outside Liechtenstein to be the only trustee of a Liechtenstein trust, but has to co-operate with a trustee residing in Liechtenstein (see old art 905 PGR). This residence requirement had been challenged in 2012, when the EFTA Surveillance Authority found “that a personal residence requirement is contrary to the freedom of establishment and the freedom to provide services, as set out in the Services Directive. Such a requirement places foreign service providers at a disadvantage compared to Liechtenstein service providers and is therefore in breach of EEA rules.”

According to common practice the names of the “true” settlor and the beneficiaries are not included in the trust instrument. Settlor will most likely be a fiduciary settlor signing in his name. The “true” settlor, in most cases first beneficiary, and consequent beneficiaries will be named in any other instrument i.e. the letter of wishes, which is not part either of registration or deposit.

The Liechtenstein Office of Economics – Department of Civil Aviation does not maintain its own civil air craft register. The “Liechtenstein Register” is annexed to the Swiss Federal Department for Civil Air Traffic (BAZL) which keeps the register (art 9 LFG). However, applications for registration have to be addressed to the Liechtenstein Office of Economics. See http://www.llv.li/llv-avw-zivilluftfahrt.htm.

Liechtenstein does not have a ship register yet. Although the topic has been raised in parliament in March 2012, the government (at that time) did not intend to install a register for cost reasons. See http://liechtenstein-journal.li/assets/files/Hefte/032012.pdf.
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In its original 1926 version there was no obligation for registration but it remained in the joint discretion of both contracting parties whether or not to file the trust relationship for registration.\(^{193}\) Though this registration according to art 900 PGR of 1926 is to be understood as deposit of the documents, as it still exists today. A non registered contract was considered as a tacit or implied trust relationship.\(^{194}\) In case of “registration” the trust deed or a notarised copy thereof may be produced for the filing process. The intention of the ancient legislator may be found in the protection of creditors and their right to challenge\(^ {195,196}\)

Although intensely criticised\(^ {197}\) for creating an incoherent system, the mandatory registration was enacted in 1980\(^ {198}\). As a compromise the registration was not considered to have constitutive effect to the trust settlement but to be of declaratory nature.\(^ {199}\) The Government suggested to abandon the registration and provide only for the deposit of trusts during the 2006 revision of trust statutes.\(^ {200}\) Yet, this has been left unattended to the very present day.

With regard to the art 899 PGR and the contractual element of the trust settlement\(^ {201}\)

\(^{193}\) Art 900 para 1 PGR as of LGBl 1926 / 004: “If a trust relationship between settlor and trustee has been established with a written deed, it shall be filed for registration at the Public Register with a the written deed or a notarised copy thereof by the settlor, the trustee or both jointly, unless the parties [of the agreement] intend differently (…). Besides Art 901 para 1 PGR as of LGBl 1926 / 004: “A filing and entry into the Public Register could be omitted if the trust deed provided so […]”.

\(^{194}\) Art 900 para 1 PGR as of 19 February 1926.

\(^{195}\) The original wording of art 902 PGR (titel “Significance of Entry”) stated that “the failure to file for entry into the Public Registries (plural!) does not make the trust relationship void; however, in case of doubt a non registered contract will be considered as challengeable according to the provisions of the Law Concerning Acts Voidable (Anfechtungsordnung) and the burden of proof lies with the person claiming rights thereof.” Also: Biedermann, *Liechtenstein Trust* (n 7) 475.

\(^{196}\) Kurzer Bericht zum Personen- und Gesellschaftsrecht, undated, 46.

\(^{197}\) Biedermann, *Liechtenstein Trust* (n 7) 475.


\(^{199}\) Biedermann, *Liechtenstein Trust* (n 7) 475.


\(^{201}\) Independent of it being either a mutual agreement or a unilateral legal act that requires acceptance.
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the present mandatory registration requirement seems inconsistent with basic principles of civil law. This may be supported by the fact that the modern legislator required the entry of a denomination\textsuperscript{202} (Bezeichnung) of a trust relationship\textsuperscript{203}, whereas historically, the trust did not necessarily\textsuperscript{204} require one. Accordingly only the name or company name of the trustee but not the “denomination of the trust deed” had to be filed for registration\textsuperscript{205}, if a registration was intended at all.\textsuperscript{206}

Therefore, it seems obvious, that the ancient non-obligatory registration focussed primarily on the trustee, secondarily on the denominated trust deed, whereas today it is the opposite. It can be assumed that the historic legislator used the vehicle of “denomination” rather than “name” or “firm” in order to avoid the applicability of rights of personality, which at the time already would have been applicable to entities not eligible as legal entities.\textsuperscript{207} Strictly interpreted, the latter still applies today and still is reflected by the fact that Commercial Register\textsuperscript{208} does not envisage to have trusts in its “firm register”.\textsuperscript{209} Neither does the Commercial Register Ordinance

\textsuperscript{202} As a law of nature the right of name and protection thereof is a right of personality and consequently restricted to either individuals, legal entities or other entities to whom these provisions are applicable. In case of legal entities the civil law refers to the “firm”. It is therefore dependent on the special provisions for the single types of entities that are neither natural nor legal, to provide for the application of the civil right of a name and its protection. It is significant, that the the provisions for the trust relationship does not refer to the term “name” or “firm” but uses the wording “denomination”.

\textsuperscript{203} Art 900 para 2 lit a PGR “name of the trust relationship”; the fact that the german original wording is Bezeichnung and in lit d leg.cit. uses the word “Name” for the requirement to enter the trustee's (personal) name shall not be of significance. The historic legal text does not refer to a Bezeichnung of a trust relationship but only refers to the “name” under which other forms of legal entities shall be registered. It may be therefore assumed that the legislator in 1980 copied from what the historic legislator set forth for is not a legal term.

\textsuperscript{204} Art 899 para 3 PGR of 1926 provided indeed for “all cases” [of different trust relationships] to be “denominated” as a “trust relationship”. However, this only proved of importance with regard to trust deeds that were filed for registration with the Commercial Register as Trust Register (“open trust relationships”) and consequently with regard to the trustee's claims for expenditures for the trust relationship according to art 920 para 4 PGR, which he could file against the “denomination” under which the settlement was registered.

\textsuperscript{205} Art 900 para 2 PGR of 1926.

\textsuperscript{206} As explained above art 900 para 1 PGR provided for discretionary entry due to the parties intention and hence allowed for the distinction between “tacit trust” and “open trust”, the latter being registered.

\textsuperscript{207} e.g. for the “Gemeinderschaft” art 792 para 1 and 2 fig 1 PGR; for “Heimstätten und Fideikommiss“ art 821 PGR;

\textsuperscript{208} Ordinance of 11 February 2003 on the Commercial Register, published in Liechtenstein law Gazette No 66 of 18 February 2003.

\textsuperscript{209} Art 12 Commercial Register Ordinance.
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explicitly require a name but a “denomination” of the “trust” upon application of entry.\textsuperscript{210} However, with assimilating the registration requirements as well as the legal obligation for registering trusts to all other types of legal entities has narrowed the gap of its characteristics to those of other legal entities and in practical daily application has disappeared.\textsuperscript{211}

For a trust relationship's obligatory character and a coherent application, it is therefore crucial to abandon the current register practice and reshape the register process to its origin. Today this is understood as a deposit of trust deed, yet under the name of the trustee. The registration shall be understood as a registration right\textsuperscript{212} not an obligation. An obligation shall only be provided as a minimum legal standard, where the parties have not agreed differently and where the principle of publicity prevails for asset protection against claw backs.\textsuperscript{213}

B) Deposit of trust deed

Alternatively, according to art 902 PGR a trust may not be registered but “deposited” with the register.\textsuperscript{214} In practical terms this means that either an original or a certified copy of the trust deed has to be deposited with the registrar\textsuperscript{215}, within twelve months

\begin{itemize}
\item \textsuperscript{210} Art 52 Commercial Register Ordinance.
\item \textsuperscript{211} Information Sheet of the Department of Justice, Commercial Register, no 1/2015, 1.
\item \textsuperscript{212} Art 946 PGR but in its historic sense (formerly art 945 para 1 PGR): “Everyone who can oblige themselves with contracts shall have the right to register in the public register.” According to historic art 947 para 1 fig. 8 PGR (current art 7 para 1 lit h Commercial Register Ordinance) a trust relationship may be considered as a “registrable fact or circumstance”, for which according historic art 949 ara 3 PGR a separate folio has to be installed.
\item \textsuperscript{213} See historic art 902 para 1 PGR on the “significance of the entry” providing for the contestability of a trust settlement according to the Law Concerning Acts Voidable ("Anfechtungsordnung") in case of doubt. The burden of proof lies with the person deriving rights of the settlement.
\item \textsuperscript{214} The deposit of the trust deed follows the rules of deposit of public deeds in general pursuant to art 990 PGR.
\item \textsuperscript{215} Although the statutes remain tacit, it is the Commercial Register as a Trustee register. Although a similar provision is mentioned only for trust companies (see art 102 Commercial Register Ordinance) it must apply also for trusts since a trust may not be registered in the Company Register (even the name “commercial” is misleading). With the introduction of the PGR the Commercial Register, at the time only dealing with company forms known to classic civil legal countries like Austria and Germany (e.g. the GmbH, the AG) was abandoned and several different registers for different institutions were combined as the Public Register. Historic evidence may be found in art 50 of the transitory statutes of the PGR of 1926 which refers to the registers replacing the [old] commercial
\end{itemize}

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as of the creation of the trust. Access to deposited files and documents is only be given to the depositor, anybody empowered or any universal legal successor. The Department of Justice confirms upon request only, whether or not a trust relationship exists that is not registered in the Commercial Register. Hence, no more information than its existence or non-existence is available of a trust relation of which the trust deed is deposited. This official confirmation of the Department of Justice is not to be qualified as register extract and has no constitutive legal effect but is to be classified as a mere declaration of knowledge. This is of importance where “facts” are contested by different parties as it was the case in VGH 2007/054. The VGH (Verwaltungsgerichtshof) held, that although the registrar had the competence to substantially verify if the prerequisites for entries and is obliged to do so, the official confirmation may only confirm non-contested facts which do not influence the legal position of any involved party.

The registration/deposition has no constitutive effect but merely declaratory, meaning the registration/deposition does not give rise to the trust’s legal existence. However, if a trust hasn’t been registered or deposited this constitutes a misdemeanour facing a penalty.

register; art 922 PGR and art 929 PGR which both (still in their present form) refer to a register of trusts settlements to be held either by the trustee (art 922 PGR) or the Princely Court as a supervisory authority (art 929 PGR). See also Report of the Commission on the Trust Company (Report Dr. Beck), undated, 8. Besides historic art 949 para 3 PGR.

The twelve month period shall distinguish “transitory trust relationships” (e.g. for liquidation purposes) from other of longer duration; see historic art 901 para 1 PGR which doesn't refer to an absolute period of time but refers to the content/ intention of the trust relationship.

Art 955a PGR, which is – systematically inconsistent – in the 18th Title amongst provisions for “entries in the Commercial Register”; see also VGH 2007/054, decision of 13 November 2007, LES 2008, 145.


The VGH is the highest Administrative Instance; for the registrars competence see art 29 para 1 lit b sub-para 4 LVG.


Bösch, Liechtensteinische Treuhänderschaft (n 6) 73.
VI. Summary

Part II has highlighted the creation of a Liechtenstein trust. Besides the personal element of a settlor's capacity, it is characterised by the formal criteria allowing for the auxiliary element of constitution to be applied in the context of a trust settlement. These formal requirements must be distinguished from specific formal modes of transferring trust property, which will be analysed in detail in Part IV. Thus, where trust property had previously been validly transferred to a trustee, the trust instrument, whether unilateral in form a declaration of trust, or bilateral in the form of a trust settlement, may only have declaratory effect. In any case, an express trust must always be in writing and denominated as such. Although not every trust must be registered in the Commercial Register but deposit of the trust deed may suffice, its omission may have destructive effect. Most of the formal requirements seem questionable in light of the historic setting of the trust but seem to have been established by (false) practice and may not be left unattended in order to correctly set up a Liechtenstein trust.
Types of properties

Part III

Types of properties

I. A general perspective

Art 897 PGR refers to the trustee holding moveable or immoveable “assets” (or rights of any kind) in his own name as trust estate. In this given context “assets” refer to property, although by applying the term “assets” the legislator circumvented the use of the term “property” and reference to property law. This general description may cause unnecessary confusion by giving room for discussion on property theory. Although, the legislator's intention seems to be clear by distinguishing between real and personal assets (or rights of any kind) that reflects the basic division of Liechtenstein property law between immoveable and moveable properties. In terms of property law, art 897 PGR may consequently be read as moveable or immoveable trust property.

Property law, or more literally the translation for the “law of things”, does not create “things” as normative concepts but rather assigns these things to individuals or legal entities by way of assigning interests in them. These interests are classified according to the Property Law Act and determine the extent of the granted exclusive power basically inherent to these rights in rem, asserted against the world at large.

Since Liechtenstein Law of Property Law Act allocates both types of properties,
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moveable or immoveable, either to limited or unlimited ownership and/or possession\textsuperscript{230}, the reference contained in art 897 PGR implicitly implies the element of ownership.

From a property law point of view the notion “trust property” is therefore misleading since a trust is not a legal entity and consequently cannot be an owner. However, where this notion is applied it shall be understood as “property held in trust” or “entrusted property”.

II. Real property

Real or immoveable property pursuant to art 34 SR\textsuperscript{231,232} may be considered as ownership of land, including parcels of land with buildings\textsuperscript{233}, distinct and permanent rights recorded in the Land Register, mines or co-ownership shares in immoveable property. It is essential to distinguish between ownership of land\textsuperscript{234} in the wider sense, including the above mentioned forms of ownership of land or in the narrow sense, referring to parcels of land with buildings\textsuperscript{235}. The inclusion of distinct and permanent rights recorded in the Land Register, of mines and of co-ownership shares in immoveable property into the legal definition of parcels of land has been previously criticised due to their lack of quality as real property.\textsuperscript{236} For the purpose of this chapter the notion of real property in the narrow sense shall suffice to elaborate on the question of ownership regarding trust assets.

\textsuperscript{230} The provisions on possession generally do not distinguish between real or personal properties but include both. However, possession will be excluded from further investigation, since it is considered to be evident form of rights in rem, rather than the right itself. Schmid, Sachenrecht (n 226) 22 para 81.

\textsuperscript{231} Liechtenstein Property Law Act (Sachenrecht, SR) of 21 December 1922, published in Liechtenstein Law Gazette No 4 of 1 February 1923.

\textsuperscript{232} See also art 655 Swiss Civil Code (Zivilgesetzbuch, ZGB) of 10 December 1907, enacted on 1 January 1912, status as of 14 July 2014.

\textsuperscript{233} Commonly referred to as “real estate”.

\textsuperscript{234} In the SR referred to as “Grundstücke”.

\textsuperscript{235} In the SR referred to as “Liegenschaften”.

Types of properties

Real property can only be subject to ownership if “the boundaries of the parcel of land are adequately defined”\(^\text{237}\). Here “adequately” may be open to further interpretation: with regard to the acquisition and entry into the Land Register the context can be reduced to a bipartite definition according to official mapping\(^\text{238}\) and description\(^\text{239}\).

Generally, the boundaries of civil ownership of real property\(^\text{240}\) are rather vague and should be interpreted on a case by case basis. Art 2 SR sets the limit to good faith beyond which the individual exercising their rights and duties will not be protected. Good faith is conditional to legal consequences set forth by statutes. However, the law sets an objective measure and requires adequate diligence according to the circumstances\(^\text{241}\) which in the case of the trustee is further governed by art 919 et seq PGR. In any case, the manifest abuse constitutes an absolute limit to the exercise of ownership\(^\text{242}\) rights.

Specifically, art 20 SR restricts the exercise of ownership generally to the set boundaries of the jurisdiction\(^\text{243}\). Although this may result in circular reasoning with the afore mentioned, in the case of real property further concrete boundaries may be set within either public and / or private law\(^\text{244}\). Specific limitations may directly arise from legal statutes or indirectly from statutes granting certain persons a right to claim.\(^\text{245}\) Even in cases of more specific limitations the protection of ownership of real property\(^\text{246}\),

\(^{237}\) See art 35 para 1 SR. Though, identical wording but outsourced from the ZGB to the Swiss Land Register Ordinance (Grundbuchverordnung, GBV) of 23 September 2011, as of 1 January 2012, art 2 para 1 lit a.
\(^{238}\) See art 1, 2, 3 para 1 and 4 GBV.
\(^{239}\) See art 1, 2 and 5 GBV.
\(^{240}\) Currently excluding cases of joint ownership which in the case of trustees follows the provisions according to art 911 para 4 PGR and 31 et seq SR. See decisions of the Supreme Court OGH 05 C 303/98-53, decision of 6 July 2000, LES 2000, 148; OGH 03 C 46/45, decision of 1 July 1999, LES 1999, 248; also Antonius Opilio, Liechtensteinisches Sachenrecht vol 1 (Verlag Edition Europa Dr. Anton Schäfer 2009) I-45;
\(^{241}\) See art 3 SR and art 3 PGR.
\(^{242}\) Art 2 para 2 SR and (identical) art 2 para 2 PGR setting forth a basic principle define the limit not just for ownership but to any right or duty in the jurisdiction; see decision of the Constitutional Court StGH 1996/ 021, decision of 21 February 1997, LES 1998, 18.
\(^{243}\) Art 20 et seq SR contain provisions for ownership in general and consequently do not differentiate between real or personal properties.
\(^{244}\) Schmid, Sachenrecht (n 226) 167 para 686.
\(^{245}\) Schmid, Sachenrecht (n 226) 168 para 687 et seq.
\(^{246}\) For ownership of real properties see, StGH 1996/29, decision of 24 April 1996, LES 1998, 13, 17; StGH 1997/12, decision of 29 January 1998, published in LES 1999, 1, 5; Also Herbert Wille, Liechtensteinisches Verwaltungsrecht (Liechtenstein Politische Schriften vol 38,
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although a fundamental right\textsuperscript{247}, may meet further restrictions since it is not considered to be an absolute fundamental right.\textsuperscript{248} According to case law of the Constitutional Court an “invasion” of the fundamental right has to meet the three basic criteria developed by case law: the invasive act limiting the “owners’ ” right must be of public interest or justified by fundamental rights of a third party and must have a sufficiently specified legal basis.\textsuperscript{249} Additionally, it must conform to the principle of proportionality and shall not infringe the substance of art 34 para 1 LV.\textsuperscript{250}

III. Personal property

Moveable physical things or objects that can be transported from one place to another without a substantial alteration of their nature may be objects of personal property. By statute this includes controllable forces of nature (e.g. energies of hydraulic, electric, chemical or nuclear nature\textsuperscript{251}) which are not part of a certain parcel of land (e.g. a well).\textsuperscript{252} Items considered to be attached to real property may be moveable property per definition but legally they follow the real property's legal fate.\textsuperscript{253}

Personal property is subject to the general limitations of property pursuant to art 20 SR. Accordingly, the owner of an object can dispose of it upon their own discretion but within the boundaries of the legislation. This includes both, the actual disposition (e.g.

\begin{thebibliography}{9}
\bibitem{247} Liechtensteinische Akademische Gesellschaft 2004) 58, with further references to case law.
\bibitem{248} See art 34 para 1 Constitution of the Principality of Liechtenstein (Verfassung des Fürstentum Liechtenstein, LV) of 5 October 1921, published in Liechtenstein Law Gazette no 15 of 24 October 1921 and art 1 para 1 phrase 1 (ratified) Additional Protocoll no 1 of the ECHR.
\bibitem{250} ibid 712 para 42.
\bibitem{251} Schmid, \textit{Sachenrecht} (n 226) 274.
\bibitem{252} Art 171 SR.
\bibitem{253} Schmid, \textit{Sachenrecht} (n 226) 274.
\end{thebibliography}
use, destruction, etc.) and the legal disposition to enter obligations with relation to the property or to create liens (e.g. tenancy contracts, sale of the property). According to art 20 para 2 SR the owner has a claim for restitution against everybody who restricts the unlimited right to the owner's property, as well as the right to defend any unjustified infringements.

With relation to personal property as trust assets art 897 PGR refers to the trustee who administers or uses it against everybody, whereas the latter notion is significantly congruent with art 20 SR. Although this is a characteristic that applies to rights in rem in general, it is art 919 para 3 PGR that further describes that trustee's right in rem with that one of “namely an owner”.

Conclusively, the rights to claim and defend pursuant to art 20 SR must accrue to the trustee. If he is not considered the owner of the personal property he cannot benefit from the entitlement according to art 20 SR. Art 912 para 3 PGR provides for the right to trace and follow the trust property and explicitly mentions the particular claim for restitution, which by statute is transferred to the settlor, beneficiaries, a co-trustee, or a judicial trustee.

A) Exemption: ships

According to their nature, ships are generally considered to be moveable objects. The Swiss Supreme Court held that it may prove impractical to apply principles for

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254 Schmid, Sachenrecht (n 226) 274.
255 Also rei vindicatio.
256 Also actio negatoria.
257 The fact that it is a right in rem is sufficiently established by art 910 para 3 PGR; see Francesco A. Schurr, 'A Comparative Introduction to the Trust in the Principality of Liechtenstein' in Francesco A. Schurr (ed) Trusts in the Principality of Liechtenstein and Similar Jurisdictions – Aspects of Wealth Protection, Beneficiaries’ Rights and International Law, vol 4 (ZLR 4, Dike Verlag Zürich/St.Gallen 2004) 6.
258 The reference to “owner” may be read with relation to real and personal assets according to art 897 PGR; the reference to “creditor” with relation to rights of any kind and compensations/debts according to art 897 PGR and 911 para 3 PGR.
moveable things and the creation of liens thereon to ships exceeding a certain size\textsuperscript{259, 260}. However, the relevant Swiss legislation has not yet been declared as applicable. Further, Liechtenstein does not yet maintain a Ship Register\textsuperscript{261} preventing registration from taking place. Therefore, the registration of ships with a trustee as a trust asset is currently not possible.

B) Exemption: civil aircrafts

Although a civil aircraft is by nature mobile or moveable, the rules of personal property do not necessarily apply but the special provisions of the Swiss Aviation Law Act.\textsuperscript{262} The latter show significant similarities to principles applicable to real property.\textsuperscript{263}

Civil Aircrafts may be registered in Liechtenstein. According to art 9 Liechtenstein Aviation Law Act\textsuperscript{264} the registration has to be filed at the Department of Economics but

\textsuperscript{259} BGE 118 Ib 60, decision of 12 February 1992, cons 1a: “c'est pourquoi les grands bateaux de navigation intérieure" et les "navires de mer" sont ou peuvent être soumis à un régime juridique qui se rapproche de celui des immeubles.”

\textsuperscript{260} BGE 118 Ib 60, 62, decision of 12 February 1992.


\textsuperscript{262} For the application of Swiss civil aviation law for Liechtenstein see Announcement of 9 December 2014 of the applicable Swiss Legal Provisions (Schedules I and II) based on the Agreement for Cooperation in Civil Aviation (Kundmachung vom 9. Dezember 2014 der auf Grund der Vereinbarung betreffend die Zusammenarbeit im Bereich der Zivilflughfahrt anwendbaren schweizerischen Rechtsvorschriften (Anlagen I und II)), published in Liechtenstein Law Gazette No 329 of 16 December 2014; Application of SR 748.0 (with exception of art 40, 41 para 2, 44, 50 and 103) and SR 748.217.1.

\textsuperscript{263} Schmid, \textit{Sachenrecht} (n 226) 275.

the register is kept and maintained with the Swiss Federal Department of Aviation, which will verify if the necessary prerequisites for registration are met by the applicant.

However, with regard to the protection of the bona fide purchaser, an exception may apply. For non-Liechtenstein registered aircrafts, which are grounded in Liechtenstein at the time when the bona fide purchaser has acquired his right, the vessel subject to the principles of protection of bona fide according to moveable property applies.

IV. Other bankable assets

A) Transferable securities

According to art 4 lit h Liechtenstein Asset Management Act transferable securities are types of securities that are tradable on financial markets, except for the means of payment, such as:

- shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
- bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
- any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

A detailed analysis of each type of security would go beyond the scope of the current thesis, which shall be limited to a property law point of view with regard to physical

265 Liechtenstein has no airport but only a heliport.
266 Art 2 Swiss Federal Aviation Register Act (Bundesgesetz über das Luftfahrzeugbuch) of 1 January 1961 (as of 1 January 2011).
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shares or share certificates. The physical share or share certificate in general is considered to be moveable property. However, bearer shares as such have been immobilised with the introduction of the obligatory share register. Accordingly, and similar to registered shares, the ownership is bound to the entry in the share register with the depositor or for a transitory period to a court order ascertaining the ownership of the bearer share, which consequently has to be registered. Besides, the mode of transfer is not the physical tradition but the change of registration which gives legal effect to the transfer. Besides, bearer shares have to be deposited with the depositor. Thence, factually bearer shares as such have seized to exist and may not be considered moveable property anymore, since the bearer is the depositor not the actual owner. With regard to possession rights, abandoning the character of a moveable property the protection of the (bona fide) bearer according to art 514 SR cannot be upheld.

In the absence of any special agreement the depositor or custodian holds securities under collective custody, owners of securities become co-owners according to art 25 et seq SR. Scholars and practitioners consider this kind as modified and labile co-ownership because the single co-owners only stand in a theoretical legal relationship

269 Schmid, Sachenrecht (n 226) 275.
270 BuA 2012/ 69 regarding the Amendment of the Persons- and Companies Act refers tof “immobilisation of bearer shares”.
272 See art 326 a PGR and art 326 c PGR.
273 See art 326 c para 1 PGR; according to para 2 bearer shares of companies listed on the stock exchange, securities of UCITS, investment funds and investment companies are exempt of the application of art 326 c PGR.
274 Swiss art 935 ZGB.
275 The legal intent of art 514 SR/ 935 ZGB (on money and bearer securities) is the protection of transactional interest (see Schmid, Sachenrecht (n 226) 69, with reference to Emil W. Stark, 'Vorbemerkung Rechtsschutz (art 930-937 ZGB) N 33, and N 3 on art 935 ZGB in Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Schweizerisches Zivilgesetzbuch, vol IV (Das Sachenrecht, 3. Abteilung: Besitz und Grundbuch, 1. Teilband: Der Besitz, art 919-941 ZGB, 3.A, Bern 2001). However, with the immobilisation of 'bearer' shares transactions are completed with the register entry not the the tradition the legal chain of ownership is safeguarded by the register.
276 Swiss art 973 a ZGB;
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and every co-owner may dispose of his part of property without consent of the others. 278

The specific value of the single share or share certificate may be of little value and most
certainly of little interest with regard to the value of the securitised debt or obligation 279,
and can therefore be considered under the “rights of any kind” according to art 897
PGR.

B) Money

Although physical money, or cash, as trust property seems to have lost its importance
today, from a property law point of view it is noteworthy to stress that physical
money 280 is considered to be moveable property 281 and consequently is subjected to the
relevant provisions according to art 171 SR 282 et seq.

Physical money for the general principle of mixing moveable things of two different
owners according to art 195 SR 283 284 Where a person mixes someone else's money with
his own in a way that it cannot be specifically separated 285 he becomes the legal owner
of the entire amount of money 286 whereas the other person receives a legal claim against
the owner, independent of the latter being in good or bad faith. 287 Theoretically, where a
sum of cash money is identifiable (e.g. specific currency, specific coins, specific
registration of the serial number of bank notes), funds may not be considered mixed and

278 Schmid, Sachenrecht (n 226) 286; Swiss BGE 112 II 406, 411.
279 Schmid, Sachenrecht (n 226) 275.
280 Regarding the nature of physical money, which is considered to be a non interest bearing debt
vis-à-vis the state see Joseph Unger, System des österreichischen Privatrechts, vol 1 (4th ed, 
Breitkopf und Haertel 1876) 378.
282 Swiss art 713 ZGB et seq.
283 Swiss art 727 ZGB.
284 Art 195 SR/ art 727 ZGB provide for a pro rata division, hence co-ownership where moveable
things of two owners have been physically mixed and cannot be separated without substantial
damage, disproportionate effort and expenses.
285 The separation is considered to be the central element. Physical money according to civil law
is considered to be a “genus” not a “species”, that cannot be identified from other items of its
own kind once mixed. Therefore, the focus is set on the interest of efficiently securing
transactions rather than the single owners' interest to claim his (former) property; see Schmid,
Sachenrecht (n 226) 69.
286 BGR 47 II 267, decision of 29 June 1912; BGR 101 IV 371, 380, decision of 12 September
1975; BGR 112 IV 74, 76, decision of 3 December 1986.
287 Peter Tuor, Bernhard Schnieder, Jörg Schmid, Alexandra Rumo-Jungo, Das Schweizerische
Zivilgesetzbuch (13th ed, Schulthess 2009) § 91 N 32, § 102 N 9; Schmid, Sachenrecht (n
226) 286.
hence are subject to property claims as stated above.

With relation to trust assets the act of mixing was given consideration in art 922 para 4 PGR stating an obligation for trustees who professionally provide depositary services, comparable to deposit banking of commercial banks, to hold trust property separately of other assets if nothing else may be concluded from the trust relationship. Although, pursuant to case law limits to this duty may apply within the same trust relationship. In 10 HG.2003.17\(^{288}\) the Court decided on whether trustees had committed a breach of trust by mixing two cash payments made upon for the constitution of a trust. Based on the wording in that particular trust instrument it held, that the trustees were not obliged to hold separate accounts for the payments.\(^{289}\) Besides, it held, that a trustee's due diligence has to be measured on art 922 para 1 PGR. Accordingly, trustees who had acted in compliance with the trust instrument, the law and that had deposited and administered the trust property with due diligence may act upon their own discretion. If in that discretion they act upon adequate information, free of conflicting interests and in good faith that their decisions are in the best interest of the trust property, they act in conformity with their duties.

Although upon handover of the cash it is the intention to assume legal ownership of the trustee and nothing else is the consequence of art 195 SR, this current provision within the PGR ensures separation from trust assets. The separation of “trust and other properties held by the trustee” becomes of legal interest where a trustee goes bankrupt or commits a breach of trust. The former case is provided for by art 915 para 1 PGR. In the case of bankruptcy of the trustee it ensures for (cash) money legally owned and held by the trustee as trust property to be considered as liabilities and hence may be separated from the bankrupt's estate.\(^{290}\) In default of a possibility for such immediate separation by the trustee in bankruptcy the statutes provide for the Princely District Court's competency to do so. Only where such separation is not possible during the

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290 Art 915 para 2 PGR which provides for the “separation” and consequently of assertion of rights of ownership against the bankrupt's estate. See also Chapter II, s 283 (2) (a) UK Insolvency Act 1986.
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enforcement- or bankruptcy proceedings, the settlor or his legal successors, the co-trustee or beneficiaries, may receive a right for compensation which precedes all creditor claims\textsuperscript{291} because of their better proprietary right.\textsuperscript{292}

The most common case is not cash money but bank deposits. Bank deposits are not considered to be moveable property but liabilities, hence debts or obligations\textsuperscript{293}. Consequently, deposited funds may be considered as “rights of any kind” according to art 897 PGR and may be transferred to a trustee for the endowment of a trust only by way of an act in personam (e.g. order or cession).

V. Rights of any kind

Art 897 PGR\textsuperscript{294} refers to “rights of any kind” to be transferred to a trustee with the duty to administer and to use them in his own name as the independent holder of trust property but for the benefit of third parties\textsuperscript{295}. Only punctually the legislator refers to specific rights as trust property: art 901 PGR refers to patent rights listed in a register; art 911 para 3 PGR refers to a right accruing to the trust property as a substitute for an object of the trust property which has been destroyed, damaged or removed, or acquired in any other way, by the means of the trust property or as the result of a transaction related to the trust property; art 912 para 1 PGR provides for rights registered in the Land Register; art 912 para 2 case 1 PGR refers to an undertaking registered under a company name\textsuperscript{296}; art 912 para 1 case 2 PGR provides for any other asset forming part

\textsuperscript{291} See art 915 para 4 and 5 PGR; the fact that para 5 distinguishes between separation and compensation indicates that the mixing of inseparable funds.

\textsuperscript{292} The better proprietary right may be contested if the trustee himself was partially beneficially entitled. In such case, called a “mixed trust”, the trustee's creditors may claim for the trustee's beneficial interest in money (not other trust property). See art 915 para 6 PGR: for mixed trusts former 897 para 2 PGR; also Biedermann, \textit{Liechtenstein Trust} (n 7) 48 fn 260.

\textsuperscript{293} OGH 2R EX.2009.3707, decision of 2 September 2011, GE 2011, 160; with reference to Austrian case law RIS-Justiz RS0004074 <www.ris.justiz.gv.at> accessed on 16 February 2015; For Switzerland also Schmid, \textit{Sachenrecht} (n 226) 286.

\textsuperscript{294} For a constructive trust art 898 para 1 PGR contains the equivalent provision; see Biedermann, \textit{Liechtenstein Trust} (n 7) 59.

\textsuperscript{295} With the exemption of the “mixed trust”; see n 163.

\textsuperscript{296} Unlike art 909 PGR which provides for a “company”, a “firm” or a “legal person”, in art 912 para 1 PGR the legislator focussed on the registration only and circumvented that art 909 PGR is not entirely consistent with the legal terminology the PGR uses for the different types of entities. Regarding the latter it can be assumed that the historic legislator tried to cover all possible types of companies since no consistent terminology was applied.
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of the entrusted property registered in any other register (e.g. Patent Register).

One of the most commonly used forms of rights of any kind is money. Formally, paper currency – hence money not for its metal value – has no value of its own but stands for a non-interest bearing debt of the state or the bank duly authorised by the state.297,298 As previously mentioned, physical money is still subject to the rules of property law. But upon the transfer to a bank account synonymously the ownership of money seizes to exist according to the law of property but the transferor may gain an interest according to the laws of obligation. Pursuant to case law “bank balances are the client's claims against the bank, especially from a current account”299. Consequently, debt interest or bank deposits in general classify rights of any kind according to art 897 PGR rather than property interest and will not be further pursued in this thesis.

297 For the three main functions of money see Unger, österreichisches Privatrecht (280) 374.
298 Unger, österreichisches Privatrecht (291) 378.
VI. Summary

Part III has established that art 897 PGR provides for essential legal basis to create a nexus between trust provisions and property law. By focussing on the trustee's legal relation to moveable and immovable types of assets, the legislator has adopted the basic legal division in moveable and immovable property in the context of trust law. In order to define the rights inherent to different kinds of properties these were analysed according to the Property Law Act. Similarities to legal statutes within trust law were analysed that allowed for the conclusion that the historic legislator intended not to violate but provide for the principal of numerus clausus also with regard to trust property. The applicability of property theory to trust assets has been further established with regard to rights of any kind which may replace former property rights of the trustee, that have seized to exist. Based on the central Roman law theory which states that no one can transfer more rights than one has, Part IV will examine the transfer of legal ownership in order to establish a trustee's position with regard to legal ownership of trust assets.
Part IV

Transfer of legal ownership

I. The trustee and the numerus clausus of legal interests

According to the applicable doctrine of causal tradition\textsuperscript{300,301}, the creation of a trust requires a valid act within the law of obligations and the actual conveyance of assets\textsuperscript{302}, the “transfer” of the property.\textsuperscript{303} The general provisions of art 897 and art 911 et seq PGR (on “Trust property”) do not contribute further details on the transfer. Although seemingly trivial, art 899 para 4 PGR (on “the creation of trusts”) subjects the transfer of property (to trustees to be held upon trust) to the general statutes with limitations applying to property rights and other assets and at the same time bridges the trust

\textsuperscript{300} Unlike other civil jurisdictions as e.g. Germany the principle of “causal tradition” is prevailing in the Swiss legal system (which due to reception subsidiarily applies in matters of property law also in Liechtenstein), requiring a valid \textit{act in personam} for the \textit{act in rem} to be valid. Without such valid act in personam the act in rem is void and no property transfer has occurred. See decision of the Swiss Supreme Court BGE 55 II 302, decision of 29 November 1929 \textless http://servat.unibe.ch/dfr/c2055302.html\textgreater; also Heinrich Honsell, \textit{Tradition und Zession - kausal oder abstrakt?} \textless http://www.honsell.at/Publikationen/FS_Wiegand.pdf\textgreater; accessed 25 August 2014.

\textsuperscript{301} From a strictly formal perspective, in 1926 at the time of enactment of the Act on Property the principle of causal tradition had not yet been explicitly found entry into the Swiss jurisdiction. Only in 1929 the Swiss Supreme Court held in BGE 55 II 302, that Swiss civil law had to be based on the principle of justa causa traditionis. It held, that although with the yet new civil code (of 1912) the principle had found entry in statutory law only for immovable property (art 974 para 2 ZGB); hence nothing else could be applicable for moveable property, as opposed to the case law under the rule of the ancient act on obligations (aOR). Therefore, it can be assumed, that at the time of the reception of the Swiss Civil Code in Liechtenstein the principle of justa causa traditionis was already prevailing in Switzerland (at least for immovable property). For real property see the Liechtenstein Supreme Court explicit findings in OGH 6 C 488/97-26, decision of 4 April 2000 \textless www.gerichtsentscheide.li\textgreater;.

\textsuperscript{302} See implicitly art 897 PGR “[...]to whom another (the settlor) transfers [...]”; also: OGH 3 C 46/95, decision of 1 July 1999 \textless www.gerichtsentscheide.li\textgreater;: “[...] for this purpose provisions in rem, which effect the transfer of trust property from the trustor to the trustee, enabling latter to exclusively dispose of the trust assets, are necessary, besides the obligatory manifestation of intention to create a trust [...]”; see also Biedermann, \textit{Liechtenstein Trust} (n 7) 425; Samuel Plachel, 'Trusts im liechtensteinischen Recht' (MA thesis University of St. Gallen 2009) 17.

\textsuperscript{303} One without the other does not create a trust, not even imperfectly; see Biedermann, \textit{Liechtenstein Trust} (n 7) 425 n 9.
provisions with the Liechtenstein Property Law Act304.

Accordingly, depending on the type of assets transferred to the trustee, as differentiated in art 897 PGR, real, personal or rights of any kind, specific modes of transfer apply. As a consequence of the transfer, the trustee must hold one standardised legal “proprietary” position as set forth by Liechtenstein property law Liechtenstein trust provisions do not explicitly apply the wording (full and/or partial) “owner”, “possessor”, “holder” or any corresponding legal entitlement according to the catalogue of legal estates pursuant to property law. Art 910 para 3 PGR refers to an “administrative right in rem”. Art 912 para 1 and 2 PGR refer to legal estates or other rights recorded in the Land Register and other interests in trust assets which are recorded in any public registry. Art 919 para 1 PGR refers to the powers of the trustee to act “like specifically an owner [...]” of the trust property in his own name. The question arises why the legislator did not apply one of the existing forms of ownership in order to clarify the trustee’s legal position.

With regard to the trustee’s property rights on trust assets the scarce and recent Liechtenstein case law refers to a “common concept”305 of the legislator. It does not further elaborate on this common concept, however, declares that it is (also) manifested in art 912 para 2 PGR. Accordingly, with regard to personal property “[... the position of trustee is not the one of an owner, but rather one of a person entitled to administer and dispose of ‘separate funds’ ”.306 For real property the Court concluded that even though the trustee is the “owner”307 according to the public Land Register, he is not.308 The reasoning is based on the “special status”309 of the real property which is ensured by a corresponding annotation310 or note311 in the public Land Register, which explicitly declares the real property as trust property.

304 Liechtenstein Property Law Act (Sachenrecht, SR) of 21 December 1922, published in Liechtenstein Law Gazette No 4 of 1 February 1923; the term “property” according to this act includes (a.o.) moveable and immovable assets.
307 Accentuation according to the judgement.
308 OGH 01 CG.2010.181, decision of 04 November 2011, LES 2012, 22, 26.
309 „Sonderstatus“ as the original wording applied by the Court in LES 2012, 22, 26.
310 Known to civil lawyers as “Vormerkung”; for legal definition see Liechtenstein see art 537 SR et seq.
311 Known to civil lawyers as “Anmerkung”; for legal definition see art 541 SR.
Transfer of legal ownership

The Court bases its decision on the “special status” of trust property which itself had previously been subject of case law. In LES 1987, 114 the claimant and settlor brought an action for debt, the trust property, against the trustee, on the grounds of undue investment of the trust property. The Court held that within the provisions set forth in the trust deed and the applicable statutes, the trustee shall hold and administer the trust property with due diligence. Thereby he shall bear in mind, that the trust property is not his private property but rather a debt instrument. The judgement does not explicitly refer to the trustee’s position with regard to the catalogue of estates but merely applied wording derived from accountants but not legal terminology. Therefore, in summation, the consequences regarding the legal status of the trustee in relation to the trust property cannot be derived from this judgement. Much later, in 1999, the Court again focussed on the essential question of how the trust property relates to the trustee in terms of property law.

In LES 1999, 248 a Swiss bank (claimant) claimed for damages caused (amongst others) by the Liechtenstein trustee, who had previously pledged all explicitly listed trust assets (real property, arts collection...etc.) as securities for a credit the bank granted to the beneficiary’s company. The bank intended to hold onto the pledged assets as collateral in the event of the beneficiary defaulting with the payment terms he had validly agreed with the bank. However, in fact the trustee had (partially) no right in rem regarding these assets and consequently could not grant a pledge over them because the protector had previously alienated them. The Court ruled that upon creation of the trust, trust assets had to be effectively transferred to the trustee in order to allow him to exclusively dispose of the trust assets. This had to be done by means of singular succession so that the trustee shall receive the power of disposition in order to prevent illegal dispositions of the settlor and/or a protector. However, in conformity with previous jurisdiction it held, that the conveyed trust property is a special fund to be kept

312 OGH 03 C 298/75-76, decision of 15 April 1986, LES 1987,114, 122
313 Although art 2 para 1 lit a of the Hague Trust Convention refers to the assets as “separate funds” the Court could not have made reference to that since the Hague Trust Convention was ratified and enacted in Liechtenstein 9 years later on 1 April 2006 with LGBI. 2006 Nr. 62; LR 0.216.41. Besides, nothing else can result even if it was argued that the Hague Trust Convention may have served as template or inspiration for the Liechtenstein Court. Art 2 para 1 of the convention describes the characteristics of a trust and consequently based on its nature as conflict law too does not serve as a material legal statute.
separate from the other property of the trustee. The Court concluded that the question on
the “proprietary” position of the trustee with regard to the trust property could remain
unanswered.\textsuperscript{314} Again, the Court did not refer to the trustee’s proprietary position
according to the property law. On the contrary, it differentiated clearly between the
“special status” of the trust property to be held separately of the trustee’s “other”
property and the question of legal ownership.

It is therefore unclear, why in LES 2012, 22 the Court concludes that the trustee is not
the owner, when citing the previous jurisdiction, which had omitted the question or even
clearly differentiated between the two topics of “special status” and of “ownership”.
The Court’s reference to the findings of some Liechtenstein practitioners\textsuperscript{315} who argue
on the special status, does not give any further evidence on the question of legal
ownership of property.\textsuperscript{316}

Accordingly, the quality of the “special status” should derive from various references
within the trust provisions to provisions on foundations. It remains unclear, why
references to foundation law\textsuperscript{317}, mainly of procedural or formal nature permit the
conclusion for the appropriation of property law, if there is no doubt that the foundation
has a legal personality whereas the trust simply has none.

The reasoning of the Court on the special status of the trust property, citing further
numerous trust provisions, is without any doubt correct, but does not support the
conclusion on that the trustee shall not be owner of the trust property. Even more so,
when the Court cites art 914 para 1 PGR providing for claw backs which even more so
requires the assets to have been legally transferred upon the trustee based on the
challenged transaction.

\textsuperscript{314} OGH 003 C 46/95, decision of 1 July 1999, LES 1999, 248, 256 et seq.
\textsuperscript{315} LES 2012, 22, 26.
\textsuperscript{316} See also The Hague Trust Convention which clearly distinguishes the question of the trustee’s
title to the trust assets, which stand in his name (art 2 para 2 lit b), and the question of the
special fund (art 2 para 2 lit a).
\textsuperscript{317} E.g. art 906 para 2 PGR on the application of procedural rules regarding dissolving a
foundation; art 907 para 1 PGR on the procedural prerequisites of revoking a foundation; Art
910 para 4 PGR referring to the rules on how to amend a foundation; and 926 para 2 PGR on
the amendment of the organisational structure or purpose of a foundation.
II. The administrative right in rem

When the Court concludes that the trustee is not the owner but is a “person entitled to administer and dispose of separate funds” it omits the fact that the closed catalogue of estates of the Liechtenstein Property Law Act does not provide for such a right in rem. The Court's decision is based on the findings of Bösch, a practitioner who claimed the administrative right in rem to be a property right of its own kind, intentionally created by the legislator.\(^{318}\) He seeks to explain that this right of the trustee originates not merely from common law trust tradition but to a great extent from the German “Treuhand” doctrine.\(^{319}\) His findings led to an overruling\(^{320}\) of existing case law\(^{321}\) and to the conclusion, that the English trust concept could not have been “imported” in its entirety into Liechtenstein law because the concept of “dual ownership”\(^{322}\) that is alien to the domestic jurisdiction. Specifically, the beneficiaries’ rights, which are based upon equitable jurisdiction, could not have been inserted in a civil jurisdiction.\(^{323}\) Their interest in trust property had to be safeguarded on a functional basis within the means the Liechtenstein jurisdiction.\(^{324}\) Therefore, the wording applied in the PGR “administrative right in rem” shall constitute a property right of its own kind which reflects the legislator’s solution to avoid the disadvantages of the rigid principle of ownership.\(^{325}\) Besides, he argues, compatibility with continental civil law and its basic principles of property law, amongst others the principle of numerus clausus would be granted.\(^{326}\)

Doubts arise with regard to trust assets that are transferred from the settlor, who disposes of his full ownership, to the trustee, who shall not receive full ownership but a

\(^{318}\) Bösch, Liechtensteinische Treuhänderschaft (n 6) 330.
\(^{319}\) Bösch, Liechtensteinische Treuhänderschaft (n 6) 330.
\(^{322}\) Or as Bösch calls it “the question of division of interest in trust property”; see Bösch, Liechtensteinische Treuhänderschaft (n 6) 252.
\(^{323}\) Bösch, Liechtensteinische Treuhänderschaft (n 6) 252.
\(^{324}\) Bösch, Liechtensteinische Treuhänderschaft (n 6) 253.
\(^{325}\) Bösch, Liechtensteinische Treuhänderschaft (n 6) 251 et seq.
\(^{326}\) Bösch, Liechtensteinische Treuhänderschaft (n 6) 296.
mere right in rem to administer and dispose of the assets which is unknown to the Liechtenstein Property Law Act. It may be argued that despite the institutional character of the numerus clausus, a civil law jurisdiction may enlarge its (closed) list of estates and property rights by enactment.\textsuperscript{327} Although this right in rem was held to be an enlargement of the “closed” list of property rights\textsuperscript{328}, the question on to whom the difference between the unlimited property right of ownership and the administrative right in rem accrues remains unanswered.

As for the argument that the common law does not know a closed catalogue of estates, it seems that the theory is based on a misunderstanding of English common law. Although, the common law does not believe in enacted law as the exclusive source of legal obligation and hence the principle of the numerus clausus\textsuperscript{329} in common property law cannot be drawn from fundamental postulates, there exists a “closed” catalogue of estates established by jurisdiction.\textsuperscript{330} English common law Courts treat previously-recognised forms of property as a closed list that may be modified only by legislature.\textsuperscript{331} This judicial standardisation of properties applies not just to estates in land, but amongst others also to interests in personal property.\textsuperscript{332} It may therefore not be correct to punctually refer to common law where suitable. The question of transfer of legal title would rather require an in depth analysis of the term “property” and “ownership”


\textsuperscript{328} Bösch, \textit{Liechtensteinische Treuhänderschaft} (n 6) 273, 279, 288, 290, 296. With regard to the principle of numerus clausus of property laws Bösch mainly quotes Gerstle, who abstractly finds, that the dogma of numerus clausus does not constitute valid reason to dispute the theory of a newly created material administrative right in rem. In his opinion the numerus clausus previously seemed perforated leading him to the conclusion that a deliberate decision for a new creation to be added to legal system. Unfortunately, a deeper reasoning is not provided.

\textsuperscript{329} Also known as “catalogue of estates” or “forms of ownership”; see Thomas W. Merrill and Henry E. Smith, ‘Optimal Standardization in the Law of Property: The Numerus Clausus Principle’ (2000) 110 Yale LJ 1, 3, 10, 59.

\textsuperscript{330} ibid (n 329) 10.

\textsuperscript{331} ibid (n 329) 11 and 59; Merrill and Smith describe this phenomenon as a norm of \textit{judicial self-governance}.

\textsuperscript{332} ibid (n 329) 12 et seq; Although Merrill and Smith examine the judicial self-governance regarding the jurisdiction of US courts they generally come to the conclusion that „(...) courts exhibit a general conservatism analogous to that which characterizes civil-law courts, the "unwritten" rule of the numerus clauses has had a similar effect. Notwithstanding Tulk v. Moxhay, English courts have generally declined to create new property forms. The result, predictably, has been that nearly all changes in the forms of property have been achieved through parliamentary action“ (59 et seq.).
according to English common law.  

III. The transfer of real property

Real property may only be transferred upon entry in the Land Register. The aforementioned numerus clausus principle allows only for certain rights of rem to be entered. Pursuant to art 536 SR these are:

- ownership;
- easements and real burdens established in favour of or encumbering the property; and
- the charges with which it is encumbered

Any other form of a right in rem not corresponding to the aforesaid is excluded from registration. In order to do so, the registration must be applied for in writing by the owner of the real property, which is the object of the entry.

According to art 544 SR any disposition in the Land Register, such as an entry, amendment or deletion, may be made only on the basis of documents establishing the right to make such disposition and its legal basis. Authority to request a disposition is established by proof that the applicant is the person entitled by virtue of the entry in the Land Register or has been duly vested with a power of attorney by said person. The

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333 For further analysis of transfer of title of personal property in English common law see Michael Bridge, *Personal Property Law* (4th edn, Claredon Law Series, Oxford University Press 2015) 195 et seq.

334 Art 536 et seq PGR „on ownership and limited real rights“ (chapter: “entries in the public land register“) as amended with Liechtenstein Law Gazette 2008 no 139.


336 e.g. rights of lien.

337 This does not include “annotations” (see art 537 SR) or “(explanatory) notes“ (art 541 SR).

338 The owner may be represented by a signatory who has been duly vested with a power of attorney by the owner (power to dispose, a proof of relation to the representative or a power of attorney). A general Power of Attorney may not be older than 2 years at the day of application. The specific formal requirements depend on the legal nature of the owner; detailed see art 18 Ordinance on the Public Land Register of 17 May 2000; (Grundbuchverordnung, GBV).
legal basis for the requested disposition is established by proof that the formal requirements have been observed. In the case where the entry has constitutive power\textsuperscript{339}, such proof consists in the written and notarised\textsuperscript{340} contract between the present owner as transferor and the prospective owner, the transferee, of the real property.

In terms of trust assets art 897 PGR refers to the transfer of real property to the trustee, who shall administer or dispose of it in his own name as an independent legal entity for the benefit of one or several third parties (beneficiaries) with effect towards all third persons. Upon creation of a trust, the transfer takes effect between two persons\textsuperscript{341}, the owner and settlor as transferor and the trustee as transferee. In the light of the above mentioned and given the assumption that a prospective settlor is the full and sole registered owner of a Liechtenstein real property, he must present a written and notarised contract\textsuperscript{342} stating the reason of transfer in order to successfully apply for the transfer of the real property to the trustee. Upon approval of the registrar the (former) owner of the Liechtenstein real property will be deleted and he loses all his rights (and duties) accrued from ownership.\textsuperscript{343} Instantly the ownership of the real property will be transferred upon the trustee, who obtains all the rights and duties, hence civil legal

\textsuperscript{339} See art 20 GBV which provides for the form of documentation differentiating between constitutive and declarative effect of the entry. For the present study only the constitutive power, establishing a right in rem by entry, is of interest unless specifically stated otherwise. Therefore, cases of declarative entries (inheritance, public auction or special statutes provision, whereas the trust provisions or the general provisions applicable do not contain any) my generally be neglected for the purpose of this study.

\textsuperscript{340} Art 20 para 2 GBV, referring to art 13 phrase 2 GBV in the event of a non-Liechtenstein notarised contract.

\textsuperscript{341} According to the statute the trustee may either be a natural person, a firm or a legal entity. According to art 1011 PGR the firm is the name of an entrepreneur under which he is registered and under which he runs the business and signs for it. Although often explained as the company name, in the sense of art 897 PGR it seems that the legislator intended to point out differences in individuals acting as individuals or as businesses in their capacity as trustee. For the settlor the same applies, it may be a natural person or legal entity.

\textsuperscript{342} E.g. a trust deed with a schedule listing the real property.

\textsuperscript{343} Florence Guillaume, 'Fragen rund um die Eintragung eines im Trustvermögen befindlichen Grundstücks ins Grundbuch' (2009) 1 Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht 4.
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ownership.\textsuperscript{344} The title to ownership remains unchanged as regards property law\textsuperscript{345}. Besides, art 912 PGR on “specific trust properties” provides for the case where real properties (or rights registered in the Land Register) form part of trust assets. It states, that, unless provided differently by the trust deed, the real property (or registered rights) shall be in the name of the trustee in order to safeguard the effect of the trust against third parties. This doubtlessly refers to afore mentioned statutes of the SR on the prerequisites of entries in the Land Register. Attention must be paid to the notion “effect against third parties”, which refers to qualities of a right in rem. Consequently, the simple terminology “entry of the name of the trustee” in the Land Register as applied in the trust provisions has several legal effects: first, to secure ownership of the trustee as a right in rem against everybody else\textsuperscript{346}; and secondly, it implies the principle of protection of bona fide.\textsuperscript{347}

A) The principle of bona fide

The principle applies as a result of a wrongful entry in the Land Register a legal deficit of a right in rem had occurred and parties claim rights emerging from that entry.\textsuperscript{348}

\textsuperscript{344} ibid (n 343) 4. Guillaume, when mentioning the three essentials of a trust, refers to the art 2 para 2 lit b Hague Trust Convention which clearly points out the characteristics of a trustee, amongst others that the title to the trust assets stands in the name of the trustee […]. Though, Guillaume also argues on the division of ownership, which is alien to Swiss property law and therefore the trustee shall be considered as „full“ owner. The result remains the same, but as previously mentioned, the division of ownership does not necessarily exist and hence this aspect cannot serve as a basis for the present paper. See also Peter Max Gutzwiller, Scheizerisches Internationales Trustrecht – Kommentar zum Haager Übereinkommen über das auf Trust anzuwendende Recht und über ihre Anerkennung (HTÜ) vom 1. Juli 1985 und zur schweizerischen Umsetzungs-Gesetzgebung vom 20. Dezember 2006 (Helbing Lichtenhahn Verlag, Basel 2007) 40.

\textsuperscript{345} For the distinction between the question of the transfer of rights (in the chain of previous owners) as a consequence of the „deducted ownership„ and the question of the assumed ownership based on the entry in the Land Register: OGH 6 C 488/97-26, decision of 4 April 2000, LES 2000, 138.

\textsuperscript{346} See generally art 20 para 2 SR.

\textsuperscript{347} Also known as the positive legal force of the land register implemented in art 554 SR (art 973 ZGB).

\textsuperscript{348} Schmid, Sachenrecht (n 226) 142 et seq.
Hence, the “obvious” and the factual legal situation deviate. The principle protects the good faith of third parties only and consequently not those persons, who were involved in circumstances leading to the wrongful entry. This is based on the assumption of accuracy and completeness of the Land Register which is basically a fiction, not necessarily a fact. This legal fiction protects the public faith in the Land Register and primarily penetrates the basic principle of property law, that nobody can transfer more right than one pertains. In different terms, any purchaser, whether in good or bad faith, obtains ownership of the land upon registration in the register. However, the question if this person remains owner is one of faith. A person is protected in the position as owner if he or she did not or could not have known the unwarranted right in rem. Only in this case, the person in good faith persist in ownership despite the false entry. On the other hand, no party can claim to be in good faith if the party had known or ought to have known about the unwarranted right in rem and as a consequence may not rely upon the entry. With regard to real estate as trust property, this principle is also reflected in art 912 para 3 PGR, which provides for the right to trace the purchaser of the trust property had acquired it in bad faith.

B) The restraint on disposal

The numerus clausus of the Land Register allows only for certain rights in rem to be entered. For terminological clarification, reference may be made to the subtitle of section B (art 536 et seq. SR) of the Land Register on “entries”. The notion of “entry” includes both, a wider and a narrow sense. In its narrow sense it only refers to entries according to art 536 SR including to (a) ownership, (b) easements and real burdens and

349 Obvious from the Land Register and not from reality of the land itself, since the latter considers a further exemption of the bona fide principle.
351 Schmid, Sachenrecht (n 226) 142.
353 Schmid, Sachenrecht (n 226) 144.
354 This applies where the entry has constitutive effect.
355 Schmid, Sachenrecht (n 226) 143; and fundamentally for the bona fide Art. 3 SR.
356 Schmid, Sachenrecht (n 226) 144.
357 See art 555 para 1 and art 3 para 2 SR (= art 974 para 1 and art 3 para 2 ZGB); also Schmid, Sachenrecht (n 226) 143.
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(c) charges and liens. However, section B includes also (2.) “annotations” and (3.) “notes”. Consequently a distinction between entry in the narrow sense and in the wider sense (including the narrow sense, (2.) and (3)) is indispensable. Annotations may be entered in the Land Register to secure personal rights according to art 537 SR or a restraint on disposal according to art 538 SR. A restraint on disposal can therefore be always classified as an entry, but ex ante it seems potentially wrong to use the terms interchangeably. A restraint on disposal may be entered in the Land Register to secure disputed or enforceable claims or where the law provides for it.

The trust statutes particularly refer to “annotations” or “notes” in the Land Register. Art 912 PGR provides for the transfer of real property with “either a restraint on disposal” by annotation or a “note of the trust relationship”. The annotation can therefore only be done in the form set forth as “restraint on disposal” according to art 538 SR. Although, the legal effect of an annotation cannot be described in general for the restraint on disposal the statutes provide that such restraints become effective against all subsequently acquired rights by securing priority of the restraint of disposal towards subsequent measures of enforcement proceedings, especially the attachment of assets or bankruptcy. In specific, art 73 GBV links trust provisions and the provisions of the SR regarding Land Register by defining the formalities a trustee has to consider when registering such annotation in the form of a “restraint on disposal”. Para 2 leg. cit. states, that the volume of the restriction has to be specified. As a result of the

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358 “Vormerkungen” according to art 537 - 540 SR (= art 959 – 961 ZGB) and art 68 et seq GBV.
359 “Anmerkungen” according to art 541 SR (= art 962 ZGB) and art 77 et seq GBV.
360 Silvia Verena Leemann, 'Die Vormerkung von Verfügungsbeschränkungen im Grundbuch nach dem schweizerischen Zivilgesetzbuch' (Dissertation University of Zürich 1937) 11.
362 Karl Heer, 'Die Wirkung persönlicher Rechte im Grundbuch nach dem schweizerischen ZGB' (Dissertation University of Bern 1930) 2; Heer points out that the notion „law“ of the corresponding Swiss provision art 959 para 1 ZGB refers to the ZGB and OR only. Unlike with the ZGB Liechtenstein did not enact their PGR based on the Swiss OR. However, in the present context it may correspondingly assumed, that the Liechtenstein legislator refers to the "SR" and the "PGR".
363 See art 912 para 1 PGR.
364 Schmid, Sachenrecht (n 226) 109; see also BuA 2007 /141, 58.
365 Schmid, Sachenrecht (n 226) 114.
entry, the trustee will be entered as owner of the land transferred by the settlor, but may face limitations explicitly described in the annotations. Third parties acquiring trust property cannot invoke on having acted in good faith, because the annotations perish their good faith, if the trustee had acted beyond the scope of the limitations as set forth in the Land Register. Without this declarative annotation the third party (who acted otherwise in good faith) could not know of the trustee’s limitation regarding the real estate as trust property and not be held liable for having acted in bad faith. This is further elaborated by art 912 para 3 PGR, which, based on the bona fide principle as outlined above, acknowledges the right of the settlor, a co-trustee, beneficiaries or a trustee appointed by the Court, to follow the trust property in case of a bad faith purchase of a third party.

Based on the general third-party-effect of the annotation an internal effect among settlor and trustee can be concluded vice versa of safeguarding the settlor’s, beneficiaries’ or co-trustee’s interests. The legal nature of an annotation therefore raises rights with an “in rem character”. Accordingly, the Swiss Supreme Court confirmed that an annotation, containing a restraint on disposal according to art 960 para 1 no 1 ZGB, serves to secure contentious or executable claims. The latter include claims of personal nature in relation to real property, if they are finally granted and consequently have effect on the Land Register. The annotation of the restraint on disposal therefore confers according to art 960 para 2 ZGB an effect to the claim, which it secured, against all subsequent acquired rights. Generally, this effect have only rights in rem. The Court concludes that “with the annotation in the Land Register next to the personal right, a

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367 Art 551 SR (=970 ZGB); see also Schmid, Sachenrecht (n 226) 107 et seq, on the fiction of public knowledge of entries.
368 Schmid, Sachenrecht (n 226) 111.
369 Schmid, Sachenrecht (n 226) 111.
370 See also Bösch, Liechtensteinische Treuhänderchaft (n 6) 112; as Bösch elaborates, that the third party’s knowledge is about the fact of the quality of the asset in question as trust property, and not any knowledge about the act of the trustee who acted in breach of trust. This clearly points out the legislator’s focus on the property law aspect rather than on the obligations of the trustee, exceeding his powers which usually is not obvious to third parties.
371 The assumption is explicitly based on the annotation and not on the specific form of a restraint on disposal because art 912 PGR provides for the transfer of real property in the name of the trustee, with or without restraint on disposal, but in any case with an annotation in order to develop a third-party-effect.
right in rem is placed, which persist only depending on the main claim.”  

With relation to a specific form of annotation, the pre-emption right, the Swiss Supreme Court held in another case the restraint on disposal according to art 960 para 1 nr 1 ZGB to contain the same effects. It held, that “it allows for the guarantee to enforce a personal right on the basis of a right in rem, without changing the obligatory (personal) nature of that right.” Although considering the differences in wording of Liechtenstein art 538 para 1 SR and Swiss art 960 para 1 ZGB the Liechtenstein legislator acknowledged that an annotation in the Land Register according to art 538 SR enforces the right or legal relationship with an in rem character.

C) Note

Unlike an entry or an annotation, a note has generally no power to give rise, change or annul rights in rem, but merely has a descriptive function. It can therefore not serve to distinguish and prove the in rem character of a trust relationship. However, with regard to the bona fide principle the note also plays an important role. Pursuant to art 541 SR legal relationships according to private law can only be noted in the Land Register where the statutory law provides for an entry. Art 912 para 1 PGR of the

374 Although the original wording of art 358 SR as enacted and published in the Liechtenstein Law Gazette 1923/ 004, did not contain the wording “restraint of disposal”, it provided for annotations in general. With reference to the original wording of art 912 para 1 PGR as enacted and published in the Liechtenstein Law Gazette 1926/ 004, it seems consistent, that the statutes apply the wording annotation in order to connect to the principles of the Property Law Act but add a “restraint on disposal” which was facultative and independent of the third party effect referred to in art 912 para 1 PGR.
375 The legislator writes: “Art 537 - 540 SR provide corresponding to art 959 to 961a ZGB the annotation”; see BuA 2007/ 141, 58.
376 BuA 2007/ 141, 59.
377 See infra: the notion “entry” in a wider sense pursuant to section B therefore includes notes.
378 This may serve as an explanation why the Swiss legislator has avoided to include the possibility of an annotation of the trust relationship in their civil code.
379 As for Liechtenstein law both, the annotation and the note may serve to destroy the bona fide of a third party purchaser, whereas in the Swiss legal system the annotation of a trust relationship is basically not possible.
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statutes on trusts states that the trust may be entered in the Land Register in the form of a note at the folio of the respective real property or equal right which is conveyed as trust property. In this regard the effect is ‘similar’ to the annotation. As art 912 PGR states itself in accordance with the principles of the Public Register: only in such case, where the relevant real property or equal rights are marked with a note, stating they are trust property, the trust becomes effective towards third parties with regard to these assets\(^{380}\). Simply, the note may destroy any good faith\(^{381}\) of a third party purchaser because upon entry of the note it becomes public knowledge, that the real property or equal rights form part of the trust property. Hence, the trustee cannot validly alienate such real property, if he/she had no right to do so without the third party purchaser facing the perils of restitution of the property acquired. For example, as a consequence of the purchase agreement and the consecutive entry of any third party, independent of its faith, acquires property according to the constitutive effect of the entry in the Land Register.\(^{382}\) However, the note ensures that the purchaser (“the new owner”) cannot claim his or her status as owner from the entry in the Land Register because of it being unwarranted.\(^{383}\) The consequences are stated again in art 912 para 3 PGR, enabling the settlor, the beneficiaries or the co-trustees or a trustee appointed by the Court to trace the trust property and claim for the trust unlawfully alienated trust assets in the name of the trust.\(^{384}\)

The note is facultative\(^{385}\) and its entry has to be applied for by the trustee as owner of the real property\(^{386}\) at the Liechtenstein Office of Justice, department for Land Register. If the application is granted\(^{387}\), the respective real property will have the note “trust

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380 The note has only an informative nature and points out a legal relationship involving the real property. However, the legal relationship is not influenced or altered by the entry. See Schmid, Sachenrecht (n 226) 117; and BuA 2007/ 141, 61.
381 In combination with art 555 para 1 SR; see also BuA 2007/ 141, 62; see also: Schmid, Sachenrecht (n 226) 118.
383 See art 555 SR.
386 See art 80 para 1 GBV.
387 Upon application the land registrar undertakes an examination whether the legal documentation according to art 544 SR is complete. Under the present assumption of real property situated in Liechtenstein this includes the examination of prerequisites according to
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property. Apart from the effect of the destruction of good faith the legal effect of a note is quite different to an annotation.

The note has neither constitutive, nor determining character, but is merely informative and has declaratory power. It shall create awareness of a legal relationship to which the real property is object but the existence of the latter is not dependent on the entry. Consequently, if real property is transferred to the trust with the trustee as owner in the Land Register and a note declaring this real property as trust property, the legal effect serves to destroy any contradictive bona fide if invoked. It does not create or guarantee an in rem character of a right unlike the annotation.

Regarding the scope of the protection of good faith both types vary. Art 912 para 3 PGR restricts the destruction of good faith to cases where the trustee alienated trust property where he had no right to dispose. As previously stated, a restraint on disposal is only feasible in the form of an annotation, not a note.

With relation to third parties, the annotation is significantly narrower, because a real property may carry an annotation with a restraint on disposal but not with relation to a specific form of contract involving the real property, hypothetically a sale. A third party purchaser would therefore not be in bad faith when acquiring the trust property. A note in the contrary does not allow any types of restriction. As a consequence, all third party purchasers must be aware that it is trust property and may face the legal consequence of

According to art 78 et seq GBV the note shall be in the form of a keyword. According to the Guidelines of the Swiss Federal Department for Land Register - and Real Property Law (Eidgenössisches Amt für Grundbuch- und Bodenrecht) of 28 June 2008, 4, the note shall read as follows: “is part of trust assets”. It can be assumed, that the Liechtenstein registrar will apply the same wording or simply “trust property”, similar to art 912 para 2 PGR.

Schmid, Sachenrecht (n 226) 117. Although differently: Decision of the Swiss Supreme Court, BGR 89 II 203 p. 210, which acknowledges a „legally constitutive effect“ of (certain) notes, which can – if initially wrongfully entered in the land register – be object of a claim for removal according to art 975 ZGB (= art 556 SR).


See also Pfeiffer, 'Vormerkung persönlicher Rechte' (n 385) 4.
bad faith.394

D) Process of registration

As previously mentioned, the principle of causal transfer requires a valid act within the law of obligations and based upon that an act of disposition.395 The conveyance of real property396 to a trust is only legally complete with the registration in the Land Register.397 The registration process consists of two acts: the entry in the journal and subsequently the entry in the register. According to art 525 SR every application for entry is immediately entered in the journal in timely order of their filing.398 The application has to be filed by the present owner of the real property399 who has to bring along valid proof of authority400 to make such disposition and the legal basis401. The application for entry in the Land Register constitutes the disposition necessary for the successful transfer real property402.

The legal basis corresponds to the act in personam within the law of obligations. Therefore, the obligation must correspond to the form requirements the provisions on the Land Register set forth for contracts, serving as legal base for transfers of land ownership.403 Depending on the trust deed, hence whether the trust was established with a trust settlement or a trust declaration form requirement may vary. In the case of a trust settlement, this may qualify as the obligation for the transfer of land if such transfer is

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394 Guillaume, Eintragung (n 343) 1, 9.
395 See above Point A) Principle of causal tradition.
396 Only real property situated in Liechtenstein.
397 Where the entry in the Land Register has constitutive effect. See art 38 para 1 and 552 SR.
398 For aspects of the principle of priority it is therefore essential to apply for entry of a provisional annotation according to art 539 para 1 SR upon knowledge of the prospective transaction in order to prevent any rights in rem brought forward by third parties.
399 Art 542 SR.
400 See art 544 para 2 SR: authority to request a disposition is established by proof that the applicant is the person entitled by virtue of the entry in the Land Register or has been duly vested with a power of attorney by said person.
401 See art 544 para 3 SR: the legal basis for the requested disposition is established by proof that the formal requirements have been observed.
402 Guillaume, Eintragung (n 343) 1, 10.
403 See art 37 para 1 and 2 SR pursuant to which contracts with the object of transferring land must be in writing and the signatures of the parties must be notarised. According to art 37 para 3 SR – providing for the transfer upon death, hence also the trust mortis causa - the obligation must follow the formalities as set forth by the provisions on inheritance.
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stated in the settlement. As a consequence, the trust settlement must follow the formalities as set forth by art 37 SR and must be in writing and notarised. According to Liechtenstein trust law, a trust deed must be in writing and therefore art 37 SR does not create any further requirements unless where a trust is created by operation of law or in the case of a resulting trust. Additionally, the trust settlement must be notarised in order to serve as a valid act in the law of obligations for the land transfer.

The same applies where Liechtenstein real property was transferred to a trust settled according to foreign law. If doubts arise regarding the ratione loci and ratione materiae of the foreign notary, the Liechtenstein land registrar is entitled to demand an authentication or an apostille. It remains questionable upon which criteria the Liechtenstein registrar practically decides upon the ratione loci and especially the ratione materiae, since latter would include to research on foreign law. The private legal nature of the obligation is not of importance, since it may constitute a unilateral act which becomes complete upon acceptance or a bilateral act. As regards the Land Register formalities prevail.

The manifested act in personam practically finds entry in the Land Register in the record of documents. According to the principle of public access to the Land Register any party invoking an interest gains access or receives extracts. Interests include legal, economic, personal, family, public or other factual interests, which

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404 Liechtenstein law does not provide for the institute of a notary. Therefore, notarisations are executed by the Court, the land registrar or the public arbitrator.
405 Art 33 para 1 IPRG; see also Guillaume, Eintragung (n 343) 10.
406 See art 33 para 2 IPRG and art 13 GBV.
407 See art 33 para 1 IPRG and art 37 SR.
409 Guillaume, Eintragung (n 343) 1, 10.
410 See art 521 para 2 SR, art 525 para 2 SR, art 552 para 2 SR, art 57 SchlT PGR.
411 See art 551 para 1 SR.
412 See art 551 para 2 and 3 SR. No proof is needed, but only prima facie „evidence“.
413 Applications may be made for access or extracts depending upon the choice of the interested party; see decision of the St. Gallen Cantonal Court, in (1999) 80 ZGBR, 97 et seq.
414 BGer 112 II 422, 426, decision of 4 December 1986 <www.bger.ch>, where the Court held that personal rights with secured with an annotation or note is classified as a legal interest.
415 BGer 111 II 48, 50 decision of 29 March 1985 <www.bger.ch>.
416 BGer 126 II 514, decision of 31 October 2000 <www.bger.ch>, where the Court held that not any interest may suffice to gain access. Mere curiosity does not classify as a relevant reason.
must correlate to the real property subject\textsuperscript{417} to the request.\textsuperscript{418} Alternatively the party may apply for extracts of the register based on interest as outlined above.\textsuperscript{419} The extracts may include copies of the legal basis\textsuperscript{420} which in the case of a trust is the trust deed. Consequently, an interested party with granted access could get information of the trust deed. Especially in the case of a registered trust, where no trust deed is accessible via the Commercial Register\textsuperscript{421}, this could permit to interested third parties to gain access to otherwise privileged information on the trust via the Land Register\textsuperscript{422}. To avoid such unwanted disclosure of information the transfer of real property will most likely have a different legal basis than the trust deed.\textsuperscript{423} This separate act of obligation serving as legal basis must then comply with the formalities as set out above and may be accessed by an interested third party.

No alternative may apply to a trust declaration according to art 899 para 2 PGR.\textsuperscript{424} Although the trust declaration is a unilateral act\textsuperscript{425} and may be oral or written\textsuperscript{426} in order to completely create a trust, it must be in writing in order to validly transfer (real) assets

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{417} BGE 111 II 48, 50, decision of 29 March 1985 <www.bger.ch>, where the Court took reference to the notion of the legitimate interest, which derives from the basic principles of „equity“ according to art 4 Swiss Civil Code; with further references to Henri Deschenaux, \textit{Le registre foncier, Traité de droit privé suisse}, vol V (no II 2); BGE 109 II 208, 209, decision of 30 August 1983 <www.bger.ch>.
\item \textsuperscript{418} BGE 117 II 151, 152, decision of 20 March 1991 <www.bger.ch>, where the applicant invoked interest for scientific reasons and was granted access to recorded information not related to his personal family interests; Peter Tour, Bernhard Schnyder, Jörg Schmid and Alexandra Rumo-Jungo, \textit{Das Schweizerische Zivilgesetzbuch} (13th ed, Schulthess2009) § 93 n° 36.
\item \textsuperscript{419} Peter Tour, Bernhard Schnyder, Jörg Schmid and Alexandra Rumo-Jungo, \textit{Das Schweizerische Zivilgesetzbuch} (13th ed, Schulthess2009) § 93 n° 36.
\item ibid.
\item \textsuperscript{421} According to art 952 PGR.
\item \textsuperscript{422} According to the Guidelines of the Swiss Federal Department for Land Register - and Real Property Law (Eidgenössisches Amt für Grundbuch- und Bodenrecht) of 28 June 2008, the [notarised] trust deed has not to be filed as a legal basis of the transfer of real property. Consequently, the trust deed cannot be accessed via the Land Register.
\item \textsuperscript{423} Guillaume, \textit{Eintragung} (n 343) 11; with further reference to Luc Thévenoz, 'Créer et gérer des trusts en Suisse après l’adoption de la Convention de la Haye' in Luc Thévenez and Christian Bovet (eds), \textit{Journée 2006 de droit bancaire et financier} (Schulthess 2007) 51, 64.
\item \textsuperscript{424} Guillaume, \textit{Eintragung} (n 343) 12.
\item \textsuperscript{425} OGH 04 C 322/84-40, decision of 8 January 1987 LES 1989, 3; the Court held that until the enactment of art 899 para 2 PGR with LGBl. 1980, Nr. 39 a trust could be constituted by merely unilateral act. Subsequently the written acceptance of the trustee was necessary in order to validly constitute a trust. Biedermann, \textit{Liechtenstein Trust} (n 7) 363.
\item \textsuperscript{426} Biedermann, \textit{Liechtenstein Trust} (n 7) 363.
\end{enumerate}
\end{footnotesize}
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to the trust. In that case the trust declaration serves as one part of the act in personam, whereas the other is the letter of acceptance. In order to validly transfer the real property to the trust the act in personam must formally contain both, the declaration of trust as well as the letter of acceptance of the trustee. The reason is as follows: without a letter of acceptance a trust has not been validly created and the assets could not be vested in the trustee. Unless the act of creation and the act of transfer of real property are split the trust declaration and the letter of acceptance find entry in the Land Register as legal basis. Again, to avoid access to eventually privileged information the transfer of land should be object of a separate legal basis.

i) Entry of an annotation

The filing for entry of a restraint on disposal according to art 912 para 1 PGR and 538 SR must contain a written declaration of the owner of the real property in question who in the case of a trust is its trustee. As legal basis for the entry art 73 para 2 GBV requires either an extract from the Commercial Register or a certified copy of the trust deed. The declaration of the trustee must follow the formalities as set forth for all entries and consequently must be notarised. Besides, the scope of the restraint on disposal must be made evident. Most interestingly for the discussion of the beneficiaries’ rights (in rem) is the provision that the deletion of the annotation requires the consent of

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427 Biedermann, Liechtenstein Trust (n 7) 363.
428 Dissenting Guillaume, Eintragung (n 343) 12; Guillaume argues that only the letter of acceptance may serve as legal base for the transfer of land. In Liechtenstein pursuant to art 20 para 1 lit a GBV and art 20 para 2 GBV a contract and the notarisation of the signatures of both parties is mandatory, which formally does not allow for a unilateral declaration of acceptance to serve as a legal base for the application of an entry in the Land Register.
429 According to art 899 para 2 PGR the letter of acceptance of the trustee must be in writing which corresponds to the formal requirements of art 37 PGR.
430 See art 899 para 2 PGR (argumentum e contrario).
431 See also Guillaume, Eintragung (n 343) 12.
432 According to art 18 GBV.
433 Art 542 para 1 SR.
434 See art 73 para 1 GVB; besides he may be represented with a notarised power of attorney, which itself must follow the formalities as set out by art 13 GBV.
435 Art 13 GBV.
436 Art 73 para 2 GBV.
the interested parties\textsuperscript{437} of the trust.\textsuperscript{438}

ii) Entry of a note

In default of special provisions for notes, the formal requirements regarding the filing for an entry of a note\textsuperscript{439}, declaring the real property as trust property, follows in principle the same requirements for entries in general.\textsuperscript{440} An application therefore requires a declaration of the owner of the real property which must follow the formal requirements set forth for legal bases\textsuperscript{441}. The owner or a person empowered with a power of attorney may file the application at the land registrar.\textsuperscript{442}

E) Excursus: declaration of self as trustee

The above must also apply for the situation where a settlor declares his wish/intention to hold property as trustee\textsuperscript{443}. Although this can be considered to be a declaration of creation and a disposition, differences must be made between internal and third party effect. Within the former, the transfer from personal to trust property takes effect with taking on the trust obligation with regard to the prospective trust property.\textsuperscript{444} The conveyed property becomes part of the special funds\textsuperscript{445} the trustee administers in his own name.\textsuperscript{446} As previously mentioned this does not have binding effect according to Liechtenstein property law.

In relation to third parties the trust relationship regarding real property only takes effect if prerequisites as provided for in art 912 PGR, an annotation or a note in the Land Register, are complied with. This gains importance for the “transfer” of real property to

\begin{itemize}
\item \textsuperscript{437} According to art 898 PGR.
\item \textsuperscript{438} Art 73 para 3 GBV.
\item \textsuperscript{439} Art 77 GBV.
\item \textsuperscript{440} Art 542, art 544 SR.
\item \textsuperscript{441} Art 13 GBV.
\item \textsuperscript{442} Art 18 GBV.
\item \textsuperscript{443} Biedermann, Liechtenstein Trust (n 7) 363, 399.
\item \textsuperscript{444} ibid 399.
\item \textsuperscript{445} Art 2 para 2 lit a Hague Trust Convention
\item \textsuperscript{446} Art 2 para 2 lit b Hague Trust Convention
\end{itemize}
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the trust within property law. As set out above, art 912 para 1 PGR requires the trustee to be entered in the Land Register as owner of the real property. In cases where a trust is established with a declaration of self as trustee, a transfer of ownership of real property would not be visible from the Land Register, because the previous and the current owner are identical. For the trust to become effective towards third parties the owner of the real property must therefore apply for entry of an annotation or note at the Land Register. The question arises on what could serve as a legal basis for the entry. Since art 899 PGR requires the trust deed to be in writing, the declaration of self as trustee cannot be exempt from that formality. This unilateral trust deed shall serve as legal base for the entry in the Commercial Register or may be deposited there. According to art 73 para 2 GBV an extract of the register or a notarised copy of the trust deed shall serve as legal basis for the entry of the annotation in the Land Register.

In default of special provisions for notes art 77 GBV refers to the general requirements for entries in the Land Register. By doing so the legislator omitted special provisions on trusts based on art 912 para 1 PGR within the section on notes resulting in the application of art 11 et seq GBV. Upon strict application of art 37 SR and 14 GBV the application for entry of a note would require the written declaration of self as trustee to be notarised which consequently would be filed in the folio as legal base and accessible to the public. It may be assumed that this inconsistency in legislature was unintentional and that the registration of a note as mentioned in art 899 para 1 PGR must follow the same formalities as annotations according to art 73 GBV. As a consequence for the filing of the note entry an extract of the Land Register must suffice as a proof of the legal base.

447 From a mere property law perspective art 899 para 4 PGR does not apply in the case of a declaration of self as a trustee.
448 Art 912 para 1 PGR.
449 See also OGH 04 C 322/84-40, decision of 8 January 1987 LES 1989, 3; although the Court refers basically to art 899 PGR, nothing else can apply for the case where a person declares itself as trustee. Consequently no letter of acceptance is necessary.
450 See art 900 PGR.
451 Unless the declaration of self as trustee would be signed in presence of the land registrar (art 13 GBV).
452 Art 541 and 544 SR, art 14 and 15 GBV.
453 See above fn 454.
F) Foreign real property

The previously described scenario does not apply where real property located outside of Liechtenstein is being endowed into a trust that is registered in Liechtenstein. From a property law perspective this does not serve to elaborate on the ownership question since foreign properties are not captured by the Liechtenstein Property Law Act in relation to the Land Register. However, it proves to be the more relevant case in practice with Liechtenstein trusts. This scenario will be briefly outlined according to Liechtenstein law.

Art 911 para 1 and 2 PGR on “Trust Property In General” refer to two assumptions on the allocation on trust property:

- firstly, the dedication of trust property by the settlor or by law; and
- secondly, a list or an inventory of trust property.

Therefore, foreign real property may be considered as trust property out of one of the four mentioned reasons. If foreign real property is claimed to be trust property the question of the applicable law arises. In general art 930 et seq PGR provide for the application of foreign law. The Liechtenstein Courts will examine the law of the country to define whether material law classifies the property as real or as personal. If the foreign jurisdiction classifies the property as real property art 32 IPRG applies for rights in rem on real property to be examined on the basis of the law where the real property is situated. As a consequence, in the case of real property in most cases foreign law applies.

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454 Art 521 para 1 SR.
455 Assumption of lex fori.
456 Art 3 International Private Law Act (IPRG).
457 Art 31 IPRG.
458 Unless the foreign law refers (back) to Liechtenstein law, which then applies according to art 5 IPRG.
G) Civil aircrafts

Ownership of civil aircrafts may only arise upon registration. Pursuant to art 23 Swiss LFG the transfer by contract must be in writing whereas the entry in the register has constitutive effect. On the grounds of the absence of the trust relationship in the Swiss legal system neither the applicable Swiss Federal Civil Aviation Law Act nor the Federal Aviation Register Law Act provides for the annotation or note of a trust relationship. Unlike the law applicable to real estate a corresponding annotation or note of the trust relationship is not permissible. Though, on the basis of the Hague Trust Convention which entered into force in Switzerland on 1 July 2007, foreign trusts are recognised in Switzerland. It is therefore possible and common practice to register aircrafts in the Swiss Aircraft Register with the trustee “as Owner Trustee”. The same must therefore apply to Liechtenstein civil aircrafts. The above seems necessary in order to safeguard a continuity regarding the bona fide principle since art 16 Swiss Federal Aviation Act protects good faith which is based upon entries in the register with regard to transfer of property or creation of a lien.

IV. Personal property

A) The principle of causal tradition

Art 172 SR does not explicitly state whether the the transfer of personal property requires a valid act within the law of obligations and a mode of transfer or just a factual transfer. It is common understanding amongst scholars and practitioners that the principle of causal tradition applies also to personal property. The transfer is therefore
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necessary consequence of the valid\textsuperscript{465} disposition\textsuperscript{466} of the settlor\textsuperscript{467}. In cases of declaration of self as trustee no separate transfer of property will be necessary since the written\textsuperscript{468} declaration to hold the property in trust for the benefit of others will suffice to serve as disposition.\textsuperscript{469} Where the disposition of the settlor is substituted either by operation of law or court decision no transfer will be needed since property will be vested in the trustee without further mode of transfer.\textsuperscript{470} Similarly, if a trust is created upon mortis causa the act in obligation and the disposition naturally fall together and no further disposition is required.\textsuperscript{471}

B) Transfer of possession - the principle of publicity

Personal property is transferred according to art 172 para 1 SR\textsuperscript{472} by transfer of possession. Possession according to art 501 para 1 SR\textsuperscript{473} is transferred by physical delivery of the moveable object itself or of the means which enable the recipient to gain effective control\textsuperscript{474} of it.\textsuperscript{475} The physical delivery shall ensure an external effect so it becomes evident to third parties that the possessionary relationship has changed.\textsuperscript{476} A change of possession indicates a change in interests too because possession in most cases is transferred not abstractly but in order to acquire connected rights.\textsuperscript{477} The recipient then qualifies as the possessor according to art 498 SR\textsuperscript{478} because he exerts

\begin{itemize}
\item Schmid, Sachenrecht (n 226) 277; Biedermann, Liechtenstein Trust (n 7) 364.
\item According to art 899 PGR and art 910 PGR a written agreement, or a trust document.
\item Or in the case of a constructive trust any kind of disposition according to art 898 PGR.
\item Biedermann, Liechtenstein Trust (n 7) 389.
\item Biedermann, Liechtenstein Trust (n 7) 363, 387.
\item e.g. the trustee in bankruptcy in whom the bankrupt's estate is vested.
\item Biedermann, Liechtenstein Trust (n 7) 396.
\item Swiss art 714 ZGB.
\item Swiss art 922 para 1 ZGB.
\item Opilio, Liechtensteinisches Sachenrecht (n 26) I-393.
\item Exceptions apply according to art 503 SR/ Swiss art 924 ZGB (“Transfer of possession without physical delivery”) if a third party or the transferor himself retains possession of it in terms of a special legal relationship.
\item Opilio, Liechtensteinisches Sachenrecht (n 240) I-392.
\item Tuor et al., Das Schweizerische Zivilgesetzbuch (n 287) § 90 N 4.
\item Swiss art 919 ZGB.
\end{itemize}
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factual\textsuperscript{479} power over the object.\textsuperscript{480}

Pursuant to art 509 SR\textsuperscript{481} the possessor of personal property\textsuperscript{482} is presumed to be its owner, whereas this applies to each previous possessor who is presumed to have been the owner of the personal property while it was in his or her possession (para 2). It can therefore be held, that art 172 SR and art 509 SR\textsuperscript{483} establish the principle of publicity of within personal property\textsuperscript{484} and that the physical delivery (with the exceptions mentioned) may have the same function as the register entry of real property.\textsuperscript{485}

The transfer of possession may also be effected without a physical delivery but by mere contract of possession, hence the corresponding manifestation of intention of both, the transferor and the transferee.\textsuperscript{486} The manifestation of intention to transfer possession of objects and its corresponding acceptance may suffice and can occur in four different forms:

- the traditio longa manu according to art 501 para 2 SR;\textsuperscript{487}
- the traditio brevi manu;
- by way of instruction; and
- the constitutum possessorium.\textsuperscript{488}

\textsuperscript{479} As opposed to ownership the transfer of possession being a factual act does not require a valid act in obligation. See BGE 121 III 345, 347, decision of 6 October 1995 <www.bger.ch>.

\textsuperscript{480} Art 498 SR/art 919 ZGB para 1 refers to the factual possession of the physical thing whereas para 2 refers to the possession of rights which manifests in the factual exercise of these rights.

\textsuperscript{481} Swiss art 930 ZGB.

\textsuperscript{482} For the possessor of real property similar applies: art 516 SR/ Swiss art 937 ZGB provides that in respect of land recorded in the Land Register, only the person registered may invoke presumption of title and bring an action for recovery of possession.

\textsuperscript{483} Swiss art 714 ZGB and art 930 ZGB

\textsuperscript{484} Opilio, Liechtensteinisches Sachenrecht (n 240) I-393; Schmid, Sachenrecht (n 226) 16.

\textsuperscript{485} Tuor et al., Das Schweizerische Zivilgesetzbuch (n 287) § 89 N 1 et seq.

\textsuperscript{486} Schmid, Sachenrecht (n 226) 34; Tuor et al., Das Schweizerische Zivilgesetzbuch (n 287) § 90 N 6.

\textsuperscript{487} Swiss art 922 para 2 ZGB

\textsuperscript{488} Another form, the intermediate transfer of property by documents establishing title to goods, mostly used in transportation, can currently be neglected.
i) Traditio longa manu

According to art 501 para 2 SR\textsuperscript{489} the transfer is complete once the transferee is enabled to exercise effective control over the object with the consent of the prior possessor. According to some scholars\textsuperscript{490} this includes cases where the transferee (amongst others)\textsuperscript{491} previously had possible access to the personal property of the immediate possessor\textsuperscript{492} but not yet had exclusive control. Upon corresponding declaration of their intention to transfer the possession the transferee gains exclusive control and hence “new” possessor even if he doesn't exert factual power over the object.\textsuperscript{493} Depending on a valid legal cause for the transfer he then becomes owner of the moveable property since the principle of causal tradition does not apply for the transfer of possession\textsuperscript{494} but for the transfer of personal property.\textsuperscript{495}

With regard to transfer of personal property to a trustee this may not apply and seems of importance for the trustee's liability. In OGH 03 C 46/95 a trustee held (only) an inventory of the trust assets, amongst others a collection of paintings, which according to the Court's findings was never properly\textsuperscript{496} delivered to him. Based on the inventory he pledged the assets in order to secure a credit for the benefit of the settlor. Upon default of payment and realisation of the pledge the assets were not available anymore because they had been unlawfully alienated by a third party. The Liechtenstein Supreme Court held that with the act in rem the trustee must be enabled to exclusively dispose of the

\textsuperscript{489} Swiss art 922 para 2 ZGB.
\textsuperscript{490} See Schmid, \textit{Sachenrecht} (n 226) 34.
\textsuperscript{491} Called “open possession”; see BGE 132 III 155, 159 et seq., decision of 2 December 2005 <www.bger.ch>, with further references to Emil W. Stark, Berner Kommentar, N 37 zu Art. 922 ZGB; Arthur Homberger, Zürcher Kommentar, 1938, N 13 zu Art. 922 ZGB.
\textsuperscript{493} Art 501 para 2 SR/ Swiss art 922 para 2 ZGB; see Schmid, \textit{Sachenrecht} (n 13) 35, with further reference to Emil W. Stark, Berner Kommentar, N 40 et seq. zu Art. 922 ZGB.
\textsuperscript{495} However, although the the traditio longa manu may suffice for the transfer property it does not if these assets were pledged. See art 172 and 365 SR/ Swiss art 714 and 884 ZGB.
\textsuperscript{496} According to art 501 para 1 SR/ Swiss art 922 para 1 SR.
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trust assets. The Court further elaborated that the trustee's power of disposition of trust assets must be transferred in such manner, that unlawful dispositions of the settlor and / or a protector are “excluded”.

With the requirement of “exclusivity” the Court does not just exceed the transfer requirements according to art 501 SR but factually excludes that the tradition substitutes, such as the traditio brevi manu but also the constitutum possessorium suffice as modes of transfer of possession of moveable property to a trustee.

It follows that a mere inventory of (prospective) trust assets cannot practically be considered as secure manifestation of corresponding intentions to successfully transfer possession of assets to a trustee. The trustee cannot be considered to have been enabled to exert exclusive power over the trust assets and eventually, if the trust assets were transferred upon constitution of the trust as sole existing assets, the trust would not have been completely constituted.

The Court's findings seem in incompatible to art 911 para 2 PGR. The statutory legal assumption therein, stating that trust assets included in a schedule or an inventory shall be presumed to be part of the trust property may not substitute the proper delivery pursuant to art 172 para 1 and 501 SR. By focussing on the factual rather than the legal, the Court applies an approximate level of strict publicity comparable to the requirements for pledges on moveable property.

The legislator may exactly intended to circumvent the problem of lack of publicity within the trust legislation by creating a legal assumption pursuant to art 911 para 1 last phrase and para 2 PGR. It seems rather impractical to require a physical delivery, such as an art collection to the trustee with the requirements of excluding unlawful dispositions of the transferor. According to the case law cited, not even the handing over of keys of special premises where a collection may be held, could be ensuring the exclusive factual disposition rights of the trustee, if he did not make sure that the

499 It cannot be concluded, that the Court focussed on the property law aspect of absolute rights since it held, that any unlawful dispositions (not obligations) shall factually not be possible.
500 Swiss art 714 para 1 and art 922 ZGB.
501 As a “means” of delivery for possession according to art 501 para 1 second case PGR.
settlor or any third party had no access. Given the potential case that the settlor might
dedicate assets e.g. a picture to a trust which still remains in his surrounding, the
inventory together with the possibility to access and offhand dispose of it, should
factually suffice to manifest the settlor's intention to transfer possession and
consequently property to the trust.\textsuperscript{502}

Therefore, the criterion must not be the exclusion of factual disposition as the Court
found, but according to Biedermann – the Court even cited him itself\textsuperscript{503} – the exhaustion
of the settlor's power to transfer the property. Biedermann subsidiarily refers to English
common law\textsuperscript{504} which more precisely requires the settlor to have done all in his power
to vest \textit{legal title} in the trustee\textsuperscript{505}. Significantly, and contrary to Liechtenstein case law,
the English common law rule departs from the settlor as stated in \textit{Melroy v. Lord}\textsuperscript{506}:
“It is essential that no further step remains to be taken by the settlor. Where this is the
position the property is regarded as effectively transferred [...]”.

Also in English common law an effective transfer for personal property does not
necessarily require a physical delivery.\textsuperscript{507} In \textit{Jaffa v Taylor Gallery Ltd} the settlor
intended to give a painting, which was in the hands of a third party acting as agent for
the settlor, to his children of whom two were minors. The minors interest were
therefore placed in the hands of trustees with a document.\textsuperscript{508} The transfer was held to be
effective with the declaration of trust, hence the document. The Court held that “it
could not conceive that a physical transfer had to take place and indeed it would be
absurd so to find when one trustee was in Northern Ireland, another in England and
when the third owner was the adult third plaintiff.”

\textsuperscript{502} This however may not be upheld where property law itself restricts the use of transfer
substitutes e.g. to create a pledge. If the Court's findings were restricted to cases where
moveable property was pledged, its findings would have proved to be in line even with art
911 PGR.
\textsuperscript{503} The Court refers to Klaus Biedermann, \textit{Die Treuhänderschaft des liechtensteinischen Rechts
\textsuperscript{504} \textit{Melroy v. Lord} (1861-1871) All ER Rep 783 at 789.
\textsuperscript{505} Biedermann, \textit{Liechtenstein Trust} (n 7) 395.
\textsuperscript{506} \textit{Melroy v. Lord} (1861-1871) All ER Rep 783 at 789.
\textsuperscript{508} It was not further stated whether the document met all formal requirements necessary in order
to effectively transfer the interest. See Philip Pettit, \textit{Equity and the Law of Trusts} (12th edn,
Oxford University Press 2012) 103.
The same must apply for the transfer of moveable property in Liechtenstein law. The statutory rules according to property law are clear and also would be art 911 PGR which enables for the application of a constructive delivery. The transfer is effected by the settlor as stated in art 897 PGR “to whom another person (the settlor) transfers”, not the trustee. Hence, there are no statutory grounds to place the burden of exclusivity - as held by the Liechtenstein Court – for an effective transfer with the trustee.

ii) The traditio brevi manu

The traditio brevi manu is a legal construct for transferring ownership developed to capture cases where the transferee is already in possession of moveable objects of the transferor. As with the traditio longa manu, both parties, the transferor and transferee, must conclude a contract to transfer possession which is basically a corresponding intention.

With regard to the endowment of assets to a (professionally established) trust this constellation seems rather unlikely. However, it would be valid and legally possible to fully transfer property from the settlor to the trustee. In such case the trust settlement or declaration of trust may be considered not just as the obligation but at the same time as the manifestation of intention to transfer possession to the trustee who then becomes possessor and owner at the same time.

iii) Instruction

Art 503 para 1 SR first case provides for constellations where a third party is in immediate possession which shall be transferred in connection with another legal

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509 There is no statutory law providing for these legal constellations.
510 “dependent but immediate possessor” according to art 499 SR/ Swiss art 920 para 2 ZGB; further details see Schmid, Sachenrecht (n 283) 26 et seq.
511 The transferee must be in possession with the consent of the owner.
512 Schmid, Sachenrecht (n 283) 36.
513 In German legal language “Besitzanweisung”.
514 Swiss art 924 para 1 ZGB first case.
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transaction in order to transfer ownership.\(^{515}\) Hence, three persons are involved: the owner, who is intermediate possessor and transferor, the immediate possessor of the object\(^ {516}\) and the transferee, who will upon acquisition of the object the “new” immediate possessor.\(^ {517}\) In order to transfer possession the transferor and transferee conclude a contract of instruction\(^ {518}\), again a corresponding conclusive intention\(^ {519}\) of the contracting parties. Although the possession successfully transfers upon corresponding declaration of the contracting parties\(^ {520}\) independent of informing the immediate possessor, with regard to the third party, the immediate possessor, the transfer is only legally valid, after he had been informed by the “previous” intermediate possessor.\(^ {521}\)

With regard to the creation of a trust the question may arise, whether it is completely constituted upon corresponding declaration to transfer possession or only after the third party had been informed. As previously outlined the settlor must have done everything in his capacity to transfer the property to the trustee.\(^ {522}\) Upon completion of both, on the one hand the trust settlement or declaration of trust and its acceptance by the trustee and on the other hand the agreement to transfer possession the trustee becomes the new owner according to art 172 para 1 SR\(^ {523}\). Though, the settlor has not yet informed the third party holding the assets and the third party may object against dispositions of the “new” owner. The answer may be twofold: the trust can be considered as completely constituted upon transfer of property for all third persons but the one immediate possessor. According to art 912 para 4 PGR a debtor (the immediate possessor can be considered as such) shall acknowledge that a claim forms part of the trust property only after receiving notification to this effect. If that claim would constitute the only trust

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515 Emil W. Stark, Berner Kommentar, N 18 zu Art. 924 ZGB.
516 According to art 503 para 1 SR/ Swiss art 924 para 1 ZGB he possess the object based on a “special legal relationship” which can be an obligation (e.g. a deposit contract) or a right in rem (e.g. pledge). Further see Schmid, Sachenrecht (n 283) 37.
517 See also Schmid, Sachenrecht (n 283) 37.
518 In German legal language “Besitzanweisungsvertrag”.
521 According to case law, the transferee may also inform the immediate possessor as representative of the transferor; see BGE 72 II 351 – 353, decision of 19 September 1946 <www.bger.ch>.
522 Biedermann, Liechtenstein Trust (n 7) 395.
523 Swiss art 714 para 1 ZGB.
Transfer of legal ownership

asset upon creation of the trust, its complete constitution may be questioned because
potentially dependent upon an objection. In such case, the trustee would not be fully
entitled to dispose of the assets because they were not endowed to the trust. 524
Consequently, the existence of the trust could be questioned by the immediate
possessor.

iv) The constitutum possessorium

Very similar to the instruction but only within a two partite relation art 503 para 1 SR 525
second case provides for the acquisition of possession of an object without physical
delivery if the transferor himself retains possession of it in terms of a special legal
relationship. The latter may be any kind of legal relationship allowing for the object to
remain at the transferor who is and remains possessors (e.g. hire, lease, pledge,
etc. 526). 527 Again, transferor and transferee conclude a possessory contract. As a result
three contracts must be distinguished: the trust settlement providing for the legal cause
of the transfer of ownership, the possessory contract and the (e.g.) rental contract. 528 The
possessory contract causes a split of possession: the transfer of independent possession
from the transferor to transferee. The transferor remains dependent 529 possessor, the
transferee independent possessor and upon a valid legal cause new owner (or holder of
the right in rem intended to be transferred) 530 531.

Especially with regard to creditors 532 to whom the transfer of ownership is not evident 533

524 See OGH 03 C 46/95, decision of 1 July 1999, LES 1999, 248, 259.
525 Swiss art 924 para 1 ZGB second case.
526 If for example the settlor endows a trust with a valuable painting, hence transfers possession
and ownership to the trustee but at the same time “rents” it back for it to remain in his house.
527 Schmid, Sachenrecht (n 283) 40; For a special legal relationship it does not suffice to just
accept that the physical delivery of the moveable object e.g. machines will be postponed due
to convenience of one of the contracting parties. See BGE 77 II 127 - 130 et seq., decision of
20 April 1951 <www.bger.ch>.
528 Schmid, Sachenrecht (n 283) 40.
529 Dependent of the transferee's possession.
530 See art 172 para 1 SR/ Swiss art 714 para 1 ZGB.
531 Emil W. Stark, Berner Kommentar, N 72 zu Art. 924 ZGB.
532 For focus on creditors of the transferor see Tuor et al., Das Schweizerische Zivilgesetzbuch
(n 287) § 102 N 7; for focus on the transferee's intention see BGR 88 II 73 – 79, decision of
533 Tuor et al., Das Schweizerische Zivilgesetzbuch (n 287) § 102 N 7.
the application of the constitutum possessorium is restricted pursuant to art 187 para 1
SR\textsuperscript{534,535}.

If as a result of a special legal relationship, the moveable object remains in the
transferor’s possession, this transfer of ownership is null and void in relation third
parties if the underlying intention was to disadvantage them or to circumvent the
provisions governing the pledging of moveable property.\textsuperscript{536}

The intention must be proven for both, the transferor and especially the transferee.\textsuperscript{537}
However, if the intention cannot be concluded from the parties' testimonies, the Court
may subsidiarily\textsuperscript{538} draw conclusions from circumstances\textsuperscript{539} and according to art 187
para 2 SR\textsuperscript{540} shall rule on this at its discretion.

The above mentioned aspect must be taken into consideration not just with regard to the
liability of the trustee but also entails significance for the complete constitution of a
trust. In general, the transfer of possession and property by way of constitutum
possessorium is an admissible means upon creation and existence of a trust. However,
based on the criterion that the complete constitution requires both, a valid act in
personam and a disposition\textsuperscript{541}, the latter seems very much voidable taking into
consideration that case law requires the endowment according to art 897 PGR to be of
exclusive disposition of the trustee.\textsuperscript{542}

The questionability of the Court's reasoning reference is made to the above argument
with the traditio longa manu. For the current mode of transfer the same applies, so that
the measure must be the settlor's effort of having done everything necessary for the
transfer.

\textsuperscript{534} Swiss art 717 para 1 ZGB.
\textsuperscript{535} Art 187 SR/ Swiss art 717 ZGB are providing for the “acquisition of moveable property
without possession” as in contrary to art 501 et seq. SR/ Swiss art 922 et seq. ZGB which
provide for the transfer of possession without physical delivery.
\textsuperscript{536} <http://www.admin.ch/ch/e/rs/2/210.en.pdf> accessed 13 March 2015.
\textsuperscript{537} BGR 88 II 73 – 79, decision of 22 March 1961 <www.bger.ch>.
\textsuperscript{538} BGR 88 II 73 – 79, decision of 22 March 1961 <www.bger.ch>.
\textsuperscript{539} BGE 78 II 211, decision of 13 June 1952 <http://servat.unibe.ch/dfr/pdf/c2078207.pdf>
\textsuperscript{540} Art 717 para 2 ZGB.
\textsuperscript{541} Biedermann, Liechtenstein Trust (n 7) 394.
\textsuperscript{542} OGH 03 C 46/95, decision of 1. July 1999, LES 199, 248, 257.
Transfer of legal ownership

Besides, the constitutum possessorium fully empowers the trustee as legal owner to legally dispose of the trust asset\textsuperscript{543}. However, it is against the nature of this form of constructive delivery to exclude the previous owner, the settlor, who continuously possesses and may factually and unlawfully dispose of the assets e.g. sell it to a third party. If the third party had no knowledge about the moveable objects being trust property it acquires in bona fide and consequently non derivative ownership. In the light of the above cited Liechtenstein case law, the personal property had never been factually transferred to the trustee resulting in the trust being without property. Consequently, the trust had never been legally completely constituted.

\textsuperscript{543} Within his duties as trustee set forth by the trust deed and/or the statutes.
V. Summary

Part IV examined different modes of transfer for types of legal property interests that were identified previously in Part III. Although the trust provisions do not use standard legal terminology of property law to establish a trustee's position to property held on trust, they implicitly refer to and consequently apply the principles of numerus clausus. This must result in the trustee holding a standardised proprietary position pursuant to the Law of Property Act. These findings may not be supported by current case law, which refers in the context of personal property to a common concept of the legislator that sees the trustee not as an owner but as an administrator of trust properties.

With the model of real property transferred to a Liechtenstein trustee it has been demonstrated that there is sufficient legal grounds for the trustee to be considered as legal owner of property transferred upon him. This finds support in art 912 PGR that ensures for the application of the exclusive effect of ownership by the trustee against everyone at large and the principle of bona fide. Consequently, to support the theory of ownership of the trustee, the annotation and the note and their practical entry in the Land Register have been discussed in detail. Besides the in rem character of the annotation, both remedies share the capacity to provide against unlawful alienation of trust property and its effect due to bad faith. This finds reflection in art 912 para 3 PGR which provides for statutory legal basis for the tracing right of the settlor, co-trustees or beneficiaries, of unlawful disposed trust property only where the third party purchase had knowledge of the asset being part of trust property. Such protection could legally and would factually not be possible if the trustee was not the owner of said real property.

In order to give a full perspective the particular registration requirements have been outlined. To highlight the applicability and consistency of the legislators intention foreign real property and civil aircrafts have been discussed under the same set of rules that are applicable to real property. With regard to aircrafts it is not possible to register an annotation or a note. However, in order to secure the principle of bona fide registration of trustee owned aircrafts is possible with the supplement “owner trustee”.

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Transfer of legal ownership

Again, this secures the bona fide principle and proves to be essential for the application of art 912 PGR.

Finally, the transfer of personal property has been analysed. It has been demonstrated that the principles of property law as analysed with real estate may also apply mutatis mutandis for personal property. The Property Law Act's statutes on transfer of personal property by transfer of possession provide for a clear ownership position of the trustee who ideally physically holds the objects. An analysis of the related case law revealed the perils if transfer substitutes are applied.
Part V

Trust property and constitutional protection

I. Introduction

This part addresses the question if the theory of the trustee as owner of trust assets also withholds with regard to the fundamental right of protection of private real or personal property or rights of any kind. In addressing this question, entitlements to apply for its unjustified violation will also be covered.

The present chapter supports the theory that the trust is not a party but that the capacity to be party is either with the trustee as the legal owner of the trust property or, in some specific proceedings, transferred by statute to other interested parties, such as the settlor, the beneficiaries or a co-trustee. In the latter cases the controversial question of ownership of a trust property is greatly independent of the capacity to be party which is always transferred by statute, independent of the structure of trust assets and consequently the degree of separation in Liechtenstein.

544 Herbert Wille, Liechtensteinisches Verwaltungsrecht (Liechtenstein Politische Schriften vol 38, Liechtensteinische Akademische Gesellschaft 2004) 58, with numerous references to case law.
545 ibid 58.
546 ibid 60.
547 Hugo Vogt, Das Willkürverbot und der Gleichheitsgrundsatz in der Rechtsprechung des liechtensteinischen Staatsgerichtshofes, (Liechtenstein Politische Schriften vol 44, Liechtensteinische Akademische Gesellschaft 2008) 36, fn 120: Vogt is of the opinion that the holder of the fundamental right is also entitled to the right of complaint at the Constitutional Court.
548 For dissenting opinion see Bernhard Lorenz, Zur Rechtsfähigkeit der liechtensteinischen Treuhänderschaft in Helmut Heiss, Andreas Kellerhals, Anton K. Schnyder and Francesco Schurr (eds), Schriften des Zentrums für liechtensteinisches Recht (ZLR) an der Universität Zürich (vol 1, Dike Verlag Zürich/St. Gallen 2013) 149 et seq. According to Lorenz based on his interpretation of the statutes (a.o. the right to follow the trust property provided for in art 912 para 3 PGR) the trustee has no substantial interest in the trust property but a mere right to claim for and on behalf of the trust property.
It is necessary to examine the following:

• the trust's capacity to be subject to the fundamental right of protection of private property;

• the capacity to be party, either of the trust or the trustee; and

• the capacity to act as party\(^{549}\) will be examined, focussing on an irrevocable discretionary trust\(^{550}\) in complaint proceedings according to art 15 para 1 StGHG.

II. Capacity to be subject of fundamental rights

The fundamental right of protection of property according to art 34 para 1 LV protects the inviolability of private property. The notion \textit{property} has been interpreted extensively by case law.\(^{551}\) Primarily\(^{552}\), this fundamental right guarantees property as a subjective interest of the respective owner\(^{553}\), who at the same time receives a defensive right.\(^{554}\) Art 919 para 3 PGR entitles the trustee

\[
[T]o \text{ dispose of the trust property in the same manner as an independent holder of rights and duties as, for instance, an owner, a creditor, a member or governing body of a legal entity or partnership or similar entity and he may represent the trust before the authorities in his own name as a party to an action in any capacity including that of an intervener participant, co-summoned person [...]}.\(^{555}\)
\]

\(^{549}\) According to point 1 of the qualification scheme suggested by Höfling. See Wolfram B. Höfling, \textit{Die Verfassungsbeschwerde zum Staatsgerichtshof} (Liechtenstein Politische Schriften vol 36, Liechtensteinische Akademische Gesellschaft 2003) 77 et seq.

\(^{550}\) In order to avoid a clear allocation of entitlements to assets vested in trust.


\(^{552}\) ibid. Vallender and Vogt also mention the inherent "institutional guarantee" of the fundamental right of inviolability of property which serves to protect other freedoms such as the freedom of trade, which will not be further discussed.

\(^{553}\) ibid 700 para 20 et seq, with reference to numerous case law.

\(^{554}\) ibid fn 40.

Despite the reference to the trustee as holder of rights and the assignment of capacity to act as a party on behalf of the trust, it could be questionable from a constitutional legal perspective to simply conclude that the trustee is the owner and therefore subject to the fundamental right of protection of ownership because the Liechtenstein Constitution departs from the protection of the property, not its owner.

The complainant's capacity to be subject of fundamental rights is an abstract prerequisite in order for the complaint to be admitted to the Constitutional Court. All individuals as well as (domestic private) legal entities and partnerships without legal personality may be subject to fundamental rights. Though, legal entities may only be subject to fundamental rights as far as it "corresponds to their legal nature". Specifically for the fundamental right to protection of property according to art 34 para 1 of the Liechtenstein Constitution and art 1 para 1 phrase 1 Additional Protocol No. 1

556 The specific capacity of the complainant to invoke the violation of one or more fundamental right(s) is a substantial question and to be solved in the proceedings. However, in cases where the substantial legitimation to invoke the violation of fundamental rights is doubtful (or not admitted at all) the abstract question may be part of the specific examination. See for German Constitutional jurisprudence: Michael Sachs, Verfassungsprozessrecht (Verlag Recht und Wirtschaft GmbH, Heidelberg 2004) 136.

557 This chapter sets focus on the “Individual Complaint” according to art 15 StGHG.


559 “All” referring to domestic and foreign individuals; see StGH 1977/6, decision of 24 October 1977, LES 1981, 45, 47; Vallender, Grundrechtspraxis (n 551) 705 para 29; with further references to: Wille, Verwaltungsrecht (n 544) 70 et seq; and Höfling, Grundrechtsordnung (n 558) 59 et seq.

560 For a more detailed analysis see Vallender, Grundrechtspraxis (n 574) 67 para 22 et seq.

561 Vallender, Grundrechtspraxis (n 551) 72 para 32, 75 para 39 and 705 para 29; with further references to: Hilmar Hoch, 'Schwerpunkte in der Entwicklung der Grundrechtsprechung des Staatsgerichtshofes' in Herbert Wille (ed), Verfassungsgerichtsbarkeit im Fürstentum Liechtenstein, 75 Jahre Staatsgerichtshof (Liechtenstein Politische Schriften vol 32, Liechtensteinische Akademische Gesellschaft 2001) 81 et seq.; Höfling, Grundrechtsordnung (n 558) 59 et seq.

562 As opposed to the German Constitutional Court (Bundesverfassungsgericht), the Liechtenstein Constitutional Court does not focus on the nature of the respective fundamental right but on the nature of the (legal) entity. See Wille, Verfassungsprozessrecht (n 558) 253; Vallender, Grundrechtspraxis (n 574) 72 para 33.

563 Hoch, Schwerpunkte (n 561) 83; with further reference to StGH 1977/3, decision of 24 October 1977, LES 1981, 41 (43); StGH 1984/14, decision of 28th May 1986, LES 1987, 36 (38); Höfling, Grundrechtsordnung (n 558) 64 et seq.
of the ECHR\(^{564,565}\) this has been previously admitted\(^{566}\).

The trust is neither a legal entity, nor is it a partnership pursuant to the 3\(^{rd}\) Section of the PGR but rather a “special endowment of assets” that lacks legal personality\(^{567}\). The lack of legal personality does not exclude to qualify as a party in complaint proceedings at the Liechtenstein Constitutional Court since it argues that substance prevails over form.\(^{568}\)

In its decision StGH 1998/14\(^{569}\) the Constitutional Court decided on the complaint of a condominium owners' association. Such association is, like a trust, neither a legal entity, nor is it a partnership according to the PGR. Nevertheless, based on findings of Swiss scholars\(^{570}\), the Court held that the nature of the owners association in execution of its duties has been very much “approximated to a legal entity” and that these conclusions are indicated by the association's right to carry a name and its limited legal capacity, also to act in (enforcement) proceedings.\(^{571}\) Thus, the Court referred implicitly to what is known in civil proceedings\(^{572}\) as a *formal party* or a *statutory party*\(^{573}\). Their capacity to be party has been conferred to them by the legal system, or special provisions\(^{574}\). As a result, the Court based its reasoning on formal\(^{575}\) rather than on substantive aspects\(^{576}\).


\(^{565}\) The latter does not have a wider scope of protection than the art 34 para 1 LV and vice versa may not be invoked if interpreted more restrictively by the EGMR itself. See Vallender, *Grundrechtspraxis*, (n 551) 98 para 16 et seq, with reference to StGH 1987/12, decision of 11 November 1987, LES 1/1998, 4 (cons. 6).

\(^{566}\) See Vallender, *Grundrechtspraxis* (n 551) 705 para 29.

\(^{567}\) See title of the 4\(^{th}\) Section of the PGR.

\(^{568}\) Vallender, *Grundrechtspraxis* (n 551) 72 para 33.


\(^{570}\) Arthur Meier-Hayoz, Heinz Rey in: Berner Kommentar, Vorbemerkungen zu den Artikeln 712a – 712t para 44 and para 46.

\(^{571}\) Liechtenstein Property Law Act (Sachenrecht, SR) of 21 December 1922, published in Liechtenstein Law Gazette No 4 of 1 February 1923, art 170.

\(^{572}\) Although originally from Austrian civil proceedings this has been admitted also to be valid for Liechtenstein civil proceedings by the Liechtenstein Supreme Court in its decisions (orders) OGH 7 Rs 97/99-20, decision of 10 September 1999, LES 1/2000, 50; OGH 8 Rs 122/99-27, decision of 2 December 1999, LES 3/2000, 166 (167); see also, Wille, *Verfassungsprozessrecht* (n 558) 465.

\(^{573}\) Günter Schubert, 'Vor § 1, para 2' in Hans W. Fasching and Andreas Konecny (eds), *Zivilprozessgesetze, Kommentar*, vol 2 sub-vol 1 (§§ 1-73 ZPO, 2\(^{nd}\) ed, Manz 2002).

\(^{574}\) ibid para 2 et seq.

\(^{575}\) For dissenting opinion see Wolfram Höfling, 'Adressaten der Grundrechte' in Vallender, *Grundrechtspraxis* (n 551) 72 para 33.

\(^{576}\) By reference to “subordinate” substantive civil law, which itself gives the association a formal
and acknowledged the association's capacity to be subject to fundamental rights from its civil legal qualification as a party.

With regard to trusts case law exists, where trusts have been implicitly acknowledged to be subject to fundamental rights. In StGH 2008/133 a trustee filed a complaint against an interlocutory injunction that prevented the trustee to access trust funds. He claimed the violation of following fundamental rights: right of appeal, denial of justice, the right to be heard before a court, the right to legal equality, the right to protection of property and arbitrary treatment. In favour of the trustee the Court held that the established case law acknowledges the entire freezing of funds as violation of the fundamental right to appeal and referred to its previous decisions on the subject. As a result, the Court did not have to elaborate further on the other fundamental rights, amongst others the right of protection of property. Unfortunately, the cited case law does not explicitly mention trusts but again refers to legal entities.

In StGH 2010/39 the Court implicitly refers to its practice to consider trusts as holder of the fundamental right of appeal. The respondent acting as trustee of a trust was opposing a freezing order that prevented him of accessing trust assets. The Court consented to the Supreme Court's findings that the case law regarding the limitation of preliminary measures to allow for payment of administration fees and legal costs of a legal entity shall also apply to trusts, because their interests are of similar character. From an economic perspective it further reasoned, that “it cannot be expected of a trustee, depending on the situation, but to finance a trust's administration fees and legal costs for years, even though he pursues proceedings in his own name and not for a separate legal entity”.

qualification as party the reasoning becomes formal rather than substantive, besides it focussing on the capacity of being a party rather than (just) the here relevant aspect of being a subject to fundamental rights.

577 StGH 2008/122, decision of 10th February 2009 <www.stgh.li> accessed 23 January 2015. Unfortunately the Court did not elaborate on the legitimacy of the trust but tacitly acknowledged its capacity to file a complaint by deciding on it.


579 non-official translation.

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Hence, the Court acknowledges the existence of a “legal sphere of the trust” different to that of the trustee\textsuperscript{581} and, in a constitutional legal environment, takes account of what the PGR is legally undefined considered as “separate funds”.

However, apart from the conclusion that the separate funds a trustee holds in trust indicate a separate legal sphere, no conclusion can be drawn for a trust's capacity to be subject to constitutional rights. Under consideration of the principle of legal nature, it seems a possible but a rather vague approach to qualify a trust with its own “name” and trust assets by its “nature” as subject to the fundamental right of protection of property.

III. Capacity to be party in proceedings

A) The general criterion of a “party”

On the grounds of the wider understanding of party\textsuperscript{582} and other involved persons or entities as well as the multitude of different types of proceedings at the Constitutional Court there exists, unlike for other proceedings, no general legal definition of a “party”.\textsuperscript{583} As a result, the Constitutional Court has to examine the capacity to be a party separately in every individual case.\textsuperscript{584}

For complaint proceedings according to art 15 para 1 and 2 StGHG Wille, a Liechtenstein practitioner, suggests that, although the statutes use the terminology “applicants” rather than “parties”, the legal terms can be used interchangeably. His reasoning is based on art 41 StGHG. It states, that the individual complaint\textsuperscript{585} must be

\begin{itemize}
  \item \textsuperscript{581} ibid consideration 2.4; explicit wording of the Supreme Court.
  \item \textsuperscript{582} The Constitutional Court has adopted the theory of the substantial party for its proceedings, as opposed to the formal understanding of party as e.g. in civil proceedings. According to the substantial understanding, parties are not just persons formally acting as plaintiffs or defendants, but also include persons who's rights or legal relationship may be immediately affected by a decision. See Walter H. Rechberger and Daphne-Ariane Simotta, \textit{Grundriss des österreichischen Zivilprozessrechts- Erkenntnisverfahren} (8th edn, Manz 2010) 142 para 290 et seq.
  \item \textsuperscript{583} Wille, \textit{Verfassungsprozessrecht} (n 558) 104 et seq.
  \item \textsuperscript{584} ibid 105
  \item \textsuperscript{585} \textit{Individualbeschwerde (Individual Complaint)} which is on specific form of complaint according to art 15 para 1 and 2 StGHG which is open to any individual that claims its fundamental rights according to the Liechtenstein Constitution or the fundamental rights explicitly mentioned in art 15 para 2 StGHG to be violated by an ultimate decision of a final instance of a public authority.
\end{itemize}
filed personally by the parties who also must participate at the proceedings, or eventually must be represented by an attorney at law. He concludes, that complainants are parties. His conclusion is also indicated by Art 16 StGHG which provides for the necessary content of an individual complaint; it refers to the prerequisite of the complainant to prove one's position as a party in previous proceedings subject to the alleged violation of the party's fundamental rights.\footnote{586}

**B) The specific criterion of a “party”**

Each complainant must individually meet specific criteria in order to be admitted to complaint proceedings.\footnote{587} The individual qualification itself contains amongst others the capacity to be party (in the narrow sense)\footnote{588} and the capacity to act in proceedings.\footnote{589} These prerequisites are subject to preliminary examination\footnote{590} at each filing of a complaint.\footnote{591}

**i) The “trust”**

The capacity to be a party in constitutional proceedings may be derived from different sources. As stated before, for an individual complaint according to art 15 StGHG, the complainant may file proof of his position as a party in the previous proceedings. With regard to application of rules for proceedings Art 38 StGHG refers to either special procedural provisions of the law applicable in the specific subject or the respective provisions of the General Administrative Act\footnote{592}. With regard to the capacity to be party,

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586 Wille, *Verfassungsprozessrecht* (n 558) 113.
587 ibid 107.
588 Höfling calls it the legitimacy to complaint in the narrow sense. It is on the question, whether the complainant is entitled to invoke the violation of the fundamental right he specifically based his complaint on. See Wolfram Höfling, *Die Verfassungsbeschwerde zum Staatsgerichtshof* (Liechtenstein Politische Schriften vol 36, Liechtensteinische Akademische Gesellschaft 2003) 78.
589 Wille, *Verfassungsprozessrecht* (n 558) 106.
590 Art 43 and art 40 StGHG.
591 Wille, *Verfassungsprozessrecht* (n 558) 114, 461 et seq.
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the latter refers\textsuperscript{593} to the qualification pursuant to the Liechtenstein Civil Code and other corresponding statutes.\textsuperscript{594} Subsidiarily, the respective provisions of the Liechtenstein Civil Procedures Code\textsuperscript{595} apply in analogy\textsuperscript{596,597}.

The Civil Procedures Code does not provide for a definition but a formal understanding of a “party”. Accordingly, party is any person who claims or defends its legal interests in its own name\textsuperscript{598}, resulting from the general legal capacity.\textsuperscript{599} This applies to all individuals and legal entities and to all those entities to whom the legal system has acknowledged the capacity to claim or defend their interest despite their lack of legal personality.\textsuperscript{600}

According to recent case law of the Constitutional Court\textsuperscript{601}, indicators\textsuperscript{602} for the capacity of the trust to be a party may be found in several statutes: art 916 para 4 PGR and art 920 para 4 PGR. The Court reaffirmed\textsuperscript{603} the Supreme Court's findings and ruled that from a teleological point of view, art 912 para 3 PGR indicates the qualification of a trust as a party\textsuperscript{604}. The Supreme Court\textsuperscript{605} had granted a trust for the capacity to be a party in civil proceedings\textsuperscript{606} although the trust had no “governing body” (trustee) at the time when the claim was filed.\textsuperscript{607} It had held, that with respect to the tracing right of the legally entitled parties\textsuperscript{608} a trust's capacity must be granted in order to allow for a

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{593} In the absence of special provisions within the LVG.
\item\textsuperscript{594} See art 38 StGHG and art 31 para 3 LVG.
\item\textsuperscript{595} Civil Procedures Code (Gesetz vom 10. Dezember 1912 über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten, ZPO) of 10 December 1912, published in Liechtenstein Law Gazette No 9/1 of 30 December 1912.
\item\textsuperscript{596} See art 31 para 4 LVG.
\item\textsuperscript{597} Also Wille, \textit{Verfassungsprozessrecht} (n 558) 463.
\item\textsuperscript{598} Schubert in Fasching, \textit{Zivilprozessrecht} (n 573) Vor § 1 ZPO 237 para 1 et seq.
\item\textsuperscript{599} ibid 237 para 1.
\item\textsuperscript{600} ibid.
\item\textsuperscript{601} StGH 2011/139, decision of 4 September 2012, not published.
\item\textsuperscript{602} The Constitutional Court's emphasise on indicators rather than acutal legal forms of entities, see Höfling, \textit{Verfassungsbeschwerde} (n 588) 84.
\item\textsuperscript{603} It held, that the findings of the Supreme Court “are justifiable”.
\item\textsuperscript{604} ibid point 4.3.
\item\textsuperscript{605} OGH 06 CG.2007.337-117, decision of 1 October 2010 <www.gerichtsentscheide.li> accessed on 12 January 2015.
\item\textsuperscript{606} It qualified the trust as a “collation of assets with the capacity to be party”.
\item\textsuperscript{607} The Supreme Court drew an analogy to art 5 and 6 Enforcement Proceedings Code (Exekutionsordnung, EO) on active an passive legitimacy in enforcement proceedings.
\item\textsuperscript{608} According to art 912 para 3 PGR.
\end{enumerate}
\end{footnotesize}
permissible claim; that it corresponds to previous case law\textsuperscript{609} for claims to be made for the benefit of the trust and not for the previous unfaithful trustee\textsuperscript{610} because the latter would prove paradoxical; and that with regard to the uncertain duration of appointment proceedings it cannot be assumed for the statutes to require a new trustee to be appointed before the tracing right was pursued.

The Court's reference to the lack of a governing body causing a necessity to grant the capacity to be party to civil proceedings seems questionable. A corporate body does not cause (partial) legal personality, hence the capacity to be party but the capacity to act and consequently the capacity to be subject of proceedings\textsuperscript{611}.

\textbf{ii) Trustee}

Although disputed in practice, it seems obvious that the statutes do not explicitly mention a trust's capacity to be party in proceedings but refers either to the trustee\textsuperscript{612} or other interested parties\textsuperscript{613} when it comes to remedies with regard to trust property.

Art 897 PGR, when defining a trust relationship, refers to the trustee as a person, who holds certain trust assets “in his own name as an independent legal owner”. The applied wording contains the two dimensions as stated before: the capacity to be party (claiming or defending in one's own name) and the substantial legitimacy arising from legal ownership.

Most essential for the trustee's capacity is art 919 para 3 PGR. It contains two elements: substantial legitimacy and the capacity to be party. It reads as follows: “Subject to his obligations pursuant to the provisions of the trust instrument,…”

which must be seen as a general reference to art 917 et seq. PGR and consequently a reference to the trustee's liability for breach of trust with regard to proprietary claims

\textsuperscript{609} OGH 02 C 341/87-61, decision of 25 February 1991, LES 1991, 162 et seq.
\textsuperscript{610} OGH 06 CG.2007.337-117 (n 62) cons. 11.2 et seq.
\textsuperscript{611} For a more detailed examination see below.
\textsuperscript{612} See art 919 para 3 PGR.
\textsuperscript{613} According to art 912 para 3 PGR “the settlor, a co-trustee or a beneficiary or, finally, a trustee appointed by the Princely Liechtenstein Court of Justice”.

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subsequent to following or tracing trust property according to art 912 para 3 PGR. Although a breach of trust entitles also to compensation claims according to art 924 and art 925 PGR, systematically within the further scope of art 912 para 3 PGR this cannot be related. The latter claims are based on personal liability of the trustee. They follow the rules of contract law. In a personal claim the qualification of the trustee as party, the defendant, does not rely on the consecutive statutory precision of the trustee as party. This must be only clarified where the trustee's relation to trust property is in dispute. In other words expressed: art 919 para 3 PGR applies for proprietary claims regarding trust estate and is independent of the application of personal claims pursuant to art 924 and 925 PGR.

The trustee's substantial legitimacy as owner according to property law, is ensured by the following “…the trustee shall be entitled to dispose of the trust property in the same manner as an independent holder of rights and duties as, for instance, an owner, a creditor, a member or governing body of a legal entity or partnership or similar entity…”.

Although, this is not a procedural prerequisite to file a claim, the entitlement to dispose guarantees substantial legitimacy. It seems partially redundant to art 897 PGR but can be interpreted as an indicator to clarify the trustee's legal position within proceedings. Had substantial legitimacy not been inserted, the trustee may qualify as a statutory party only, leaving numerous question with regard to ownership of trust property unanswered. However, his qualification as a (formal) party is ensured by the following: “…and he may represent the trust before the authorities in his own name as a party to an action in any capacity including that of an intervener participant, co-

614 See art 924 para 1 PGR: “...liable according to the principles of contract law...”.
615 For a dissenting (non binding) line of argumentation, where art 924 para 1 PGR was interpreted to be a more specific provision to art 919 para 3 PGR, and hence to be set aside according to the doctrine of systematic interpretation see StGH 2013/090, decision of 3 February 2014, GE 2014 p 341 (cons 7.2.6) <www.gerichtsentscheide.li> accessed on 15 January 2015.
617 Schubert in Fasching, Zivilprozessrecht (n 573) Vor § 1 ZPO para 81 et seq.
618 For a more detailed analysis on statutory party see below.
summoned person.”

### iii) Other interested parties - art 912 para 3 PGR

Art 912 para 3 PGR empowers the settlor, a co-trustee or a beneficiary or a judicial trustee, as joint litigants, hence party. Even without further substantial entitlement, these interested parties can in any case be classified as statutory parties. They derive their legitimacy – if not substantially – from this explicit statute. They are entitled, alone or as joint litigant with others, to claim the surrender of trust property, which had previously been misapplied by the trustee in breach of trust, or take action on grounds of unjust enrichment for the benefit of the trust assets.

The latter notion “for the benefit of trust assets” has caused some interpretation as of the capacity of the trust to be party. As opposed to the Constitutional Court's interpretation, also in this context there is no room to give rise to a “trust” to be party. The term “for the benefit of the trust” is a procedural necessity to empower every single beneficiary to pursue the right to follow or trace and claim for trust property. If the claim was not filed for the benefit of the trust estate, then, the claimant, potentially a beneficiary, would solely be entitled and could execute such entitlement, leaving other beneficiaries empty handed in which case, the trust instrument, would most likely be violated.

The plaintiffs are defined by statutes, as is the defendant. According to the prevailing principle of two parties in civil procedures law, only two parties are allowed. The claim for restitution of assets according to art 912 para 3 PGR must therefore be independent of the question of who is holding the trust property. In contrary to binding case law, where the restitution of property to trust estate to the trustee in breach of trust is

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620 Rechberger and Simotta, Zivilprozessrecht (n 582) 167 para 324.

621 StGH 2011/139, decision of 4 September 2012, not published.

622 Independent of their classification.
considered to be paradox, it may be concluded, that the restitution is to be made to the trust estate independent of whom is trustee, being the trustee in breach or newly appointed trustees.

**iv) Other interested parties – further provisions**

With relation to bankruptcy proceedings of the trustee art 915 para 5 PGR provides for the settlor or the personal representatives of the latter, a co-trustee or beneficiaries to act as *joint litigants* for securing trust assets where a trustee had mixed trust and private assets.

With relation to creditors of trust assets art 916 para 1 PGR refers to personal liability of the trustee for the debts incurred “by him on behalf of the trust”.

With relation to a trustee's own reimbursement art 920 para 1 PGR refers to his entitlement for necessary expenses and costs incurred “by him in the interest of the trust”.

**IV. Exclusion of the trustee and other interested parties as a legally empowered litigant**

**A) Trustee**

Where a plaintiff acts in *his own name* as a party but claims a foreign right, judicature has developed the concept of a legally empowered litigant. This is the case where substantial legitimacy and the right to conduct proceedings is separated. Though, the empowered litigant is considered to be party not representative because he acts in his

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623 In detail see below point.
624 In german language known as “Prozessstandschaft”.
625 Rechberger and Simotta, *Zivilprozessrecht* (n 582) 48.
626 ibid.
627 ibid.
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own name, a prerequisite of the legal definition of “party”\textsuperscript{628}. The notion\textsuperscript{629} empowered litigant\textsuperscript{630} was thought to have been first introduced by Josef Kohler, a scholar in the 19\textsuperscript{th} century, who argued, that with the right to dispose of property and the right to act as a part is connected.\textsuperscript{631} He found that “...despite the process lacking the quality of a disposition it has similar effects and may lead – like a disposition – to changes of ownership. [...] His (the statutory) process has effects on the property due to his rights in the property”\textsuperscript{632}. Central to Kohler’s idea is the discretionary power over property.

Although, the discretionary empowerment is doubtful and not entirely accepted amongst scholars, the legal empowerment\textsuperscript{633} has been developed\textsuperscript{634} and is often applied in cases of managed assets.\textsuperscript{635} Examples for empowered are officially appointed asset managers, such as the appointed liquidator, the appointed administrator in compulsory administrations\textsuperscript{636} or in cases where creditors claim for compensation of company interests from board members\textsuperscript{637}. It also includes certain participants of a company claim for its interests from other participants, board members or CEOs.\textsuperscript{638} All these circumstances are characterised by the split of statutory entitlement to litigate without substantial entitlement to the interest pursued.\textsuperscript{639}

\begin{thebibliography}{99}
\bibitem{628} Schubert in Fasching, \textit{Zivilprozessrecht} (n 573) Vor § 1 ZPO, 276 para 81. Schubert refers to the lack of “active legitimacy” to claim.
\bibitem{629} As Kohler mentioned himself, the concept was previously known to civil procedures. He refers to art 236 german Civil Procedures Code (Zivilprozessordnung, ZPO), equivalent to todays § 235 Liechtenstein Civil Procedures Code. He first introduced the notion “empowered party” as a procedural consequence of what he called in civil law the concept of “Dispositionsniessbrauch”, a certain form of right in rem, where ownership and use of property are “split”.
\bibitem{630} “Prozessstandschaft”\textsuperscript{104}
\bibitem{632} ibid (inofficial translation).
\bibitem{633} Legal empowerment contains two aspects: empowerment by procedural law or by substantial law, whereas the latter is currently of interest, since art 919 para 3 PGR is substantial law.
\bibitem{634} Schubert in Fasching, \textit{Zivilprozessgesetze} (n 573) Vor § 1 ZPO, 276 para 81.
\bibitem{635} Klaus Schreiber, ‘Die Prozessführungsbebfugnis im Zivilprozess’ (2010) 10 JURA 750, 751.
\bibitem{636} ibid.
\bibitem{637} Rechberger and Simotta, \textit{Zivilprozessrecht} (n 582) 149 para 299; with reference to § 84 para 5 Austrian Stock Corporations Act (Aktiengesetz, AktG), enacted with the Federal Law Gazette No 98/1965 of 6 May 1965, as amended.
\bibitem{638} ibid; with reference to § 48 para 1 Austrian Private Limited Liability Companies Code (GmbH Gesetz), enacted with Imperial Law Gazette No 85/1906 of 15 March 1906, as amended.
\bibitem{639} ibid.
\end{thebibliography}
On first sight, the above outlined pattern may correspond to art 919 para 3 PGR where the trustee is empowered to safeguard interests in the trustee's own name as a party but for the trust. This excludes a trustee's qualification as representative\textsuperscript{640} of the trust. Also with regard to the central idea of the discretion over the trust asset the empowerment seems applicable, since the discretion is transferred to the trustee.\textsuperscript{641}

However, as legal owner\textsuperscript{642} of the trust assets the trustee does not safeguard foreign interests but has substantial legitimacy to the trust property which he possesses to execute the trust according to the deed. Only partially and temporarily in cases of breach of trust these interests are conferred by statutes\textsuperscript{643} to other interested parties such as the settlor, the beneficiaries, co-trustees or judicial trustees.\textsuperscript{644}

\textbf{B) Other interested parties}

The settlor, the beneficiaries, co-trustees or judicial trustees cannot be considered (merely) as statutory parties. Art 912 para 3 PGR provides for a proprietary claim for those who may have a substantial interest in trust assets. The interest in ownership may be contentious between the plaintiff and may accrue entirely to one or several persons acting as plaintiff. However, no interest may be assigned to the trust estate. Consequently, the substantially interested parties must be qualified as “full” party and not as statutory party.

\textbf{V. The capacity to be party in bankruptcy proceedings}\textsuperscript{645}

With regard to art 916 para 4 PGR the consideration of the trustee as party in proceedings seems consistent. The statute provides for \textit{special bankruptcy} to be held

\textsuperscript{640} Therefore the misleading translation “representative”.
\textsuperscript{641} “the trustee shall be entitled to dispose of the trust property in the same manner as an independent holder of rights and duties as, for instance, an owner”.
\textsuperscript{642} See art 897 PGR and art 919 para 3 PGR.
\textsuperscript{643} Art 912 para 3 PGR.
\textsuperscript{644} See above point III) B) iii.
\textsuperscript{645} As opposed to the UK Liechtenstein does not yet distinguish between insolvency and bankruptcy proceedings.
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over trust assets; though, if the creditors of the trust assets are not fully satisfied, claims for compensation for loss must be filed against the trustee. Again, the statutory law does not refer to a trust's capacity to be party; quite contrary it refers to the trustee as bankrupt\textsuperscript{646} and to the creditors of trust assets\textsuperscript{647}, but in any case not to the trust as bankrupt.

Attention may be given the notion “special bankruptcy”. Neither the present Liechtenstein Bankruptcy Act\textsuperscript{648} nor its predecessor\textsuperscript{649} contains a definition of special bankruptcy. However, it can be assumed that a common understanding of special bankruptcy existed at the time the statutes were enacted.\textsuperscript{650} As von Gönner, a German scholar, wrote in his draft for a Bankruptcy Code in 1815, it is the substantial civil law which determines when special bankruptcy proceedings take place but the proceedings follow the general bankruptcy rules.\textsuperscript{651} According to his draft, special bankruptcy

\textsuperscript{646} See marginal note of art 915 PGR.
\textsuperscript{647} See marginal note of art 916 PGR “Creditors of trust assets”, as opposed to art 915 para 5 PGR referring to the trust or the bankrupt's estate (but here of the trustee in person) as liable party.
\textsuperscript{649} Concurs-Ordnung für das souveräne Fürstenthum Liechtenstein vom 1. Januar 1809.
\textsuperscript{651} ibid.
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proceedings\textsuperscript{652} can be understood as bankruptcy proceedings on a separate part of the assets of the bankrupt only and only for certain creditors who are entitled to these.\textsuperscript{653}

Although the previous may just serve as auxiliary argument and is no proof the Liechtenstein legislator's intention, it seems to correspond to the contemporary understanding of the current Liechtenstein legislator. With reference to the special bankruptcy mentioned in art 916 para 4 PGR the Liechtenstein legislator argues (in accordance with von Gönner's draft) that the proceedings “will follow the provisions of the bankruptcy proceedings” and finds further that they “may be similar to the bankruptcy of a company.”\textsuperscript{654} However, it was explicitly held that no demand exists for explicit legal definition of the notion “special bankruptcy” in the (current)\textsuperscript{655} Bankruptcy Act.\textsuperscript{656}

By virtue of absence of separate provisions in the current Liechtenstein Bankruptcy Act the capacity to be subject to bankruptcy proceedings follows the rules of the general legal capacity\textsuperscript{657} and is consequence and part of the capacity to be bearer of rights and obligations according to private civil law.\textsuperscript{658} As previously demonstrated the trust, although potentially bearing a name, may not acquire real or personal property or rights of any kind in its own name. The statutes\textsuperscript{659} refer to “debts incurred by the trustee on behalf of the trust”, which reflects the procedural aspect of the trustee's rights and duties to what is generally outlined in art 897 PGR, where the trustee is mentioned as the “bearer of rights in his own name”.

As a consequence, in bankruptcy proceedings the trustee as personal debtor must be

\textsuperscript{652} Also “particular- or partial bankruptcy”.
\textsuperscript{653} Von Gönner, \textit{Entwurf} (n 672) chapter IX § 1 para 3.
\textsuperscript{654} BuA No 69/2014, 54.
\textsuperscript{655} The current analysis is based upon the Liechtenstein Bankruptcy Act of 17 July 1973 (Konkursordnung, KO), published and enacted with Liechtenstein Law Gazette No 45/2 of 1 October 1973. According to non public sources the Liechtenstein Government is currently working on a new draft of a Bankruptcy Act, which is presently not publicly available. However, for the present understanding and reasoning this is not of any influence.
\textsuperscript{656} BuA No 69/2014, 54.
\textsuperscript{659} art 916 para 1 PGR.
considered as the bankrupt\textsuperscript{660}, \textsuperscript{661} whereas the trust property represents the “bankrupt's estate”\textsuperscript{662}. The bankrupt's estate does (primarily)\textsuperscript{663} not include the private sphere of the trustee\textsuperscript{664}. It is art 916 para 4 PGR that ensures for the “separate funds”\textsuperscript{665} to gain capacity to be subject of special bankruptcy proceedings, which follow the general rules of bankruptcy.\textsuperscript{666} In other words, although one person, two bankruptcies must be separated, as must be the assets: the trustee's private\textsuperscript{667} and the trust's.\textsuperscript{668}

The right to dispose of the trust property, now called the bankrupt's estate, is vested by law\textsuperscript{669} without any further conveyance in the trustee in bankruptcy. He is appointed by court order and has sole and exclusive discretionary power over the bankrupt's estate.\textsuperscript{670}

It is the legal competence of the trustee in bankruptcy which is subject to a broad discussion in theory, mainly in Austria and Germany, the former providing for subsidiary legal sources for Liechtenstein law, especially in procedural matters.\textsuperscript{671} 672 In

\begin{itemize}
\item \textsuperscript{660} In German legal language \textit{Gemeinschuldner}.
\item \textsuperscript{661} Buchegger in Buchegger, \textit{Insolvenzrecht} (n 657) § 1 para 40.
\item \textsuperscript{662} In German legal language \textit{Konkursmasse}.
\item \textsuperscript{663} See art 916 para 1 and 4 PGR which explicitly refers to the liability of the trustee for any remaining debts not covered by the bankrupt's estate.
\item \textsuperscript{664} Buchegger in Buchegger, \textit{Insolvenzrecht} (n 657) § 1 para 40.
\item \textsuperscript{665} Explicitly ensured by art 916 para 4 PGR.
\item \textsuperscript{666} Buchegger in Buchegger, \textit{Insolvenzrecht} (n 657) § 1 para 40.
\item \textsuperscript{667} As in “not part of the bankrupt trust assets”.
\item \textsuperscript{668} This must be considered the logic consequence of the person acting in their respective quality either for their own interest or for the interest of the trust. The latter would also explain why art 915 para 4 PGR provides for the case where trust and the bankrupt's assets aren't clearly separated and allows for the preferential treatment of parties with interest in trust assets, which otherwise contradicts strict hierarchy of classes of interests pursuant to the art 41 et seq KO. For latter, see also Heinz Josef Stotter, ‘Zur Rechtsstellung des Masseverwalters nach liechtensteinischem Recht’ [1982] LJZ 1, 5.
\item \textsuperscript{669} art 16 para 1 KO.
\item \textsuperscript{670} Buchegger in Buchegger, \textit{Insolvenzrecht} (n 657) § 1 para 41.
\item \textsuperscript{671} Re Austria see Stotter, \textit{Die liechtensteinische Konkursordnung (KO)(2nd ed, ex jure Verlagsanstalt 1990) XXV et seq}; also Elisabeth Berger, \textit{Rezeption im liechtensteinischen Privatrecht unter besonderer Berücksichtigung des ABGB, Rechtsgeschichte und Rechtsgeschehen}, vol 14 (Lit Verlag 2011) 105 et seq.
\item \textsuperscript{672} ibid; with numerous citations for Austrian and German sources. Basically there exist four theories: 1.) the trustee in bankruptcy holding public office; 2.) the trustee in bankruptcy as representative; 3.) the trustee in bankruptcy as body of the bankrupt's estate; 4.) the trustee in bankruptcy as a neutral person not representing any interest. For the English lawyer it may seem primarily not understandable because it being a trustee and the trustee being a legally defined person. However, above discussion in Austrian bankruptcy law is consequence of a terminological issue: the trustee in bankruptcy is called “administrator of the bankrupt's estate”. Neither procedural law, nor material law does explicitly define the term “administrator”. So the name does not allow for the legal classification.
\end{itemize}
Liechtenstein it was a practitioner, Judge Stotter, who first examined the legal position of the trustee in bankruptcy and established the theory of him being a trustee according to art 897 et seq PGR which was consequently followed by the Supreme Court. He examined the position of the trustee in bankruptcy with relation to the creditors, the bankrupt's estate and the bankrupt. Stotter concluded, that the trustee in bankruptcy is a specific form of a statutory trustee intended and provided for by the Liechtenstein legislator with art 898 para 2 PGR that provides as follows:

[I]f the law does not make special provision for such legal relationships or nothing otherwise results from the special circumstances, the regulations relating to the trust relationship concerning, in particular, the status of the trust property in the case of levy of execution and writ and bankruptcy proceedings shall be applied analogously to the legal relationship between the holder of assets or rights and the third party.

It may indeed prove a viable and consistent solution to apply the general trust provisions to the trustee in bankruptcy. The fact that he acts as a judicial trustee in official duty, does not affect his legal position as trustee. As opposed to a trustee according to art 897 et seq. PGR his liability is restricted to the bankrupt's estate. Where he acts under instruction of the court, official liability must prevail.

However, for the trustee's capacity it is common practice to consider him an “administrator” of the bankrupt's estate according to art 4 KO. Based on Austrian
sources Liechtenstein case law has established that within civil proceedings relating the bankrupt's estate it is the estate to which the capacity to be party accrues. In the relevant case at the Supreme Court to file no 02 CG.2012.455 a trustee and plaintiff pursued claims against the estate of a bankrupt of whom he was the trustee in bankruptcy. The Liechtenstein Supreme Court held in accordance with Austrian case law, that the bankrupt's estate has to be considered as legal subject of the proceedings in whose legal sphere the proceedings have impact, and to whom the trustee's in bankruptcy actions are accountable to. It concluded that therefore the principle of two parties is not violated and that such claim must be admitted. Based on the fact that there is one natural person acting in two capacities, the Court ruled that there is “only” a potential conflict of interest.

Unfortunately, this may prove to be an unnecessary inconsistency with the above theory. If the trustee in bankruptcy is to be considered a trustee, the bankrupt's estate must consequently considered as trust property, based on the absence of special statutes of the Bankruptcy Code or Civil Procedures Code which would provide for different application according art 898 para 2 PGR. As a consequence, the trust estate cannot be considered to gain capacity to be party but merely as a separate fund of the trustee in bankruptcy who himself may represent the trust before the authorities in his own name as a party to an action in any capacity including that of an intervener participant, co-summoned person.

Also with regard to the bankrupt, this approach may seem consistent. Upon commencement of the bankruptcy proceedings the bankrupt loses his capacity to act in

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682 OGH 02 CG.2012.455, decision of 6 December 2013, LES 2014, 54; Stotter, *Liechtensteinische Konkursordnung* (n 671) XXV et seq.
683 âOGH 6 Ob 145/02w (n 681).
684 Also Stotter, *Liechtensteinische Konkursordnung* (n 671) 29.
685 OGH 02 CG.2012.455, decision of 6 December 2013, LES 2014, 54; thereof it concludes, that the correct title of the party representing the bankrupt's estate must be: “XY as trustee in bankruptcy for the bankrupts estate of the bankrupt NN”.
686 ibid.
687 See art 919 para 3 PGR. That sentence one of art 919 para 3 PGR refers to the trustee's obligations according to the trust settlement and does not contradict the above theory. The trustee in bankruptcy is simply not bound by the settlement but by his duties according to the Bankruptcy Act (esp. art 4 KO), which prevails according to art 898 para 2 PGR (“special provisions clause”).
proceedings. However, according to current theory and practice it is the trustee in bankruptcy who is considered to be his legal representative. Theoretically, in civil proceedings both, the trustee in bankruptcy and the bankrupt, hence the trustee of the trust may be heard as parties. Though, parties as opposed to witnesses cannot be forced to attend hearings or to give testimony. Therefore, it is established common practice to hear the bankrupt as witness. This practical correction of statutory law shall prevent the trustee in bankruptcy from liability for lack of evidence and not to facilitate abusive practice of the bankrupt.

However, with perspective on the bankrupt's position, the result according to Liechtenstein law may be the same but more consistently argued. As Stotter already reasoned, it is the trustee in bankruptcy acting in his own name with effect against everybody, hence as party; it follows that the same applies for civil proceedings regarding the bankrupt's estate which excludes the bankrupt to be party. As a result, he can only be considered to be witness and is subjected to coercive measures ensuring appearance and testimony. Art 372 para 3 ZPO providing for statutory grounds for the bankrupt's qualification as party could systematically be set aside by art 898 PGR.

Therefore, it would be stringent to deviate from Austrian doctrine and case law which has no comparable legal construct to the trust and to fully acknowledge trustee's in bankruptcy position as a party and not the bankrupt's estate.

VI. Capacity to act as a party

Legal entities are granted the capacity through their company bodies or by way of

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<td>Schubert in Fasching, Zivilprozessgesetze (n 573) Vor § 1 ZPO para 6.</td>
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<td>ibid. para 6.</td>
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<td>See art 378 ZPO.</td>
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<td>See art 380 para 3 ZPO.</td>
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<td>Stotter, Rechtsstellung des Masseverwalters (n 668) 1 - 3.</td>
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<td>See art 380 para 3 ZPO.</td>
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<td>On the grounds of the basic legal principle: lex posterior derogat legi priori.</td>
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<td>Stotter, Rechtsstellung des Masseverwalters (n 668) 1 - 5.</td>
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qualifying their bodies as legal representatives. It is the specific legal provisions or the entity's statutes which define, which person may act as the respective legal representative in the proceedings. Again, the trust is no legal entity and consequently has no bodies. With regard to trusts art 919 para 3 PGR explicitly empowers the trustee as legal “representative” in the quality of a party. It is the latter to whom the capacity to act in proceedings accrues. Consequently, a separate derivation of the capacity to act as a party at the Constitutional Court is not necessary, since it basically refers to and follows the rules of the Civil Procedures Code.

699 Wille, Verfassungsprozessrecht (n 558) 467 et seq.
701 A representative does not claim in his own name. See ibid.
702 Höfling, Verfassungsbeschwerde (n 588) 94.
703 See art 38 StGHG and art 31 para 4 LVG.
704 Wille, Verfassungsprozessrecht (n 558) 466 et seq.
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VII. Summary

Part V dealt with whether the theory of the trustee as owner of trust assets can be upheld in a constitutional legal environment, specifically with regard to the fundamental right of protection of property. According to case law there exists a separate legal sphere of the trust different to that of a trustee. However, no final conclusion may be drawn from the Court's findings to whether this separate legal sphere may suffice for a trust to be subject and holder of rights. Consequently, the procedural analysis resulted in the conclusion that the capacity to be party in proceedings derives from civil procedures and follows a formal approach, rather than a substantial. According to the Court formal indicators exist within trust statutes that point out a trust's capacity to be party despite the “missing” legal personality.

The Court's reasoning is based on the lack of a “governing body”. This predominantly applies in cases where the right to follow or trace the trust property shall not depend on the unfaithful trustee or the previous appointment of a new trustee. This theory seems questionable. A corporate body does not cause (partial) legal personality, hence the capacity to be party, though the capacity to act and consequently the capacity to be subject of proceedings. Rather, the PGR offers numerous indicators to allow for the assumption that a trust can not exist without a trustee or any other interested party that are legitimised by statute to pursue interests with regard to the trust assets. Nevertheless, subsequent analysis has demonstrated that neither the trustee nor other interested parties can be considered as statutory parties, because they act in their own interest.

These findings are also applicable for bankruptcy proceedings. Although Liechtenstein case law has established that within civil proceedings relating the bankrupt's estate it is the estate to which the capacity to be party accrues, it has been demonstrated that this legal construct drawn from Austrian case law, seems unnecessary for Liechtenstein purposes. The trustee in bankruptcy may classify as a judicial trustee pursuant to art 898 para 2 PGR. As such they may obtain the necessary legal capacities of a party that have seized to exist for the former trustee of the trust.
Concluding remarks

A Liechtenstein trust or trust relationship is created upon an act in personam and an act in rem. The principle of causal tradition requires a written proof of the intention of the parties to create a trust and entrust the trustee with property. A Liechtenstein trust is defined and characterised by rights and duties of the trustee. No abstract definition of a trust applies. The basic set up of duties of trustee's with regard to assets entrusted upon him are to be found in art 897 et seq. PGR, although some provisions may only qualify as referrals to statutes of different acts. The applicability of these acts depends on the specific type of asset under review. For physical objects, being them real or personal property, art 897 and art 898 PGR (implicitly) and art 899 para 4 PGR refer to the applicability of the Liechtenstein Property Law Act. This civil legal act is also based on the principle of the list of closed estates. Accordingly, property interests are either unlimited, known as ownership, or limited. Possessory interests and detention, which are two further legal interests, have not been further pursued. Consequently, transferring legal interest in both, real and personal property, is subjected to these two categories of property interests. Upon review of the example of real property the transfer of ownership may only be successful upon entry in the Land Register, a public register ensuring the public knowledge and faith of legal interests in real property. A successful transfer of real property from the settlor to the trustee must result in the trustee being entered in the Land Register and consequently being marked as the civil legal owner. Limitations or indications thereof are subject to special forms of entries, the note or the annotation, whereas their legal effect varies but does not alter the basic right of ownership. The standardised proprietary position of the trustee as owner may not be supported by current Liechtenstein case law. However, an in depth analysis has demonstrated the cross references within the relevant judgements result in circular reasoning that is not exhaustive.

The transfer of proprietary interests has also been analysed for personal property.
Personal property is successfully entrusted to a trustee by transfer of possession. The latter can be either by physical delivery or a substitute form. The case law on personal property is clear, the trustee must have exclusive power of control over the assets. Without the latter he may be held liable in the event of unjustified alienation of the property or the trust could held to be void, if the initial trust property had not been validly transferred. The trustee must therefore receive ownership of the assets transferred.

The above results was consequently analysed under a constitutional legal and a civil procedural legal environment, that must provide for the effective protection of the property transferred. The trustee must be able to act as party to be able to pursue the legal interests in the property transferred upon trust. As a legal consequence he can only do so by acting in his own name to excercise full rights (and duties) conferred upon him, not just by the trust settlement, but by the Property Law Act. It is insufficient for a trustee to act as a statutory party. As for opposing interests with the settlor and/or beneficiaries, one must refer to a legally transferred interest and procedural role. Further research may be necessary to reflect on how the rights to trace or follow the trust property according to art 912 para 4 PGR intertwine in the above.

In conclusion, it seems legitimate under a contemporary legal understanding to state that the Liechtenstein Law of Property Act confers an unrestricted right in rem to the trustee of a Liechtenstein trust and consequently he may be considered as the owner of the trust assets. It is the trustee's right in rem which enables for the fundamental right to protection of property as well as for the trustee to act as party in court proceedings. If the civil law concept of ownership corresponds in all aspects to the 'ownership' of a English common law trustee may remain open at this point and may be difficult to prove from a historic point of view. Yet, in my opinion a deviation from this perspective seems neither permitted by the Liechtenstein Law of Property Act nor does it further the practicability of the Liechtenstein trust. Practicability and consequently legal certainty must be ensured also in light of the states' signatory of the Hague Trust Convention desire to establish common provisions and a common understanding to facilitate the mutual recognition of trusts. Whether or not this absolute assumption can be upheld
Concluding remarks

with regard to beneficiaries and their right to trace or follow the property must remain open at this point and may be subject to further scientific analysis of Liechtenstein trust law.
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<tr>
<td>ABGB</td>
<td>Allgemeines Bürgerliches Gesetzbuch, Civil Law Code of 1 June 1811, published in Liechtenstein Law Gazette No ASW of 1 June 1811.</td>
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<tr>
<td>AG</td>
<td>Aktiengesellschaften</td>
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<td>Art</td>
<td>Article</td>
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<tr>
<td>BBl</td>
<td>Schweizerisches Bundesblatt</td>
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<td>BGE</td>
<td>Amtliche Sammlung der Entscheidungen des Schweizerischen Bundesgerichts</td>
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<td>Schweizerisches Bundesgericht</td>
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<td>Bericht und Antrag</td>
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<td>Cons.</td>
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<td>Ed. / Eds.</td>
<td>Editor / Editors</td>
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<tr>
<td>EGMR</td>
<td>Europäischer Gerichtshof für Menschenrechte</td>
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<td>ELG</td>
<td>Entscheidungen der Liechtensteinischen Gerichtshöfe</td>
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<td>Erw.</td>
<td>Erwägung</td>
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<tr>
<td>Fn.</td>
<td>Fussnote</td>
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<tr>
<td>HTÜ</td>
<td>Haager Trust Übereinkommen (Haager Übereinkommen über das auf Trust anzuwendene Recht und über ihre Anerkennung), Convention on the law applicable to trusts and their recognition, concluded on</td>
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1 July 1985.

ibid ibidem


LES Liechtensteinische Entscheidungssammlung


LGBI Landesgesetzblatt

LJZ Liechtensteinische Juristenzeitung


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No Number

N (margin) Number

OBE Order of the British Empire

OGH Oberster Gerichtshof

öOGH österreichischer Oberster Gerichtshof

para Paragraph


RGBl. (österreichisches) Reichsgesetzblatt

RIS Rechtsinformationssystem

Rz Randzahl / Randziffer(n)

SchlIT PGR Schlussabteilung des Personen und Gesellschaftsrechts


SR Systematische Sammlung des Bundesrechts


SZ Sammlung Zivilsachen

TrUG Treuunternehmensgesetz (Gesetz über das Treuunternehmen und andere Ergänzungen des Personen- und Gesellschaftsrechts), Trust

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<tr>
<td>UCITS</td>
<td>Undertakings for Collective Investments ins Transferrable Securities</td>
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<td>VGH</td>
<td>Verwaltungsgerichtshof</td>
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<td>ZGB</td>
<td>Schweizerisches Zivilgesetzbuch, Swiss Civil Code of 10 December 1907, enacted on 1 January 1912, status as of 14 July 2014.</td>
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<tr>
<td>Ziff.</td>
<td>Ziffer(n)</td>
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Declaration of originality

I hereby declare, that this thesis is my own work and has not been submitted in any other form for any other degree (Master or Doctorate) or diploma at any university or other institute of tertiary education. Information derived from the published and unpublished work of others has been acknowledged in the text and a list of references is given in the bibliography.

Vaduz, 12 June 2016

_______________________
Christoph B. Gaßner
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