Malta

International Estate Planning Guide

IBA Private Client Tax Committee

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A. *Will formalities and enforceability of foreign wills*

The general provisions of Maltese law governing wills are those set out in the Civil Code.[1] The Civil Code provides the definition of a will as being an instrument, revocable in nature, by which a person, according to the rules laid down by law, disposes, for the time when they cease to live, of the whole or part of their property. Furthermore, a will may contain dispositions by universal title, whereby the testator bequeaths to one or more heirs the whole of their property or part thereof, or by singular title, whereby the testator bequeaths their property to one or more legatees.

While the law contemplates that there may only be one person who may bequeath by way of a will in one single instrument, the Civil Code does allow for a will to be made up between spouses by way of a will *unica charta*. As a will is by law revocable, revocation by one of the testators of a will *unica charta* is possible, but the validity of the will remains vis-à-vis the estate of the testator who has not revoked the same will. However, in doing so, and where the testators have bequeathed to each other the ownership of all their property or the greater part thereof, the revoking testator, if they survive the other testator, will forfeit all rights that such a person may have had by virtue of such a will on the estate of the predeceased spouse.

Wills under Maltese law may either be public or secret. A public will is received and published by a notary in the presence of two witnesses (in the same manner as any other notarial instrument, and according to the provisions set out by the Notarial Professions and Notarial Archives Act).[2] This is the case even as regards to the procedures to be followed where the testator may not know how to sign their signature and/or write. The heirs, legatees or their relations by consanguinity or affinity within the degree of, and including, an uncle/aunt or nephew/niece may not act as witnesses to the will. The publishing notary is furthermore bound to deliver and register the will at the public registry within 15 days from having received the will. Revocation of the will, whether in whole or in part, must also be carried out by means of a notarial act to the same effect.

A secret will may be printed, typed or written in ink either by the testator or by a third person. Where the testator knows how to and can write, the will shall in all cases be signed by the testator at the end thereof. If the testator does not know how to or cannot write, any disposition made via the secret will must be made with the assistance of a judge or magistrate. The respective judge or magistrate must read out and explain to the testator the contents of the paper that the testator declares to be their will and shall enter, at the foot of the will, a declaration to the effect that the requirements have been complied with and that they are satisfied that the contents of the paper are in accordance with the intention of the testator. The declaration must be signed and dated by the judge or magistrate. After the will is duly closed off and sealed, the latter shall add on the paper itself on which the will is written or on the envelope a declaration to the effect that such paper or envelope contains the will of the person making it.

A notary in receipt of a secret will is bound to draw up an act of delivery, thereby recording the declaration of the testator on the paper itself on which the will is written or on the envelope. The act of delivery must be signed by the testator, the witnesses and the notary. If the testator declares that they do not know how to or cannot write, the notary shall add a declaration at the foot of the act and such an entry shall be

[1] Chapter 16 of the Laws of Malta.
[2] Chapter 55 of the Laws of Malta.

equivalent to a signature. The notary must then, within four days from the date of delivery, present the will to the court of voluntary jurisdiction for preservation by the registrar of the courts, in accordance with the provisions of the Code of Organisation and Civil Procedure.[3]

A testator may at any time withdraw their secret will. If the secret will is still with the notary to whom they delivered it, the will must be withdrawn from the same notary. Otherwise, if the will has been deposited with the court registry, the will must be withdrawn from that registry. Furthermore, a person claiming to have an interest in a secret will may demand the opening of the will as soon as the death of the testator has been ascertained.

The capacity of the testator is paramount to the validity of a will. Therefore, any person who is suffering from incapacity as per the provisions of the Civil Code may not dispose of or receive property by will. Persons who are incapable by law of making wills are the following:

- persons who have not reached the age of 16;
- persons who, even if not interdicted, are not capable of understanding and volition, or who, because of some defect or injury, are incapable, even through interpreters, of expressing their will;
- persons interdicted on grounds of insanity or mental disorder;
- persons who, not being interdicted, have a mental disorder or other condition that renders them incapable of managing their own affairs at the time of attempting to make a will; and
- persons who are interdicted on the ground of prodigality, unless they have been authorised to dispose of their property by the court that has ordered their interdiction, although said persons may, in all cases, revoke any will made by them prior to their interdiction without the authorisation of the court.

Maltese succession law applies to the estate of a deceased person who is domiciled in Malta and to immovable property situated in Malta. According to the European Union Succession Regulation (Regulation (EU) No 650/2012), a testator may choose the law of their nationality to apply to their estate.

B. *Will substitutes (revocable trusts or entities)*

The laws of succession under Maltese law have been consolidated following centuries of jurisprudence, based on civil/continental legal traditions. An alternative means of estate planning that is well regulated under Maltese law is the establishment of a trust. In addition to recognising foreign trusts based on the Hague Convention,[4] Malta has introduced domestic trust legislation. The Trusts and Trustees Act[5] is the main instrument regulating trusts and trustees in Malta.

The Act provides 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

[3] Chapter 12 of the Laws of Malta.
[4] The Recognition of Trusts Act 1994 enabled Malta's accession to the Hague Convention on the Law Applicable to Trusts and on their Recognition.
[5] Chapter 331 of the Laws of Malta.

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 aforesaid'.[6]

Furthermore, while the trust property is held by, in the name or under the control of the trustee (both with full power and the duty for which they are accountable, to administer, employ or dispose of the trust property in accordance with the terms of the trust and as imposed by law), the Act specifies that trust property shall constitute a separate fund owned by the trustee. This fund is distinct and separate from the personal property of the trustee and from other property held by that trustee under any other trust. Consequently, personal creditors of the trustee have no recourse against trust property. Trust property is also recognised as not forming part of the trustee's personal estate upon its insolvency or bankruptcy. Furthermore, trust property does not form part of the matrimonial property of the trustee or their spouse, or part of the trustee's estate upon their death.

It is also possible to set up a discretionary trust under Maltese law, whereby trustees are endowed with significant discretionary powers in regard to the manner in which they administer the property of the trust fund, as well as the manner and timing of distributions to beneficiaries of the trust. In accordance with the provisions of the Act, the terms of a trust may also be varied and revoked if the trust instrument allows for these actions to be taken. In the event that a trust is revoked, the trustee shall hold the trust property in trust for the settlor absolutely. Therefore, the absolute title of the property shall in the case of revocation revert back to the settlor, with the settlor being able to alienate or otherwise encumber the property.

A trust may be created either *causa mortis* or *inter vivos*. Therefore, dispositive provisions of a will may provide for the establishment of a trust *causa mortis*, otherwise referred to as a testamentary trust. Where a testamentary trust is established, the testator *qua* settlor establishes the trust by means of their 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 the case of a secret will, deposited with the relevant court in accordance with the procedures in force for the deposit of secret wills (see section (I)(a)). At the time of death of the testator, the succession is opened, the will of the testator is rendered public and the testamentary trust is established.

While the testator may choose to settle either specific assets or all of their estate in the testamentary trust, property settled in the trust may in no way exceed the disposable portion of the testator's estate as permitted by law. Therefore, where a testator has settled in trust an amount exceeding this disposable portion, the heirs of the settlor who are entitled by law to the reserved portion of the estate, namely the descendants and surviving spouse of the testator *qua* settlor, may claim the respective amount of their reserved portion directly from the trustee out of the trust assets.

An *inter vivos* trust is expected to survive the testator. Therefore, while the trust is established by a trust deed during the lifetime of the settlor and the respective trustee or trustees are duly appointed, the trust property is immediately settled in trust at this time. At the time of death of the settlor and thereafter, the trust property shall remain governed by the terms of the trust deed. The remaining property of the settlor (that was not settled in the trust) is governed by the last valid will of the settlor or intestate succession rules where no will exists. However, it should be noted that this will not prevent the right of the settlor's heirs, for whom a portion of the estate is reserved, from claiming against the trust property if the assets in the trust exceed the applicable disposable portion to the extent, in all cases, that the assets of the deceased settlor's estate, ie, those not settled in the trust, are utilised in order to satisfy this claim.

[6] *Ibid*, Article 3(1).

Trustees who act in a professional and commercial capacity must be licenced by the Malta Financial Services Authority. In addition, Maltese law provides for the appointment of a private trustee. A private trustee is an individual who acts as a trustee by virtue of their family ties or a long-standing personal connection with the settlor, and acts without remuneration and only in respect of a limited number of settlors.

In conclusion, trusts are an effective tool in estate planning and may provide additional assurance to the settlor that the assets within the trust and the rights of the beneficiaries are more clearly secured and regulated. That being said, the provisions of Maltese law relating to succession will still apply, particularly when it comes to the protection of the reserved portion of the assets due to specified heirs of the settlor/testator. Accordingly, the creation of a trust should also involve an assessment of the implications that may be brought about by the settlor's last valid will (if any and, particularly, if this is the instrument establishing the trust, that is a testamentary trust) and the Maltese law of succession.

C. *Powers of attorney, directives and similar disability documents*

A major (being a person who has passed their 18th birthday) is capable of performing all the acts of civil life in terms of Maltese law, including making a will. The law, however, provides that a major with a mental disorder or other condition that renders them incapable of managing their own affairs or who is insane or prodigal may be interdicted or incapacitated from carrying out certain acts.[7] The disability of an interdicted person is either specific or general in regard to all types of acts. Persons who are interdicted are deemed incapable of making a will, unless the interdiction is on the ground of prodigality, in which case the court ordering the interdiction may also authorise the interdicted person to dispose of their property.[8] In addition, persons who are incapable of understanding and acting on their volition or are of unsound mind at the time of attempting to create a will (even if they have not been interdicted) are also deemed incapable of making a will.[9] The capacity to make a will is central to the validity of the will itself.

The Civil Code also provides for disability provisions whereby a person may be considered by law to be unworthy and therefore incapable of receiving property under a will. Such persons include any person who has wilfully killed or attempted to kill the testator or their spouse; has charged the testator or their spouse before a competent authority with a crime punishable with imprisonment of which they knew the testator or their spouse to be innocent; has compelled or fraudulently induced the testator to make their will or to make or alter any testamentary disposition; has prevented the testator from making a new will; has prevented them from revoking an existing will; has supressed, falsified or fraudulently concealed the will; and any person who has been an accomplice in any of the said acts. Furthermore, where a tutor or curator has been appointed to administer the property of another person, such tutor or curator cannot benefit from a will made during the tutorship or curatorship by the person under their charge, unless the tutor or curator is the ascendant or descendant, brother, uncle, nephew, cousin or spouse of the person making the will.[10] Likewise, members of monastic orders or religious corporations of regulars are prohibited from disposing of or receiving assets under a will after taking vows in the religious order

[7] Civil Code, Chapter 16 of the Laws of Malta, Article 189(1).
[8] *Ibid*, Article 597(e).
[9] *Ibid*, Article 597(b).
[10] *Ibid*, Article 609.

or corporation, as the case may be, unless and until such persons are lawfully released from their vows.[11]

II. Estate administration

A. *Overview of administration procedures*

The Civil Code's general provisions on succession provide that an 'inheritance' is the estate of a deceased person and it devolves either by the disposition of a person or, in the absence of any such disposition, by operation of law.[12] In light of the foregoing, administration procedures contemplated under Maltese law are similar to probate, the latter being the 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 court. The Maltese Civil Code does not refer to such administration procedures per se because probate administration is not in itself enshrined in Maltese law.

The Civil Code details the formalities and procedures to be observed when drawing up a will and disposing of an inheritance. There are provisions addressing, inter alia, the validity of wills, the 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.

A testator is empowered by law to appoint one or more testamentary executors.[13] The appointment and office of such testamentary executors are regulated accordingly. A testamentary executor must be confirmed by the court of voluntary jurisdiction before they take on the administration of the estate,[14] barring any urgent matters in the interest of estate preservation.[15] Prior to the court confirming the testamentary executor, the executor must have entered into a recognisance in the records of the court, including the hypothecation of their property to be registered in the public registry, declaring to faithfully carry into effect the will of the testator and to render an account of their administration every year or once only, as the court shall direct according to the circumstances.[16]

For the purposes of paying the debts of the estate or discharging legacies, the testator is also empowered to, solely in situations where there is the absence or insufficient funds in the estate, collect sums owing to the estate or, in default, sell estate property. Such sales must be carried out by public auction, unless the heirs agree or the court allows the sale be made other than by auction in response to an application by the executor.[17] In this case, the heirs may also prevent the sale of such property by offering the means with which to pay the debts and discharge the legacies.

The law also contemplates the appointment of more than one testamentary executor, who are deemed to act conjointly, unless the testator specifies in their will that the executors are to act separately on distinct matters. An executor may renounce their office at any time, even in cases where the executor has already commenced to act. The law also provides that the testamentary executor may be removed

[11] *Ibid*, Article 611.
[12] *Ibid*, Article 585.
[13] *Ibid*, Article 762.
[14] *Ibid*, Article 765.
[15] *Ibid*, Article 769.
[16] *Ibid*, Article 766.
[17] *Ibid*, Article 771.

from office as a result of good cause being shown.[18]

In the case of the death, absence or renunciation or illness of the sole executor or of all executors, where more than one is appointed, the execution of the will vests either in the heirs directly, unless the court of voluntary jurisdiction, with the consent of the heirs, or the court of contentious jurisdiction, for just cause on the demand of any interested party, confers the office of executor upon another person.[19]

In conclusion, the law contemplates the concept of the administration of testate succession through the optional appointment of testamentary executors. Ultimately, and in the absence of the appointment of such an executor, it falls to the heirs to execute the testamentary succession from which they are to benefit.

B. *Intestate succession and forced heirship*

Intestate succession is governed by Subtitle 2, 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 accretion[20] among the co-heirs does not arise, intestate succession takes place, wholly or in part by operation of law. Intestate succession (succession *ab intestato*) is granted in favour of the descendants, ascendants, collateral relatives and spouse of the deceased and the government of Malta according to the terms of the Civil Code. In regulating succession among relations, the law takes into consideration the proximity of the relationship and does not consider either the prerogative of the line or origin of the property, except in cases expressly laid down by law. Succession *ab intestato* takes place in the following circumstances:

- where the deceased has left children or their descendants *and* a spouse, the succession devolves as to one moiety upon the children and other descendants, and as to the other moiety upon the spouse;

- where the deceased has left children or other descendants but no spouse, the succession devolves upon the children and other descendants;

- where the deceased has left no children or other descendants but is survived by a spouse, the succession devolves on the spouse;

- where the deceased has left no children or other descendants, nor a spouse, the succession shall devolve:

    - if there is an ascendant or ascendants and no direct collaterals (brothers and sisters, whether half, full or adopted, and their descendants) to the nearest ascendant or ascendants;

[18] *Ibid*, Article 776.

[19] *Ibid*, Article 778.

[20] Where two or more persons have been instituted heirs or named as legatees conjointly and any one of such persons predeceases the testator, is incapable of receiving, refuses the inheritance or the legacy or has no right thereto owing to the non-fulfilment of the conditions under which they were so instituted or named, the share of such person, with the obligations and burdens attached to it, accrue to that of the other co-heirs or co-legatees.

- if there is an ascendant or ascendants and direct collaterals, one moiety to the nearest ascendant or ascendants and the other moiety to the direct collaterals (brothers and sisters succeed per capita, while their descendants succeed *per stirpes*);

- if there is no ascendant or ascendants, but there are direct collaterals to the direct collaterals; and

- if there is no ascendant or ascendants nor direct collaterals to the nearest collateral in whatever line such collateral may be.

Where the deceased is not survived by any of the persons entitled to succeed under the rules laid down in the Civil Code, the inheritance will devolve upon the Government of Malta.

The law seeks to protect the interests of the descendants and spouse (where applicable) of the deceased by reserving a portion of the estate of the deceased in their favour from which they may claim. In terms of Article 615(1) of the Civil Code, the 'reserved portion' is defined as the right to the estate of the deceased reserved by law in favour of the descendants and the surviving spouse of the deceased. This right is deemed by law to be a credit of value of the reserved portion against the estate of the deceased. Such credit accrues interest from the date of opening of the succession if the reserved portion is claimed within two years from such date or from the expiry of a judicial act if the claim is made after the expiration of the said two-year period. However, the court may decide not to award interest or may award a reduced rate of interest if the circumstances of the case so require.

The reserved portion due to all children (whether conceived or born in wedlock, out of wedlock or adopted) is set at 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 there are five or more children. The reserved portion is divided into equal shares among the children who participate in it, unless there is only one child who would, in that case, receive the whole of the aforementioned third part.[21] The term 'children' also includes the descendants of the children of whatever degree.

The reserved portion may not be encumbered by the testator with any burdens or conditions. It is calculated with reference to the entire estate, after deducting the debts owed by the estate and the funeral expenses, and must include all the property disposed of by the testator under gratuitous title, even in contemplation of marriage, in favour of any persons whomsoever, with the exception of any such expenses as may have been incurred for the education of any of the children or other descendants. In calculating the share of the reserved portion due to any child, all things received from the testator shall be imputed as subject to collation in terms of law. Any property bequeathed by will is to be considered when calculating the reserved portion. Furthermore, it is not possible for a person to renounce any testamentary disposition and also be able to claim the reserved portion, except when such testamentary disposition is made in usufruct or consists of the right of use or habitation, a life annuity or an annuity for a limited time.

In addition to the grounds on which a person may become unworthy to inherit (as discussed in section (I)(c)), the law also provides grounds for dishersion (or disinheritance). The persons entitled by law to a reserved portion may be deprived thereof by a specific declaration of the testator on any of the grounds

[21] *Ibid*, Article 616.

specified by the Civil Code, which must be stated in the will.[22] These grounds include:

- if the descendant has, without reason, refused maintenance to the testator;
- if, where the testator has become insane, the descendant has abandoned them without providing for their care in any manner;
- if, where the descendant could release the testator from prison, they have failed to do so without reasonable grounds;
- if the descendant has struck the testator or has otherwise been guilty of cruelty towards them;
- if the descendant has been guilty of grievous injury against the testator;
- if the descendant is a prostitute without the connivance of the testator; and
- in any case in which the testator, by reason of the marriage of the descendant, shall have been declared free from the obligation of supplying maintenance to such descendant in terms of the respective provisions at law.[23]

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 into 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 their work or industry;
- the fruits of the property of each of the spouses, including the fruits of property settled as a dowry or subject to entail, whether any of the spouses possessed the property 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 based on conditions that the fruits thereof shall not form part of the acquests;
- apart from any provisions of the Civil Code to the contrary, the fruits of such property of the

[22] *Ibid*, Article 622.
[23] *Ibid*, Article 623.

children as is subject to the legal usufruct of any one of their parents;

- any property acquired with money or other things derived from the acquests, even where such property is so acquired in the name of only one of the spouses;

- any property acquired with money or other things that either of the spouses possessed before the marriage, or which, after the celebration of the marriage, have been given to one of them as a result of any donation, succession or other title, even though such property may have been so acquired in the name of such spouse, reserving the right of such spouse to deduct the sum disbursed for the acquisition of such property; and

- fortuitous winnings made by either or both spouses and part of a treasure trove found by either of the spouses, as is by law assigned to the finder, whether such spouse has found the treasure trove in their own tenement, in the tenement of the other spouse or that of a third party.

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, the ownership and administration thereof vest exclusively with the spouse to whom the property belongs. In the ambit of succession, it is not uncommon for spouses to make a will using the same instrument, known as a will *unica charta* (see section (I)(A) above). A will *unica charta* may 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 applicable in the case of the revocation of the will by either spouse. Article 593 of the Civil Code states that where, by a will *unica charta*, the testators 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 they shall forfeit any right in their favour from such joint will, the survivor, who shall revoke the will with regard to such bequest, shall forfeit all of the rights which they 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 in Maltese law. The latter appear, albeit indirectly, in the provisions of life insurance contracts contained within the Civil Code, particularly Article 1712C, which allows a policyholder 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*

The Maltese legal system contemplates a number of legal arrangements that may be utilised in estate planning. Trusts and wills, as have been discussed in section I, are prime examples of this and are perhaps the most common form of estate planning tools utilised under Maltese law. Furthermore, Maltese law also provides for the establishment and regulation of foundations.[24] The Maltese foundation is an

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

attractive option in terms of estate planning because foundations tend to combine certain characteristics from both limited liability companies and trust arrangements.

Importantly, Maltese foundations, unlike trust arrangements, are considered to be separate legal entities possessing legal personality. Furthermore, foundations are treated as companies for the purpose of Maltese income tax legislation,[25] unless the administrators of the respective foundation elect to have that foundation irrevocably treated as a trust for Maltese income tax purposes.[26]

However, the basic functions and characteristics of a foundation may be more akin to those of a trust arrangement. Both foundations and trusts are legal arrangements that are constituted with the purpose of creating a patrimony that is separate and distinct from that of the founder, administrator or beneficiaries. Said patrimony is administered by fiduciaries for the benefit of a beneficiary or beneficiaries. In the same way that a trust is administered by one or more trustees who may be bestowed with discretion in the way that they carry out that administration, a foundation is administered by its board of administrators, who are bestowed with discretion in regard to the exercise of their fiduciary role. However, a major difference lies in the fact that the foundation, as a legal person, is the owner of its assets, whereas it is the trustees of a trust that are the legal owners of trust property.

The similarities to the trust concept also extend to the functioning of the entity, with parties similar to those one would expect to see in a trust. For example, the concept of the founder providing an initial endowment is comparable to the settlor settling property on trust. Recipients of the beneficial interest of either arrangement are referred to as the beneficiaries and they generally have similar rights and obligations vis-à-vis the entity or arrangement.

Foundations may be constituted both *inter vivos* by means of a public deed or they may be constituted by a last will and testament. Upon the registration of the deed of foundation with the registrar for legal persons, the respective foundation is attributed with legal personality under Maltese law. Generally, there are two types of foundations that are recognised under Maltese law. The first, and most common, is the public or purpose foundation, which is established for charitable, philanthropic or other social purposes. Private foundations are established for the specific benefit of one or more identified persons or classes of persons. The term of existence of a foundation is generally limited to 100 years, with limited exceptions.

As discussed earlier, the standard treatment of a foundation for Maltese income tax purposes is the same as that of limited liability companies, unless the administrators of the foundation elect to have the foundation treated as a trust. The taxable income of the foundation is therefore subject to the standard corporate income tax rate of 35 per cent, with any deductions applicable to companies also being applicable to foundations. The transfer of beneficial interest in a foundation is treated similarly to the transfer of shares in a company, and distributions of beneficial interest to the beneficiaries are furthermore treated as distribution of profits to shareholders. Because of this, the beneficiaries would therefore be entitled to claim tax refunds (such as the 6/7ths refund) that would normally be applicable to shareholders of Maltese companies receiving dividend distributions. Foundations may also have segregated cells in terms of Maltese law. This allows different assets to be segregated from the general patrimony and any other segregated assets. Such assets may then be reserved and directed towards a specified purpose, or dedicated to the exclusive benefit of specific beneficiaries, all within the same single foundation.

[25] Foundations (Income Tax) Regulations, Subsidiary Legislation 123.114, Regulation 3.
[26] *Ibid*, Regulation 4.

B. *Fiduciary duties (trustees, board members, directors, etc)*

Under Maltese law, fiduciary obligations may arise by virtue of law, contract, quasi-contract, unilateral declarations, including wills, trusts, assumption of office or behaviour. The primary legislation regulating the legal concept of fiduciary obligations is the Civil Code.[27] In terms of the applicable provisions of the Civil Code, fiduciary obligations are created whenever a person owes a duty to protect the interests of another, has registered in their name, holds, exercises control or has powers of disposition over property for the benefit of another or receives information from another person subject to a duty of confidentiality.[28]

The obligations that are incumbent on a fiduciary in terms of law must be carried out with the utmost good faith and honesty. Among the fiduciary's duties is the duty to exercise the diligence of a *bonus pater familias* in the performance of their fiduciary obligations.[29] Importantly, where a fiduciary is vested with ownership, has registered in their name, holds, exercises control or has powers of disposition over property subject to fiduciary obligations, such property constitutes a distinct and separate patrimony, and shall not be subject to the claims or rights of action of the fiduciary's personal creditors, their spouse or heirs, unless specifically provided for in terms of law.[30]

While the Civil Code provides the general provisions relating to fiduciary relationships, certain fiduciary relationships have been further governed by specific laws. In terms of the Trusts and Trustees Act,[31] trusts impose fiduciary obligations on the trustee in favour of the beneficiary or beneficiaries of the trust in relation to trust property.[32] The administrators of foundations are likewise deemed to be fiduciaries and, therefore, are subject to certain fiduciary duties as laid down by the provisions of the Civil Code that are specific to foundations.

In terms of Maltese law, the director of a company is also deemed to be a fiduciary as a result of the office they hold and the role they carry out within the company. A director is duty bound to act in the best interests of the company of which they have been appointed a director. While the directors of a company are generally afforded a certain level of discretion in order to more effectively be able to exercise their role for the benefit of the company, Maltese company law seeks to further safeguard that benefit by outlining the general duties expected of company directors[33] in exercising their role. A director of a company is bound to act honestly and in good faith, in the best interests of the company.[34] Another intrinsic concept of the fiduciary relationship is present here in that the assets of the director form a separate and distinct patrimony from that of the company. Therefore, the assets of the director may not be claimed against by the creditors of the company, except in limited circumstances, such as when wrongful or fraudulent trading has occurred.

C. *Treatment of foreign trusts and foundations*

The laws applicable to trusts in Malta provide that, wherever the proper law of a trust is the law of Malta, the validity of the trust, its construction, its effects and the administration of the trust shall be governed

[27] Chapter 16 of the Laws of Malta.
[28] *Ibid*, Article 1124A(1).
[29] *Ibid*, Article 1124A(4).
[30] *Ibid*, Article 1124C(1).
[31] Chapter 331 of the Laws of Malta.
[32] *Ibid*, Article 3(6).
[33] Companies Act, Chapter 386 of the Laws of Malta, Article 136A.
[34] *Ibid*, Article 136A(1).

by the Maltese laws applicable to trusts, notwithstanding any other law.[35] As Malta is a member of the Hague Convention on the Law Applicable to Trusts and their Recognition, when the proper law of a trust is not Maltese law, the proper law of the trust shall prevail and be given effect in Malta.[36]

Furthermore, where a Maltese trust is governed by Maltese law, the trust must abide by mandatory domestic rules, which cannot be derogated from by a voluntary act, and such rules shall prevail over the terms of the trust, unless expressly permitted by the applicable law.[37] However, when a trust is governed by Maltese law and has no connection to Malta by reason of the domicile of the settlor at the time of settlement of the property on trust or the situs of (immovable) property, the trust shall not be required to comply with the mandatory rules.

Non-Maltese foundations that are duly established and attributed with legal personality under the respective laws are duly recognised as a legal person for all intents and purposes under Maltese law.

IV. Taxation

A. *Domicile and residency*

Malta asserts its jurisdiction to tax on the basis of territoriality, residence, domicile and remittance. The concepts of residence and domicile in terms of Maltese law are determined on the basis of the facts and circumstances that may be applicable to specific persons. While the term 'resident in Malta' is provided with a definition in law, the concept of domicile is not specifically defined in the Income Tax Acts.

Article 2 of the Income Tax Act (Chapter 123 of the Laws of Malta) provides a collective definition of the term 'resident in Malta':

'"resident in Malta" when applied to an individual means an individual who resides in Malta except for such temporary absences as to the Commissioner for Tax and Customs (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 from 1st January 1995 where the management and control of the business of the company is exercised outside Malta'.

While the law provides a definition of the term 'resident in Malta', the definition itself bestows the Commissioner for Revenue with significant discretion in regard to determining whether or not an individual is resident in Malta. In this regard, the definition of residence for the purposes of the Income Tax Acts, and insofar as it relates to individual persons, has developed outside of that found in Article 2 of the Income Tax Act.

In practice, an analogous reference to Malta's definition of a 'temporary resident', ie, a person who is in Malta for a temporary purpose only and not with any intent to establish residence therein and who has not actually resided in Malta during one or more times for a period equal in total to six months in a year,[38] has resulted in a generally accepted principle that an individual is deemed to be resident in Malta if that

[35] Trusts and Trustees Act, Chapter 331 of the Laws of Malta, Article 6(1).
[36] *Ibid*, Article 6(2).
[37] *Ibid*, Article 6A(1).
[38] Income Tax Act, Chapter 123 of the Laws of Malta, Article 13.

person spends six months in Malta in a given year.[39] Subsequent guidance issued by the Commissioner for Revenue on this matter has cemented this general rule and provides more insight on the interpretation of residence, 'ordinary residence' and domicile for Maltese tax purposes.[40]

The guidance issued by the Commissioner for Revenue provides that residence does not depend on the individual's nationality or any other civil status, but is a question of fact, and a person may be resident in Malta even if they are also a resident for tax purposes in another country. Furthermore, a person's presence in Malta for more than 183 days in any particular year amounts to residence in Malta for that year, regardless of the purpose and nature of the individual's stay in Malta. However, individuals who intend to stay in Malta are deemed to be resident from the date of their arrival, regardless of the duration of their stay in Malta.[41]

A person is then deemed to be 'ordinarily resident' in Malta if they live in Malta on a permanent or indefinite basis. This treatment applies to both persons who exceed the 183-day threshold in Malta (and who do so over a long period) and also to persons who do not exceed that threshold if the person comes to Malta regularly and establishes personal and economic ties in Malta. Likewise, an ordinary resident of Malta would be deemed to have lost their residence status if they leave Malta permanently or indefinitely. A temporary absence may also lead to a loss of residence status if such absence is deemed to be inconsistent with the person's residence status.[42]

The Maltese concept of domicile is derived from English law and is a fundamental concept for defining the scope of both tax law and inheritance law in Malta. A person is born with a domicile of origin (normally derived from their parents) but may acquire a domicile of choice. A domicile of choice in a jurisdiction may be obtained through a combination of their physical presence coupled with the intention to reside there permanently. This implies a stronger connection to the country than simple residence. Therefore, even long periods of stay in a country will not cause a domicile of choice if the individual in question ultimately has the intention of leaving that country and returning to their country of domicile or settling somewhere else. Whereas obtaining nationality in a jurisdiction may be indicative of a person's intention to live there permanently, it is not conclusive evidence of the creation of a domicile of choice. Importantly, no one may be without a domicile, and the domicile of origin is deemed to automatically revive once a domicile of choice is lost.[43]

B. *Gift, estate and inheritance taxes*

There is no inheritance, gift or estate tax in Malta. However, 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.[44] In this regard, the duty payable is five per cent (or, more specifically, €5 for every €100 or part thereof) of the amount or value of the consideration for the transfer or the value of the property, whichever is higher. Donations are treated in the same manner as 'gifts' which, barring some exceptions,[45] shall be considered as a deemed sale at the market value of the property at the time of the

[39] Vide Board of Special Commissioners case number 13/63, decided on 14 December 1963.
[40] Guidance Note: The Remittance Basis of Taxation for Individuals under the Income Tax Act, Commissioner for Revenue, 28 March 2019.
[41] *Ibid*, Section 2.
[42] *Ibid*, Section 2.
[43] *Ibid*, Section 3.
[44] Chapter 364 of the Laws of Malta.
[45] Namely donations to a spouse, cohabitant, 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.

transfer, and as such are subject to any applicable capital gains derived on the transfer of immovable property.

C. *Taxes on income and capital*

In accordance with Maltese tax law, the general basis on which an individual is liable to Maltese income tax arises on a worldwide basis, a remittance basis or a territorial basis, depending on the individual's residence and domicile. Consequently, individuals who are ordinarily resident and domiciled in Malta are taxed on a worldwide basis,[46] that is, on their income and capital gains, regardless of where they arise or where they are received. The worldwide basis of taxation also applies to individual spouses living together to the extent that at least one of the spouses is ordinarily resident and domiciled in Malta.

Individuals who are ordinarily resident but not domiciled in Malta, and vice versa, are taxed on a source and remittance basis. Therefore, such individuals will be liable to pay tax on all of their income arising in Malta (regardless of where the income is received) and income arising outside of Malta to the extent that it is received in or remitted to Malta. Capital gains arising outside of Malta are not subject to Maltese tax, whether or not they are received in or remitted to Malta. This treatment is subject, in most cases, to an annual minimum tax payment.

Article 4 of the Income Tax Act provides that the total taxable income of an individual comprises their aggregate income (after any exemptions and allowable deductions), including gains or profits derived from a trade, business, profession or vocation; employment or office;[47] dividends, premiums, interest or discounts; any pension, charge, annuity or annual payment; rents, royalties, premiums and any other profits arising from property; and specific capital gains. Gains on the transfer of specified capital assets are aggregated with a person's other income, and the total income and capital gains is charged for income tax purposes at the applicable progressive rates, the highest being 35 per cent. However, differing tax rates may apply in specific cases, such as the following:

- exemptions in the case of the aforementioned transfers of immovable property by way of a donation to specified persons, including spouses, registered cohabitants, descendants and/or ascendants;

- rates of eight per cent or ten per cent final withholding tax on the value of the immovable property (the latter if the property was acquired before 1 January 2004 and a promise of sale or transfer was not registered prior to 17 November 2014);

- a reduced rate of five per cent withholding tax on the value of the property transferred for qualifying properties, such as those situated in designated urban conservation areas;

- reduced rates of zero per cent or two per cent on certain transfers of residential property;

- capital gains taxes of seven per cent or 12 per cent (on the gain or difference in value from the date of original acquisition to the date of transfer) in certain cases, as directed by the taxpayer;

- a flat rate of 15 per cent on income from a qualifying contract received by a beneficiary

[46] As are 'long-term' and 'permanent' residents, as defined by the Income Tax Act.
[47] Which includes fringe benefits.

consisting of income subject to tax under Article 4 of the Income Tax Act of a minimum of €75,000, adjusted annually in line with the Retail Price Index (exclusive of fringe benefits) and consisting of emoluments from an eligible office;[48]

- a 15 per cent flat rate of tax on remittances of income by beneficiaries of Malta's Residence Programme Rules and Global Residence Programme Rules (subject in both cases to a minimum annual tax payment of €15,000); and
- a ten per cent final rate of tax on income derived from 'authorised work' by holders of a Nomad Residence Permit (following an initial 12-month exemption), applicable to income from remote services provided to non-Maltese employers or clients, with non-qualifying income remaining subject to tax at the ordinary progressive rates.[49]

[48] Tax Treatment of Highly Skilled Individuals Rules, 2026 (L.N. 20 of 2026).
[49] Nomad Residence Permits (Income Tax) Rules, 2023 (L.N. 277 of 2023).