



PORTCULLIS TRUSTNET NEWSLETTER*

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This Quarter's Update

A. Prime Minister of Malaysia Announces Comprehensive Deregulation of FIC Guidelines

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D. Quick guide to contact persons

A. Prime Minister of Malaysia Announces Comprehensive Deregulation of FIC Guidelines

YAB Dato' Seri Mohd. Najib Tun Abdul Razak, Prime Minister of Malaysia announced on 30 June 2009 a comprehensive rationalisation of the investment guidelines administered by the Foreign Investment Committee (FIC), during his keynote address at the Invest Malaysia 2009 conference.

During the speech, the Prime Minister articulated the need for a transformational change, which is critical for Malaysia in its pursuit of a developed nation status. In this regard, the Government decided to substantially deregulate FIC investment guidelines with the following immediate changes:

(a) Guidelines on the acquisition of interests, mergers and takeovers:

The FIC guideline on the acquisition of interests, mergers and takeovers is repealed.

The FIC will, therefore, no longer process such share transactions, nor impose equity conditions on such transactions.

The equity conditions imposed by the respective sector regulators will continue to apply.

For strategic sectors, sector regulators are best placed to oversee their respective sectors and to tailor equity conditions according to the requirements and strategic nature of each sector.

There will no longer be any equity conditions imposed on sectors not deemed strategic.

(b) Treatment of Listed Companies:

The conditions imposed on fund raising exercises by listed companies have also been significantly eased in the context of raising Malaysia's attractiveness as a listing destination.

The revised guidelines covering the treatment of listed companies have been issued by the Securities Commission (SC) and full details can be obtained from the SC website, www.sc.com.my.

(c) Guideline on the acquisition of properties:

Going forward, FIC will only process transactions involving the dilution of Bumiputera interests and/or Government interests in properties valued at RM 20 million and above, whether bought directly or indirectly (through acquisition of companies owning properties).

All other property transactions shall no longer require the approval of FIC.

Except in the event of a dilution, as stated above, foreign interests will no longer be required to apply for approval to FIC for the acquisition of properties. However, foreign interests cannot acquire properties below specified threshold limits. The threshold amounts for commercial properties will be RM 500,000. For the purchase of residential properties, the present threshold of RM 250,000 is maintained until the end of 2009, and with effect 1 January 2010, it will be RM 500,000.

This amendment of the property guidelines significantly eases the regulations on property acquisitions, while at the same time enhancing transparency and reducing regulatory processes.

A copy of the revised FIC guideline on the acquisition of properties can be found on the EPU website, www.epu.gov.my.

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The measures set out above constitute a major easing of investment regulations and should significantly strengthen Malaysia's value proposition as an investment destination.

The Government remains committed to the objective of growth with equity. However, in light of the current challenges and landscape, a new approach is required which promotes effective and sustainable economic participation in a market friendly manner. This new approach will focus on promoting genuine partnership, meaningful participation of Bumiputera, and meritocracy amongst Bumiputera.

As part of this new approach, the Government will set up Ekuiti Nasional Berhad (EKUINAS), as a private equity fund to ensure meaningful and effective participation by Bumiputeras, as well as stimulate investments in sectors with high growth potential.

The Government will provide EKUINAS an initial endowment of RM500 million, with a target of scaling up EKUINAS to become a RM 10 billion fund. EKUINAS will jointly invest with private sector and investment decisions

will be commercially driven. This is to ensure meritocracy in the selection of companies that will benefit from capital injection and be nurtured for growth.

The comprehensive deregulation of FIC investment guidelines has been formulated to strengthen Malaysia's attractiveness as a place to do business and invest, for Malaysians and foreigners alike. A facilitative business and regulatory environment, combined with a more effective and market friendly distribution policy, will benefit all stakeholders. Through these measures, the Government intends to place Malaysia on a high growth trajectory, while at the same time maintaining the philosophy of growth with equity.

For further inquiries on the new guidelines please contact 03 – 8888 2919 / 2928 / 2940 / 2934. For EKUINAS please contact 03 – 8888 2797 / 2787 / 2792.

Excerpted from:
Economic Planning Unit
Prime Minister's Department
30th June 2009

B. Legislative Changes in Labuan:

Several legislative changes are expected by end-2009 in Labuan. The first reading of the bills took place on 2 July 2009 and the second reading will take place during the October 2009 Parliamentary session:

1. Bills to amend existing legislation:
 - i. Labuan Offshore Financial Services Authority (Amendment) Bill 2009
 - ii. Labuan Offshore Business Activity Tax (Amendment) Bill 2009
 - iii. Labuan Offshore Trust (Amendment) Bill 2009 and
 - iv. Offshore Companies (Amendment) Bill 2009
2. Bills to replace existing legislation:
 - i. Labuan Limited Partnership and Limited Liability Partnership Bill 2009 to replace the current Labuan Offshore Limited Partnership Act, 1997 which will be repealed.
 - ii. Labuan Financial Services And Securities Bill 2009 to replace (a) Offshore Banking Act, 1990 (b) Offshore Insurance Act, 1990 (c) Labuan Trust Companies Act, 1990 and (d) Labuan Offshore Securities Industry Act, 1997, all of which will be repealed



3. Bills for new legislation:
 - i. Labuan Foundation Bill 2009 and
 - ii. Labuan Islamic Financial Services and Securities Bill 2009

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C. LOOKING AT TRUSTS & PRIVATE FOUNDATIONS

In recent years a number of common law jurisdictions have introduced private, non-charitable foundations into their legal systems. This raises the question- when might a foundation be better than a trust and vice versa? The main differences between trusts and foundations and the factors that might lead a client to prefer one over the other are outlined below.

Trusts and private foundations

Trusts derive uniquely from anglo-*common law* jurisprudence. Public charitable or philanthropic foundations have long been a feature of continental, European civil law jurisdictions. Private, non-charitable foundations are also a civil law concept- though of more recent origin.¹

A recent blossoming of interest in private foundations

In the past ten years common law trust jurisdictions have looked at foundations and decided to import them into their common law systems. This trend began with Caribbean offshore centres². This broke new ground as these were predominantly common law based jurisdictions with a common law trust legacy that were now for the first time embracing a civil law institution.

Soon afterwards, other offshore centres, recognising the new trend, began to follow suit.³ Even the older European offshore centres are conscious of the attractions of foundations: the *Isle of Man* and *Gibraltar* promote a company limited by guarantee as fulfilling the role of a foundation in all but name.

As a result there are now many jurisdictions in which 'foundations' are recognised. However, some of the new laws on foundations introduce novel variations to the traditional civil law foundation, and it remains to be seen to what extent they will be recognised and accepted as foundations in the traditional sense by those jurisdictions.

The common feature of trusts and private foundations-divested wealth

Speaking generally⁴, both trusts and foundations share one common characteristic - they each offer a means for an asset holder to divest himself of formal legal ownership of assets while still retaining some influence over the way the assets are enjoyed and distributed.

The essential notions underlying both trusts and foundations are:

- (a) divestment - one removes oneself from ownership of the assets and
- (b) custodianship - one puts assets into the safe custody of another and

- (c) care for others - one stipulates how others are to benefit from the assets.

The reasons for divesting oneself of wealth

Putting distance between an owner and his property may be important:

- (a) for **family inheritance** reasons (e.g. for smooth transition of assets on death);
- (b) for **business** reasons (e.g. to observe confidentiality requirements);
- (c) for **commercial** reasons (e.g. to securitise assets);
- (d) for **personal security** reasons (e.g. to safeguard from extortion or kidnapping);
- (e) for **tax planning** reasons (e.g. for inheritance tax planning);
- (f) for **asset protection** (e.g. to shield from contingency fee litigation);
- (g) for a **family office** (e.g. to manage philanthropy or family distributions); and
- (h) for **matrimonial** reasons (e.g. for ante and post nuptial objectives).

These objectives have led trust professionals to offer trusts as a means to enable a client to ensure that:

- (a) during their lifetime they remain low profile so that their assets can be enjoyed in privacy secure from the risk of threats, ransom demands and attack;
- (b) in the event of disability or illness, their wealth is handled in the way they would want and is in capable hands;
- (c) upon death their wealth will continue without interruption to be preserved, managed, administered and increased in privacy;
- (d) after death it will pass to charity or preselected relatives free of delays, publicity and costs of probate, estate duty and forced heirship;
- (e) at all times both during lifetime and on death their wealth is safe from attacks by private or public claimants against the client as a result of :

¹ Harry Wiggin has traced the development of foundation laws and shows how the continental model of philanthropic, public entities was modified into a private, non-charitable vehicle- first by Monaco (1922) and later by Liechtenstein (1926) and Panama (1995)- see, Wiggin, 'Anguilla: foundations and trusts- a comparison', *Trusts & Trustees*, Vol. 14, No. 5, June 2008, p. 287. Non-charitable, private foundations are now in various European countries see e.g. Austria, Switzerland, Italy, San Marino, Cyprus and Malta.

² Foundation laws have been enacted in Netherlands Antilles (1999), St. Kitts (2003), The Bahamas (2004), Nevis (2005), Anguilla (2006) and Antigua and Barbuda (2007).

³ Jersey enacted a foundations law 2009. Guernsey, Seychelles, Labuan and Mauritius currently have foundations laws in the pipeline.

⁴ There are slight differences in approach and in the precise rules applicable to foundations in different jurisdictions. Legal advice on the rules applicable in any given jurisdiction should always be sought before implementing a structure.

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- (i) **sovereign risk** (nationalisation, expropriation, forfeiture, confiscation),
- (ii) **business risk** (business failure, insolvency, regulatory fines and penalties, class action damages and other private law suits) and
- (iii) **personal risk** (excessive taxation, frivolous and vexatious lawsuits, bankruptcy, divorce, kidnapping, blackmail, extortion, frame-ups, stings and other crime.)

The balance between divesting and control

An ideal structure will maintain continuity of influence for the wealth creator while avoiding charges of nominee ownership, alter ego, shadow directorship, sham arrangements and de facto ownership. The challenge is to keep a proper balance between 'securing' wealth and retaining influence over it. While the benefits of trusts and foundations stem from the client relinquishing "ownership and control", with expert guidance a client can preserve a degree of influence without compromising the structure.

Historically the trust has been a favoured device for splitting ownership and influence.

Until recently the private family trust has been the only effective way in common law jurisdictions to split ownership and influence. A *settlor* divests himself of legal ownership by transferring his assets to a *trustee* under the terms of a *declaration of trust* or a *deed of settlement*. The deed sets out how the assets are to be held and invested and distributed to the chosen *beneficiaries* who are said to have an *equitable* or *beneficial* interest in them. A protector may be appointed by the settlor to monitor the trustee. This arrangement achieves various asset protection objectives.

- (a) Creditors and other claimants upon the *settlor* discover he no longer owns the assets, so that generally (subject to any applicable claw back period and in the absence of proof of a fraudulent transfer to defeat creditors) they can not seize them.
- (b) Claimants upon *beneficiaries* discover that (under the trust deed) when beneficiaries are only entitled to assets in the discretion of the trustee, they do not own them and will be excluded from benefit in future in the event of a claim in order to protect the class of beneficiaries as a whole.
- (c) Claimants who have personal claims upon the *trustee* discover that the trust assets do not as a matter of law form part of the private assets of the trustee upon his death or bankruptcy and cannot be used to satisfy any personal claim on the trustee.
- (d) In the meantime the trustees manage the assets during the settlor's lifetime for the beneficiaries (of whom the settlor may be one), and upon his death they can continue to do so. Since the assets are owned by the trustee and do not belong to the settlor, they do not form part of the settlor's estate that needs to pass under his will and go through probate.

- (e) The settlor can exert a certain influence over the trustee through his letter of wishes, and subject to the local law of the trust, through powers he can reserve to himself- such as, for example, to appoint or remove trustees, to add or remove beneficiaries and to direct or manage trust investment activities. He may also appoint a protector to monitor the trustee and veto distributions by the trustee.
- (f) Depending on the jurisdiction in question it is possible that income, capital gains and inheritance tax reductions may be legitimately achieved as a result of the above.

Some disadvantages of a trust

Despite their ancient lineage and established role as wealth management vehicles, trusts are not perfect for everyone. Looked at from the standpoint of the person who is considering a divestment-custodian-care solution, the individual:

1. may **not be familiar** with trusts;
2. may **not be comfortable** with ownership going to a "third party" trustee;
3. may be unwilling to tie himself down to an **irrevocable** trust;
4. may need to retain **"too much" control** over the assets;
5. may not be able to find a **trustee he likes**;
6. may not be happy with the **complexities of a trust deed**;
7. may prefer to keep **beneficiaries unknown**;
8. may think trusts are **"too expensive"**;
9. may need results that a trust **cannot produce**.

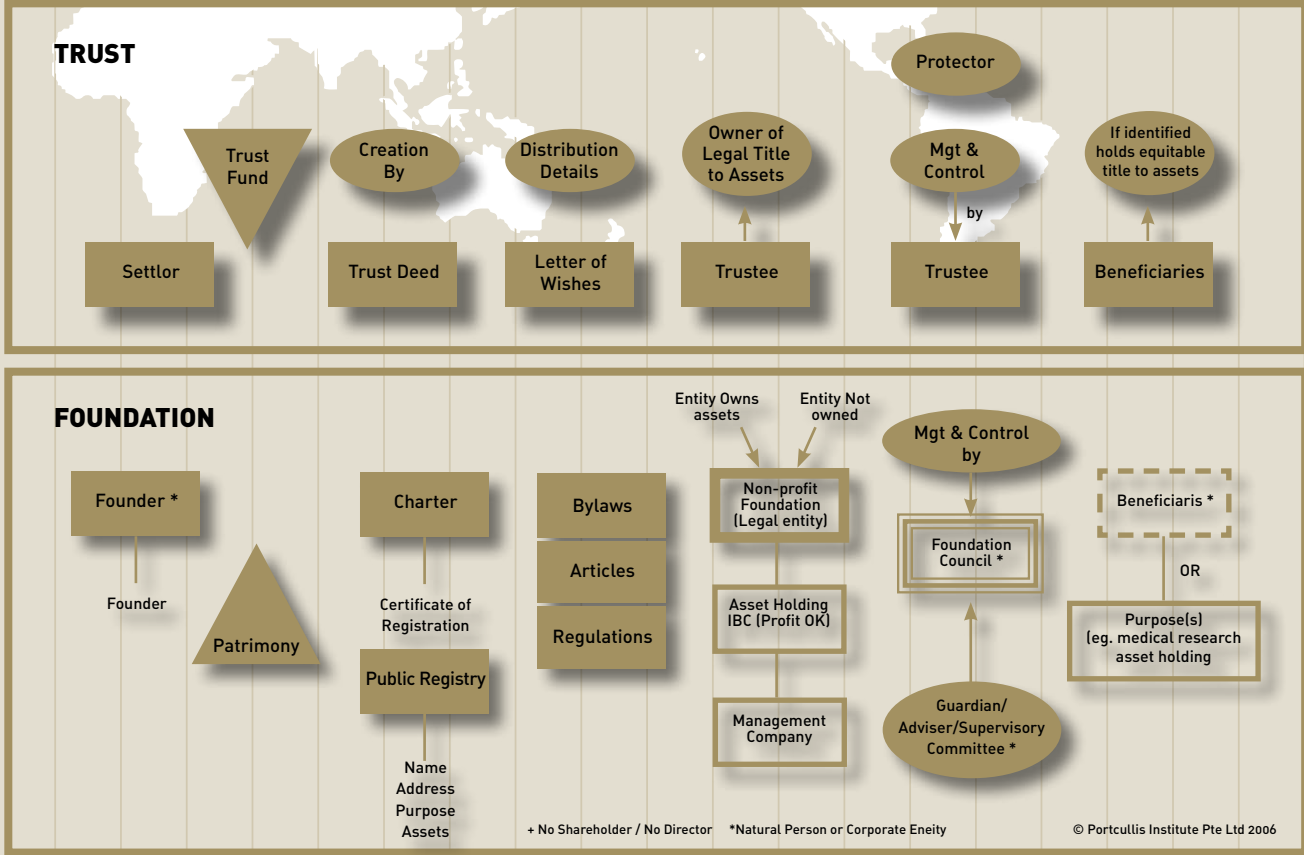
Another problem with trusts is that there are areas of uncertainty in the law. This gives rise to the risk of litigation in order to settle disputes. This is expensive and may lead to loss of privacy if public court hearings are held and reported. Areas of uncertainty that have arisen in the past include issues such as:

- (a) whether beneficiaries are entitled to require trustees to disclose certain trust documents;
- (b) whether mistakes in the original drafting of the trust deed can be rectified with retroactive effect;
- (c) whether the terms of the trust can be amended to take account of new circumstances;
- (d) whether the directors of trust companies can be held accountable to beneficiaries for their actions;
- (e) whether the trust is a sham because of excessive control or influence by the settlor;
- (f) whether trustees can rely on exemption clauses to shield them from liability to beneficiaries.

Finally, since a trust arrangement rests on the relationship between a trustee on the one hand and the settlor and beneficiaries on the other, if this breaks down the settlor will be faced with the stress and anxiety of removing the trustee and finding another. A trust relationship can be like a marriage- delightful to enter but sometimes painful to leave.

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TRUSTS v. FOUNDATIONS



Comparison with foundations

A foundation is another way for a high net worth individual to divest himself of ownership while still retaining influence over the assets. A foundation is administered by a *council* appointed by the founder in accordance with a *charter* and *byelaws* or 'regulations'.⁵ In terms of the main players and functions there are certain similarities in the respective roles, albeit with different terminology in certain respects:

Foundation	Trust
The Founder(s)	The Settlor
The Foundation	The Trust
The Council	The Trustee
The Councillors	The Trustee
The Protector	The Protector
The Beneficiaries	The Beneficiaries
The Charter	The Deed
The Byelaws/ Regulations/Articles	The Letter of Wishes
The Patrimony/Assets	The Trust Fund
The Registered Agent	-
The Registrar	-
The Supervisory Person	-

A foundation is normally established by a *charter* made in writing and signed by one or more *founders* and on the issuance of a *certificate of registration* by a government registrar. Typically⁶ a *founder* will create a *foundation* by having an attorney or *registered agent* submit a *charter* to a government *registrar*, accompanied by the fee. Assuming it is in order the agent is issued with a *certificate of registration*. The foundation is then a *legal entity*. It has a registered office run by its registered agent, who may be required to be licensed, and who must retain certain records relating to the foundation.

Assets transferred to the foundation cease to be the assets of the founder and become the assets of the foundation, with *full legal and beneficial title*. They do not become the assets of a beneficiary unless and until distributed to the beneficiary. The beneficiaries of a foundation, unlike those of a trust, have no equitable title or interest.

The charter appoints a *council* which is to carry out the *objects* of the foundation and administer its *assets*, which may include a *purpose* or *charitable object* or distributing them to *beneficiaries*. The council, made up of councillors appointed by the founder, administers the assets and affairs of the foundation in accordance with the charter and a set of *byelaws* or *regulations*. The charter sets out certain essential elements relating to the creation of the foundation such as the name, initial assets, founder, establishment of a *council*, names and addresses of *councillors*, the *objects*, the registered *agent*, registered *office* and the term and is available for public inspection at the government registry.

⁵ A trust is administered by the trustee appointed by the settlor in accordance with the trust deed.
⁶ The precise terminology and steps may differ in different jurisdictions depending on the terms of the applicable foundations law.

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The byelaws set out the details of the beneficiaries and how they are to benefit and may set out how decisions of the council are to be made. The byelaws are not filed at the government registry and are not open to inspection by the public.

The key to a foundation's functionality lies in its council and a councillor may be required to act honestly and in good faith with a view to the best interests of the foundation and exercise the care, diligence and skill that a reasonably prudent person would exercise in similar circumstances. The duty of the councillor however may be stated to be to the foundation, not the beneficiaries (unlike a trust where the duty of the trustee is to act in the best interests of the beneficiaries as a whole).

Conceptual differences between trusts and foundations

There are thus several structural features that distinguish a foundation from a trust:

- (a) A foundation is a distinct legal entity. A trust is not a separate legal entity. It is an arrangement or a relationship.
- (b) Once assets are transferred to a foundation, they are owned in legal and beneficial title by the foundation. They are not owned in any sense by the beneficiaries until actually distributed to them. A trust is not an entity and may only operate and hold property through a trustee. Once trust assets are transferred to a trustee they are owned by the trustee only as to legal title. A beneficial or 'equitable' interest (depending on the terms) is enjoyed by the beneficiaries of the trust.
- (c) Depending on the jurisdiction, no fiduciary duty may be owed to a foundation beneficiary. A beneficiary of a trust is owed a fiduciary duty by the trustee and, other than a purely discretionary beneficiary, has an equitable interest in the assets.
- (d) A foundation is a stand alone, autonomous entity that operates under its charter and byelaws/regulations. There is only a limited role for the courts to intervene, in the absence of fraud. A trust is an emanation of the common law that is subject at all times to the continuing supervision of the Courts, to whom the trustees may apply for directions, and from whom beneficiaries may seek assistance and redress in enforcing the fiduciary obligations placed by the common law upon trustees.

Some benefits of the private foundation

1. The foundation is **well known** to persons in civil law countries.
2. When a foundation is set up, there is **no stranger** holding title to the property.
3. Subject to the provisions of its charter, a foundation can be **terminated at any time**.
4. Foundation laws allow the founder to retain a degree of **control over assets** (although, generally speaking, onshore tax considerations may dictate against a founder seeking to exercise "too much" influence in respect of an offshore foundation).
5. There is **no outside, independent trustee**. A council may be entirely 'in-house' and under the control of a founder, (though this would be inadvisable where

vigorous asset protection is needed.).

6. The foundation *charter* is usually a **simple** document.
7. The *byelaws* or *regulations* are private and can be easily altered.
8. The beneficiaries can remain **anonymous**.
9. "**Sham**" issues do not arise in theory since a foundation is a separate legal entity.
10. Foundations are generally cheaper to run than trusts.
11. Foundations have a long **history** and are **versatile**.

Some disadvantages of a private foundation

The following are some of the drawbacks to use of a foundation:

1. Clients from common law countries are unfamiliar with foundations.
2. High tax common law countries may treat a foundation as a company or a trust, depending on which levies most tax.
3. Creditor jurisdictions, especially common law ones, may treat a foundation as ineffective for ring fencing, especially where the founder is a member of the foundation council and a beneficiary and protector.
4. There is less choice of venues for a foundation governing law than for trusts.
5. There may be difficulty finding appropriate council members.

Key issues

For most clients the key issues of concern when considering a new structure are

- (a) cost;
- (b) confidentiality;
- (c) complexity.

(a) Cost: how much does it cost to form and run a trust or foundation?

Foundations usually score highly on the cost comparison.

The initial and annual Government fees are usually low.

The costs of administration are usually lower than for trusts and if the council is managed 'in-house' these costs will be under the control of the founder. Depending on the jurisdiction, there may be no annual meeting requirement in respect of the founder, councillors or protector and no requirement that a member of the council be a registered or qualified person – although this is not always the case.

It will be necessary to obtain a quotation for professional fees from a person licensed to provide foundation services for obtaining name approval and filing the necessary papers with the registrar to obtain a certificate of registration and for acting as registered agent and registered office.

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There will also need to be agreed professional fees for any additional services such as drafting a charter and regulations, supplying a nominee founder and members of a council and a protector and supervisory person, supplying a registered office and assistance with opening a bank account, putting the foundation's assets into its name, administering the foundation and carrying out its objects including making distributions to beneficiaries.

By contrast, the set up and annual running costs for trusts will usually be higher than for foundations reflecting the amount of work required to maintain minutes, draft resolutions, maintain accounts, and handle all aspects of trust administration. They also must reflect the costs incurred by trustees in maintaining adequate staff, professional indemnity insurance and meeting the requirements of a regulator.

(b) How much confidentiality do I lose on the registration of a foundation?

Trusts usually score highly on the confidentiality scale, as a trust deed is a private instrument and is not open to public inspection (although in a trust regulated jurisdiction it may be open to inspection by the regulator).

Foundations information held by registrar open to public inspection

Typically the foundations register kept by the government registrar is open to public inspection and may contain the following information: foundation name and registered address, the name and address of each councillor, the date of establishment, and the charter or amended charter and certificate of dissolution. The charter itself usually must contain the name of the foundation, the initial assets, the name and address of the founder (which may sometimes be a nominee), the names and addresses of the councillors, the objects for which the foundation was established and the name and address of the registered agent.

Depending on the jurisdiction, there may also be certain information held by the registered agent that is open to inspection by a government registrar and by foundation functionaries.

Information for beneficiaries

In trust law much litigation has been devoted to the question of what rights a beneficiary has to demand information from the trustees about the trust and its administration. Foundation laws can resolve this issue either in favour of or against the beneficiary, but at least the issue will be clear.

Although at first sight it may appear there is more 'publicity' with a foundation, on close analysis it emerges that the personal and sensitive information on file at the registry is limited and does not reveal private details beyond the bare name and address of councillors. In some jurisdictions the founder may be a nominee and only the initial councillors' names are on file.

(c) Complexity

Foundation laws invariably score higher than trusts on a complexity comparison, because the law is usually codified,

clear and concise. A foundation is created by registration. It has a charter. Assets are contributed to the foundation. A foundation council is formed to administer distributions to beneficiaries. A protector oversees the council. A simple statement (in any language) of the founder's intent for the distribution of assets to named beneficiaries is made in regulations, which are private, are not filed with any Registry and can be changed at any time. The day to day administration is handled by persons selected by the founder to serve on the council, which can include the founder though this is inadvisable.

Trusts by comparison are subject to the complexity of the trust deed, to the uncertainty of case law legal systems in general and to the vagaries of the laws of equity in particular. Trusts are also subject to the added costs and imperatives of statutory requirements for trust administrators where these are professional trust companies in jurisdictions that regulate trust service providers.

With the rising costs of litigation and the stress and publicity associated with court disputes, a vehicle like the foundation which is created as an entity by operation of law and is then run under its own management offers the virtues of certainty, simplicity and autonomy.

The final selection

The choice between a trust and a foundation will ultimately depend on what are the main priorities of the client. In this regard, there are three typical scenarios to be considered:

(a) The Pure Succession Planner

A trust would seem a natural choice for a client whose main priority is confidential transfer of assets to the next generation under the care of a professional fiduciary. A client who needs a vehicle to achieve smooth succession of property on death, and who has no desire to control assets in the meantime with extraordinary reserved powers, but is content (i) to form an irrevocable trust; (ii) to use an independent, institutional trustee (as opposed to a private trust company); (iii) to have an independent protector; (iv) to be a discretionary beneficiary or subject to protective provisions in the event of distress or even to be excluded as beneficiary to rebut any suggestion of disguised self-ownership; would probably select a trust in preference to a foundation especially if he comes from a trust familiar jurisdiction. In this situation a trust can attain everything that a foundation can offer and more in the sense that it will be assured of recognition in "mainland" trust jurisdictions. Those from a civil law background would doubtless prefer a foundation, which would achieve the same results.

(b) The Control-Minded Succession Planner

On the other hand, a foundation would be better for those that want a vehicle for achieving smooth succession of property on death, but who, while they do not have or foresee any particular creditor, tax claim or litigation risks, want to have their cake and eat it too, in the sense they want the security of separated or even orphaned ownership together with present enjoyment and control of the assets. In theory they could chose a trust. They might use a trust from one of the many progressive, reformist, island, common law states that permit (i) extensive

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reserved powers; (ii) revocability; (iii) self-trusteeship; (iv) self-protectorship; (v) self-enjoyment; (vi) immunisation of trustees from the prudent management rule in the face of total control exerted by a settlor; or (vii) the use of a private trust company with (ix) a purpose trust. On the other hand, a foundation offers a solid statutory basis for allowing founder control over assets through the council and where there is no risk of aggressive litigation, it may be a more cost-effective and straightforward solution than an exotic trust.

(c) The Vulnerable Defender

Clients who are less interested in family office management or succession issues but are concerned with fending off life-time or post-death attacks from tax collectors, regulators, creditors, litigants, divorcing spouses or disgruntled forced heirs are in a difficult situation. In theory and on first glance a foundation would seem a preferred choice because it is usually regarded as acceptable for a founder to exercise personal control over assets held in the foundation. However, these matters have yet to be tested in litigation between an aggressive litigant and a founder who is being accused of abuse. It may transpire that as regards assets in the jurisdiction of attack, they will always be vulnerable to claw-backs, allegations of fraudulent preference

or fraudulent conveyance, of nominee or alter ego or sham arrangements and even to court orders for repatriation or re-vesting of other assets whether they are held in trusts or foundations. If this is correct, the key issue is not whether a trust or a foundation has been used but what view the court forms of the tactics of the settlor/founder. Generally speaking, a trust or foundation structure will be less vulnerable to attack if the settlor / founder minimises his or her direct influence on the structure.

Summary

The recent expansion of foundations into common law jurisdictions has opened up areas of choice for clients seeking to divest themselves of ownership of assets to transfer custody to others for the future care of beneficiaries. Those seeking autonomy and a clear-cut and cost effective solution may be attracted to the foundation. Those who must anticipate the possibility of cross-border attacks and who need to ensure the structure will be recognised in a common law jurisdiction where assets are located or issues may fall to be determined, may prefer to use a trust. A detailed fact-find by the professional adviser to unearth all potential family, fiscal and business factors that may come into play will be of critical importance.

**You are invited to discuss your interest in a trust or foundation with the
Portcullis TrustNet office most convenient to you. For all enquiries in Singapore,
please feel free to contact
Michael Darwyne at michael.darwyne@pc-tn.com or telephone +65-6836-9555.**

D. QUICK GUIDE TO CONTACT PERSONS



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