

## THE REVISED LAWS ON TRUSTS IN MALTA

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The revised Maltese law of Trusts is now in force. Unlike the previous model where all of Maltese trusts law could be found in a single Act of Parliament, called the *Trusts Act 1988* (as amended in 1994), the new trusts law is now to be found in a various laws. This is so because trusts were originally a ring-fenced offshore product and are now one of the institutes in the domestic legal infrastructure. The main law on trusts remains the revised Trusts Act, with its special focus on trusts. This has been renamed as the *Trusts and Trustees Act*.

### **The Trusts and Trustees Act**

The Act deals with some concepts in a detailed manner when previously there were no provisions. Likewise various rules have been eliminated to “domesticise” the law. New definitions, such as “approved jurisdiction” and “approved person”, “charitable purpose” and “commercial transaction” have been added<sup>2</sup>. Several definitions such as “nominee company” have been eliminated as one of the purposes of this review was to comply with OECD and FATF requests for the elimination of the nominee company and ring-fencing.

### *Charitable Trusts*

A definition of “charitable purpose”, which is so important for the establishment and operation of charitable trusts, is now included. This means any charitable and philanthropic purposes and includes the advancement of education, including physical education and sports, the advancement of religion, health, culture, arts

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<sup>2</sup> See Article 2(1), Trusts and Trustees Act (“TTA”)

and heritage and social and community advancement. It also includes the promotion of human rights, conflict resolution and reconciliation but does not include a political purpose, which is defined as the promotion of a political candidate or a political party or the promotion of changes to law or policy except when of direct concern to the achievement of the charitable purpose. The importance of this addition is certainty. The limitation of duration of trusts to 100 years does not apply<sup>3</sup> to charitable trusts. The requirement that beneficiaries be ascertained or ascertainable does not apply to charitable trusts<sup>4</sup> and the duty of the trustee to provide information to beneficiaries in a charitable trusts context is different<sup>5</sup>. Any ambiguity on what is “charitable” could result in difficulties.

### *Commercial Transactions*

A second important definition is that of a “commercial transaction” which includes securities offerings, securitisation, grant of security, collective investment schemes, employee benefit schemes, syndicated or multi-creditor transactions, insurance policies, timeshare and multi-property structures. The purpose for such a definition is to clearly establish the rule that, in these contexts, the rights and duties of trustees and beneficiaries are allowed to be freely regulated by the trust instrument<sup>6</sup>. The only limitations are the rules on failure of trusts<sup>7</sup> and the exclusion of liability or indemnities for the trustees own fraud, wilful misconduct or gross negligence<sup>8</sup>. The effect of these rules is to make certain the principle of freedom of contract in these cases where the parties are treated as being able to protect their own interests and where the fiduciary element of such trusts is weak and may be displaced by contractual agreements. This will ensure that Maltese law is very predicable when it is used in the context of commercial transactions, particularly relating to liability of trustees.

### *Definition of a Trust*

The definition of a trust in Article 3 has remained largely intact but now the requirement that the trustee be the “owner” of the property has been expressed,

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<sup>3</sup> See Article 12(2), TTA

<sup>4</sup> See Article 9(4), TTA

<sup>5</sup> See article 29(8), TTA

<sup>6</sup> See Article 6(6) which ensures that foreign law trusts used in commercial transactions shall operate “in accordance with the express terms of the trust instrument.” See also article 21(7) and 29(12), TTA

<sup>7</sup> In terms of Article 11, TTA

<sup>8</sup> See the Proviso to Article 21(7), TTA

mainly because the term “holds” traditionally used in this context was considered ambiguous and easily be confused with deposit or mandate, where fiduciary obligations can feature without a trust existing. A trust exists where the trustee “holds, as owner...” The same article has also been amended to make sure that the only “purpose trusts” which can exist under Maltese law are the charitable trusts and no others. This law makes it clear that there was no intention of allowing non-charitable purpose trusts to be created under Maltese law. The trend seen in some offshore jurisdictions has not been followed. A new sub-article (4) has been added to this article 3. A fundamental legal effect of trusts is being expressed clearly in the law: third party rights are blocked over trust property. A new sub-article (5) implements a principle in the Hague Convention that public authorities must allow trustees to record the fact that they act as trustee in transactions and a new sub-article (6) now states the other important effect that a trust gives rise to fiduciary obligations in favour of *the beneficiary* and that the settlor no longer enjoys rights over the trust property, except limitedly as provided by law<sup>9</sup>. Again Maltese law has not followed the trend in some offshore jurisdictions to allow greater settlor control.

### *Hague Convention*

Malta has been a party to the Hague Convention on the Law applicable to Trusts and their Recognition since 1994 and a special law had been enacted<sup>10</sup> to implement the Convention in domestic law at a time when Malta had no domestic law on trusts. Since 1994, trusts have been used in domestic transactions very similarly to what has been happening in Italy. The issue of validity of such trusts “interni” has not really been doubted in the commercial sector and even in the Courts. In a recent case<sup>11</sup> a foreign law trust by a resident of Malta in relation to immovable property in Malta, with a Maltese trustee, was the subject of an application for a prohibitory injunction. No doubts were raised about the effects of the trust and the Court rejected the application to interfere in the trustees’ discretionary powers.

The Recognition of Trusts Act has now been merged into the TTA and Article 5A, parts of Article 6 – 6(1), (2) and (3) – and parts of Article 6A – 6A(1) in particular – basically repeat the old law.

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9 For instance the law imposes a duty on the trustee to provide full information to the settler only as expressly provided for by the terms of the trust; see article 29(1)(b), TTA

10 The Recognition of Trusts Act, 1994 (“RTA”)

11 See *iWorld Group Europe Holdings plc vs. Bettina Vossberg (1st Hall, Civil Court; 7.08.2004)*. - Reported in “*Maltese Cases and Materials on Trusts and Related Topics*”, (Malta 2004) at page 45

### *Recognition extended to all types of trusts*

Now that Malta is a trust jurisdiction, the recognition of foreign law trusts is no longer limited to express trusts, “*but also in relation to any other trusts of property arising under the law of another country.*”<sup>12</sup> Thus Malta now recognizes all types of trusts including oral, constructive or resulting trusts created under a foreign law, such as English law. This was considered necessary because it would have been inconsistent to recognize all types of trusts in domestic law and then recognize only some types when governed by foreign law. This will help make Malta a more attractive jurisdiction in cross border financial and security structures involving trusts.

### *Maltese domiciliaries using foreign law trusts*

The second set of issues arise because since 1994 Maltese persons could validly use trusts for all their affairs and have them governed by a foreign law. When this happens the law of their domicile, being Maltese Law, will come into play on certain issues and one can have potential conflict. This has been dealt with in great detail in the revised law. The Civil Code will basically prevail where mandatory rules are at play and no circumvention of the law of the domicile on succession and other important issues may take place. The innovative approach to the issue is to be found in Article 6B which introduces a set of conflict management rules which are consistent with the way the Civil Code already deals with internal conflicts, such as that between inter vivos donations or wills and legitim. These tools include principles like the non-failure of the trusts and severability, the benefit of discussion and the power of the trustee to reduce the trust property.

### *Foreign domiciliaries settling both Maltese and foreign law trusts*

On the hand we have the opposite case of foreign domiciliaries who may use either Maltese law or a foreign law for their trusts. In this case it is the law of their domicile which should apply to succession and other patrimonial issues and not the Maltese Civil Code. This therefore results in a bifurcation in the rules. When the settlor is domiciled in a common law jurisdiction, issues of conflict are unlikely to arise. When the settlor is domiciled in a civil law jurisdiction, the same conflicts as may arise in Malta may occur. Article 6B, providing conflict management rules, operates as necessary and this also applies to the enforcement of foreign judgments in Malta<sup>13</sup>. The rules are now as follows:

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<sup>12</sup> See Article 5(2), TTA

<sup>13</sup> See article 6A(7), TTA

*Common law domiciliaries*

When the trusts of these settlors, eg. English, are governed by Maltese Law, the TTA will apply to their trusts but the Civil Code mandatory provisions and the prevalence rules will not apply in any manner<sup>14</sup>. If their trusts are governed by a foreign law, eg. English Law, then the TTA applies only to recognition and the effects of the trusts and the Maltese Civil Code mandatory provisions and prevalence rules do not apply<sup>15</sup>. These rules find reflection even in the Maltese *lex situs* when the trust property is immovable property in Malta. The Civil Code has now been amended to ensure that when a person is domiciled in a country which does not have rules on legitim or testamentary incapacities connected to reserved or maximum portions, then such rules will not even apply to immovable property acquired by such persons in Malta<sup>16</sup>. This ensures that the law of the domicile of an English person will continue to apply even to the Malta estate, thus making Malta more predictable as a location for foreign residents from common law states. The wide freedom of disposition they have under their laws will be respected and the split, which used to arise in practice, between their worldwide estate and their Malta estate will be avoided.

*Civil Law Domiciliaries*

In this case the Courts *may* apply the law of their domicile, eg. Italian Law, and so mandatory provisions in that law may be applied, always subject to Article 6B on conflict management. Maltese law, therefore, does not take the aggressive approach of some offshore centres which seek to block the application of the laws of legitim and other mandatory rules<sup>17</sup>. On the contrary, Maltese law allows foreign mandatory rules to be applied and then subjects the case to conflict management rules which are likely to be the same type of rules that will be found in the internal civilian system under which the problem arises. It is believed that this will make Maltese law a much more acceptable option to regulate trusts for persons based in Civil Law systems as it will not indicate any attempt by the settlor to circumvent mandatory rules of his home territory. Furthermore the outcome of potential conflicts relating to property located in the country of his domicile, eg. Italy, will be far more predictable as there are clear rules on how

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<sup>14</sup> See Article 6A(3), TTA

<sup>15</sup> See Article 6A(5), TTA

<sup>16</sup> See Article 958G(1)(b), CC

<sup>17</sup> Maltese law used to do this in the Offshore Trusts Act but the relevant provision has now been deleted and it is only reflected in the rule on property in Malta which applies when the settlor is not domiciled in Malta and there are no such mandatory rules in his own legal system

the situation is to be managed by the Trustee and the courts, to the extent the foreign Courts are directed, by their own conflicts rules, to apply the proper law of the trust (i.e. Maltese Law).

The relevant time for determining domicile is the time of the creation of the trust by the settlement of the property and any changes in the domicile of the settlor subsequently taking place will not affect the disposition.<sup>18</sup>

### *Types of trusts*

One of the most important developments in the revised law is the acceptance of all modes for the creation of trusts, in particular by oral declaration. This is critical for the integration of trusts within the legal system.

Constructive, judicial and resulting trusts are all recognized at law though it ought to be appreciated that the constructive trust under Maltese law will not be as powerful a tool in the hands of the Maltese Courts as it is sometimes perceived to be in English law. Constructive trusts are limited to context of a breach of trust and do not arise generally when a person acts in a fiduciary capacity and there appears to be the need for the trusts law infrastructure to strengthen remedies.

### *Beneficiaries*

The provisions of the law relating to beneficiaries have been revised substantially. Beneficial interest, and its status at law, is naturally a critical aspect of the institute and so it has been addressed in more detail.

Article 9 establishes that the beneficial interest is an entitlement “in or to the trust property”. It then provides that such beneficial interest is a right personal to the beneficiary and is determined by the terms of the trust.

Sub-article (8) states that when a power is granted to a trustee to add a person as a beneficiary, such power will be valid only if such person is identifiable by name or forms part of a class of persons who are “reasonably individually identifiable”. This makes it impossible to have an open ended power without parameters as is the case in some trust laws and is akin to the English rule of administrative workability. The indication of the persons who can be added can be in the trust deed or in another written instrument signed by the settlor, whether binding or not on the trustee.

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see Article 6A(5) TTA and Article 958G(2)CC

### *Protective Trusts*

One of the aims of the new law was to support cases of disability as trusts provide a much better solution to such situations that have been possible under the Civil Law. The provisions on protective trusts have been extended further to ensure that assets under a protective trust, when for the maintenance of the beneficiary or as a pension, enjoy immunity from garnishee in the hands of the trustee by third parties<sup>19</sup>.

### *Revocability of Trusts*

Two new rules have been inserted on revocation of trusts to deal with possible ambiguities. Article 15(4) states that when trusts are settled by more than one settlor then they can be revoked only with the express consent of all settlors and Article 15(5) establishes the default rule that unless the trust is expressly stated to be revocable or capable of variation, the settlor may not revoke or vary the trust instrument.

### *Trustees and their Duties*

More detailed regulation of trustee duties appears in Article 21. The old obligation to “enhance” the value of trust property has been removed and the duty to safeguard trust property has been subjected to reasonableness and the express terms of the trust.

On the duty to segregate, the law now clarifies that where the trust deed permits (and in all cases of fungible property, such as listed securities) the trustee may place trust property in common pools of identical assets in clients’ accounts.<sup>20</sup>

The duty of trustees to provide accounts to beneficiaries has been made clearer<sup>21</sup>. The concept of a “blind trust” where rights of information are suspended is now dealt with expressly in the proviso to Article 21(4).

### *Beneficiary Rights to Information*

Article 29, relating to rights of information, has been substantially reviewed and expanded to make sure that access to information from trustees is unambiguous and as many persons as possible have the right to seek information. These include

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<sup>19</sup> See Article 13(1),(d), TTA

<sup>20</sup> See Article 21(5), TTA

<sup>21</sup> See Article 21(4) combined with Article 29 on rights of information of beneficiaries

the Court, the settlor (subject to the terms of the trust saying so), the protector and any beneficiary. The right to information has been strengthened by a general obligation on the trustee to inform beneficiaries of their entitlement, in writing, within a reasonable time of his accepting to act as trustee<sup>22</sup>. This applies even to beneficiaries subject to a discretion and even to persons forming part of a class of beneficiaries who may enjoy property under the trust. There are no rights of information for persons who may be appointed beneficiaries in terms of a power granted to the trustee<sup>23</sup>.

It was recognised, however, that there could be cases where the provision of information would have to be controlled. Article 21(3) states that the terms of the trust may expressly determine when and how beneficiaries are to receive information about their entitlement under a trust. Furthermore Article 21(4) states that in the case of a discretionary trust, the trust instrument may suspend the duty to inform such beneficiaries of their entitlement until a discretion in their favour is actually exercised, but if the deed prohibits notifying beneficiaries of their potential entitlement under a trust, including that they form part of a class, then such prohibition shall be valid until the settlor dies. After the settlor dies the trustee must inform all beneficiaries, including those who form part of a class, of their entitlement.

Article 29(10) makes it clear that the suspension of the duty to inform beneficiaries of their entitlement shall not reduce the rights of beneficiaries to be fairly considered or the liabilities of the trustees towards such beneficiaries in terms of the Act.

### *Third Parties dealing with Trustees*

That trustees are owners of trust property and are to be treated as such for all intents and purposes is clear. However the culture in some countries, particularly in Civil Law countries, to seek to verify authority and its limitations is real. In the new Maltese law there is clear evidence of an effort to overcome this sort of attitude and the revised Article 40 goes a very long way in this regard. Sub-article (4) introduces the concept of a certificate issued by the trustee containing basic representations on which a third party can rely. It is a crime for a trustee to make statements which are not true.

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<sup>22</sup> See Article 29(3), TTA

<sup>23</sup> See Article 29(11), TTA

*Fast Track Approval for Foreign Licensees*

The new law introduces a fast track system of notification for trustees who are already licensed as trustees in an approved jurisdictions. This fast track system is of particular interest to professional trustees operating out of different centres who wish to consider setting up an operation in Malta too.