



THE MALTA PRIVATE TRUST - EXPLANATION OF ITS CHARACTERISTICS AND USES

Malta, traditionally a civil law jurisdiction, has adopted the trust law into its legislation and permits therefore not only the establishment of trusts, but also accepts and recognises foreign trusts and integrates the provisions of the Hague Convention on the Law Applicable to Trust and their Recognition. The Maltese law defines the concept of a trust as a “legal institute” where the settlor places the ownership of his assets to the trustee for the benefit of the beneficiaries. Trusts can be an important tool in any financial planning and can best be used for wealthy individuals who reside and carry on business in a sophisticated and ordinarily taxed economy, who wish to place a proportion of their assets in a trust under the control of a trustee. The concept of trusts has also extensively expanded into the commercial world particularly as a pre-requisite of every business transaction is the protection from the insolvency of a business partner (for more information please see our brochure to the use of Commercial Trusts <https://www.mandaris.com/malta/publications/>). The distinctive feature of a trust is the separation of legal ownership and beneficial ownership of the assets in the trust fund, the latter focusing on the enjoyment of the property.

The Trust in simple Terms

In brief, a classic trust is a relationship wherein a person (the settlor) transfers any type of property to another person (the trustee) so that this manages and controls the property for the benefit of a third person, known as the beneficiary, either with a fixed or discretionary interest. In particular trusts can be used to:

- Transfer assets to future generations
- Simplify legal proceedings, tax situations on succession or transfer of assets as well as probate and notarial formalities
- Protect assets in times of adverse political events i.e. wars, excessive expropriation, social or political persecution
- Administer and distribute assets both during the settlor’s lifetime and after his death
- Distribute income and capital to meet specific expenses i.e. education, medical or in emergency
- Create special funds for minors or people with disabilities
- Generally as a substitute for a Will
- Plan and optimize the tax exposure by placing a part of the assets under the control of a Trustee.
- Protect assets as part of a risk management policy

Malta offers the additional attraction of setting up charitable purpose trusts. In a trust set up for charitable, social or philanthropic purposes, the beneficiaries are replaced by a purpose specified by the settlor(s), e.g. advancement of education,



religion, health, culture, arts, national heritage etc., but not for political purposes. The obligation of the trustee to maintain and apply the trust assets to the specified purpose in accordance with the established rules is the most prominent feature of the purpose trust. The precise terms of the purpose and the mode of its execution are specified in the trust instrument and can be varied within the parameters established by the settlor. While some jurisdictions permit the establishment of non-charitable purpose trusts, this option is limited to foundations in Malta. A purpose foundation is permitted to have e.g. shareholding as sole purpose. Please refer here to our Malta Foundation Brochure.

Trustees, by law, must at all times act purely for the benefit of the Beneficiaries or purpose, put the interest of the Beneficiaries above their own, avoiding all conflicts of interest and exercising a high duty of care. Trusts are therefore an amazingly useful structure, combining a high degree of flexibility with strong protections and certainty as to interpretation and execution.

Trusts are regulated by the Trust and Trustees Act Malta which provides that the Trustees are licensed and supervised by the Malta Financial Services Authority (MFSA).

The legal Concept of a Malta Trust

There is no precise definition for a trust. A trust is not a legal “entity”, but a legal relationship. It does, in its simplest form arise when an individual or corporate entity, the settlor, transfers cash, shares or other property to another individual or corporate entity, the trustee, who will then invest, administer and effect distributions of income and/or capital of the trust fund for the benefit of a person or specified class of persons, the beneficiary. Normally for reasons of continuity and security, the trustee is a corporate entity. The details of the arrangement are usually laid out in a Trust Instrument. A trust may also be set up by testamentary disposition.

The trust is set up within few days, constituted by the Trust Instrument. For a trust to be valid three essential elements must be in existence. The intention of the settlor to create a trust, the trust asset(s) and a beneficiary or beneficiaries. The absence of any of the three certainties may technically terminate the trust or inhibit its creation.

The Components of a Trust

- **The Settlor** creates the Trust by providing and transferring assets, which will constitute the subject matter of the trust, to the trustee that he has appointed. The settlor also normally determines in the Trust Instrument who is to benefit from the trust and in what circumstances and under what conditions. The settlor further defines whether a trust is revocable or irrevocable i.e. the settlor, if expressly provided in the trust instrument, can revoke the trust.
- **The Trustee** is the person who has been appointed by the settlor as the legal owner of the trust property and who is responsible for dealing with the trust property in accordance with the terms of the Trust Instrument. The legal obligation that binds a trustee means that he must deal with the trust property over which he exercises control for the exclusive benefit of the objects of the trust, the “beneficiaries”. The trustee owes a legally enforceable duty of care to



the beneficiaries and cannot receive any personal benefit from the trust, other than fees and reimbursement of expenses incurred by the trustee in connection with the trust .

- **The Beneficiaries** are parties that are entitled to benefit from the property held within the trust in accordance with the terms of the Trust Instrument. A settlor may or may not be a beneficiary under the trust.
- **The Protector**, an optional position, is an additional party that can be incorporated into the Trust Instrument should the settlor wish to have a guardian over the trustee and someone who knows the circumstances of the beneficiaries i.e. a trusted family friend/ member/ associate. The protector should have an advisory role only and the extent of his powers will be defined in the Trust Instrument and the trustee, if expressly provided for in the Trust Instrument, may consult with the protector for his agreement before exercising some of his trustee powers e.g. a distribution to a beneficiary. A protector may also be appointed to give "comfort" to the settlor with a power to dismiss the trustee and appoint another in its place if necessary. Care should be taken to balance powers so as to not deem the protector to be trustee in effect.
- **The File Note of Wishes** gives guidance to the Trustee. It is not legally binding on the Trustee and it may be altered as often as necessary due to changing circumstances. The trustee still has total discretion over the funds as per the Trust Instrument. However, as the Instrument may not (for reason of privacy) specify how the settlor requires the assets to be distributed amongst the beneficiaries, the File Note of Wishes becomes very important. A settlor is advised not to appear by way of the File Note of Wishes, to be imposing obligations to the trustee, with regard to the exercise of the trustee's powers and discretions, for he may be found to be in control of the trust assets and therefore be de facto trustee. This may have adverse consequences with regard to the recognition of the trust, from a tax perspective and more generally. In a Fixed Interest Trust or a Life Time Trust, the rights of the Beneficiaries are clearly defined in the Trust Instrument and therefore a File Note of Wishes might be not necessary. In such trusts, the use and distribution of trust assets are already defined upon constitution, e.g. under what circumstances or in which frequency a beneficiary is entitled to receive distributions.
- **The Trust Instrument** is a written document made either between the settlor and the trustee, the Trust Deed, or unilaterally by the trustees, the Declaration of Trustee, creating a separation of legal ownership from beneficial ownership. It clearly sets out the terms of the trust (the powers, duties, responsibilities, interests, rights etc. of the parties). The Trust Instrument specifies if distributions are to be from income or capital or both and may also give instructions to accumulate income. The Trust Instrument specifies the duration of the trust to a maximum of 125 years in Malta since the date on which it came into existence. The Trust Instrument specifies the duties of the trustee i.e. a duty to account, to ensure full protection for all parties involved.

Taxation of a Malta Trust

Malta has an attractive tax regime for both individuals and companies. Where at least one trustee is a Maltese tax resident, the trust itself is taxed in Malta on its capital and income and has to be registered for this purpose with the Commissioner for Revenue.



A trust is taxed transparently, this means that when a trust fulfils the following conditions, the income would be deemed to have been derived directly by the beneficiaries and would therefore not be chargeable to tax in Malta: a) the income of the trust arises outside of Malta or is income generated only from interest, royalties, premium, discounts, is generated from gains or profits made on transfer of any units in a collective investment scheme, instruments relating to linked long term business of insurance (including the surrender or maturity of linked long term policies of insurance), or on any interest in a partnership which is not a property partnership or of any shares or securities in a company which is not a property company, and all the beneficiaries are neither resident nor domiciled in Malta; or b) where all the income of the trust consists of dividends received from Maltese companies and all the beneficiaries are not resident in Malta, and the trustee has issued a certificate confirming the latter, it shall be deemed that such income is also income directly derived by the beneficiaries and is not income attributable to the trust.

Alternatively, a trust can choose the option to be taxed as a company. The trust is then treated as an ordinarily resident and domiciled in Malta. The trust is eligible to be taxed as company when the trust is established by written Trust Instrument restricting income in the form of royalties, dividends, capital gains, interest, rents or any other income from investment. The trust must apply for this option within 30 days since its constitution. The election of this tax module is irrevocable and the trust is subject to income tax of 35%. This module may benefit from the advantages of double tax treaties when income has been taxed overseas.

Irrespective which tax module the trust has elected generating income tax consequences, the trust has to register the Beneficial Ownership (the Trusts and Trustees Act (Register of Beneficial Owners) Regulations, 2017) with the MFSA. The term "Beneficial Owner" includes the settlor, the trustees, the beneficiaries, the protector and any other person exercising ultimate and effective control over the trust. This information is only accessible to national competent authorities with designated responsibilities for combating money laundering and terrorist financing, national competent authorities that have the function of investigating or prosecuting money laundering, the FIAU, national tax authorities; and any other national competent authority within the meaning given to it under the Prevention of Money Laundering and Funding of Terrorism Regulations (S.L. 373.01).

Succession Laws, Wills and Probate

The determination of the assets to inheritors can be structured and executed by a trust or by a Will of the deceased. The advantage of a trust is that it may be used to negate the expense and lengthy exercise relating to the process of probate in Malta or overseas, to preserve the assets until a minor is of an age of majority and/or allow for the disposition of assets to the settlor's heirs without those assets being transferred immediately upon the settlor's death.

The inheritance of immovable property or shares in a company, not listed on the Malta Stock Exchange, requires a causa mortis declaration, via public deed which is created by a Notary Public, who registers the declaration in the Public Registry in Malta. A share transfer in a Maltese company following a death shall always be registered with the Register of Companies in Malta (MFSA); this is a formality which needs to be followed irrespective of whether a person has a will or is intestate.



Further, there is also no difference as to whether the shares in a Maltese company are owned by a Maltese resident or not.

A transfer of immovable property through causa mortis is taxable, the default rate of which is 5% on the value of the immovable property inherited. However there are a number of scenarios in which the tax is exempt such as:

- (a) when the property transferred causa mortis consists of a dwelling house or a part thereof, or of any real right over a dwelling house;
- (b) when the property is transferred by the person from whom the transfer causa mortis originates to his descendants in the direct line;
- (c) at the time of the transfer, and during the whole period of three years preceding the transfer, the dwelling house was the ordinary residence of the person from whom the transfer originates (this exemption is subject to further conditions)
- (d) where the value of the usufruct of immovable property bequeathed by the person from whom the transfer causa mortis originates in favour of his/her surviving spouse is not subject to duty;
- (e) where immovable property consists of a dwelling house, being the ordinary residence of the person from whom the transfer originates, and the beneficiary of such residence is the surviving spouse, then no duty shall be applied at the time of the transfer.

In situations where a heir submits a causa mortis declaration within 6 months from the death of the deceased and is liable to pay less than €2,300 in causa mortis tax, a tax rebate of €250 on the payable shall apply. The causa mortis declaration shall be carried out by any qualified Notary Public, but does not necessarily need to be the same Notary Public who published the deceased's Will. A Notary Public will be required to carry out the necessary testamentary searches in order to ascertain which Will or succession law regulates the deceased's estate.

In the case of holding of shares in a Maltese company, ideally a Maltese trust or Will shall be put in place, clearly stipulating to whom the shareholder is bequeathing the shares. A Will or Testament is a legal declaration by a person, the testator, which provides for the transfer and distribution of his/her property upon death. A Will may contain dispositions by universal title and dispositions by singular titles. A disposition by universal title indicates that the testator bequeaths to one or more persons the whole of his/her property or a portion thereof and he nominated his heirs. All other dispositions are referred to as singular title and those receiving such property are known as a Legatee. Upon the demise of the shareholder, a testamentary search will show that this Will has been made to regulate the said shares. Ideally, any other Will in other jurisdictions should also have dispositions reflecting the same intention (to avoid conflicting dispositions in Wills).

Probate is the judicial process assessing the validity of a deceased's Will in court and is the process by which the claims over the estate of the deceased are resolved and distributed under a valid Will or Testament. A probate court shall interpret the Will or Testament and determine whether it is valid and if so shall grant approval known as granting of probate to the executor (as legal representatives empowered to dispose of the testator's estate). The probated Will shall be classified as a legal instrument under the courts of law.

EU Regulation 650/2012 on international successions provides a framework for those persons who have private and financial interests in at least two countries, within and outside the European Union. This regulation applies only to successions opened from



17 August 2015 and regulates all aspects of a succession including administration and disposition of property. The regulation proposes that unless provided for in the Regulation, the law of the last habitual residence of the deceased at the time of death shall designate both the competent jurisdiction to preside on the entire succession and the applicable law to a succession. However a person may decide the law to govern his/her succession as the whole law of the State whose nationality he/she possess during the time at which the Will is created or at the time of death. In the case that the person possesses multiple nationalities the validity of the determination of law of the State shall be expressly stated in a Will drawn up and produced validly in the country where it is created. The Regulation provides for the creation of a European Certificate of Succession, intended to simplify the process of succession for heirs and as such the European Certificate of Succession is recognised in all Member States. It should be noted that the regulation expressly prohibits succession relating to donations, life insurance contracts, tontines, trusts, matrimonial property regimes, maintenance obligations, the nature of rights in rem and taxation.

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Mandaris Trustees (Malta) Ltd. is a licensed trustee and is specialised in the area of trusts and other asset structuring solutions. Our multi-lingual professionals have particular knowledge and experience with regard to legal, tax and administrative questions surrounding the structuring of assets in an international environment.

Please do not hesitate to contact us if you have any questions or queries.