
AN OVERVIEW AND A COMPARISON OF TRUSTS AND FOUNDATIONS LAW IN MALTA

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Trusts and foundations are very often thrown into the same melting pot because both can serve as asset protection vehicles; however, this is only one facet of their respective uses. While both institutes share this similarity, they both vary considerably in their essential elements. In fact, even their historical roots can be found in wholly different legal traditions. A thorough understanding of their differences and what they imply is crucial in order to employ the most efficient vehicle that would suit one's scenario.

The Trusts and Trustees Act, Chapter 331 of the Laws of Malta, provides for a clear definition of trusts, outlining that trusts exist when a person (the trustee) holds property for the settlor as if he or she were the owner. This Act defines 'settlor' as the person who creates the trust for the benefit of persons, referred to as beneficiaries, irrespective of whether they are ascertained or in existence.¹

Trusts find their roots in Medieval England through the Common Law tradition. The earliest form of trusts came about to mitigate the effects of the feudal system which did not allow lands to be passed onto different heirs by will, but forced the testator to leave everything to the first-born son. Testators could opt to transfer their property *inter vivos* through what is known as 'cestui que' trust. This allowed the transferor to transfer property to another individual or multiple individuals, known as the trustee, to use the land for the benefit of another person, the beneficiary, who could be a third party or the

¹ The Trusts and Trustees Act, Chapter 331 of the Laws of Malta, article 3.

transferor of the land themselves. The 'cestui que' already bears the clear signs of the basic elements of a trust.²

Another noteworthy institute which bears significant parallelisms to the Medieval English trust is the Roman Law institute of 'fiducia'. Essentially, fiducia consisted of an agreement which was considered an extension to the transfer of property. This agreement delineated the direction as to what was to be done with the property.³ This parallelism shows that both the Common Law and the Civil Law tradition individually developed their own independent notion of 'trust'.

While Malta has been classified as a mixed jurisdiction, ⁴ a predominance of sources still refer to it as a Civil Law jurisdiction due to the fact that the Common Law tradition began infiltrating the Maltese legal system significantly only in 1800, with the advent of Malta becoming a protectorate under the British rule and, eventually, a colony. Naturally, incorporating a Common Law concept into a predominantly Civil Law system resulted in certain incongruences. Thus, the definition of trust had to be redefined within the context of a Civil Law model, and later, within the international model of a trust.⁵ While these three models (Common Law, Civil Law and international) can be distinguished, the core elements are common to all three models, namely, their purpose, the transferring of the property onto a trustee, and the obligations which must be upheld by the trustee.

From the Civil Law side of the spectrum, foundations stand as a separate institution from trusts; however there are uncanny parallelisms which make the two institutions closely associated with one another. Maltese Law even allows for a foundation to be converted into a trust and vice-versa,

² Dr Priscilla Mifsud-Parker, 'Trusts in Civil Law Systems' (cc-advocates.com) <<http://www.cc-advocates.com/trust-law/malta-trusts-civil-law-systems.htm>> accessed 10 September 2016.

³ *ibid.*

⁴ Kevin Aquilina, 'The nature and sources of the Maltese mixed legal system: a strange case of Dr. Jekyll and Mr. Hyde?' [2013] 4(1) Comparative Law Review.

⁵ See: the Cyprus International Trust.

which further highlights the similarities between the two.⁶ The use of foundations in Malta dates back to many years before the institution was formally given statutory standing in 2008. In fact, one finds subtle references to foundations in Ordinance VII of 1868.

Act XIII of 2007, which amended the Maltese Civil Code, was the catalyst for foundations and associations legislation in Malta as it provided a clear framework through which founders and administrators can operate. In Continental Law, there is no clear-cut definition for foundations as this differs in every Civil Law jurisdiction. However, under Maltese Law, a foundation is defined as:

[a] universality of things constituted in writing, by one or more founders whereby assets are destined either for the fulfilment of a specified purpose or for the benefit of a named person or class of persons, and whose assets are entrusted to the administration of a designated person or persons.⁷

The chief distinction which must be drawn on the onset between trusts and foundations is the fact that the latter has a separate legal personality,⁸ a fact which has great bearing when a foundation operates within the commercial sphere, particularly in the Financial Services sector. On the other hand, a trust has no legal personality and, thus, cannot conduct transactions in its own name.

Trusts and foundations may also be distinguished through their respective methods of establishment. A foundation may be set up by the founder through a public deed, or through the founder's last will registered with a notary public.⁹ Founders contribute to their foundation with an initial endowment; however, if a foundation has been set up as a non-profit making entity for a social purpose, the cost of the initial endowment is reduced. Trusts are set up by a settlor through an initial settlement, and later on funded

⁶ Petra Camilleri, *The Use of Trusts and Foundations in the Financial Services Sector*, (LL.D, University of Malta 2012); See also: Article 21 of the Second Schedule to the Civil Code.

⁷ Article 26 of the Second Schedule to the Civil Code.

⁸ Article 6(2) of the Second Schedule to the Civil Code.

⁹ *ibid.*

through subsequent settlements. The focus here is on the assets held in trust, because a trust cannot exist without them.

The term for which a foundation or a trust is established differs slightly. A trust may be set up for 125 years¹⁰ while a private foundation is limited to a term of 100 years. Like most legal persons, foundations set up for securitisation purposes or those used as collective investment vehicles are set up for an unlimited term.¹¹

While the main actors in trusts and foundations do carry out similar jobs, they differ in title. A trustee will administer a trust while administrators run a foundation. The settlor and the founder may both retain a certain degree of power in the administration of their respective trust and foundation; however, when a settlor puts assets in trust they will no longer control the property. On the other hand, our laws confer a greater degree of control on the founder than to the settlor.

Another fundamental distinction between trusts and foundations is the registration process. Since foundations have a separate legal personality, they must be registered into the Register for Legal Persons. To date, there is no requirement to register a Maltese trust, thus, there are no initial registration fees. However, in this regard, corporate trusts may experience a change with the introduction of the EU's Fourth Anti-Money Laundering Directive (4ML) which is not yet in force, but which is expected to be transposed into the Member States' national laws towards the end of 2016.¹² The 4ML proposes various rules in a bid to fight terrorist financing. It includes new corporate trust disclosure rules which would require corporate trusts to disclose details of the trust beneficiaries to central registries which would be managed by each Member State. Under the latest version of the 4ML, proposals were made to allow parties with a 'legitimate interest' to access a beneficial ownership register of express trusts, and to make the registers of the beneficial

¹⁰ Article 12 of the Trust and Trustees Act, Chapter 331 of the Laws of Malta.

¹¹ Article 29(7) of the Second Schedule to the Civil Code.

¹² Step.org, 'Uncertainty over EU AML directive's proposed new trust disclosure rules' (STEP, 11 July 2016) < <http://www.step.org/news/uncertainty-over-eu-aml-directives-proposed-new-trust-disclosure-rules> > accessed 20 September 2016.

ownership of companies and business-related Trusts publically available.¹³ The implementation of this Directive into national legislation is a source of worry for practitioners in the field of trusts as this would mean that trusts can no longer serve as efficiently as they used to, namely, as vehicles whose purpose is to protect vulnerable beneficiaries who would be at risk if their identities were to be made public.

The differences mentioned above are only some of the main differences which one finds when comparing trusts and foundations. However, due to the flexibility allowed in the drafting of a trust deed and deed of foundation, one can note that both institutes can be altered to suit the particular needs and situations of the individual(s) willing to establish either institute.

¹³ *ibid.*