I assent,

(L.S.)

UGO MIFSUD BONNICI
President

13th September, 1994

ACT No. XX of 1994

AN ACT to enable Malta to ratify the Convention on the law applicable to Trusts and on their recognition, and to make certain amendments to the Offshore Trusts Act, Cap.331.

BE IT ENACTED by the President, by and with the advice and consent of the House of Representatives, in this present Parliament assembled, and by the authority of the same, as follows:

Short title and commencement.

1. (1) This Act may be cited as the Recognition of Trusts Act, 1994.

(2) This Act shall come into force on such date as the Minister responsible for finance may by notice in the Gazette appoint.

Interpretation.

2. (1) In this Act unless the context otherwise requires:

"the Convention" means the Convention on the law applicable to trusts and on their recognition which was adopted by the Hague Conference on Private International Law on 20 October 1984, and which came into force on 1 January 1992;

"trust" means a trust as referred to in Article 2 of the Convention.

(2) In this Act, if there is any conflict between the English and Maltese texts, the English text shall prevail.

Applicable law and recognition of trusts.

3. (1) The provisions of Articles 1 to 12, 14, 15, 16 (the first paragraph only), 17, 18 and 22 (the first paragraph only) of the Convention as set out in the First Schedule to this Act shall have the force of law in Malta.

(2) In accordance with Article 15 of the Convention, where Maltese conflicts rules require the application of the laws of Malta or of a foreign state with regard to any of the following matters-

(a) the protection of minors and incapable parties;

(b) the personal and proprietary effects of marriage;

(c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;

(d) the transfer of title to property and security interests in property;

(e) the protection of creditors in matters of insolvency;

(f) the protection, in other respects, of third parties acting in good faith,

then, save as provided by the following subsection, such laws shall be applied by the Maltese courts to the exclusion of the provisions of the Convention in so far as such laws cannot be derogated from by voluntary act and are incompatible with the Convention.

(3) If a person domiciled outside Malta transfers or disposes of movable property during his lifetime to a trust:

(a) such person shall be deemed to have had capacity to do so if at the time of such transfer or disposition he was of full age and of sound mind under the law of his domicile; and

(b) no rule relating to inheritance or succession to such movable property (including, but without prejudice to the generality of the foregoing, forced heirship, legitim or similar rights) of the law of his domicile or of any other system of foreign law applicable under Maltese conflicts rules shall affect the recognition of such trust by the courts of Malta.

For the purposes of this subsection, "forced heirship" means a legal rule restricting the right of a person to dispose of his property during his lifetime so as to preserve such property for distribution at his death, or having similar effect.

(4) In accordance with the first paragraph of Article 16 of the Convention, the courts shall not give effect to a trust in so far as the provisions of the trust are incompatible with the rules of Maltese law which are mandatory regardless of Maltese conflicts rules.

(5) Without prejudice to the generality of Article 18 of the Convention, the courts shall not give effect to a trust to the extent that to do so would be inconsistent with the fundamental public policy of the law of Malta.

(6) In Article 17 of the Convention, the reference to a State includes a reference to any country or territory (whether or not a party to the Convention) which has its own system of law.

(7) Article 22 of the Convention shall not be construed as affecting the law to be applied in relation to anything done or omitted before the coming into force of this Act.

(8) Nothing in the Convention shall have any effect on the interpretation or application of the laws of Malta relating to fiscal matters.

Amendments to the Offshore Trusts Act, Cap 331.

4. The Offshore Trusts Act, shall have effect subject to the amendments set out in the Second Schedule to this Act.

SCHEDULES

FIRST SCHEDULE

(Section 3)

CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR RECOGNITION

CHAPTER I - SCOPE

Article 1

This Convention specifies the law applicable to trusts and governs their recognition.

Article 2

For the purposes of this Convention, the term "trust" refers to the legal relationship created - *inter vivos* 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.

A trust has the following characteristics-

(a) the assets constitute a separate fund and are not a part of the trustee's own estate;

(b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

(c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

Article 3

The Convention applies only to trusts created voluntarily and evidenced in writing.

Article 4

The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

Article 5

The Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involved.

CHAPTER II - APPLICABLE LAW

Article 6

A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.

Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply.

Article 7

Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to:-

(a) the place of administration of the trust designated by the settlor;

(b) the situs of the assets of the trust;

(c) the place of residence or business of the trustee;

(d) the objects of the trust and the places where they are to be fulfilled.

Article 8

The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust.

In particular that law shall govern-

(a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;

(b) the rights and duties of trustees among themselves;

(c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;

(d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;

(e) the powers of investment of trustees;

(f) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;

(g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;

(h) the variation or termination of the trust;

(i) the distribution of the trust assets;

(j) the duty of trustees to account for their administration.

Article 9

In applying this Chapter a severable aspect of the trust, particularly matters of administration, may be governed by a different law.

Article 10

The law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law.

CHAPTER III - RECOGNITION

Article 11

A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust.

Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.

In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular -

(a) that personal creditors of the trustee shall have no recourse against the trust assets;

(b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;

(c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;

(d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.

Article 12

Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.

Article 14

The Convention shall not prevent the application of rules of law more favourable to the recognition of trusts.

CHAPTER IV - GENERAL CLAUSES

Article 15

The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters-

(a) the protection of minors and incapable parties;

(b) the personal and proprietary effects of marriage;

(c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;

(d) the transfer of title to property and security interests in property;

(e) the protection of creditors in matters of insolvency;

(f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

Article 16

The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws.

Article 17

In the Convention the word "law" means the rules of law in force in a State other than its rules of conflict of laws.

Article 18

The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (*ordre public*).

Article 22

The Convention applies to trusts regardless of the date on which they were created.

SECOND SCHEDULE

(Section 4)

Amendments to the Offshore Trusts Act, Cap. 331

1. (1) The short title of the Act, shall be deleted and substituted by the words "Trusts Act".

(2) In the long title to the Act, the word "Offshore" shall be deleted.

2. (1) In subsection (1) of section 2 of the Act:

(a) the definition of "the Act" shall be substituted by the following:

" "the Act" means the Malta Financial Services Centre Act, Cap 330;";

(b) the definition of "the Authority" shall be deleted and after the definition of "breach of trust" and before the definition of "company" there shall be inserted the following definition:

" "the Centre" means the Malta Financial Services Centre;";

(c) after the definition of "company" and before the definition of "the Court" there shall be inserted the following definition:

" "the Convention" means the Hague Convention on the law applicable to trusts and on their recognition, set out in all material parts in the First Schedule to the Recognition of Trusts Act, 1994;";

(d) after the definition of "the Court" and before the definition of "immovable property situated in Malta" there shall be inserted the following definition:

" "foreign trust" means a trust the proper law of which is not the law of Malta;";

(e) the definition of "Minister" shall be substituted by the following:

" "Minister" means the Minister responsible for finance.";

(f) for the definition of "nominee company" there shall be substituted the following:

" "nominee company" means a company authorised to perform the functions of a nominee company as provided in section 47 of this Act and a licensed nominee duly licensed under section 51A of the Act; "; and

(g) the definition of "offshore trust" shall be deleted.

(2) Save as provided above, for the word "Authority" wherever it occurs in the Act, there shall be substituted the word "Centre".

(3) The words "offshore trust" and "offshore trusts" wherever they appear in the Act, except in section 53 introduced by item 18 of this Schedule, shall be substituted by the words "trust"and "trusts" respectively.

3. Subsection (2) of section 5 of the Act shall be substituted by the following:

"(2) The proper law of the trust shall be determined in accordance with the Convention.

(3) The terms of a trust may provide for the proper law of the trust to be changed from the law of Malta to the law of another jurisdiction.".

4. (1) For subsection (1) of section 6 of the Act there shall be substituted the following:

"(1) When the proper law of the trust is the law of Malta, the validity of a trust, its construction, its effects and the administration of the trust shall be governed by this Act notwithstanding the provisions of any other law and a trust shall be governed by its proper law as determined in accordance with the Recognition of Trusts Act, 1994 in all other cases.".

(2) In subsection (2) of section 6 of the Act for the words "A trust is an offshore trust if " there shall be substituted the words "A trust shall be governed by this Act if ".

(3) Subsections (3) and (4) of section 6 of the Act shall be deleted.

5. For section 8 of the Act there shall be substituted the following:

"8. The instrument of trust shall include the name by which the trust is to be known and registered, and such name may, subject to the terms of the trust, be changed at any time.".

6. For section 13 of the Act and the marginal note thereto there shall be substituted the following:

"Protective trust.

13. The terms of a trust may make the interest of a beneficiary -

(a) liable to termination; or

(b) subject to restriction on alienation or dealing; or

(c) subject to diminution or termination in the event of the beneficiary becoming bankrupt, or insolvent, or any of his property becoming liable to seizure for the benefit of his creditors.".

7. Section 17 of the Act shall be amended as follows:

(a) for subsection (2) thereof there shall be substitued the following:

"(2) Notwithstanding the provisions of subsection (1) of this section, the trustee may require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise before distributing trust property."; and

(b) subsections (3), (4) and (5) thereof shall be re-numbered (4), (5) and (6) respectively and immediately after subsection (2) there shall be inserted the following:

"(3) Subject to the provisions of this section and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained and no one of them is interdict or a minor, they may require the trustee to terminate the trust and distribute the trust property among them.".

8. For subsection (4) of section 21 of the Act there shall be substituted the following:

"(4) Trustees shall keep accurate accounts and records of their trusteeship and shall, upon a request by any beneficiary, provide a copy of such accounts within a reasonable time.".

9. Subsection (3) of section 24 of the Act shall be deleted.

10. A new section 24A shall be inserted after section 24 of the Act as follows:

"Protector.

24A.(1) The terms of a trust may provide for the office of protector of the trust.

(2) Subject to the terms of the trust, the protector shall have the following powers:

(a) to appoint a new or additional trustee;

(b) to remove a trustee;

(c) to require the trustee to obtain his discretion.

(3) In the exercise of his office the protector shall not be deemed to be a trustee.".

11. Subsection (5) of section 30 of the Act shall be substituted by the following:

"(5) Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct or gross negligence.".

12. Subsection (2) of section 32 of the Act shall be amended by the insertion of the words "and that party is otherwise unaware of it," immediately after the words "acting as trustee,".

13. Section 34 of the Act shall be amended as follows:

(a) for the marginal note thereof, there shall be substituted the following:

"Position of outgoing trustees."; and

(b) subsection (4) thereof shall be deleted.

14. A new section 40A shall be inserted immediately after section 40 of the Act as follows:

"Following trust property and bankruptcy of trustee.

40 A. (1) Without prejudice to the personal liability of a trustee, trust property which has been alienated or dealt with in breach of trust, or the property into which it has been converted, may be followed and recovered unless it is in the hands of a *bona fide* purchaser for value without notice of the breach of trust.

(2) Where a trustee becomes bankrupt, or insolvent, or upon his property becoming liable to seizure or similar process of law, his creditors shall have no right or claim against the trust property except to the extent that the trustee himself has a claim against the trust.

(3) The Court may make an order or directive as it deems fit in the circumstances of the case upon an application made under this section by any beneficiary or creditor as the case may be. ".

15. (1) Subsection (1) of section 43 of the Act shall be substituted by the following:

"(1) Every trust shall be registered with the Centre.".

(2) Subsection (2) of section 43 of the Act shall be deleted and substituted by the following:

"(2) It shall be the responsibility of the trustee to ascertain that a trust is registered under this Act.".

(3) Subsection (4) of section 43 of the Act shall be substituted by the following:

"(4) The Centre, on being satisfied that the requirements of paragraphs (a) and (b) of subsection (3) of this section have been complied with and that the appropriate fee has been paid, shall register the trust and issue a certificate of registration accordingly.".

16. New section 43A shall be inserted after section 43 of the Act and before the title "Fiscal and other exemptions" as follows:

" Optional registration of foreign trusts.

43A.(1) A foreign trust which satisfies the conditions of subsection (2) of section 6 may register with the Centre.

(2) Registration shall be effected by filing with the Centre:

(a) a certified copy of the trust instrument; and

(b) a declaration by the licensed nominee acting as a trustee of the foreign trust that the trust satisfies the conditions of subsection (2) of section 6 of this Act.

(3) The Centre, on being satisfied that the requirements of subsection (2) of section 6 of this Act are satisfied and that the appropriate fee has been paid, shall register the foreign trust and issue a certificate of registration accordingly.

(4) Any subsequent change in the trust instrument shall likewise be registered with the Centre.

(5) The trustee being a licensed nominee shall likewise give notice to the Centre of the termination of the trust, irrespective of the cause or reason of such termination.

(6) At the request of a trustee (being a licensed nominee) of a foreign trust registered under this section, and on adequate proof being given to the satisfaction of the Centre, the Centre may issue a certificate stating that, to the best of its knowledge, on the date of the certificate, the applicant was a trustee of the trust. A certificate under this subsection shall be issued on the payment of a fee of Lm25 or such higher amount as the Centre may from time to time determine.

(7) The Centre shall keep a register of all foreign trusts registered under this section and shall enter therein any change relative to them notified to it and such other matters as it may deem appropriate to register.

(8) The fee payable for registration shall be Lm200.

(9) A trustee (being a licensed nominee) of a foreign trust may by notice in writing request the Centre to cancel the registration of the trust under this section and upon receipt of such request, the Centre shall cancel such registration.

(10) Nothing in this Act shall be deemed to make registration of a foreign trust a condition of recognition under the Recognition of Trusts Act, 1994.

(11) For the purposes of this Act, "licensed nominee" refers to a licensed nominee company established in terms of section 51A of the Act.".

17. New section 46A shall be inserted after section 46 of the Act and before the title "Nominee Companies", as follows:

"Application to foreign trusts.

46A. A foreign trust which is registered pursuant to section 43A may, by accomplishing the formalities prescribed by section 46, qualify for the fiscal and other exemptions provided by sections 44 and 45 and the guarantee provided by section 50 as though it were a trust validly created under this Act.".

18. New section 53 shall be inserted after section 52 of the Act, as follows:

"Existing offshore trusts.

53. An offshore trust, the proper law of which is not the law of Malta, and existing at the date of entry into force of the Recognition of Trusts Act, 1994, shall, as from such date, be automatically re-registered by the Centre as a foreign trust under section 43A and from such date such trust shall be governed by section 43A and not by section 43 except that the guarantee provided by section 50 shall continue to be determined by reference to the date of registration of the trust under section 43.".

Passed by the House of Representatives at Sitting No.303 of the 20th July 1994.

LAWRENCE GONZI

Speaker

RICHARD J. CAUCHI

Clerk to the House of Representatives

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