Maltese trusts

The importance of choosing which proper law is to govern the Maltese trust comes into play when considering the application of the mandatory rules on:

- the protection of minors or incapable parties
- the personal and proprietary effects of marriage
- succession rights, testate and intestate, especially the reserved portions (legitim) of spouses, ascendants and descendants
- the transfer of title to property and security interests in property
- the protection of creditors in matters of insolvency; and
- the protection, in other respects, of third parties acting in good faith.

Mandatory rules usually prevail over the terms of the trust unless otherwise expressly provided in the TTA or related legislation.

The TTA offers partial or total displacement of the terms of a trust in the face of certain mandatory rules of law, but is careful to insist on such limitations only in a purely domestic context.

The mandatory rules are waived in relation to trusts governed by Maltese law, which, aside from the governing law, has no connection with Malta, because:

- the settlor is not domiciled in Malta when the property is settled on trust, or
- in the case of immovable trust property, the property is not situated in Malta.

Thus, in this context, other connecting factors to Malta are disregarded, namely:

- the trustee or protector being domiciled, resident or licensed in Malta
- the proper law being Maltese law
- movable trust property being located in Malta; and
- the trust instrument or other trust documents being executed in Malta.

This rule is clearly based on the principle of Maltese private international law of succession, that on death the law applicable to:

- movables is the law of the domicile of the decedent at the time of death, and
- immovables is the law of the situs.

Hence, the Maltese court will give effect to the trust but will not apply the mandatory provisions of Maltese law to alter the terms of the trust.

FOREIGN TRUSTS

Where the settlor of a trust with a foreign proper law is not domiciled in Malta at the time of the trust’s creation, then:

- the Maltese mandatory provisions are not applicable, and
- the TTA only applies in so far as it regulates the recognition or otherwise in Malta of the effects of such trust.

In the case of trusts regulated by a foreign law, Malta’s mandatory rules only apply to trusts where the settlor was domiciled in Malta at the time of the creation of the trust.

As Malta is a civil-law jurisdiction, the Maltese Civil Code was specifically amended to preclude the applicability of Maltese mandatory rules relating to succession, inheritance or forced heirship in cases where, upon settlement, the settlor was not domiciled in Malta, irrespective of whether the property settled on trust, movable or immovable, is property situated in Malta or elsewhere.

CONFLICT MANAGEMENT

What happens, however, when the Maltese courts are asked to enforce a foreign judgment on, for example, inheritance rights claimed by individuals who are not beneficiaries of the trust set up in Malta? In all cases, the norms are applied subject to the provisions of article 6B of the TTA, which provides for the management of conflict rules, with the express intention of preserving the trust relationship as much as possible.

Thus, the application of mandatory rules, whether Maltese or foreign, will not produce failure or invalidation of a trust and, where possible, the trust will continue under the same terms to the extent unaffected by the relevant mandatory rules. Where this is not possible, the trustee will hold the affected property in trust for the settlor absolutely or their heirs, and may seek directions from the court that has jurisdiction.

COURTS’ JURISDICTION

The general principles state that the Maltese courts have jurisdiction only when:

- the trust is a Maltese trust
- the trustee is resident in Malta or is a trustee authorised by the Malta Financial Services Authority
- any trust property is situated in Malta, or
- administration of any trust property is carried on in Malta.

The exception to these general principles is that when the trust instrument
specifically grants jurisdiction to another
country, the proper law of which governs
the trust, the courts in Malta shall, on
demand of any party to the proceedings,
stop the proceedings instituted in Malta
in favour of the jurisdiction of the foreign
courts of law. Thus, for example, if the trust
instrument is regulated by English law and
specifically grants exclusive jurisdiction
to English courts of law, any proceedings
initiated in Malta will be thrown out by
the Maltese courts, as these do not have
jurisdiction over the proceedings.

This notwithstanding, however, the law
also empowers the Maltese court to issue
interim orders for the protection of any
interested party as it considers appropriate.
Also, the court has discretion over whether
to stay the proceedings if the trust property
consists of immovable property in Malta or
the settlor or beneficiaries are domiciled
and resident in Malta.

CAREFUL EVALUATION
In effect, therefore, trust practitioners
should carefully evaluate which proper
law is to govern Maltese trusts, to provide
a measure of comfort to the settlor that
the trust, its assets and any conflicts that
may arise will be regulated in accordance
with the provisions of the proper law of
choice. The choice of law alone should not
deemed to be sufficient and indeed other
measures may need to be considered.

Diane Vella Bianco TEP is a Managing Partner
of TW Management Ltd and a Partner of
Antelope Trustees Ltd in Malta

1 ‘Maltese trust’ means a trust whose proper law is
the law of Malta
2 ‘Foreign trust’ means a trust whose proper law is
not the law of Malta
3 Cap 16 of the Laws of Malta