



A Guide to Mauritius Trusts

IMARA
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IMARA TRUST COMPANY (MAURITIUS) LIMITED

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WHY USE A TRUST

A trust is a highly flexible, bespoke private arrangement which can be structured to meet the individual needs of the client.

The flexibility and protection afforded by trust arrangements are such that they have become an important part of long term wealth management. Through the use of trusts it is often possible for assets to be preserved over succeeding generations substantially free from taxation, probate requirements, succession laws, expropriation and foreign exchange controls.

CREATION

To create a trust, a settlor will transfer assets to an independent party, the trustee, who will then manage the assets based on the terms of a deed for the benefit of a particular class of people, the beneficiaries. Alternatively, a trust can be established for a particular purpose.

The trust is usually confirmed in writing by a trust deed setting out the terms of the trust, the powers and duties of the trustees and the rights of the beneficiaries.

There are no public records of a trust or any parties to it.

TRUSTEES AND THEIR DUTIES

Trustees have a general duty in the exercise of their functions to observe the utmost good faith and to act with due diligence with care and prudence and to the best of their ability and skill. Trustees must execute and administer the trust, and exercise their functions in accordance with the Act and the terms of the trust and only in the interest of the beneficiaries or in fulfillment of the purpose of the trust. As a general principle, trustees cannot use or deal with trust property for their own profit or for any purpose not connected with the trust. Subject to the terms of the trust, trustees have the duty to preserve and enhance, so far as is reasonable, the value of the trust property. Trustees are required to keep updated and accurate accounts and records of their trusteeship. In addition, trustees must keep trust property separate from their own property and separately identifiable from any other property of which they are trustees. Where a trust has more than one beneficiary, or more than one purpose, the trustees, subject to the terms of the trust, must be impartial and must not execute the trust for the advantage of one beneficiary at the expense of another.

Subject to their duties under the Act and to the terms of the trust, trustees have, in relation to the trust property, all the powers of a beneficial owner. Trustees have power to appropriate, accumulate, advance or appoint trust property. Trustees may delegate any of their powers. Any desired or intended restriction of trustee powers should be included in the trust deed.

SETTLOR

Any person who has the legal capacity to contract may create a trust. The settlor may be a natural person or a body corporate. A settlor may also be a trustee, a beneficiary, a protector or an enforcer, but cannot be the sole beneficiary of a trust of which he is a settlor.

The settlor can guide the trustee as to how to invest and distribute the assets by way of a "letter of wishes".

BENEFICIARIES

Any person, whether natural or corporate, entitled to benefit under a trust, or in whose favour a power to distribute trust property may be exercised may be a beneficiary. A beneficiary must be identifiable by name or ascertainable.

PROTECTORS

The office of a protector has been codified by the Trust Act 2001. Any person of full age or any body corporate, any firm, partnership or group of persons, whether incorporate or unincorporated may be appointed as protector. The settlor, trustee or a beneficiary of a trust may also be the protector.

The terms of the trust will generally provide powers and functions of the protector. Unless otherwise provided in the terms of the trust the protector has the following powers:

- (a) to remove a trustee and to appoint a new or additional trustee;
- (b) to determine the law of which jurisdiction is the proper law of the trust;
- (c) to change the forum of administration of the trust; and
- (d) to withhold consent from specified actions of the trustees either conditionally or unconditionally.

The Act provides that a protector exercising any of the above powers is not by reason only of the exercise of the power deemed to be a trustee and, unless otherwise provided under the terms of the trust, is not liable to the beneficiaries or the trustees for the bona fide exercise of the power.

TYPES OF TRUST

There are many different types of trusts and selection of the most suitable trust for a particular client's requirement will usually be decided after discussion with the trustee.

- > Discretionary trust
- > Purpose Trust
- > Asset Protection Trusts
- > Charitable Trusts

DURATION OF TRUST

The duration of a trust is perpetual unless earlier terminated. A charitable trust may be of perpetual duration. A trust may be terminated by the unanimous agreement among all beneficiaries or by court order.

USES OF TRUSTS

A trust has a wide variety of uses, applications and benefits, which might include:

- > Anonymity
- > Asset sheltering, protecting and ring-fencing
- > Estate planning
- > Tax planning
- > Asset holding
- > Employee benefits
- > Loan capital, collective security, syndicated loan transactions
- > Project and structured finance

BENEFITS OF TRUSTS

Trust Assets

Transferring assets to the trustee removes them from the legal ownership and control of the settlor, and they are not then the property of the settlor or the beneficiary, as legal ownership of the assets becomes vested in the trustee.

Taxation

As a matter of general law, trust income and capital gains belong to the trustee, not the settlor or the beneficiaries.

The tax position of the settlor, the beneficiaries and the trust assets will depend on a variety of factors; the nature of the trust and the tax residence of the settlor and the beneficiaries. Specific tax and legal advice should be sought in all cases.

Asset Sheltering

As assets transferred to a trustee are no longer legally owned by the settlor and do not form part of his estate, provided that the trust is properly established in good faith.

Estate Planning

On the death of the settlor, assets held in a trust do not form part of the settlor's estate and as such trust assets are not usually subject to "forced heirship" laws that may otherwise affect the settlor's estate.

A trust can also be established to benefit a settlor's family in a particular manner such as providing income to a spouse and children and then to share assets between other named beneficiaries on the occurrence of specific events.

Holding Assets

Shares in companies can be placed under legal ownership of a trustee.

Employee Benefits

This allows for tax-efficient structure for the benefit of the employees of a company.

Purpose Trusts

A trust can be established for a specific purpose such as holding shares for a predefined purpose or period rather than for the exclusive benefit of a group of beneficiaries.

LETTERS OF WISHES

Letters of wishes is a common feature where a settlor creates an offshore discretionary trust. The status of letter of wishes and in particular whether they are trust documents and are binding on trustees has been the subject of litigation in several jurisdictions. In Mauritius, the Act has removed all uncertainty about the status of letters of wishes by providing that trustees may have regard to a letter of wishes or memorandum of wishes in exercising any functions conferred upon them by the terms of the trust but shall not be accountable in any way for their failure or refusal to have regard to that letter or memorandum. No fiduciary duty or obligation is imposed on a trustee merely by the giving to him of a letter of wishes or the preparation by him of a memorandum of wishes.

It is worth noting that the settlor as well as any beneficiary of a trust may give to the trustees a letter of his wishes or the trustees may prepare a memorandum of the wishes of the settlor with regard to the exercise of any functions conferred on the trustees by the terms of the trust.

CONFIDENTIALITY AND DISCLOSURE

The Trust deed does not have to be registered with any governmental authorities. Except where ordered by the court, trustees must keep as confidential and may not be required to disclose to any person not legally entitled to it, or be required to produce or divulge to any authority in Mauritius or elsewhere, any information or document in their possession or under their control relating, among others, to the state and amount or any other details of the trust property and the conduct of the trust administration. The state and amount of the trust property and the conduct of the trust administration may only be disclosed to the beneficiaries where the trust deed so authorize.

The court cannot make an order for disclosure or production of any confidential information relating to a trust except on the application of the Director of Public Prosecutions and on being satisfied that the confidential information is bona fide required for the purpose of any enquiry or trial into or relative to -

- (a) the trafficking of narcotics and dangerous drugs and to the proceeds of such trafficking, contrary to the Dangerous Drugs Act 1986, arms trafficking or money laundering under the Financial Intelligence and Anti-Money Laundering Act 2002;
- (b) any act done otherwise than in Mauritius which, if done in Mauritius, would have constituted an offence of trafficking or money laundering under the Financial Intelligence and Anti-Money Laundering Act 2002.

FORCED HEIRSHIP

A person may potentially avoid the forced heirship rules and determine freely how to dispose of all of his assets by transferring his assets to a Mauritius trust. Where a non-citizen transfers or disposes of property on trust, the transfer or disposition shall not be set aside, avoided, or otherwise declared invalid or ineffective by virtue of any rule or law of his domicile or nationality relating to inheritance or succession or any rule or law of a similar nature, or any rule or law restricting the right of a person to dispose of his property during his lifetime so as to preserve such property for distribution at his death, or any rule or law having similar effect.

The forced heirs would also not be able to enforce in Mauritius a judgment obtained in a jurisdiction that is sympathetic to their claim because the Act provides that where the law of Mauritius is the proper law of a trust, the courts in Mauritius shall not recognise the validity of any claim against the trust property pursuant to the law of another jurisdiction or the order of a court of another jurisdiction in respect of succession rights (whether testate or interstate) including the fixed shares of spouses, ascendants and descendants or relatives.

Now the effectiveness of a Mauritius trust to circumvent the forced heirship rules will depend on the type of assets being settled and its location. The settlor should ensure that the trust assets are not situated in the country having forced heirship rules. If estate of the settlor consists of immovable property, then the settlor must transfer the immovable property to a company and settle the shares of that company on trust. The trust deed must contain provisions which would discourage the heirs from attacking the trust or make it difficult for them to do so. Thus, the trust deed may contain a clause preventing the trustees from disclosing any information relating to the trust property to the beneficiaries. The trust deed may also provide that the beneficial interest of a beneficiary will automatically lapse if he attacks the trust. In such a case, the heir who is already a beneficiary under a trust may have to think twice before attacking the trust as he may end up getting nothing.

TRUSTS AND TAXATION PLANNING

One of the main attractions in using a Mauritius trust is for tax planning purposes. Trusts are usually liable to income tax on its chargeable income at the rate of 15% per annum. However, a special taxation regime applies to a trust

- a) where the settlor is a non-resident, or holds a global business licence, or is another tax incentive trust; and
- b) where all the beneficiaries appointed under the terms of the trust are, throughout an income year, non-resident, or hold a global business licence; or which is a purpose trust whose purpose is carried out outside Mauritius.

Such trusts (hereinafter referred to as the "Tax Incentive Trust") may opt either to be resident or non-resident for taxation purposes. A Tax Incentive Trust may by depositing a declaration of non-residence for any income year with the Commissioner within 3 months after the expiry of the income year, be exempt from income tax in respect of that income year. A non-resident trust is appropriate where the income of the trust is to be accumulated as for example in the case of family trusts. It is also the preferred vehicle in structured finance transactions where the trust will typically be a special purpose trust set up to hold shares in an underlying company. The disadvantage of a non-resident trust is that it does not benefit from Mauritius' network of Double Taxation Agreements ("DTA").

A trust is resident in Mauritius for income tax purposes where:

- a) where the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius; or
- b) where the settlor of the trust was resident in Mauritius at the time the instrument creating the trust was executed.

Therefore, a foreign trust may be resident in Mauritius and benefit from the DTA as long as the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius.

TRUSTS AND TAXATION PLANNING (continued)

A Tax Incentive Trust which does not opt to be non resident is taxable on its chargeable income at the rate of 15% per annum. However, the trust is allowed a credit for foreign tax on foreign source income. Where written evidence is not presented to the Commissioner of Income Tax showing the amount of foreign tax charged, the amount of foreign tax is conclusively presumed to be equal to 80 per cent of the Mauritius tax chargeable with respect to that income. Thus effective rate of income tax for a Tax Incentive Trust is 3%.

The chargeable income which is subject to tax is defined as the difference between:

- a) the net income derived by the trust; and
- b) the aggregate amount distributed to the beneficiaries under the terms of the trust deed.

Generally, any amount distributed to the beneficiaries under the term of a trust is liable to income tax in the hands of beneficiaries. However, a non-resident beneficiary of a trust is exempt from income tax in respect of his income under the terms of the trusts.

Therefore, the net income derived by the trust can be tax free if the trust distributes all of its net income to its non-resident beneficiaries.

Indeed, it is more tax efficient to use a trust instead of a company where income is to be distributed out to the promoters. Companies holding a Category 1 Global Business Licence are also taxed at the rate of 15% and also benefit for the 80% presumed foreign tax credit. However, in the case of companies, income tax is levied on the net income before any dividend distributions.

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