

TRUSTS AND FOUNDATIONS COMPARED

OVERVIEW



Trust: Trust law is based on English common law principles. Jurisdictions with law system based on English law such as The Commonwealth include frameworks addressing trusts in their legal and tax system. A number of other jurisdictions (e.g. Switzerland), though not having a trust law in itself, recognize the law of trusts and have ratified the Hague Convention on the Law Applicable to Trust and their Recognition.

Foundation: Foundations are a civil law concept and the existence of a specific foundation law is required to allow for the creation of a foundation. The statutory laws of the chosen jurisdiction govern the foundation.

LEGAL STRUCTURE

Trust: A trust is not itself a legal entity; it is a private arrangement that comes into existence when a person (the “settlor”) transfers property to another. The trust assets are legally owned by the trustee but the trustee has a fiduciary duty towards the beneficiaries for whose ultimate benefit the assets are held on trust. The trust assets are held as a separate fund (the “trust fund”) in accordance with the trust terms.

The terms of the trust are normally set out in the trust deed and typically the settlor will also write a letter of wishes to the trustee providing guidance as to how the trust should be administered as well as listing the beneficiaries. The letter of wishes is non-binding and confidential to the trustee. A trust may be revocable or irrevocable and the duration of the trust can be limited by the governing law. Some jurisdictions including The Bahamas, have abolished the rules limiting the maximum duration (perpetuity) of a trust.

Foundation: A foundation is a separate legal entity, completely detached from its creator (the founder) and owns assets in its own right. The foundation documents comprise the foundation charter and separate, confidential articles or by-laws, both of which bind the foundation council. A foundation usually comes into existence once the charter is registered in the public registry of the relevant jurisdiction. It is common for the foundation documents to reserve certain powers and privileges for the founder. A foundation may be revocable or irrevocable and may be established for an unlimited duration.

CONTROL AND ADMINISTRATION

Trust: The control and administration of a trust is exercised by the trustee according to the terms of the trust deed. After the creation of the trust, the settlor’s only powers in respect of the trust are those set out in the deed. Frequently, the deed will provide for a “protector” who can supervise the trustee and exercise certain controls over the trust. The settlor can act as the protector during his/her lifetime or appoint a close family member or advisor. However, the settlor must take care not to reserve too many powers as this could render the trust ineffective for the settlor’s personal tax and legal objectives.

Foundation: A foundation is administered by the foundation council or board that is made up of individuals and/or legal persons. The council is bound by the charter and articles and a protector or advisor can be appointed to oversee the foundation council. It is common for the founder to retain during their lifetime extensive powers in relation to the foundation. The founder must take care to ensure that these retained powers do not render the foundation ineffective for the founder’s personal tax and legal objectives.



ASSETS AND PURPOSES

Trust: A trust can hold variety of assets and no minimum value is required by law, with exception of an initial amount required to constitute the trust. Trusts are mainly used as a vehicle for estate and tax planning purposes to hold personal and business assets, as well as for asset protection reasons (e.g. divorce, incapacity etc.). Trusts can also be used for charitable and philanthropic purposes and, sometimes, to facilitate commercial transactions and the entering into of international agreements.

Foundation: Foundations can hold bankable and non-bankable assets, though in certain jurisdictions some restrictions apply to commercial assets (e.g. Liechtenstein, Panama). A foundation requires a minimum value to be held in the foundation at all times (e.g. USD10,000 for a Bahamas, CHF30,000 for a Liechtenstein, CHF50,000 for a Swiss foundation). The most common use of a private foundation is for succession planning reasons and for philanthropic and charitable purposes. Foundations are less frequently used for tax planning objectives.

BENEFICIARIES

Trust: The beneficiaries of a trust are defined in the trust deed and may include legal persons, individuals or charities. In certain jurisdictions (e.g. The Bahamas) it is possible to set up trusts for charitable or non-charitable purposes. The most common type of trust is “discretionary”, meaning that the trustee has wide flexibility to decide how and when the beneficiaries can benefit. The beneficiaries have power to enforce the proper administration of the trust and many jurisdictions entitle the beneficiaries to information in relation to their interest (e.g. to view trust accounts).

Foundation: The beneficiaries are usually designated by the founder in the by-laws. They can be legal persons, individuals or charities and may include the founder. Distributions are made in accordance with the by-laws, which typically provide for them to be made in accordance with the founder’s instructions. The laws of most jurisdictions permit the foundation by-laws to limit the rights of beneficiaries to information with respect of the foundation.

CONFIDENTIALITY

Trust: A trust is a private arrangement between the trustees and the settlor. Trustees are subject to a general duty to keep the affairs of the trust confidential (the extent of this duty depends on the laws of the jurisdiction concerned). There is currently no requirement to register trusts in a public registry. Most trusts are treated as “Reporting Financial Institutions” for the purposes of FATCA and the Common Reporting Standard (CRS). This can mean that certain information in relation to the trust is reportable on a confidential basis to the local tax authority of any person with a deemed “equity interest” in the trust.

Foundation: The foundation charter or a registration document containing a minimum amount of information must be filed at a public registry. The by-laws is a private and confidential document that is not registered. There are no statutory requirements for external audits. Most foundations will qualify as ‘Financial Institutions’ for FATCA and CRS purposes. This can mean that certain information in relation to the foundation is reportable on a confidential basis to the local tax authority of any person with a deemed “equity interest” in the foundation.

RE-DOMICILIATION

Trust: Transferring a trust from one common law jurisdiction to another is simple. The governing law of the trust can usually be changed without too much difficulty and changing the place of administration does not require any formal legal procedure.

Foundation: A foundation is tied to the governing law of the jurisdiction where the foundation is registered and thus less easily transferable. The process can be lengthy and costly depending on the jurisdiction. Some jurisdictions (e.g. The Bahamas; Panama) allow for the possibility to transfer a foundation by virtue of special legislation.

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