

TRUSTS IN MALTA



Fenech & Fenech
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Background

Whilst being a civil law jurisdiction, Malta has a fully-fledged trust law in place. Indeed Malta ranks among the few civil law jurisdictions that have developed the concept of equity by integrating it with an intrinsically civil law legislative system.

A trust involves a transfer of property of any kind by the settlor to the trustee who holds and controls the said property, as owner, but entirely for the benefit of the beneficiaries or for a charitable purpose.

Trust relationships are formed for many reasons and purposes, which has led many professionals in the industry to label trust relationships, somewhat incorrectly, as 'products'. It is impossible to set out an exhaustive list of types of trust. A settlor may generally tailor a trust to achieve any purpose as long as it is not against public policy, illegal or in contravention of certain fundamental tenets of trust law. Within these limits, the purpose for which trusts may be used is limited only by the imagination of the various parties concerned, as well as their professional advisers. Trusts may be set up as discretionary trusts or fixed trusts. Typical trusts include:

- general asset protection trusts;
- matrimonial property trusts;
- testamentary trusts;
- special needs trust; and
- charitable trusts.

Applicable law

The terms of the trust would identify the law applicable to the trust. Furthermore through the adoption of the Hague Convention on the Law Applicable to Trusts and on their Recognition, Malta recognises trusts having a foreign proper law.

Where the proper law of a trust is foreign law, the validity of the trust, its construction, its effects and the administration of the trust shall be governed by such foreign law and shall be so recognized and given effect to in Malta in accordance with the Hague Convention on the Law Applicable to Trusts and on their Recognition.

Effects of Trust

The primary effect of a trust is that the trust property is distinct and separate from the personal property of the trustee. Nevertheless, the trustee has full power and responsibility to handle trust property in accordance with the trust terms. The trustee has the power and duty to administer, employ and dispose of the trust property in accordance with the terms of the trust deed, and will be held accountable for all that is done in this regard.

The trust property is segregated from the trustee's personal property, in that it remains unaffected by the trustee's bankruptcy - personal creditors of the trustee have no recourse against the trust property, nor does it form part of the trustee's matrimonial property, or of his/her estate upon death.

Rights of Settlor

The settlor must be of age, have full capacity to contract and a free disposition of the assets settled on trust. While imposing fiduciary obligations upon the trustee in favour of the beneficiaries, trusts do not leave the settlor with any rights in relation to the trust property - except as specifically provided for in the Trusts and Trustees Act. The settlor is simply the 'donor' and is removed from the picture (unless the trust fails and a resulting trust is created in the settlor's

favour). The Trusts and Trustees Act lists the settlor's rights (which may be supplemented by the trust deed) as follows:

- The settlor has the power to seek court directives as to trust validity;
- The settlor has the right to a variation of terms and revocable trusts where the trust deed so provides;
- In cases of trust termination, interest lapses or no existing or possible beneficiary, the trustee holds the trust property for the settlor (or his or her heirs) absolutely; and
- It is the trustee's duty to provide the settlor with information, subject to the terms of the trust deed.

Office of Protector

The protector is typically a person who enjoys the settlor's trust (e.g. the family lawyer). The protector is granted various rights regarding trustees, although the law makes it clear that "in the exercise of his or her office, the protector shall not be deemed to be a trustee". Subject to the trust terms, the protector typically has the power to:

- appoint new and/or additional trustees;
- remove trustees; and
- require trustees to obtain the protector's discretion (including approval) in relation to particular matters e.g. purchase / sale of trust property.

Rights of Beneficiaries

A person shall not benefit unless he or she is mentioned by name or is ascertainable by class or by relationship to a person alive or dead.

Children not yet born or conceived may be beneficiaries.

A beneficiary has an entitlement in or to the trust property and these rights are enjoyed subject to the terms of the trust and the law. The rights of the beneficiary are personal and are regarded as movable property. Subject to the trust deed, the beneficiary may sell, charge or deal with his or her interest in any manner, provided that this is done in writing. The beneficiary has the right to information from the trustee and may seek court directives regarding the validity of the trust. The beneficiary may also disclaim his or her interest or part thereof.

Taxation of Trusts

Generally, where the settlor and beneficiaries are not domiciled / resident in Malta and where the trust assets are situated outside Malta, no Maltese income tax (or transfer duty) is payable on:

- settlement;
- gains or income generated as a result of day-to-day administration;
- distribution;
- reversion; and
- the disposal of beneficial interest.

However, where the settlor and/or the beneficiaries are domiciled / resident in Malta for tax purposes, the principle of tax transparency usually applies. A Maltese trust may also be used in a tax efficient manner to hold shares in Maltese or non-resident companies or other entities.

Trusts may also, in certain circumstances, opt to be taxed as Maltese resident companies.

The firm's Tax Department is available to advise clients with respect to

particular structures they may wish to put into place for estate / tax planning or other purposes.

FENECH & FENECH ADVOCATES

Fenech & Fenech Advocates is one of Malta's largest and longest established law firms with a predominantly international clientele.

The firm's Trusts & Foundations Group, composed of specialised partners and associates, has acquired considerable experience over the years in relation to the settlement and administration of trusts. Accordingly, this team is available to advise and guide clients (and their advisors) wishing to settle property on trust.

Together with the Fenlex Group (a corporate and trust services group closely affiliated to the firm), our organisation may provide the full range of services relative to the settlement and ongoing administration of trusts as well as of any underlying companies or other entities. Services provided include: trusteeship (through our licensed trustee company Fenlex Holdings & Services Ltd.), registered address, trust administration, fiduciary shareholder, directorship services, company secretarial services, corporate and trust maintenance and administration services, accountancy services, banking support, income tax and VAT compliance, amongst others.

Three teams of professionals, organised into the Corporate Services Department, the Accounts Department and the Operations Department, have been servicing international business clients for over 25 years and accordingly our organisation has the necessary experience and expertise required to provide clients with a 'one-

stop shop' service, together with any legal advice and assistance that the client may require in relation to its local operations

For more info kindly contact:

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