

Trusts

Maltese Trusts

Trust law in Malta has recently been through an extensive overhaul which culminated in the implementation of the Trust and Trustees Act of 2004 (Laws of Malta, Chap. 331). Prior to the Trust and Trustees Act of 2004, Maltese residents could not set up a trust governed by Maltese Law, although foreign trusts were recognised in Malta under the Recognition of Trusts Act 1994 (Laws of Malta, Chap.374) which enabled Malta to ratify the Hague Convention on the Law applicable to Trusts and their Recognition (The Hague Convention 1985).

Maltese law may be chosen as the law governing the said trust and the settlor may also be a Maltese resident.

Under the 2004 Act, trusts can be governed either by Maltese or Foreign Law and the trustees, if resident or operating in Malta, must be registered as an approved trustee with the MFSA. Foreign trusts may be governed by the settlor's choice of law in accordance with the freedom of choice allowed by the Hague Convention on Trusts in this regard.

Fiduciary relationships

The New Trusts Law has also introduced a whole new revamped area in respect of Fiduciary Obligations which apply where a person (*'the fiduciary'*) owes a duty to protect the interests of another person, or holds exercises control or powers of disposition over property for the benefit of other persons, including when that person is vested with ownership of such property for such purpose. It would also apply where such person receives information subject to a duty of confidentiality.

The trustee shall thus be bound by the overriding general duties to carry out his obligations with *'utmost good faith'* and to act honestly in all cases. These duties are not capable of modifications. It is only prejudice to such general duties that the New Trusts Law specifies other duties that can be altered or excluded, by express provision of law or any instrument in writing.

Therefore, the Trustee's role is naturally central, since it is the trustee who acts as full owner of the trust assets in his dealings with third parties albeit in the interests of the beneficiaries and in accordance with the trust instrument. The trustee may also delegate his powers. Any third parties who acquire trust property from a trustee in good faith and under onerous title will be considered to have acquired with full title.

Who can act as Trustees

Persons may carry on the activities as trustees either in a professional or in a private capacity.

Any person, whether an individual resident or operating in Malta, or a corporate trustee registered or operating in Malta, who receives property upon trust or accepts to act as a trustee or co-trustee of a trust and who:

- receives or is entitled to remuneration for so acting, or
- does so on a regular and habitual basis, or
- holds himself out to be a trustee;

shall require authorisation by the MFSA in terms of the Act irrespective of the proper law of the trusts they hold and whether or not at all or part of the trust property is in Malta.

Any person, whether individual or a company may apply in writing to the Authority to be authorised as a professional trustee. The Authority may grant authorisation upon being satisfied that the conditions laid down at law have been met. Such authorisation may be general or may be restricted to particular specified activities.

An application for authorisation shall be made in the form and manner required by the MFSA and shall furthermore:

- contain or be accompanied by such information and particulars, in addition to those required by law, as the Authority may require as may be prescribed;
- be verified in the manner and to the extent required by the MFSA, or as may be prescribed;
- contain the address in Malta for service on the applicant of any notice or other document required or authorised to be served on him by or under the Act;
- be accompanied by such fee as may be prescribed in respect of the authorization applied for.

Corporate applicants must ensure, for example, that this is permitted by the objects of the company and that its name and actual activities are, in fact, compatible and connected with the services of trustee. Furthermore, the directors of, and any person having a direct or indirect interest in, the company, are individuals who are 'approved persons'. Finally, the directors must not be less than two in number.

Tracing of trust assets

The remedy of tracing trust property is also available under the New Trusts Laws without prejudice to any rights which the beneficiaries may have against the defaulting trustees personally. This remedy shall apply both in the case of property which has been alienated in breach of trust as well as in respect of property into which the original trust assets have been converted, with the exception of property in the hands of a '*bona fide*' purchaser for value and without notice of the breach of trust.

Protector

The New Trusts Law also recognises the possibility of having a Protector in the context of a Maltese trust, being a trust having Maltese law as the proper law. Subject to the terms of the trust, the Protector is deemed to have the powers to appoint a new or additional trustee, to remove a trustee, and to require the trustee to obtain the Protector's consent before exercising a power or discretion. The Protector shall not be deemed to be a trustee.

Setting up a Trust

- *Documents requested from settler as well as any known beneficiaries of trusts to be formed*

In this case the following documents are required by the Licenced trust company:

- completed personal questionnaire
- copy of passport
- two suitable character references, one of which being from a bank of standing;
- police conduct certificate (where such is available)
- curriculum vitae, providing suitable information also of business experience
- funds/asset provenience.

- *Further documents requested from retiring trustees of a trust (where applicable)*

- confirmation by retiring trustee of identity, nationality and domicile of settlor and beneficiaries;
- explanation concerning circumstances surrounding termination of present arrangement;
- the existence or otherwise of any letters of wishes, or any other factor possibly limiting or qualifying the discretion of the trustees;
- the existence or otherwise of any protector or other figure having a role in normal decision making processes of the trustees;
- a statement regarding the state of the trust and its property, past decisions taken, and results.

On receiving acceptable information, and if deemed desirable, a services agreement may also be drawn up, detailing inter alia professional secrecy rules, channel of communication etc.

Taxation of trusts

The taxation of income attributable to trusts and all matters relating to taxation upon the settlement, distribution and reversion of property settled in trust are regulated by the Income Tax Act.

The tax authorities would generally '*look through*' a trust applying the principle of substance over form, in the sense that income attributable to a trust is not charged to tax in the hands of the trustee if it is distributed to a beneficiary. Also, when all the beneficiaries of a trust are not resident in Malta and when all the income attributable to a trust does not arise in Malta, there is no tax impact under Maltese tax law. Beneficiaries are charged to tax on income distributed by the trustees. Income attributable to a trust that is not so distributed to beneficiaries is charged to tax in the hands of the trustee at the rate of 35%.

A careful tax assessment would therefore need to be carried out at the various stages of a trust's life, that is, upon creation, during its daily administration, upon transfer of beneficial interest and on termination or distribution of the trust property. The normal tax rules would then be applied depending on the nature of the trust property, that is, whether it is chargeable property or otherwise. The tax authorities also allow an election for a particular trust to be treated like a company for tax purposes.

How are Trusts considered for VAT purpose? - As the Trust itself merely consists of property and/or other assets, there is no economic activity carried on and therefore it is outside the scope of VAT.

How is the Trustee treated for the purpose of VAT? - Since the Trustee services essentially consist in the management and administration of assets of which, in terms of Trust law, the

Trustee is the legal owner, it is considered that any sums that the Trustee is entitled to appropriate from the Trust assets by way of remuneration do not constitute a consideration for services rendered. Therefore no economic activity is deemed to be carried out, where such remuneration is specified under the terms of the deed of the Trust.

Other tax laws and regulations such as Capital Gains and Duty on Documents and Transfers may have an impact on the taxation of trusts and trustees. Furthermore, Malta is also signatory to a number of Double Tax Treaties that may apply in the circumstances.

Trusts used in Commercial Transactions

The New Trust Law identifies a number of commercial situations within which the use of trusts would attract more favourable treatment. These include security trusts, unit trusts or collective investment schemes and securitisation, amongst others.

One of the great attractions of the trust for the transaction planner designing a business deal is the convenience of being able to absorb into the ground rules for the business deal, those fundamental and well-articulated principles of fiduciary law that protect trust beneficiaries of all sorts. These attractions have made the trust a reputable alternative to other devices, such as contract and incorporation, whenever the relationship to be established is too delicate or too novel.

Malta – the Right Jurisdiction

In reality, the more important considerations in the choice of the right jurisdiction would be the stability of the jurisdiction and its legal and professional services, and the level of legislation. Malta has made a name for itself in this area offering lower costs when compared to other jurisdictions but with a high degree of professional legal and support services.

Setting up a trust may today serve far beyond its traditional use as an institution primarily intended for estate planning. With the right guidance and a proper understanding of the legal and practical implications of trusts, persons may enjoy their benefits, in a flexible, confidential and yet regulated and transparent environment.