

TRUSTS



Malta, despite being a civil law jurisdiction, has a fully-fledged trust legislation. The Trusts and Trustees Act enables both residents and non-residents to set up various types of trusts in Malta. Maltese trust legislation places great responsibility on trustees resident or operating in Malta. An individual or a corporate entity acting as a trustee and which is resident or operating in Malta, must be approved and licensed by the Malta Financial Services Authority (MFSA) if it receives or is entitled to remuneration, or acts on a regular and habitual basis, or holds itself out to be a trustee.

This licensing requirement means that licensed trustees have a high level of responsibility especially in ensuring that trusts under their administration are fully compliant with the legislation, including all disclosure requirements in terms of the money laundering regulations. Due to this approach, Malta does not adopt a centralised trust register. The law also establishes that trustees must not only act with diligence and attention but must also act with the utmost good faith.

What is a trust?

A trust is a legal relationship created by a person, the settlor who places assets under the control of a trustee under an obligation to deal with that property for the benefit of a beneficiary/ies or for a particular purpose. Property held in trust constitutes a separate patrimony from the assets of the trustee and personal creditors of the trustee shall have no recourse against the trust property. Furthermore, the property of a particular trust is also segregate from property of another trust held by the same trustee. Importantly, the trust property shall not form part of the trustee's personal estate upon his insolvency or bankruptcy and the trust property shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death.

Formation of trusts

In terms of Maltese law, a trust can come into existence in any manner. However, a unit trust must be set up in writing. In practice it is always ideal to have a written trust deed so that this clearly delineates the functions and discretions of the trustee. A trust shall continue until the hundredth anniversary from the date of its creation and unless already terminated, shall then terminate. This limit does not apply to trusts set up for charitable purposes or unit trusts.

Under Maltese law, the beneficiary or beneficiaries must be identifiable by name or ascertainable by reference to a class or to a relationship to some person. The settlor of a trust may also be a beneficiary under the trust. A trustee is normally precluded from being a beneficiary of a trust apart from specific trusts utilised in a financial services context and known as commercial trusts. A trustee may benefit under a trust where he is not the sole trustee and in those cases where he is, he may still benefit if he has prior approval of the MFSA or the Court.

Maltese law also provides for the possibility of having a protector in a trust relationship. Such a protector is designated by the settlor so as to supervise the operation of the trustees in terms of the trust deed.



Applicable law

The terms of the trust may 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 recognized and given effect to in Malta in accordance with the Hague Convention on the Law Applicable to Trusts and on their Recognition.



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Types of trusts

There are three types of trusts, namely, an express trust, an implied trust and a constructive trust.

An express trust is one in which the intention of the settlor to create the trust relationship is clearly and openly expressed.

An implied trust arises from the unexpressed but presumed intention of the settlor, which intention is presumed from his words or actions.

A constructive trust arises by operation of law and is not dependent on the intention of the settlor.

Trusts can be tailor-made for a number of uses. Trusts may be used for such purposes as asset protection, wealth management, investment purposes, to provide a life annuity for a surviving spouse or a child with special needs. Maltese law allows such a flexible use of the trust concept and details out specific safeguards to ensure the protection of settlors, beneficiaries and the trust property.

Commercial trust

The trust legislation also envisages the use of trusts for commercial purposes or commercial transactions. The law identifies a number of scenarios qualifying as commercial transactions such as the use of trusts for:

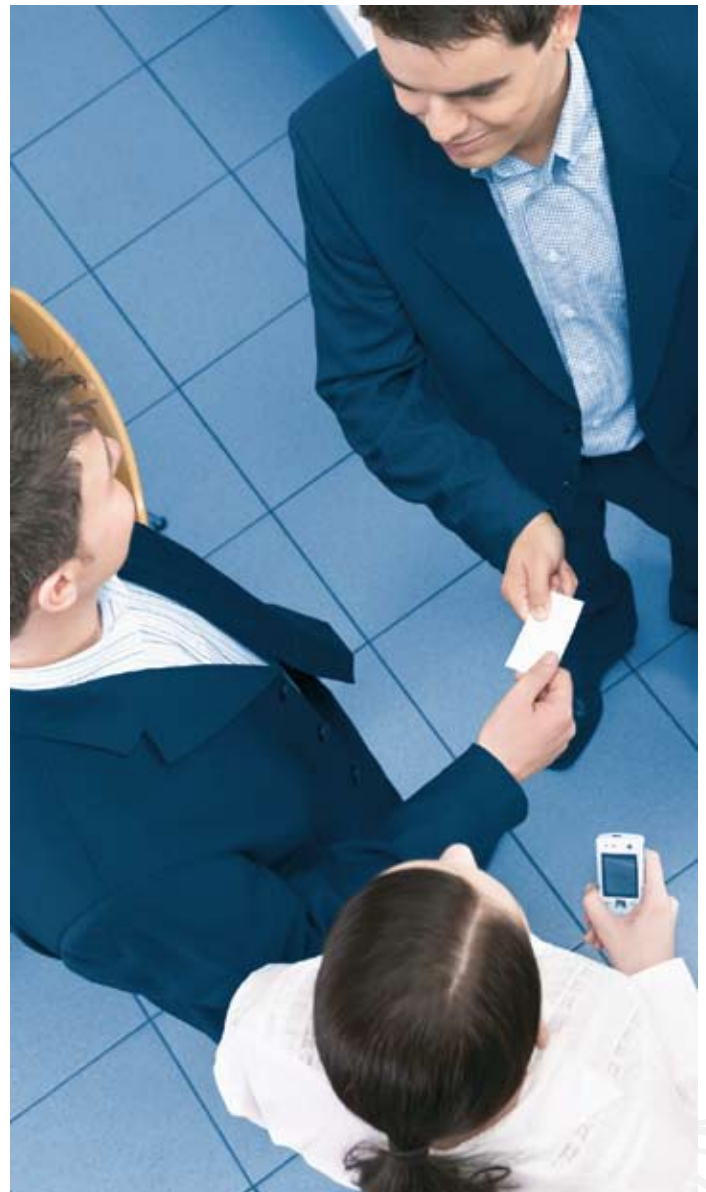
- ❖ Collective Investment Schemes;
- ❖ Securitisation of assets;
- ❖ Granting of real or personal security;
- ❖ Securities offerings, whether to the public or for private placement;
- ❖ Portfolio management;
- ❖ Custody of investment instruments;
- ❖ Syndicated loan agreements and other multi-creditor banking facilities;
- ❖ Insurance policies and the payment of proceeds thereunder.

Taxation

Trusts are considered to be transparent for tax purposes if the income of the trust is distributed to the beneficiaries. In that case the income of the trust is not charged to tax in the hands of the trustee but is taxed in the hands of the beneficiaries. Where all the beneficiaries of the trust are not resident in Malta, and where all the income attributable to the trust does not arise in Malta, there are no tax implications in terms of Maltese law. Income attributable to a trust which is not distributed to the beneficiaries is taxed in the hands of the trustees at a rate of 35%.

How we can help

MSD Holding Limited is a company within the Avanzia Group which is licensed by the MFSA to act as a trustee. As a result, we may assist you not only with the drafting of the trust deed and other documents such as the letter of wishes and the setting up of the trust but also acting as trustees through our licensed trust company, MSD Holding Limited.



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