

The law relating to trusts

applicable law, recognition of foreign trusts

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Art. 6(1), T&T Act

- Notwithstanding any other law, where the law of Malta is the proper law, as the chosen law of the trust, or as determined by Art. 7 of the Hague Convention:
“the validity of the trust, its construction, its effects and the administration of the trust shall be governed by this Act and other provisions of Maltese law on trusts”

The modern law regulating trusts in Malta includes the following:

- **Civil Code.** Obligations in general under the Civil Code now include “Fiduciary Obligations”, ie Art. 1124A and B;
- Art. 958L(1) of the Civil Code: “Property under trusts shall be regulated by the special law on trusts and to the extent applicable, the rules of this Code relating to trusts.”
- **The Trusts & Trustees Act** (originally enacted as the Offshore Trusts Act in 1988 but substantially amended on various occasions since then), is Chapter 331 of the Laws of Malta.

the general rule:

Art. 958L(2)(a) of the Civil Code

Transactions relating to property including –

- the settlement of property under trusts, even when effected by unilateral declaration or resulting from a judgement or order of a court;
- the distribution, application, or advancement of property by a trustee to a beneficiary;
- the reversion of property to a settlor or his estate when a trust fails or is terminated;
- the assignment, vesting or transfer of property under trusts from a trustee to another trustee under the same trusts,

shall be subject to the special laws relating to trusts and their effects when such transactions arise by operation of law or are carried out in the form and manner required by applicable law.

Other relevant Civil Code provisions

- Title IIIA in Part two of Book Second of the Civil Code , entitled “Of Trusts & their effects” has 10 Articles: Art. 958L – 958U;
- Title XXIII A, entitled “Of Trusts and Obligations” has 3 sub-titles:
 - Matrimonial Regimes
 - Annuities
 - Security Trusts
 - Security by title transfer

General safeguards in the T&T Act

Art. 6(4)-(6), 21(7)

- “Trusts created or recognised in accordance with this Act are not prohibited by” specified provisions in the Civil Code prohibiting entails, limiting rights to given to successive persons, or regulating the transfer of an inheritance.
- When a commercial transaction includes the appointment of a trustee to hold property under trusts in relation to such transaction,
 - the trust shall operate in accordance with the express terms of the trust instrument.
 - the duties and liabilities of trustees can be varied by the terms of the trust other than exoneration of the trustee from the effects of his own fraud, wilful misconduct or gross negligence.

Particular Civil Code provisions: 1. transfer of ownership & reserved portion

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Transfer of ownership of property: 958L(2)(b)

- Transfers of ownership or other rights to or in property must comply with all applicable requirements at law;
- When so carried out, such transfer shall –
 - (i) be effective modes of transfer of ownership or other rights to or in such property;
 - (ii) result in the creation or termination of legally enforceable interests in or to such property in favour of such persons as provided by the special laws relating to trusts; and
 - (iii) be operative against third parties.
- Art 996: transfers of immovable property must be registered at the Public Registry to have effect on 3rd parties.

Transfers of ownership of property: Art. 958L(2)(c), (3)

- “The sole consideration for the validity of such transactions may be the imposition or assumption, the performance, or the termination, as the case may be, of legally enforceable obligations on or by a trustee in relation to such property.”
- A trustee may validly transfer trust property notwithstanding any right of reserved portion arising in the context of Succession and the other provisions of this Code relating to reduction of trust property.

Reserved portion and other rights

Art. 958L (4)-(6), 958M

- Where, after the death of the settlor, the trustee is formally notified of a reserved portion claim, a statutory trust is created whereby the trustee holds: “a sum of money based on the net transfer value of the property at the time of transfer”, until claim is determined or lapses;
- This duty operates for a preemptory period of 5 years from death of decujus;
- If the property will have already been transferred, the claim can be made against the beneficiary;
- More detailed rules on reduction and reserved portion claims in Art. 958M;

Effects of claim for reserved portion

Art. 958M(9)

- Subject to the T&T Act, and if not excluded by the trust deed:
 - (a) a person claiming the reserved portion shall lose any benefit under the trust; and
 - (b) the provisions re collation, etc shall apply in relation to any gains received under the terms of the trust.
- Collation: generally, how property transferred to some heirs prior to death is considered in relation to total estate
- Other detailed rules in Art.958M(10)-(13)

Art. 958M(14)

property within reserved portion

- No breach of reserved portion rules if the trust is to hold property:
 - (a) temporarily and unconditionally for a person entitled thereto under fixed trusts; or
 - (b) until a calculation is made to establish the reserved portion and thereafter to hold the same under fixed trust for or to distribute the said reserved portion to the person entitled thereto; or
 - (c) for a person who suffers from a mental or physical disability such that he cannot sustain himself.

Particular Civil Code provisions: 2. unworthy beneficiaries

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Unworthy beneficiaries

Art. 958N(1)

A person (or accomplice) who has

- (a) killed or attempted to kill settlor (S) or his spouse; or
- (b) charged any of them, with a crime punishable with imprisonment, of which he knew them to be innocent; or
- (c) compelled, or fraudulently induced S to make or alter any trust settlement; or
- (d) prevented S from revoking or making a new settlement, or suppressed, falsified, or fraudulently concealed it,

shall be considered as unworthy, and, as such, shall be incapable of receiving property under a trust.

Revocation of trusts for ingratitude

Art. 958N(2)

- Court Action within 1 yr of committing offence (subject to Art. 15 T&T Act):
 - (a) if beneficiary has attempted to kill S or has been guilty of cruelty or grievous injury to him;
 - (b) if B wilfully, and with intent to cause injury to S, considerably damages his property, or prejudices his interests;
 - (c) if, S being in urgent need of maintenance or other personal assistance, B has refused him such support as without great inconvenience to himself he could have given him.

Particular Civil Code provisions:

3. Settlers not domiciled in Malta

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Non-domiciled settlors

Art. 958R(1)

- For a non-domiciled person (S) who settles any property in Malta in trust, under the laws of Malta or otherwise:
 - (a) S is deemed to have had capacity if at the time of settlement he was of full age and sound mind under the law of his domicile and the law of Malta; and
 - (b) No provision in the Code relating to inheritance or succession to such property including rights to a reserved portion or similar rights shall apply to such trust property, at such time or subsequently; and
 - (c) the beneficiaries shall be deemed to have capacity to benefit.

Non-domiciled settlors (2)

Art. 958R(2) + (3)

- Once property has been settled in trust it shall not be affected by a change of domicile of the settlor, even if the settlor subsequently becomes domiciled in Malta.
- “For the purposes of this article “reserved portion” means the legal rule restricting the right of a person to dispose of his property during his lifetime so as to preserve such property for distribution at his death, or having similar effect.”

Particular Civil Code provisions:

4. Inheritance partition
5. Stipulations for the benefit of 3rd parties
6. Assignment of litigious rights

Partition of inheritance

- Art. 912 allows co-heirs to exclude an assignee of inherited property from a partition in certain circumstances
- Art. 958S: such right shall not apply when the relevant share consists of a settlement of such right under trusts, and the beneficiaries are the settlor himself, his heirs or the other heirs of the estate or a distribution or reversion thereof to such persons.

Stipulations for the benefit of third parties: Problem?

- 1000. It is lawful for a person to stipulate for the benefit of a third party, when such stipulation constitutes the mode or condition of a stipulation made by him for his own benefit, or of a donation or grant made by him to others; and the person who has made any such stipulation may not revoke it, if the third party has signified his intention to avail himself thereof. Contracts to be operative only as between contracting parties.
- 1001. Contracts shall only be operative as between the contracting parties, and shall not be of prejudice or advantage to third parties except in the cases established by law.

Stipulations for the benefit of third parties: No problem (Art. 958T)

- The provisions of articles 1000 and 1001 shall not be interpreted as creating any limitation:
 - On the power of any person to settle a trust or a person to accept to act as trustee under a trust for the benefit of a beneficiary,
 - on the binding nature and effect of any trust or
 - on the enforceability of such rights as arise under a trust by a beneficiary.

Assignment of litigious rights

Art. 1483

- (1) Where a litigious right has been assigned, the debtor in the obligation may obtain his release from the assignee by reimbursing to him the actual price of the assignment together with the expenses and interest to be reckoned from the day of the payment of the said price by the assignee.
- (2) A right is deemed to be litigious, if there is a contested suit as to the existence thereof or if the debt due is not liquidated and is difficult to liquidate.

Litigious rights and trusts (Art. 958U)

- “The right of a debtor of a litigious right in terms of article 1483 shall not arise when the settlement involves the assignment of a litigious right under trusts for the benefit of the creditor or creditors who have assigned the debt.”

Particular Civil Code provisions: 7. Trusts between Spouses

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Matrimonial Regimes (1)

Art. 2095A

- (1) Property which is subject of matrimonial contracts may be settled in trust only by written instrument.
- (2) Trusts between spouses are not created by operation of law.
- (3) Property forming part of the community of acquests (or community of residue under separate administration) may only be settled in trust with the consent of both spouses.
- (4) Paraphernal property of either spouse may be settled in trust by each spouse acting singly.

Matrimonial Regimes (2)

Art. 2095A(3), (4)

- A trust settled by both spouses jointly may only be varied or, if revocable, may only be revoked by both spouses acting jointly;
- after the death of one of the spouses such trust shall be irrevocable notwithstanding any of its terms, except with the authorization of the Court in its voluntary jurisdiction.
- A beneficial interest held by a spouse under a trust shall not form part of the community of acquests irrespective of when it was settled in his favour or when he became a beneficiary, except in the case of a beneficial interest under a trust into which community property has been jointly settled by the spouses and only in relation to such property.

Matrimonial Regimes (3)

Art. 2095A(5) + (6)

- (1) Any distribution of income made under a trust in favour of a spouse shall, unless otherwise expressly provided in the trust instrument, form part of the community of acquests or of the community of residue under separate administration of such spouse, as may be applicable, in accordance with applicable law
- (2) A Matrimonial home in a trust where the spouses, or one of them, are beneficiary, a spouse will not be deemed having lesser rights, and both will have to consent to any transfer, revocation or variance of the trust, or as authorized by the Court.

Matrimonial Regimes (4)

Art. 2095A(7)

- Any debt, indemnity or other liability due by either spouse as a trustee shall not be charged to the assets of the community of acquests;
- An exception applies where the assets of the spouse do not suffice to cover the debt, but only up to the portion owned by the relevant spouse.
- Any such debt shall be deemed to be a paraphernal debt.

Trust set up by spouse

Art. 2095B

- (1) A person may settle property under trusts to his spouse acting as trustee for the benefit of beneficiaries including any such spouse as beneficiary.
- (2) When a spouse is a beneficiary, a trustee may not enter into a contract of sale with the settlor spouse except in the cases specified in article 1366(b).
- (3) Art. 1366(b): A spouse can sell or assign to the other spouse the payment of a debt due to the buyer or assignee, or the investment of money belonging to such buyer or assignee: Provided that where any indirect advantage results to either of the spouses, it shall be lawful for the heirs of the other spouse, or for any other person interested, to demand that the contract be rescinded

Limits for trust set up by spouse

Art.2095B(3)

- A person cannot be a beneficiary under a trust settled by his or her spouse for more than the property that is allowed to be bequeathed or donated to such spouse in terms of the Civil Code.
- Notwithstanding the terms of the trust and the rules at law otherwise applicable in relation to any excess, the excess shall be held by the trustee for the use and enjoyment of such spouse for his lifetime and thereafter shall be held on trust for the settlor or his heirs.

Property subject to particular rights

Art. 2095B(4)

- If a beneficiary spouse is entitled to any property in ownership, the property held in trust up to the reserved portion will be held on separate trust for the benefit of such spouse alone irrespective of the terms of the trust, having regard to any other dispositions in such person's favour.
- Any further property settled in trust for the benefit of the spouse shall, irrespective of the terms of the trust, be held under trust only for the use and enjoyment of the beneficiary for his lifetime and thereafter for the settlor or his heirs.
- The above is subject to the right of any person entitled to the reserved portion to demand the reduction of the trust as may be applicable.

Spouse acting as trustee

Art. 2095C

- “The provisions of law relating to spouses or matrimonial property shall not apply in any manner to the actions of a spouse when acting as trustee.”

Particular Civil Code provisions:

8. Annuities

9. Security Trusts

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Annuities in a trust

Art. 2095D

- “Title XI of Book Second “Of the Constitution of Annuities” and the provisions of sub-titles I and II thereof shall not apply in relation to annuities constituted in a deed of trust or testamentary trusts and the obligations of trustees and the rights of the beneficiaries shall be regulated exclusively by the terms of the trust and the special laws relating to trusts unless the trust instrument (or any written agreement entered into by the trustee) expressly states that a particular annuity shall be governed by the provisions of the said Title.”

Security Trusts & Security by title transfer

- Art. 2095E(1)-(14) deal with security trusts, providing detailed provisions relating to the trustee as the holder of security rights, etc.
- Art. 2095F to Art. 2095J deals with Security by title transfer, which is a contract whereby the debtor transfers movable things to a creditor (present or future) or a third party as trustee for the creditor, so as to secure a present or future obligation.

The proper law of a trust & the Hague Convention 1984

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Chapter 331 determines proper law issues

Art. 5, T & T Act

- (1) “Subject to the provisions of this Act, a trust shall be governed by its proper law and shall be interpreted and be enforceable accordingly.
- (2) The proper law of the trust shall be determined in accordance with this Act.
- (3) The terms of a trust may provide for the proper law of the trust to be changed to the law of another jurisdiction.”

The Hague Convention

- Article 5A of the T&T Act confers the force of law in Malta to most of the Articles of the Hague Convention on Trusts, with the relevant provisions reproduced as a Schedule to the Act.
- The full formal reference to the Convention is “Convention on the Law applicable to Trusts and on their recognition, adopted by the Hague Conference on Private International Law on 20 October 1984, and which came into force on 1 January 1992.”

A foreign proper law

Art. 6(2) + (3)

When the proper law of a trust is a 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 recognised and given effect to in Malta in accordance with the Convention and this Act.

(3) The administration of a trust may be regulated by a law different from the proper law of the trust.

An integrated approach

- Malta has integrated trusts into its domestic law since 2004, and the legislator decided to provide for general rules as to the effects of trusts in the Civil Code, both in general as well as in particular civil situations.
- The Legislator has furthermore decided to specifically deal with Maltese trusts that have no real connection with Malta.

The treatment of rules of mandatory application in the context of trusts

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Mandatory rules to prevail re Maltese trusts

Art. 6A(1)(2)

- The general principle is that wherever Maltese law contains any provisions that cannot be derogated from by voluntary act, with regard to particular subjects, such laws will prevail over the terms of a trust governed by Maltese law, unless otherwise expressly provided by any provision of applicable law.
- the courts shall however apply such mandatory rules subject to the provisions of article 6B.

Mandatory rules to prevail (2)

Art. 6A(1)(2)

- The relevant subjects are the following:
 - (i) the protection of minors or incapable parties;
 - (ii) the personal and proprietary effects of marriage;
 - (iii) succession rights, testate and intestate, especially the indefeasible shares of spouses, ascendants and descendants;
 - (iv) the transfer of title to property and security interests in property;
 - (v) the protection of creditors in matters of insolvency;
 - (vi) the protection, in other respects, of third parties acting in good faith

Massive Exception to the general rule

Art. 6A(3)

- Unless the trust property includes immovable property in Malta, the general rule does NOT apply where the settlor is not domiciled in Malta at the time of settlement;

Where exception applies

- In such cases no regard shall be had to:
 - (i) the domicile, habitual residence, registration, authorisation or place of business in Malta of the trustee or any protector or any person rendering administration, accounting or other services to the trustee, or
 - (ii) the fact that the proper law of the trust is Maltese Law; or
 - (iii) the situs of property in Malta, when movable; or
 - (iv) the place of execution of the deed of trust, any documents relating to the trusts or the trust property or other transaction documents is Malta.

Foreign trusts

Art. 6A(4), (5)

- In the case of a foreign trust:
 - The general rule applies only when the settlor is domiciled in Malta at the time of creation of the trust, subject always to the rules stated in article 6B.
 - When settlor is not so domiciled in Malta, the T&T Act shall apply only in so far as it regulates the recognition or otherwise in Malta of the effects of such trust.
 - A court may accede to a request to recognise a foreign judgement which enforces any rules of mandatory application as referred to in subarticle (6), but only subject to the provisions of article 6B.

Management of conflict provisions

Art. 6B

- Reference to Article 6B is almost constant because it provides for rules that give effect to the Legislator's general intention to preserve trust relationships as far as possible.
- This is deliberately emphasised, essentially to provide general guidelines to the courts.
- Opening sentence states as follows:

“In order to ensure that the provisions of applicable law which cannot be derogated from by voluntary act are applied in a manner which preserves the trust relationship as far as possible, the following rules shall apply:”

Art. 6B(a)

- the application of mandatory rules shall not produce the failure or invalidity of the trust, and where possible, the trust shall continue under the same terms in relation to property which is unaffected by such mandatory laws.
- Subject to any order of the court, the affected property shall be held by the trustee in trust for the settlor absolutely, or if he is dead, for his heirs;

Art. 6B(b)

- “the trustee shall be empowered to –
 - (i) vary the terms of the trust in so far as relates to the nature or the extent of benefit, or
 - (ii) do such acts as are necessary and legally permissible,

so that the beneficiary derives the benefits in accordance with the intentions expressed by the settlor in the trust instrument in a manner compatible with the mandatory rules and any property which becomes free from trusts for any reason shall be held by the trustee in trust for the settlor absolutely, or if he is dead, for his heirs;”

Art.6B(c)

- To resolve issues with mandatory rules and to further assist trust relationship, the terms of the trust shall be deemed to include:
 - (i) the power, without any obligation to do so, of the trustee to reduce the trust assets and return all or part of them to the settlor or the estate of the settlor so as to achieve compliance with such provisions of law;
 - (ii) the power of the trustee to enter into arbitration and mediation agreements and to reach a compromise to disputes and claims by third parties; and
 - (iii) the power to seek directions from the Court on such matters;

Art.6B(c) (cont.)

- “such powers being exercisable notwithstanding any contrary provisions of the trust and, provided the trustee acts honestly, in good faith and reasonably, such acts shall not constitute a breach of trust.”

Art.6B(d), (e)

- “the property of the settlor which is not settled in trust should first be utilised, to the extent possible, to meet the claims of any person seeking to invalidate or reduce a trust;”
- “notwithstanding any other applicable law, the trustee may meet a valid claim being made against the trust property, whether voluntarily or as a result of a court direction, order or judgement, by a payment of value in money and shall not be obliged to return property settled in trust in kind;”

Art. 6B(f)

- “any person who succeeds in reducing the property under trusts or obtains a court order to invalidate a trust in part or who enjoys the benefits of an arrangement with the trustee as provided in paragraph (c)(i), shall forfeit the benefits under the trusts, unless the terms of the trust expressly state otherwise or the trustee considers it unreasonable in the circumstances and obtains the consent of the Court to maintain in force trusts in favour of such person subject to such conditions as the Court may consider appropriate;”

Art. 6B(g)

- “in any event and notwithstanding any provision of law, a trustee shall not be subject to an obligation to pay or return more than the trust property held by him under trust, after deducting any fees and costs, and he shall not be subject to any obligation to account for any distributions made by him in good faith prior to having written notice of any claim.”

Questions?

- Students are welcome to make contact if they have questions that haven't been addressed during my lecture, copying the other students with such communication

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