



THE ONLY GLOBAL ASSOCIATION OF YOUNG LAWYERS

## MALTA

21-23 October 2010

### Seminar Private Clients Trusts Under Attack



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21-23 October 2010 | MALTA  
21-23 octobre 2010

# Malta

“TRUSTS UNDER ATTACK” | “ATTAQUE CONTRE LES TRUSTS”



## SEMINAR REPORT

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**FRIDAY MORNING, 22 OCTOBER 2010**

**TRUSTS UNDER ATTACK FROM SPOUSES CLAIMING ON DIVORCE**

Speakers: **Eliza Hebditch**, Farrer & Co LLP, London; **David Cadin**, Bedell Cristin, Jersey; **Ziva Robertson**, Withers LLP; London; **Agnès Proton**, Cabinet Proton, Cannes

Eliza Hebditch, Farrer & Co: Attacks on trusts in the English divorce courts

- London is the divorce capital of the world (Presumption of equality; nothing is off the table, including separate property; inclusion of trusts' assets in the calculation)
- Suspicion of English family judges against trusts
- Disclosure about trusts:
  - Family judge can order the trustee to provide information
  - Letters of Request to foreign courts
  - Look at the pattern of distributions, letter of wishes, all documents
- Is a trust a nuptial settlement or a non nuptial settlement?
  - No statutory definition, issue is whether marriage was taken into account when settling the trust.
  - Orders directly against the trustees (direct attacks) only if nuptial settlement (order capital or income out of the trust/transfer of property/removal or appointment of trustee)
  - In non nuptial settlement: Judicious encouragement (indirect attacks)
- Sham trust: Not a valid trust at all (Minwalla case)
- Transaction to defeat the other spouse's claims: Transfer not valid if 3 years before divorce with intent to deprive the other spouse.
- International orders: English Courts can make orders against foreign assets or foreign trusts, but only if they are nuptial settlements.
- Discussion of the Charman case and the Mr and Mrs K. case
- However, enforcement offshore can be very difficult.

David Cadin, Bedell Cristin: Enforcement in Jersey

- Enforcement of foreign orders against Jersey trusts: Possibly... no certainty that they will be enforced though.
- 3 stages: 1) request for information, 2) joinder to the proceedings, 3) enforcement
- Request for information:
  - Principle in Jersey is "keep secret"
  - Goal is to maintain the integrity of the Jersey structure
  - Jersey court is very protective of trusts, will not give information which may be a threat
  - Question is not what you ask but why you ask
- Joinder to proceedings (request from foreign court to a Jersey trustee to appear in court):
  - Jersey trustee should not submit to UK court's jurisdiction
  - To preserve freedom of action is in the interest of the beneficiaries
  - Exception if all the assets are anyway in the UK
- Enforcement:
  - Art. 9 (4) Jersey Trust law: Jersey law must apply to Jersey law questions (UK court cannot declare a Jersey trust a sham). As an exception, Jersey court enforced the UK order in the Minwalla case because the Jersey trustee submitted to the UK court's jurisdiction
  - If foreign order is made against Jersey trustee to pay: Trustee should ask Court for directions
  - Variation order can possibly be enforced, alteration order cannot.

Ziva Robertson, Withers LLP: Enforcement in Cayman

- Cayman court in divorce has no authority to change the nature of trust and cannot approve a variation of trust (unless for unborn or incapacitated)
- Section 90 Cayman trust law (2009): only Cayman law is applicable, no recognition of foreign law
- Cayman trustee, submit or not submit to the foreign court's jurisdiction?
  - In favor of submission if property is in divorce jurisdiction, if Cayman is *forum non conveniens*, if foreign Court will anyway apply Cayman law
  - Against submission if foreign court will apply domestic law, hence interfering and defeating Cayman law

Agnès Proton, Cabinet Proton: Trusts and divorce in France

- Presentation of the new concept of "fiducie" in French law:
  - only obligations

- no legal/equitable ownership
  - must be notarized and registered
  - for management of assets, also for collaterals
  - earmarking is mandatory
- French law recognizes trusts (did not ratify HTC)
  - French divorce decisions do not set aside trusts (opposite approach for forced heirship!)
  - Same for fiducie and divorce, fiducie will be upheld, as long as fiducie is valid under its governing law
  - French "Cour de cassation" imposed a constructive trust

### **TRUSTS UNDER ATTACK FROM HEIRS – JOINT PANEL WITH ABA – SIL**

Speakers: **Ziva Robertson**, Withers LLP, London; **Henrietta Mason** / Withers LLP, London; **Paola Fudakowska** / Withers LLP, London; **Agnès Proton** / Cabinet Proton, Cannes; **Andrea Dorjee-Good**, Schellenberg Wittmer, Zurich

#### Case study: Trusts under Attack from Heirs

A French wealthy father settles a trust under English law. The settlor and his wife are the primary beneficiaries, the interest on capital and income passing to the father's "issues" on death of both primary beneficiaries. They both die tragically simultaneously. Father's two sons are beneficiaries. Another son from a former marriage shows up and requests information about the trust.

- Jurisdiction of UK court: Brussels 1 Reg. or English common law
  - Claim within scope of Brussels 1 Reg. and defendant in a member state → Brussels 1 Reg applies
  - Art. 2, 5, 23 of Brussels 1 Reg. are important
- Breach of trust/trustee's duties relating to investments (see Trustee Act 2000 or express power in trust deed)
- Right to information?
  - Re Londonderry : Beneficiaries have the right to get the trust documents
  - Schmidt v. Rosewood: Made it unclear, no right to disclosure when private personal information
  - Letter of wishes? *Prima facie* confidential, but it depends
  - Trustee is offshore and will not submit to UK court: Letter of Request based on Hague Convention

- If trustee does not comply to order or if he receives letter of Request, he might be in breach of trust → seek direction from his court
- During life of father, large distributions which undermine trust corpus, remedy under French law?
  - Son is beneficiary and also heir
  - French law knows forced heirship, applicable with regard to a trust
  - Trust will be ignored in France up to forced share
  - Under forced heirship, right to full ownership of assets (position of beneficiary is not sufficient)
  - Double dip: be beneficiary of the trust and receive ½ in full ownership based on forced heirship
  - "Droit de prélèvement": Deprived French national heir can complete his forced heirship portion with assets under French jurisdiction
- Forfeiture clause in the trust deed whereby beneficiary loses his entitlement in case of contest
  - Forfeiture clauses are common
  - Clause must be very clear and predictable, necessary to know what triggers it and what not
  - Cayman case AN v. Barclays where such clause was upheld
- Swiss approach to forced heirship and trusts
  - If *de cuius* dies domiciled in Switzerland: Swiss law applies to whole estate (unless *professio juris*)
  - *inter vivos* gifts within 5 years before death (or older if the intent to deprive heirs can be proved) must be taken into account when calculating forced heirship share and can be set aside (claw back claim)
  - In case of a sham trust, claim in restitution (action en pétition d'hérédité) can be made BUT all heirs must file a joint submission, which in practice can be a big hurdle.

## **FRIDAY AFTERNOON 22 October 2010**

### **TRUSTS UNDER ATTACK IN COURT: COMMON LAW VS. CIVIL LAW (FIRST PART)**

Speakers: **James Price** / Farrer & Co, London  
**David Cadin** / Bedell Cristin, Jersey

**Lessons from Alhamrani – the ultimate trust under attack**  
 (the longest running and biggest trust litigation ever before the Jersey Court)

The Alhamrani case is said to have broken the record for Jersey's most expensive case in addition to being one of its longest. Five members of the Alhamrani family, which is well-known in Saudi Arabia for business interests, sought compensation before the Jersey courts for losses; they claimed more than \$120m. The charges included breach of trust, conflict of interest, gross negligence and lack of communication between the trustees and beneficiaries.

- Some figures illustrating Jersey's largest legal trial ever:
  - 7 firms of Jersey lawyers were involved
  - 9 trusts
  - 8 tons of paper
  - 103 days in court
  - Over 200 interlocutory applications
  - Plaintiff's claim over 250 pages long
  - 430 lever arch files for the trial bundles
  
- Practical challenges of the case:
  - Pleadings reached surrejoinders
  - Venue
  - Document management
  - Logistics
  - Interlocutory decisions
  - The trial never reached a conclusion
  
- The lessons of Alhamrani
  - unless parties take a pragmatic approach to trust disputes, identifying the issues that really matter and sticking to them, they will become ensnared in an expensive legal campaign entirely of their own making, which is disproportionate to the real dispute
  - be prepared

## **TRUSTS UNDER ATTACK IN COURT: COMMON LAW VS. CIVIL LAW (SECOND PART)**

Speaker: **Jean Louis Collart** / Mentha & Associés, Geneva

### **Case law and trusts in Switzerland: recent developments**

- Recognition of trusts in the past
  - **Recognition based on case law**
    - 1970: Harrison vs. Credit Suisse
    - Trust as quasi-contractual relationship
  - 1989: Federal Act on International Private law entered into force
    - Trust as an organised association of persons / asset units (company)
    - Applicable law: law of the State in which the company is organised
  
  - 1 July 2007: Ratification of the Hague Trust Convention

- Trust and Succession – Questions arising from a Swiss law perspective:
  - Must Swiss forced heirship rules be respected?
  - Can someone's succession be organized by way of a trust?  
(numerus clausus of testamentary dispositions under Swiss inheritance law)
  - Can Trusts be used for the purpose of financial support of a family on a perpetual basis  
(prohibition of entailment / "fidéicomis de famille" under Swiss law)
- Forced heirship rules
  - must generally be respected
- Testamentary trusts or trusts by will
  - not allowed under Swiss inheritance law
  - however, controversial
- Prohibition of entailment / "fidéicomis de famille"
  - Prohibition is not part of the Swiss public order
  - i.e. trusts can be used for the purpose of financial support of a family on a perpetual basis
- Confidentiality of trusts / right to information of heirs
  - No contractual relationship between trust and heirs
  - Right to information for forced heirs only
  - Right to information requires that
    - Holder of the information (e.g. the bank) is aware of the structure
    - Existence of the assets must be very likely
      - Breach of the compulsory portion must be very likely

## **TRUSTS UNDER ATTACK FROM CREDITORS / OTHER CLAIMANTS**

Speaker: **Jeremy Cline** / Farrer & Co, London

### **Asset Protection Trusts**

- Many actors to be taken into account when establishing asset protection trusts, among others: choice of jurisdiction; Irrevocability; Discretionary; Independence of trustee; Location of trust assets; Purpose
- Choice of jurisdiction – what is important? Sophisticated and experienced asset protection legislation; appropriate rules on recognition and enforcement of foreign judgments; political stability; Sophisticated and reliable local financial and legal services; Strong communication infrastructure

### **Setting aside dispositions into trust**

- English rules for setting aside a transaction ("Pauliana"):
  - Transaction at an undervalue may be set aside if made within 2 years prior to bankruptcy, or between 2 - 5 years prior to bankruptcy if the individual was insolvent at time of transaction or as a result of it
  - Transactions defrauding creditors – transactions at an undervalue may be set aside if entered for the purpose of putting assets beyond reach of a person who is making, or may at some time make a claim against the transferor or otherwise prejudicing his interests
- Bahamas – strong asset protection all in all
  - To set aside a disposition, a creditor must prove that transferor owed him a pre-existing obligation, had actual knowledge of obligation and made disposition at an undervalue willfully to defeat him
  - Proceeding must be brought within 2 years of date of disposition
  - Disposition will only be set aside to the extent necessary
  - If the trust is governed by Bahamian law, the court will not consider any foreign law
  - Onward transferees are protected
- Cayman Islands - Very similar to Bahamas but a bit more creditor friendly
  - Constructive notice of the obligation by transferor is sufficient
  - Proceeding must be brought within 6 years of date of disposition
  - An onward transferee must show he did not act in bad faith
  - Orders of foreign courts to set aside dispositions may be enforced
- Cook Island - most robust asset protection all in all
  - No international trust or disposition to an international trust is void in the event of the settlor's insolvency or liquidation
  - a creditor may set aside a trust if he proves beyond reasonable doubt that the transfer was made with the principal intent of defrauding that creditor and rendered settlor insolvent
  - No intent to defraud if transfer took place before or more than 2 years after date creditor's cause of action accrued
  - Reliance on foreign judgments
  - No protection for onward transferees

Speaker: **José Agustín Preciado** / Fabrega, Molino & Mulino, Panama

**What level of protection does a Panamanian Trust offer? Do the Panamanian courts mount a robust defence against an attack by foreign courts?**

- Trust law was first adopted in 1940
- The most important features of Panamanian trusts
  - Liberal rules on content of trust deed
    - May contain any lawful clause



- May be created for any purpose provided it is not contrary to the law or public policy
  - Must contain certain basic provisions, particularly regarding settlor, trustee, beneficiaries, trust assets, appointment of a resident agent in Panama, domicile of the trust, duration
- Trust documents are private
- Corporations and individuals of any nationality may be used as settlors, trustees and beneficiaries
- What level of protection does a Panamanian trust offer regarding inheritance and succession law?
  - Panamanian law has no forced heirship rules – individuals may freely dispose of their assets
  - Request for information or actions against assets in trusts located in Panama is only possible by way of exequatur
  - Exequatur in Panama is quite difficult and requires that the object of said petition is licit in Panama
  - Considering that in Panama the free disposition of assets prevails, it is quite difficult to execute a foreign court order
  - Nevertheless, it is recommended to consider and respect the clauses concerning the disposition of assets in other jurisdictions when structuring trusts under Panamanian law
- What level of protection does a Panamanian trust offer regarding Obligations according to Panamanian Civil and Judicial Law?
  - A foreign court order must comply with the requirements of the exequatur of procedure
  - In Panama, it is common practice to structure "guarantee trusts" in order to guarantee the due and complete fulfilment of certain obligations (i.e. for car loans, mortgages etc.)

Speaker: **Dimitria Coucouni** / Andreas Coucounis & Co L.L.C., Larnaca, Cyprus

**What legal protection does a Cypriot Trust offer? Do the Cypriot courts mount a robust defence of Cypriot Trust against an attack by a foreign court?**

- Some general information of Cyprus trust law
  - Trust law of 1955 (CAP 193), International Trust law 69 (I) 1992; Equity and Case Law in England
- Main advantages of Cyprus trusts
  - Confidentiality
  - Tax treatment (No taxation on trusts, Lowest corporate tax rate in the EU, High number of double tax treaties)
  - Estate planning opportunities
  - Avoidance of family disputes
  - Avoidance of forced heirship restrictions

- Asset protection
- Creation of a Cyprus Trust
  - By will or document
  - For the benefit of one or more individuals
  - Many trust types
  - Trust assets must be defined
  - Legal owner of trust assets is the trustee
  - Protector is possible
- Cyprus International Trust
  - Settlor must not be a resident of Cyprus
  - At least one of the trustees must be resident in Cyprus
  - Beneficiaries must be non Cyprus residents
  - Trust assets cannot include immovable property in Cyprus
  - Duration up to 100 years
  - Favourable tax treatment
- Forced heirship
  - Cyprus trusts are immune to forced heirship rules
  - No Cyprus or foreign inheritance law will invalidate the trust or affect any disposition or transfer relating to the creation of the trust
- Asset protection
  - Cyprus trusts are not affected by the Settlor's liquidation or bankruptcy
  - Creditor claims
    - Burden of proof with the creditors
    - 2 year limitation period to bring a claim
  - Very difficult to attack Cyprus trusts

Speaker: **Mark Beardsworth** / Kingsley Napley, London

### **Current Issues in Trusts and Fraud**

- Hot international fraud issues
  - Liechtenstein Disclosure Facility (LDF)
    - Concerns offshore bank accounts held by UK residents
    - Disclosure facility guarantees immunity from prosecution but carries a 10% penalty on unpaid tax; disclosure may be made up until 31 March 2015
  - Erosion of Banking Secrecy
    - The 9/11 attacks have lead to a massive burst in legislation and policy designed to open up mechanisms of banking secrecy
    - Greater international cooperation and information sharing
    - UBS affair
  - Bribery and Corruption

- Switzerland, Liechtenstein, Monaco, Belgium and Luxembourg were all placed on the OECD's grey list of non compliant countries in 2009
- Recent G20 Summit resulted in almost all countries undertaking to implement tax agreements facilitating the exchange of information
- Now that banking secrecy has been eroded many commentators suspect trusts are next
- Terrorism
  - Trusts are considered as potential vehicles for money laundering or financing organised crime and international terrorism
- The Recession
  - Government are even more determined to collect taxes and wipe out fraud
  - More policy aimed at financial transparency
  - Orders to "open up" trusts or to make presumptions in relation to trusts that will not open up are becoming more common
- Increase of State Power
  - The Courts are now more willing to make orders which presume that trusts are holding criminal property
- The USA
  - The Department of Justice sees trusts as a vehicle for fraud
  - Between 2001 and 2007: more than 250 injunctions to stop the promotion of tax fraud schemes. Many of these involve trusts
- Conclusions
  - There is a far greater perceived need for financial transparency in the world
  - The response has been an increase in legislation and regulation designed to protect state assets, make professionals more accountable and provide transparency in bank accounts, trusts and financial schemes

### **A CHOICE IN TRUST, WHERE TO GO? PANEL DISCUSSION**

Speakers: **Isabel Bharwani-Scicluna**, Antelope Trustees Limited, Malta  
**Dimitria Coucouni** / Andreas Coucounis & Co L.L.C., Larnaca, Cyprus  
**Alexander Ospelt** / Ospelt-Law, Liechtenstein  
**David Cadin** / Bedell Cristin, Jersey  
**Filippo Nosedo** / Withers, UK  
**Milan Patel** /Sharp & Kemm, U.S.A.

There is no general "best place" to go. Each jurisdiction has certain pro and contras which are to be analyzed on a case by case basis.

When deciding on the place to go, particularly the following aspects must be kept in mind:

- What is the main purpose of the trust?
  - Confidentiality?
  - Asset Protection?
  - Estate planning?
- What are the key factors for the individual client?
- Where are the assets located?
- What are potential attacks?

### **The Maltese perspective in particular**

Speaker: **Isabel Bharwani-Scicluna**, Antelope Trustees Limited, Malta

- Maltese trust law (Trust and Trustees Act, 2004) bases on the Jersey Trust Law model; Trust and Trustees Act provides for regulated Trustees; Professional Secrecy Act provides for confidentiality
- Maximum period for Maltese trusts: 100 years; no time limit for charitable trusts
- Maltese trusts are protected from claims:
  - Art. 9 (2) of the Trust and Trustees Act: Rights of a beneficiary are personal to the beneficiary
  - Creditors, spouses, heirs or legatees of the beneficiary do not have any rights to or over the trust property
  - The beneficial interest held by a spouse under trust shall generally not form part of the matrimonial property
- Fiscal benefits in Malta
  - Jurisdiction to tax trust income if one of the trustees is resident in Malta
  - Income and capital gains generated from the administration of trust assets are taxable in Malta at the flat rate of 35%, where the trustee is resident in Malta
  - However, foreign passive income and gains allocated specifically to the beneficiaries is deemed to flow through directly to the beneficiaries
  - No inheritance tax implications in Malta
  - Further exemptions from Capital gains tax available
  - Unilateral relief for international double taxation available
  - For trusts used for commercial transactions: Exemption from capital gains and transfer duty on settlement and reversion of trust property, or where there is a transfer of beneficial interest in trusts used for *designated* commercial transactions
- Asset Protection – advantages of Malta
  - Politically stable economy
  - Regulated Trustees
  - Multi lingual
  - Reputable banks, optimal liquidity levels

- Reliable and effective communication services
  - Efficient support services, qualified legal and accounting firms
  - Sensible and effective regulations
  - High ethical standards and competent judiciary
  - Maltese trust law provides for setting up spendthrift trusts
- Mandatory rules are not applicable in relation to trusts governed by Maltese law, which beside the governing law and the trustee or protector being domiciled in Malta, have no connection to Malta. Mandatory rules relating to succession, inheritance or forced heirship do not apply in cases where, upon settlement, the settlor was not domiciled in Malta.
- Recognition and enforcement of foreign court orders
- Maltese Courts generally have only jurisdiction if
    - The trust is a Maltese trust, or the trustee is resident in Malta or is a trustee authorised by the Authority, or trust property is situated in Malta or the administration of trust property is carried on in Malta
  - Maltese law recognises the validity of a jurisdiction or arbitration clause in a trust instrument.
  - According to Maltese trust law a trust is generally governed by its proper law, to be determined in accordance with the provision of the Trust and Trustees Act; most provisions of the Hague Trust Convention apply
  - A foreign court order will be given effect in Malta in respect of a trust having foreign law as its proper law (the validity, construction, effects and administration of the trusts shall be governed by this foreign law).
  - Maltese rules on forced heirship can be excluded and do not apply if the settlor is not domiciled in Malta at the time of settlement and if these rules are not applicable to the settlor in terms of the law of the country of domicile at the time of the settlement.
  - It is possible that the settlor's creditors can set aside a trust and attach the trust assets on the grounds that the trust was created by the settlor solely in order to defeat the creditors' claims

**SATURDAY MORNING, 23 OCTOBER 2010**

**TRUSTS AND SWISS (CIVIL) LAW**

Speaker: **Delphine Pannatier Kessler** / Bär & Karrer AG, Switzerland

- Swiss law does not know the institution of trusts, but: many trustees in Switzerland, many Swiss bank accounts held by trustees, lots of interplay between Swiss law and trusts
- No implementation of trusts but rather implantation with clear and practicable conflict of law system
- Ratification of the Hague Trusts Convention → conflict of laws rules, trusts are recognized in Switzerland but are not introduced in its material law
- Presentation of the HTC and of the new rules introduced by Swiss law (art. 149a-e PILA, art. 21 PILA, art. 284a and b LP)
- Art. 149b PILA creates the competence of Swiss courts in trusts' affairs (only internal disputes, external disputes are governed by the usual provisions). Choice of forum has priority → international practitioners should be aware that a forum in Switzerland for trust disputes may exist!
- Art. 149d PILA offers the possibility to give publicity to the trust relationship on real estate, IP rights, airplanes and boats ("mention" in the Land Registry)
- The mention destroy the good faith of third parties; no mention = no tracing
- Recognition of tracing in Switzerland is very controversial, but it should be possible, based on HTC and Swiss law
- Trusts may conflict with Swiss law in matters related to matrimonial property, alimony, inheritance or insolvency
- Matrimonial law: sham trust, invalidity of transfer of matrimonial assets, claw back claims based on Swiss matrimonial law
- Inheritance law: sham trust, invalidity of transfer, forced heirship and claw back, invalidity of the testamentary trust for lack of respect of the Swiss testamentary formalities
- Area of law in evolution, see the jurisprudence in the future

**ATTACK BY THE TAXMAN AND BY GOVERNMENTS – PANEL DISCUSSION  
COVERING THE VIEWS UNDER SEVERAL TAX JURISDICTIONS' APPROACHES ON  
TRUSTS AND THE POSITION OF THE SETTLOR AND LIKELY BENEFICIARIES**

Speakers: **Gerd D Goyvaerts** / Tiberghien Lawyers, Belgium; **Filippo Noseda** / Withers UK; **Lucinda E. Main** / Beard Winter, Canada; **Diane Nykamp** / RechtStaete, Nether-

lands; **Milan Patel** / Sharp Kemm, Switzerland; **Ryan Myint** / Taylor Wessing, UK; **Harun Can** / Schellenberg Wittmer, Switzerland; **Milan Patel** / Sharp & Kemm, USA

The panel provided in a broad overview of the different attacks that are currently experienced when client allocate assets to a trust. The attacks were highlighted at three different stages of the "life of a trust", at birth, during the 'life' of the trust and at dissolution/distribution or "death" of a trust. The differences in anti-abuse measures and the different scope by tax authorities between common law and civil law jurisdictions was nicely compared. For a view on the 90 slides please have a look at [www.aija.org](http://www.aija.org)

## **ALTERNATIVE STRUCTURES, ARE THEY ANY SAFER?**

### **Liechtenstein Trust and Foundation**

Speaker: **Alexander Ospelt** / Ospelt-Law, Schaan, Liechtenstein;

- The Liechtenstein Trust
  - it is mainly coincident with the Anglo-Saxon trust; no new legal person is created; the beneficiaries have a "right to follow the trust property" i.e. the right to claim certain assets as trust property ("proprietary claims")
- The Liechtenstein Foundation
  - a legal entity which can be understood as assets endowed by a natural/legal person („founder“) for specific purpose in accordance with the guidelines laid down by the founder, whereby said assets are rendered legally independent and are accorded their own legal personality
  - Charitable Foundation (charitable purposes; they must be registered with a Public Register, and are subject to supervision by the Foundation Supervision Authority)
  - non-Charitable Foundation (founder may be one or several natural or legal persons; beneficiaries can be natural/legal person; flexible structure)
  - advantages of a Non-Charitable Foundation: easy asset allocation (minimum capital: CHF 30.000); few limitations on objects and purpose unconditional distribution of assets; extremely high privacy and confidentiality; low Taxes and low Administration fees; New rules on Non-Charitable Foundations adopted in 2009
- How to attack the Liechtenstein Foundation ? Asset protection
  - Bankruptcy – attacks by creditors: high level of privacy and confidentiality; creditors of the founder can attack transfers to a foundation like a donation within certain limits; in family foundations, the founder can stipulate that beneficiaries' claims towards the foundation may not be subject to execution actions by creditors; choice of applicable law possible on donations made to the foundation after their formation
  - Inheritance Law – attacks: foundation assets are not part of the estate, generally heirs cannot seize them; however if a heir does not receive his legal share, he can attack the foundation; applicable law is generally the

law of the home country of the deceased person, with some possibility to choose the applicable law

- Taxes: foundations may be treated either as look-through entities, or as taxable legal entities; in general, the more influence the founder has, the more likely the foundation's assets are taxed on the founder (look-through entity); as a consequence, the transfer of assets from the founder to the foundation is not subject to gift or inheritance taxes as from an economic point of view no transfer of assets took place

### **Alternatives to trusts in Luxembourg: fiduciary agreements, insurance policies, corporate instruments**

Speaker: **Aldwin Dekkers** / Arendt & Medernach, Luxembourg;

- Overview of the Luxembourg taxation
  - Worldwide principle for residents, non-residents on Luxembourg sourced income only
  - Final withholding tax of 10% on certain interest paid by the paying agent to a Luxembourg resident (threshold exemption of EUR 250); Luxembourg paying agents required to withhold tax at 35% on certain interest income paid to EU (and certain non-EU) beneficial owners; exemptions might be available
  - An exemption of 50% of received dividends is granted on dividends received from Luxembourg and certain other companies
  - Certain exemptions are available on capital gains on movable and immovable property
- Overview of the Luxembourg inheritance principles
  - Succession opens at the last domicile of the deceased, without any consideration for the place of death
  - Exemptions applicable to succession: the entire share inherited in direct line (except for the share exceeding the "ab intestato" share), and the entire share inherited from a spouse or a partner with whom the heir has common descendant
- Recognition of foreign trusts
  - Through court judgments and through international conventions and internal laws; limit of public policy
- Fiduciary agreements
  - May be used for various purposes (management, guarantee, credit, carrying, gift or inheritance); freedom of contract
  - Full transfer of ownership in favour of the fiduciary agent; separate patrimony held by the fiduciary agent on behalf of the principal (segregation principle); no registration requirements except when relating to real estate, aircraft, vessels or shares in Luxembourg
  - Eligible as fiduciary agents may be credit institutions and certain professional of the financial sector (lawyers, notaries are not eligible)
- Luxembourg Life insurance policies
  - A contract by which a person receives from another person the promise that it will perform a certain task for the benefit of a third party



- As long as the beneficiary has not accepted the contract, policy holder remains in control of the assets, keeps control of investment policy, and benefits from great protection and confidentiality on assets
- Useful for estate planning
- Corporate instruments available for estate and tax planning:
  - Family wealth management company (SPF)
  - Specialized Investment Fund (SIF)
  - Société en Commandite par Actions (S.C.A.)

## **Regulatory Framework for Trustees in Malta**

Speaker - **Dr. Paula Marie Meilak**, Autorisation Unit, Malta Financial Services Authority

- Introduction
  - Malta is signatory to the Hague Convention on Recognition of Trusts
  - Act XII 2004 overhauled the old Trust legislation and introduced the institute of trust into Maltese civil law.
  - The Trusts and Trustees Act, Cap 331 (TTA), is the principal legislation regulating trusts and trustees
- Professional and Private trustees
  - Under the TTA a person may act as trustee in a professional or private capacity
  - Professional trustees require autorisation by the MFSA
  - Autorisation is required irrespective of proper law of the trust or the location of the trust property
  - Private trustees may only be physical persons and have to comply with certain formalities under the TTA
- Autorisation requirement
  - Where the applicant is a corporate entity, its objects must be compatible with trustee services, it must have 3 directors, persons involved must be approved persons and it must have adequate systems in place.
  - Where the applicant is an individual, he must be resident or operating in Malta ; must be an approved person and must have adequate systems in place.
  - Authorisation is also required if providing nominee services or if acting as officer of a private foundation.
- Exemptions
  - Various exemptions are granted which provided exemption from the requirement of obtaining autorisation to act as trustee.
- 'Fast Track' autorisation
  - 'Fast track' procedures apply to certain categories of persons
  - One category relates to persons having a license or autorisation to act as trustee issued by relevant regulatory authority in an approved jurisdiction.

- Continuation of companies in Malta
  - Maltese regulations allow a body corporate incorporated under the laws of an approved jurisdiction other than Malta to be registered as being continued in Malta and vice versa
  - Various conditions to apply.