

IFSP BRIEF

IFSP NEWS

➤ TRUSTS FOUNDATION COURSE

The seminar on the 'International Aspect of Trusts and Companies' held on the 3rd of June at the Westin Dragonara Resort was a success. Dr Bernice Gauci and Dr Tonio Ellul, on behalf of IFSP, introduced the seminar, while Mr Geoffrey Shindler and Mr Oscar Grech presented the module to 230 attendees. Detailed material was also provided to the participants at the seminar. Mr Shindler was invited to lecture on the international financial industry, modern uses of international trusts, the role and status of the international asset holding company, and international corporate services, while Mr Grech addressed the issues of company shareholders, directors and other officers.

For the first time the examination on trusts which, this year, was held on the 22nd of June 2006 at the University of Malta premises, contained questions on the second module. 57 applicants attempted the exam out of which 53 were successful while 4 have failed.

➤ IFRS/ IAS 24

Three Council members: Mr Walter Cutajar, Mr Martin H. Said and Dr David Grech represented the IFSP at a second meeting held with 4 MIA representatives to discuss the issue of **IFRS/ IAS 24 and the obligation to disclose the ultimate controlling party and related party transactions**. A detailed guidance note followed which was distributed to all our members. The guidance note informed our members about the recent change in IAS 24, Related Party Disclosures, which now requires that the following matters are included in the financial statements of companies:-

- a) The immediate (not the ultimate) parent company
- b) The name of the ultimate controlling party
- c) Related party transactions, whether the company transacts with an immediate parent company, a more senior parent company or a subsidiary as well as with companies where the ultimate controlling party has an interest.

More specifically, the guidance note acknowledges that, in certain instances, such as when the ultimate controlling party is entitled in terms of the Companies Act and the Trust and Trustees Act to hold shares through a licensed fiduciary, the controlling party may not wish his/her identity, or details of related party transactions, to be disclosed in the financial statements of the Malta company, thereby resulting in non-compliance with IAS 24. In such an event, it is likely that the auditor of the Malta company will need to make reference to this fact in the auditor's report. When an auditor feels it necessary to refer to non-disclosure in the audit report accompanying financial statements, then the wording of the audit report will be along the lines of the sample agreed to between the MIA and IFSP, which sample has also been distributed to all members.

➤ **SHARE CAPITALISATION BANK ACCOUNTS**

Dr Adrian Gabarretta and Ms Juanita Bencini met Bank representatives in order to try to settle the problem practitioners encounter when opening an account particularly in the case of ITCs and IHCs with respect to share capitalisation. The Companies Act requires that a share capital of at least Lm500 would be paid up before a company can be formed. Unfortunately the law fails to establish the manner how this can be achieved. The practice adopted however is that the share capital would be deposited with the bank which bank would in turn provide the client with a bank slip. This would enable the client to register the company with the Registry of Companies. While a company had no choice but to have a local Company-in-Formation (CIF) or suspended account to be able to be registered, it could choose whether it wanted a business relationship with a Maltese bank or with the client's own Bank abroad. The local banks however were not ready to accept a client who would not establish a business relationship. On realising that an account is dormant the bank would contact the client and encourage an ongoing relationship. Otherwise the Bank would ask the client to close the account and remove its deposited funds. The banks' attitude is well understood as the deposit of this fund would only impose administrative fees especially with the introduction of the PML rules and the banks' obligation of due diligence and KYC procedures.

A meeting was consequently held with the Registry of Companies and an agreement has been reached to the effect that an exception with respect to the procedure indicated above will be made by the Registrar only where:

1. the activity of a Company-in-Formation is about to be principally carried out abroad

AND

2. the client does not intend to open an account in Malta.

Guidelines are currently being drafted and will be distributed to our members following approval of their contents by both IFSP and the Registry of Companies.

➤ **FINANCE MALTA**

The MOF, the MFSA and the FSCC have set up a Committee to develop a marketing strategy with the aim of promoting Malta as a Financial Services Centre. Such Committee represents four sectors: Insurance, Banking, Investment and Non-Regulated Business. Members within the FSCC agreed that each sector was to come up with its own ideas and projects and these will be amalgamated into one plan and handed to the MFSA as the common input coming from the financial services industry. It was also agreed that the representatives for the insurance sector will rotate between the AIB and MIA; the MBA will be represented by either Mr Shaun Wallis or Mr Tonio Depasquale; the IFSP will be represented by Mr Kevin Valenzia, and the investments sector by Mr Kenneth Farrugia.

To this end, the IFSP President has requested all Council members and the Marketing & Promotion Sub-Committee members to forward their suggestions to the formulation of a marketing strategy. These suggestions have in turn been discussed at a Marketing & Promotion SC meeting, which has done a filtering exercise on all the incoming ideas so as to formulate one common approach. The IFSP's proposals have been presented to the Finance Malta committee during a meeting held on the 1st of August 2006.

NOTICES

DATE	ACTIVITY
Thursday, 28th September 2006	Tentative date for Launch of STEP (Malta)
Every Tuesday from 26th September – 31st October 2006 15:30 – 17:00	'Taxation on Trusts' Course (further information below)
April-May 2007	IFSP Foundation Course in Trusts Law and Management

COURSE ON 'TAXATION ON TRUSTS'

Two of our members have expressed interest in coordinating and lecturing for this course. It is expected that such course will commence on the 26th September and last until 31st October 2006, and will consist of 6 lectures of 1.5 hours each. The course will cover tax implications of the settlement of property on trust; the Malta tax

implications of the day to day administration of trusts; the Malta tax implications to beneficiaries of trusts and those arising from dealings in beneficial interests in trusts; the Malta tax implications arising upon distributions by the trustee, reversions of trust assets and the termination of a trust; Trusts (Income Tax) Regulations and practical examples on accounting issues; and finally, the practical use and application of a Maltese trust in an international context, thus having the attendees updated in an area which has so far been ambiguous.

Preparations are currently under way. Attendance is expected to be limited to 30 participants, which this time round would be available only to full IFSP members. Bookings will be allowed on our receipt of the completed application form together with payment which will be accepted on a first-come-first-served basis. Watch out for application forms to be issued in due course.

COUNCIL & SUB-COMMITTEES

➤ **COUNCIL**

Council has met once since the publication of our last Brief and will be meeting again on the 8th of August.

➤ **MARKETING & PROMOTION SUB-COMMITTEE**

The Marketing & Promotion SC members gave their own suggestions as to the Marketing Strategy to be presented to the Finance Malta Committee. Moreover this Sub-Committee met to coordinate the ideas and filter all the comments received from Council members, following which a comprehensive report was compiled and presented to the Finance Malta Committee.

➤ **INSURANCE SUB-COMMITTEE**

The Insurance SC is currently discussing the possibility of promoting the Captive Management Course by distance learning as offered by Glasgow Caledonian University. This would encourage professionalism and excellence in the field of Captive Insurance. Should there be enough interest, the IFSP would ask the University of Glasgow about the possibility of holding such exams in Malta. Additional modules could then be organised by the IFSP to cover the local aspects of the course.

<http://www.gcal.ac.uk/cbs/gab/ccim/index.html>

➤ TRUSTS SUB-COMMITTEE

Dr Tonio Ellul, Chairman of the Trusts Sub-Committee, suggested an exercise to find out why Maltese Trusts do not seem to appeal to practitioners in Malta. This would enable the Sub-Committee to address any misconceptions which become evident. This questionnaire could be sent out to our members annually in order to track any improvement or change in attitude.

Websites regarding Trusts are an important source to the transmission of correct information. Our members are therefore encouraged to keep their websites updated.

Tax on Trusts Task Group

Due to the fact that this task group had affected its mandate, the Trusts Sub-Committee thought of other subjects that could be discussed and sorted at Task Group Level. The Task Group was consequently invited to discuss the ambiguity in the area of money laundering with particular reference to the obligation to disclose in case of suspicion in so far as Trusts are concerned. The main question that arises is: 'Is the duty to disclose retrospective and therefore applicable to cases where Trusts had been created before the concept of Money Laundering became applicable to 'all crimes', or does it apply as from the date of the entering into force of the regulation?'

The task group agreed that the scope of its mandate could be expanded to all areas, rather than specifically to trusts. It identified the different scenarios that arise and discussed the legal implications connected therewith. Considering that there is no certain solution to this ambiguity, the IFSP will aim at being provided with a learned opinion from the Attorney General or a retired judge.

All members are invited to contribute to the discussion.

The **STEP Task Group**, is working hard to have STEP (Malta) officially launched towards the end of September. A circular has been distributed to all IFSP members informing them about the good news that STEP (Malta) is now considered to be a Branch-in-Formation. The MFSA authorities have kindly accepted to assist the Branch financially, while the IFSP will be supporting STEP (Malta) both financially as well as with respect to Human Resources. Invitations are about to be distributed to a selected few who have shown interest and who are considered to be the most experienced in the field of trusts, estate planning, wealth management and taxation related to the aforementioned areas. All other interested individuals would have the opportunity to apply for membership through the experience route during the first two years following the launch of STEP (Malta). Associate members would need to have experience ranging from 2 to 5 years, while full members would have over 5 years of experience. When the timeframe allowed to apply through the experience route has expired, membership would only be possible through the educational route. This means that individuals would need to achieve the STEP Diploma Course which can only be applied for on achievement of the STEP Foundation Course, or alternatively, the IFSP Foundation Certificate in Trusts. The official address of STEP (Malta) is P.O. Box 68, Birkirkara, BKR01.

EUROPEAN INFORMATION

➤ EUROPEAN CORPORATE GOVERNANCE FORUM

The European Corporate Governance Forum has adopted a statement on risk management and internal control. The statement considers that there is no need to impose an EU obligation on boards to certify the effectiveness of internal controls as required in the US by the Sarbanes-Oxley Act. The European Corporate Governance Forum has also agreed to recommend to the Council of the European Union and the European Parliament the introduction of a rule obliging financial intermediaries to facilitate the exercise of voting rights in general meetings of listed companies by or on behalf of their clients. The European Corporate Governance Forum was established by Commission Decision of 15 October 2004 and provides high level advice to the European Commission in the field of corporate governance. The full texts of the statement and recommendation together with more information on the Forum's activities are available at:

http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm

Moreover, the Forum has reviewed the Proposal for a Directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market and amending Directive 2004/109/EC, dated 5 January 2006 (COM 2005 685 final). The Forum believes that the efficient exercise of voting rights by shareholders is of essential importance to the furtherance of good corporate governance and supports the Proposal as a major contribution to this end. One of the stated objectives of the proposed directive is that problems relating to cross-border voting should be solved as a matter of urgency.

http://ec.europa.eu/internal_market/company/docs/ecgforum/recomm_en.pdf

In the local field, new corporate governance rules for listed companies and for public interest companies have been published by the MFSA and came into immediate effect. These rules encourage boards to work in more transparent manner and put in place checks and balances, by means of internal board committee procedure. This would ensure higher levels of financial accountability while putting individual directors at the centre of specific board actions.

The new corporate governance provisions for listed companies are now incorporated in the Listing Rules which can be viewed from the Listing Authority Section within the following MFSA website:

<http://www.mfsa.com.mt>

➤ **CAPITAL REQUIREMENTS FOR CREDIT INSTITUTIONS AND INVESTMENT FIRMS**

The objective of the capital requirements is to have in place a comprehensive and risk-sensitive framework and to foster enhanced risk management amongst financial institutions. This will maximise the effectiveness of the capital rules in ensuring continuing financial stability, maintaining confidence in financial institutions and protecting consumers.

The European Commission has welcomed the signing by the Council and the European Parliament of the Capital Requirements Directive for credit institutions and investment firms. The Directive introduces an updated supervisory framework in the EU which reflects the Basel II rules on capital standards agreed at G-10 level.

Internal Market and Services Commissioner Charlie McCreevy said *“The implementation of the CRD will be good for the EU economy and good for financial stability, bringing benefits to both firms and consumers. The next important step is to get this piece of legislation implemented in a coherent way across Europe”*.

The MFSA is currently focusing on transposing and implementing the Directive by the end of this year.

http://ec.europa.eu/internal_market/bank/regcapital/index_en.htm#directive

➤ **COMMISSION ENABLES PUBLIC ACCESS TO ALL NATIONAL FINANCIAL SERVICES LEGISLATION**

An internet database giving complete access to national laws implementing EU financial services Directives is now available to the public.

Internal Market and Services Commissioner Charlie McCreevy said: *“For the first time every business, consumer and citizen can see openly how Member States are enabling better and more integrated financial services and markets. Now national rules are no longer a 'black box', and any gold-plating will be visible to all.”*

http://ec.europa.eu/internal_market/finances/actionplan/transposition/index_en.htm

ARTICLE: TRUSTS -WHERE TRUSTEES DON'T AGREE ON A DECISION

Contributed by Dean Felton for Paul Napier Ltd.

Paul Napier Ltd is a niche insurance broker specializing in Directors and Officers Liability, Professional Indemnity and Crime Insurance working in conjunction with the Elmo Insurance Brokers, Malta.

Malta has recently provided new legislation relating to the formation of Trusts. The fiduciary responsibilities of a trustee to protect the interests of a beneficiary must meet a high standard. From time to time, when there is a trust administration under more than one trustee, trustees may not agree on a course of action to be taken. While this is often healthy and prompts dialogue and compromise and ultimate good decision making for the benefit of the beneficiary, an action proposed may violate the responsibilities set forth in the trust. When this happens, trustees may very well be challenged and highly sensitized to their responsibilities under the trust. They also potentially become vulnerable to liability for breach of their fiduciary responsibilities.

There are two general types of decisions made by trustees:

1. discretionary decisions; or
2. decisions where particular results are set forth in the trust plan or by law.

For discretionary decisions, if the trust declares the settlor's intent that the trustees are vested with broad discretion, then courts will not generally interfere with the trustee's judgment. The exception to this is where the trustee may be capricious or the acts are an abuse of discretion. There is broad latitude in discretionary decision making. Accordingly, a dissenting trustee's actions and reactions are much different than when he/she believes a particular action violates a law or the trust plan.

Where a trustee questions whether a decision is legal or appropriate, the minutes are usually consulted for decisions made by trustees and the rationale for the decision. When a trustee disagrees with a decision, he or she should make certain his or her dissent is noted and the reason for such dissent.

Among the notes on record should be:

1. date, time, place of the meeting
2. who was present at the meeting - trustees, advisors, accountants, legal counsel etc.
3. the minutes should reflect each and every topic discussed
4. the topics minuted should include - who, what, when, where and why. By asking these points the trustee establishes that their decision is based on a thorough decision-making process consistent with the trust plan, the law or an action of a prudent person.
5. all motions of the trustees should be stated accurately and completely.

Where the minutes are inadequate, incomplete or inaccurate, the dissenting trustee should note his or her protests, changes and additions in writing and communicate them to the trust. This will generally protect the dissenting trustee if there would be subsequent legal action.

The law or the plan may provide for an arbitration should a dispute be deadlocked among trustees. Arbitrations should be generally avoided as the trustees are in the better position of the management and administration of the trust plan than the "outsider".

Fiduciary violations and other legal issues must generally be determined by the courts. Where certain conduct of the trustees may violate the trust, even if a majority of the trustees agree, the dissenter must take the legal steps to protect his /her fiduciary responsibility by seeking a judicial challenge to the wayward fiduciary

conduct. Such steps could be seeking to enjoin an action or to notify a legal authority of the proposed act.

There is often the feeling that the trustee, when they don't agree with the majority, should simply walk away from the situation. However, in many cases, a trustee may not avoid their potential liability by resignation. Mere resignation without taking steps to protect the beneficiary usually will not suffice to avoid liability when they have knowledge that an imprudent action is under consideration or about to be taken. Resignation can be construed as inconsistent with the fiduciary responsibility of the dissenting trustee to remedy the breach. Resigning, therefore, may create additional liability for the dissenting trustee.

Therefore, when an economic motive, bargaining or other hidden agenda can threaten or derail a prudent decision on the part of the trustees, the dissenting trustee must take positive steps to reduce or eliminate his/her potential liability to the trust. The trustee must decide how to react to dispute whether it involves "discretionary" issues where numerous results are all appropriate, or whether it involves legal or trust plan violations where fewer course of action are available. Inaction or "flight" are inappropriate and dangerous responses for the dissenting trustee. However in most cases the debate among the trustees will eventually lead to a resolution of disputes.

Trustees can protect themselves from potential personal liability from exposures inherent in their the role as trustee by the purchase of Professional Liability Insurance. The Trust plan must provide for the purchase of the insurance and for the payment of premium by the trust. Otherwise, the trustees must pay for such insurance from their own pockets or be exposed personally, without insurance, to the whims of the beneficiaries.

Our members are encouraged as good practice to inform themselves further and consider purchasing a Professional Liability Insurance if they are not yet professionally insured. This can be done by contacting licensed insurance companies that provide such service in Malta.

INTERNATIONAL NEWS

➤ FRANCE

Tax Authorities Issue Instruction on the Elimination of Double Taxation

contributed by Tirard Naudin

The tax authorities have released an instruction which provides for the deferral of payment for tax adjustments within the context of mutual agreement procedures for the elimination of double taxation. The instruction also details the obligation for the competent authorities to eliminate double taxation under the relevant EU convention.

<http://www.internationallawoffice.com/Newsletters/Detail.aspx?r=12822&i=1042743>

➤ **JERSEY**

A Guide to Jersey Limited Partnerships

contributed by **Mourant du Feu & Jeune**

A limited partnership is a partnership between one or more general partners (which manage the partnership) and one or more limited partners (passive investors which have no involvement in the day-to-day management of the partnership). While general partners have unlimited liability, a limited partner's liability is limited (subject to certain restrictions) to the difference (if any) between the amount which it has actually contributed to the partnership and the amount it has agreed to contribute to the partnership.

<http://www.internationallawoffice.com/Newsletters/Detail.aspx?r=12730&i=1042743>

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