



**CHETCUTI
CAUCHI**
ADVOCATES

Foundations under Maltese Law

2012

cema.la.com

Foundations under Maltese Law

CONTACT DETAILS

For more information, contact:

Dr Maria Chetcuti Cauchi
BA, LL.M(Warwick), LLD, TEP.
Senior Partner

Dr Charles Cassar
BA, LL.D.
Manager Legal

Dr Anton John Mifsud
BA, LL.D.
Associate

- 120 · St Ursula Street · Valletta · VLT1236 · Malta
- Britannia House · 60 · Melita Street · Valletta · VLT 1122 · Malta
- 203A · Old Bakery Street · Valletta · VLT 1453 · Malta

T: (+356) 2205 6200 · F: (+356) 2205 6201 · E: info@ccmalta.com · W: www.ccmalta.com

The materials contained in this document are provided for general information purposes only and are not intended to provide legal or other professional advice. We accept no responsibility for any direct, indirect or consequential loss or damage which may arise from reliance on information contained in this document. Readers are advised to seek confirmation of statements made herein before acting upon them; specialist advice should also be sought on your particular cases. Please feel free to contact us at your convenience.

© COPYRIGHT NOTICE: Reproduction in whole or in part is strictly forbidden, except with the prior written consent of Chetcuti Cauchi.

Contents

1. Introduction	5
2. Applicable Law	5
3. Organizations and Foundations	5
4. Legal Personality	6
5. Setting up a foundation	6
6. Augmentation of the fund.....	9
7. Administrators	10
8. Beneficiaries	12
9. The founder.....	13
10. Confidentiality and the right to information	14
11. Powers of foundations	15
12. Conversion, amalgamation and division	16
13. Revocation of a foundation.	17
14. Winding up.....	17
15. Disposal of assets on winding up	18
16. Powers of the Court	19
17. Tax.....	20
18. Foundations and Trusts	21
19. Conclusion	22

1. Introduction

Foundations have long been found in Malta, and are essentially a product of continental law. Despite this, they have only recently become regulated by codified legislation. This, however, has not prevented the growth of the sector, as Maltese courts have provided extensive jurisprudence on the formalities required for the setting up and administration of Maltese foundations. Naturally, the fact that the legislator deemed it fit to regulate this area of the law through the enactment of a specific law means that foundations and their founders and administrators can now operate within a framework which provides them with the desired legal certainty.

2. Applicable Law

The law which applies to foundations registered in Malta can be found in the Second Schedule to the Civil Code, Chapter 16 of the Laws of Malta.

3. Organizations and Foundations¹

An organization is a universality of persons who associate or a universality of things which are appropriated to achieve a lawful purpose having a form recognised by law, and which is capable of being a legal person in terms of law. Foundations are a special type of organisation. In fact, a foundation is an organisation consisting of a universality of things constituted in writing, by one or more founders whereby assets are destined either

- a) for the fulfillment of a specified purpose; or
- b) for the benefit of a named person or class of persons,

and whose assets are entrusted to the administration of a designated person or persons. In general, the assets of a foundation may originate from any lawful business or activity and may consist of present or future assets of any nature.

3.1 Public Organisations and Private Organisations

An organization, including a foundation, may be public or private.² Public organisations are those organisations which are controlled, directly or indirectly, by the Government. Such organizations and their administrators are governed by the law applicable to the State and the public service, and any other special laws applicable to the particular organisations. On the other hand, private organisations are governed by the Civil Code, as well as by any special laws which may be applicable to their legal form and purpose.

3.2 Purpose Foundations and Private Foundations³

When a foundation is established exclusively for a charitable, philanthropic or other social purpose or as a non-profit organisation⁴ or for any other lawful purpose it is referred to as a "purpose foundation" and when it is established for a private benefit it is referred to as a "private foundation". Unless evident from the statute, a foundation is considered to be a private foundation. In the specific case where the dominant purpose of a foundation is to

¹ Article 26 - Second Schedule, Civil Code, CAP. 16.

² Article 1(6) - Second Schedule, Civil Code, CAP. 16.

³ Article 26(7) - Second Schedule, Civil Code, CAP. 16.

⁴ The terms "non-profit making" and "social purpose" have the meaning assigned to them in the Voluntary Organisations Act, CAP. 492, and include the advancement of education (including physical education and sports), the advancement of religion, the advancement of health, social and community advancement., the promotion of human rights, conflict resolution, democracy and reconciliation as well as the advancement of culture, arts and national heritage.

support a class of persons which constitute a sector within the community as a whole, because of a particular social, physical or other need they may have or disability they may suffer from, the indication of such a class of persons or one or more members of such a class does not render it a private foundation but it is still treated as a purpose foundation.⁵

4. Legal Personality

As soon as an organization, including a foundation is registered with the Registrar for Legal Persons, it acquires legal personality. Legal personality is the status granted by law to an organization, including a foundation, which is established for a lawful purpose stated in writing in a constitutive instrument, which has a patrimony of assets and liabilities, separate and distinct from that of any other person and the legal powers to achieve such purpose through the administration of its own governing body.

A foundation exists from the date of registration. In general, it is not be lawful to state a term of existence in excess of one hundred years except in case of a purpose foundation, a foundation used as a collective investment vehicle or a foundation used in a securitisation transaction which may be established for an unlimited term. When no term is specified, a foundation is deemed to have a term of one hundred years from its establishment. A foundation and its legal personality cease to exist with effect from the date when it is struck off from the relevant register.

5. Setting up a foundation⁶

Any person, whether a national or otherwise, has the right to establish legal organizations, including foundations, as long as that person complies with the prescribed rules as to form and content.

A foundation can be set up either by means of a public deed or else through a last will.⁷ The foundation needs to have a name, which must conform to law and include a denomination that clearly indicates that the foundation is in fact a foundation. Moreover, the foundation needs to have an address in Malta where communications can be received and information requested about its activities.

In setting up the foundation, the founders also need to make an endowment of money or property worth at least one thousand and one hundred and sixty-four euro and sixty-nine cents to the same foundation. This does not apply to the case of a foundation established exclusively for a social purpose or as non-profit making in which case the endowment is to amount to at least two hundred and thirty-two euro and ninety-four cents. When the property endowed is not cash or any other asset the value of which appears on the face of it, the administrators need to make statement which states that in their considered opinion the property endowed upon or vested in the foundation has a value of at least the amount required by the law as stated above. The assets settled as an endowment may be used by the foundation when this is eventually set up, and in fact there is no obligation to maintain such assets by way of minimum capital within the foundation.⁸

⁵ Article 32(5) - Second Schedule, Civil Code, CAP. 16.

⁶ Article 29 - Second Schedule, Civil Code, CAP. 16.

⁷ When a foundation is created by a will, the foundation does not come into existence when the will is done but when the will enters into effect i.e. when the testator dies.

⁸ Article 29(3) - Second Schedule, Civil Code, CAP. 16.

Apart from the above requirements, the deed of foundation must also state, on pain nullity the purposes or objects of the foundation, the composition of the board of administrators and the names of the first administrators (and if not yet appointed, the method of their appointment), the legal representation of the foundation and the term for which it is established. In the case of a foundation whereby all the administrators are non-residents of Malta, the name and address of a person resident in Malta who has been appointed to act as the local representative of the foundation in Malta will have to be indicated.

As relates to private foundations, one also needs to include either the names of beneficiaries, or, in the absence of such indication, a declaration that the foundation is constituted for the benefit of beneficiaries. In the latter case the beneficiaries will have to be indicated in a written instrument called the 'beneficiary statement'. Such statement need not form part of the public deed, but has to be signed by the founder and addressed to the administrators. Such document is authenticated by the Notary Public who publishes the deed of foundation. The benefit of such a document is obviously that of maintaining the identity of the beneficiaries secret. This legislator wanted to ensure this feature so much so that while the Registrar for Legal persons has the right to require any information from any person if such information is deemed by him to be necessary for registration of a foundation, he is not entitled to request a copy of the beneficiary statement from the administrators or the Notary Public.

The statute then needs to be signed by the founders.⁹ As relates to the administrators, these also need to express their consent to act as administrators in writing.

5.2 Private Foundations¹⁰

5.2.1 General characteristics

A foundation may be established for the private benefit of one or more persons or of a class of persons. Such beneficiaries will enjoy such benefits, and have legally enforceable rights against the foundation, as may be stated in the terms of the foundation and in the law. When the purpose of a foundation is a private benefit it must be, on pain of nullity, for the benefit of a person or class of persons who can be ascertained or are ascertainable. In the absence of a specified purpose, the purpose of the legal person is deemed to be the private benefit of the founders thereof or their successors in title.¹¹

5.2.2 Beneficiaries

The law allows quite some flexibility as to who may and may not be appointed a beneficiary. In fact, the founder of a foundation may also be a beneficiary. Moreover, persons who are not yet conceived at the time of the creation of a foundation may be named as beneficiaries or form part of a class of beneficiaries but their rights arise only once they are born viable. Persons unworthy of receiving under a will cannot receive as beneficiaries under a foundation.

5.2.3 Appointment and removal of beneficiaries

Private foundations must name:

- a) the class of persons entitled to benefit as clearly and as fully as possible; or
- b) the person or persons entitled to benefit as clearly and as fully as possible, by specifying first names, surnames, identity card numbers, father's name, mother's

⁹ Any person subscribing to the statute after a foundation is established, is deemed to have consented to all the provisions of the statute and all rules which may have been validly promulgated by the foundation until such date.

¹⁰ Article 33 - Second Schedule, Civil Code, CAP. 16.

¹¹ Article 4(1) - Second Schedule, Civil Code, CAP. 16.

name and maiden surname and other relevant personal or family factors to eliminate any doubt as to who the intended beneficiary is.

The identification of beneficiaries need not be made in the deed constituting the foundation but may be made in a separate beneficiary statement. If there are no beneficiaries identifiable or ascertainable described above, the foundation is deemed to be for the private benefit of the founders or their successors in title.

Subject to the terms of the deed of foundation, if the founders are still alive and capable of acting they may freely amend the deed and substitute, add or remove beneficiaries. Although the law allows this flexibility, in such cases no decision of a founder may affect the validity of anything lawfully done by the administrators prior to such decision before they are made aware of it. Nor does it affect or interrupt lawful acts in progress or lawful commitments made and not yet fulfilled by the administrators.

A beneficiary may be appointed subject to a condition or for a specified time or up to a specified value of benefit as a founder may deem appropriate. It is very interesting that that if the founder is deceased, a beneficiary may apply to the Court requesting it to eliminate any condition or requirement which is considered to be unreasonable having regard to all the circumstances.

The terms of the foundation may also provide for the addition of a person as a beneficiary or the exclusion of a beneficiary from benefit at the discretion of the administrators. When the administrator is granted the power to add a beneficiary at his discretion, such power is valid on condition that sufficient indication is given in the deed of foundation or in the beneficiary statement as to the class of which the beneficiary forms part. In the absence of such indication the power will be null and void.

A person who may be appointed a beneficiary in terms of a power or discretion granted to the administrator does not enjoy any rights in relation to the foundation or vis-à-vis the administrator and is not be considered a beneficiary in any manner until appointed as a beneficiary by the administrator.

5.2.4 The benefit:

The terms of a foundation may make the interest of a beneficiary:

- a) liable to termination; or
- b) subject to restriction on alienation or dealing; or
- c) subject to diminution or termination in the event of the beneficiary becoming bankrupt, or insolvent, or any of his property becoming liable to seizure for the benefit of his creditors; or
- d) not liable to attachment under a garnishee order issued against the administrator or to termination without the prior consent of the Court, when the interest is expressed to be for the maintenance of the beneficiary or as a pension.

Where the benefit consists in an annuity or pension or the use and enjoyment of property and the enjoyment of fruits therefrom, the terms of the foundation may make the interests of the beneficiary:

- a) subject to restriction on alienation or dealing;
- b) not liable to attachment under a garnishee order served on the administrators as garnishees; or
- c) not liable to termination without the prior consent of the Court.

It is possible for an administrator to be granted the power to decide at his absolute discretion, which beneficiaries are to benefit, the quantity of any benefit, at what time and in what manner beneficiaries are to benefit and such other powers relating to the appointment, application or advancement of property of the foundation. Having said this, a beneficiary in whose favour a discretion to distribute or appoint property may be exercised, does not have any rights to specific property of the foundation until such time as such discretion is exercised by the appointment, application or advancement of such property in his favour.

A beneficiary may disclaim his whole interest in writing and such a disclaimer is irrevocable. Moreover, and subject to the terms of the deed of foundation, a beneficiary may disclaim part of his interest, whether or not he has received some benefit from his interest - in any such case, and subject to the terms of the foundation, a disclaimer may, by the instrument by which the interest is disclaimed, be made revocable, and will then be capable of revocation in the manner and under the circumstances therein mentioned or referred to.

The interest of the beneficiary under a private foundation is deemed to be movable property even if the foundation includes immovable property. Moreover, the benefit under a foundation is personal to the beneficiary and in general, creditors have rights only to the extent of the beneficiary's entitlements under the foundation and have no other rights in relation to the assets of the foundation. Due to the fact that the benefit under a private foundation is personal, upon the death of the beneficiary the beneficiary's entitlement does not devolve to his heirs but terminates, unless the deed of foundation provides otherwise. Subject to the terms of the foundation, a beneficiary may, by instrument in writing, sell, charge, transfer or otherwise deal with his interest in any manner.

5.3 Purpose Foundations

In the case of a purpose foundation, the founder - or if permitted by the statute, another body or person - may amend or add to the purpose of a foundation by means of an additional public deed. After the death of the founder, the Court may authorise such amendment or addition to the purpose on the application of any administrator, supervisory council or other interested party.

The deed of foundation may naturally indicate the way in which the moneys or property of the foundation may be used for the attainment of the purpose for which the foundation is established and when no such indication is made the administrators may exercise their discretion. The deed of a foundation may indicate how the assets of the foundation are to be applied if its purpose is achieved, exhausted or becomes impossible and when no such indication is made, the administrators or the supervisory council may make specific proposals to the Court for authorisation to use or dispose of the assets, unless the founder amends the purpose.

6. Augmentation of the fund¹²

During the lifetime of the foundation, the founder, or any other person with his consent, may add to the assets of a foundation by additional endowments at any time. Endowments may be granted under a condition, for a fixed time or in accordance with express rules of a foundation. In the specific case of a purpose foundation, third parties, with the concurrence of the founder, the supervisory council, the administrators or, in

¹² Article 34 - Second Schedule, Civil Code, CAP. 16.

default of such persons, with the concurrence of the Court, may augment the endowment of the foundation by a new endowment.

Where an endowment is made, the administrators are bound to file with the Registrar, within three months from any grant, an inventory or descriptive note of the assets added to a foundation (in the case of cash endowments, only a certified copy of the relative bank deposit statement needs to be filed.)

In the absence of any indication every endowment is be deemed to have been made unconditionally. In the specific case of purpose foundations, endowments are deemed to be irrevocable notwithstanding any term to the contrary in the deed of constitution. In the case of private foundations, unless expressly stated otherwise, endowments are deemed to be irrevocable. Moreover, unless otherwise stated in the deed of constitution, the fact that an endowment is stated to be revocable does not imply any limitation on the use or appointment of the capital or income by the administrators. In such cases, in the case of revocation, the grantor is only entitled to the balance of capital which may remain unutilised.

Where an endowment is made by two or more grantors jointly and expressed to be revocable, such endowment may only be revoked with the express consent of all the grantors. Naturally, revocation of an endowment does not affect or invalidate acts already carried out or interrupt acts in progress, nor affect commitments made and not yet fulfilled. It is interesting that revocation of an endowment is suspended until such time as the administrators certify to the Registrar that all commitments have been fulfilled and is deemed to refer only to such amount as shall not have been utilised in fulfillment of such commitment. Naturally, the revocation of an endowment does not imply the termination of a foundation unless the effect of such revocation results in the exhaustion of all the property of the foundation.

In order to allow foundations to exploit the possibility of augmenting their funds, the law allows the administrators of a foundation which is the beneficiary of an endowment which is granted for specific purposes different from those of the recipient foundation, to seek new instructions from the grantor and if that is not possible, from the Court for directions.

7. Administrators

7.1 Appointment

Foundations act through their board of administrators. Every private foundation must have at least one administrator who may act on its behalf and in the absence of at least one incumbent in the office of administrator, the Attorney General or any other interested person are entitled to request the Court to appoint an administrator for such purposes, for such time and under such conditions as the Court considers appropriate.¹³⁾ On the other hand, purpose foundations need to have at least three administrators or at least one juridical person acting as administrator.¹⁴ In general, the persons named to be administrators of a foundation may be juridical persons provided they have at least three directors.¹⁵ A founder may be an administrator of a foundation, provided that when the

¹³ Article 4(6) - Second Schedule, Civil Code, CAP. 16.

¹⁴ Article 35(2) - Second Schedule, Civil Code, CAP. 16.

¹⁵ Article 35(1) - Second Schedule, Civil Code, CAP. 16.

founder is a beneficiary, such founder may not at the same time act as the sole administrator of such a foundation.¹⁶

The statute of the foundation normally designates who the first administrators of the foundation will be. Alternatively, if no administrators are identified the statute needs to include provisions as to how administrators are appointed and removed. Being engaged in a fiduciary role, such administrators are subject to fiduciary duties as these are better explicated in the Civil Code.¹⁷

If none of the administrators is ordinarily resident in Malta, the foundation is bound to appoint and retain at all times, a person who is ordinarily resident in Malta to act as judicial representative of such foundation in Malta and this for all purposes of any law in Malta.

Certain persons cannot be appointed administrators of a foundation, namely those who have been convicted of certain crimes within the previous ten years or those who have been made subject to a disqualification order issued by the Court.

7.2 Removal and resignation

Administrators may be removed in cases of misconduct, failure to declare conflicts of interest, breach of duty or failure to comply with the statute or any law. A fundamental rule in this respect is that, notwithstanding any provision of the statute to the contrary, any action intended to remove an administrator needs to be preceded by a notice in writing to such person stating the alleged reasons for such removal and providing such person with a reasonable opportunity to defend himself and rebut the allegations. Removal of an administrator takes place in accordance with the statute of the foundation – however, after exhausting all applicable remedies within the foundation, any person who demonstrates an interest may apply to the Court with a request for removal of an administrator and the Court will issue such orders (including a disqualification order) as it deems necessary after hearing the applicant and the administrator and considering any other relevant evidence. In order to ensure continuity, the Court may, when it orders the removal of an administrator, name a temporary or definitive administrator or administrators in substitution when it appears to the Court that the method of appointment as stated in the statute will not result in an effective and immediate appointment of a substitute administrator or administrators.

Having said this, any provision in a statute to the effect that an administrator may not be removed is null and void.

An administrator may resign from office by notice in writing to his co-administrators and in case of there being no other administrator, to the founder or to the beneficiaries or, if impracticable, to at least one beneficiary, or if there are none to whom notice can be given, to the administrator's duly appointed successor. In certain cases, a resignation does not have any legal effect i.e. a resignation

- a) given in order to facilitate a breach of duty, or
- b) which would result in there being no administrator for the foundation – in this case an administrator may resign office if, before the resignation takes effect, application is made to the Court for the appointment of a new administrator and a new administrator is so appointed.

¹⁶ Article 36(2) (3) - Second Schedule, Civil Code, CAP. 16.

¹⁷ Article 1124(A), Civil Code, CAP. 16.

When administrators, both those originally named or those succeeding, have made any acts of administration, they are bound to submit an account of their administration on their ceasing to act as such.¹⁸ Apart from this, an administrator ceasing to be an administrator is bound to immediately deliver all property of the foundation which may be in his possession to the remaining or successor administrators and to take all such formal or other actions as may be necessary in the interest of the foundation.

7.3 Administration

The administrators of a foundation bind it to the extent of the powers vested in them by law, and the constitutive act. The administrators are responsible for maintaining possession and control of the property of the foundation, safeguarding such property and ensuring compliance with the statute of the foundation and the law.

Legal and judicial representation of a foundation is vested in the manner stated in the statute of the foundation or the applicable law.¹⁹ Moreover, the administrators are deemed to enjoy the power to delegate such powers of representation by means of a written resolution or written power of attorney in favour of any third parties.

Although there exists no guidance as to book-keeping, administrators need to keep records of all assets and liabilities, as well as the income and expenditure of the foundation for annual financial periods. Such accounts, reports and records are to be held for a period of ten years after the relevant annual period to which they refer.

Unless the deed of foundation provides otherwise, administrators may be remunerated from the income or capital of the foundation. Such remuneration would normally be in such amounts and in such manner as may be stated in the deed of foundation or in any agreement between the founder and the administrator. Remuneration may also be established by the Court on application of the administrator or any interested party.

7.4 Regulation²⁰

In general, an administrator of a private foundation requires authorisation in terms of the Trusts and Trustees Act, irrespective of the extent of his activities, or whether remuneration is payable or otherwise. *A contrario sensu*, this means that the administrator of a purpose foundation does not need any authorisation whatsoever.

8. Beneficiaries

Unless the terms of the foundation expressly determine the time when and the method how beneficiaries are to be informed of their entitlement under the foundation, the administrator of the foundation is obliged to inform any beneficiary of his entitlement, in writing, within a reasonable time of his accepting to act.²¹ In the case of persons who may be added as beneficiaries in terms of a power, these have no right of information until such time as they are appointed beneficiaries by the administrator pursuant to such power.

In the case that the terms of the foundation grant a discretion as to the choice of beneficiaries, the terms of the foundation may suspend, until such time as a discretion is exercised in their favor, the duty of the administrator to inform such beneficiaries that they

¹⁸ Article 35(5) - Second Schedule, Civil Code, CAP. 16.

¹⁹ Article 4(5) - Second Schedule, Civil Code, CAP. 16.

²⁰ Article 43(12) – Trusts and Trustees Act.

²¹ Article 38 - Second Schedule, Civil Code, CAP. 16.

may benefit under the foundation or that they form part of a class of beneficiaries which may so benefit. The terms of the foundation may also indicate the time when and the method of how such beneficiaries are to be informed. Moreover, if the deed of foundation expressly provides for the notification of information to beneficiaries or to those persons that form part of a class from among which beneficiaries may be appointed, without reference to any point in time, ascertained or ascertainable, such term is construed as implying a duty of the administrator to inform such beneficiaries within a reasonable time after the death of the founder.

In the case of a purpose foundation, the duty to inform either unnamed beneficiaries forming part of a class or persons forming part of a class of persons who may be appointed as beneficiaries in terms of a power of the administrator, does not arise notwithstanding the terms of the foundation unless, in case of the unnamed beneficiaries the administrator establishes that there exist less than ten beneficiaries appertaining to such class of beneficiaries.

The law has introduced a measure of flexibility in that should the administrator consider the provision of information as required by the law to be prejudicial to the beneficiaries of the foundation or any of them, the administrator may apply to the Court and the Court may release the administrator from the obligation to inform under such conditions as it may consider appropriate.

The duty to inform as explained above does not arise if the administrator is in possession of information which reasonably demonstrates that those entitled to such information have already been informed or are already aware of such information. The duty to inform is naturally carried out at the expense of the foundation and in the event that it appears to the administrator that such exercise will be too costly or burdensome, the administrator may apply to the Court for directions and the Court is empowered to release the administrator from such duty under such conditions as it considers appropriate.²² Naturally, this suspension of the duty of an administrator to inform beneficiaries does not reduce the rights of beneficiaries or the duties and liability of the administrator towards such beneficiaries in terms of the law.

9. The founder

When there is more than one founder, initial or subsequent, founder rights are exercised in accordance with the statute. When the statute is silent, in case of two founders, decisions will be taken unanimously and when there are more than two founders, in accordance with the decision of the majority.

9.1 Supervision of the foundation

The founder, and such other persons who may be designated in the deed of foundation, may exercise supervision over the administration of a foundation, obtain a copy of the accounts held by the administrators, a copy of the inventory or descriptive notes of property, and may intervene in the matter of appointment of administrators or in the disposal of the assets, when these issues are being dealt with by the Court. Over here one can appreciate that the founder in the case of a foundation retains more significant rights than a settler in the case of a trust, whereby the settler loses complete control over the assets once these are settled.

²² Article 38 - Second Schedule, Civil Code, CAP. 16.

Moreover, the terms of the foundation may provide for the establishment of a supervisory council consisting of at least one member or for the office of a protector or protectors with similar functions. The members of the supervisory council or protectors are appointed by the founder in the statute of the foundation or subsequently. The deed of foundation may also provide for eventual substitution or replacement of the members of the supervisory council or protectors. Naturally, the supervisory council or protectors are not be considered to be administrators, but they have the power to exercise supervision over the acts of the administrators and may be vested with the power of appointment, removal, substitution or addition of administrators. What is even more interesting is that the exercise of any action or discretion on the part of the administrators may be made subject to the express consent of the supervisory council or the protectors.

10. Confidentiality and the right to information²³

The documents of private foundations, other than those which are registered, which may be in the possession of the Registrar cannot be made available to third parties without the prior written consent of the administrators, the supervisory council, if any, or the Court and only when it is satisfied that such third parties have a legitimate interest in the information.

An administrator is obliged, so far as is reasonable and within a reasonable time of receiving a request in writing to that effect, to provide full and accurate information as to the state and amount of the foundation property, including the accounts of the foundation and the conduct of the administration to:

- a) the founder;
- b) the Court;
- c) the supervisory council or protectors;
- d) any other person who is vested with such right in the deed of foundation;
- e) subject to the terms of the foundation, any beneficiary of the foundation who is of full age and capacity, or if a minor, to his lawful guardian or representative;
- f) subject to the terms of the foundation, any other purpose organisation or charitable trust referred to by name for the benefit of which the foundation was established; and
- g) in case of a foundation established for a purpose, the Attorney General or the relevant authority under applicable law.

Subject to the terms of the foundation and to any order of the Court given for special reasons, an administrator or any other person cannot be required to disclose to any person any document or information relating to a private foundation which:

- a) discloses the administrator's deliberations as to the manner in which a power or discretion was exercised, or a duty conferred or imposed by law or by the terms of the foundation was performed;
- b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason will be or might have been based;
- c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty.

²³ Article 38 - Second Schedule, Civil Code, CAP. 16.

As can be seen further below, the law has given the Court some powers which can be exercised with respect to foundations. In order to preserve confidentiality, the legislator deemed it fit to provide that all proceedings in relation to a private foundation are to be held *in camera* and only the parties to the proceedings, the administrators, the beneficiaries (if the latter prove they have an interest in the proceedings to the satisfaction of the Court) and their respective advocates and legal procurators are allowed in Court during the hearings. Moreover, any decree or judgement of the Court need to preserve the confidentiality of the proceedings and may only reveal such facts as may be necessary to make the same intelligible and enforceable by the parties and the administrators. In fact, all applications, responses, affidavits, opinions, statements and other documents or evidence are to be kept by the Registrar of the Court in a confidential manner and no access can be given thereto except with the written consent of the Court.²⁴

11. Powers of foundations

11.1 Allowable activities

Having a legal personality, a foundation may be used for several purposes; in particular, a foundation may, unless prohibited by its statute, establish other organisations of any legal form, to achieve all or any of the purposes for which it has been established. However, a foundation may not be established to trade or carry on commercial activities, even if the proceeds of such efforts are destined to social purposes, except that:

- a) a foundation may be endowed with commercial property or a shareholding in a profit making enterprise, a franchise, a trade mark or other asset which gives rise to income, as well as a ship as long as the foundation is only the passive owner of such assets;
- b) a foundation may, subject to such authorisations as may be necessary under applicable laws, be used as a collective investment vehicle, and issue units to investors therein, for the passive holding of a common pool of assets, the management of which is delegated to a third party, including a pension or employee benefit arrangements; and
- c) a foundation may be used as a vehicle for the purpose of a securitisation transaction, borrow monies against the issue of bonds and do all relative and ancillary acts.

11.2 Segregated cells

A foundation may also establish segregated cells within itself in order to achieve particular purposes with particular assets. A segregated cell within a foundation exists when established formally:

- a) by the statute of the foundation; or
- b) by the administrators pursuant to a power vested in them by the statute,

A segregated cell does not constitute a legal person and in fact it is not even eligible for registration as a legal person, however, it still does have its own distinct name or designation. A segregated cell is established subsequently to the creation of the foundation when the following conditions are observed:

²⁴ Article 45 - Second Schedule, Civil Code, CAP. 16.

- a) the foundation is authorised by its statute to establish segregated cells for the achievement of one or more defined purposes which are consistent with the main purposes of the foundation;
- b) the administrators of the foundation resolve in writing to establish such cell; and
- c) a notice relating to the establishment of a segregated cell is delivered to the Registrar of Legal Persons for registration.

When a segregated cell is established, its assets and liabilities constitute a distinct patrimony which is distinct from all other assets and liabilities of the foundation or other cells which may be established. Essentially this means that the assets of such cell are available for the fulfillment of any obligations undertaken by the foundation in relation to that cell but not for any other liabilities entered into by the foundation for itself or in respect of other cells. This applies in an inverse scenario as well i.e. the general assets of a foundation cannot be available for the fulfillment of the obligations undertaken in relation to the cell. In this respect, it is important that administrators maintain separate and distinct accounts in relation to each cell. The existence or termination of each cell must also be disclosed in the reports and accounts of the foundation. Moreover, in order for the winding up of the foundation to take place, any segregated cells which may be in existence must be wound up prior to the winding up of the foundation.

12. Conversion, amalgamation and division²⁵

In general, the law allows organizations to convert themselves from one form into another without the necessity of dissolving and winding-up the legal person. Essentially this allows foundations to be converted into associations or trusts and vice-versa. Such conversion allows for a smooth continuation of the same legal person into a new form with all rights and subject to all obligations existing prior to the conversion.

A foundation may also be converted into a trust for the benefit of the persons beneficially interested in the foundation. In such a case, the trustee succeeds to all rights and obligations of the foundation and it will not be required to dissolve and wind up the legal person as required by the applicable law. In order for the conversion from a foundation into a trust (and vice versa) to take place, one would need the consent in writing of:

- a) all trustees or administrators, as the case may be;
- b) all beneficiaries with fixed interests under the trusts or having similar rights under the foundation; and
- c) any other person appointed in the trust instrument or deed of foundation, as the case may be, whose consent may be required for the taking of material decisions in relation to the relevant assets.

One would also need to execute a deed of foundation or instrument of trust in the appropriate form and with content so as to faithfully reflect the intentions of the settlor of the trusts or the founder of the foundation and the rights of beneficiaries as the case may be. When a foundation is converted into a trust, the trustees of the trust are obliged to cancel the registration of the foundation within thirty days of the receipt of all consents mentioned above. On the other hand, when a trust is converted into a foundation, the administrators of the foundation are bound to execute a public deed and register the foundation within thirty days of the receipt of all consents required

²⁵ Articles 21, 22, 47 - Second Schedule, Civil Code, CAP. 16.

The law also makes it possible for two or more foundation, or a foundation and association, to be amalgamated into one. Conversely, a foundation may also be divided into two foundations or else into a foundation and an association.

13. Revocation of a foundation.²⁶

Unless expressly provided otherwise in the statute, a foundation is not subject to revocation prior to the term for which it is established. The statute of a foundation may provide that it is revocable, provided that revocation does not affect or invalidate acts already lawfully carried out or interrupt lawful acts in progress or lawful commitments made and not yet fulfilled. In fact, termination upon revocation is suspended until such time as the administrators certify to the Registrar that all lawful commitments have been fulfilled.

Unless the founder has expressly excluded such a right, a private foundation may be terminated on the demand of all the beneficiaries of the foundation provided they are all in existence, have been ascertained and no one of them is an interdicted or a minor. However, if the founder is still alive his consent is required for revocation by the beneficiaries. The founder may also subject termination to the consent of a person stated in the statute.

Moreover, notwithstanding anything stated in the statute, after the death of the founder, the Court has the power to dissolve and wind up any private foundation when requested by all the beneficiaries of the foundation if it is satisfied that the continuance of the foundation is no longer necessary to achieve the intentions of the founder. The right to revoke is a right personal to the founder, and thus without prejudice to any other remedies available at law, creditors of the founder may not exercise the right to revoke a foundation.

In the case of a purpose foundation, this may only be constituted in an irrevocable manner and any clause in the statute reserving the right to revoke the foundation is disregarded. However, a power of the administrators to apply the proceeds to another purpose when the stated purpose has been achieved or is no longer possible is valid.

The administrators of a foundation are bound to dissolve and wind up a foundation when the term for which it has been created, if any, has expired or if its purpose has been achieved or becomes impossible. The founder or members may amend the statute at any time, even after such event, to remove the reason for dissolution.²⁷

14. Winding up²⁸

In those cases where a revocation of a foundation is possible, a winding up process will need to be carried out meaning that all liabilities are paid out and all the assets remaining thereupon are distributed. In general, a foundation may be wound up voluntarily or by order of the Court.

14.1 Voluntary winding up

A foundation is wound up voluntarily by following the procedures laid down in the statute of the foundation. Unless otherwise stated, the winding up of a foundation requires the

²⁶ Article 40 - Second Schedule, Civil Code, CAP. 16.

²⁷ Article 61 - Second Schedule, Civil Code, CAP. 16.

²⁸ Articles 57-59 - Second Schedule, Civil Code, CAP. 16.

support of a majority of all administrators. A certified copy of a winding up resolution has to be delivered to the Registrar within fourteen days from when it is passed.

A foundation may be wound up voluntarily only if its assets exceed its liabilities and all its debts have been paid. In this regard, the administrators need to prepare a scheme of distribution of the remaining assets of the foundation which is then notified to the Registrar and all interested parties. The scheme then requires approval by the founder or the beneficiaries, as the case may be, or in their absence the Registrar, before being implemented.

14.2 Winding up by the Court

A foundation is wound up on order of the Court, upon the application of any interested party, for reasons valid at law in terms of its statute or in terms of the law. Moreover, the Court may order the winding up of a foundation on an application to this effect if it considers it necessary in the public interest or if the provisions of the law are not being observed by the foundation and the Court considers the situation to be so grave as to merit such an order, the ordinary remedies for breach of laws not being sufficient in the circumstances. In the case of a private foundation, the power to request its winding up by the Court is also exercisable by the Malta Financial Services Authority.²⁹ In the case of a purpose foundation which makes public collections, the power to request its winding up by the Court is also exercisable by any member of the public.

If a foundation becomes insolvent or is undergoing serious difficulties which impede it from operating and achieving its aims, the administrators are bound to cease operations and notify the Registrar and appoint a liquidator to wind up the affairs in the interest of creditors, the promoters or beneficiaries of the foundation and the foundation itself.

If the foundation does not have any administrators for more than six months and suitable persons are not appointed by the Court on the application of any interested person, the Registrar is bound to proceed to demand from the Court an order for the winding up of the foundation and the appointment of a liquidator. In the case of a private foundation such power to apply to the Court is also vested in the Malta Financial Services Authority. The same applies to cases where a foundation has been found to be operating illegally or is abandoned and the Registrar is unable to obtain the co-operation of the administrators or other interested persons for the formal winding up of the foundation.

15. Disposal of assets on winding up³⁰

In the absence of a clear statement in the statute of a purpose foundation, as to how assets are to be disposed of on termination of the foundation, the administrators may apply for directions and are bound to dispose of the assets as ordered by the Court. In any case, disposal of assets may be made only to another purpose foundation with similar purposes. On the other hand, in the case of a private foundation, and in the absence of an indication in the constitutive act as to how assets are to be distributed in case of winding up, the assets are to be paid to the beneficiaries or returned to the founder's estate, after payment of all expenses, as may be determined by the Court after hearing the proposals of the administrators, the beneficiaries and any other interested persons, keeping in mind the intentions of the founder. Unless the Court is satisfied that

²⁹ Article 62 - Second Schedule, Civil Code, CAP. 16.

³⁰ Article 60 - Second Schedule, Civil Code, CAP. 16.

the founder intended the assets to be available to the beneficiaries, the assets are returned to the founder or his heirs at law.

On receipt of a declaration by the administrators or liquidators or on otherwise being satisfied that all assets have been appropriately exhausted as required by law and that all assets have been distributed in accordance with the approved scheme of distribution, the Registrar will cancel the registration of the foundation which is then struck off the Register and thus cease to exist.

16. Powers of the Court³¹

In general, the Court has jurisdiction in relation to foundations, their administrators, beneficiaries and other parties having an interest therein. An application to the Court may, in general, be made by the administrator or by any beneficiary, by the Attorney General or by any other person having a lawful interest.

One of the most important powers of the Court is that it may, if it thinks fit, by order approve any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the foundation or enlarging the powers of the administrators of managing or administering any of the foundation's property. In this respect, the Court is capable of giving its approval on behalf of the following persons:

- a) any person incapacitated at law having directly or indirectly, an interest, whether vested or contingent, under the foundation; or
- b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the foundation as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons; or
- c) any person unborn; or
- d) any person in respect of any interest of his that may arise to him by reason of any discretionary power given to any one on the failure or determination of any existing interest that has not failed or determined;

Naturally, this power cannot be exercised in an arbitrary fashion, and in fact, the Court will not approve such an arrangement unless it is satisfied that the carrying out of such arrangement appears to be for the benefit of that person.

Where in the management or administration of a foundation, any sale, lease, pledge, charge, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction is in the opinion of the Court expedient but the same cannot be effected by reason of the absence of any power for that purpose vested in the administrator by the terms of the foundation or by law, the Court may confer on the administrator, either generally or in any particular circumstance, a power for that purpose on such terms and subject to such provisions and conditions, if any, as it thinks fit, and may direct in what manner and from what property any money authorised to be expended, and the costs of any transaction, are to be borne.

An administrator may apply to the Court for directives concerning the manner in which he may or should act in connection with any matter concerning the foundation and the Court

³¹ Articles 41, 42 - Second Schedule, Civil Code, CAP. 16.

may make such order, if any, as it thinks fit. The Court may also, if it thinks fit make an order concerning:

- a) the execution or the administration of any foundation; or
- b) the administrator of any foundation, including an order relating to the exercise of any power, discretion or duty of the administrator, the appointment or removal of an administrator, the remuneration of an administrator, the submission of accounts, the conduct of the administrator and any payments into the Court; or
- c) any beneficiary or any person having any connection with the foundation;
- d) the validity or enforcement of a foundation;

Where any Court makes an order on the demand of a beneficiary who has been prejudiced as a result of bad faith on the part of the administrator in the operation of a foundation, the Court will have the power to restore the position to what it would have been had the action complained of not been taken or otherwise to protect his interests.

17. Tax

For tax purposes, foundations are akin to limited liability companies resident and domiciled in Malta. Private foundations do not enjoy exemptions and are taxed at the rate of 35% on their worldwide profits in the same manner as a company's taxable profits. Where however a foundation is either enrolled in terms of the Voluntary Organisations Act, or, where not so enrolled, is established for the achievement of a social purpose and is non-profit making, it would only be taxed in the same manner as a company where it informs the Commissioner of Inland Revenue in writing that it opts irrevocably to be treated in this manner. Where such option is exercised, any rules pertaining to the taxation of income applicable to companies as provided for under the laws of Malta shall equally apply to the foundation. Thus the foundation may benefit from the participation exemption provisions and/or foundation beneficiaries may be entitled to claim a refund of all or part of the tax paid at the level of the foundation. In the same manner, the foundation may also deduct for tax purposes any donations paid under the Donations (Sports & Culture) Rules (SL123.102).

The administrators of a foundation may also by notice in writing to the Commissioner irrevocably elect that a foundation be taxed under the provisions of the Income Tax Act applicable to trusts. As a general rule where at least one of the trustees is a person resident in Malta, tax is to be payable in Malta on any income attributable to the trust. There are however certain situations where income is not deemed to be attributable to the trust, such as for example where all the income of the trust consists of income arising outside Malta and all the beneficiaries are persons who are either not ordinarily resident in Malta or not domiciled in Malta. In such a case it is deemed that such income is derived directly by the beneficiaries of the foundation. Consequently, a Maltese foundation is beneficial and particularly advantageous in cases where the foundation involves non-resident founders, beneficiaries and assets.

Moreover, foundations which are enrolled in terms of the Voluntary Organisations Act or established for the achievement of a social purpose and with a non profit-making intention are subject to progressive rates of tax where the highest rate of tax is capped at 30% instead of 35%. The tax is calculated on the chargeable income of the foundation where no part of its profits constitutes distributable profits or are destined for the personal benefit of any member, administrator or owner of the property of the foundation.

There is also another scenario where the foundation has not opted to be taxed as a company or as a trust and does not qualify for the capped rate as above. In that case it would be taxed as follows:

- For every euro of the first €2,400 15c
- For every euro of the next €2,400..... 20c
- For every euro of the next €3,500..... 30c
- For every euro of the remainder 35c.

The transfer of a beneficial interest in a foundation is treated as a transfer of a security in a company. For tax purposes, where a foundation is set up with segregated cells each segregated cell is treated separately as if it were an autonomous foundation.

18. Foundations and Trusts

Although in a particular scenario both institutes might be used conveniently, there are a number of differences between trusts and foundations.

18.1 Transfer of Property

A trust envisages the transfer of property owned by the settlor to a trustee who is to administer the property he is vested with as owner, for the benefit of beneficiaries who have a vested interest in the trust property and who are the beneficial owners of such property. A foundation, on the other hand, is a collection of assets owned by the founder but managed as a collective entity having separate legal personality by administrators following his instructions. The foundation is administered for the realisation of a purpose or for the benefit of persons having vested rights against the foundation as a whole.

A trust implies a transfer of property, yet does not require a written deed *ad validatem* so that the property may be vested in the trustee by operation of law, judicial order or orally. A foundation, however, requires a public deed or will leaving instructions to the administrator regarding the management of the property according to the founder's wishes. In fact, upon dissolution of the foundation, the assets devolve onto the founder's heirs and not the beneficiaries who only have a vested right to the purpose of the foundation. The trust property, on the other hand, is owned by the trustee as a separate patrimony from the latter's personal property so that the property reverts to the beneficiaries when the trust ceases to exist.

18.2 Ownership control

A trust wherein the settlor tries to maintain control over the property transferred is usually regarded as a nominee arrangement, sometimes called a sham trust. The institute of trust envisages the administration of the trust property by the trustee as owner, which administration is to be effectively assessed and run by the trustee alone. Although a settlor may leave a letter of wishes outlining his preferences, he has no specific say on the property, once transferred, and retains no powers whatsoever on its administration.

A foundation, on the other hand, may continue to be controlled by the founder, who may determine the course of action of the foundation in the instrument creating it. After coming into being, the foundation is then run by administrators according to the specifications outlined in the deed but the founder retains the right to monitor their decisions. Considerable founder control is not foreign to Maltese foundations and acceptable under Maltese law, so much that the founder may himself be an administrator of the foundation.

19. Conclusion

Foundations may be used in several scenarios, particularly by high-net worth clients wishing to structure and plan their finances. They are ideal mediums for estate planning, especially when the founder wishes to ensure adequate provision for his descendants. Foundations may also be approached from an investment perspective to ensure the maintenance and separate personality of the property in question.

Corporate Social Responsibility is another area in which foundations are popular. Corporate Social Responsibility is the conscious consideration of the public interest in the determination of corporate affairs. The contemplation of social and humanitarian affairs makes the foundation an ideal instrument, especially when fashioned as a voluntary organisation. Since a foundation has a distinct personality from the firm setting it up, there would be no economic interest issues.

The establishment of foundations in Malta is not restrictive, and the institute may be used as a vehicle for several purposes. Moreover, the registration of foundations is inexpensive and expeditious. Malta can also boast of extensive judicial and practical experience in relation to the employment and flexibility of the institute and the obligations inherent in fiduciary duties have long been recognised and enforced. This makes Malta an ideal location for the setting up of foundations.