



## Dixcart Group – Private Client Services

### TRUSTS\*FOUNDATIONS\*FAMILY OFFICE

The Dixcart Group has more than 45 years of experience in assisting wealthy individuals and their families in matters of succession, estate planning and in the efficient administration of their affairs.

The Dixcart Group can assist with the formation and administration of trusts, foundations, private and managed trust structures and other family office services and is able to offer these services through six fully regulated and independent entities positioned to enhance the Group's offering for clients with interests all over the world.

Our services are tailored to each specific client with the assistance of the clients' own lawyers, accountants and tax advisers together with input from specialists within the Dixcart Group.

Please see below additional information in relation to wealth management structures:

- Trusts and Foundations Compared and Contrasted (pages: 2-6)
- Why Private Trust Companies are Becoming Increasingly Popular (pages: 7-9)

Details of the six Dixcart offices able to provide these services and the relevant regulatory authorities complete this Briefing Note.





## TRUSTS AND FOUNDATIONS: COMPARED AND CONTRASTED

### Introduction

Trusts have been used in common law countries for many hundreds of years for a variety of reasons. With the development of international business, international tax and estate planners were quick to realise the benefits of using offshore trusts in mitigating tax liabilities and assisting in the flow of family wealth through the generations.

Historically, clients from civil law countries have been more familiar with the concept of the foundation. However, now they are becoming increasingly aware of the benefits of trusts.

### Summary of Similarities and Differences

There are many similarities between trusts and foundations. One has a Settlor, who may have reserved powers; the other has a Founder, who may have rights reserved to him over the management of the foundation. One has a Trustee and the other a Council and officers. One is governed by the provisions of a trust deed and the other by a charter and articles or regulations. Both have beneficiaries. These are merely some examples.

The differences lie in the nature of the solutions. A trust is not a legal entity; the foundation is a registered legal entity. The ownership of the assets in a trust vest in the Trustee whilst the foundation owns the property concerned directly.

### Foundations

A foundation may be defined as “... an independent self-governing legal entity, set up and registered or recorded by an official body within the jurisdiction of where it is set up, in order to hold an endowment provided by the Founder and/or others for a particular purpose for the benefit of Beneficiaries and which usually excludes the ability to engage directly in commercial operations, and which exists without shares or other participation”.

It may be said that a foundation is more structured than a trust as it is governed by its charter and articles or regulations. The roles of council, officers, supervisory person and secretary are spelled out and provisions have to be made for meetings. Potentially a foundation provides more certainty than a trust and is less likely to be treated as a sham particularly in civil law jurisdictions.

Foundations can be perpetual and have stated objects and purposes. Those who administer a foundation are personally liable to the Founder and to the beneficiaries if they act outside the governing rules of the foundation. The liability of a foundation is limited to the value of its net assets. The Founder may have a liability to transfer assets, with which he has agreed to endow the foundation. With foundations the will and intentions of the Founder can be imposed on the foundation and the rights of the Founder are assignable by him.



The foundation arguably has all of the advantages of a trust, but to state just a few defining characteristics, it is a legal entity in its own right and can therefore own assets directly, and it is controlled by a Council of which the Founder can be a dominant member. Unlike most trusts, the Beneficiaries may be denied rights to information and they generally do not have any equitable or other form of ownership of foundation assets.

Although the foundation has similar characteristics to a regular company, it has no shareholders and is thus 'self-owned' and 'self-governed'. Very much unlike a trust, the Councillors or Directors of a foundation owe their duty to the foundation itself and not to the beneficiaries and thus, they will be thinking in terms of what the Founder wants and not what might be in the best interest of the Beneficiaries.

Title to the assets stands in the name of the foundation itself as it has full legal capacity. It is this departure from the trust-related concept of 'dual ownership' by the legal owners and the equitable owners that possibly removes the biggest sticking point when it comes to understanding trusts versus foundations from the perspective of a civil-law client or their advisor.

The concept of 'sham' and 'lack of (Settlor's) intention' does not arise as the foundation is an incorporated entity and speaks for itself.

## Trusts

At the very basic level, the concept of the trust is relatively easy: a person (Settlor) places assets in the legal custody of another (Trustee) held for the benefit of some third party (Beneficiary). The trust is not a separate legal entity, but more of a legal "obligation" agreed between two parties: the Settlor and the Trustee. Trusts are of course much more complicated than this, but this is the basic concept.

A trust is legally defined as "... an obligation, binding a person (called a Trustee) to deal with property owned by him (called trust property, being distinguished from his private property) for the benefit of persons (called Beneficiaries ), of whom he may himself be one, and any one of whom may enforce the obligation."

A further definition of trusts, which is more in the form of a description, is that in the Hague Convention on the Law Applicable to Trusts and on their Recognition:

"For the purposes of this Convention, the term "Trust" refers to the legal relationships created during the lifetime or on death by a person, the Settlor, when assets have been placed under the control of a Trustee for the benefit of a Beneficiary or for a specified purpose."

There are three minimum certainties for a trust to be valid:

- Intention: the Settlor must have clearly intended to settle the trust and confer legal control of assets.
- Assets: the trust is not operative until assets have been transferred.



- Objects: it must be clear for whom the trust was created and subsequent assets transferred to the trust are being held.

These are the bare minimums for the trust to be valid. Common validity issues that can result in the trust being dismissed as a 'sham' are:

- the Settlor wants to maintain full control of the trust assets and just gives orders to the Trustee
- assets are never transferred since the trust was only created as a safety net in case something adverse happens to the Settlor;
- the Settlor wants to be the sole Beneficiary of the trust.

Failing any of these three can lead to potential legal issues for the Settlor. A court could determine that the trust is a "sham trust" and order any assets transferred (assuming they ever really were) to be repatriated and part of a settlement. To battle this, many offshore jurisdictions (international financial centres) have enacted specific trust laws which make it difficult to declare a trust "invalid".

The Trustees owe a fiduciary duty both to the Settlor and the Beneficiaries as well as to the trust itself. Depending on the jurisdiction under whose laws the trust is constituted the trust can either have a pre-determined life span or be indefinite. Trusts are intrinsically very flexible. Some commonly used forms of trust are:

- Accumulation and Maintenance Trust
- Charitable Purpose Trust
- Discretionary Trust
- Fixed Interest in Possession Trust
- Non-charitable Purpose Trust
- Revocable Trust

### Uses of Foundations and Trusts

Foundations and trusts are used for a wide variety of reasons and these will typically include one or more of the following:-

- Preservation of wealth and selected distribution of assets.
- Favourable tax treatment.
- Circumvention of forced heirship laws.
- Asset protection.
- Confidentiality.
- Continuity on death.
- Philanthropy



## Structure

As stated previously probably the most important distinction between a trust and a foundation is that a trust is a legal relationship between the Settlor, the Trustee and the Beneficiaries. The trust itself is not a legal entity. However, the Trustees themselves are the legal, but not beneficial, owners of the assets. A foundation constitutes a legal entity in its own right. A trust can be used for commercial purposes but foundations, except under limited circumstances, cannot be so used.

The practical day to day administration of the assets placed in the trust or foundation will be carried out by the Trustee of the trust, or the Board of the foundation. Although the Settlor or Founder no longer has control over the assets, they do retain an advisory facility to provide the Trustee or Board with an indication as to how they would like the assets to be managed. For a trust this will normally take the form of an unenforceable and informal letter of wishes, and with a foundation the intentions are normally incorporated in the foundation's by-laws and thus tend to be less flexible in meeting changing needs. It should be emphasised, however, that the Settlor or Founder of a trust or foundation can normally merely make recommendations or suggestions and not issue instructions, unless the power to do so is specifically written into the trust or foundation documentation.

## Capital

There is no minimum capital requirement for the establishment of a trust, although there is normally a minimum initial capital requirement for a foundation, dependent on where it is formed. Similarly for most jurisdictions there is no requirement for trusts to file any documentation. Foundations, depending on the type, are normally registered and the Registrar must make available certain information although not necessarily the name of the Founder.

## Acceptance

Almost all low or nil tax jurisdictions have laws recognising trusts including a number of those in civil law countries. Foundations, however, are only available in a small number of jurisdictions although this number is increasing. As stated earlier, common law or Anglo-Saxon countries have recognised the trust concept for many years and their acceptance is now spreading rapidly into civil law countries as people become aware of their benefits. The Hague Convention of 1985 formally recognised trusts and has now been adopted by thirty-four countries. Foundations have been used for many of the same reasons as trusts, although there are many more trusts than foundations in existence.

## Mobility

One advantage of a trust is the ability of the management of a trust to move from one country to another by a change of Trustee. This provides additional fiscal and tax protection since without the requirement for registration, there is no residual or ongoing obligation for the trust to meet any newly imposed regulations in the jurisdiction of the previous Trustee.



## Summary

It is worth noting that often a specific choice between a trust or a foundation is more dependent on how familiar and comfortable an individual is with the particular entity rather than its precise characteristics. With the expertise available through the Dixcart offices, we are able to offer different solutions incorporating both of these structures discussed in this document.



## WHY PRIVATE TRUST COMPANIES ARE BECOMING INCREASINGLY POPULAR

### Background

Many high net worth individuals find the concept of handing control of substantial wealth to a professional Trustee, who then becomes the legal owner of such wealth, frightening, even though the Trustee is not the beneficial owner.

Some Settlers are also concerned that professional Trustees will not necessarily understand the nature of private businesses owned by the trust.

For many Trustees, holding a substantial stake in a family business presents them with a dilemma as, whilst it may be that it is the Settlor's intention that the business continue under the trust it may equally be that holding these shares is not in the best financial interest of the Beneficiaries. For instance should the business fail those same Beneficiaries may argue that the Trustees should have diversified the trust fund to reduce risk.

### A Solution to Meet Various Concerns

The solution to this dilemma, for both the Trustee and the Settlor, is for a Private Trust Company (PTC) to be set up to act as Trustee of trusts set up by the Settlor. In Guernsey, a PTC does not need a fiduciary license if the PTC is not paid for its services as a Trustee.

In its simplest form, a PTC would be formed with Directors, considered by the Settlor, to have the requisite skills to make decisions in the best interests of the family.

### Structure of the Board of a Private Trust Company

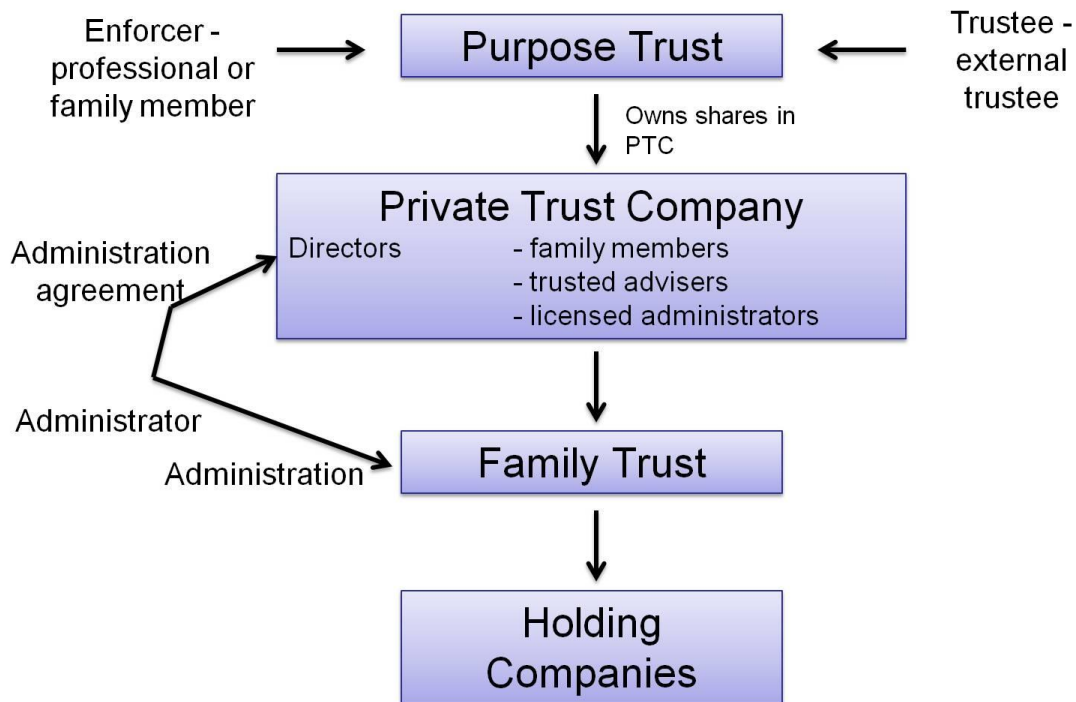
The structure of the Board needs to be carefully considered in order to ensure that the trust does not become taxable in an unsuitable jurisdiction. It should, however, be possible to include some family members and trusted advisers on the Board who will therefore have influence over the family trust, which they would not have had with a purely professional Trustee.

A typical PTC is a limited company established for the sole purpose of acting as Trustee of a trust or group of related trusts. In order to avoid issues arising from ownership or control of the PTC, the shares in the PTC are usually 'orphaned'. This can be achieved by the shares being held by the Trustee of a non-charitable purpose trust. Typically the Trustee of the purpose trust would be a professional Trustee, but the trust would have an Enforcer to whom the Trustee would be accountable. This Enforcer could be a family member or trusted adviser. The Enforcer could also be a corporate entity with a Board made up of persons who will act in the best interests of the family.



It would be normal for the PTC to appoint a company, such as Dixcart Trust Corporation Limited, to advise the Board and to carry out the administration of the PTC. The following diagram sets out these arrangements.

### Private Trust Company (PTC)



### **A Private Trust Foundation as an Alternative to a Private Trust Company**

As an alternative to the typical PTC double structure described above, a Guernsey Foundation can be used to replace both the PTC and the purpose trust. A Private Trust Foundation (PTF) can be established for the sole purpose of acting as a trustee.

Receipt of remuneration for its services as Trustee would be incidental to that purpose and would mean the foundation was not carrying out commercial activities. As a legal person of full corporate capacity, a foundation could act and exercise all the powers, and would be bound to the obligations, of a Trustee in the same manner as any Trustee which is a company.

Unlike a company, a foundation has no members or shareholders and is therefore already an orphaned structure. Guernsey law makes it clear that a foundation has its own legal personality, independent from that of its Founder. The foundation would be run by a 'Council', in much the same way as a company is run by its Directors.

As the Private Trust Foundation will have no Beneficiaries, a Guardian will have to be appointed. The Guardian's duty is to the Founder to enforce the constitution and purpose of the Foundation. The Guardian could be a trusted adviser or a company, which, as Enforcer, can also have the power to appoint and remove Councillors of the foundation.





## Summary

A PTF therefore, would make a suitable alternative to a purpose trust as an owner of the PTC.

Private Trust Companies have become the vehicle of choice for owning and administering assets of wealthy families. They are favoured because the decisions relating to the underlying trust are made by Directors chosen to best represent the interests of the beneficiary family.

## Additional Information

If you would like additional information on PTCs, please speak to your usual Dixcart contact or to the Dixcart office in Guernsey : [advice.guernsey@dixcart.com](mailto:advice.guernsey@dixcart.com)



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Dixcart Management (Cyprus) Limited is regulated and holds a full fiduciary licence under the Cyprus Securities and Exchange Commission.

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Dixcart Trust Corporation Limited is a member of the Guernsey Association of Trustees





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Dixcart Management (IOM) Limited holds a full fiduciary licence and is regulated by the Isle of Man Financial Services Authority.

Dixcart Management (IOM) Limited is a member of the Association of Corporate Service Providers



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Elise Trustees Limited is regulated and holds a full fiduciary licence under the Malta Financial Services Authority.

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Dixcart Management Nevis Limited is regulated and holds a full fiduciary licence under the Financial Services Regulatory Commission.



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