

Luxembourg
fiduciary structures



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Luxembourg Law Firm of the Year

IFLR Europe Awards 2007, 2009 and 2010

“Allen & Overy is one of the best firms in Luxembourg. At least that’s the consistent message from clients across all departments. They describe the firm as having a ‘strong brand’, ‘good knowledge through to junior levels’ and being ‘leaps and bounds above the rest’. One even goes so far as to say that ‘every lawyer was perfect’.”

IFLR1000, 2014



Contents

Legal framework and concept	4
Key features of structures based on a fiduciary contract	5
Typical fiduciary structures	6
Eligible entities	7
Eligible assets for fiduciary estate	8
Tax treatment	8
Fiduciary note issuances	9
Key contacts – Luxembourg	10

Legal framework and concept

The Luxembourg act dated 27 July 2003 relating to trust and fiduciary contracts, as amended (the **Trust and Fiduciary Contracts Act 2003**) provides the legal basis for the creation of a fiduciary contract (*contrat fiduciaire*) between:

- the fiduciary or fiduciary agent (*fiduciaire*);
- the principal (*fiduciant*); and
- where applicable, a third party beneficiary (*tiers bénéficiaire*).

A fiduciary contract is an agreement whereby the fiduciant confers ownership rights over specific assets (the fiduciary assets) to a fiduciary, subject to the obligations set out in the fiduciary contract. The fiduciary obtains legal title over the assets designated in the fiduciary contract. Upon the termination of the agreement, the fiduciary assets are transferred back to the fiduciant or to a third party beneficiary.

The Trust and Fiduciary Contracts Act 2003 also ratifies the Hague Convention of 1985 on the law applicable to trusts and on their recognition.

Key features of structures based on a fiduciary contract

The fiduciary assets entrusted with the fiduciary are held by the fiduciary in segregated fiduciary estates:

- these fiduciary estates are recorded off balance sheet by the fiduciary;
- these estates do not form part of the fiduciary's own estate;
- they do not have a separate legal personality; and
- a fiduciary may create several fiduciary estates.

The fiduciary assets may only be seized by creditors holding rights deriving from the fiduciary assets.

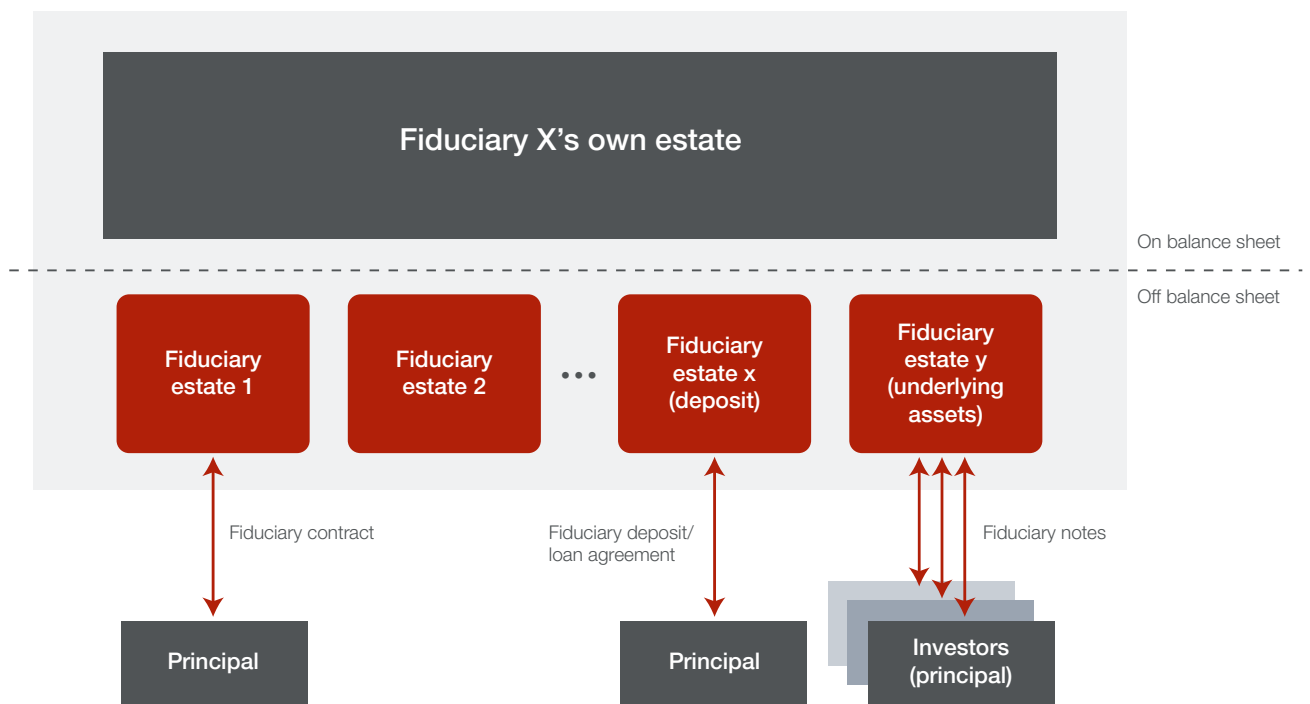
The fiduciary estates are not affected by the insolvency proceedings opened in respect of the fiduciary – the personal creditors of the fiduciary cannot seize fiduciary assets for the satisfaction of their claims against the fiduciary.

The fiduciary contract is an agreement governed by Luxembourg law (ie the Trust and Fiduciary Contracts Act 2003).

Unlike a trust, a fiduciary contract does not distinguish between equitable and legal ownership.

Typical fiduciary structures

Fiduciary X (eg a Luxembourg credit institution)



Fiduciary contracts can be structured in multiple ways, for instance as a fiduciary deposit, where the fiduciant deposits assets (eg cash) with the fiduciary and the fiduciary is obliged under the fiduciary contract to return the deposit at a specified date.

Other common fiduciary structures include fiduciary note issuances. The fiduciary contract then takes the form of a transferable security (a note or certificate) issued by the fiduciary to the fiduciant (see: page 9).

Eligible entities

Fiduciary

- Credit institutions
- Investment firms
- Investment companies with variable or fixed share capital
- Securitisation companies
- Fiduciary representatives acting in the context of a securitisation transaction
- Management companies of an investment fund or a securitisation fund
- Pension funds
- Insurance or a reinsurance undertakings
- A national or international public body operating in the financial sector
- **No restriction on nationality of fiduciary and no requirement for a permanent establishment or place of business in Luxembourg: can be a Luxembourg or foreign qualifying entity¹**

Fiduciant/third party beneficiary

No restrictions

¹ If a foreign entity is appointed it needs to be ensured that the segregation of fiduciary estates is reflected in its books and would be recognised as a matter of the laws applicable to the qualifying entity.

Eligible assets for fiduciary estate

No restrictions on type of assets (immovable and movable property, rights and claims (eg swap agreement), etc).

Luxembourg assets or foreign assets.

No restrictions on the management of the fiduciary assets (third party asset manager appointed for the management of the portfolio allocated to the fiduciary estate).

Tax treatment

Assets held by the fiduciary for the benefit of the fiduciant are attributable to the fiduciant for Luxembourg direct tax purposes (ie, income tax, corporate income tax, municipal business tax and net wealth tax). As a result, the fiduciant will be taxed as if holding the fiduciary assets directly. A non-resident fiduciant will not be subject to taxation in Luxembourg on income and capital gains derived from the fiduciary assets in the absence of a permanent establishment in Luxembourg, except for Luxembourg sourced income (eg income and capital gains from real estate located in Luxembourg).

The transfer of the fiduciary assets by the fiduciant to the fiduciary, and vice versa, under a fiduciary contract governed by the Trust and Fiduciary Contracts Act 2003 is in general neutral for Luxembourg direct taxes, VAT and registration duties (except for a fixed registration duty of EUR12 if the fiduciary contract is or must be registered in Luxembourg). However, if the fiduciary contract has a term of more than 30 years, registration duties may become due in accordance with ordinary rules and rates upon the transfer of Luxembourg real estate as well as aircrafts and boats registered in Luxembourg. Furthermore, if the fiduciary assets are transferred to a third party, registration duties (in the case of Luxembourg real estate or boats and aircrafts registered in Luxembourg) or gift/inheritance tax may become due in accordance with ordinary rules and rates.

Fiduciary note issuances

As mentioned above, fiduciary notes or certificates can be issued which are subject to the Trust and Fiduciary Contracts Act 2003. Such fiduciary notes/certificates can be structured as transferable securities:

- Possibility to set up a fiduciary note issuance programme.
- Listing of fiduciary notes on a market is possible. For instance, the Luxembourg regulated market or the Euro MTF market.
- There are credible arguments to the effect that fiduciary notes/certificates do not fall within the scope of the EU Alternative Investment Fund Managers Directive.



Key contacts – Luxembourg

International Capital Markets



Frank Mausen
Partner – Luxembourg
Tel +352 44 44 5 5257
frank.mausen@allenoverly.com



Paul Péporté
Partner – Luxembourg
Tel +352 44 44 5 5711
paul.peporte@allenoverly.com

Taxation



Patrick Mischo
Partner – Luxembourg
Tel +352 44 44 5 5233
patrick.mischo@allenoverly.com



Jean Schaffner
Partner – Luxembourg
Tel +352 44 44 5 5613
jean.schaffner@allenoverly.com

“Sources describe leading figure Jean Schaffner as ‘really proactive, innovative and always looking for a solution.’ He regularly advises international investment banks, institutional investors and private equity funds on the most complex tax cases in the Luxembourg market.”

Chambers Europe 2014 (Tax)

“The ‘efficient and business-friendly’ Patrick Mischo is ‘very easy to work with and always looking for solutions,’ according to interviewees. He brings focused expertise to the tax aspects of private equity transactions, international real estate investments and the structuring of investment funds.”

Chambers Europe 2014 (Tax)

“Frank Mausen receives excellent praise for his acute understanding of securitisation law: ‘If a structure does not work, he thinks with us about ways we can come up with alternatives. He is always up to speed about what works and what doesn’t, and his knowledge is very broad’.”

Chambers Global 2014 (Capital Markets)

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