



## **Asset Protection and the concept of Trust under Cyprus International Trusts Law**

**By Dr. Pavlos Neofytou Kourtellos**

The roots of the Trust are to be found in the old English law of Equity. Various jurisdictions, including Cyprus, adopted the concept of trust, reformulated it or even changed its characteristics often to its core. Trusts have become a tool when it comes to asset protection and selecting the most favorable jurisdiction in which to establish the trust is a crucial factor to be considered.

Although asset protection can take different forms (e.g., family partnerships, limited liability companies), asset protection through a trust settlement should take into account the possibility that an aggrieved creditor will take all steps necessary to pursue a debtor, so the trust must withstand challenge in the forum selected.

In broad terms key issues to take under consideration are: (i) the treatment of foreign judgments, (ii) the extent of the fraudulent conveyance provisions and (iii) the degree of interest and control that can be conferred on, or reserved to, the settlor. At the same moment the question for anyone related to such trust settlements is how to maintain the integrity of the trust.

Further considerations include the wise appointment of the trustees, the expertise and skill applied when drafting and setting up the trust. Another element is the extent of influence permitted to the settlor so as to retain certain powers and benefits which often attract the possibility to challenge the validity of the trust based on the settlor's retained interest. Therefore, the choice of jurisdiction for the trust is most critical.

A closer look of the Cyprus respective legislation follows along with the clarification of what is meant by the term trust and the key protagonists of a trust settlement.

### **Trust Defined**

The essence of a trust is the imposition of an equitable obligation on a person who is the legal owner of property (a trustee) which requires that person to act in good conscience when dealing with that property in favour of any person (the beneficiary) who has a beneficial interest recognized by equity in the property. The trustee is said to "hold the property on trust" for the beneficiary. Four are the significant elements to the trust: that it is possible, that it provides the beneficiary with rights in property, that it also imposes obligations on the trustee, and that those obligations are fiduciary in nature.

The assets comprising the trust fund are legally held and registered as owned by the trustee and the trustee is under a duty, enforceable in the Courts, to hold those assets and the income arising from them for the benefit of the beneficiary. The core of the "trust" is the inter-action of personal rights and claims between these persons in relation to the trust property. In general terms a trustee is the officer under a trust who is obliged to carry out the terms of the trust and who owes strict fiduciary duties of the



utmost good faith to the beneficiaries. A trustee is an example of a fiduciary, so it is important to understand what the concept of fiduciary responsibility entails.

### **The concept of fiduciary responsibility**

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. The core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

### **Cyprus International Trusts Legislation**

The law on International Trusts in Cyprus has undergone considerable changes in 2012 with the introduction of the new Law 20 (1) 2012 that amends the pre-existing 1992 Cyprus International Trusts Law of 1992, now to be read together (herein after referred to as the “**CIT Law**”). CIT Law provides a settlor with a high degree of protection against claims by future creditors. Anyone attempting to reach the assets under the trust will find it extremely difficult.

In brief we note the necessary prerequisites for the establishment of a Cyprus International Trust (“**CIT**”):

- i. The creator of a CIT i.e. the settlor and the beneficiaries must not be tax residents in Cyprus during the year preceding the year of creating a CIT (they may become tax residents subsequently);
- ii. All matters in relation to a CIT are determined in accordance with Cyprus Law and the Cyprus Courts have jurisdiction;
- iii. A CIT may be challenged only on defraud of creditor grounds with a two year limitation period since the creation of the trust;
- iv. Succession, heirship or other laws applicable in foreign jurisdictions or court judgments or orders or arbitral awards or decisions by foreign competent authorities do not affect the validity of a CIT or the transfer of property to the Trustee of a CIT;
- v. The settlor has the right to reserve many powers, including, the powers to revoke or amend the trust, to instruct the Trustee, to appoint and remove trustees, the protector or the enforcer, to change the law regulating the CIT or the place of its administration and others;
- vi. Subject to the provisions of the Trust Deed, complete freedom of the trustees to invest the whole or part of the funds in any kind of investment
- vii. A CIT may last for indefinite period;
- viii. The income of a CIT may be accumulated without limitations;
- ix. The trustees of a CIT are bound by confidentiality under statutory law and/or the applicable principles of equity as they hold a fiduciary position in nature and



- as such they cannot disclose information or documents unless they are ordered by a Cyprus Court or are required by law in certain defined circumstances.
- x. Under a CIT settlement the settlor can also be a trustee or beneficiary.

### **Creation of Trust**

In order to form a CIT, the following formalities must be complied with:

- i. Trust Deed (or a similar document-trust instrument) must be executed in which the Settlor clearly expresses his/her intentions as regards the settlement of the property into the trust and entitlement of the beneficiaries to the property so settled;
- ii. the instrument creating an international trust is liable to a stamp duty of Euro 430;
- iii. Transfer of legal title of the property and/or the trust assets to the trustee/s;

### **Annual fees, accounting/audit**

CITs enjoy important tax advantages, where the most important tax advantage is that the CIT is not taxed in Cyprus. In more detail, the tax advantages are:

- i. All income, whether trading or otherwise of a CIT is not taxable in Cyprus;
- ii. Dividends, interest or other income received by a CIT from a Cyprus company are neither taxable nor subject to withholding tax;
- iii. Capital gains on the disposal of the assets of a CIT are not subject to capital gains tax in Cyprus;
- iv. An alien who creates a CIT and retires in Cyprus is still exempt from tax of all the property settled and the income earned abroad;
- v. A CIT created for estate duty planning purposes would not be subject to estate duty in Cyprus;

### **Duration of the trust**

The CIT is not subject to a maximum duration and therefore it may exist in perpetuity and/or it may be established for an indefinite period. As such the English rule against perpetuities does not apply. It should be noted that if an international trust does not provide for an express power of revocation it shall be deemed to be irrevocable by the settlor or his legal personal representative notwithstanding\ that it is voluntary.

### **Confidentiality**

Confidentiality is a condition sine qua non when it comes to Trusts. The Instrument of Trust is private to the parties concerned. Confidentiality and privacy of the constitution of CITs as well as their transactions and activities are highly prized and sought after. This aspect is a cornerstone of the CIT Law which ensures that the



trustee or any other person, including public officers, may not disclose to any person any information or documents in relation to:

- i. The name of the settlor or any of the beneficiaries;
- ii. The consultations of the trustee regarding the exercise of his power, discretion or duties;
- iii. The reasoning of any such specific exercise of power, discretion or duties or the elements supporting the aforesaid reasoning;
- iv. The exercise of the power, discretion or the performance of the duties of the trustee;
- v. The accounts of the International Trust.

To the above secrecy of the affairs of the CIT there are **two exceptions**:

- (a) The Trustee is under an obligation to disclose all documents and information relating to the accounts of the trust, to a beneficiary.
- (b) The Courts, before which criminal or civil proceedings are pending, may order the disclosure of documents or information relating to an International Trust, if they are satisfied that such a disclosure is substantially important for the outcome of the pending proceedings.

### **Public Register of CIT**

Further after recent amendments of the legislation a registry of trusts has been introduced and trustees and/or service providers upon the creation of a CIT need to submit to the their supervisory bodies (depending the case CySEC, Cyprus Bar Association and the Institute of Certified Public Accountants of Cyprus the following information:

- i. the name of the trust; the name and full address of every trustee at all relevant times;
- ii. the date of establishment of the trust;
- iii. the date of any change in the law governing the trust to or from Cyprus law;
- iv. the date of termination of the trust.

It is evident from the aforesaid that no information are maintained as to the identity of the settlor or the beneficiaries. Further and subject to the terms of the instrument creating a CIT and where the Court has not issued an order for the disclosure of information in accordance with the provisions of CIT Law, the trustee, the protector, the enforcer of a trust or any other person included, shall not disclose to any person not legally entitled thereto any documents or information:

- (a) which disclose the name of the settlor or any of the beneficiaries;



- (b) which disclose the trustee'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 international trust was performed;
- (c) which disclose the reasoning or the information upon which any specific exercise of such power or discretion or performance of duty had been or might have been based;
- (d) which relate to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty;
- (e) which relates to or form part of the accounts of the international trust;

Provided that, where a request is submitted by a beneficiary to the trustee for the disclosure of the accounts of an international trust or of any documents or information relating to the proceeds and payments made by the trustees, forming part of the said accounts, the trustee shall have the power to disclose such accounts, documents or information to the beneficiary, only if in his opinion such disclosure is necessary and secures the bona fide interests of the trust.

A CIT is always considered as validly created if at the time of its formation the settlor is of sound mind and of full age. No provisions of any inheritance or succession laws of any country in the world shall in any way effect the validity of a transfer or disposition of assets into the trust. As far as asset protection is concerned a CIT shall not be violable or void simply because the settlor becomes bankrupt after the disposition or the transfer of his assets. The creditor will have to prove (and the onus of proof lies with them). Any action must be brought within two years from the date of the transfer of the property .

For further information on this topic please contact Dr. Pavlos Neofytou Kourtellos at P. N. KOURTELLOS & ASSOCIATES LLC, by telephone (+357 25 745575) or by fax (+357 25 755525) or by e-mail [pnk@kourtelaw.com](mailto:pnk@kourtelaw.com)

### **Disclaimer**

This publication has been prepared only as a general guide and for information purposes. It does not constitute or should not be read as a legal advice. One must not rely on it without receiving independent advice based on the particular facts of his/her own case. No responsibility can be accepted by the authors or the publishers for any loss occasioned by acting or refraining from acting on the basis of this publication.