

**MEMORANDUM**

**Advice in connection with the registration of an organisation  
styled “European Walled Towns” under Maltese law**

24<sup>th</sup> October 2013

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This Memorandum is intended for the scenario as delineated herein and is specific to the issue referred to us for advice by European Walled Towns (EWT). This Memo has been compiled for the sole use by EWT and is intended to give a generic advice on the status of the association and the options for registration available under Maltese law. This Memo is not to be applied or used in any way for ancillary and/or related matters or by any third parties without our prior consent. Use of this Memo by any third party for whatever purpose should not and does not absolve such a third party from seeking further legal advice specific to any other matter and verifying applicability of the present Memo to such other matter. The advice tendered herein is restricted to the position obtaining under Maltese law and any views expressed with regard to any issues pertinent to laws of foreign jurisdictions are generic and academic in nature and may not be relied upon. Scerri & Bonello Advocates shall not incur liability of any kind whatsoever or responsibility for damages, if any, suffered by any third party as a result of a decision made, or not made, or actions taken, or not taken, based on this Memo.

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## **A. Brief**

We have been asked by the Secretariat of European Walled Towns (hereinafter “EWT”) to advise on the position obtaining under Maltese law for the registration of an association in Malta.

It appears that following the election of Valletta Local Council to the Secretariat of EWT, the organisation has to be registered as an association in Malta. Clause 2 of the EWT Constitution defines the legal status of EWT. This clause is being reproduced in full for ease of reference:

### **2. Legal Status**

2.1. EWT will operate under the law of England and Wales as an ‘Unincorporated Association’. The EWT will register as an Association under the Jurisdiction of the country of the current Secretariat with the same objectives and Constitution as far as the legal process allows. Any required amendments to the Constitution of the EWT for this purpose will be made by the authority of the President and subsequently ratified by the next EWT Annual General Meeting. It will operate on the basis of a co-operation agreement signed by all members agreeing to abide by and work within the regulatory framework of the Constitution.

2.2. It will operate within the terms of this Constitution as a not for profit Association, compatible with the laws of other Member Nations as far as is legally possible.

2.3. Should EWT acquire assets or property then these will be held by a group of members acting as a Trust. The trust will hold such assets benignly on behalf of the members of EWT. Any surpluses generated will be reinvested in the activities EWT (*sic*).

## **B. Understanding of Issues Involved**

We understand that in terms of the above cited provision, EWT (at least in theory) exists (or should exist) under the following form:

- As an unincorporated association under the law of England and Wales;
- As an association incorporated under the Jurisdiction of the country of the Secretariat;
- With regard to assets or property acquired by EWT, these will be held in Trust.

Clearly, these forms of organisation constitute different entities. A trust is independent of the settlors thereof while the term “unincorporated association” under English law, commonly refers to two or more persons bound together for one or more common purposes by mutual undertakings, each having mutual duties and obligations,

in an organization which has rules identifying in whom control of the organization and its funds are vested, and which can be joined or left at will.<sup>1</sup> Insofar as the term “*as an association under the Jurisdiction of the country of the ... Secretariat*” relates to the position obtaining under Maltese law<sup>2</sup>, we take this to mean as an incorporated legal person or association in terms of the Maltese Civil Code.<sup>3</sup>

We must submit that we are not in a position to tender advice on the position obtaining under English law and remarks made above in connection with English law are based on academic research.

### **C. The Status of Associations under Maltese law**

Organisations, including associations, are regulated by virtue of the Second Schedule to the Civil Code. For the purposes of law, an organisation is defined as “*a universality of persons who associate or a universality of things which are appropriated to achieve a lawful purpose having a form recognised by law, and which is capable of being a legal person in terms of law*”. Subject to the fulfilment of certain conditions, the law grants the status of “legal personality” to organisations so that their patrimony of assets and liabilities would be held separate and distinct from that of any other person. Legal personality also gives rise to the legal powers to achieve such purpose through the administration of its own governing body.

In terms of Clause 2(1) of the Second Schedule to the Civil Code, foreign organisations having legal personality under the laws by which they are established shall be recognised as legal persons for all purposes of Maltese law.

The law also provides for the establishment of foundations and associations in general and defines the formalities necessary for registration thereof. An unincorporated association may also exist under Maltese law. In fact, the Civil Code recognises the existence of unregistered organisations, that is to say organisations having a form recognised by law, which are constituted by an instrument in writing and which, being registerable in terms of law, are not so registered.

We shall not delve into the institute of trust in view of the position obtaining under international law with regard to mutual recognition of trusts. Furthermore, clause 2.3 of the EWT Constitution makes the establishment of an EWT trust contingent on the acquisition of assets or property by the organisation.

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<sup>1</sup> Conservative and Unionist Central Office vs Burrell, [1982] 1 WLR 522

<sup>2</sup> Considering that a Maltese member has been elected to the Secretariat

<sup>3</sup> Cap. 16 of the laws of Malta

**D. Conflicts between an unincorporated association under the law of England and Wales and an association established under the Jurisdiction of the country of the Secretariat**

We acknowledge that the above-described arrangement in the EWT Constitution was made to ensure continuity,<sup>4</sup> and flexibility or practicality in the day-to-day management of EWT.<sup>5</sup> However, from a purely legal point of view, the two associations would be independent of each other giving rise to the concurrent existence of two organisations styled European Walled Towns. It is reasonable to state that the roving<sup>6</sup> arrangement implies:

- Unnecessary costs for the incorporation of an association in the country of the Secretariat and the winding up thereof when the EWT Secretariat would move to another country;
- Obligations contracted by the association registered in the country of the Secretariat would have to be somehow assumed by the “subsequent” association;
- The property of assets held by the association registered in the country of the Secretariat (including bank accounts) would have to be transferred to the “subsequent” association.

In the context of a Constitution which provides that assets or property acquired by EWT should be held in trust, the association arrangement becomes even more cumbersome. Strictly speaking, assets and property should be held by in trust and therefore administered by the trustees and not by the association.

One must acknowledge that the structure obtaining under the EWT Constitution may give rise to confusion for really and truly it foresees the existence of two independent associations and possibly a trust.

We believe that we cannot proceed with the formalities to set up an association under Maltese law without raising our concerns about this structure and the conflicts which may arise.

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<sup>4</sup> through an unincorporated association under the law of England and Wales

<sup>5</sup> through an association established under the Jurisdiction of the country of the Secretariat

<sup>6</sup> Depending on the seat of the Secretariat

#### **E. Proposed Way Forward**

Our proposed way forward is to have one single organisation that would act under the name of “European Walled Towns.” The Secretariat would act in the name of such organisation. Some kind of permanent presence in the country of jurisdiction would have to be established. Such organisation may be set up in any jurisdiction that allows for the incorporation of private associations. In this way, any conflict which may arise between the two EWT associations would be avoided once and for all.

With a view to provide for long term prospects for EWT, we envisage that in lieu of the trust referred to in clause 2.3 of the Statute that is to be constituted only when EWT acquires assets or property, there would be a foundation, or possibly a trust, whereby any surplus funds would be invested. The object of the foundation or trust would be the furtherance of the objectives of EWT. In this way we would ensure that EWT remains a not for profit organisation and that any surplus funds would be invested through a special vehicle.

The association and the foundation may be set-up under Maltese law, in which case, EWT shall establish an address in Malta where communications can be received and information requested about its activities. This address may be established at the offices of a Maltese member of EWT or at the premises of a reputable professional services firm. An association with distinct legal personality will also provide adequate security for the administrators who will not be held personally liable for the affairs of the association save for such cases which are specifically stated at law.

#### **F. Direction Required**

In view of the above, we would kindly ask you to give us direction as to the following:

1. Whether or not to proceed with the incorporation of an association under the laws of Malta (to exist in parallel with the unincorporated association under the law of England and Wales), as per original brief;
2. Whether or not to proceed with the incorporation of an association under the laws of Malta that would take over all responsibility for EWT and would therefore exist in lieu of the unincorporated association under the law of England and Wales. This will entail the drawing of a new statute in accordance with Maltese law and the association will take over all responsibility from the

unincorporated association/previous associations established by other secretariats;

3. Whether or not to proceed with the setting-up of a foundation or trust which would exist in parallel with the association;

EWT may also consider avoiding setting up an association in Malta and relocate its activities elsewhere.

Our proposed/preferred course of action would be option 2 with or without option 3.

We trust that the above will serve as a basis for a decision. Please feel free to contact us should you require any further input from our end.

Sincerely,

John Bonello