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# Guidance Notes

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*Foundations and Trusts*  
*A Brief Comparison*



	<u><b>Foundations</b></u>	<u><b>Trusts</b></u>
<b>Applicable law</b>	<ul style="list-style-type: none"> <li>• Originating from Civil Law</li> <li>• Foundation law applies</li> </ul>	<ul style="list-style-type: none"> <li>• Originating from Common Law</li> <li>• Trust law applies</li> </ul>
<b>Similarities in appearance</b>	<ul style="list-style-type: none"> <li>• A foundation is founded by the Founder, who may have rights reserved to him in respect of the foundation</li> <li>• A foundation is managed by the foundation council</li> <li>• A foundation is governed by its charter (similar to a Memorandum and Articles of Association)</li> </ul>	<ul style="list-style-type: none"> <li>• A trust is settled by a Settlor, who may have powers (such as investment powers) reserved to him</li> <li>• A trust is managed by the trustee</li> <li>• A Trust is governed by the provisions of the trust deed</li> </ul>
<b>Conceptual Difference</b>	<p>A foundation is a registered legal entity which has legal personality, thereby owning the assets it holds outright without any split of legal and beneficial ownership</p>	<p>A trust is not a legal entity but a relationship between settlor, trustee and beneficiaries. "A <i>trust is an equitable 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, of whom he may himself be one, and any one of whom may enforce the obligation.</i>" The trustee has legal ownership of the trust fund and the beneficiaries enjoy beneficial ownership</p>
<b>Beneficiary rights</b>	<p>The foundation council or Directors of a foundation owe their duty to the foundation itself and not directly to the Beneficiaries. Beneficiaries, however, have rights against the foundation and may petition the court in the event of a breach of duties of the foundation council. The foundation council is liable to the Foundation with all of its private assets if it causes damages due to an error for which it is culpable e.g. it must have violated the usual standards of care that can be expected from the average person.</p>	<p>Beneficiaries of a trust have equitable proprietary rights in the trust fund. This means that they have both personal rights against the trustee to compel the trustee to comply with their duties and obligations and also rights "in rem" which enable beneficiaries to trace property into the hands of third parties (if trust properties is given away in breach of trust) and also giving them first priority of trust assets, before unsecured creditors. In trust law, Beneficiaries also have rights to be informed of their interest in the trust fund.</p>



<b>Flexibility</b>	<ul style="list-style-type: none"><li>• Foundations usually require registration with the governing body</li><li>• In order to change the applicable law, a foundation must be redomiciled.</li></ul>	<ul style="list-style-type: none"><li>• Trusts usually do not require registration with the governing body</li><li>• Changing the governing law of a Trust is easily effected through a deed of amendment of the proper law.</li></ul>
<b>Fiduciary duties</b>	A foundation is run by administrators who, together with the foundation council, exercise their functions as fiduciaries in the interests of beneficiaries.	The trustee holds the property in the trust in his name and administers same for the benefit of the beneficiaries. The trustee is answerable to the beneficiaries for his actions and must therefore exercise a high degree of care and skill in carrying out his functions.
<b>Remedies for sham arrangements</b>	A foundation cannot be treated as a sham in the same way as it is not subject to trust law, i.e. the foundation council/administrator may be held liable for breach of duty.	Where a trust is misused, i.e. where the trust arrangement purports to be something (e.g. a discretionary succession structure for the benefit of the beneficiaries) but it is actually run as something else (e.g. as a personal bank account of the settlor), then it could be held to be a sham arrangement.
<b>Lifespan</b>	Indefinitely due to the corporate personality	Subject to the rules against perpetuity (if any) in the jurisdiction concerned