SYMPOSIUM

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Maltese Law on Trusts and Fiduciary Obligations

Introduction

Under Maltese law[1], fiduciary obligations may arise from six sources[2]: the law, contract, quasi-contract, **trusts**, assumption of office or behaviour. Irrespective of the source, such obligations arise whenever the fiduciary:

(a) has a duty to protect the interest of another person;

(b) holds (including as owner), controls or may dispose of property for the benefit of another person; or

(c) receives information confidentially and knows, or ought to know, that the use of such information is restricted.

Trusts are, therefore, a source of fiduciary obligations under Maltese Law. A trustee is a fiduciary. One can follow the course of developments involving "trusts" and "fiduciary obligations", and the interchanges between these concepts, at least since 1988 to come up to date with where we are today.

Historical Iter

The treatment of Trusts in Maltese law is not a result of Malta being a colony. During the colonial period (1800-1964), trust law and equity relating to trusts were never absorbed or statutorily incorporated and trusts were only rarely mentioned in Maltese laws[3], mainly due to their English origin. The Courts only referred to trusts in specific cases.[4] On the other hand, the concept of "*fiducia*" and "fiduciary obligations", while well know for historical reasons mainly the prohibition of

1 The Maltese legal system is a ***mixed legal system***. It contains strong elements of Roman Law and the Code Napoléon (on which the Civil Code is based) and has also been influenced by English law, especially in the case of public law, private international law and commercial law;

2 See article 1124A(1) of the Civil Code (Cap. 16, Laws of Malta);

3 For example the Income Tax Act, 1948;

4 **Buttigieg v. Avellino**, First Hall, 26th April, 1969 – this case concerned proceeds of a bank deposit left on trust. The Court had to decide whether this bank deposit formed part of a testamentary deposit. The Court held that as a will was made after the trust, the testator intended to revoke the trust. The beneficiary could only claim what was bequeathed to her in the will;

fiduciary dispositions in wills[5] and the institute of entail (*fedecommissum*)[6] in our Civil Code, was not articulated in any relevant manner and floated in the legal system mainly in two areas. The first is that of what are called "mandates *prestanome*"[7] where persons appear to be owners of property acquired through public deeds but in reality act on behalf or for the interest of others. The second is that of misappropriation where persons receive property not due to them knowing it belongs to others.[8]

Until at least 1986 no special study appears to have been made on these legal topics of trusts or fiduciary obligations and there does not appear to have been any impelling reason to do so. The first hints of a need for trusts to be addressed in the legal system came with the emergence of the Maltese maritime flag with the accompanying ship finance demands and instruments of mortgage which came along with it. Mortgages are part of Maltese law through the British Merchant Shipping Act which was made part of Maltese statutory law in the late 1800s[9]. The Maltese flag attracted ship owners from all over the world but finance institutions came predominantly from England which meant that the use of mortgages with trusts underlying the concept and trusts used for administrative efficiency started coming to the forefront when the local system started to treat mortgage practices similarly to hypothecs, with resulting inefficiencies. This quickly changed in practice in 1994 when Malta adopted the Hague Convention on Trusts[10].

Fiduciary obligations only emerged as an important topic after 2000 when the Government of Malta took the policy decision to incorporate trusts into the domestic legal system. Fiduciary obligations were the way trusts were "rationalised" within an umbrella concept which was already known to the Maltese legal system. Without such a concept, it was proving very hard to convince the local legal

5 Article 693 of the Maltese Civil Code states: *Any testamentary disposition whereby even a sum of money or any other determinate thing is bequeathed to a person designated in the will for the purpose of making such use thereof as the testator shall have declared to have confided to such person, shall be null, even though such person shall offer to prove that such disposition is in favour of persons capable of receiving property by will, or for lawful purposes;*

6 Article 757(1) of the Maltese Civil Code: *Entails are prohibited: Provided that entails created before the date of the commencement of Ordinance No. IV of 1864, hereby repealed, shall continue to be regulated by the provisions of the law in force before that date including the provisions contained in Chapter II of Book IV of the Municipal Code of Malta, commonly called "Code De Rohan", saving the provisions of Title I of Part II of Book Second of the Code of Organization and Civil Procedure. (2) Any provision by which the heir or legatee is required to preserve and return the inheritance or legacy to a third person shall be considered as if it had not been written;*

7 There are many cases involving this subject spanning many years many of which are collected into a series of collected judgements and commentaries issued regularly. So far two Volumes have been issued. See Maltese Cases & Materials on Trusts & Related Topics, Volumes 1 and 2, Institute of Financial Services Practitioners, Malta, Volume 1 published in 2004 and Volume 2 published in 2009;

8 See **Vella vs Vella**, First Hall, Civil Court, 28th February, 2003 and **Bezzina vs Caruana**, First Hall, Civil Court, 28th October, 2003;

9 Merchant Shipping Acts 1894 to 1958;

10 Convention on the Law Applicable to Trusts and on their Recognition, 1st July, 1985;

profession of the consistency of trusts with the Civilian system prevalent in Malta and things changed once trusts were contextualised in this way. For the past 10 years since the Trusts Law Project resulted in extensive legal amendments to several important laws, there has been a constant inter-action between the two topics. Both are now firmly part of the legal discourse among Maltese lawyers and in the Courts.

So how did this happen?

The Offshore Trusts Act, 1988

Trusts were not introduced in any relevant manner until 1988 when the offshore model[11] was adopted. In **1988**, Malta was launched as an offshore centre and the first law on trusts, the **Offshore Trusts Act**[12], based on the law of Jersey, made trusts available to non-residents and for property outside Malta, and therefore was applied mainly for movables, such as investments, bank account or shares in private limited companies, which were in Malta for the purposes of the trust. This Act imposed the use of a Maltese nominee[13] company, licensed by the Malta Financial Services Authority, as the trustee of a Maltese trust. The trust deed also had to be registered with the Authority and this ensured that the trustee was subject to regulatory supervision and access.

Offshore trusts also continued when offshore structures were phased out in 1993 following the trend towards Malta joining the EU and developing Malta as an onshore financial centre.

Few took notice of this law at the time. It was marketed by some banks, law and accountancy firms as a product but was quite unsuccessful in outcomes.

This typology, describing what was happening at this stage, could be called the Offshore Model[14] as it helps one classify the extent of absorption and focus which was taking place in this phase.

Recognition of Trusts Act, 1994

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11 The offshore model includes countries where trusts have been introduced only for non-residents, non-citizens or non-domiciliaries, only for property outside the relevant country, and with an exemption from the rules of domestic fiscal law, which therefore basically introduce trusts as an "offshore" product, and stop it entering the domestic system;

12 Cap. 331, Laws of Malta;

13 I had criticised this term at the time as it was contradictory, given that nomineeship in our system is an un disclosed mandate and not a trust;

14 See "*How Civil Law Systems Absorb Trusts*", Max Ganado (2014) in "Developing a Global Agenda, STEP Global Congress", Edited by Richard Pease, Bloomsbury Professional Limited, Great Britain; Pages 196-211;

In **1994**, the **Recognition of Trusts Act**, which incorporated the **Hague Convention** into Maltese law, was introduced as part of a series of law aimed at restructuring the Maltese policy approach to international business. The agenda was to eliminate the "offshore" concepts and aim at an open and transparent legal regime for higher end financial services. Not much happened to the trusts statute and all we see is the elimination of the word "offshore" but the fairly "closed" approach to trusts remaining prevalent. Again the poor adoption of trust services remains evident.

This resulted in the division of trusts into two groups:

(a) Maltese law trusts which were regulated by the **Trusts Act**[15]. These were fiscally exempt and were available only to non-residents. Small activity in this area continued to take place with few taking any particular interest in Trusts and the law of trusts;

and

(b) Foreign law trusts which were recognised in Malta by the Recognition of Trusts Act. This meant that all foreign law structures formed as trusts could operate in Malta freely as they would henceforth be subject to their governing law[16].

The latter group was promoted by lawyers who saw the solution provided by trusts in several areas within the domestic legal system where the Trusts Act (Maltese Trusts) was still severely blocked from Maltese property and residents of Malta. This step allowed full access to trusts by those who wanted to use them. There was no formality at all – they were automatically recognised and did not need to go through radical alterations to comply with Maltese Civil Law. This was happening in parallel to what was happening in Italy, another Civil law system which adopted the Hague Convention and did not have trusts within its legal system.

Trusts started to be used in extensively in ship finance structures and in the banking and capital market sectors. With the introduction of investments services legislation, the importance of segregated assets became evident and, because of the lingering resistance to trusts, in **1998** the concept of distinct patrimonies (based on Italian Law) were introduced in the Investment Services Act

15 Note that "offshore" was removed from the title of the Act and in the law itself in 1994 but all else remains the same;

16 This meant that English law, Jersey and Guernsey law and the laws of several other countries suddenly became relevant and provided a solution to cases where trusts would be an ideal solution to a challenge within the domestic legal system;

(Control of Assets) Regulations.[17] The creditors of operators, like managers and custodians, were barred recourse to a segregated patrimony.

As a result of this development many lawyers who operated in relevant areas needed to understand trusts governed by English law and extensive study took place between 1994 and 2000 to take full advantage of English and Jersey law as the governing law of trusts used for structures in the period. In the ship finance field this was not a problem at all as all finance documentation was already English or New York law and the trusts featuring in the documents were very standard. The Maltese flag was helped to grow in no small part due to this openness to banking practices long in place.

This can be called the Recognition Model[18].

Trusts and Trustees Act, 2004

The year 2000 brought a major policy shift when Malta was reviewed by the OECD and reference was made to the need to eliminate "offshore" features still lingering in the legal system, particularly in the Trusts Act 1988. The choice was either to eliminate trusts under Maltese law or to eliminate the offshore features and open the gates to trusts within the domestic environment, without any limitations as to property or settlors or beneficiaries. Thankfully the Government took the latter decision which led to a major review of the legal system with regard to trusts and its impacts.

In **2004**, trusts were fully integrated into Maltese law. The Trusts and Trustees Act was amended to eliminate all offshore features and to dovetail with the Civil Code and other statutes to address the international and domestic market in a holistic manner. The **Trusts Amendment Act**[19] amended around 17 laws to do this. The introduction of trusts into Maltese law also involved amendments to the Maltese Civil Code, which was amended to include, *inter alia*, the regulation of fiduciary obligations which was considered necessary to rationalize the place of trusts within the legal system based on Roman law.

This can be referred to as the Total Incorporation Model[20].

Let us now focus on that aspect of the Trusts Law Project which touches fiduciary obligations.

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17 L.N. 240 of 1998;

18 Op. Cit supra note 14;

19 Act XIII of 2004;

20 Op. Cit supra note 14;

The Introduction of Fiduciary Obligations into the Civil Code

The same Act also introduced two articles regulating fiduciary obligations in the Civil Code. These articles (Art. 1124A and 1124B – See Appendix '**A**') sought to do very basic things but which have very far ranging effects:

(a) establish the *sources* of fiduciary obligations, whether the law, contract, quasi-contract, **trusts**, assumption of office or behaviour;

(b) determine the *obligations* of all fiduciaries, some of which may be excluded or modified subject to an express provision of law or the express terms of any instrument in writing;

(c) introduce legal *segregation of assets* – the fiduciary is under the obligation to keep any fiduciary property segregated from his personal property and that of other persons towards whom he may have similar obligations and the assets held under fiduciary obligations is a distinct patrimony where creditors, heirs or spouses of the fiduciary have no rights on such assets which are held for the beneficiary;

(d) determine that a person *delegated any function* by a fiduciary is also subject to fiduciary obligations;

(e) extend the obligations to all property derived from the original property or for which it has been *substituted*;

(f) regulate *ownership by a fiduciary*: third parties may act in relation to the fiduciary as though he were the absolute owner of the property. They need not make enquires into the authority of the fiduciary or obtain the consent of the person to whom fiduciary obligations are owed. The personal creditors, spouse or heirs at law of the fiduciary, however, do not have any claims on the property subject to such fiduciary obligations. A fiduciary may provide a certificate containing information about his authority, the identity and address of the fiduciary and a declaration that he is authorised to carry out the particular transaction. Any false statement renders the fiduciary guilty of an offence and he may be sentenced to two years imprisonment or to a fine.

In reality the 2004 amendments brought efficiency to a legal remedy which already existed under Maltese Law, as fiduciary obligations, and maybe trusts, find their origin and basis in the Roman Law

fiducia[21]. We found that Trusts Law sharpens focus on the subject and it is evident that the following trusts principles were reflected in Articles 1124A and 1124B of the Civil Code:

(a) *Fiduciary obligations emerge from behaviour*: this principle reflects features of the constructive trusts under English law which has never been introduced into Maltese law generally as it was considered too ambiguous. We find it in the Trusts Act for an accomplice in a breach but now we also find it in fiduciary law as a source of fiduciary obligations whereby a person who is an accomplice in a breach of fidiuciary obligations or misappropriates assets becomes a fiduciary[22];

(b) *The distinct patrimony and segregation of assets*: the trustee must keep trust property distinct and separate from his own property as well as from any other property held by him under any other trust or title, and separately identifiable therefrom; however, at law, fiduciary property constitutes a distinct patrimony for the benefit of the beneficiary who would be a mere principal under a mandate or contract of deposit and clearly does in an undisclosed mandate, even absent the segregation of assets, for it is when the fiduciary co-mingles the fiduciary assets with his own that we need the greater protection and remedial status of the assets. Maltese law, however, also recognises the rights of a third party in good faith under an onerous contract who will be given greater protection than the beneficiary, giving prevalence to the "acquisition in good faith for value" principle over the "*nemo dat quod non habet*" principle.

(c) *Substituted assets are to be considered to be trust assets:* In the Trusts and Trustees Act, "trust property" is that property which is settled in trust by the settlor, that subsequently added, all fruits therefrom *and property which represents the original or added property*.

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21 See David Johnston, "*The Roman Law of Trusts*", (1988) Clarendon Press, Oxford. Conceptually the trust is a derivation of the Roman law on *fiducia* and so there necessarily are some similarities in the Common law and the Roman law on the basic elements of this institute. The institute of *fiducia* developed throughout the history of Roman law and received different approaches at different eras. In Roman law, *fiducia* was an agreement "appended to a conveyance of property, involving a direction or trust as to what was to be done with it." *Fiducia* was, even at that time considered to be a separate agreement to a main contract and need not be in writing. Interestingly, it is debated whether it was a contract as it never featured in the list of nominate contracts. Some authors considered it to have been a *pactum*. "The reason for its non-appearance in the lists [of contracts] may be its parasitic character; it could occur only as an appendage to a conveyance." See W.W. Buckland, *A Textbook of Roman Law*, Cambridge University Press, 2nd Edition - pg. 431. In Roman law *fiducia* features in many different applications, two main ones being the *fiducia cum creditore*, which eventually leads to security law of pledges and hypothecs, and *fiducia cum amico* which pre-dated the contracts of deposit, loan and mandate, all of which were later classified as *bonae fidei* contracts, giving rise to a higher level of care. Today, these are contracts where fiduciary obligations can feature very strongly. There were also *fideicommessa*, which were testamentary dispositions whereby a person leaves property to another under obligation to transfer it to a third person;

22 Art. 1124A (3) of the Maltese Civil Code: *Fiduciary obligations arise from behaviour when a person: (b) being a third party, acts, being aware, or where he reasonably ought to be aware from the circumstances, of the breach of fiduciary obligations by a fiduciary, and receives or otherwise acquires property or makes other gains from or through the acts of the fiduciary;*

Reception by the Courts

The provisions on fiduciary obligations were referred to expressly by the Courts at least since **2007**, although there were cases where the Courts could have implemented the new provisions but either remained silent[23], disregarded them but came to the same conclusion[24] or missed a valuable opportunity and awarded the wrong remedy.[25]

The general trend in the Courts has, however, been positive and the amendments gave the Courts extensive powers to resolve disputes affecting fiduciary obligations. Between 2005 and 2007 there were numerous cases dealing with *prestanome* mandates (undisclosed mandates or nomineeship) where the Courts generally declared the 'beneficiary' of the property to be the real owner. The holder was ordered to transfer the property to the beneficiary.

A watershed judgment was issued by the Court of Appeal in 2104 in **Anthony Caruana & Sons Limited (C7512) vs. Caruana Christopher**[26]where, in a case where a general manager abused of his position and took over brands of his employer on leaving the company, the Court stated:

"This Court recognizes that while it is true that article 1124A of the Civil Code came into force after the occurrence of the facts in this case, this article is nothing more than a reproduction of the principle of applicable law, which was the case in Roman Law where [a fiduciary obligation] was considered as a "parasitic institution" (see Lee, The Elements of Roman Law, page 340*) and not as a contract. It was seen as imposing additional obligations to the contractual ones in the case of certain contracts. The concept of fiduciary obligations is also not necessarily tied to the concept of trusts which came into the Maltese legal system in a complete manner on the 1st January 2005 and is of general application in every case where a person acts in the interest of another person, in which case he is expected to act with due attention and care. As the Magistrate's Court stated in* ***Cordina vs Cordina*** *(26/9/2007) through the introduction of article 1124A into the Civil Code the situation "has been immensely clarified" but no new concept was introduced. As stated by the Court in* ***Messina vs Galea*** *(5/1/1881) Roman Law was and still is the "common law" of Malta and "when there is no provision in Maltese law then we need to refer to Roman law". The concept of fiducia between a principal and his representative has long existed in our legal history, and when one considers that the*

23 The **Zeturf Case**, First Hall Civil Court, 16th May, 2006;

24 The Courts relied on principles which were, through the amendments, included within the law;

25 In the **Ta' Cenc Case**, Court of Magistrates (Gozo), 30th March, 2007, the judge awarded damages for breach of fiduciary duty rather than a proprietary remedy which the law caters for in breaches of fiduciary duties;

26 Court of Appeal (Civil, Superior), 28th February, 2014;

defendant held the post of the General Manager, it is evident that equity imposed upon him duties and obligations which go beyond the contractual obligations he had."

2007 – 2014

The **Civil Code (Amendment) Act, 2007** amended the Civil Code so as to introduce a new Second Schedule which deals with legal personality, foundations and associations. The Act also included consequential amendments to other laws, including the Trusts and Trustees Act[27]. Indeed, throughout the years, this Act has been amended numerous times essentially for alignment purposes and to clarify certain areas were necessary.

In the area of foundations we use fiduciary obligations in two major ways:

1. The administrators are fiduciaries of the foundation's purpose and its assets. It is they who must achieve the purpose and safeguard the assets, although they are not the owners of the assets as would be trustees.

2. The foundation is a legal person of a fiduciary nature in that it is created to promote and carry out fiduciary obligations towards its beneficiaries in case of private foundations or towards the purpose in purpose foundations. These obligations are carried out by its administrators under paragraph 1 above, but the obligations burden the foundation itself first. This is implied by the law. Of course the foundation can undertake voluntarily by contract or otherwise other fiduciary obligations and can even be a trustee but these would be additional and would need to be considered separately.

Fiduciary obligations in the Maltese legal system can therefore be observed to give rise to multiple effects, far beyond those of ordinary obligations[28]:

(a) *A Simple Obligation:* They can give rise to *simple obligations* between two or more persons. This would be the case where, as a result of a contract of mandate, a person engages another to do something with his property, e.g. appear on a deed of sale to sell the property to someone else. Another example would be the deposit of a thing for safekeeping or the engagement of a lawyer to advise a client. These contracts create fiduciary obligations;

(b) *An Office:* The fiduciary obligations can also result in an *office*. Indeed fiduciary obligations are what characterise the nature of the office and we see this in curators appointed by the courts, directors

27 Cap. 331, Laws of Malta;

28 See "Trusts and Other Fiduciary Relationships" Max Ganado (2009) in "An Introduction to Maltese Financial Services Law", edited by Max Ganado, Allied Publications, Malta, 2009;

of a company or the administrators of a foundation. These are offices which cater for the administration of property and are dedicated to the interest of others;

(c) *A Legal Institute:* The imposition or assumption of fiduciary obligations has sometimes produced legal institutes of a distinct nature, beyond the mere contract. What starts off as a mere contract such as a transfer of property to the fiduciary, then becomes a self-standing institute with its own rules. These emerge from and go beyond the discipline of mere contracts and produce new property rights, new remedies and new rules of law.

This is the case of the *mandate prestanome* although to a limited extent. This is more so the case of a *trust.* However, we are seeing the emergence of another identifiable institute in civilian legal systems called the *fiducie*. In these cases we see that the fiduciary becomes the owner of the relevant property which then results in defined features and effects of these institutes which are atypical. There are several other broadly similar institutes in the legal systems of several countries.

When a legal system develops a complex set of rules relating to a particular fiduciary relationship, it tends to elevate those rules to a named institute, mostly for identification, for purposes of applying the atypical rules. This enables the legal system, for instance, to go beyond the discipline of pure contract without creating confusion in the interpretation of basic legal norms. It enables the system, for example, to deal with a "different" type of ownership.

Trusts do this on several important aspects, particularly when regulating the status of a beneficiary and his interests relating to the property held under trust, the method and effects of transfer of trusts among trustees when one trustee succeeds another and the concept of ownership of assets by a trustee;

(d) *A Legal Person:* An even greater step we see with fiduciary obligations is when the constitution of the fiduciary obligation actually produces a legal person as a result. We see this with foundations, where the endowment of property and its appropriation for a purpose, creates a legal person which is then administered by fiduciaries who control the property, although they do not own it.

The effects of legal personality are extensive but the focus of such an institute is indeed the fiduciary nature of the legal entity and the obligations of the administrators. In Civil Law the rights and status of the beneficiaries do not seem to have been given much importance, at least in terms of the development of legal norms. This is in strong contrast with what we see in trusts, where the beneficiary is the central feature of the institute and most of the rules of this institute deal with beneficiary rights and remedies. Maltese law has however made the beneficiary rights and status a major feature of its law on foundations when it deals with beneficiary foundations, often referred to a

"private foundations". It has been remarked that Maltese law appears to be unique in this regard and this is heavily influenced by the fact that in 2004 we incorporated trusts into our legal system. The provisions in the law on foundations are actually almost fully lifted from the Trusts and Trustees Act where it deals with beneficiaries.

The general observation regarding the period between **2009 and 2013** is that fiduciary obligations could be better supported by the Courts. Could this lack of results be attributed to:

(a) the perception that trusts are instruments of fraud and abuse, to hide assets, evade tax?

(b) the approach taken by the Courts which is excellent at times but not so impressive at others?

(c) the fact that the laws of trusts and fiduciary obligations are not keeping up in the detailed reaction to weak interpretation and application of the law?

BUT now the trend is more positive. In Anthony Caruana & Sons Limited vs Christopher Caruana[29] a general manager left the company. He was aware of all the confidential information relating to the company's business. He used this information to attract principals away from the local agent for whom he worked. The Court concluded that he was *not* a fiduciary and in this judgement there is evidence of a misunderstanding on the historical roots of the provisions on fiduciary obligations in the Maltese Civil Code. The Court stated that fiduciary obligations were introduced into Maltese law from common law, together with the concepts of trusts, through the amendments which came into effect of the 1st January 2005. However, our rules on fiduciary obligations did not come from English law. Fiduciary obligations are a very old Roman law concept and permeate all of the Civil law systems of the world.

This judgement has now been very clearly reversed in the Court of Appeal judgement of Anthony Caruana & Sons Limited (C7512) vs. Caruana Christopher[30] (quoted above) where the Court unequivocally stated that the 2004 amendments apply in all cases even those instituted pre-2004, thereby acknowledging that fiduciary obligations existed in Maltese law prior to their formal introduction in 2004.

2014

29 First Hall Civil Court, 24th September 2010;

30 Court of Appeal (Civil, Superior), 28th February, 2014;

The Trusts and Trustees Act was amended again in **2014**. The **Trusts and Trustees (Amendment) Act**, Act XI of 2014, made various changes, including:

(a) the introduction of Private Trust Companies for family trusts;

(b) the appointment of an enforcer in trusts established for a charitable purpose who ensures that the trust is administered in accordance with the trust instrument;

(c) actions against trustees for the recovery of trust property are no longer time barred and trustees may not acquire by acquisitive prescription.

The law relating to Foundations is currently being reviewed.

The Way Forward on Fiduciary Obligations

Amendments are being proposed to the articles regulating fiduciary obligations in the Civil Code which again continue, *inter alia*, to introduce principles developed under trusts law into the "umbrella" regime on fiduciary obligations.

The new provisions (See Appendix **'B'**) propose to[31]:

(a) regulate the rights and obligations of *retiring and successor fiduciaries*. Successor trustees are regulated by article 18 of the Trusts and Trustees Act[32] but more importantly as to the process of change in fiduciaries and the legal implications of it on rights and obligations;

(b) regulate the *enforcement of fiduciary obligations*: the proposed amendments introduce a *fiduciary action* which allows the beneficiary to exercise a right of action to enforce fiduciary obligations which may be made in combination with any other action available under the Civil Code or any other law. In the absence of a beneficiary (in the case of a fiduciary obligation undertaken solely for the achievement of a purpose) this right of action may be exercised by a person who has the authority to supervise the purpose in the instrument creating the obligation. In the case of an obligation undertaken by a public benefit organisation, the Attorney General also has this right of action;

31 These are still under Government consideration;

32 Cap. 331, Laws of Malta;

(c) increase *the Court's powers* in relation to property held by a fiduciary: it may order the transferring of property to another fiduciary, the termination of the powers of disposition, the granting of adequate security by the fiduciary, it may impose damages or even impose a judicial trust in relation to such property. It is important to note that the Court's decision will not prejudice a person who, *unaware of the fiduciary obligations*, acquired in good faith and under an onerous title. This reflects the position in trusts: a person acquiring trust property from a trustee in good faith and under an onerous title acquires a good title as if he had acquired it from the person having the absolute title. He is not affected by the trusts on which the property is held.

On the other hand, when a person who is *aware of the fiduciary obligations*, acquires under a *gratuitous title* from a fiduciary *who acts in breach of his fiduciary obligations*, such person acquires subject to the same fiduciary obligations as were binding on the fiduciary. This proposed article is also based on trust law: in the case of trusts, when a person makes or receives any profit, gain or advantage from breach of trust he is deemed to be a trustee of that profit, gain or advantage. This, however, does not apply to a person acquiring property under an onerous title in good faith.[33]

In our system of law we have the *actio pauliana*, of fraudulent preference action. This provided solutions but they are far more complex and far less effective when compared to the proposals being made based on trusts law.

A fiduciary is *personally liable* to a third party with whom he enters into an obligation when such third party is unaware of the fiduciary obligations. This new provision mirrors that found in the Trusts and Trustees Act[34] which establishes that a trustee is personally liable to a third party where, in any transaction, he fails to inform the third party that he is acting as trustee;

(d) regulate fiduciary obligations when organisations established specifically for a purpose and with no private beneficiaries, are involved. The last amendments made to the Trusts and Trustees Act have introduced an *enforcer* in the case of trusts established for a charitable purpose. The duty of the enforcer is that of ensuring that the trustee administers the trust in accordance with the terms of the trust and to promote the purposes of such trust.[35]

Conclusion

33 Art. 33, Trusts and Trustees Act;

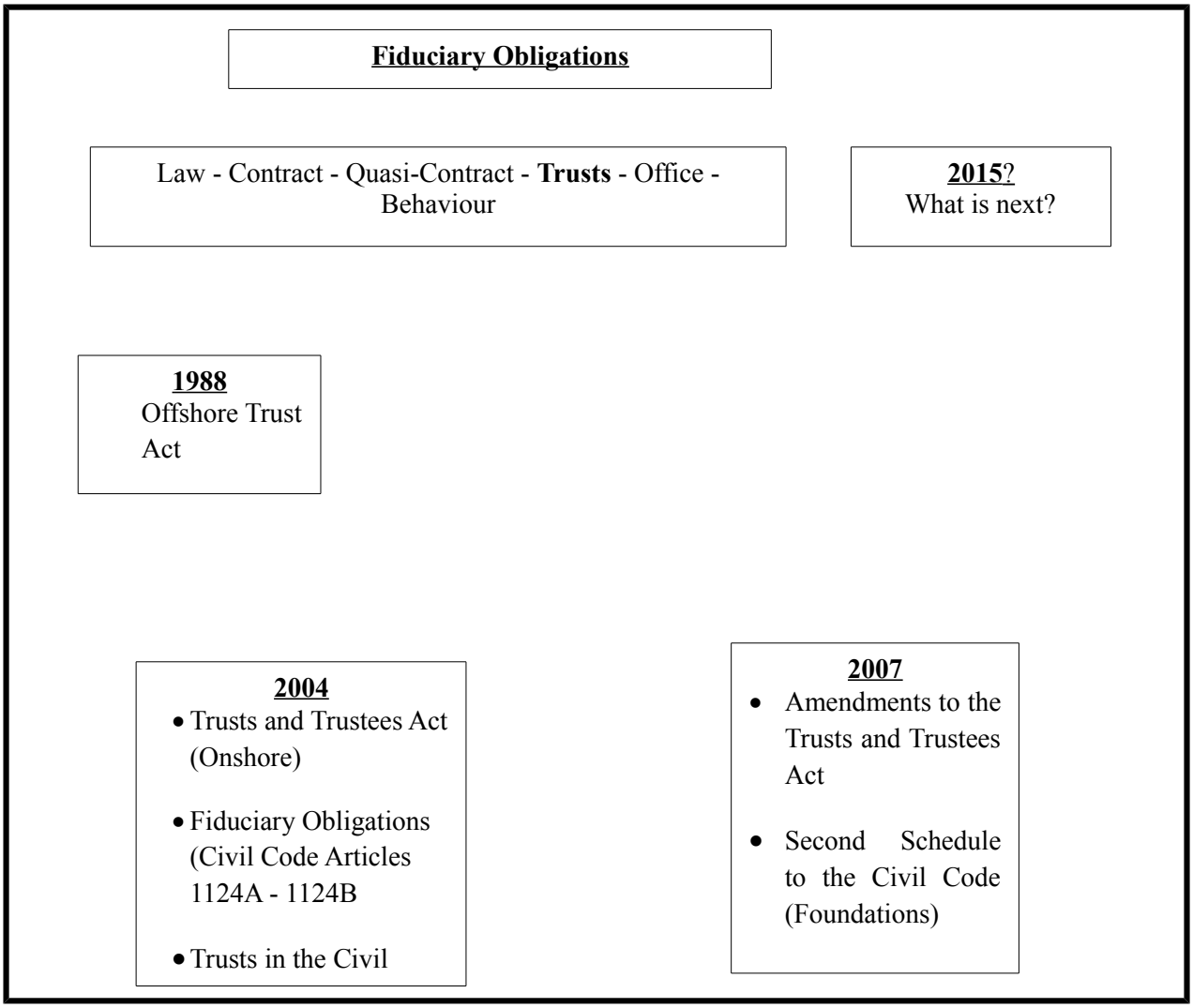
34 Art. 32(2), Trusts and Trustees Act;

35 Art. 24B, Trusts and Trustees Act.

New provisions are also being proposed to reflect recent Court judgments and basic principles of trust law which now means that trust law practice is influencing the qualitative development of fiduciary obligations *on issues of substance*. Following the inclusion of the aforementioned proposed amendments, the regime on fiduciary obligations will be substantively as strong as that of trusts practice without trusts featuring *per se*.

A full circle, enriching itself along the way!

Visual Representation of the development of Trusts and Fiduciary Obligations under Maltese law.



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