
Malta

International Estate Planning Guide

Individual Tax and Private Client Committee

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I. Wills and Disability Planning Documents

A. Will Formalities and Enforceability of Foreign Wills

A will is an instrument by virtue of which a person, known as the testator, regulates the manner in which he wishes to dispose of his estate upon his death. The testator may bequeath the whole of his property or a portion thereof by universal title in favour of one or more heir/s, or may otherwise bequeath his property by singular title to one or more legatee/s.

Whereas it is unlawful for any two or more persons to make a will in one and the same instrument, it is lawful and common for husband and wife to make such a will, known as *unica charta*. Special rules apply in the event that one of the spouses revokes a will *unica charta* so that the revoking party shall consequently also be forfeiting any rights arising in his favour from such joint will.

The capacity of disposing and receiving by will is a fundamental pre-condition for the validity of wills. On the one hand, wills made by persons subject to incapacity are null even though the status of incapacity of the testator may cease before his death. Instances of testamentary incapacity whereby a person is deemed incapable of disposing by will are defined by law and include persons who are below sixteen years of age, persons who are interdicted on grounds of insanity and those who are of unsound mind at the time of the will. On the other hand, all children are deemed capable of receiving by will from the estate of their parent/s in so far as the law does not distinguish between children born in or out of wedlock or those who are adopted. However, the law defines specific instances as a result of which a person shall be deemed unworthy and consequently incapable of receiving property under a will.

Furthermore, other than the capacity to dispose and receive by will, other factors contribute to the observance of formalities of wills, non-compliance with which shall render any such will null and void. In this context, it is important to premise that a will may be either a public or a secret will, and in each such instance, the formalities of law must be observed.

A public will is received and published by a civil law notary in the presence of two witnesses, and is duly signed by the testator and the said witnesses. Special procedures apply in the event that the testator does not know how to or cannot write. In public wills, the heirs, legatees or their relations by consanguinity or affinity within the degree of and including an uncle or nephew, shall not be competent witnesses. The notary will proceed to register the will with the public registry within fifteen days from having received it. A will may be revoked, wholly or in part, by a subsequent will, or otherwise, by any other notarial act received by a notary whereby the testator declares that he revokes his will, wholly or in part.

A secret will may be printed, type-written or written in ink by the testator himself or by a third party provided that where the testator knows how to and can write he shall sign the will at the very end. Where the testator does not know how to or cannot write, special procedures will apply. The testator must necessarily be assisted by a judge or magistrate, who, in such a case, shall be bound not to disclose the contents of the will. The paper containing a secret will must be closed and sealed and delivered by the testator to a notary, or, in the presence of a judge or magistrate sitting in the court of voluntary jurisdiction, to the registrar of such court, and a declaration must be made by the testator to the effect that such paper contains his will. The will shall be deemed to have been made on the day on which it is so delivered. The notary receiving the will shall draw up an act of delivery recording therein the declaration made by the testator, which act of delivery shall in turn be signed by the testator, any witnesses and the notary himself. The notary shall proceed to present such will to the court of voluntary jurisdiction for preservation by the registrar within four working days from the date of delivery.

It is to be noted that the testator may withdraw his secret will at any time from the notary to whom it was deposited provided that the will is still with such notary, or otherwise, from the court registry in which it has already been so deposited. Any such withdrawal shall constitute an implied revocation of the will. Furthermore, a person claiming to have an interest in a secret will may demand the opening of such will as soon as the death of the testator thereof has been ascertained.

Maltese law provides that a will made outside Malta shall have effect in Malta if and only if it is made in the form prescribed by the law of the place in which the will is made.¹ Therefore, for a foreign will to be enforceable in Malta, one must assess compliance with the applicable rules on formalities of wills prevailing in the foreign jurisdiction where the will was drawn up.

B. Will Substitutes

As described above, succession law allows an individual to plan and determine ‘who gets what’ upon one’s death by making a will while one is still alive. However, another effective tool for estate planning is the resort to trusts. The Trusts and Trustees Act, Chapter 331 of the Laws of Malta, establishes that “*a trust exists where a person (called a trustee) holds, as owner or has vested in him property under an obligation to deal with that property for the benefit of persons (called the beneficiaries), whether or not yet ascertained or in existence, which is not for the benefit only of the trustee, or for a charitable purpose, or for both such benefit and purpose as aforesaid*”.²

In this context one may mention that the most common type of trust is the discretionary trust whereby the settlor grants the trustee substantial discretion to decide the manner in which to administer the trust property, including how and when distributions of trust income and capital are to be made and who the beneficiaries should be. Trust law also permits terms of the trust to provide for the revocation of the trust. However, revocability is regarded with a vigilant eye for fear of tainting the validity of a trust by virtue of it being regarded as a sham trust. Where a trust is revoked in accordance with the terms of the trust deed, the trustee shall hold the trust property in trust for the settlor absolutely.³ This is to say that while the trustee will continue to be obliged to hold the property for the settlor, the absolute title of the property reverts back to the settlor, such title carrying with it incidents of ownership allowing the settlor to sell, mortgage, donate or otherwise encumber the property as he deems fit.

Furthermore, a trust can be created *causa mortis* or *inter vivos*, as explained below. The dispositive provisions of a will may provide for the establishment of a trust known as a *causa mortis* trust or testamentary trust, this being a trust created by the testator qua settlor in his last valid will. A testamentary trust must comply with the formalities required for a valid will and must therefore be entered into by public deed before a notary or in a secret will deposited with the relevant court in accordance with the procedures in force for the deposit of secret wills explained in I a.) above. The succession only opens at the time of death of the testator at which point the will of the testator is rendered public and the testamentary trust enters into effect.

Testamentary trusts may include settlements in trust of either specified assets or all of the estate of the testator provided that any property settled in trust must not exceed the disposable portion permitted by law. Therefore, when the settlor wishes that, after his death, part or all of his estate be administered by a trustee for the benefit of one or more beneficiaries in accordance with the terms of the trust incorporated in the will, those persons related to the settlor who are entitled to the reserved portion – being the right on the estate of the deceased reserved by law in favour of the descendants and the surviving spouse of the deceased – are entitled to claim such legitimacy right from the trustee.

Moreover, Maltese law also allows for the creation of *inter vivos* trusts. This is to say that, rather than directing, by will, what is to happen to one’s property upon one’s death, a person may decide to establish a trust during his lifetime to direct what is to happen to his property from the date of the trust. To this effect, a trust deed will be entered into by and between the settlor of the property – while the settlor is still alive – and a trustee for the immediate settlement unto the trustee of property formerly belonging to the settlor. Upon the death of the settlor, the property settled in trust will continue to be governed and administered by the trustee in accordance with the terms of the trust rather than devolving in accordance with the terms of the last will made by the settlor. A will shall only enter into play to govern the portion of the estate of the deceased that has not been settled into trust.

This notwithstanding, the law also provides that trust settlements shall be reduced to the disposable portion permitted by law if at the time of opening the settlor’s succession, the trust settlements are

¹ Article 682 of the Civil Code, Chapter 16 of the Laws of Malta.

² Article 3 (1) of the Trusts and Trustees Act, Chapter 331 of the Laws of Malta.

³ Article 15 (2) of the Trusts and Trustees Act, Chapter 331 of the Laws of Malta.

found to exceed the disposable portion of his estate. When the trust property is so reduced, the excess property shall be retained by the trustee for the benefit of the settlor's heirs or any person entitled thereto. The reduction of trust settlements can only be demanded by those persons for whom the law has reserved a portion of the estate of the deceased – being the descendants and the surviving spouse of the deceased – and by their heirs or any person claiming under them.⁴ Also, unless the terms of the trust expressly provide otherwise, a person claiming the reserved portion, in relation to property settled in trust, shall lose any benefit under the trust.⁵ Moreover, the action for reduction shall be barred by the lapse of five years from the day of opening of succession of the deceased.⁶ The law further provides that the property of the settlor which is not settled in trust should be utilized first, to satisfy the claims of any person seeking to invalidate or otherwise reduce the trust, to the extent this is possible.⁷

On a concluding note, further to the discussion above, rather than a will substitute, a trust is best regarded as a will complement because a trust may exist in parallel with a will. Furthermore, a trust only affects the disposable portion of the estate of the deceased so that the rules on reserved portion applicable under Maltese succession law, under testate or intestate succession, must always be observed.

C. Powers of Attorney, Directives and Similar Disability Documents

Maltese law contains a number of disability provisions which render a person incapable of disposing by or receiving under a will.

As a general rule, a major (i.e. a person who has reached the age of eighteen years), is capable of performing all the acts of civil life, including the making of a will. The law further provides that persons who have attained the age of majority but are in a state of imbecility or other mental infirmity, or are otherwise spendthrifts, may be interdicted or incapacitated from doing certain acts.⁸ The disability of persons interdicted is either general in regard to all acts or specific. Indeed, as pointed out in the previous section, under Maltese law persons who are interdicted are deemed incapable of making wills unless the interdiction relates to interdiction on the ground of prodigality, in which case the court ordering the interdiction may also authorize the interdicted person to dispose of his property. Also, persons who are incapable of understanding and volition or are of unsound mind at the time of the will, even if not interdicted, are also deemed incapable of making a will.⁹ If, on the other hand, the person subject to incapacity makes a will, such a will is null notwithstanding that the person's incapacity may cease before his death.

The law also lays down a number of disability provisions as regards the persons who cannot receive by will, amongst whom are persons deemed unworthy of receiving by will in terms of law owing to some fraudulent or willful wrongful behaviour on their part towards the testator.¹⁰ Furthermore, where a tutor or curator has been appointed to administer the property of another person, such tutor or curator cannot benefit under a will made during the tutorship or curatorship by the person under his charge, unless the tutor or curator is the ascendant or descendant, brother, uncle, nephew, cousin or spouse of the person making the will.¹¹ Likewise, members of monastic orders or religious corporations of regulars are prohibited from disposing by or receiving under a will after taking vows in the religious order or corporation, as the case may be, unless and until such persons are lawfully released from their vows.¹²

⁴ Article 958B (2) and (5) of the Civil Code, Chapter 16 of the Laws of Malta.

⁵ Article 958B (9) of the Civil Code, Chapter 16 of the Laws of Malta.

⁶ Article 958B (13) of the Civil Code, Chapter 16 of the Laws of Malta.

⁷ Article 6B (d) of the Trusts and Trustees Act, Chapter 331 of the Laws of Malta.

⁸ Article 189 (1) of the Civil Code, Chapter 16 of the Laws of Malta.

⁹ Article 597 of the Civil Code, Chapter 16 of the Laws of Malta.

¹⁰ Article 605 of the Civil Code, Chapter 16 of the Laws of Malta.

¹¹ Article 609 of the Civil Code, Chapter 16 of the Laws of Malta.

¹² Article 611 of the Civil Code, Chapter 16 of the Laws of Malta.

II. Estate Administration

A. Overview of Administration Procedures

Inheritance is defined by the Civil Code (Chapter 16 of the Laws of Malta) as “the estate of a person deceased, and it devolves either by the disposition of man or, in the absence of any such disposition, by operation of law.”

Administration procedures are akin to probate, which is a legal process of administering the estate of a deceased person by resolving all claims and distributing the deceased person’s property under a will that has been declared valid by a probate court. The Maltese Civil Code does not refer to such administration procedures *per se* as probate administration is not in itself enshrined in our law.

Nevertheless, the Civil Code does provide for the formalities and procedures to be observed when drawing up wills and disposing of an inheritance. Thus there are provisions addressing, *inter alia*, the validity of wills, opening and publication of wills, testate and intestate succession, testamentary executors, vacant inheritance and the appointment of curators, the reserved portion and the rights of the surviving spouse.

Subtitle 1 of Part 2 of the Civil Code deals with testate succession and sets the parameters within which the testator may dispose of his property *causa mortis*. Of particular relevance to this paper is Article 762 which states that it shall be lawful for a testator to appoint one or more testamentary executors and such appointment and office is regulated by subsequent provisions of the Code. Notwithstanding the appointment by will, a testamentary executor is to be confirmed by the court of voluntary jurisdiction before commencing with the administration of the estate (barring urgent matters in the interest of estate preservation¹³). Such confirmation requires the executor to be recognized in the records of the court, to register his property in the Public registry, faithfully to carry into effect the will of the testator, and to render an account of his administration according to court orders.¹⁴

Article 771 of the Civil Code bestows upon the testamentary executor the power to collect sums owing to the estate and to sell property thereof to satisfy debts of the estate and/or to discharge legacies.¹⁵ Such power is limited to instances of absence or insufficiency of funds in the estate, and therefore, the executor may not dispose of the estate arbitrarily. Furthermore, the testamentary executor has a duty to render an account of his administration which is *secured* by the hypothecation of the executor’s property as aforementioned. By default, the sale of estate property shall be by public auction unless the heirs agree or the court, on the application of the executor, allows the sale to be made otherwise. Furthermore, any heir may prevent the sale of estate property by paying the debts and/or discharging the legacies.

The testamentary executor may resign his office at any time even though he may have already served as executor.¹⁶ A testamentary executor may also be removed from office in accordance with Article 776(2) of the Civil Code. Interestingly, the law does not stipulate the grounds on which a testamentary executor may be challenged and removed but states that this may be done on “good cause being shown.” In practice, testamentary executors are mainly challenged on grounds of poor administration.

In case of the death, absence, or renunciation of the testamentary executor, the execution of the will shall vest the decedent’s property in the heirs. However, the executor of a will shall not vest such property in the heirs if a court of voluntary jurisdiction, with the consent of the heirs, or a court of contentious jurisdiction for just cause, or on the demand of any interested party, shall have conferred the office upon another executor.¹⁷

Therefore, the “administration” of an estate of a deceased person under Maltese law may be said to be vested in the testator-appointed testamentary executor; the heirs in absence thereof; and in a

¹³ Article 769 of the Civil Code, Chapter 16 of the Laws of Malta.

¹⁴ Article 766 of the Civil Code, Chapter 16 of the Laws of Malta.

¹⁵ Dispositions by singular title *vide* Articles 589 and 591(2) of the Civil Code, Chapter 16 of the Laws of Malta.

¹⁶ Article 776 of the Civil Code, Chapter 16 of the Laws of Malta.

¹⁷ Article 778 of the Civil Code, Chapter 16 of the Laws of Malta.

court-appointed executor with the consent of the heirs or on the demand of any interested party. In each case, the administration of the estate is governed by the relevant sections of the Civil Code.

B. Intestate Succession and Forced Heirship

Intestate succession is governed by Subtitle 2 of Part 2 of the Civil Code. Article 788 states that “where there is no valid will, or where the testator has not disposed of the whole of his estate, or where the heirs-institute are unwilling or unable to accept the inheritance, or where the right of accretion¹⁸ among co-heirs does not arise, intestate succession takes place, wholly or in part, by operation of law.” Intestate succession is granted in favour of the descendants, ascendants, collateral relatives and spouse of the deceased and the government of Malta by the terms of the Civil Code. Succession *ab intestato* takes place in the following circumstances, with applicability of the relevant provisions in each case:

- Where the deceased is survived by descendants and spouse, the succession devolves as to one moiety upon the descendants and as to the other moiety upon the spouse.
- Where the deceased is survived by descendants and no spouse or by the spouse and no descendants, the succession devolves upon such descendants or spouse, as the case may be.
- Where the deceased leaves no descendant nor a spouse, the succession shall devolve:
 - if there are ascendants and no direct collaterals,¹⁹ to the nearest ascendant/s.
 - if there are ascendants and direct collaterals: one moiety to the nearest ascendant/s and the other moiety to the direct collaterals.
 - If there are no ascendants but there are direct collaterals: to the direct collaterals.
 - If there are no ascendants and no direct collaterals, to the nearest collateral in whatever line such collateral may be.
 - Where the deceased is not survived by any of the aforementioned persons, the inheritance shall devolve upon the Government of Malta.

Where a person conceived and born out of wedlock succeeds *ab intestato* with adoptive or natural children of the deceased or with the surviving spouse, the person conceived and born out of wedlock shall only receive three quarters of the share to which he would have been entitled if all heirs of the deceased, including such person, had been conceived and born in wedlock, and the remaining quarter of the share to which he would have been so entitled shall devolve on the other heirs of the deceased.

The “reserved portion” is the right on the estate of the deceased reserved by law in favour of the descendants and the surviving spouse of the deceased. Therefore, the testator’s discretion over the disposal of the said portion of the estate is limited by law. In terms of Article 616 of the Civil Code, the reserved portion due to all children²⁰ shall be one-third of the value of the estate if such children are not more than four in number or one-half of such value if they are five or more.

The reserved portion is calculated on the whole estate after deducting debts due by the estate and funeral expenses. It is to be unencumbered and is divided in equal shares among the children

¹⁸ Accretion occurs where two or more persons have been instituted heirs or named as legatees conjointly, and any one of such persons predeceases the testator, or is incapable of receiving, or refuses the inheritance or the legacy, or has no right thereto owing to the non-fulfilment of the condition under which he was so instituted or named, and the share of such person, with the obligations and burdens attaching to it, accrue to that of the other co-heirs or co-legatees.

¹⁹ Brothers and/or sisters, whether of the half or full blood or adopted, and the descendants of the predeceased brothers or sisters, of the half or full blood or adopted. Brothers and sisters succeed *per capita* and their descendants succeed *per stirpes*.

²⁰ Whether conceived or born in wedlock or conceived and born out of wedlock or adopted.

participating therein (should there be only one child, he shall receive the whole of the reserved portion). Furthermore, for the purposes of assigning the reserved portion, the term “children” shall include descendants thereof, in whatever degree they may stand. In calculating the share of the reserved portion due to any child, there shall be imputed all things received thereby from the testator as subject to collation in terms of law. Any property bequeathed by will is to be considered when calculating the reserved portion. One cannot renounce any testamentary disposition and claim the reserved portion, except when such testamentary disposition is made in usufruct or consists in the right of use or habitation, a life annuity or an annuity for a limited time.

The only limitations to the right of a child to the reserved portion are disherison and the instances by which a person may become unworthy to receive by will in terms of law. The former ensues by means of a specific declaration of the testator on any of the grounds specified in the Civil Code, particularly in Article 623 *et sequitur* thereof. Such grounds include, *inter alia*, grievous injury against the testator, failure to provide maintenance and engaging in prostitution without the connivance of the testator. If a disinherited person has children or other descendants, the reserved portion of which such person has been deprived shall be due to such children or other descendants.

Persons unworthy of receiving by will are those listed in Article 605 of the Civil Code and include any person who has wilfully killed or attempted to kill the testator or his spouse; charged the testator or spouse thereof, before a competent authority, with a crime punishable with imprisonment of which he knew the testator or spouse to be innocent; compelled or fraudulently induced the testator to make or amend his will or prevented the testator therefrom.

The other form of “forced heirship” contemplated by the Civil Code is embodied in the provisions relating to the rights of the surviving spouse. Articles 631 and 632 quantify the rights of the surviving spouse over the estate of the deceased as one-fourth of the value of such estate in full ownership if the deceased is survived by children or other descendants, and one-third of the value of the estate in full ownership if there are no such children or descendants. Furthermore, the surviving spouse has the right of habitation in the principal residence if occupied at the time of death of the predeceased spouse.

C. Marital Property

Subtitle 3 of title 5 of the Civil Code addresses the community of acquests which, in terms of Article 1316 of the Code, is established *ipso jure* between two spouses celebrating marriage in Malta. Indeed, the spouses could enter in to a pre-nuptial contract doing away with the community of acquests if desired.

In terms of Article 1320 of the Civil Code, the community of acquests principally comprises:

- All that is acquired by each of the spouses by the exercise of his or her work or industry;
- The fruits of the property of each of the spouses including the fruits of property settled as dowry or subject to entail, whether the husband or wife possessed the property since before the marriage, or whether the property has come to either of them under any succession, donation, or other title, provided such property shall not have been given or bequeathed on conditions that the fruits thereof shall not form part of the community of acquests;
- any property acquired with moneys or other things derived from the acquests, even though such property is so acquired in the name of only one of the spouses;
- the fruits of such property of the children as is subject to the legal usufruct of the father or of the mother.

By elimination, all that does not form part of the community of acquests as defined by law constitutes the paraphernal property of the respective spouse and as such, ownership and administration thereof vests exclusively in the spouse to whom the property belongs.

In the ambit of succession, it is not uncommon for husband and wife to make a will in the same instrument, known as a will *unica charta* and regulated by Article 592 of the Civil Code. A will *unica charta* maybe be made to the mutual benefit of the spouses or to the benefit of any third party. It is drawn up in a manner that the provisions with regard to the estate of one of the testators are kept separate from those containing the provisions of the other spouse. An intrinsic feature of this form of will is the forfeiture of rights in case of revocation of the will by either spouse. Article 593 of the Civil Code states that where, by a will *unica charta* the testators shall have bequeathed to each other the ownership of all their property or the greater part thereof with the express and specific condition that if one of the testators revokes such bequest he shall forfeit any right in his favour from such joint will, the survivor, who shall revoke the will with regard to such bequest, shall forfeit all rights which he or she may have had in virtue of such will on the estate of the predeceased spouse.

D. Tenancies, Survivorship Accounts, and Payable on Death Accounts

Survivorship accounts and payable on death accounts as such do not typically appear under Maltese Law. The latter appear, albeit indirectly, in the provisions on life insurance contracts in the Civil Code, particularly Article 1712C which allows a policy holder to elect that the proceeds or any benefit from a contract of life insurance, whether payable on a definite maturity date or on the death of the insured, including any surrender value, be payable to one or more named beneficiaries.

III. Trusts, Foundations and Other Planning Structures

A. Common Techniques

Under Maltese law, estate planning structures not only include wills and trusts as explained above, but also foundations.²¹ For a discussion on wills and trusts please refer to I A. and B. above. This brief discussion shall provide an overview of the legal nature of foundations whilst comparing foundations to and distinguishing them from trusts as a tool for estate planning.

The common understanding of foundations is that they look like ordinary companies but act like trusts. The similarity between trusts and foundations is also reflected in the provision of law which allows the conversion of a foundation into a trust and vice versa.

Maltese law distinguishes between types of foundations. On the one hand, there are public/purpose foundations which are established exclusively for a charitable, philanthropic or other social purpose or as a non-profit organization or for any other lawful purpose. On the other hand, there are private foundations established by a founder for the benefit of one or more named persons or classes of persons. Charitable foundations in Malta are numerous and private foundations are less common. Like foundations, trusts may also be set up for a charitable purpose or for the benefit of one or more beneficiaries or both.

Both trusts and foundations are legal institutions intended to create a distinct fund that is administered by fiduciaries for the benefit of one or more beneficiaries. The administration of foundations is entrusted to one or more designated persons collectively constituting a board of administrators. The Board members enjoy discretion in the exercise of their powers and duties, similar to trusts, trusts being institutions which are also administered by a trustee or co-trustees, who, more often than not, are also granted discretionary powers in the undertaking of their fiduciary duties. As in the case of trusts, the patrimony of the foundation is also separate and distinct from that of its founder, the administrator or the beneficiaries thereof. The settlor of a trust cannot also be a trustee of the trust property; however the founder can be one of the administrators of the foundation.

Like trusts, foundations may be constituted by virtue of a public deed *inter vivos* or by will. Deeds of foundations must be registered with local authorities, including the Office of the Registrar of Legal Persons. The requirement for registration grants a foundation the attribute of legal personality, like companies, but unlike trusts. Indeed, foundations exist from the date of registration and cease to exist with effect from the date when they are removed from the relevant register. In addition, as a general rule, the term of the foundation cannot exceed 100 years save in those specific instances contemplated by law. Because a foundation is a juridical person at law, the foundation itself, rather

²¹ Sub-Title II of Title III of the Second Schedule of the Civil Code, Chapter 16 of the Laws of Malta.

than the administrator of the foundation, becomes the owner of the foundation property. In the case of trusts, it is the trustee rather than the trust who holds the trust property as owner.

Also, foundations are treated in the same manner as companies for tax purposes such that profits of a foundation are taxed at the rate of 35% and distributions made to beneficiaries are treated as dividends. Beneficiaries are also entitled to claim the tax refunds available under Maltese law as though the beneficiaries were shareholders of a company. A transfer of a beneficial interest in a foundation is also treated as a transfer of a security in a company. Alternatively, foundations may elect to be taxed as trusts.

Another interesting feature of foundations under Maltese law is that it is possible to create segregated cells within the same foundation. The cells may be utilized to segregate certain assets from the general patrimony of the foundation for the exclusive benefit of certain beneficiaries or otherwise dedicated to a specific purpose.

B. Fiduciary Duties (Trustees, Board Members, Directors, etc.)

The concept of fiduciary obligations is governed, generally, by the provisions of the Civil Code, more specifically Article 1124A and 1124B thereof. Fiduciary obligations may arise in virtue of law, contract, quasi-contract, trusts, assumption of office or behaviour. In terms of the said provisions, fiduciary obligations arise in the following instances: whenever a person owes a duty to protect the interests of another; holds or exercises control over property for the benefit of another, including powers of disposition; or receives information from another person subject to a duty of confidentiality.²²

A fiduciary is subject to a number of duties in terms of law and is required to always act with utmost good faith and honesty in the performance of his obligations in the interest of the person for whom he is acting as fiduciary.²³ An important consequence of fiduciary obligations is that whenever a person acts as fiduciary and holds property subject to fiduciary obligations, such property cannot be subject to claims by the fiduciary's own personal creditors or his/her spouse or heirs at law.²⁴

Under Maltese law, a number of legal institutes / obligations / offices ("Institution") exist, all of which may have characteristics of fiduciary obligations. However, notwithstanding that these Institutions share common characteristics – all of which give rise to fiduciary relationships – this does not mean that they function in the same way or with a similar purpose. One cannot freely apply the special rules, if any, relative to one Institution, to another. Indeed, it is important to consider not only the provisions of the Civil Code governing fiduciary obligations generally but also the specific rules applicable to the relevant Institution.

Trusts create fiduciary obligations of the trustee in favour of the beneficiary/beneficiaries of the trust in relation to trust property.²⁵ The administrators of foundations are also deemed to be fiduciaries, and therefore, owe fiduciary duties consistent with the obligations laid down by the applicable provisions of the Civil Code.

Moreover, under Maltese law, the director of a company is also deemed to be a fiduciary as a result of the position/office he occupies/holds within the company. A director must act in the best interests of the company of which he has been appointed director. Directors are generally afforded a number of discretions in relation to the conduct of the business of the company so as to enable them to exercise efficiently their powers and duties for the benefit of the company at large. This notwithstanding, in order to curtail the abuse of such discretions, not only are directors required to refrain from acting *ultra vires* by exceeding the company's objects or powers, but are positively bound to always act honestly and in good faith whenever they are exercising their discretions in the interests and for the benefit of the company.²⁶ An important characteristic of fiduciaries which also applies in the case of directors vis-a-vis companies relates to the segregation of assets of the fiduciary from those of the person in whose best interests the fiduciary is acting. Consequently, the personal assets of a director

²² Article 1124A (1) of the Civil Code, Chapter 16 of the Laws of Malta.

²³ Article 1124A (4) of the Civil Code, Chapter 16 of the Laws of Malta.

²⁴ Article 1124B (2) of the Civil Code, Chapter 16 of the Laws of Malta.

²⁵ Article 3 (6) of the Trusts and Trustees Act, Chapter 331 of the Laws of Malta.

²⁶ Article 136A of the Companies Act, 1995, Chapter 386 of the Laws of Malta.

cannot be used to satisfy the company's own debts should the company become insolvent, except in instances of proven wrongful or fraudulent trading on the part of any such defaulting director.

C. Treatment of Foreign Trusts and Foundations

Maltese law requires that a trust governed by Maltese law must comply with domestic mandatory rules – which rules cannot be derogated from by voluntary act – including provisions regulating succession rights. As a general rule, in the event of a conflict between the terms of a trust and any such mandatory rules, the latter will prevail. However, if any trust governed by Maltese law has no connection to Malta by reason of the domicile of the settlor at the time of creation of the trust or the *situs* of the property settled in trust, the provision of law that requires mandatory rules to be observed shall not apply.

Malta is a member of and follows the Hague Convention on the Law Applicable to Trusts and their Recognition, which provides that while a foreign trust shall be governed by its foreign law for all intents and purposes, such foreign trust shall be recognized by and given effect in Malta.²⁷ Furthermore, the law also provides that Maltese mandatory rules, as referred to earlier on, shall apply to such foreign trust where the settlor of the trust is domiciled in Malta at the time of creation of the trust.²⁸ In contrast, when the settlor of a foreign trust is not domiciled in Malta at the time of creation of the trust, Maltese mandatory rules shall not apply, and Maltese law shall only apply in so far as relates to the recognition of the foreign trust in Malta.²⁹ Such a provision of law is intended to ensure that Maltese public policy rules are not circumvented by a person having a Maltese domicile.

Regarding foundations, please refer to sections earlier that in consequence of the requirement of registration, Maltese foundations possess legal personality under Maltese law. Therefore, foreign foundations which are deemed to have legal personality by and under the law of their domicile shall also be recognized as legal persons for all intents and purposes by and under Maltese law.

IV. Taxation

A. Domicile and Residency

Domicile and residency are the criteria by which a person's tax liability attaches to a particular jurisdiction. Residency and domicile are determined on the basis of legal and factual considerations as applicable to physical and legal persons. Although the latter may fall outside the scope of this paper, Article 2 of the Income Tax Act (Chapter 123 of the Laws of Malta) gives a collective definition of "resident in Malta":

"...when applied to an individual means an individual who resides in Malta except for such temporary absences as to the Commissioner may seem reasonable and not inconsistent with the claim of such individual to be resident in Malta; when applied to a body of persons, means any body of persons the control and management of whose business are exercised in Malta, provided that a company incorporated in Malta on or after 1st July 1994 shall be resident in Malta and any other company incorporated in Malta shall be resident in Malta from 1st January 1995 where the management and control of the business of the company is exercised outside Malta."

With regard to physical persons, this definition is not conclusive as, while assuming that every person desires to be considered a resident of Malta, it vests considerable discretion in the Commissioner of Inland Revenue in determining such resident status. In practice, a person is considered to be a resident of Malta if such person spends six months (183 days) in Malta in any given year.³⁰

However, even this definition drawn by analogy to Article 13 of the Act³¹ may not necessarily be in itself conclusive. The fact that a person spends less than 183 days in Malta in a given year does not exclude *a priori* his qualification as a resident of Malta due to the applicability of the notion of "habitual

²⁷ Article 6 (2) of the Trusts and Trustees Act, Chapter 331 of the Laws of Malta.

²⁸ Article 6A (4) of the Trusts and Trustees Act, Chapter 331 of the Laws of Malta.

²⁹ Article 6A (5) of the Trusts and Trustees Act, Chapter 331 of the Laws of Malta.

³⁰ Vide Board of Special Commissioners case number 13/63, decided 14th December 1963.

³¹ Defining temporary residents as persons residing in Malta for a period of less than six months in a given year.

residence.” The concept of habitual residence is akin to the British common law concept of “ordinary residence,” which is not defined in the Income Tax Act but which is commonly defined as voluntary residence with a degree of continuity.

The concept of domicile entails legal and factual considerations against fundamental rules establishing domicile and distinguishing principally between domicile of origin and domicile of choice. The domicile of origin is the starting point, equated to the domicile of the father at the time of birth. Throughout the course of one’s life, affinity to the domicile of origin may dilute to the point of abandoning the domicile of origin and adopting a domicile of choice. Such transition is the result of the change in the territory one considers his permanent home and goes beyond mere residence. Of paramount importance in determining whether the domicile of origin has been abandoned is the intention of the person, more precisely the *animus revertendi*. That is, whether the person seemingly abandoning the domicile of origin or choice intends to return thereto. A person can only have one domicile and cannot be without a domicile. Therefore, should a domicile of choice be substantially abandoned without the effective taking up of another domicile of choice, one would revert to his domicile of origin.

The concept of domicile applies also in the case of bodies of persons. Jurisprudence, British in particular, equates domicile in the case of bodies of persons with the country of incorporation and does not contemplate the possibility of change in domicile. However, given that at the time of inception of the concept of domicile of bodies of persons, re-domiciliation of companies did not exist, it is today safe to assume that a change in domicile of bodies of persons is indeed triggered by the process of company re-domiciliation.

B. Gift, Estate, and Inheritance Taxes

There is no inheritance, gift, or estate tax in Malta. However, 5% duty is payable on the transfer of immovable property or any real right thereon, including transfers *causa mortis*, in terms of the Duty on Documents and Transfers Act. The said duty is payable on the greater of the value of the consideration for the transfer and the real value of the immovable being transferred.

Akin to ‘gifts’ are ‘donations’ which, barring some exceptions,³² shall be considered as a deemed sale made at the market value of the property at the time of transfer, and therefore are subject to any applicable capital gains.³³

C. Taxes on Income and Capital

Generally speaking, a person who is ordinarily resident and domiciled in Malta is taxed in Malta on his worldwide income and chargeable gains. A person who is resident in Malta but not *ordinarily* resident or domiciled in Malta is taxed in Malta on income and capital gains arising in Malta as well as income (but not capital gains) remitted to Malta. All other persons are liable to tax in Malta on a source-basis, that is, on income arising in Malta.

In terms of Article 4 of the Income Tax Act, the total taxable income of an individual comprises his aggregate income (after allowing for exemptions and allowable deductions in terms of Part IV of the Income Tax Act) including gains or profits derived from a trade, business, profession or vocation; employment³⁴ or office; dividends, premiums, interest or discounts; pensions, charge, annuities or annual payments; rents, royalties, premiums and any other profits arising from property; and chargeable capital gains. The latter, comprising gains on the transfer of capital assets,³⁵ are aggregated with a person’s other income and the total of income and capital gains is charged to income tax at the applicable progressive rates, the highest being 35%.

³² Namely donations to a spouse, descendant or ascendant in the direct line and their respective spouses or, in the absence of descendants, to brothers or sisters and their descendants; and donations to approved philanthropic institutions.

³³ Tax levied on the gains derived from the transfer of immovable property.

³⁴ Including fringe benefits.

³⁵ Capital assets include immovable property, securities, business, goodwill, copyrights, patents, trademarks, trade-names, beneficial interest in a trust and interest in a partnership.

However, certain income and capital gains attract a bespoke rate of tax. For instance:

- The transfer of immovable property in Malta after 22nd November 2005 tax is payable at 12% on the higher of the market value of the property or the consideration. If the property was inherited before 25th November 1992, tax is payable at 7% on the consideration received. Finally, if the property was inherited after 24th November 1992 and before 25th November 2003 or was acquired by the transferor by title of donation more than five years before the date of transfer, tax is payable 12% on the gain derived from the transfer.
- A 15% withholding tax may, at the option of the recipient, be imposed on certain types of investment income.³⁶ Being an optional tax, the recipient may elect to receive such income without the deduction, in which case it is to be included in the computation of his annual income to be charged to tax at the ordinary progressive rate.
- As of 2011, a flat rate of 15% applies to highly qualified persons in terms of Legal Notice 106 of 2011, eligibility to which principally entails an expatriate holding an 'eligible office' by virtue of a 'qualifying contract of employment' in terms of the Schedule to the Legal Notice.
- Furthermore, a High Net Worth Individuals Scheme was recently launched to gradually replace the "outdated" Permanent Residence Scheme by virtue of which foreign nationals taking up residency in Malta enjoy attractive tax incentives. Whilst the end-result may be said to be largely similar to that of its predecessor - predominantly income tax at the flat rate of 15% on foreign income (excluding capital gains) received in Malta - the criteria under the new Scheme are more rigorous with the intention to curb potential abuse.

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³⁶ As per the "investment income provisions" of the Income Tax Act, Articles 32A – 42, both inclusive.