

# Trusts versus Foundations: Estate planning and asset protection in Mauritius

As the jurisdiction offers investors a choice between trusts and foundations to meet their wealth management objectives, Tania Li and Yoshinee Radhoa of Orison Legal examine the factors that might cause founders to favour one structure over another, motivated by their individual requirements.

**W**ith the advantage of being a hybrid legal system inspired by both French and English law concepts, the Mauritian IFC offers two distinct structures for estate planning and asset protection: the trust and the foundation.

Whilst the trust and the foundation bear similarities in terms of flexibility, perpetuity, and continuous professional management, some distinctions may lead investors to favour one structure over the other, based on their needs and objectives.

## Ease of setting up and efficient management

Both trusts and foundations can be set up through an inter vivos disposition of assets during the settlor or the founder's lifetime, or upon their death by a will or testament, for the benefit of persons called beneficiaries, charitable or non-charitable purposes, or a mix of both.

Trusts can be established by a settlor by a trust deed (which need not be filed with any regulatory authority) and boast a maximum lifetime of 99 years, except for purpose trusts which can be of perpetual duration. Legal ownership of assets vests in one or several trustees, one of whom must necessarily be a qualified trustee licensed by the Financial Services Commission (FSC), hence providing comfort in terms of experienced and competent management for the ultimate benefit of the beneficiaries and/or the advancement of the trust's purposes.

A settlor can prepare a letter of wishes but this document is, compared to the trust deed, not binding on the trustees. A settlor can act as trustee allowing



him to retain some control over the management of trust assets and be named as beneficiary, provided he is not the sole beneficiary.

Foundations on the other hand are established by a founder for any duration specified in the charter filed with the Registrar of Foundations (ROF), and articles governing other intricacies (such as the regulation of council affairs and the distribution of assets by the council) may also be adopted. Foundations are managed by a council, the members of which must necessarily include one Mauritian resident and can comprise individuals or body corporates. The founder can be appointed as a council member and, in

comparison with trusts, the founder can be named as either sole beneficiary or as one of the beneficiaries.

Trustees and council members of foundations owe fiduciary duties: accountability towards the beneficiaries of the trust or the foundation, diligence, due care, and avoidance of conflict of interests form the basis of proper management of either structure.

### **Legal personality and registration with authorities**

However, one key difference is that the trust does not have separate legal personality and hence cannot contract in its own name. The trustee as the legal owner of the assets will execute contracts and enter into transactions with third parties on behalf of the trust.

## **Trustees and council members of foundations owe fiduciary duties**

A foundation which is not registered with the ROF will similarly not have any separate legal personality. However, this is uncommon as most, if not all, foundations are indeed registered with the ROF, therefore conferring the distinct advantage of being able to contract and sue in the foundation's own name. A registered foundation's assets are owned by the foundation itself.

### **Confidentiality**

Confidentiality is another key difference: trusts and trust deeds need not be registered or filed with any regulatory authority and, as such, no public inspection can be effected. Unregistered foundations also benefit from this advantage.

In contrast, foundations registered with the ROF are subject to statutory filings and inspections of certain documents can be conducted by persons authorised by the foundation or the FSC following the payment of prescribed fees.

### **Functionaries**

The objectives, administration, and powers conferred

to functionaries are set out in either the trust deed or the foundation charter, which afford a degree of flexibility in terms of drafting – as long as the provisions comply with our laws.

The trust deed can cater for the appointment of protectors responsible for advising the trustees and who have any other powers conferred by the trust deed. Enforcers (whose appointment is mandatory only for purpose trusts) will supervise the management of assets by the trustees.

Foundations must appoint a secretary, which is also a management company licensed by the FSC or a resident person authorised by the FSC to, amongst other functions, maintain the books and records of the foundation. Protectors may also be appointed and will have such powers as set out in the foundation charter.

### **Taxation**

Charitable trusts and charitable foundations registered with the Mauritius Revenue Authority are exempt from income tax. Other categories of trusts and foundations are otherwise liable to income tax in Mauritius, bearing in mind that the trustee is responsible for handling payments for the trust in the absence of the latter's separate legal personality.

### **Non-citizen considerations**

Whilst foundations appear to be a more popular choice for investors from civil law jurisdictions, investors from common law-based jurisdictions tend to favour the more familiar trust structure. Indeed, our laws allow foreign trusts and foreign foundations to migrate to Mauritius.

Here, non-citizens of Mauritius can create trusts or foundations and settle trust assets or endow the foundation with tangible assets (such as immovable property) and intangible assets (such as shares or financial instruments) situated outside of Mauritius or, subject to any required regulatory approvals, situated in Mauritius.

### **Concluding remarks**

Ultimately, there is no one size fits all when it comes to the choice between these two distinct structures for estate planning and asset protection.

Choosing the appropriate structure needs to be carefully considered in conjunction with the proper advisers.



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